Los Angeles lawyer Allison S. Brehm explains the defense of independent creation in idea submission actions page 28.
ARBITRATORS
WITH UNRIVALED REPUTATIONS FOR FAIRNESS
AND SUPERB CASE MANAGEMENT SKILLS

Peter D. Collisson
pete@pdclaw.com

Edward J. Costello
www.edcostello.com

Max Factor III
www.FactorMediation.com

William Fitzgerald
www.fitzgeraldADR.com

Louise LaMothe
www.dispute-solutions.com

John “Jay” McCauley
www.jaymccauley.com

Deborah Rothman
www.DeborahRothman.com

Hon. James Slater (Ret.)
jslater0812@msn.com

These arbitrators are available exclusively through the American Arbitration Association where they are members of the Large, Complex Case Panel.
Peter M. Walzer is the founding partner of Walzer & Melcher LLP. He is past President of the Southern California Chapter of the American Academy of Matrimonial Lawyers. He is former chair of the State Bar of California Association of Certified Family Law Specialists.

Christopher C. Melcher earned his law degree at Pepperdine University, and was admitted to the California bar in 1994. His practice focuses on complex family law litigation and the preparation of premarital agreements. He is a certified family law specialist and a member of the Family Law Executive Committee of the State Bar of California. He is a regular lecturer on family law issues statewide, and the author of several family law publications.

Leena S. Hingnikar received a Bachelor of Arts Degree in 2003 from the University of California, San Diego. She received her Juris Doctor from Whittier Law School in 2007. She presented a program on family law and estate planning issues.

Jennifer L. Musika received a Bachelor of Arts Degree in 2005 from Vanderbilt University. She received her Juris Doctor from Boston University Law School in 2008. She gave a State Bar webinar on preparing initial pleadings in a divorce action.
Endorsed Protection

AHERN INSURANCE BROKERAGE
LAW FIRM INSURANCE SPECIALISTS

LOS ANGELES COUNTY BAR ASSOCIATION

ENDORSED PROFESSIONAL LIABILITY INSURANCE BROKER

- 2,000+ LAW FIRM CLIENTS
- ACCESS TO OVER 25 PROFESSIONAL LIABILITY PROVIDERS
- ON-LINE APPLICATIONS FOR EASY COMPLETION

Call 1-800-282-9786 today to speak to a specialist.
FEATURES

28 Creative Defense
BY ALLISON S. BREHM
While independent creation is an absolute defense to an idea submission claim, it may shift the burden of proof to the defendant.

35 Mix and Mash
BY JEFFREY OMARI
Technological advances allowing the creation of new musical works from samples of copyrighted material are challenging the assumptions of copyright law.

Plus: Earn MCLE credit. MCLE Test No. 195 appears on page 37.

42 Secure Transactions
BY RICHARD G. REINIS
The role of the Committee on Foreign Investment in the United States is to maintain a balance between free market goals and national security.

DEPARTMENTS

10 Barristers Tips
Administrative remedies must be exhausted before filing a suit.
BY ANDREW DHADWAL

14 Practice Tips
The specialty occupation requirement for the H-1B visa.
BY JOSEPH WEINER

21 Tax Tips
How the new basis rules affect estate planning.
BY WILLARD D. HORWICH

52 Closing Argument
Understanding the true value of private justice.
BY REGINALD A. HOLMES

49 Classifieds

50 Index to Advertisers

51 CLE Preview
Asset Protection Planning Now Can Insulate Your Clients’ Assets From Future Judgments

Yes, it’s true. By properly restructuring your clients’ estate plan, their assets and the assets they leave to their family will be protected from judgment creditors. Here are some of the situations in which our plan can help protect your clients’ assets:

- Judgments exceeding policy limits or exclusions from policy coverage.
- Judgments not covered by insurance.
- Children suing each other over your client’s estate.
- A current spouse and children from a prior marriage suing each other over your client’s estate.
- A child’s inheritance or the income from that inheritance being awarded to the child’s former spouse.

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.

STEVEN L. GLEITMAN, ESQ.
310-553-5080

Biography available at lawyers.com or by request.
Professor Bobby Dexter joined the full-time faculty at Chapman in the Fall of 2006 after serving as a Westerfield Fellow at Loyola University (New Orleans) College of Law. A specialist in tax and business law, he previously served as a tax partner in the Chicago office of Foley & Lardner, LLP. Professor Dexter’s scholarship has appeared in numerous journals, including the Harvard Law Review, the Tulane Law Review, the University of Kansas Law Review, the University of Pittsburgh Law Review and the Mercer Law Review. While in practice, he was principal draftsman of Tax Management Portfolio #546, Annuities, Life Insurance, and Long-Term Care Insurance Products and co-edited the insurance company chapter of Mertens Federal Income Taxation treatise.

Professor Dexter received his B.A., magna cum laude, from Yale University and his J.D. from Harvard Law School, where he served on the Editorial Board of the Harvard Law Review with U.S. President Barack Obama. Professor Dexter teaches Federal Income Taxation, Corporate Mergers & Acquisitions, Corporate Taxation, Secured Transactions, and Corporations.
HELPING CLIENTS AND LAWYERS FOR 40 YEARS

Civil Litigation and Appeals, Intellectual Property, Defamation, Invasion of Privacy, Anti-SLAPP Motions, Entertainment Disputes, Civil Rights, First Amendment, Constitutional, Tenure and Academic Freedom Issues

Experienced at co-counseling and consulting with attorneys

STEPHEN F. ROHDE
ROHDE & VICTOROFF

310.277.1482 • steve@rohde-victoroff.com

California’s Boutique Eminent Domain Law Firm

Trusted by California’s legal community to obtain maximum just compensation for their business and property owner clients.

A. J. Hazarabedian
Guillermo A. Frias
Glenn L. Block
Bernadette M. Duran
Artin N. Shaverdian
(818) 957-0477
(818) 957-3477 (fax)
info@caledlaw.com
3429 Ocean View Blvd., Suite L
Glendale, California 91208
www.caledlaw.com

American Institute of Mediation

World Class Training for the Complete Mediator

ADVANCED CONFLICT RESOLUTION STRATEGIES FOR FAMILY MEDIATORS AND COLLABORATIVE PROFESSIONALS with Forrest (Woody) Mosten
Friday-Saturday • August 20-21
10 MCLE Hours

MEDIATING AND NEGOTIATING COMMERCIAL CASES with Lee Jay Berman
Tuesday-Saturday • October 5-9
Meets the 40-hour Court Requirement - 30 MCLE Hours

BEYOND YES with Erica Ariel Fox
Friday-Saturday • November 4-5

See our complete listing of courses and dates at:
www.AmericanInstituteofMediation.com
213.383.0454

LOS ANGELES LAWYER is the official publication of THE LOS ANGELES COUNTY BAR ASSOCIATION
255 West 7th Street, Suite 2700, Los Angeles CA 90017-2548
Telephone 213.627.2727 / www.lacba.org

ASSOCIATION OFFICERS
President
ALAN K. STEINBRECHER
President-Elect
ERIC A. WEBBER
Senior Vice President
RICHARD J. BURDGE JR.
Vice President
PATRICIA EGAN DAHNKE
Treasurer
MARGARET P. STEVENS
Assistant Vice President
PAUL R. KIESEL
Assistant Vice President
HELEN B. KIM
Immediate Past President
DON MIKE ANTHONY
Executive Director
SALLY SUCHIL
Associate Executive Director/Chief Financial Officer
BRUCE BERRA
Associate Executive Director/General Counsel
W. CLARK BROWN

BOARD OF TRUSTEES
CHRISTOPHER C. CHANEY
MARRIAN S. CHANG
BRIAN S. CURREY
LINDA L. CURTIS
JEFFERY J. DAAR
ANTHONY PAUL DIAZ
LOUIS R. DIENES
BEATRIZ D. DIERINGER
DANA M. DOUGLAS
MIGUEL T. ESPINOZA
TANYA L. FORSHET
JOSHUA G. HAMILTON
JACQUELINE J. HARDING
ANGELA S. HASKINS
BRIAN D. HUBEN
TAMILA C. JENSEN
DIANE L. KARPMAN
MICHAEL K. LINDSEY
SARAH E. LUPPEN
HON. RICHARD C. NEAL (RET.)
ANNALUISA PADILLA
ANN I. PARK
THOM H. PETERS
DAVID K. REINERT
JAMES R. ROBBE
ALEC S. ROSE
DEBORAH C. SAXE
JULIE K. XANDERS
STEVEN R. YEE

AFFILIATED BAR ASSOCIATIONS
BEVERLY HILLS BAR ASSOCIATION
BLACK WOMEN LAWYERS ASSOCIATION OF LOS ANGELES, INC.
CENTURY CITY BAR ASSOCIATION
CONSUMER ATTORNEYS ASSOCIATION OF LOS ANGELES
CULVER-MARINA BAR ASSOCIATION
EASTERN BAR ASSOCIATION OF LOS ANGELES COUNTY
GLENDALE BAR ASSOCIATION
IRANIAN AMERICAN LAWYERS ASSOCIATION
ITALIAN AMERICAN LAWYERS ASSOCIATION
JAPANESE AMERICAN BAR ASSOCIATION OF GREATER LOS ANGELES
KOREAN AMERICAN BAR ASSOCIATION OF SOUTHERN CALIFORNIA
LAWYERS’ CLUB OF LOS ANGELES COUNTY
LESBIAN AND GAY LAWYERS ASSOCIATION OF LOS ANGELES
LONG BEACH BAR ASSOCIATION
MEXICAN AMERICAN BAR ASSOCIATION
PASADENA BAR ASSOCIATION
SAN FERNANDO VALLEY BAR ASSOCIATION
SAN GABRIEL VALLEY BAR ASSOCIATION
SANTA CLARA BAR ASSOCIATION
SANTA MONICA BAR ASSOCIATION
SOUTHERN CALIFORNIA CHINESE LAWYERS ASSOCIATION
WHITTIER BAR ASSOCIATION
WOMEN LAWYERS ASSOCIATION OF LOS ANGELES
LMIC has set exceptional standards for the industry for stability, customer service, continuing education and performance... standards by which other legal malpractice providers in California must be measured.

We are proud of those policyholders who see the value of membership in LMIC.

Financial Stability
A.M. Best “Excellent”
Expertise
50+ HOURS “FREE” ONLINE MCLE
Free One-On-One Loss Prevention Hotline
Longevity Credits
Preferred Policyholder Discounts
Easy Renewal Process
Dividends*

Even More Benefits at LMIC.com

Visit us at: www.lmic.com
or call (800) 252-2045

* Dividends are paid at the sole discretion of the Company’s Board of Directors and past dividends do not guarantee the payment or amount of future dividends.
I keep a file close at hand that I have titled “Great Quotes That Are All But Meaningless.” The quotes are “great” because they are poignant witticisms, banal truisms, and quasi-maxims of jurisprudence that never found their way into the Civil Code. They “Are All But Meaningless” because they are taken out of context, drawn far away from the facts that aid their application, and are left to fend for themselves in the equivalent of a electronic sketch pad.

Many of the quotes are sarcastic or written out of frustration with litigants and lower courts. Sometimes there is apparently nowhere else to start. For example, “The homonym ‘suit’ can mean a legal action or apparel. Though quite dissimilar, the two share one important attribute in class actions. One size does not fit all.” Akkerman v. Mecta Corporation, Inc., 152 Cal. App. 4th 1094, 1097 (2007). Other times, they make a point when being straightforward will not suffice: “We thought—incorrectly, as it turned out—that the trial courts would simply follow our opinion even if they disagreed with it. Stare decisis and all that stuff….But sometimes it seems as though we have to remind the lower court there is a judicial pecking order.” Giuritz v. Superior Court, 71 Cal. App. 4th 480, 481 (1999). Others are apparently too obvious not to repeat for the sake of doing so, such as “cases are not authority for propositions not considered.” Silverbrand v. County of Los Angeles, 46 Cal. 4th 106 (2009).

The citation of judicial precedent all too often is akin to a game of telephone that no one wants to play for very long except on rare occasions to suit the players’ purposes. For example, hardly anyone is likely to trace Silverbrand’s trite statement to its origin. (Admittedly, doing so is boring and, after eight searches, produces a far less satisfying construction: “No point was made in the prior case….It cannot, therefore, in any sense be regarded as an authority upon the question before us.” Cate v. Fresno Traction Company, 213 Cal. 190, 202 (1931). It is no wonder why no one cites Cate.) Sometimes citing a case is simply not necessary: “[I]n the absence of a precedent stating the obvious, common sense will suffice.” Jeffer, Mangels & Butler v. Glickman, 234 Cal. App. 3d 1432, 1439 (1991). What remains debatable, however, is whether and when a proposition is obvious. For me, obviousness, like reasonableness, is “a mutable cloud, which is always and never the same.” United States v. Metropolitan District Commission, 847 F. 2d 12, 17 (1st Cir. 1988) (internal quotations omitted).

The importance of citations is thrown into disarray anew by the emerging trend to put all citations in footnotes to avoid any distraction from the narrative. (Those distracted by citations might enjoy tracing Silverbrand to Cate.) To avoid such distractions, Los Angeles Lawyer places cited material in endnotes, like literary dessert. Doing so allows great quotes and narrative to flow unhampered by pesky citations.

I relish the fact that our profession permits us to step out from behind the artificial authority, where appropriate, and remember that “you don’t need a weatherman to know which way the wind blows,” or to tease out the contours of res ipsa loquitur. See Flowers v. Torrance Memorial Hospital Medical Center, 8 Cal. 4th 992, 1001, n.4 (1994). And even in deciding whether to sustain a demurrer without leave to amend, sometimes it cannot be said (or sung) any better than Billy Preston—the fifth Beatle—who explained that “[n]othing from nothing leaves nothing.” Quelimane Company v. Stewart Title Guaranty Company, 19 Cal. 4th 26, 61 (1998) (Brown, J., dissenting). And if that’s not a great quote that is all but meaningless, I don’t know what is.

Submit your “Great Quotes” to mageibelson@rkmc.com.
You told us there are currently 127 unnecessary steps from email to research.

Introducing Lexis® for Microsoft® Office. Focus on delivering work for your clients, not switching between programs. Now, when you’re creating a Word document or working in Outlook®, you can pull content directly from Lexis® with intuitive simplicity. We’ve teamed with Microsoft® to bring this innovation to our customers’ existing work flow processes. It’s just one example of intuitive tools created for legal minds, by legal minds. Another LexisNexis® innovation that enables better outcomes.

LexisNexis®. For more information, go to www.lexisnexis.com/office

LexisNexis, Lexis and the Knowledge Burst logos are registered trademarks of Reed Elsevier Properties Inc., used under license. Microsoft and Outlook are registered trademarks of Microsoft Corporation. Copyright 2010 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.
Administrative Remedies Must Be Exhausted before Filing a Suit

WHEN CONSIDERING A COMPLAINT OR WRIT PETITION, it is imperative to ensure that the client has exhausted administrative remedies. Exhaustion of remedies is a generally applicable procedural prerequisite to superior court review, and failure to exhaust administrative remedies can subject a case to demurrer and dismissal.

If an administrative remedy is available to resolve a dispute, that remedy must be exhausted before courts will act. The failure to exhaust administrative remedies will bar court intervention in cases in which administrative remedies are available and incomplete, including actions for damages and tort claims.

The California Supreme Court views exhaustion of administrative remedies as a fundamental rule that “is not a matter of judicial discretion, but is a fundamental rule of procedure.” The supreme court also provides an explanation of why administrative remedies must be exhausted before superior court action:

The rule has important benefits: (1) it serves the salutary function of mitigating damages; (2) it recognizes the quasi-judicial tribunal’s expertise; and (3) it promotes judicial economy by unearthing the relevant evidence and by providing a record should there be a review of the case.

The exhaustion requirement has been upheld even when the administrative agency cannot provide the precise relief sought in the judicial action. Even if the statute sought to be enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief. While there is authority for the argument that the exhaustion doctrine is inapplicable when constitutional or jurisdictional issues or questions of law are raised, this argument is not followed in California. Here, the law strictly requires exhaustion of administrative remedies, unless a limited exception applies.

The doctrine of exhaustion requires more than the initiation of prescribed administrative procedures. They must be pursued to their conclusion before seeking judicial intervention. An administrative decision only attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim. Until a public agency makes a final decision, the matter is not ripe for judicial review.

It is important to note that even the decision of an administrative law judge (ALJ) is generally not final, because the administrative agency must review the ALJ’s decision and determine whether it will adopt, amend, or reject that decision. The final decision is rendered by the administrative agency, generally by its director or designated agent, following review of the ALJ’s decision.

It is prudent for counsel to review copies of the administrative decisions relating to the dispute, because government actions may involve several preliminary decisions and notice letters that could erroneously be construed as final decisions. A final decision letter usually indicates its finality in clear terms, whereas preliminary decision letters will generally list the administrative review procedures that remain. Many final administrative agency decisions specify that further review can be obtained by filing a petition or complaint in superior court. Attaching a copy of the final decision to a petition or complaint is a sensible way of preempting exhaustion issues.

Exceptions
The limited exceptions to the exhaustion requirement do not apply to an administrative remedy that is a statutorily specified jurisdictional prerequisite. Exceptions may apply when 1) the agency indulges in unreasonable delay, 2) the subject matter lies outside the administrative agency’s jurisdiction, 3) pursuit of an administrative remedy would result in irreparable harm, 4) the agency is incapable of granting an adequate remedy, and 5) resort to the administrative process would be futile because it is clear what the agency’s decision would be.

Unreasonable agency delay sufficient to excuse exhaustion has been found when the administrative hearing process came to a stop without a final decision. The petitioner submitted evidence demonstrating that an administrative hearing commission would not go further “pending civil action.” The lack of agency jurisdiction exception to the exhaustion requirement applied in a case in which the Department of Social Welfare and the State Social Welfare Board had no power to supervise or control the administration of indigent relief.

Unreasonable delay sufficient to excuse exhaustion has been found when the administrative hearing process came to a stop without a final decision. The petitioner submitted evidence demonstrating that an administrative hearing commission would not go further “pending civil action.” The lack of agency jurisdiction exception to the exhaustion requirement applied in a case in which the Department of Social Welfare and the State Social Welfare Board had no power to supervise or control the administration of indigent relief.

Andrew Dhadwal serves as a deputy attorney general with the Civil Division of the California Department of Justice. This article does not in any way represent the position of the California Department of Justice, the Office of the Attorney General, or any other government office, agency, or official.
Relationships are built on many things...

Like feeling valued as a client.

Crowe Horwath LLP takes pride in the relationships we have with our clients. In a recent client survey, our clients said we do a better job than our competitors of making them feel valued as a client.

As one of the largest public accounting and consulting firms in the United States, Crowe serves clients worldwide as a leading independent member of Crowe Horwath International, providing innovative business solutions in the areas of audit, tax, advisory, risk, and performance.

To learn more about our commitment to building lasting relationships, visit crowehorwath.com/clients or contact:
Jay Mangel at 818.325.8402,
jay.mangel@crowehorwath.com
Vicky Ludema at 800.599.2304,
vicky.ludema@crowehorwath.com

Jay Mangel, Partner
Los Angeles
the futility exception will apply only if the petitioner can positively state that the administrative agency has declared what its ruling will be in a particular case.\textsuperscript{18} Overwhelming agency precedent on a particular issue is insufficient. The showing of futility must relate to the particular case before the court.\textsuperscript{19} These narrow exceptions to nonstatutory administrative remedies demonstrate that courts will generally require exhaustion.

California law makes it clear that failure to obtain a final administrative decision before filing a case in court could subject the case to an early demurrer or court dismissal sua sponte. Clients generally assume that the trial courts that they see on television and read about online are the natural starting point and proper forum to redress their grievances. However, a favorable administrative agency decision may obviate the need for a court hearing. While clients may not appreciate the additional level of quasi-judicial review that they must go through before reaching the courts, they rely on their counsel to understand the proper way to litigate their claims.


\textsuperscript{3} Campbell v. Regents of Univ. of Cal., 35 Cal. 4th 311, 328-29 (2005) (citing Abelleira, 17 Cal. 2d at 292).

\textsuperscript{4} Id. at 328 (citing Westlake Cmty. Hosp., 17 Cal. 3d at 476).

\textsuperscript{5} Westlake Cmty. Hosp., 17 Cal. 3d at 476.

\textsuperscript{6} Roth v. City of Los Angeles, 53 Cal. App. 3d 679, 687 (1975) (citing United States v. Superior Ct., 19 Cal. 2d 189, 195 (1941)).


\textsuperscript{11} Federal Sav. & Loan Ins. Corp. v. Superior Court, 180 Cal. App. 3d 336, 344 (1986) (Statutory exhaustion requirements may call into play constitutional concerns of separation of powers.).


\textsuperscript{13} Hollon v. Pierce, 257 Cal. App. 2d 456, 476 (1967).

\textsuperscript{14} Los Angeles County v. Department of Soc. Welfare, 41 Cal. 2d 455, 459 (1953).

\textsuperscript{15} Salt’er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 (1971); Mountain View Chamber of Commerce v. City of Mountain View, 77 Cal. App. 3d 82, 90 (1978).

\textsuperscript{16} Id.

\textsuperscript{17} Endler v. Schutzbank, 68 Cal. 2d 162, 168 (1978).


\textsuperscript{19} Gantner & Mattern Co. v. California Employment Comm’n, 17 Cal. 2d 314, 318 (1941).
CAN’T SPOT YOUR WEB SITE ONLINE?

FindLaw is the #1 online legal marketing solutions provider to over 14,000 law firms, creating award-winning Web sites that help law firms get found more than any other.

• MORE VISITS - over 33 million visits sent to our customers’ Web sites each year
• MORE CLIENTS - our customers get twice as many client leads over industry average
• MORE VALUE - client leads average over $1 million in potential annual case revenue per customer Web site

SEE HOW YOUR CURRENT SITE MEASURES UP
Contact us today to receive a FREE evaluation of your firm’s existing Web site. Visit lawyermarketing.com/freelaudit or call 1-888-413-8994.
The Specialty Occupation Requirement for the H-1B Visa

THE H-1B CATEGORY is one of the most versatile nonimmigrant visa categories in U.S. immigration law. Intended for foreign workers in specialty occupations, the H-1B program is the main vehicle through which countless thousands of scientists, engineers, doctors, business executives, teachers, and other professionals have been able to work in this country.

The requirements for obtaining an H-1B visa appear to be fairly straightforward. A foreign national must have a job offer from a U.S. employer. The job must be temporary, and it must be in a “specialty occupation”—defined as requiring the “theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor’s or higher degree in the specific specialty...as a minimum for entry into the occupation in the United States.”

Although these requirements might seem straightforward, determining which jobs qualify as specialty occupations has sparked extensive debate and litigation ever since Congress created the modern H-1B category in 1990. The U.S. immigration service, currently known as the U.S. Citizenship and Immigration Services (USCIS), has changed what it considers employment in a specialty occupation numerous times over the years, leading to situations in which approved H-1B employment one year becomes impermissible employment the next. This shifting interpretation of the term “specialty occupation” has led to a great deal of uncertainty among employers and foreign employees alike, especially since the USCIS has been aggressively denying H-1B petitions on this very basis over the past several years. Understanding how and why the USCIS can deny an H-1B petition can mean the difference between employers hiring the workforce they want and spending a great deal of time, effort, and money on a wasted exercise.

The present-day H-1B category is actually the product of a decades-long evolutionary process that began with passage of the Immigration and Nationality Act (INA), the landmark 1952 legislation that created the nation’s current immigration system. The INA originally contained an H-1 category that allowed for the entry of non-immigrant workers of “distinguished merit and ability.” The H-1 category covered professional workers and entertainers, but the standards of admission for these two classes of workers differed dramatically. Members of what the INA called the “learned professions” only had to show that they possessed the qualifications to practice one of those professions. Entertainers, however, had to be distinguished or renowned in their field.

Interestingly, neither the INA nor any other statute or regulation in place at that time specifically defined the term “professional.” The regulations promulgated subsequent to the INA’s passage only stated that one could qualify for H-1 status through “a high level of education in his field of endeavor.” Also, even though professional workers qualified for H-1 status, they could only work in jobs that were temporary. In practical terms, this meant that very few professional workers could ever enter the United States as H-1 nonimmigrants, since the vast majority of professional positions are essentially permanent.

In 1970, Congress amended the H-1 category to allow foreign workers to be employed in positions that were permanent in nature, even though their stays still had to be temporary. This change opened the H-1 category to numerous professionals who could never have qualified for H-1 status before, leading to a sharp increase in the number of H-1 applications and changing the composition of the foreign workforce in the United States. As America’s foreign-born workforce diversified and increased, the former Immigration and Naturalization Service (INS) began issuing a series of precedential decisions clarifying various requirements for obtaining H-1 status.

One of these decisions, the landmark Matter of Portugues do Atlantico Information Bureau, Inc., was the first to define a “professional” position. The Portugues case specified that professional positions must require a baccalaureate degree as the minimum threshold for entry in the United States as well as “extensive autonomous application of individual professional knowledge to individual fact situations.” The INS later elaborated and clarified Portugues in Matter of Caron, International, which reconfirmed the statement in Portugues that the list of occupations considered “professional” in...
Could you benefit from a wealth specialist who understands the legal landscape? Our Legal Specialty Group is dedicated to advising law firms, partners and associates.

Robert Sheedy, Senior Vice President, Regional Director, 213-236-7736
David Jochim, Senior Vice President, Regional Director, 949-553-2520
nature will necessarily expand as modern business conditions change.9

**Tests and Criteria**

The Immigration Act of 1990 turned the H-1 category into the H-1B category and first introduced the term “specialty occupation” into the lexicon of immigration practitioners.10 The drafters of the 1990 act essentially borrowed the definition of “specialty occupation” from the Portuguese case, excluded artists and entertainers from H-1B coverage, and retained H-1B classification for fashion models of “distinguished merit and ability.”11 The modern definition of “specialty occupation” is largely a result of the 1990 act. Despite several pieces of legislation related to the H-1B program enacted in subsequent years, the definition of “specialty occupation” has not changed substantially, even though other aspects of the H-1B category have been completely transformed.

The 1990 act instituted a cap of 65,000 new H-1B approvals per fiscal year.12 Subsequently, the American Competitiveness in the Twenty-First Century Act (AC 21) introduced portability provisions into the H-1B category, whereby H-1B workers can change jobs immediately upon filing another H-1B petition and can extend their H-1Bs beyond the statutory limit of six years if a Labor Certification, I-140 Petition for a Labor Certification, and retained H-1B classification for fashion models of “distinguished merit and ability.”11 The modern definition of “specialty occupation” is largely a result of the 1990 act. Despite several pieces of legislation related to the H-1B program enacted in subsequent years, the definition of “specialty occupation” has not changed substantially, even though other aspects of the H-1B category have been completely transformed.

The Immigration Act of 1990 instituted a cap of 65,000 new H-1B approvals per fiscal year.12 Subsequently, the American Competitiveness in the Twenty-First Century Act (AC 21) introduced portability provisions into the H-1B category, whereby H-1B workers can change jobs immediately upon filing another H-1B petition and can extend their H-1Bs beyond the statutory limit of six years if a Labor Certification, I-140 Petition for a Labor Certification, and retained H-1B classification for fashion models of “distinguished merit and ability.”11 The modern definition of “specialty occupation” is largely a result of the 1990 act. Despite several pieces of legislation related to the H-1B program enacted in subsequent years, the definition of “specialty occupation” has not changed substantially, even though other aspects of the H-1B category have been completely transformed.

Subsequently, the American Competitiveness in the Twenty-First Century Act (AC 21) introduced portability provisions into the H-1B category, whereby H-1B workers can change jobs immediately upon filing another H-1B petition and can extend their H-1Bs beyond the statutory limit of six years if a Labor Certification, I-140 Petition for a Labor Certification, and retained H-1B classification for fashion models of “distinguished merit and ability.”11 The modern definition of “specialty occupation” is largely a result of the 1990 act. Despite several pieces of legislation related to the H-1B program enacted in subsequent years, the definition of “specialty occupation” has not changed substantially, even though other aspects of the H-1B category have been completely transformed.

The modern definition of “specialty occupation” has not changed substantially, even though other aspects of the H-1B category have been completely transformed. The 1990 act instituted a cap of 65,000 new H-1B approvals per fiscal year.12 Subsequently, the American Competitiveness in the Twenty-First Century Act (AC 21) introduced portability provisions into the H-1B category, whereby H-1B workers can change jobs immediately upon filing another H-1B petition and can extend their H-1Bs beyond the statutory limit of six years if a Labor Certification, I-140 Petition for a Labor Certification, and retained H-1B classification for fashion models of “distinguished merit and ability.”11 The modern definition of “specialty occupation” is largely a result of the 1990 act. Despite several pieces of legislation related to the H-1B program enacted in subsequent years, the definition of “specialty occupation” has not changed substantially, even though other aspects of the H-1B category have been completely transformed.

**Tests and Criteria**

The Immigration Act of 1990 turned the H-1 category into the H-1B category and first introduced the term “specialty occupation” into the lexicon of immigration practitioners.10 The drafters of the 1990 act essentially borrowed the definition of “specialty occupation” from the Portuguese case, excluded artists and entertainers from H-1B coverage, and retained H-1B classification for fashion models of “distinguished merit and ability.”11 The modern definition of “specialty occupation” is largely a result of the 1990 act. Despite several pieces of legislation related to the H-1B program enacted in subsequent years, the definition of “specialty occupation” has not changed substantially, even though other aspects of the H-1B category have been completely transformed.

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The answer is found in another section of the regulations, 8 C.F.R. Section 214.2(h)(4)(iii)(A), which specifies that the position in question must meet one of four criteria for minimum educational requirements:

a) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

b) The degree requirement is common in the industry in parallel positions among similar organizations or, alternatively, the particular position is so complex or unique that a degree is required.

c) The employer normally requires a degree or its equivalent.

d) The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with attainment of a degree.16

Although these criteria give a better indication of when a particular occupation or position will fall within the definition of “specialty occupation,” the USCIS also relies on a host of other sources when adjudicating individual H-1B petitions. These include established criteria from prior administrative decisions, occupations that the USCIS and its predecessors have previously defined as “professional,” and the list of occupations contained in INA Section 101. The INA Section 101 list, while not exclusive, defines the term “profession” to include “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”17

These sources and tests cover most of the more recognized professional occupations. There is no question that, for example, electrical engineers, doctors, and research scientists fall within the definition of “specialty occupation.” When it comes to less clear-cut cases, however, the USCIS has tended to rely almost exclusively on the Department of Labor’s Occupational Outlook Handbook (OOH), which contains basic information about most of the jobs in today’s labor market. The information contained in the OOH applies most directly to the first of the four criteria outlined in the INA’s regulations—a baccalaureate or higher degree normally being the minimum requirement for entry into a particular position.18 After all, the OOH specifically states whether a bachelor’s or other degree is normally required for any given position, providing adjudicators with a convenient means of analyzing the position’s relative sophistication.

The problem with this approach is that it allows the USCIS to discount or ignore evidence relating to the other three criteria outlined in the regulations. Worse, the USCIS often decides that the job duties for one of these less clear-cut specialty occupations actually equate to the duties of a position already established as not being professional—and denies petitions on that basis. The USCIS’s heavy reliance on the first of the four criteria and its analogizing of job duties to nonqualifying employment usually go hand in hand. If a certain employer normally requires its budget analysts to have a bachelor’s degree, but the USCIS decides that the budget analyst in a particular case actually performs the duties of a bookkeeper, it will not matter that the third criterion has been satisfied. A bookkeeper is not a specialty occupation, and the employer’s requirements will not be relevant.

These questionable denials can have a devastating effect on employers and foreign-born workers in terms of money spent and opportunities missed or lost. The filing fees alone for most H-1B petitions are from $1,570 to $3,320, depending on the size of the employer and whether premium processing service is requested.19 A denied petition prevents American employers from hiring the workforce they want and need and keeps foreign workers from advancing their careers and even remaining in this country legally. The stakes are very high in the world of the H-1B, and in the current climate of “no” at the USCIS, it is even more important for attorneys to know how to respond to tough questions about any specialty occupation.

**Strategies for Practitioners**

What can a practitioner do when the USCIS says that a client’s accountant is actually a bookkeeper, or the client’s music teacher does not perform the same duties as a primary or secondary school teacher? For these and other dilemmas, practitioners must keep in mind that the USCIS’s position on what constitutes a specialty occupation is questionable on several fronts. As a result, counsel should employ a number of strategies when faced with a challenge to their client’s H-1B petition.

First, the INA’s regulations clearly outline how adjudicators should determine what qualifies as employment within a specialty occupation. If a position involves the application of highly specialized knowledge and requires attainment of at least a bachelor’s degree or its equivalent as the minimum threshold for entry, the position should qualify as a specialty occupation.20 While difficulties emerge from the fact that this definition is generic, practitioners should still cite the definition and argue its applicability as a preliminary matter in any problematic H-1B petition. If the professional nature of the position remains unclear, adjudicators will proceed to apply the four-part test established in the regulations. Practitioners should be prepared to argue all four criteria if the position in question is anything less than clear-cut. It is possible that all four criteria apply, and it is also possible that only one will be relevant. Either way, practitioner should always submit evidence if any of the criteria apply to the position at hand.

Practitioners have almost limitless possibilities regarding the type of evidence they can submit in support of the criteria. The evidence can include everything from excerpts from the OOH to letters from experts in the field explaining why the position requires at least a bachelor’s degree. For example, coun-
Looking to sharpen your competitive edge?

LACBA Litigator Tools

INVALUABLE TOOLS FOR YOUR EVERYDAY LAW PRACTICE

Online products enable litigators to move casework forward and to represent clients more effectively

This kit of power tools equips attorneys in Los Angeles County to:

- Stay versed on current case law by easily accessing Daily EBriefs and Los Angeles Lawyer magazine
- Be notified automatically of any new court filings or motions by subscribing to any of the four Elerts
  - Daily Case Watch
  - Daily Name Watch
  - Daily Case Filings
  - Daily Case Type
- Contact highly experienced and specialized experts and consultants at expert4law.org—The Legal Marketplace
- Prepare for trial with California Judicial Council Smart Forms and Judge in a Flash, and for considering appeals with Appellate Tip
- Research a case for all possible legal recourse with Searchable Civil Register

CURRENT CASE LAW
RESEARCH
PREPARATION FOR COURT
EXPERTS & CONSULTANTS

JOIN TODAY! Only as an Association member can you access these Litigator Tools.

For more information, call Member Services at 213.896.6560 or visit www.LACBA.org
Attorneys should keep in mind that they must connect the evidence they present regarding the four criteria in Section 214.2(b)(4)(iii)(A) to the evidence they show regarding the applicability of the INA’s definition of “specialty occupation” to the position in question. Although the owner of a plumbing company might require all its plumbers to have a bachelor’s degree, this fact does not magically turn plumbing into a professional occupation. Even if the OOH indicates that employers normally require a bachelor’s degree for a certain occupation, the occupation must also require the application of a specific body of “highly specialized knowledge.” The USCIS takes the position that a generalized need for a bachelor’s degree—without more—does not demonstrate the specialized knowledge that has to characterize a specialty occupation.

Second, practitioners can cite a growing body of case law to argue that a certain position should be a specialty occupation. For example, *Portugues* contains a clear and detailed explanation of what constitutes a “specialty occupation,” including language suggesting that an expansive interpretation of this term is appropriate. In that case, the INS described how the concept of “profession” expands as an industry or business evolves and changes. Positions that might not have been considered professional one year could become professional later on. If a specific position is in this transitional state, an employer can show that “it has consistently required the higher standard of a specific university degree for the more complex positions in its organization.”

Another case, *Matter of Michael Hertz Associates*, outlines a set of criteria to use when evaluating whether a certain position is a specialty occupation. These criteria include:

1. The tasks, demands, duties, and requirements of the position, as specified by the petitioner and industry documents.
2. Whether the position requires knowledge, both theoretical and applied, that is almost exclusively obtained through studies in institutions of higher learning.
3. Whether the position requires a precise and specific course of study that relates directly and closely to the position.
4. The fact that the person for whom H-1B status is sought has a college degree in business or liberal arts, without further specification, does not establish eligibility. An employer’s degree requirement for the sake of “general education” is not sufficient for H-1B purposes.
5. The form, method, and extent of compensation as well as the form of the employment agreement or contract (showing that compensation is adequate and there is a set end-date for the position).

Clearly, practitioners should focus on establishing the first three criteria. The fourth criterion, which is a limitation on eligibility, should not be a problem if practitioners can portray the duties of a position as being sufficiently complex.

A number of federal cases interpret the term “specialty occupation” in a manner favorable to employers and foreign nationals. In *In re Hard/Blaker Corporation v. Sava*, the district court specified that an exception to the “industry standard” requirement exists when the position is identified as being a “transitional occupation” from nonprofessional to professional.

Attorneys should bear in mind, however, that the USCIS, as a matter of practice, tends to give greater weight to cases coming directly from the former INS or from the USCIS than cases issued by federal district courts or circuit courts. Indeed, decisions from the USCIS appeals unit, the Administrative Appeals Office, will often be given more weight than a district or circuit court decision, possibly because the AAO is directly binding on the USCIS, while federal court decisions usually are binding only within their jurisdiction.

A third strategy involves analogizing the position in question to a position that has already been found to be professional, either through case law or by inclusion in the INA’s definition of “profession.” Positions established as being “professional” include fashion designers, painting restorers, computer programmers, and social workers. Conversely, practitioners can find guidance in case law establishing that certain positions are not specialty occupations. Counsel will face many situations in which some positions or a particular set of job duties will rarely qualify for H-1B employment status—for example, managers and bookkeepers. Still, there will always be some situations in which a managerial or bookkeeping position’s spe-
cific duties are so complicated that a bachelor’s degree is necessary to carry them out effectively—and thus the position can be considered a specialty occupation.31

If all else fails, practitioners can appeal an adverse finding regarding a specialty occupation. Federal courts generally have interpreted the applicability of the terms “specialty occupation” and “profession” more broadly than the INS or the USCIS. For cases in which significant equities exist, a federal appeal might be an effective option. The main problem with this course of action is that appealing an adverse USCIS decision does not confer lawful immigration status on the beneficiary. Moreover, an appeal often takes a long time to decide. The length of the federal appeal process is even more critical given the long processing times at the AAO, which currently stand at 14 months for appeals of H-1B denials.32 Thus, practitioners should advise foreign nationals who decide to appeal an H-1B denial to wait outside the United States while their appeal is pending to avoid any issues regarding unlawful presence should the appeal ultimately be denied.33

At present, the outlook for success in the H-1B nonimmigrant visa category is grim. The USCIS has gradually narrowed the definition of what constitutes a specialty occupation to a point where only clear-cut petitions filed by large companies are being approved. This trend does not appear likely to change anytime soon.

However, the prevailing narrow view of what constitutes a specialty occupation cannot be justified in light of the regulations and precedential case law. Moreover, preventing qualified foreign workers from working at American companies is a detriment to the U.S. economy. Many might question the wisdom of a program for employing foreign nationals at a time when so many Americans are unemployed. H-1B professionals not only fill gaps and shortages in the American workforce but they also provide employers with the specialized knowledge and skills they need to grow and create additional jobs for American workers. American companies are also able to remain competitive due to the H-1B program, and as a result they will be less inclined to move their facilities, and their jobs, out of the country.

Attorneys are well positioned to ensure that the H-1B program is functioning properly. They have a wide array of tools at their disposal to combat the restrictive interpretation of the USCIS regarding what qualifies as legitimate H-1B employment. Practitioners need to be aware of what those tools are and when and how to use them.34

1 Immigration and Nationality Act (INA) §214(i)(1)(A)-(B).
4 See id. at 1-4.
5 See id.
6 See id. at 1-5.
8 Id.
11 See FRAGOMEN & BELL, supra note 3, at 1-7.
12 See Immigration Act of 1990, supra note 2. The 65,000 cap each fiscal year also includes H-1B approvals set aside through free trade agreements with Singapore and Chile; subtracting those from the cap, the yearly total of H-1B visas available is actually 58,200. See INA §214(g)(8)(B)(ii),(iv). The annual cap also does not include the additional 20,000 H-1B approvals set aside for H-1B beneficiaries that earned a master’s degree or higher from a U.S. institution of higher education, nor does it include applicants considered exempt from the annual numerical limitation; most importantly, beneficiaries who have a job offer at an institution of higher education or a related or affiliated nonprofit entity, nonprofit research organization, or a government research organization. See INA §214(g)(3)(A)-(C).
15 INA §214(i)(i); 8 C.F.R. §214.2(h)(4)(ii).
17 INA §101(a)(32).
19 See U.S. Citizenship and Immigration Services, Form M-235, Optional Processing Worksheet for FY2011 H-1B Filings.
20 See 8 C.F.R. §214.2(h)(4)(ii).
21 See Royal Siam Corp. v. Chertoff, 484 F. 3d 139 (1st Cir. 2007) (holding that the USCIS had properly denied the petition and concluding that a general degree in business administration did not indicate that the restaurant manager position required the application of specialized knowledge); see also Matter of ____, WAC 04 010 54346 (AAO Apr. 1, 2005) (available on AILA InfoNet) (dismissing an appeal because no evidence had been submitted indicating that a bachelor’s degree in a specific specialty is a normal requirement for entry to human resources positions, even though the OOH indicated that most employers required college-level training for entry to that occupation).
23 Id.
25 See id.
28 See INA §101(a)(32).
30 See, e.g., Fred 26 Importers, Inc. v. DHS, 445 F. Supp. 2d 1174, 1180-81 (C.D. Cal. 2006) (holding that the AAO ignored evidence that the duties of a human resources manager at a small company were so complex that the position qualified as employment in a specialty occupation).
33 Generally, if the AAO sustains an appeal, it restores the beneficiary—the foreign worker—to the position in which he or she would have been had the USCIS originally approved the underlying petition. Thus, a successful appeal usually results in no unlawful presence issues. If the AAO dismisses an appeal, however, the beneficiary is considered to have been out of status and accumulating unlawful presence from the date the USCIS denied the underlying nonimmigrant petition.
How the New Basis Rules Affect Estate Planning

AMONG THE MOST CONFUSING and complicated changes made by the new tax laws that went into effect on January 1, 2010, are the provisions for the computation of the gain or loss on the sale of property—including a personal residence—by a decedent’s estate or a family trust. The new rules were originally enacted as part of the 2001 amendments to the Internal Revenue Code that included the repeal of the estate tax, which also became effective on January 1, 2010.\(^1\)

The 2001 statute repealed the increase in basis for assets acquired from a decedent. The underlying idea was to substitute a capital gain tax in place of the estate tax, at least in part. Prior to the new law, the basis of property acquired from a decedent was the fair market value of the property at the time of death.\(^2\) In computing the estate tax on this property, no deduction was allowed for the original cost of the property, so its entire fair market value was included in the decedent’s gross estate for purposes of computing the estate tax. Since the estate tax in recent years has been as high as 45 percent, the tax on estate property could be very substantial. Under the terms of the new law, there will be no tax on such property until that property is sold or otherwise disposed after the death of the decedent in an income-taxable transaction.

Under the old law, for example, if the decedent died owning a property worth $1 million that originally cost $100,000 and if the property was included in the taxable estate, the estate tax on that property could have been as high as $400,000. At the same time, however, the $900,000 of increase in value was not subject to a capital gains tax when it was subsequently sold. This is because the basis of property acquired from a decedent was the fair market value of the property at the time of death.\(^3\) Under the new statute, there is no estate tax, but there is a carryover basis from the decedent. Thus, the $900,000 increase in value will be taxed when the property is sold. Of course, the new law is not nearly so simple, and there are modifications of the rules for computing the basis of property acquired from a decedent that are not intuitive and are not as easy to apply as merely determining fair market value.

One of the major issues facing surviving spouses and executors under the new law is the determination of the basis of the property owned by the decedent. For example, if a property was bought decades ago, the purchase documents may be difficult to locate. If the property in question is rental property, the basis can be determined from the depreciation schedules shown on the decedent’s recent income tax returns. The depreciation schedules, however, will not ordinarily show the cost of the land, because land is not depreciable. However a combination of the tax return depreciation schedule indicating the original cost of the building, together with a property tax bill, which shows the assessed values of both the land and the improvements, will provide sufficient information to compute the cost of the land.\(^4\)

The basis of property acquired by gift is the basis of that property in the hands of the donor. So if a person transfers property with a basis of $100,000, the basis in the hands of the transferee will be $100,000.\(^5\) The new basis rules are built around this concept. IRC Section 1022 provides that, with the exceptions set forth in the statute, property acquired from a decedent will be treated as if the property were acquired by gift. So, if a property is transferred to the owner’s child by a testamentary transfer, the basis of the property in the hands of the child will be the basis of the property in the hands of the decedent. For example, if an individual owned an apartment building, which, at the individual’s death, had an adjusted basis of $800,000 and if that property is transferred upon the death, the transferee will have a basis of $800,000, even if the fair market value of the property is far in excess of that amount.\(^6\) If the property had a fair market value less than the adjusted basis, the lower market value would be the basis of the property in the hands of transferee.\(^7\)

Statutory Basis Increases

The foundational rule found in Section 1022(a) is that the basis in the hands of the transferee is the lesser of the adjusted basis of the decedent or the fair market value at the decedent’s death. However, the basic rule is modified to take into account the difference between the fair market value and the cost (adjusted basis) of the property in the hands of the decedent. The Senate report issued when the law was passed in 2001, describes this modification, or basis increase, as follows:

The bill allows an executor to increase (i.e., step up) the basis of assets owned by the decedent and acquired by the beneficiaries at death. Under this rule, each decedent’s estate generally is permitted to increase (i.e., step up) the basis of assets transferred by up to a total of $1.3 million.\(^8\)

This basis increase of $1.3 million may be further increased on property that is labeled “qualified spousal property,” which is property transferred outright to the spouse or transferred by a qualified terminable interest.\(^9\) The spousal property transfer rules provides for a basis increase of up to $3 million for qualified spousal property. Thus, the basis of property transferred to a surviving spouse can be increased by $4.3 million—$1.3 million plus $3 million.

In addition to these basis increases, the basis in estate property may be increased by the amount of unused built-in losses and loss carryovers. Loss carryovers are losses under IRC Section 1212 (capital loss carryovers) and under IRC Section 172 (net operating loss carryovers). Under the previous law, unused capital loss carryovers and unused net operating loss carryovers could not be carried over to the estate of a decedent. In addition to the carryover losses from Sections 1212 and 172, Section 1022(b)(2)(C) provides that any losses under IRC Section 165 (losses in general and bad debt specifically) which are unused at the death of the decedent may also be added to the basis increases.

The increase in property values during the last generation, together with the opportunity to obtain tax-free cash by refinancing, has

\[\text{Willard D. Horwich is a tax and probate lawyer in Beverly Hills. His practice is limited to tax planning and litigation and estate and probate matters.}\]

Los Angeles Lawyer September 2010 21
resulted in many properties being encumbered by liabilities in excess of the adjusted basis of the property. For example, if a property was purchased in 1970 for $600,000 and had a market value of $1.5 million when a new encumbrance of $1 million was obtained, there would be a liability against the property in excess of its adjusted basis. In an installment sale, this excess of liability over adjusted basis would be considered to be a part of the contract price to be received from the sale. In order to avoid situations in which such an excess might be considered to be a modification of the new basis rules, the new law specifically provides that in determining whether gain should be recognized by the decedent’s estate or by any beneficiary, liabilities in excess of basis shall be disregarded.

The new basis rules apply to property acquired from the decedent, which includes any property directly acquired from the decedent by reason of a bequest, devise, or inheritance. Further, property acquired from certain trusts is considered to have been acquired from the decedent. This includes any trust in which the decedent reserved the right to make changes in the enjoyment of the trust corpus through the exercise of a power to alter, amend, or terminate the trust. Further, any property transferred by the decedent during his or her lifetime to a trust defined in IRC Section 645(b)(1) will also be considered to be property passing from the decedent. The foregoing rules are similar to the rules regarding property of a decedent found in IRC Sections 2036 to 2038. By analogy, then, if property is to be included in the gross estate of a decedent (from the estate tax point of view), the new basis rules of Section 1022 will apply.

**Allocation of Basis Increases**

Any increase in basis of the property of the decedent must be allocated to specific property; however, the statute is silent as to how to make this allocation. This will create difficult issues for executors as well as estate planners. The spousal basis increase of $3 million is only available to the surviving spouse. However, the $1.3 million of basis increase is available to everyone who benefits from the estate. Thus, the allocation of a portion of this basis increase to specific property will have an effect on the transferee when the property is subsequently sold. To the extent that a legatee receives property with a small or no basis increase, that legatee will have a larger gain on a later sale of the property than he or she would have had if that property had received a larger portion, or all, of the basis increase.

For example, assume that a property that cost a decedent $300,000 is later sold by a legatee for $1 million. If no portion of the $1.3 million of basis increase is allocated to that property, the legatee will have a capital gain of $700,000. However, if $500,000 in basis increase is allocated to the property, the capital gain will only be $200,000. At a capital gains tax rate of 15 percent, the tax difference to the legatee is $75,000.

If the decedent’s will or trust is silent regarding the allocation of a Section 1022 basis increase, a problem may well arise as to which of the legatees will be entitled to step up the basis of the property that is received from the decedent. The 2001 Senate report states, “If the amount of basis increase is less than the fair market value of assets whose bases are eligible to be increased under these rules, the executor will determine which assets and to what extent each asset receives a basis increase.”

As shown above, the difference in the taxable gain on sale may well be substantial, and the tax consequences are not negligible.

Under prior law, a typical plan for a moderate estate of a husband and wife and their children was to divide the property into two trusts. One, the survivor’s trust, gave the income to the surviving spouse with a power of appointment to that spouse. The other trust was for the benefit of the children, with the income going to the surviving spouse, and the remainder divided among the children at the surviving spouse’s death. In effect, in this typical plan, the portion in the children’s trust was a part of the decedent’s gross estate, while the survivor’s trust was excluded from that estate. If the value of the property in the children’s trust was less than the estate tax exclusion, then at the decedent’s death there was no tax. The survivor’s trust would be a part of the gross estate of the survivor at the second death. So, the effect of this plan was that the income of the entire estate was available to the survivor and the children, and any estate tax consequences were deferred until the death of the surviving spouse.

According to the pre-2010 basis rules, the property in both trusts would receive a stepped-up basis, and the property would have the benefit of the stepped-up basis at the time the property was sold—whether the property was sold from the children’s trust or from the survivor’s trust. With the carryover basis rules now in effect this will not be the case. Now, only that part of the property to which the basis increase provided by Section 1022 has been allocated will have the benefit of a stepped-up basis and a corresponding decrease in taxable gain.

The change in rules regarding the step up in basis for estate property will require a rethinking about the allocation of property at the time of the death of the first spouse. Before January 1, 2010, all the community property of the decedent received a stepped-up basis. If the estate was sufficiently large, a third trust, the marital deduction trust, was added to the plan. This trust was structured so that it escaped tax at the first death, but the property taxed at the second death included the property of both the marital deduction trust and the property of the survivor’s trust. Thus, that property could grow in value, could accumulate income on money that would otherwise have been paid in taxes, and might provide additional tax savings from unknown events in future years.

Now, estate planners need to rethink the basic structure of the tax plans for relatively modest estates. Under the new rules, there is no estate tax. There is, however, an increase in taxes on the sale of former estate property because of the lower basis that will now be assigned to such property. The table below listing a decedent’s assets and disposition provides an illustration:

<table>
<thead>
<tr>
<th>SAMPLE DISPOSITION OF ASSETS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td><strong>CASH</strong></td>
</tr>
<tr>
<td>250,000</td>
</tr>
<tr>
<td>250,000</td>
</tr>
<tr>
<td>250,000</td>
</tr>
<tr>
<td>250,000</td>
</tr>
<tr>
<td><strong>SECURITIES</strong></td>
</tr>
<tr>
<td>500,000</td>
</tr>
<tr>
<td>800,000</td>
</tr>
<tr>
<td>400,000</td>
</tr>
<tr>
<td>400,000</td>
</tr>
<tr>
<td><strong>RESIDENCE</strong></td>
</tr>
<tr>
<td>400,000</td>
</tr>
<tr>
<td>2,000,000</td>
</tr>
<tr>
<td>600,000</td>
</tr>
<tr>
<td>1,400,000</td>
</tr>
<tr>
<td><strong>RENTAL PROPERTY</strong></td>
</tr>
<tr>
<td>800,000</td>
</tr>
<tr>
<td>3,000,000</td>
</tr>
<tr>
<td>900,000</td>
</tr>
<tr>
<td>2,100,000</td>
</tr>
</tbody>
</table>

The amounts for the spouse’s interest in the residence and the rental property are assumed to be equal to a life estate with a value of 30 percent of the full value of the property. The total assets are $6,050,000, with the surviving spouse to receive $2,150,000, and the children, $3,900,000. If the executor determines that all the property received by the surviving spouse should receive the step up in basis, then the $1.3 million of basis increase should be allocated to nonspousal property, and $2,150,000 of the available $3 million of spousal basis increase should be allocated to spousal property. If this is not done, and the $1.3 million of nonspousal basis increase is allocated to the property received by the spouse, then the remaining beneficiaries will receive no step up in basis.

The 2001 Senate report states that the basis increase will be on an asset-by-asset
WE SERVE ANYTHING,
ANYWHERE
STATEWIDE · NATIONWIDE · WORLDWIDE
1-800 PROCESS
"If we don't serve it, you don't pay"
U.S.A. Only

(800) 672-1952 · Fax: (800) 236-2092
www.served.com/email: info@served.com

INTERNATIONAL
Call for cost · 1-800-PROCESS
ANY STATE · ANY NATION · ANYWHERE
basis, with the caveat that the basis of any asset cannot be adjusted above its fair market value. Thus, if any property of the estate is sold after its basis has been increased, the executor will not be able to create a loss by increasing the basis to an amount higher than the sales price, which presumably will be the fair market value. However, there might be circumstances in which the sales price might be demonstrably below the fair market value, in which case there may be a loss, at least for tax purposes.17

Before 2010, when all property of the decedent received a stepped-up basis, the gain or loss on the subsequent sale of a decedent’s property—whether by the trustee, the executor, or the legatee—was calculated from the fair market value of the property at the date of death of the decedent.18 Under the new rules, the basis of property of the estate will be increased by only $1.3 million except when the surviving spouse acquires the property, in which case the basis of that property (referred to as spousal property in the statute) may be increased by an additional $3 million. In total, then, a spouse may receive property worth $4.3 million with a stepped-up basis. However, the allocation of the basis increase among the assets of the estate will have income tax consequences in the future.

The surviving spouse will also receive a step up in basis for his or her share of the community property.19 However, the step up will only be in effect if the surviving spouse is treated as having acquired at least half of the total community interest in the property from the decedent. The acquisition of this property interest can be by bequest, devise, or inheritance, or by a transfer from the decedent to a qualified revocable trust or any other trust in which the decedent had the power to alter, amend, or terminate the trust. The statute states that if the deceased spouse has an interest in property that is a part of his or her gross estate, then the surviving spouse will be entitled to receive a stepped-up basis in both halves of that community property. This is a carryover of the prior rule that there was a stepped-up basis in both halves of the community property at the death of the first spouse.20

All adjustments to the basis of estate property must be reported on a return required by IRC Section 6018. This section, which is also new, requires that a return be filed if the property of the decedent exceeds $1.3 million. If the executor is unable to make a return, then trustees or beneficiaries must file it.21 The penalties for failing to file the necessary return, either by the executor or other person charged with this responsibility, are substantial. IRC Section 6716 provides for a penalty of $10,000 for each failure to supply the information required under Section 6018. The
reporting requirements under Section 6018 are quite comprehensive.\(^{22}\) No penalty will be imposed if the failure to file was due to reasonable cause.\(^{23}\) A penalty equal to 5 percent of the fair market value of the property for which a report was required will be imposed if the rules are intentionally disregarded.

Practitioners should insert exculpatory language in wills and trusts to protect executors from penalties and from criticism from any beneficiaries who are unhappy with the basis increase allocations. The later income tax consequences to a beneficiary who does not receive a stepped-up basis or who does not receive as much of a stepped-up basis as he or she thinks appropriate, can be substantial. Language like the following might be appropriate:

The executor shall make any and all allocations of the increase of basis of any property transferred pursuant to this instrument, or arising by reason of the death of the grantor [testator], and any such allocation shall be binding upon all persons who may have an interest in any of such property, or any property transferred pursuant to the terms of this instrument. Any proceeding at law, or otherwise, contesting or seeking to modify such allocation shall be considered a contest to the terms of this instrument, and the no contest clause set forth in paragraph ..., hereof shall apply to any such proceeding.

The new basis rules are not simple, so estate planners must counsel their clients about the new requirements. Existing estate planning forms—such as wills, trusts, and property transfer documents—must be examined and provisions added to protect executors and their advisers. It may be appropriate to contact clients with estate plans already in place if modifications to those plans are now indicated.

---

1 The repeal of the estate tax was enacted in 2001. I.R.C. §1022 was added to the Internal Revenue Code for estates of decedents dying after December 31, 2009.

2 I.R.C. §1014.

3 I.R.C. §1022.

4 A typical property tax bill shows the assessed value of both the land and improvements. The ratio of each to the total assessed value of the property can be calculated, and so the cost of the land can be determined. For example, if the cost of a property was $10,000 and the land represents 25 percent of the assessed value, then the cost of the land was $2,500.

5 I.R.C. §1015.

6 Inflation during the past 20 years has increased the value of almost all real property by a significant amount.

7 I.R.C. §1022(a)(2).


9 The term “qualified terminable interest” is defined in I.R.C. §1022(c)(5).

10 Treas. Reg. §1.453-4(c).

11 I.R.C. §1022(g).

12 See I.R.C. §1022(e).

13 I.R.C. §1022(d)(3).

14 SENATE REPORT, supra note 8.

15 An income interest (life estate) can be calculated from annuity tables.

16 As provided in I.R.C. §1022(c), the total increase in spousal property may be $3 million, so that a spouse may have an increase in basis in the total amount of $4.3 million.

17 For example, the transfer of the asset might be governed by a business buy-sell agreement that fixes the price for the sale.

18 For simplicity, in this article the alternative valuation date of the property under I.R.C. §2032 is ignored.


20 I.R.C. §1014.

21 I.R.C. §6018(b)(4).

22 The information required is listed in I.R.C. §6018(c) and applies to the property acquired from the decedent. The statute requires: 1) Name and taxpayer identification number of the recipient. 2) Accurate description of the property. 3) Adjusted basis of the property in the hands of the decedent and its fair market value. 4) Decedent’s holding period for the property. 5) Information sufficient to disclose whether the gain on disposition of the property would be ordinary income. 6) Amount of basis increase per I.R.C. §1022(b) or §1022(c). 7) Other information prescribed by the IRS.

23 I.R.C. §6716(c).

---

WITH EVERY ACCIDENT, there’s a fine line between what happened, and what people think happened.

No two people see the same thing the same way. That’s why you need someone that can quickly and accurately analyze your accident from different perspectives.

Accident Reconstruction • Traffic/Transportation Engineering • Human Factors

Send us an accident or police report for a free initial consultation...

Ph (800) 675-7667 • Fax (877) 494-7667

ACCIDENT RECONSTRUCTION SPECIALISTS
WWW.FIELDANDTESTENGINEERING.COM
The California Academy of Distinguished Neutrals

“Selecting The Right Neutral”

California’s Foremost Mediators

The Academy is pleased to recognize over 60 neutrals.

Mark S. Ashworth
(949) 752-9401

Eleanor Barr
(310) 201-0010

Lynne S. Bassis
(626) 577-7807

Michael J. Bayard
(213) 383-9399

Daniel Ben-Zvi
(310) 201-0010

Lee Jay Berman
(213) 383-0438

Tim Corcoran
(909) 798-4554

Lawrence Crispo
(213) 926-6665

Greg Derin
(310) 552-1062

Michael Diliberto
(310) 201-0010

Max Factor III
(310) 456-3500

Jack D. Fine
(310) 553-8533

Joan Kessler
(310) 201-0010

Leonard Levy
(310) 201-0010

Christine Masters
(818) 955-8518

Steve Mehta
(661) 284-1818

Jeffrey Palmer
(626) 795-7916

Barry Ross
(818) 840-0950

At www.CaliforniaNeutrals.org you can search by subject matter expertise, location and preferred ADR service in just seconds. You can also determine availability by viewing many members’ ONLINE CALENDARS, finding the ideal neutral for your case in a way that saves both time and money.

The California Academy of Distinguished Neutrals is a statewide association of mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes. All members have been recognized for their accomplishments through the Academy’s peer nomination system and extensive attorney-client review process. Membership is by invitation only and is limited to individuals who devote substantially all of their professional efforts to service as a neutral.

For formal criteria and eligibility requirements, please visit www.californianeutrals.org/about
The California Academy of Distinguished Neutrals is a state-wide association of mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes. All members have been recognized for their accomplishments through the Academy’s Speaker Nomination System and extensive attorney-client review process. Membership is by invitation only and is limited to individuals who devote substantially all of their professional effort to service as a neutral or formal criteria and eligibility requirements.

You can search by subject matter expertise, location, and preferred service in just seconds. You can also determine availability by viewing many members finding the ideal neutral for your case in a way that saves both time and money. The Academy is pleased to recognize over 80 neutrals across Southern California, including...

Viggo Boserup  
(310) 309-6205

Kenneth Byrum  
(661) 861-6191

George Calkins  
(310) 392-3044

R.A. Carrington  
(805) 565-1487

Hon. Eli Chernow  
(818) 995-3584

Steven Cohen  
(310) 315-5404

William Fitzgerald  
(310) 440-9090

Linda C. Fritz  
(619) 236-1848

Kenneth C. Gibbs  
(310) 309-6205

Reginald Holmes  
(626) 432-7222

Robert Holtzman  
(310) 282-2200

Laurel Kaufer  
(818) 888-4840

Deborah Rothman  
(310) 452-9891

Steve Rottman  
(310) 751-0114

Myer Sankary  
(818) 231-2965

Ivan K. Stevenson  
(310) 540-2138

John Wagner  
(800) 488-8805

Kenneth Weinman  
(310) 444-3030

To find the best neutral for your case, please visit our complete member roster at www.CaliforniaNeutrals.org
it is not uncommon for an aspiring writer to feel that his or her idea for the next big hit television show or blockbuster movie was stolen. After all, as noted by the California Supreme Court in its well-known Desny v. Wilder decision, there are “only thirty-six fundamental dramatic situations, various facets of which form the basis of all human drama.”1 The inescapable overlap in general ideas that many works share, coupled with a writer’s desire to be credited and compensated for his or her work, creates an environment ripe for accusations of idea theft.

While writers can sue under copyright or a variety of other theories, California plaintiffs frequently sue for breach of implied contract. These claims are also referred to as idea submission claims or as Desny claims.2 To prevail, the plaintiff must show that:

1) The plaintiff submitted the ideas to the defendant.
2) The plaintiff conditioned his or her submission on the defendant’s obligation to pay for the ideas if they were used.
3) The defendant voluntarily accepted the disclosure of the ideas on the terms under which they were disclosed and thereby impliedly agreed to pay the plaintiff for the ideas.
4) The defendant found them valuable.
5) The defendant used the ideas without paying for them.3

A crucial component of an idea submission claim is the unlawful use of the idea.4 “Unlawful use” means “the defendants based the [allegedly offending work] substantially upon [the] plaintiff’s ideas rather than on their own ideas or ideas from other sources.”5 For this issue, the plaintiff bears the burden of proof,6 and the court of appeal has explained what this burden requires: “To prevail, the party bearing the burden of proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence)....The burden of proof does not shift during trial—it remains with the party who originally bears it.”7

A plaintiff may demonstrate actual use of his or her idea by direct evidence or by circumstantial evidence.8 Absent direct evidence, the defendant’s access to the plaintiff’s idea, together with a showing of

In Hollywood, it is not uncommon for an aspiring writer to feel that his or her idea for the next big hit television show or blockbuster movie was stolen. After all, as noted by the California Supreme Court in its well-known Desny v. Wilder decision, there are “only thirty-six fundamental dramatic situations, various facets of which form the basis of all human drama.”1 The inescapable overlap in general ideas that many works share, coupled with a writer’s desire to be credited and compensated for his or her work, creates an environment ripe for accusations of idea theft.

While writers can sue under copyright or a variety of other theories, California plaintiffs frequently sue for breach of implied contract. These claims are also referred to as idea submission claims or as Desny claims.2 To prevail, the plaintiff must show that:

1) The plaintiff submitted the ideas to the defendant.
2) The plaintiff conditioned his or her submission on the defendant’s obligation to pay for the ideas if they were used.
3) The defendant voluntarily accepted the disclosure of the ideas on the terms under which they were disclosed and thereby impliedly agreed to pay the plaintiff for the ideas.

4) The defendant found them valuable.
5) The defendant used the ideas without paying for them.3

A crucial component of an idea submission claim is the unlawful use of the idea.4 “Unlawful use” means “the defendants based the [allegedly offending work] substantially upon [the] plaintiff’s ideas rather than on their own ideas or ideas from other sources.”5 For this issue, the plaintiff bears the burden of proof,6 and the court of appeal has explained what this burden requires: “To prevail, the party bearing the burden of proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence)....The burden of proof does not shift during trial—it remains with the party who originally bears it.”7

A plaintiff may demonstrate actual use of his or her idea by direct evidence or by circumstantial evidence.8 Absent direct evidence, the defendant’s access to the plaintiff’s idea, together with a showing of

Allison S. Brehm is a senior associate with the law firm of White O’Connor Fink & Brenner LLP, where she litigates idea submission, copyright, trademark, and First Amendment disputes.
similarity between the plaintiff’s idea and the defendant’s alleged offending work, may create an inference that the defendant used the plaintiff’s idea. The inference may be rebutted, however, when the defendant can demonstrate that he or she came up with the idea independently—the independent creation defense. This defense is now playing a greater role in defeating idea submission claims. After all, any implied contractual obligation to pay for an idea is contingent upon actual use of that idea. There can be no unlawful use when the alleged offending work was conceived independently of a plaintiff’s idea.

While courts have ruled on the issue of independent creation for decades, they are increasingly doing so prior to trial at summary judgment, as a matter of law. Indeed, in 2007, the California Court of Appeal in Hollywood Screentest of America, Inc. v. NBC Universal, Inc., granted summary judgment in favor of the defendants on the grounds that evidence of independent creation prevents a finding of use and is a complete defense to an idea submission claim. In 2009, two more unpublished decisions on the issue followed suit. Plaintiffs have frequently challenged any determination of the independent creation defense as a matter of law on the grounds that fact questions exist regarding unlawful use. Plaintiffs typically claim that shared similarities between the works or a defendant’s possible access to a plaintiff’s work, however remote, remove any finding of independent creation prior to trial. The recent California appellate decisions confirm that these challenges by plaintiffs are no longer successful in the face of sufficient independent creation evidence at the summary judgment stage.

As the independent creation defense plays a more prominent role in idea submission claims, questions abound as to what makes evidence of independent creation sufficient. Is testimony from the writer of the offending work enough? What about documentary evidence detailing the creation of the offending work? Does a defendant’s access to the plaintiff’s work doom the independent creation defense? Are similarities between the plaintiff’s and the defendant’s works fatal to the defense? A survey of case law reveals that these challenges by plaintiffs are no longer successful in the face of sufficient independent creation evidence at the summary judgment stage.

As the independent creation defense plays a more prominent role in idea submission claims, questions abound as to what makes evidence of independent creation sufficient. Is testimony from the writer of the offending work enough? What about documentary evidence detailing the creation of the offending work? Does a defendant’s access to the plaintiff’s work doom the independent creation defense? Are similarities between the plaintiff’s and the defendant’s works fatal to the defense? A survey of case law reveals that, over time, defendants have learned to amass better documentation and testimony to overcome any inference of use raised by the plaintiff. Indeed, raising the defense at the earliest opportunity can save sometimes staggering litigation costs.

From the Marx Brothers to Shampoo

Proponents of the independent creation defense faced skepticism in their initial efforts to persuade the California Court of Appeal. For example, in 1939, in one of the court of appeal’s earliest decisions on the issue, the court rejected the defense in an action for plagiarism. The plaintiffs in Barsha v. Metro-Goldwyn-Mayer claimed that their script was used to create the Marx Brothers’ motion picture A Day at the Races. The case went to trial and the jury returned a verdict in favor of the plaintiff.

On appeal, MGM argued that the evidence did not support any finding of use of the plaintiffs’ script. The court disagreed, however, explaining that MGM’s argument was “based largely upon the testimony of writers in the employ of appellants who testified that they did not use plaintiffs’ manuscript.” The court recognized that “[i]f [the defendants] had independently conceived and prepared [the alleged offending work], they would not be liable to plaintiffs for damages.” But the court was not persuaded by MGM’s evidence of its independent effort. Rather, the court determined, “Uncontradicted denials on the part of employees of appellants [i.e., the writers] did not compel the conclusion on the part of the jury that there had been no copying of plaintiffs’ manuscript.”

Although the Barsha court provided little basis for its reasoning, it appears that MGM’s independent creation defense was undermined by the evidence that the individual who possessed a copy of the plaintiffs’ manuscript for months was the same person who took an “active part in the production of the motion picture,” made suggestions for the film, and supervised its writer. Further, the motion picture shared “numerous similarities” with the plaintiffs’ manuscript. On this record, the court determined that the jury’s finding was supported by the evidence.

Decades later, confronted with better facts, the court of appeal in Teich v. General Mills, Inc., upheld judgment notwithstanding the verdict in light of the defendant’s evidence of independent creation. The plaintiff in Teich pitched a promotional idea—a kit for making sun pictures—to be used on the defendant’s cereal boxes and subsequently sued for breach of contract when the plaintiff learned of the defendant’s use of a similar idea.

At trial, the plaintiff proffered evidence showing that in July 1955, he pitched the idea to Otis Young, a promotions executive in a San Francisco division of defendant General Mills. Young was responsible for premiums for the division, and he had no duty to report his activities to the head office in Minneapolis. The plaintiff and Young met in person and discussed the plaintiff’s idea, but ultimately nothing happened, and Young ceased responding to the plaintiff’s communications. Independently, an advertising agency in Kansas City conceived of a similar promotions idea prior to any contact with the head office for General Mills.

After the jury found in favor of the plaintiff, the defendant filed a motion for judgment notwithstanding the verdict, which the trial court granted. On appeal, the appellate court framed the inquiry at the heart of the case: “[D]oes proof that there was no copying of plaintiff’s product make a complete defense, although the thing actually used by defendant was closely similar to the one which plaintiff had presented to it?” In concluding that “[t]he authorities require an affirmative answer,” the court held that the defendant had “proved conclusively the fact of independent development” of the idea. This defense, the court explained, was absolute even though the defendant’s work shared similarities with the plaintiff’s.

In reaching this decision, the Teich court looked to a 1924 decision written by Judge Learned Hand in Fisher, Inc. v. Dillingham. Judge Hand acknowledged that “the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted.” Applying this principle of copyright, the Teich court concluded that “it follows from the absence of copying that plaintiff has no cause of action…. ‘Here seems to be no attempt to coin money out of another’s labor.’” In short, there simply was no use of the plaintiff’s idea.

After Teich, the court of appeal faced another independent creation defense in Donahue v. Ziv Television Programs, Inc., a case that involved the television program Sea Hunt. However, the defendants in Donahue did not fare as well.

In Donahue, the plaintiffs contended that Sea Hunt was a copy of the plaintiffs’ format for a television show, and that the defendants breached a contract to compensate the plaintiffs for the use of their format. The plaintiffs submitted their idea to a production company, which at the time employed a producer who was working on a different show. That producer later joined forces with the production company to write Sea Hunt. Following the jury verdict in favor of the plaintiffs, the defendants successfully moved for judgment notwithstanding the verdict.

On appeal, the defendants pointed to their evidence of independent creation and relied on Teich for an affirmation. The court of appeal was not persuaded, holding that the evidence before the court was not conclusive proof to uphold the judgment notwithstanding the verdict. The court explained that the evidence of independent creation may be “impressive” but still not sufficient to support an independent creation defense. According to the court, the defendants’ evi-
dence was limited to “uncorroborated” testimony from the writer of the offending work that “differed sharply…with [the testimony] of plaintiffs’ witnesses.” Thus, in Donahue, the plaintiffs’ evidence was pitted directly against the defendants’ evidence, with no third-party witness or genuine documentary evidence to tip the balance in favor of the defendant as there was in Teich.

In another paradigmatic case, Mann v. Columbia Pictures, Inc., the court of appeal in 1982 upheld an order granting judgment notwithstanding the verdict on the grounds of, among other things, independent creation. The plaintiff alleged that the film Shampoo, which Columbia produced, was based upon a written story outline the plaintiff had submitted to a Columbia story analyst.

At trial, the plaintiff testified that she registered her work with the Writers’ Guild of America in October 1969 and, in 1971, put her work in an envelope and gave it to her neighbor to give to an executive at Columbia, Harry Caplan. The plaintiff never met Caplan before trial. At the time of the submission, Caplan was employed by Filmmakers Corporation, but his salary was paid by Columbia due to an arrangement regarding the release of the film Happy Birthday, Wanda June. Filmmakers’ offices were located on Columbia property, but the court determined the “geographical proximity…does not indicate any connection between Caplan and Columbia’s story department.”

Caplan admitted to passing the plaintiffs’ envelope to a “reader” at Filmmakers but not to anyone at Columbia. The reader reviewed material for Filmmakers, not Columbia, and the reader had no association with the production of Shampoo. Thereafter, in 1973, Caplan and the reader began working at Columbia. In February 1974, Columbia entered a written agreement to finance the production of Shampoo.

Columbia based its defense, in part, on evidence that Warren Beatty and Robert Towne—Shampoo’s credited screenwriters—developed the ideas for the film before the plaintiff’s alleged submission and had never even seen the plaintiff’s outline. The jury nevertheless returned a verdict in favor of the plaintiff. The trial court, however, granted the defendants’ motion notwithstanding the verdict and entered judgment in their favor.

In its examination of the record of evidence presented by the defendants to establish the independent creation of Shampoo, the court of appeal noted that the idea for the screenplay for Shampoo was conceived as early as 1965, and the first screenplay was completed in 1970. The screenplay was submitted to Columbia in 1971—before the date of the plaintiff’s alleged submission. The court held that even with the similarities between the works, the “‘independent effort’ of [Towne] and Beatty in developing the ‘Shampoo’ script provides Columbia with a complete defense against the contractual obligation alleged….The defense is established…because the inference of access and use was rebutted. Since there was neither a submission of [the plaintiff’s work] to Columbia, nor any contact between the screenplay authors and the people alleged to have possessed plaintiff’s treatment, there is no substantial evidence to support the jury verdict.”

Later Decisions

Recent defendants can claim a string of successes with the independent creation defense, with victorious motions for summary judgment affirmed by the California Court of Appeal. This was the case in 2007 in Hollywood Screentest of America, Inc. v. NBC Universal, Inc., in which the defendants’ independent creation of a television show demonstrated a lack of unlawful use.

The plaintiff in Hollywood Screentest alleged that for several years beginning in 1995, he pitched his idea for a television program, titled Hollywood Screentest, to a series of entertainment industry executives. In 1995, the plaintiff allegedly contacted an NBC executive about the program, but the executive said she was not interested. In 2001, the plaintiff allegedly contacted defendant Jeff Zucker, president of NBC Entertainment, by e-mail. The plaintiff and Zucker allegedly discussed the program over many months—off and on from January 2001 through September 2002—with the plaintiff initiating most of the contact. At one point, Zucker put the plaintiff in contact with another NBC executive, Jeff Gaspin, head of reality television, but Gaspin rejected the project. In September 2002, Zucker told the plaintiff that NBC was going to pass on the program. On September 5, 2002, NBC issued a press release announcing that NBC and Silver Pictures would be presenting a new competitive reality series titled Next Action Star.

The plaintiff sued for breach of written contract and breach of implied-in-fact contract, among other claims, on the basis that the defendants used Hollywood Screentest to conceive the idea for Next Action Star. The defendants moved for summary judgment on the grounds that all the plaintiff’s claims “were barred because there was no disputed issue of fact that Next Action Star was independently created and that NBC used nothing submitted by appellants.” In support of their motion, the defendants proffered declarations showing the development and creation of Next Action Star by “entities entirely independent from NBC.” Against this backdrop, the court of appeal determined that “NBC has successfully shown undisputed evidence of independent creation by entities unrelated to NBC and unassisted by NBC.” The court noted that the development of the program began in the summer of 2001 and occurred “over the course of a year before the show’s creators presented it to NBC.” Moreover,
“NBC had no involvement with Next Action Star prior to the initial meeting in August 2002.”42

The court of appeal also rejected the plaintiff’s argument that the “numerous similarities” between the works and the timing of NBC’s rejection of the plaintiff’s proposal and announcement of Next Action Star created a question of fact as to whether Next Action Star was independently created. According to the court, the plaintiff’s “speculation” regarding NBC’s use was insufficient to create an issue of fact. Thus, the similarities between the works as well as the timing of NBC’s acceptance of Next Action Star and its final rejection of the plaintiff’s idea were insufficient to create a disputed issue.

On this record, the court of appeal concluded that the “uncontradicted evidence [by independent entities] that Next Action Star was independently created prior to any of these parties having any contact with NBC negates any inference that NBC used appellants’ ideas.”43 Thus, NBC’s evidence of independent creation dispelled any inference of use as a matter of law, and the court upheld the order granting summary judgment on the plaintiff’s claims for breach of express and implied contract.44

In 2009, the California Court of Appeal issued two more decisions reaffirming the strength of the independent creation defense at the summary judgment stage. While the decisions are unpublished, they are highly instructive.

The first of these cases was Scottish American Media, LLC v. NBC Universal, Inc. The plaintiff alleged that the defendants copied the plaintiff’s idea for a reality television show—even though the defendants never actually produced their show. According to the plaintiff, in early June 2004, he telephoned a development executive at NBC Universal, Craig Plestis, and pitched his idea for a reality television show.45 In August 2004, the plaintiff allegedly gave a copy of his treatment to a trainee in the alternative programming department at NBC Universal. The trainee allegedly said she would give the treatment to Plestis, but the trainee did not recall the interaction and Plestis did not recall reading the treatment. The plaintiff also allegedly contacted a producer, Ben Silverman, to pitch his idea, resulting in a meeting with Silverman and others in June 2004. Silverman rejected the idea.

Thereafter, Silverman and his production company, Reveille, and Plestis began discussing the development of a reality television show that allegedly was similar to the plaintiff’s idea.46 Silverman’s idea, however, stemmed from a longstanding European reality show titled Eurovision, which Silverman had been interested in importing since the 1990s.47 Silverman had pitched the idea to Plestis and another NBC Universal executive in 2002 and 2005.48 In June 2005, NBC Chairman Zucker expressed interest in the show. Silverman and his producing partners at Reveille considered acquiring either the rights to the European show or rights from the plaintiff. The producing partners contacted the plaintiff about the opportunity, but NBC Universal preferred the European show. Thus, in November 2005, the plaintiff learned that his idea would not be used for the NBC show.49

Once Reveille and NBC Universal issued a press release announcing their planned development of the American version of Eurovision, the plaintiff sued for breach of implied contract, among other claims.50 Thereafter, NBC Universal decided not to proceed with the show, but the plaintiff nevertheless proceeded with his claim. The defendants moved for summary judgment not only based on the independent creation defense but also on the ground that no show was produced, further negating the element of use. Relying heavily on Hollywood Screenest, the trial court granted summary judgment,51 and the court of appeal affirmed.52

On appeal, the plaintiff argued that the defendants’ access and the similarities between the works created an inference of use. The defendants’ evidence, however, showed that Silverman discussed importing Eurovision since the late 1990s and pitched the idea to NBC Universal in 2002, prior to the plaintiff’s pitch in 2004. While the court acknowledged that there were sufficient similarities to raise an inference of use, it held that the defendants dispelled that inference by presenting evidence of independent creation.53

The latter 2009 case acknowledging the force of the independent creation defense was Kightlinger v. White, a dispute between two well-established writers. Plaintiff Laura Kightlinger alleged that in 2002 or 2003 she gave defendant Mike White a copy of her screenplay We’re All Animals.54 In 2004, the plaintiff allegedly gave the defendant another draft of her screenplay. In late 2005, after the defendant had access to the plaintiff’s screenplay, the defendant wrote a screenplay titled Year of the Dog.

The plaintiff claimed that Year of the Dog was based on her idea and sued for breach of implied contract and breach of confidence. The defendant’s motion for summary judgment was granted by the trial court on the grounds that there were no material similarities between the works that could give rise to an inference that the defendant copied the plaintiff’s ideas and, even if there were an inference of use, the defendant rebutted that inference with evidence of independent creation.55

The court of appeal addressed the independent creation argument by holding that the defendant had submitted sufficient evidence that Year of the Dog was based on his own life and not the ideas in the plaintiff’s screenplay. According to the court, the “[d]efendant demonstrated, with corroborating evidence, the source of [Year of the Dog’s] core premise[,]” and the “uncontradicted evidence also demonstrates that his life served as the source for other material elements of [Year of the Dog].”56 Specifically, the defendant submitted a declaration detailing his creation of the work, attaching pages from his “composition notebooks” along with third-party declarations “attesting to the fact that [Year of the Dog] very closely, if not exactly parallels events in defendant’s life.” The court further found that the defendant’s declaration from Alicia Silverstone, a third party, was persuasive. Silverstone attested to the fact that one of the scenes in Year of the Dog was inspired by an incident in her own life that she had recounted to the defendant.

Despite the defendant’s evidence of independent creation, the plaintiff claimed the evidence was insufficient because it was “untrustworthy” and postdated the defendant’s access to We’re All Animals. The plaintiff also “urge[d] the court not to accept plaintiff’s claim of independent creation for fear that any defendant could then fabricate a log of notes, or something similar.”57 The court disagreed because the defendant’s notes were not his only evidence of independent creation and “contrary to plaintiff’s claim, there are no competing facts on the issue of independent creation for the trier of fact to weigh.”58 Thus, the defendant’s evidence of independent creation precluded the plaintiff from establishing the crucial element of unlawful use.

These recent decisions confirm that independent creation is a defense that is not just viable but one worth raising at the summary judgment stage. Indeed, plaintiffs bear a heavy burden to establish unlawful use of their ideas. The inference of use simply cannot be based on “suspicion alone, or…imagination, speculation, supposition, surmise, conjecture, or guesswork.”59 In turn, defendants can rebut any inference of use with evidence documenting the development and creation of their work. Evidence that is “clear, positive, and uncontradicted and of such a nature that it cannot reasonably be disbelieved” is sufficient to support summary judgment.60

The success of an independent creation defense can be shaped by the timing of the creation of the allegedly offending work and the depth and extent of documentary and testimonial evidence of independent creation. If the allegedly offending work was conceived before the alleged access occurred, the defen-
dant may be able to establish independent creation and negate any inference of use raised by access and similarity between the works. Even if the allegedly offending work was conceived after the alleged access occurred, it is still possible for defendants to establish independent creation and rebut an inference of use. A defendant can show that the offending work was conceived by individuals without access to the plaintiff’s work. They can do this by producing declarations from those individuals. Also, defendants can demonstrate that they created their work from sources other than the plaintiff’s work.

In sum, the independent creation defense is here to stay. Indeed, evidence of independent creation defeats the essential element of use that is required for any idea submission case. Without that crucial factor, an idea submission claim fails. Given the strong impact of the independent creation defense, practitioners can drastically reduce the costs of litigation by producing evidence before trial that will bring doomed cases to a timely end.

2 Until the Ninth Circuit’s Grosso v. Miramax Film Corporation decision, defendants previously challenged Desny claims on the grounds that they were preempted under §301 of the Copyright Act. In Grosso, however, the court found that the element of an “implied promise to pay” for use of the idea saved the claim from preemption, because it distinguished the claim from a copyright infringement claim. Grosso v. Miramax Film Corp., 383 F. 3d 965, 967-68 (9th Cir. 2004). Recently, the Ninth Circuit held that implied contract claims are still subject to preemption if the plaintiff does not expressly allege an implied promise to pay. See Montz v. Pilgrim Films & Television, Inc., No. 08-56954, 2010 U.S. App. LEXIS 11235, at *5-11 (9th Cir. June 3, 2010) (upholding order dismissing implied contract claim pursuant to Fed. R. Civ. P. 12(b)(6), with prejudice).  
4 Indeed, no matter the theory, use is a fundamental element of an idea submission claim. See, e.g., Hollywood Screen test of Am., Inc. v. NBC Universal, Inc., 151 Cal. App. 3d 631, 638, 647, 649-50 (2007) (causes of action for breach of written contract, breach of implied contract, breach of covenant of good faith and fair dealing, breach of confidence, unjust enrichment, and unfair competition require showing of unlawful use); see also Nimmer on Copyright §19D.07[A], at 19D-86.  
5 Mann, 128 Cal. App. 3d at 647 n.6.
6 Id. (The plaintiff has the “burden of establishing, by a preponderance of the evidence, all of the facts necessary to prove… the defendants actually used plaintiff’s ideas.”); see also Sargent Fletcher, Inc. v. Able Corp., 110 Cal. App. 4th 1658, 1667 (2003).
7 Sargent Fletcher, 110 Cal. App. 4th at 1667. On the other hand, the burden of producing evidence “may shift between plaintiff and defendant throughout trial.” Id. “Initially, the burden of producing evidence as to a particular fact rests on the party with the burden of proof as to that fact…” Once that party produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case… Once a prima facie showing is made, it is for the trier of fact to say whether or not the crucial and necessary facts have been estab-
lished.” Id. at 1667-68. If the evidence is evenly balanced, the party that bears the burden of proof must lose. Id.

6 Nimmer on Copyright §19D.07[A], at 19D-87. For an example of direct evidence, Nimmer cites the case of Musto v. Meyer, in which the defendant candidly credited the plaintiff’s article as an inspiration. However, “direct evidence of use is more the exception than the norm.” Nimmer on Copyright §19.D.07[B], at 19D-89 (citing Musto v. Meyer, 434 F. Supp. 9 Hollywood Screentest, 151 Cal. App. 4th at 647-48 (9th Cir. June 9, 2010); Nimmer on Copyright §19D.07[B], at 19D-90, §19.D.08[A] (“In implied contract cases, the weight of California authority is that there must be ‘substantial similarity’ between plaintiff’s idea and defendant’s production to render defendant liable.”).

7 Hollywood Screentest, 151 Cal. App. 4th at 646-52 (upholding order granting summary judgment on claims for express and implied-in-fact contract based on uncontradicted evidence of independent creation); Mann, 128 Cal. App. 3d at 648-51 (affirming order granting judgment notwithstanding the verdict on the grounds that substantial similarity between the works is necessary to trigger a defense against contractual obligation); Teich, 170 Cal. App. 2d at 803 (affirming order granting judgment notwithstanding the verdict on the grounds that proof of independent development provides complete defense even when the defendant’s concept was closely similar to that which the plaintiff had submitted); see also Klekas v. EMI Films, Inc., 150 Cal. App. 3d 1102, 1114-15 (1984).


11 Id. at 588-60.

12 See id. at 565.

13 Id. at 561.

14 Id.

15 See id. at 560.


17 Id. at 795-97.

18 Id. at 799-800.

19 Id. at 794.

20 Id. at 802-03.

21 Id. at 804-05 (quoting Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D. N.Y. 1924)).

22 Id. at 803-06 (quoting Dun v. Lumbermen’s Credit Ass’n, 209 U.S. 20, 22 (1908)).


24 Id. at 598-99.


26 Id. at 630, 636.

27 Id. at 636-37.

28 Id. at 640.

29 Id. at 636-38.

30 Id. at 642-45.

31 Id. at 634.

32 Id. at 645.

33 Id. at 644, 650.


36 Id. at 634-36.

37 Id. at 638.

38 Id. at 647-48 & n.8, 636-38.

39 Id. at 647; see also id. at 636.

40 Id. at 637-38.

41 Id. at 648-49.

42 Id. at 646-50.


44 Id. at *7-10.

45 Id. at *2-5.

46 Id. at *6.

47 Id. at *9-10.

48 Id. at *12-13.

49 Id. at *15-17.

50 Id. at *34-35.

51 Id. at *25-30.


53 Id. at *3-5.

54 Id. at *51.

55 Id. at *26-30.

56 Id. at *30-31.


The Only Broker You Need.

Structured Settlements for Non-physical Injury Cases:

- Class Actions
- Employment Litigation
- Disability Claims under 104 (a)
- Punitive Damages
- Tax Deferred
- Attorneys Fees
- No Cost to Clients

We are dedicated to protecting you and your clients.

Security, Quality & Trust

CAOC Inner Circle President’s Club Members
ABOTA Supporters CAALA Supporters
OCTLA Premier Sponsors LCA Corporate Diversity Partners

The FIRST NAME in Structured Settlements - Since 1975

PATRICK C. FARBER
PFARBER@RINGLERASSOCIATES.COM
CA INSURANCE LICENSE CA04077

PAUL FARBER
PAULFARBER@RINGLERASSOCIATES.COM
CA INSURANCE LICENSE 088495

Toll Free: 800-734-3910
www.ringlerassociates.com/newportbeach
Good Copy Bad Copy, a 2007 documentary on copyright and culture, features Brazilian music producer Beto Metralha sitting in his recording studio and demonstrating, step by step, how he chooses music samples to create songs for the Brazilian genre tecno brega. The music Metralha samples in his tutorial is used without the permission of its owners and is likely a violation of applicable copyright laws. Ironically, Metralha not only samples the Gnarls Barkley hit “Crazy,” produced by DJ Danger Mouse, but also criticizes Danger Mouse by claiming he is “very lucky not to be in jail”1 for the unauthorized samples he used in creating his 2004 Grey Album.

Music sampling is the use of a portion of preexisting recordings or compositions in a new sound recording.2 It first appeared in Jamaica in the 1960s and migrated to the United States in the 1970s with the dawn of hip-hop music and culture.3 Indeed, sampling has been fundamental to rap music since hip hop’s “golden era” of the late 1970s and 1980s. However, the technological advances of the digital era have greatly enhanced sampling’s creative possibilities.

As the new style of music created by hip-hop artists and others began to flourish, record labels and music publishers realized that their sound recordings and compositions were being appropriated. As a result, they took steps to enforce their rights through the courts. In decisions such as Grand Upright v. Warner Bros. Records, Inc.,4 and Bridgeport Music, Inc. v. Dimension Films,5 courts have attempted to provide guidelines.

Jeffrey Omari is an attorney who works as a consultant in the music legal affairs department of MGM Studios. He is an adjunct law professor at the Fashion Institute of Design and Merchandising and at Emerson College.
for all those involved in the clash between a thriving art form and preexisting music. The conflicts continue, however, with technological developments during the last decade igniting a sampling craze that has challenged the limits of copyright law.

One of the more recent sampling disputes involves hip-hop prodigy Lil Wayne and his recording “I Feel Like Dying.” As in most sampling cases, the issue involves the use of an uncleared sample—music used without permission of the copyright owner. The sample in dispute is the recording “Once,” written by Karma-Anne Swanepoel. The chorus from “Once” is looped throughout “I Feel Like Dying.” While these facts are not unique, the case contains a novel issue. “I Feel Like Dying” was never released commercially. It was “leaked” (prematurely released) to the Internet and has since gone viral, reaching No. 7 in Spin’s “Best Songs of 2007.”

Subsequently, the owner of Swanepoel’s composition, Urband & Lazar Music Publishing, filed a copyright infringement suit in Louisiana district court. This sets the stage for the resolution of a rare dispute in which a song that has never been commercially released is the subject of an infringement claim.

Lil Wayne’s case is just one example of the challenges music sampling presents to artists, attorneys, and lawmakers. At issue is the delicate balance between cultivating creativity and protecting the intellectual property rights of copyright owners. This paradox is embedded in Article I of the U.S. Constitution: “The Congress shall have the Power…[to] Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Thus far, the ingenuity of artists and IT developers are light-years ahead of current copyright law.

Navigating through recent developments in music copyright law requires an understanding of the rights a song contains and the laws triggered for its use. Most songs contain two sets of rights: 1) the rights in the sound recording and 2) the rights in the underlying musical composition. The musical composition is the words and music of a song, while the sound recording is the recorded rendition of those words and music. For example, Bob Dylan (or his music publisher) has a copyright in Dylan’s composition “All along the Watchtower.” When Jimi Hendrix recorded his version of the Dylan composition, Hendrix created a sound recording that contains the copyrighted Dylan composition. To create his recording, Hendrix needed the permission of the owner of Dylan’s composition.

The leading case involving the sampling of sound recordings is the Sixth Circuit’s Bridgeport Music, Inc. v. Dimension Films. At issue in Bridgeport was a two-second use of George Clinton’s “Get off Your Ass and Jam,” which was sampled and looped throughout the NWA song “100 Miles and Runnin.” The NWA recording appeared in the film I Got the Hook Up, which was distributed by Dimension Films. Bridgeport Music and Westbound Records, which owned the copyrights in Clinton’s song, sued Dimension Films for failing to clear the Clinton sample contained in “100 Miles and Runnin” prior to distribution of the film.

In overturning the district court’s grant of summary judgment in favor of Dimension Films, the Sixth Circuit acknowledged the music industry’s need for a rule that “adds clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings.” Accordingly, the Sixth Circuit established one: “[G]et a license or do not sample.”

The rule used when sampling musical compositions is not as clear-cut, however. For example, in Newton v. Diamond, the Ninth Circuit clarified the infringement standard for compositions by holding that a claim is actionable only if there is “substantial similarity between the plaintiff’s and the defendant’s works.” Newton involved an infringement claim against a popular rap group, the Beastie Boys, who sampled a portion of James Newton’s recording “Choir” in the group’s song “Pass the Mic.” The Beastie Boys obtained a license to use the “Choir” recording but failed to seek permission for use of the underlying composition. The Ninth Circuit found the Beastie Boys sample was neither “quantitatively nor qualitatively significant”
MCLE Test No. 195

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.

1. Music sampling involves the creation of a new sound recording by using preexisting sound recordings or compositions.
   - True
   - False

2. Bridgeport Music, Inc. v. Dimension Films stated a rule for music sampling: “Get a license or do not sample.”
   - True
   - False

3. A successful fair use defense may allow the use of a copyrighted work without the copyright owner’s permission.
   - True
   - False

4. Most songs contain two sets of rights.
   - True
   - False

5. A derivative work is based on one or more preexisting copyrighted works.
   - True
   - False

6. If an artist records and sells a “cover” of a musical composition—that is, the artist’s version of a previously recorded song—music industry standards suggest the artist need not seek permission of the owner of the composition.
   - True
   - False

7. Fair use is an affirmative defense.
   - True
   - False

   - True
   - False

9. Fair use transformation is identical to the transformation required to create a derivative work.
   - True
   - False

10. The Ninth Circuit’s ruling in Newton v. Diamond implies that clearing the rights in a composition when sampling a sound recording is not always necessary.
    - True
    - False

11. Those who sample a musical composition generally face no liability “unless the copying is substantial.”
    - True
    - False

12. Courts generally consider the purpose of the defendant’s use when determining whether it meets the standards of fair use transformation.
    - True
    - False

13. In Kelly v. Arriba Soft Corporation, the Ninth Circuit found that the defendant’s use of the plaintiff’s copyrighted photographs was not transformative and not a fair use.
    - True
    - False

14. In a 2007 case against mixtape artist DJ Drama, Georgia officials chose to pursue state law claims rather than a federal copyright action.
    - True
    - False

15. In the copyright dispute between Shepard Fairey and the Associated Press, the central issue hinges on whether Fairey’s image, HOPE, is a derivative work of the copyrighted AP photo or whether it meets the standards of fair use transformation.
    - True
    - False

16. A sound recording copyright protects a song’s words and music.
    - True
    - False

17. The copyright in a musical composition protects the recorded rendition of the song’s words and music.
    - True
    - False

18. The length of the samples Girl Talk uses may support his fair use claims.
    - True
    - False

19. The fair use defense is a limitation on the exclusive rights of copyright owners.
    - True
    - False

20. In most instances, copyright law requires those who sample copyrighted works to secure permission from the sample owner prior to distribution of the sampled work.
    - True
    - False

ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. [ ] True [ ] False
2. [ ] True [ ] False
3. [ ] True [ ] False
4. [ ] True [ ] False
5. [ ] True [ ] False
6. [ ] True [ ] False
7. [ ] True [ ] False
8. [ ] True [ ] False
9. [ ] True [ ] False
10. [ ] True [ ] False
11. [ ] True [ ] False
12. [ ] True [ ] False
13. [ ] True [ ] False
14. [ ] True [ ] False
15. [ ] True [ ] False
16. [ ] True [ ] False
17. [ ] True [ ] False
18. [ ] True [ ] False
19. [ ] True [ ] False
20. [ ] True [ ] False
the defendant, the infringement will be excused if the use is deemed fair.

Section 107 of the U.S. Copyright Act is the source for the fair use doctrine, which “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”22 The defense limits the exclusive rights of copyright owners if the use of a copyrighted work is “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,...”23 Courts consider four factors, pursuant to Section 107(1)-(4):

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Although courts generally evaluate each of these four factors, they often give special consideration to the first factor (“the purpose and character of the use”), which considers the “transformative” nature of the work.24 For instance, in Campbell v. Acuff-Rose Music, Inc., the U.S. Supreme Court stated:

Although transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors....25

Whether a new use is transformative requires determining if the use duplicates the original or “instead adds something new, with a further purpose or different character, altering the [original] with new expression, meaning or message.”26 Further, a “use is considered transformative only where a defendant changes a plaintiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the plaintiff’s work is transformed into a new creation.”27 Consequently, if the new use “merely repackages or republishes the original,” it is unlikely to be a fair use.28

Further inquiry into the case law illustrates that courts consider the purpose of the defendant’s use when determining whether the use is transformative. For instance, in Kelly v. Arriba Soft Corporation,29 the defendant’s Internet search engine used thumbnail images of the plaintiff’s copyrighted photographs to improve access to information. According to the Ninth Circuit, the defendant’s use did not “supersede” the plaintiff’s use of the images for artistic expression. Rather, the defendant’s use served “a different function” and thus was transformative.30

Fair use transformation should not be confused with the transformation required to create a derivative work. Under Section 106(2) of the Copyright Act, copyright owners have the exclusive right to prepare derivative works of their copyrighted material. In this context, a derivative work is “a work based upon one or more preexisting works, such as a...musical arrangement[,]...sound recording, art reproduction[,]...or any other form in which a work may be recast, transformed, or adapted.”31 This definition may suggest that the original author has exclusive rights over any transformation of his or her underlying work. Although, by definition, a derivative work does transform a preexisting copyrighted work, a fair use transformation generally is viewed as unrelated to the transformation involved in creating a derivative work. Thus, for purposes of fair use, courts “do not view the preparation of a derivative work—or any transformation or alteration of a work’s content—as necessary to a finding that a defendant’s use is transformative. Instead, courts focus on whether the purpose of the defendant’s use is transformative.”32

Visual artist Shepard Fairey and his now controversial image of Barack Obama, HOPE, provide a contemporary example of how an analysis of the difference between a fair use transformation and a derivative work is extremely fact-specific. Using a 2006 Associated Press photo, Fairey made a poster of then-Senator Obama that became synonymous with the Obama campaign’s message during the 2008 presidential election.33 Fairey’s defense to the AP’s countersuit hinges on fair use.

The heart of the case is whether Fairey’s image is transformative in a fair use sense or whether HOPE is merely a derivative work. If Fairey’s piece is simply a “trace job” repackaging the original AP photo, as some visual artists suspect,35 then it most likely lacks transformative purpose and the requisite originality of expression, meaning, or message required for fair use transformativeness. Consequently, HOPE would be a derivative work of the original photo, and a violation of the AP’s rights.

Although Fairey’s case has yet to be decided, U.S. District Judge Alvin Hallerstein recently encouraged the two parties to settle the dispute, stating, “I have a feeling...The Associated Press is going to win.”36 It remains unclear, however, if this case will address the obvious fair use issues, because Fairey also is under criminal investigation for attempting to conceal evidence in the matter.37

Contemporary Challenges

While many artists understand that the right sample can enhance a song’s popularity and profitability, others see sampling as an art form and are intrigued by the creative potential sampling provides. Whatever their motivation, artists are no longer limited by the confines of analog devices, since “digital technology allow[s] artists to slow down, speed up, combine, and otherwise alter samples.”38

Although the recording industry was well aware of the potential pitfalls of digital sampling, it was officially put on notice in 2004 when DJ Danger Mouse had an idea for what he termed an “art project.” What Danger Mouse devised was a “mashup”—an offspring of sampling that mixes together two or more records to create a new song.39 He combined music from the Beatles’ White Album with the lyrics from Jay Z’s Black Album. The resulting Grey Album was simultaneously a commercial success and a nightmare for the recording industry.

Since Jay Z had released an a cappella version of his Black Album, apparently to encourage remixes and mashups, Danger Mouse’s use of the Jay Z material was not legally challenged. However, the unauthorized use of the Beatles’ recordings drew the ire of EMI, the copyright holder of the White Album. Oddly enough, and possibly because the Grey Album was never released commercially, no legal action was taken against Danger Mouse. EMI did attempt to halt the album’s distribution, even as Danger Mouse claimed the album’s popularity “wasn’t supposed to happen...I just sent out a few tracks [and] now online stores are selling it and people are downloading it all over the place.”40

Clearly projects such as the Grey Album appropriate sound recordings and their underlying musical compositions. As a result, permission from both sets of rights holders is essential. Nevertheless, an argument that the Grey Album has a transformative creative purpose would not be difficult to make. Of course, other fair use factors must be weighed as well, but surely “copyright law’s goal of promoting the Progress of Science and useful Arts...would be better served by allowing the use than by preventing it.”41 Indeed, Dangerous Mouse said, “[I]t was not my intent to break copyright laws. It was my intent to make an art project.”42

Since gaining notoriety with the Grey Album, Danger Mouse has apparently abandoned the legally suspect world of mashups and become a commercially successful record-
ing artist. Taking his place is DJ Girl Talk, the focus of the current mashup scene. While the Grey Album was created by blending music from two different artists, Girl Talk’s albums consist of songs that are sonic collages, layering one sample over another sample. His first album, Night Ripper, uses roughly 250 samples from more than 160 artists.43 Girl Talk’s songs were all created without the permission of the copyright owners of the samples. But Girl Talk appears to be well versed in the meaning of fair use transformativeness, however, as he recently stated his songs are meant to be “something brand new, something that transcends [their] source material altogether.”44

Girl Talk’s music is arguably transformative in a fair use sense. Nevertheless, that argument has not been convincing to distributors like iTunes, which refuses to carry his product because of legal concerns.45 Girl Talk’s albums are distributed online through a site called, appropriately enough, illegalarlart.net. Illegal Art’s catalogue consists of mostly sample-based music whose origins are legally suspect.46 According to the company’s founder, who uses the pseudonym Philo T. Farnsworth,47 “We exist simply to disseminate music that otherwise might not reach people, either for legal or aesthetic reasons.” Farnsworth further noted that his company is “against copyright law when it impedes an artist’s ability to interact with pre-existing recordings.” He would like to see the fair use doctrine expanded “to include artistic recontextualization or manipulation.”48 For all the controversy surrounding Girl Talk, no one has taken legal action against him. Surely the copyright holders of the samples contained on Girl Talk’s albums have legitimate claims. Some believe legal action is not in the interests of record labels or the Recording Industry Association of America (RIAA) because “such a move would risk a precedent setting judgment in [Girl Talk’s] favor.”49 Another theory is that the lack of support from major online distributors might essentially make the mashup problem go away.50 The Pittsburgh-based Girl Talk has found an ally in his local congressman, Democrat Mike Doyle. Doyle believes the length of the samples51 may weigh in Girl Talk’s favor and that “case law is going to fall on his side as this becomes more mainstream.”52

While the potential of a fair use defense has helped Girl Talk evade the perils of copyright infringement lawsuits, Lil Wayne has not been as fortunate. In addition to the pending action over Swanepoel’s “Once,” Abkco Music recently sued Lil Wayne for an unauthorized use of the Rolling Stones’ “Play with Fire.” In truth, Lil Wayne (and many other popular rap artists) has volumes of unau-
Authorized music released through mixtapes—selections of copyrighted sound recordings rearranged or mixed with new vocals laid over the beat. These mixtapes are often created without the consent of copyright holders. Nevertheless, they are a well-regarded marketing tool for creating buzz for rap artists and have become common practice in hip-hop culture.

Although mixtapes present obvious copyright issues, the DJs known for producing them have only recently come under legal scrutiny. In January 2007, for example, a Georgia SWAT team and Atlanta police raided mixtape artist DJ Drama’s studios. Working in conjunction with the RIAA, Georgia officials arrested Drama and confiscated thousands of CDs and various other assets while claiming Drama violated Georgia’s racketeering statute by his unauthorized reproduction of the copyrighted works found on his mixtapes.53 Worth noting is the fact that Georgia officials and the RIAA chose to pursue state law claims rather than federal copyright action. Regardless of their choice of law and forum, the message was obvious: The recording industry is no longer willing to turn a blind eye toward the mixtape market.

The irony of DJ Drama’s arrest is that Lil Wayne was prominently featured on several Drama mixtapes. Moreover, after Drama’s arrest, Lil Wayne said that mixtape DJs “gotta do it right” when releasing unauthorized music.54 What “doing it right” entails with regard to Swanepoel’s lawsuit against Lil Wayne, however, remains unclear.

In theory, Lil Wayne should have sought the permission of the copyright owners of “Once” before using their sample in his recording.55 In reality, however, it is common practice for artists to sample a recording in the studio and wait to release the sampled recording until the proper clearances are obtained. But problems arise with digital technology because anyone with a copy of the unauthorized recording can leak the song to the world via the Internet. This is apparently what happened with “I Feel Like Dying,” as it was never “officially released [or] offered for sale to the public.”56

Lil Wayne’s liability for the unauthorized use of “Once” is yet to be determined by a Louisiana district court. Nevertheless, the fact remains that Lil Wayne faces legal action over a song that had no earnings, while artists like Girl Talk, Danger Mouse, and countless others have committed similar sampling transgressions and escaped liability.

While practitioners may focus on the issue of the uniform application of copyright law, many recording artists are acting on their belief that the law is inhibiting the advancement of music and culture. When Beto Metralha in Good Copy Bad Copy shares his
remix of “Crazy” with Girl Talk and allows Girl Talk to remix Metallica’s remix, it is clear that artists from around the globe seem willing to shun legal constraints and work together to pursue that advancement.

1 GOOD COPY BAD COPY (Rosforth 2007).
3 Newton v. Diamond, 349 F. 3d 591, 593 (9th Cir. 2003).
5 Bridgeport Music, Inc. v. Dimension Films, 410 F. 3d 792 (6th Cir. 2005).
7 Id.
8 U.S. CONST. art. I, §8, cl. 8.
10 Bridgeport Music, 410 F. 3d 792.
11 Id. at 796.
12 Id. at 795.
13 Id. at 799.
14 Id. at 801.
15 Newton v. Diamond, 349 F. 3d 591 (9th Cir. 2003).
16 Id. at 594.
17 Id. at 597.
18 Id. at 594.
19 Permission to use the musical composition may come in the form of a mechanical license, a synchronization license, or a performance license. The fact that several licenses may be required to secure permission and use of a musical composition can be logistically and financially cumbersome for artists.
20 Newton, 349 F. 3d at 594.
22 Stewart v. Abend, 495 U.S. 207, 236 (1990) (internal quotation marks and citation omitted).
25 Campbell, 510 U.S. at 579 (internal citations omitted); see Joseph von Sauers, Fair Is Fair, LOS ANGELES LAWYER, Apr. 1997, at 32.
26 Campbell, 510 U.S. at 579.
27 Wall Data, Inc. v. Los Angeles County Sheriff’s Dept., 447 F. 3d 769, 778 (9th Cir. 2006).
29 Kelly v. Arriba Soft Corp., 336 F. 3d 811 (9th Cir. 2003).
30 Id. at 819.
32 Reese, supra note 24, at 494.
33 Patrick Ross, Judge Tells Shepard Fairey He’d Better Try to Settle, Copyright Alliance, http://blog .copyrightalliance.org/2010/06/judge-tells-shepard-fairey-hed-better-try-to-settle/ (last visited June 12, 2010).
34 Id. Fairey initially sued the AP claiming his artwork did not infringe the AP’s copyrights; the AP countersued claiming copyright infringement.
35 Id.
37 Id.
38 Newton v. Diamond, 349 F. 3d 591, 593 (9th Cir. 2003).
39 Astride Howell, Sample This, LOS ANGELES LAWYER, Sept. 2005, at 28.
40 Matthew Rimmer, Digital Copyright and the Consumer Revolution: Hands Off My iPod 133 (2007) (internal citation omitted).
41 Blanch v. Koons, 467 F. 3d 244, 251 (2d Cir. 2006).
42 Rimmer, supra note 40, at 251.
47 Id. The real Philo T. Farnsworth was an American inventor who was instrumental in the development of television. See http://www.philofarnsworth.com.
48 Wane, supra note 46.
50 See, e.g., LESSIG, supra note 43, at 13.
52 Levine, supra note 49.
56 Weiss, supra note 6.
Practitioners should advise clients that any transaction involving foreign investment may come under the purview of CFIUS

The Committee on Foreign Investment in the United States, known as CFIUS, is a federal interagency body that regulates transactions. Its role supplements that of legislation that bars foreign investment in maritime, aerospace, and other industries. As part of the executive branch, CFIUS also allows the president of the United States to determine the effect on national security of a transaction that results in foreign control of a U.S. business. CFIUS has scrutinized foreign investments in gold mining, commercial space travel, undersea fiber optics, semiconductors, medical equipment, computer system design, cutting-edge technology, and oil companies. Parties to transactions in these areas must be mindful that CFIUS has the power to “impose, monitor and enforce mitigation agreements or conditions.”

Applying for CFIUS review is entirely voluntary, but the committee’s jurisdiction over transactions is statutory. Deals may be examined even when parties do not apply for review. Moreover, the president may suspend or prohibit a transaction, even retroactively, if there is credible evidence that a foreign investment will impair national security. Presidential findings are not subject to review.

A survey of recent cases demonstrates the willingness of CFIUS and the president to exercise these powers. In December, 2009, a firm backed by the United Arab Emirates and Virgin Galactic, a commercial space travel company, ended negotiations after a CFIUS review raised...
transactions that may affect American security in order to protect clients involved in that an attorney cannot learn about the components vital to the nation’s defense would be controlled by foreign nations. As a result, the Reagan administration modified its support for foreign investment in the United States and established guidelines for blocking foreign private and government investment in industries of importance to national security. This strengthened the president’s authority, giving the chief executive a broad mandate to monitor, modify, condition, or disapprove transactions. Congress tried to balance public concerns about foreign investments with the long-standing commitment to a free-trade environment. The United States is the largest foreign direct investor in the world and the largest recipient of foreign direct investment. Voices on both sides of the aisle raised free market, protectionist, and security concerns. In 1992, the Byrd Amendment authorized CFIUS to investigate proposed transactions in which the acquirer is controlled by or acting on behalf of a foreign government. This legislation became well known during the public debate over the 2006 Dubai ports transaction. That incident resulted in changes to the operation of CFIUS. In connection with a transaction by which a French company may have gained access to sensitive work done by Bell Labs, President George W. Bush imposed a Special Security Agreement (SSA) on the parties that requires strict barriers to information access. CFIUS retained the right to reconsider approval if the parties were deemed to have violated the screening agreement. Previously, parties that voluntarily applied for CFIUS review did so in order to receive approval in advance of consummation of a deal. This SSA disrupted the safe harbor presumed in the old regulatory regime. The continuing supervision of CFIUS and potential unwinding of a deal created uncertainty and reduced voluntary notification. When CFIUS review could mean continuing scrutiny, an outcry arose from the U.S. Chamber of Commerce and others. The 2008 Regulations This resulted in the passage of the Foreign Investment and National Security Act of 2007 (FINSA), and the issuance of new CFIUS regulations in November 2008. These regulations retained the voluntary notification system to CFIUS by the parties to an acquisition and established deadlines for the committee to review the application (30 days) and investigate if necessary (45 days). The president also has a deadline (15 days) for a final determination. This 90-day deadline gives parties a measure of certainty. Moreover, from 1975 to 2008, CFIUS received 1,996 voluntary notices, only 60 of which became the subject of the 45-day investigation. While the number of voluntary notices that resulted in investigations is low, it has increased somewhat in recent years. The 45-day investigation concludes with CFIUS taking one of four actions: 1) dismissing the investigation, 2) drafting a mitigation agreement to alleviate a threat to national security, 3) allowing the parties to withdraw and resubmit, or 4) submitting the findings to the president to make a decision as to whether or not to allow the transaction to conclude or set it aside. Before a formal submittal, parties often submit larger transactions to CFIUS for an informal review, to avoid the potentially negative publicity that may follow an investigation. Once concerns raised by the informal review are addressed, the formal process begins with the 30-day review, and, if the parties and the CFIUS staff have adequately conferred, the submittal should be approved. One very important change to the CFIUS process included in the 2008 regulations is the elimination of the presumption that a foreign direct investment in a U.S. business contributes positively to the American economy. Previously, CFIUS had to prove that a transaction threatened national security. Now the burden is on the parties to prove that the foreign investor does not pose a threat. The effects of September 11, 2001, are clearly at work in this change. Although the rules for CFIUS review have changed over the years, the security of the nation remains the avowed purpose, and Congress has opposed modifying the committee’s mandate to effect some form of domestic industrial protection. Until FINSA and the 2008 regulations, Congress held firm to the initial goals of maintaining an open market and protecting national security. FINSA’s reforms, however, have led to an expansion of considerations of review to include the impact of a covered transaction on critical infrastructure and key resources. Covered Transactions A transaction may be reviewed if it could result in foreign control of an entity engaged in interstate commerce in the United States. In deciding whether to file voluntarily with CFIUS, the parties should determine whether the subject of the deal or the identity of the foreign investor raises national security issues. Proposed transactions that need to be reviewed involve “products or key technologies essential to the U.S. defense indus-
should be mindful of the CFIUS process and not otherwise readily available? Businesses agencies? Could the technology of the target perform engineering or commercial security sensitive installation? Is a wind farm facility present issues for the Coast Guard? Does the target business involves goods or services with no special relation to national security (e.g., toys, games, food products, hotels, restaurants, or legal services), notice is generally not required. Before making a determination as to whether or not to file with CFIUS, an attorney should review not just defense-related concerns but also a broader rubric of national security.

The 2008 regulations focus on deals that may impair national security or critical infrastructure or that involve a foreign government. If a transaction falls into these categories, there ought to be no debate about filing. Given the complexity of the economy, the decision may not be that obvious. Foreign investment in Krispy Kreme should raise no doubt, but what about an investment in a business that manufactures cooking oils?

The nature of the business is only one concern; the identity of the buyer is another. A U.S. subsidiary under the control of a foreign entity (i.e., a “blocker”) is a foreign person for CFIUS purposes. Control may take many forms. “Control” is broadly defined as the “power, direct or indirect, whether or not exercised…to determine, direct, or decide important matters affecting an entity.” It is not necessary that a foreign person own more than 50 percent of the voting or equity interests of the entity or that the foreign investor has influence over the fortunes of the venture. It does not require that foreign persons are directors or officers of the business. The form of the transaction does not matter. When it comes to who controls an entity, CFIUS law offers no bright lines.

In addition, CFIUS review of transactions for implications for national security includes consideration of critical infrastructure (e.g., major energy, communications, or transportation assets). “Critical infrastructure” is defined in broad terms as “any systems and assets, whether physical or cyber-based, so vital to the U.S. that the degradation or destruction of such systems or assets would have a debilitating effect on national security, including national economic security and national public health or safety.” A transaction that the parties consider completely unrelated to national security, including national economic security and national public health or safety, is not necessary to be covered are solely for the purpose of investment or those in which the foreign investor has “no intention of determining or directing the basic business decisions” of the target. Other exemptions include 1) transactions resulting from a stock split or dividend that do not involve a change in control, 2) acquisitions of any part of an entity or assets that are not a U.S. business, 3) acquisitions of securities by a securities underwriter in the ordinary course, and 4) acquisitions pursuant to a condition in an insurance contract made in the ordinary course.

A purchase of assets is not necessarily a purchase of a U.S. business. If a foreign person acquires land, for example, the purchase is not covered. What is critical is what is done on the land, and a reading of Firstgold’s press release shows that the location of the land may be of concern. If a foreign person enters into a long-term lease, it may not be covered if the foreign lessee does not make substantially all business decisions concerning operation of a leased entity, as an owner may. A loan is not a covered transaction as long as the foreign person does not have financial or governance rights, but a foreign lender about to foreclose on security sensitive collateral may be subject to CFIUS review.

The review process specifically excludes startup or greenfield investments. Therefore, chasing the necessary technology. The investment may involve acquisition of shares in a newly incorporated subsidiary. Assuming no other relevant facts, Corporation A will not have acquired a U.S. business, and its greenfield investment is not a covered transaction.

Before arriving at that happy conclusion, however, parties should closely examine what the foreign investor is purchasing. Is the purchase of stock or membership interests is in an existing business? If the foreign investment is made in a business that has acquired certain development rights or secured trademark, patent, copyright protection, or development permits or transmission privileges, is that business developed beyond what may be considered greenfield?

When a foreign person purchases all or a part of a recently begun enterprise, the determination of whether this exception applies is problematic. While the business may be considered a startup because it is relatively new, it will not be considered a greenfield investment if the entity is already operating. In
that scenario, the foreign investment would be a covered transaction subject to CFIUS jurisdiction. Considering this distinction, parties seeking a greenfield exemption should consider structuring the transaction to be certain this exemption applies.

CFIUS considers the identity of the foreign investor when evaluating an application. Private investors are viewed differently from foreign government23 investors. If a foreign government (or entity controlled by a foreign government) is involved, unless the secretary of the treasury or other officials have provided clearance, filing is the best course. Foreign government control of the investor constitutes a national security consideration. CFIUS may be more interested in acquisitions in defense-related sectors by certain countries (e.g., China, Russia, Middle Eastern countries) than by traditional allies such as Canada or the United Kingdom. The Firstgold case may have been affected by the fact that the acquiring entity was Chinese.

As China acquires more assets in the United States, CFIUS reviews will continue. In May 2010, the United States confirmed that it would uphold principles of nondiscrimination in CFIUS enforcement,24 but it remains to be seen whether a pattern emerges as to the nationality of acquiring entities subject to the investigation phase of CFIUS reviews. Parties should consider what a foreign owner of a particular business could do with the acquired assets to damage national security. In Firstgold, the issue was not the sensitivity of the assets acquired but the proximity of the Relief Canyon mine to the Fallon Naval Air Station.25 Would that “proximity” have been viewed differently if the purchaser were the Canadian government? Another example is a business that provides a foreign government access to the U.S. electric grid. If a foreign owner of a U.S. business could use that as a platform from which to engage in espionage or obtain sensitive technology, or to disrupt defense, transportation, or distribution channels, then national security may be an issue. After September 11, the drafters of the 2008 regulations considered a much different regulatory landscape than legislators did a decade earlier.

It is not just state-owned acquirers that are now of concern. Among other shifts attributable to September 11 was a shift from a state-based CFIUS focus to a broader concern for nonstate security threats.26 “The very nature of the 9/11 attacks made it clear that the instruments of globalization could be used to attack the international order itself, and there was a resultant effort on the part of the United States to secure various commercial facilities, such as airports, chemical factories, and ports—exemplified in the formation of the Department of Homeland Security.”27
Security to coordinate domestic security measures against terrorism.27 With such a large area of concern, it may be a surprise that the committee does not review more transactions than it does.

CFIUS Report

In its 2009 Annual Report,28 the committee provided information about the number of transactions subjected to its review during 2006, 2007, and 2008 (111, 138, and 153, respectively). A downward trend in the number of mergers and acquisitions between 1998 and 2003 was reflected in a decline in the number of CFIUS applications. Likewise, an increase in mergers and acquisitions from 2004 to 2008 led to the filing of more applications. The number dropped dramatically at the end of 2008, and reports are that the number of reviews in 2009 dropped 50 percent from 2008. Over 50 percent of the transactions that CFIUS has reviewed involve the Department of Defense. For this reason, every target with defense contracts should file. Any technology company involving defense, chemicals, advanced manufacturing, telecommunications, semiconductor fabrication, biotech, nanotechnologies, marine technologies, or energy technology systems would be wise to invest the resources and set aside the time for filing.

From 2006 to 2008, CFIUS received more applications relating to the manufacturing sector than any other. Acquisitions of utilities accounted for more than half of the applications in the mining, utilities, and construction sector. This accounts for a focus on alternative energy investment—wind and solar in particular. Information technology reviews dropped from 42 percent in 2007 to 27 percent in 2008. The United Kingdom appears more than any other foreign nation in applications, and acquisitions by U.K. companies frequently involved critical technology companies. Other investors come from Canada, Australia, Israel, India, and France.

Of the 155 reviews in 2008, 23 were withdrawn, and of these, 3 were not resubmitted. Only two reviews resulted in mitigation agreements in 2008, sharply down from two prior years when 14 and 15 mitigation agreements were negotiated. By delaying approval of staff appointments, Congress has not helped CFIUS and has contributed to the slowness of the review process. Nor has the change in administrations helped. The process also slows down in years in which state-owned acquiring entities are especially active. Virgin Galactic and Firstgold were such cases. Delays—and rejections or demands for mitigation—have a chilling effect, as well as adding costs.

Even when a transaction is covered, as a first step the parties may consider making an informal inquiry rather than filing. CFIUS encourages parties to begin informal consultations with a prenotice consultation. This prepares CFIUS staff for the filing, potentially shortening the time for review. The filing process is not onerous, and a notice can be prepared relatively quickly. A submission may include a business rationale for the transaction, organizational charts showing control, and ownership of the foreign entity (and its parent) that is a party to the transaction. Charts for the U.S. business may help, as are diagrams illustrating the ownership before and after the transaction.

Application Contents

The application should include background information about the members of the board of directors and senior company officials of entities in the ownership chain of the foreign acquirer. Also required is information regarding U.S. government contracts. The applicant should identify if the U.S. business being acquired develops or provides computer systems, products, or services, or processes natural resources. Parties to a transaction that file a voluntary notice with CFIUS are required in every case to provide two certifications: one at the time of filing that covers the contents of the voluntary notice and another at the conclusion of a review or investigation that covers all additional information filed subsequent to the original notice. The applicant certifies that the application is complete and accurate and that it complies with Section 721 of the Defense Production Act of 1950.30 The applicant also certifies any agreement or condition that has already been entered into with CFIUS or any committee member. Penalties for material misstatements in any CFIUS certification include a $250,000 fine for certain extraordinary violations.

There are 12 factors considered by CFIUS when reviewing a covered transaction:
1) Domestic production needed for projected national defense requirements.
2) Capability and capacity of domestic industries to meet national defense requirements.
3) Control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet requirements of national security.
4) Potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and transactions that pose regional military threats to U.S. interests.
5) Potential effects of the transaction on U.S. technological leadership in areas affecting national defense requirements.
6) Any other factors that CFIUS determines to be appropriate.

12 factors considered by CFIUS in reviewing a covered transaction.

- **1) Domestic production needed for projected national defense requirements.**
- **2) Capability and capacity of domestic industries to meet national defense requirements.**
- **3) Control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet requirements of national security.**
- **4) Potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and transactions that pose regional military threats to U.S. interests.**
- **5) Potential effects of the transaction on U.S. technological leadership in areas affecting national defense requirements.**
- **6) Any other factors that CFIUS determines to be appropriate.**

- **Application Contents:**
  - The application should include background information about the members of the board of directors and senior company officials.
  - Information regarding U.S. government contracts.
  - Identification of the U.S. business being acquired.
  - Certification of the application.

- **CFIUS Certification:**
  - Two certifications are required: one at the time of filing and another at the conclusion of the review.
  - Material misstatements in certification can result in fines.

- **Discussion:**
  - The importance of timely and accurate applications.
  - The impact of U.S. defense requirements.
  - The potential consequences of missteps in the certification process.

**LACBA Domestic Violence Project**

**TRAINING SEMINAR • SEPTEMBER 29, 2010**

**DINNER: 5:30PM • PROGRAM: 6:00-9:10PM**

**3 CLE credits**

Training will be held at LACBA offices
1055 W. 7th St., Los Angeles, CA 90017

**Featured Guest speakers:**
- **Judge Charlaine Olmedo** and **Renee Mundon** of the Children’s Law Center.
- Additional speakers include a social worker from Los Angeles Superior Court and a DV survivor.

There will be a workshop portion, as well as detailed instructions about the use of the appropriate forms.

**Online registration via www.lacba.org/dvseminar**

**Winner of the COMMUNITY SERVICE AWARD**
Criminal Justice Panel of the Los Angeles City Attorney’s Office

**For information about the project and upcoming trainings, contact Deborah Kelly, Directing Attorney:**
**CALL** 213.896.6491
**OR E-MAIL** dkelly@lacba.org
national security. 6) Whether the transaction has a security-related impact on critical infrastructure. 7) Potential effects on critical infrastructure, including major energy assets. 8) Potential effects on critical technologies. 9) Whether the transaction is foreign government controlled. 10) In those cases involving a foreign government, consideration of the adherence of that country to nonproliferation control regimes, the country’s record on cooperating in counterterrorism efforts, and the potential for transshipment or diversion of technologies with military applications. 11) Long-term projections of U.S. requirements for sources of energy and other critical resources. 12) Other factors the president and the committee deem appropriate.

CFIUS considers energy matters as a national security matter. A Department of Energy Draft Directive of March 23, 2010, lists issues that are involved in its risk analysis under CFIUS: 1) criticality and vulnerability of the U.S. assets being acquired, 2) the threat to those assets posed by the acquiring entity and the consequences to national security if the threat is realized, 3) whether the proposed transaction involves major energy assets, 4) whether the proposed transaction involves critical technologies, 5) long-term projections of U.S. energy requirements, and 6) in the instance of a foreign government-controlled covered transaction, an assessment of the adherence of the investor to nonproliferation regimes.

Of course, each department of the government represented on the committee will have its own criteria, all drawn from the enabling legislation and regulations. The Department of Homeland Security examines the potential effect of proposed foreign investment on current and planned critical infrastructure and key resources. The Department of Energy provides guidance, as it focuses on the foregoing factors and on the existence of classified and unclassified contracts or supply relationships, security clearances, and the like.

The worst economic crisis in 80 years has not put an end to global economic interdependence. Like it or not, what happens in Greece or China affects the U.S. economy. The United States benefits from the global stability that arises with successful economies in India, Russia, Brazil, China, and other nations. Nations that are reluctant participants in the global economy are frequently rocked by unrest that reaches beyond their borders. Nations invested in the United States are aligned with our interest in a healthy domestic economy. With this country’s open investment environment, U.S. workers gain employment, capital is invested in industry, and new opportunities arise. As Neal S. Wolin, deputy treasury secretary, put it, “Foreign investments in the U.S. are critical to economic growth and job creation here at home, but we have an obligation to prioritize national security.”

CFIUS regulations are intended to stop transactions that create a near- or long-term threat, but “only insofar as necessary to protect the national security,” and “in a manner fully consistent with the international obligations of the United States.” U.S. government involvement in transactions involving domestic investment by foreign private parties or governments is a necessary consequence of globalization. Under the Obama administration, CFIUS continues to function well, faithful to the principles of open investment. However, each administration and each Congress may have different views as to how involved the government should be in covered transactions, and CFIUS is at the center of that debate.

In any transaction, a knowledge of the law is not all that is needed to guide clients, and this includes whether to submit an application to CFIUS or to predict with certainty the likely outcome of a CFIUS review. A practitioner must also have knowledge of the political climate. In response to protectionist views or a new external security threat, Congress may increase pressure on CFIUS to reject foreign direct investment in industries and assets related to national security. When providing advice to parties to a transaction that may be a covered transaction, a practitioner must be aware of public sentiment. This requires constant information gathering and analysis.

---

3. The committee also includes representatives from the Office of the U.S. Trade Representative and the Office of Science and Technology Policy. The director of national intelligence and the secretary of labor are nonvoting, ex-officio members of CFIUS, with roles as defined by statute and regulation.
4. A March 23, 2010, Draft Directive of the DOE requires that each DOE “element” (a responsible party assigned to CFIUS) must ensure that all electronic communications pertaining to CFIUS issues are adequately protected by encryption or stored on classified servers. See 50 U.S.C. App. 2170(c); 31 C.F.R. §800.102; https://www.directives.doe.gov/directives.
14. 31 C.F.R. §800.208.
15. 31 C.F.R. §800.207.
16. 15 C.F.R. §806.15(a)(1).
18. 15 C.F.R. §806.15(a)(1).
20. The Department of Defense has developed the National Industrial Security Program, through which it has adopted various provisions under the term “Foreign Ownership, Control, or Influence.” These provisions attempt to prevent foreign firms from gaining unauthorized access to critical technology and classified information through an acquisition of U.S. firms. This is a review independent of CFIUS.
21. Defined as those in which the transaction does not involve owning more than 10% of the voting securities; or those investments that are undertaken directly by a bank, trust company, insurance company, investment company, pension fund, employee benefit plan, mutual fund, finance company, or brokerage company in the ordinary course of business. 31 C.F.R. §800.302.
22. 31 C.F.R. §800.301(c), ex. 3.
23. 31 C.F.R. §800.213.
27. Id. at 179-80.
30. 31 C.F.R. pt. 800.
31. A Draft Directive by the Department of Energy, Mar. 23, 2010, indicates that for its purposes, this review should include issues arising under the Nuclear Non-Proliferation Act.
32. One CFIUS observer, Bill Newman, points out that the interest in energy assets apparently does not extend to foreign direct investment in natural gas deposits in the Marcellus Shale formation. Silence Is Golden: Is CFUS Promoting FDI in Shale Gas Deals? available at http://www.usainbounddeals.com. However, this is consistent with past CFIUS practices. Of 404 reviews from 2006 to 2008, only 4 involved oil and gas extractive industry transactions.
**Classifieds**

**Appraisals and Valuations**

COMMERCIAL, INDUSTRIAL, OFFICE, RESIDENTIAL, estate homes, apartments, land, eminent domain, special-use, easements, fractional interests, and expert witness. Twenty-five years of experience. All of Southern California with emphasis in Los Angeles County and Orange County areas. First Metro Appraisals, Lee Walker, MAI, (714) 744-1074. Also see Web page: www.firstmetroappraisals.com.

**Investigations**

SERVING THE DEFENSE COMMUNITY SINCE 1946. Interviews, statements, sub rosa, service of process, and jury polls. MCLE classes available. Stein Investigation Agency, 2705 Media Center Drive, Los Angeles, CA 90065. Contact Gary Fradis, gfradis@steininvestigations.com or Clifford Mosby, cmosby@steininvestigations.com. Call (323) 275-2170.

**Business Opportunities**

WANT TO PURCHASE MINERALS and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201.

**Consultants and Experts**

WANT TO WIN? Conquer public speaking issues! Get help from a Harvard trained performance psychologist with 12 years of university faculty experience. Never fear going to trial again! Contact Davis K. Brimberg, PhD (310) 467-9760 or www.drdaviskbrimberg.com.

**Law Practice For Sale**

$2 MILLION ESTABLISHED Orange County law firm specializing in estate planning, estate administration and related trust/estate litigation. Experienced attorneys, paralegals/legal assistants. Representing individuals and fiduciaries. Strong referral base. Call 800-837-5880.

**LAW PRACTICE FOR SALE.** Contingency litigation practice focuses on lucrative practice areas such as construction defects, personal injury, and complex business matters; practice includes hourly billing for business/corporate contracts and disputes, and construction defect matters. Significant growth history. Small office. See www.lawbiz.com or call (800) 837-5880 for more information.

**Office Space**

150 SQ. FT. PROFESSIONAL OFFICE SPACE FOR RENT. Office sharing for $500 per month full time or $200 for eight hours per week. Access to lobby, conference room, kitchen, receptionist on-site, easy access to 60 and 91 Frews. Please contact Debra Smith (951) 780-5300. Law office of Debra A. Smith, 3595 Van Buren Avenue, #207, Riverside, CA 92503, fax (951) 346-3002, e-mail: dsmith@debrasmithlaw.com.

**DON’T COMPROMISE YOURSELF OR YOUR CLIENT**

WORK WITH PROFESSIONALS WHO HAVE BEEN SERVING THE LEGAL COMMUNITY FOR MORE THAN 50 YEARS

--- EXPERIENCE YOU CAN COUNT ON ---

**NORIEGA CHIROPRACTIC**

CLINICA PARA LOS LATINOS
SERVING THE LATIN COMMUNITY FOR 50 YEARS

**MONTEBELLO WELLNESS CENTER**
901 W. WHITTIER BOULEVARD
MONTEBELLO CA 90640
323.728.8268

**POMONA HEALTH CENTER**
1184 E. HOLT AVENUE
POMONA CA 91767
909.865.1945

1.800.624.2866
PERSONAL INJURY CASES ACCEPTED ON LIEN BASIS
INDEX TO ADVERTISERS

Accident Reconstruction Specialists, p. 25
Tel. 562-743-7230 www.FieldAndTestEngineering.com

Affiniscape Merchant Solutions, p. 20
Tel. 866-376-0950 www.lawpay.com

Ahern Insurance Brokerage, p. 2
Tel. 800-282-9786 x101 www.info@aherninsurance.com

The American Institute of Mediation, p. 6
Tel. 213-383-0454 www.americaninstituteofmediation.com

Lee Jay Berman, Mediator, p. 19
Tel. 213-383-0438 e-mail: leejay@mediationtools.com

Boykoff Investigations, p. 24
Tel. 818-718-8000 www.boykoffinvestigations.com

The California Academy of Distinguished Neutrals, p. 26, 27
Tel. 310-341-3879 www.CaliforniaNeutrals.org

California Eminent Domain Law Group, APC, p. 6
Tel. 818-957-0477 www.caledlaw.com

Chapman University School of Law, p. 5
Tel. 877-CHAPLAW (877-242-7529) www.chaplaw.edu/law

Cheong, Denove, Rowell & Bennett, p. 41
Tel. 310-277-4857 www.cdrb-law.com

Coldwell Banker-Michael Edlen, p. 33
Tel. 310-230-7373 e-mail: michael@michaeledlen.com

Lawrence W. Crispo, p. 8
Tel. 213-926-6664 e-mail: judgecrispo@earthlink.net

Crowe Horwath, LLP, p. 11
Tel. 800-599-2304 www.crowehorwath.com

Greg David Derin, p. 24
Tel. 310-552-1062 www.derin.com

James R. DiFrank, PLC, p. 33
Tel. 562-789-7734 www.bardefense.net e-mail: difrank@aol.com

Dion-Kindem & Crockett, p. 33
Tel. 818-883-4400 www.dlklaw.com

E. L. Evans & Associates, p. 24
Tel. 310-559-4005

Max Factor, Inside Front Cover
Tel. 310-456-3560 www.factormediation.com

William B. Fitzgerald, Inside Front Cover
Tel. 310-440-9090 www.fitzgeraldADR.com

Herb Fox, p. 39
Tel. 805-899-4777 e-mail: hfox@foxappeals.com

Steven L. Gleitman, Esq., p. 4
Tel. 310-553-5080

Guaranteed Subpoena, p. 23
Tel. 800-PROCESS (776-2377) e-mail: info@served.com

The Holmes Law Firm, p. 8
Tel. 626-432-7222 www.theholmeslawfirm.com

Kantor & Kantor, LLP, p. 40
Tel. 877-783-8686 www.kantorlaw.net

Louise LaMothe, Inside Front Cover
Tel. 805-563-2800 www.dispute-solutions.com

Lawyers’ Mutual Insurance Co., p. 7
Tel. 800-252-2045 www.lawyersmutual.com

Lexis Publishing, p. 9
www.lexis.com

McCLELAWYERS.COM, p. 39
Tel. 310-552-5392 www.MCLElawyers.com

Michael Marcus, p. 4
Tel. 310-201-0010 www.marcusmediation.com

John (Jay) McCauley, Inside Front Cover
Tel. 800-848-5591 www.jaymccauley.com

Momentum Engineering Corp., p. 12
Tel. 310-406-3657 www.momentum-eng.com

Noriega Clinics, p. 49
Tel. 323-728-8268

Northwestern Mutual-The Beer Financial Group, p. 39
Tel. 818-887-9930 www.beerfinancialgroup.com

Pacific Health & Safety Consulting, Inc., p. 18
Tel. 949-253-4065 www.phsc-web.com

PCG Consultants, p. 24
Tel. 213-629-9215 www.pcgci.com

Receivership Specialists, p. 12
Tel. 310-552-9064 www.receivershipspecialists.com

Ringler Associates, p. 34
Tel. 888-734-3930 www.ringlerassociates.com

Deborah Rothman, Inside Front Cover
Tel. 310-452-9835 www.DeborahRothman.com

Anita Rae Shapiro, p. 33
Tel. 714-529-0145 www.adr-shapiro.com

Shoreline Investigations, p. 40
Tel. 800-807-5440, 818-344-2193 www.shorelinepi.com

Honorable James Slater (Retired), Inside Front Cover
Tel. 805-564-1969 e-mail: slater0812@msn.com

Thomson West, p. 23, Back Cover
Tel. 800-762-5272 www.west.thomson.com

Union Bank of California, p. 15
Tel. 310-550-6400 (B.H.), 213-236-7736 (L.A.) www.uboc.com

Walzer & Melcher, p. 1
Tel. 818-931-3700 e-mail: aly@walzermelcher.com

Warronzoef Associates, p. 4
Tel. 310-954-8064 www.waronzoef.com

Mediator Ron White, Inside Back Cover
Tel. 909-596-1525 www.ronwhite mediation.com

Witkin & Eslinger, LLC, p. 18
Tel. 818-845-4000

Alice M. Yardum-Hunter, p. 19
Tel. 818-609-1953 www.yardum-hunter.com
20th Annual Seminar for Corporate Counsel

ON FRIDAY, SEPTEMBER 24, and SATURDAY, SEPTEMBER 25, the Corporate Law Departments Section and the Orange County Bar Association Corporate Counsel Section will host the 2010 Annual Seminar for Corporate Counsel at the Temecula Creek Inn Resort. This event offers an opportunity to learn and network in a relaxing, fun environment. The seminar will begin with registration at noon on Friday. The first panel will begin at 1:30 P.M., followed by a full afternoon offering of 3 hours of MCLE. The topics for Friday will include privacy and data security, corporate best practices, whistle blowers, and social media. A hosted cocktail reception follows from 5 to 6:30 P.M. Saturday morning after breakfast, 4.25 CLE hours of panel discussion will cover sexual harassment, e-discovery tips, and doing business abroad. The dinner program on Saturday evening will start with commentary and perspectives from Dennis Codon, partner at Blank Rome LLP and former general counsel of UNOCAL. The LACBA registration fee covers the 7.25-hour MCLE program, Friday reception, and Saturday dinner program. Hotel reservations must be made separately and directly with the Temecula Creek Inn no later than September 10. The registration code number is 010761. The prices below include meals.

$150—law students or interns
$210—CLE+PLUS member
$275—Orange County Bar Association Corporate Counsel Section and LACBA Corporate Law Department Section member
$350—all others, including at-the-door registrants
7.25 CLE hours (includes 1 ethics and 1.25 elimination of bias)

Immigration Law Training Course

ON THURSDAY, SEPTEMBER 30, and Friday, October 1, the Immigration Legal Assistance Project will hold a two-day training for attorneys who are new to the field of immigration law or have been practicing in the field for less than one year. The training will focus on practical concepts and procedures, including immigration court policies in the Los Angeles district office. Please note, you must be a law graduate or attorney to register for this program, which 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 5:30 P.M., with the program continuing from 6:00 to 9:30. The prices below include the meal. The registration code number is 010981.

$55—CLE+PLUS member
$75—Senior Lawyers Division member
$85—Criminal Justice Section member
$90—at-the-door registrant
$150—all others
13 CLE hours

The Michael Jackson Cases

ON WEDNESDAY, SEPTEMBER 15, the Senior Lawyers Division, cosponsored by the Criminal Justice Section, will host a historical and legal analysis of the Michael Jackson civil and criminal cases. Judge Rodney Melville (retired); the prosecutor, Deputy District Attorney Ronald Zonen; defense attorney Thomas A. Mesereau Jr., who represented Jackson in the Santa Barbara criminal trial; attorney Larry Feldman, who represented the alleged victim in the civil case; attorney Carl E. Douglas, who represented Jackson in the criminal investigation of the civil case; and moderator Seth Hufstedler will offer insights into these highly publicized and unique examples of California celebrity cases. The event 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 5:30 P.M., with the program continuing from 6:00 to 9:30. The prices below include the meal. The registration code number is 010981.

$55—CLE+PLUS member
$75—Senior Lawyers Division member
$85—Criminal Justice Section member
$90—at-the-door registrant
$150—all others
3.25 CLE hours
Understanding the True Value of Private Justice

**IN COURT CHAMBERS**, legislative halls, corporate boardrooms, and law firms, a war is now being fought over ADR. Frustrated ADR users, service providers, and neutrals are dismayed that ADR (in particular arbitration) has lost its promise of being an alternative to a public court system that many consider too slow, too costly, too Byzantine, and too self-absorbed to provide justice to the litigants that appear before it.

The reasons for this frustration are not difficult to discern. In 1976, Chief Justice Warren Burger diagnosed Americans with “some form of mass neurosis that leads [them] to think courts were created to solve all the problems of mankind” and demanded drastic changes in order to rescue American courts from unmeritorious and resource-sapping litigation. America’s congested court system, coupled with perceived commercial opportunity, spurred the spectacular growth of the ADR industry. ADR and ADR professionals became ubiquitous. Presently, the annual ADR caseload processed by the American Arbitration Association alone has surpassed 60,000 cases—a figure equivalent to a fourth of the cases handled each year in the federal courts.

**The ADR Backlash**

The seeds that gave rise to ADR, however, also spawned a crisis. From the start, ADR was sold as a lower cost process that was inferior to the public courts. Even as more complex, expensive, and significant matters were directed to ADR, the same utilitarian arguments were made. ADR was supposed to be faster, cheaper, and simpler. Rather than selling the quality and superiority of ADR relative to court processes, many in the ADR community sold the potential for savings as the primary rationale for choosing ADR as an alternative to the courts. Scant mention is made of the real benefit of ADR: It is a party-driven and controlled process that concerns itself primarily if not exclusively with what is best for the parties and not what is best for the courts, unrelated third parties, or society as a whole. Claims of cost savings—coupled with attempts to force unwilling employees, consumers, and small businesses into ADR—have created increasing resistance to it among lawyers, judges, legislators, and members of the public.

ADR is a wonderful, essential, and liberating tool. Providing resolution forums is what private justice is all about. The provisioning of private justice in its multitudinous forms is the true value and only legitimate end of ADR. Americans have a right guaranteed by the U.S. Constitution to freely contract for this option. The public’s right to knowing, voluntary, and consensual ADR must be preserved and protected. The stereotyping of ADR as a cheap, one-size-fits-all, rough-cut resolution process must be challenged.

The true value of the ADR tool must be told: Whenever parties join to take charge of the resolution of their disputes, a higher quality and more satisfying form of justice can be had in an ADR forum than in the public court system. If parties and their counsel are willing to join in structuring the ADR process with their neutral, they can seek resolution in ways that would simply be forbidden in a public court setting.

Want to limit discovery? Have a quick hearing? No experts or many experts? A summary process? An engineer as one of your neutral decision makers? A lightening quick process or one lasting 100 days over 3 cities? Simply stipulate or convince your neutral. Parties to a dispute may even design their ADR process to be less costly than the courts. With ADR, the parties select their judge, process, procedures, venue, and law. This is the true advantage of ADR, and it has been grossly undersold.

I submit that in addition to the potential for cost savings, ADR’s greatest advantage over the public court system is private justice. Private justice is the impartial, fair, and proper resolution of a dispute through ADR processes and procedures, in accord with law, equity, and contract, as well as cultural, community, industry, and subject matter standards. As a process, private justice uses ADR processes and procedures to impartially, fairly, and justly resolve disputes among parties in accordance with their contractual intent. As a person, a private justice is a neutral engaged in the profession of privately and justly resolving disputes via the application of ADR processes and procedures.

ADR was originally conceived to offer a realistic alternative to the public court system. ADR’s next evolution must be to ensure that private justice is dispensed from its many forums. This may just be ADR’s only hope for continuing legitimacy and viability. In the private justice system, the public justice system still has a role—that of an alert sentry. Within this regime, truth, justice, and the high ideals of the American justice system can once again prevail in private forums of the participants’ own choosing.

Reginald A. Holmes, chairman of the Holmes Law Firm, is an arbitrator, mediator, and private justice.

Scant mention is made of the real benefit of ADR: It is a party-driven and controlled process that concerns itself primarily if not exclusively with what is best for the parties and not what is best for the courts, unrelated third parties, or society as a whole.
RON WHITE, ESQ.
— 25 years of litigation experience —
www.ronwhitemediation.com

INLAND EMPIRE
Call Tracie
909.798.4554

LOS ANGELES COUNTY
Call Julie
909.596.1525
One reason WestlawNext™ helps you get more done is that it’s powered by our new search engine – WestSearch™, which leverages the Key Number System and other West assets to streamline the search process. In fact, it helps reduce your research time by up to 64 percent, while still assuring that you haven’t missed anything important. Hear what Brent and other customers are saying – and see details of the efficiency study yourself – at WestlawNext.com.