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FROM THE CHAIR

Getting older was something I always assumed would happen to other people, not to me. So now that I am uncomfortably past yet another birthday with a zero in it, imagine my surprise to look in the mirror and learn that I am not Dorian Gray. (For readers who were conceived

after the arrival of the cell phone, Dorian Gray was a character in an old movie—based on an older book by Oscar Wilde—who sells his soul so that his body would not age but could not prevent a portrait of himself from doing so.)

Despite my best efforts at denial, I am, in fact, getting older. I’m also hoping that it’s true that admitting you have a problem is the first step toward recovery. Okay, I just checked the mirror again—still not getting younger.

I have to say that I’m surprised to learn that those people I formerly considered old were actually right about a few things. For example, the world really is going to hell in a handbasket. Well, at least I think it is. I’ll know better when I figure out what a handbasket is. The next time someone cuts me off on the freeway, can I tell him or her to go to a handbasket?

Older people are also right that youth really do not have respect for age. Oh, sure, young people pretend to respect you, calling you things like “sir,” “ma’am,” and “mister.” But we all know that’s just mocking respect, subtly pointing out that you are too old to be “dude,” “big guy,” or “buddy”—names they reserve for people they don’t think are senile. Here’s the deal. I want young people to call me by those cool names. After all, that’s what I’m going to call them. Of course, that’s mostly because I can’t remember their names.

As we get older, memory may not be the first thing to go (knees, eyesight, and, well, other things come to mind), but it will fade, and names are the first thing the brain dumps. You know the expression “in one ear and out the other”? I don’t even bother with the “in one ear” part any more. I think names just bounce off the side of my head and into space. Somewhere on the other side of our galaxy there’s a planet being bombarded with all the names that have reverberated off my skull.

Lately, I have taken to judging people’s age by how long it takes the conversation to turn to physical ailments. When you’re young, those things never come up unless you happen to notice someone’s arm lying on the ground next to them, at which point you might casually inquire “What’s up with your arm?” When you get really old, the conversation starts with “What’s up with your arm?” You don’t actually know there is anything wrong with the person’s arm, but since the person’s old arm is still attached to his or her old body, it’s a safe bet.

Another way to judge a person’s age involves reading glasses. If he or she has a pair, strike one. If the person buys the Costco reading glasses pack, which in true Costco fashion requires a forklift just to carry it to the car, then the person’s tree trunk probably has more rings than you care to count. For me, reading glasses add insult to injury. I already wear contact lenses with slightly less magnifying power than the Hubble Space Telescope, and now I have to wear glasses over those to do the simple act of reading a book.

You remember what a “book” is. It’s kind of like 300 eReaders all bound together. I know, that didn’t work out so well for Borders. Like I said, the world really is going to hell in whatever that old-time handbasket thing is.

Ken Swenson is in-house counsel for Bank of America in Los Angeles. He is the 2011-12 chair of the Los Angeles Lawyer Editorial Board. He can be reached at swensonatlal@aol.com.
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A Checklist for Getting Organized

CONQUERING DISORGANIZATION will do more for a lawyer’s daily happiness than almost anything else. Certain lawyering skills are honed over a lifetime, but any lawyer can become more organized with just a day’s work. Disorganized lawyers miss meetings, fail to serve discovery responses on time, and do not pull their weight in collaborative efforts. Even if these failures are inadvertent, they can wreak havoc for fellow attorneys and clients.

Unopened mail, documents with original signatures sitting on a desk for days, difficulties in locating document forms, and unclaimed business expenses are all signs of attorney disorganization. No junior lawyer wants to be targeted by a senior lawyer or a client for lack of organization. Being disorganized can lead to malpractice suits for inadequately communicating with clients and missing critical court dates. Simply put, better organization can prevent career problems. Here are some tips to help beginning and seasoned attorneys get organized (or more organized).

Start eliminating excuses. No one should ever say to a client that something important could not be accomplished because office staff was unavailable. Eliminate that excuse by learning how to do key office tasks. Lawyers should learn how to use the office scanner and fax machines and contact copy and filing services directly after hours. Litigators should also be able to file personally, on paper and electronically. Even though performing these tasks is not billable work, being able to tackle them can be invaluable.

In addition, while lawyers should tailor their document organization plans to their own needs, some tips universally apply. At the start of each case, a litigator should prepare a case binder that contains a list of key players and their contact information, the operative complaint, case notes, any settlement demands, and a current deadline list. Office staff should create master proofs of service and captions that are updated as each case progresses. Personal e-filing passwords and document review system login information should be kept somewhere easily accessible. Corporate attorneys can use similar binders with outstanding issue and key player lists. Not being able to find a form, phone number, or password is no excuse for missing a deadline.

Live by the clock. Lawyers live and die by scheduling. Whether it is six-minute increment billing or keeping records for an attorney’s fees motion, every lawyer must be an effective timekeeper. An attorney should strive to enter time daily, which many firms require. Every lawyer also needs to have a system for responding to client inquiries. Responsiveness is not just good business but a professional requirement.1 Peruse unified e-mail often, and before leaving every Friday make sure that no client communications have been inadvertently overlooked. Further, litigators must pay special attention to the calendar. Many lawyers use electronic and paper calendars to keep track of deadlines. Beginning lawyers should become familiar with summary judgment, expert exchange, and other pretrial deadlines. Learn which trial dates may be extended by continuances. Most important, keep in mind that there is no substitute for double-checking the dates provided by docketing software.

Filing system. Establish a protocol for handling postal mail when it arrives. Mail should be docketed, distributed, copied, and filed daily depending on each lawyer’s preference. Lawyers should guide staff by helping to create a list of clients and other counsel who should receive copies of incoming mail. Also, beginning litigators routinely handle research and document productions. Once research is completed for each filing, that research should be saved for easy citation checking and use in hearing binders. Saving legal authorities to case-specific folders on a hard drive can also be a helpful resource if the same issues will likely arise in other cases (and do not forget to back up files). Some online research systems also allow users to save specific research folders online. In this age of e-discovery, lawyers must keep records relating to client documents and productions. One idea is to create checklists at the start of a case for mailing retention letters and spotting possible e-discovery issues. Some lawyers choose to maintain a production outline for each case, which may include lists of agreed-upon search terms, the identity of searched sources, the document ranges for productions, and any vendor contacts.

Future practice. Beginning lawyers must prepare not just for the cases they have today but for their practice years from now. Saving documents using case titles and without hard-to-read abbreviations can save hours later in the year when a partner asks for that one piece of analysis regarding an obscure issue that happens to be crucial at that moment. Even if a lawyer diligently saves documents to an electronic system, it cannot hurt to have a handful of vetted settlement agreement, discovery response, and meet-and-confer shells kept in a binder.

Basic needs. Hunger and other basic physical needs can throw even the best lawyers off their game. Every lawyer should keep a file of convenient food delivery places, as well as an office stockpile of nutrition bars, pain relievers, nail files, and mints. These things might seem trivial until it is late at night and production slows due to hunger or a headache. To stay hydrated, use reusable water bottles. Keep an umbrella, a flashlight, and a jacket in the office.

Personal items. There are a number of personal documents every lawyer should keep in a locked drawer at work or at home. Maintain records of historical self-reviews, expense reports, and MCLE attendance certificates. Lawyers should also retain an achievement file. It helps to glance at significant victories or encouraging praise from clients when creating a self-review, preparing for partnership, or on those horrible days when nothing seems to go right at work.

Lawyers who follow these basic steps will start to reclaim their time. A more organized practice leads to better structured thinking and work product.

Rachel E. K. Lowe is a litigator in DLA Piper’s Los Angeles office. She defends clients in consumer and wage and hour class actions and other complex commercial disputes.

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Advising Employers on the Use of Social Media in the Workplace

SOCIAL MEDIA HAS BECOME AN INTEGRAL PART of the way Americans communicate. In 2010, social media accounted for 22 percent of all time spent online.1 Facebook, the leading social media Web site, currently has more than 600 million active users, accounting for 10 percent of all Web pages viewed in the United States in 2010.2 It is no surprise then that social media has become an ever more prevalent fixture in the workplace.

Some employers use social media as a channel to build business with potential clients or monitor competitors. In fact, 79 percent of Fortune 500 companies use Twitter, Facebook, YouTube, or corporate blogs to communicate with customers and shareholders.3 But the rise of social media in the workplace has brought with it a number of challenges. Many employers are struggling with measures to ensure their employees are not using Facebook or sending tweets while on the clock. Employers also commonly use social media to screen applicants and to monitor employees during working hours.

According to a 2007 study by Harris Interactive for CareerBuilder.com, 45 percent of employers questioned use social networks to screen job candidates.4 Of these employers, 35 percent decided not to offer a job to an applicant based on the content found on the candidate’s social networking site. The study also reported that Facebook was the most popular online destination for screening applicants, and 7 percent of employers followed job candidates on Twitter. Over 50 percent of the employers surveyed attributed their decision not to hire to provocative photos, references to drinking and drug use, and bad-mouthing of previous employers and colleagues.

Employees are also spending more time using social media, often on company hours. The average employee spends between one and two hours each day using the Internet for personal reasons.5 This number has continued to increase over the past few years.6 As of 2009, 77 percent of workers who have a Facebook account were found to use it during work hours, no doubt resulting in a drop in productivity. However, with social networking sites such as Facebook and Twitter so readily available to the public, employers can now track their employees’ activities during work hours. For example, employers who see that an employee is constantly using social media during work hours could have grounds for reprimanding the employee for wasting company time and, in an effort to increase productivity, make it known that the company tracks Internet usage.

The use of the Internet and social media in the employment context, however, is not without risk. Employers who wish to use or are using this media as part of the application process or to monitor employees must be conscious of the potential risks and liability. The law on social media in the workplace is still developing, but there are lessons employers can learn from the pioneering opinions and complaints addressing emerging legal theories.

Managers and coworkers are increasingly more likely to have access to the Facebook pages and other postings of employees. It is easy to imagine how posts made by employees could affect workplace relationships and influence hiring and firing decisions. Holding employees accountable for public comments that relate to their work may seem natural but has possible perils. The implication of firing an employee based on something the employee posts on a social networking site is illustrated by recent complaints filed by the National Labor Relations Board relative to adverse employment actions purportedly stemming from an employee’s social media activity. In a majority of these cases, the NLRB has found the employee posts constituted protected concerted activity.

Concerted Activity

One of the first NLRB complaints, which ultimately settled, was filed on October 27, 2010, against an employer, in part because it allegedly terminated an employee for making Facebook posts that contained negative remarks about her supervisor.6 The case involved a medical technician working for a medical transportation company. Frustrated that her supervisor would not allow her to seek assistance from a union representative in preparing a response to a customer complaint about her, the employee stated, “love how the company allows a 17 to become a supervisor” (“17” being the employer’s abbreviation for a psychiatric patient).7 Her comments drew responses from coworkers, leading to more negative statements about their supervisor.8 In the complaint, the board alleged terminating the employee for making the posts violated the employee’s right to engage in concerted activity.9 It went a step further, asserting that the company’s policies were unlawful because they similarly interfered with the right to engage in concerted activity.10

Section 7 of the National Labor Relations Act (NLRA) defines protected concerted activity as: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…”11 These are commonly referred to as “Section 7 rights.” Additionally, several states have laws and regulations protecting employees against forms of retaliation by employers. In California, Labor Code Sections 232 and 232.5 protect similar interests in prohibiting discrimination against employees who disclose the amount of their wages or information about their employer’s working conditions.

Over the past year, the NLRB has taken an increasingly aggressive approach with employer actions based on employee social media activity. In response to the growing number of issues surrounding the use and restriction of social media in the workplace, the board’s general counsel issued a memorandum on April 12, 2011, stating that board regional offices faced with disputes involving employer restrictions on worker use of social media must consult the Division of Advice before taking action.12

Nicky Jatana and Cynthia Sandoval are partners, and Leslie Glyer is an associate with Jackson Lewis LLP, which represents management in workplace law disputes.
Dear Jack:

As you know, Bryan Stow, a San Francisco Giants fan, was brutally attacked by two men in the Dodger Stadium parking lot on opening day, March 31, 2011.

On May 22, 2011, Los Angeles Police Department (LAPD) SWAT officers arrested my client, Giovanni Ramirez at an East Hollywood apartment complex. LAPD Chief Charlie Beck said at a news conference that day, “I believe we have the right guy. I wouldn’t be standing here in front of you. I certainly wouldn’t be booking him later on tonight. You know this is a case that needs much more work, but we have some significant, significant pieces to it that leads me to believe that we do indeed have the right individual”.

Mr. Ramirez agreed to take a LAPD polygraph examination, to be conducted on June 1, 2011. I retained your services as a nationally known and respected polygraph examiner. You agreed to polygraph my client at Los Angeles County Men’s Central Jail, on that day prior to the LAPD examination. Further, you agreed to monitor the LAPD polygraph examination in an observation room within Parker Center (LAPD Headquarters).

After you polygraphed Giovanni Ramirez, as you departed the jail, you telephoned me. You said, “LAPD arrested the wrong guy, Giovanni Ramirez was not on Dodger stadium property on March 31, 2011”.

On June 1, 2011, you accompanied me to Parker Center to monitor the LAPD polygraph examination. The respect shown to you by the LAPD polygraph personnel comforted me. You advised them that Mr. Ramirez passed your exam as you handed them your report.

Although this case had many interesting facets, central to Giovanni Ramirez being eliminated as a suspect, were your “non deceptive” polygraph results.

It is a tribute to your reputation that polygraph testing conducted by you is so well received and respected by the prosecution, as well as the defense. You saved my client’s life...thank you.

Very truly yours,

DONALD B. MARKS
ANTHONY P. BROOKLIER

August 4, 2011
Thereafter, in August 2011, the NLRB Acting General Counsel, Lafe Solomon, released a report on the agency’s handling of 14 cases involving employers’ social media policies and their application in specific situations. In a press release, Solomon said, “I hope that this report will be of assistance to practitioners and human resource professionals,” indicating his intent that the report have broader application to the developing law on social media. According to the board, each case was submitted by regional offices to the NLRB’s Division of Advice in Washington, D.C.

The cases examined, for the most part, fall into two categories: 1) employees utilizing social media to engage in protected concerted activity, and 2) employer policies that were found to be a violation of employee Section 7 rights under the NLRA. Those cases in which the board found employees had engaged in protected concerted activity through their use of social media involved employees communicating with other employees via Facebook, text, or Twitter about top-tier conditions of employment, and none of her coworkers responded to the post. An employee’s Facebook posting containing vulgar references to an assistant manager and complaints of being “chewed out” were individual gripeys, and none of the coworkers’ responses indicated they otherwise interpreted the posting.

On the other hand, the board found employer policies containing the following language to be unlawful under the NLRA:

- Prohibiting employees from making disparaging remarks when discussing the company or supervisors and from depicting the company in any media, including the Internet, without company permission.
- Prohibiting the use of language or action that was inappropriate or of a general offensive nature and rude or discourteous behavior to a client or coworker.
- Providing employees could be subject to discipline for engaging in “inappropriate discussions” about the company, management, and coworkers.
- Prohibiting employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations of privacy or confidential information of any person or entity.
- Prohibiting any communication or post that constitutes embarrassment, harassment, or defamation of the employer or of any employee’s employee, officer, board member, representative, or staff member.
- Prohibiting statements that lack truthfulness or that might damage the reputation or good will of the employer, its staff, or employees.
- Prohibiting employees on their own time from using microblogging features to talk about company business on their personal accounts, from posting anything that they would not want their manager or supervisor to see or that would put their job in jeopardy, from disclosing inappropriate or sensitive information about the employer, and from posting any pictures or comments involving the company or its employees that could be construed as inappropriate.

In most instances, the board found these policies were overbroad and would have the potential of chilling employees in exercising their Section 7 rights. In particular, the use of such broad terms as “inappropriate,” “disparaging,” “confidential,” or “embarrassing” without definition could lead an employee to construe the policies to include protected conduct.

One of the cases addressed in the report was Hispanics United of Buffalo v. Carlos Ortiz, in which the NLRB ruled an employer unlawfully terminated five employees based on their social media postings. The employer terminated the employees based on Facebook posts concerning a complaint that the organization did not sufficiently service its clients. Hispanics United of Buffalo (HUB) claimed the postings were bullying and harassment and terminated the employees. Ultimately the board found the employees engaged in protected concerted activity through their Facebook postings and ordered HUB to offer reinstatement, pay for loss of earnings and benefits, and to post a notice outlining employee Section 7 rights and the remedy awarded to the complainants.

In addition to these recent actions by the NLRB, California employers must also be cognizant that employee Internet activity may also be protected under California’s Labor Code Sections 232 and 232.5, which protect the rights of employees to discuss their wages and working conditions.

With the NLRB leading the charge to protect both union and nonunion employees’ use of social media, in conjunction with relevant provisions from California’s Labor Code, employers wanting to take action against an employee based on the use of social media must ask several questions before doing so, including if the employee is 1) engaged in protected concerted activity, 2) discussing his or her wages or working conditions, 3) communicating with other employees about their terms and conditions of employment, and 4) engaged in whistle-blower activity.

**Privacy Violations**

In addition to protected concerted activity rights, employees also have privacy rights under a variety of federal and state laws. These laws present many issues arising from use of social media in the workplace. While employees typically do not have a reasonable expectation of privacy for content posted on public social networking sites, use of social media may still conflict with a variety of privacy laws if the information is obtained in an unlawful manner.

The Stored Communications Act (SCA) is a federal law that prohibits unauthorized access of stored communications (such as e-mail and Internet accounts). Many states have also adopted privacy laws ancillary to the SCA. For example, California has the Consumer Protection Against Computer Spyware Act, the Information Practices Act of 1977, and the California Online Privacy Protection Act of 2003.

In one action illustrative of the privacy implications of social media, an employee created a group on MySpace.com while working as a server for a restaurant. The stated purpose of the group was to allow group members to vent about their jobs. The group was private, and an invitation was required to join. Once the invited member joined the group, the member could access and read or add posts. The plaintiff invited past and present employees of the restaurant to join. While at a manager’s home, one of the group’s members showed the manager the Web site. The manager then requested and obtained the password from that member and accessed the group site without an invitation. The MySpace group included posts of sexual remarks about management and customers, jokes about the restaurant’s policies, and references to violence and illegal drug use. Based on these posts, the manager terminated two employees, who brought suit against the restaurant for violation of federal and state SCA statutes and other privacy laws.

A jury ruled in favor of the employees, finding that the restaurant intentionally or purposely accessed the group site without authorization on five occasions, in violation of state SCA statutes and other privacy laws.
of the SCA. However, the jury also found that the restaurant had not invaded the employees’ common law right to privacy and therefore it was unnecessary to reach a verdict on the employees’ claim of wrongful termination in violation of public policy. The appellate court upheld the jury verdict and damages award after finding that there was sufficient evidence to support it.

The lesson here is that employers who access employees’ social media without authorization risk liability for privacy rights violations, especially if they use the information they discover to make employment decisions. Employers who want to avoid risk should likewise refrain from accessing the personal e-mail accounts of employees by utilizing password information stored on the company’s computers.

**Discrimination and Harassment**

Job applicants and employees are protected by Title VII of the Civil Rights Act as well as similar state laws prohibiting discrimination and harassment. Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin. The Equal Employment Opportunity Commission (EEOC) enforces Title VII’s antidiscrimination and antiharassment laws. In California, the California Fair Employment and Housing Act (FEHA) serves as the state counterpart to Title VII.

The vast majority of social network users post private information online, including their sexual orientation, relationship status, religious beliefs, and political affiliations. Internet savvy employers therefore have access to a wealth of information about job applicants and employees online that likely would have been unavailable to them prior to the Internet age. But, as the saying goes, be careful what you wish for, as such information gathering on employees online that likely would have been unavailable to them prior to the Internet age.

Employers must similarly be wary of the potential ramifications of using the Internet and social media to research job applicants. Aside from failure-to-hire claims, similar factual patterns also can result in wrongful termination claims in which an employee may contend that he or she was terminated on the basis of a harassment or discrimination

**Violence in the Workplace**

Violence in the workplace is another avenue through which the Internet and social media may blur the lines between personal and work-related communications. While there are no specific standards for workplace violence, employers still have an obligation to guard against workplace violence under the Occupational Safety and Health Act (OSHA) and its state counterparts.

The act maintains that employers are directly responsible for providing a safe working environment for all employees and any other people present in the location of employment. Specifically, Section 5(a)(1) of the act, often referred to as the general duty clause, requires employers to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

In addition, an employer may owe a duty of care to protect employees and third persons from injuries caused by employees whom the employer knows or should have known pose a risk of harm to others or is otherwise unfit or incompetent. Breach of that duty may result in negligent hiring or negligent supervision claims. Accordingly, employers are required to remain vigilant of the signs of potentially violent situations. Otherwise, employers may be found negligent if any violence occurs.

In *Mar-Trang Thi Nguyen v. Starbucks Coffee Corporation*, the plaintiff worked as a barista at a Starbucks and had complained to management that she was experiencing “negativity” from her coworkers, which she believed was based on her ethnicity.

Starbucks conducted an investigation that did not corroborate any of the employee’s allegations and arranged for the employee’s leave of absence. Prior to her leave, the employee had exhibited erratic behavior, which several customers complained was inappropriate. During her leave, the employee wrote a disturbing letter to Starbucks, and a coworker showed an assistant manager the plaintiff’s MySpace page, which detailed very disturb-
ing remarks and threats against Starbucks. Notably, a blog entry dated 10 days after the employee’s last day at Starbucks, stated:

Starbucks is in deep s—t with GOD!!

I am now completely disenchanted with humans n I have NO MO Energy left 2 deal w/ their negativity. I’ve worked Tirelessly 2 not cause trouble, BUT I will now have 2 to turn 2 my revenge side (GOD’S REVENGE SIDE) 2 teach da world a lesson of stepping on GOD. I thank GOD 4 pot 2 calm down my frustrations n worries or else I will go beserk n shoot everyone...Prepare to See Crazy Trang in public eye soon IN UR TELEVISION n other news vehicles. I don’t know when EXACTLY ’cause only GOD knows of our Exact timing in his PER-FECTED-CREATED NETWORK (fate!) BUT all I know is I will fight 2 be heard beyond my death;) N I will not be happy unless I win because I AM GOD N GOD DON’T LOSE.41

Employees expressed concerns for their safety, and Starbucks thereafter terminated the employee by letter because of “inappropriate conduct and threatening violence.”

As the Internet and social networking continues to grow, employers must remain aware of the implications of the use of such technologies in the workplace in order to minimize their risks. The foregoing cases are just a few examples of the potential legal ramifications of social media in the workplace. They highlight the risks to employers doing business in today’s age of ever-changing technology.

As the Internet and social media continue to grow, so too will the legal field in this area. When the Internet first became prevalent, we are likely to see legislative regulation concerning the use of social media both inside and outside the workplace. In the meantime, it is important that employers continue to be mindful of any decision to use information obtained from the Internet or social media outlets in making employment decisions. In addition, employers must also be sure to craft reasonable and balanced social media policies that do not impinge on employees’ rights. ■

1 Social Networks/Blogs Now Account for One in Every Four and a Half Minutes Online, http://blog.nielsen.com/nielsenwire/global/social-media-accounts-for-22-percent-of-time-online (June 15, 2010).

Continued on page 19.
Applying the Attorney-Client Privilege to In-House Counsel

IT IS OFTEN ASSUMED that client communications with a practicing attorney are privileged and confidential. The extent to which the attorney-client privilege applies, however, depends on many factors, particularly with corporate in-house counsel. It is therefore imperative that in-house and outside counsel who represent corporate clients understand when communications are privileged.

State and federal courts have noted that a corporate client’s communications with in-house counsel are subject to the same privilege as communications with outside counsel. And at first glance, such protection is intuitive. After all, in-house lawyers are attorneys, and companies often hire full-time attorneys or establish legal departments under the assumption that by so doing legal advice may be obtained while maintaining internal confidentiality. However, this assumption can be dangerous, for unlike outside counsel, in-house counsel often serve a number of different roles within a company—including compliance expert, corporate investigator, and business negotiator. Depending on which of these hats the in-house counsel is wearing, the attorney-client privilege may or may not apply. It is thus crucial for companies, in-house counsel, and outside attorneys to clearly understand the circumstances under which communications between in-house counsel and clients may or may not be privileged.

In California, the attorney-client privilege is established by statute. “The client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.” But mere communication with someone who happens to be a lawyer does not automatically make that communication privileged. The purpose of the communication must be to further the objectives of the attorney-client relationship. Indeed, the client in an attorney-client relationship is defined by the purpose of his or her communication. A “client” under the Evidence Code is “a person who consults a lawyer for the purpose of retaining the lawyer or seeking legal service or advice from him in his professional capacity.” Thus, the Evidence Code defines the client by the purpose of his or her communication—that of retaining the lawyer or seeking legal advice.

Since the client’s communication must seek legal advice in order to fall within the attorney-client privilege, the nonlegal duties held by an in-house counsel may cause the privilege to be inapplicable in certain circumstances. “For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice.” Thus, if the circumstances of the communication are business-oriented, or if legal advice in a communication is not discreetly distinguishable from the business advice, courts are less likely to find the communication privileged.

If the privileged status of communication to a lawyer is contingent upon its purpose, it follows that the privilege of communication around a lawyer is also so contingent. Thus, an attempt to cloak an entire conversation in a business meeting with the privilege by inviting in-house counsel to merely sit in the room is futile. Courts are willing to parse the contents of meetings and find privileged only those portions of the conversation in which legal advice is sought and rendered. Similarly futile is the attempt to broadly cloak communications with the privilege by simply including in-house counsel. Forwarding e-mail and copying documents to in-house counsel does not automatically cloak that information with the privilege. As to forwarded e-mail, it is privileged only if it seeks to obtain, render, or recount legal advice.

When in-house counsel’s job responsibilities involve business-oriented duties, communications pertaining to those duties may amount to no more than business advice and may fall outside the privilege. For instance, in-house counsel may be asked—or hired—to perform investigations on behalf of the corporate client. Whether communications between employees and in-house counsel in the context of an investigation fall within the attorney-client privilege in large part may depend on the nature of the investigation and the content of the communications. For example, the court in Wellpoint Health Networks, Inc. v. Superior Court held that communications are privileged if an in-house attorney is hired by a corporate client to specifically investigate accusations of employment discrimination.

The court also recognized that communications between the fact-finding attorney and employees of the client company may not be privileged if the subject matter of those communications is of a factual rather than a legal nature. While courts should not give challengers of the privilege “carte blanche to [counsel’s] investigation file,” the courts should also not be inclined to apply a blanket privilege. Rather, courts should “base [their] ruling on the subject matter of each individual document.” Moreover, when the purpose of an internal investigation is driven not by the corporate client in a litigation context but by governmental inquiry, such as from the Securities and Exchange Commission or from the Financial Industry Regulatory Authority, courts may find that communications and documents prepared fall categorically outside the privilege.

Who Is the Client?

Another challenge that in-house counsel face in seeking to apply the attorney-client privilege is defining who the client is. While the existence of the privilege hinges on the subject matter and purpose of the communication between client and in-house counsel, it also hinges on the identity of the client. Because in-house counsel are usually employed by corporate clients with a number of employees, corporate clients and their counsel must take care to determine which employees are clients.

Before Upjohn Company v. United States, federal courts employed the control group test, in which only those communications between in-house counsel and the corporation’s controlling executives and managers were eligible for protection under the privilege.

Michael L. Turrill is a partner and Adam W. Bentley is an associate in the Los Angeles office of Arent Fox LLP. They practice complex commercial litigation for corporate clients.
Application of this test required a determination of corporate governance, regardless of the subject matter involved in the communication. Thus, a company’s control group often included only corporate managers and executives and excluded lower-ranked employees, even if they had personal knowledge of the issue.

To address this issue, in *Upjohn*, the Supreme Court replaced the control group test with the so-called subject matter test, which expanded the control group test to include consideration of the subject matter of the communication involved. Under the subject matter test, employees with relevant information as to the subject matter of an issue are considered to be client, regardless of their titular role within the company, so long as each of five guiding factors are met: 1) the information is necessary as a basis for legal advice to the corporation, or it was ordered to be communicated by superior officers, 2) the information was not available from control group management, 3) the communications concerned matters within the scope of the employees’ duties, 4) the employees knew they were being questioned in order for the corporation to secure legal advice, and 5) the communications were considered confidential when made and kept confidential.

In California, a robust version of the subject matter test had already been established prior to *Upjohn* by the California Supreme Court in *D. I. Chadbourne Inc. v. Superior Court*. The court in *D. I. Chadbourne* set forth 11 principles for future courts and practitioners to apply to determine whether an employee’s communication to in-house counsel is privileged.

The thrust of these principles is that communications are privileged when they are germane to the issue at hand, and when the employee’s interests are consistent with, and not divergent from, the corporation’s interests. Also, the communication must be within the scope of the employee’s responsibility.

Individual Employees

Situations in which an individual employee’s interests conflict with the company’s interests also pose potential problems for in-house counsel communications. Internal investigations may not be privileged due to their fact-finding nature. But more significantly, a conflicted employee may assume that an in-house counsel, as a coemployee of the company, may put the employee’s interests before those of the company. For example, an executive may assume that his or her communications with in-house counsel regarding his or her knowledge of facts relating to an insider trading internal investigation are privileged. However, if the officer’s interests potentially conflict with the company’s interests, in-house counsel’s duties run to the company; the officer’s communications are therefore not necessarily privileged. Moreover, the employee has the burden to establish that each element of the privilege pertains to his or her communication with in-house counsel.

In such situations, attorneys have the obligation to inform the employee that they represent the corporation, not the employee. California Rule of Professional Conduct 3-600 states that when “dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization’s interests are or may become adverse to those of the constituent(s) with whom the member is dealing.”

A recent Ninth Circuit case, *United States v. Ruehle*, illustrates the importance of counsel clarifying his or her role as representing the corporation and the burden the employee bears to assert the privilege on his or her individual behalf. In *Ruehle*, Broadcom’s CFO disclosed the results of an internal investigation to Broadcom’s outside auditors and the government, which subsequently began an official investigation. The CFO then sought to apply the attorney-client privilege and exclude statements he made during the internal investigation. The trial court held that the CFO’s communications were privileged but that counsel had breached its ethical duties for inadequately informing the officer as to exactly who was the attorney’s client.

The Ninth Circuit reversed the trial court’s finding that the privilege applied. Applying federal common law, the court held that the CFO could not assert privilege because he knew at the time of communication that the company would disclose the results of the investigation to the government. As a result, the CFO failed to demonstrate that his communications with counsel were “made in confidence.” The appellate court further described the necessity for corporate counsel to provide a “so-called Upjohn or corporate Miranda warning.” “Such warnings make clear that the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company’s attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his or her own attorney if he or she has any concerns about his or her own potential legal exposure.”

In addition to the complexities of representing a corporate client and performing nonlegal duties, in-house counsel face yet another potential risk when seeking to preserve the attorney-client privilege: establishing themselves as attorneys. In-house counsel often represent their corporate clients in foreign jurisdictions, so the corporate client must be aware of the fact that an in-house lawyer may not be admitted to practice in the state in which he or she works. Although Business and Professions Code Section 6125 allows only persons who are active members of the State Bar to practice law in California, California Rule of Court 9.46 creates a safe harbor for out-of-state in-house counsel, who are permitted to practice in California if they register and otherwise meet the criteria for admission to the State Bar.

This recently became an issue in the high-profile trademark dispute case *Gucci America, Inc. v. Guess, Inc.* The magistrate judge in the Southern District of New York held that communications between an in-house California attorney and his client, Guess, were not privileged because the attorney had not been an active member of the California State Bar for more than 13 years, which included his entire career with Guess. This ruling shocked observers, for although Gucci’s in-house counsel had not been active with the State Bar for years, he was promoted to the position of legal counsel one year after being hired by Gucci, and after five years became a vice president and director. Gucci’s in-house counsel provided his client with legal advice and regularly appeared before courts and administrative agencies. Nonetheless, the magistrate judge held that Gucci’s belief that in-house counsel was a lawyer must be reasonable, and that Gucci was “obligated to conduct some due diligence to confirm his professional status as an attorney.”

In January 2011, Judge Shira A. Scheindlin overruled the magistrate judge’s order, finding that to “require businesses to continually check whether their in-house counsel have maintained active membership in bar associations before confirming them simply does not make sense.” Judge Scheindlin’s order provided some relief to corporate legal departments. To show reasonable diligence in ensuring that in-house counsel is licensed, a company must establish that 1) it knew the individual had a law degree upon employment, 2) it hired the individual to perform a legal job, 3) the individual performed legal services throughout the individual’s employment at the company, 4) the individual represented himself or herself to third parties as an attorney, 5) the company paid the individual’s bar membership fees, or 6) sworn statements by the employees of the company indicate that they believed the individual to be an attorney.

Corporate clients and in-house counsel, as well as the outside counsel who represent them, would do well to consider the various pitfalls that threaten a successful claim for the application of the attorney-client privilege.
Precautionary steps will go a long way toward preserving the privilege. First, perhaps the most important thing in-house counsel can do is to clearly delineate the difference between legal and nonlegal advice. By educating the corporate client as to which roles give rise to the privilege and which do not, clients can approach their communications more strategically and avoid a disclosure of a communication intended to be privileged and confidential. Accordingly, in-house counsel should take care to draft their correspondence in a way that clearly separates business from legal advice, making it easier for reviewing judges and opposing counsel to determine what is and what is not a privileged communication.

Another important practice for clients and counsel is to identify situations in which individual employees’ interests conflict with those of the corporate client. In-house counsel conducting internal investigations should then make it clear to employees that communications are not privileged and that the attorney represents the company and not necessarily the employee.

2 EVID. CODE §954.
4 EVID. CODE §951.
8 Id.
10 Id.
11 Id. at 122.
12 In re Syncor ERISA Litig., 229 F.R.D. 636, 645 (C.D. Cal. 2005) (Documents prepared during internal investigation were created with the intent to disclose to the government and thus were never privileged.).
13 Upjohn, 449 U.S. at 394-95.
14 D. L. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723 (1964).
15 Id. at 736-38.
16 Id.
17 Id.
18 United States v. Ruchle, 583 F. 3d 600, 607 (9th Cir. 2009).
19 Id.
20 Id. at 609.
21 Id. at 604 n.3 (citing Upjohn Co. v. United States, 449 U.S. 383, 393-96 (1981)).
23 Id. at *8 (emphasis in original).
24 Id.

SPECIAL MEDIA IN THE WORKPLACE

Continued from page 16.

14 Id. at ¶16.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
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64 Id.
65 Id.
FOR DECADES, it seems, discussions of immigration law have focused on adults, with congressional debate and media coverage leaving children in the margins or completely off the page. Now, however, the spotlight is shifting. President Obama, in his May 2011 speech in El Paso, spoke on behalf of the proposed DREAM Act to legalize “promising, bright students—young people who have worked so hard and speak about what’s best in America.”1 Scholars and think tanks have pulled back the curtain on the suffering of young U.S. citizens whose parents are being deported.2 Advocates are attracting attention with their calls for reform.

While all these developments are occurring, an important statutory tool already in place remains ready and available to help young immigrants. Sitting largely unnoticed on a single page of the Immigration and Nationality Act is a unique classification whose purpose is not only to benefit immigrant children but also to do so consistent with accepted child welfare principles and with international norms. This classification is known as Special Immigrant Juvenile Status, or SIJS.

SIJS has solid roots in California. Throughout the 1980s, despite that decade’s amnesty program, immigrant children in the Bay Area were aging out of foster care, or being adopted out of the system, without lawful status. With their prospects bleak, these children needed their own path to lawful permanent residency and the chance for stability by living and working legally and eventually becoming U.S. citizens.

The Santa Clara County Social Services Agency sought a solution, and in 1990 Congress created SIJS.3 SIJS provided a path to residency in a truly child-centered way. Unlike all other immigration relief, SIJS incorporates the “best interest of the child” standard. This standard is internationally recognized as essential to all actions affecting children, including immigration decisions.4 It also is fundamental to child welfare proceedings.5 Congress tied SIJS to the best interest of the child standard.

Kristen Jackson practices immigration law, with a focus on children’s immigration cases, at Public Counsel. She also coteaches the Asylum Clinic at UCLA School of Law. Jackson represented the petitioner in Garcia v. Holder in proceedings at the Ninth Circuit.
est standard by making state juvenile court findings a prerequisite to SIJS. At its inception, SIJS was posed to remedy a pressing problem for undocumented children. Yet today, more than 20 years later, SIJS is largely unused. In some parts of the country, neither juvenile court attorneys nor immigration attorneys have heard of it. Only 1,492 children gained residency through SIJS in 2010—a year in which 1,042,625 people became lawful permanent residents. Rather than a flood anticipated by some SIJS detractors, the number of SIJS grantees has been only a trickle. Why is this? No one answer emerges. Surely the federal government is partly to blame; it has encouraged SIJS applications but failed to implement any systematic outreach to the juvenile courts in which these children are found. Juvenile courts and child welfare agencies, for their part, often lack policies for identifying and assisting children with SIJS. Juvenile court and immigration attorneys frequently fear crossing over into each other’s worlds. These structural barriers, combined with the reality that the most young potential SIJS beneficiaries know nothing about the law, mean that thousands of children each year miss out on this invaluable benefit.

Fortunately, Los Angeles County stands in sharp relief. SIJS was not born here but it has grown here most vibrantly. While other major metropolitan areas lacked programs to assist SIJS-eligible children, Los Angeles led the nation in SIJS cases. Here, the courts, child welfare personnel, and immigration attorneys breathe life into this federal protection. Advocates creatively work with state law to open avenues for SIJS. Volunteer attorneys represent hundreds of SIJS-eligible children from all over the world. Los Angeles, through collective hard work and vision, is an innovator for SIJS nationwide.

Interplay of Federal and State Law

SIJS involves an intricate interplay of federal and state law. The federal statute and regulations provide the skeleton, and the state courts supply the flesh. The federal requirements for SIJS are sparse. First, a juvenile court must establish the child’s eligibility for immigration relief. Without the court’s findings, the child cannot apply for SIJS. A “juvenile court,” for SIJS purposes, is “a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.” This broad definition encompasses many California courts—those that handle dependency and delinquency proceedings as well as those that hear guardianships, adoptions, and even family law cases. What matters is the jurisdiction of California courts, not the labels they use for themselves.

Second, the juvenile court must have either 1) declared the child dependent on the court, 2) legally committed the child to, or placed the child under the custody of, an agency or department of a state, or 3) legally committed the child to, or placed the child under the custody of, an individual or entity appointed by the court. Juvenile court dependents under California Welfare and Institutions Code Section 300 meet this requirement. So too do Welfare and Institutions Code Section 602 wards when the court vests their “care, custody and control” in the probation department. A child whose custody is placed with a guardian, including an institutional guardian, or with a prospective adoptive parent also meets this requirement. U.S. Citizenship and Immigration Services (USCIS)—which has sole jurisdiction to grant SIJS petitions—acknowledges that a child “on whose behalf a juvenile court appointed a guardian may now be eligible” for SIJS.

Third, the juvenile court must have determined that the child’s reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law. Congress imposed this requirement in 2008, supplanting the requirement that the child be “eligible for long-term foster care.” USCIS has not promulgated final regulations interpreting this new provision, but it has granted SIJS to children living with one parent, as well as to children living with neither parent. State law provides the content for “abuse, neglect, [and] abandonment.” The SIJS statute and regulations do not define the terms; instead, these factual determinations are left to the juvenile court applying state standards. Under California law, children have met this requirement when, for example, their parents are deceased; their parents’ identities are unknown; their parents have sexually, physically, or emotionally harmed them; or their parents have not provided appropriate care, support, or protection. By definition, SIJS-eligible children have suffered the lack of a stable and safe two-parent household.

Fourth, judicial or administrative proceedings must have established that it is not in the child’s best interest to return to the child’s or his or her parent’s country of nationality. The federal government, in issuing its SIJS regulations, explicitly stated that juvenile courts applying state law are unfettered in making this determination: “[T]he Service does not intend to make determinations...regarding the ‘best interest of a child for the purposes of establishing eligibility for special immigrant juvenile classification.’” In California, courts are not bound by hard and fast rules when determining a child’s best interest. They have called the best interest standard an “elusive guideline that belies rigid definition” and they may weigh, among other things, “any special physical, psychological, educational, medical, or emotional needs of the child.”

Additionally, the child must meet other requirements when he or she files a SIJS petition with USCIS. The child must be in the United States—the federal government cannot admit the child from abroad to seek SIJS. The child must be unmarried and remain so until he or she becomes a lawful permanent resident, since marriage triggers an automatic revocation of an approved SIJS petition. The juvenile must be under the age of 21 on the date of filing and subject to juvenile court jurisdiction when filing—and this jurisdiction must remain until USCIS grants the child SIJS, unless the child’s age causes the loss of jurisdiction. Given these last two requirements, under California law a child with an open dependency or delinquency case must file his or her SIJS petition with USCIS before turning 21. A child with a California probate guardianship, however, must file the SIJS petition with USCIS before he or she turns 18, since the child’s guardianship dissolves on his or her 18th birthday.

SIJS and Lawful Permanent Residency

When a child meets all these requirements—both the federal and state components—USCIS can classify him or her as a Special Immigrant Juvenile. USCIS then need only consent to the petition—that is, find it bona fide—to issue an approval. Yet SIJS classification alone is not enough. To reap SIJS’s real benefits, a child must use it to achieve lawful permanent residency through an “adjustment of status.” Stringent standards apply to adjustment applicants. They are judged on, among other things, their method of entry, criminal record, likelihood of needing welfare benefits, and harmful physical or mental conditions. Special Immigrant Juveniles, however, face fewer and lower hurdles. They are deemed “paroled” into the United States, regardless of how they actually entered. Some bars to adjustment—referred to as grounds of inadmissibility—do not apply, and most others are waivable “for humanitarian purposes, family unity, or when it is otherwise in the public interest.” These provisions, combined with the fact that California juvenile delinquency dispositions are not “convictions” for immigration purposes, means that Special Immigrant Juveniles are well positioned to become lawful permanent residents. To obtain SIJS and lawful permanent residency, the child follows a streamlined process. The juvenile court—at the request of the child’s attorney, social worker, probation officer, or guardian—first makes the SIJS findings
establishing the child’s eligibility for relief. In California, this can be done on Judicial Council Form JV-224. The child then submits his or her Form I-360 SIJS petition and supporting materials to USCIS. If the child is not in the midst of immigration court proceedings, he or she can include the Form I-485 application for adjustment of status; if the child is in immigration court proceedings, he or she submits the I-485 to the immigration judge. USCIS will take the child’s photograph and fingerprints, and a local USCIS office (there are nine in California) interviews the child if he or she is 14 or older. Unlike other immigration processes, which can last years, SIJS moves quickly—particularly since USCIS must adjudicate all I-360 SIJS petitions within 180 days of filing.

If USCIS does not grant the child’s application, it can place him or her into immigration court proceedings. If, however, USCIS approves the child’s I-360, he or she is classified as a Special Immigrant Juvenile. When either USCIS or the immigration judge grants the I-485 based on the approved I-360, the child becomes a lawful permanent resident. The child is then eligible to work legally, access federal financial aid, obtain a California driver’s license and Social Security number, and apply for U.S. citizenship after five years. What the child cannot do, however, is legalize his or her “natural parent or prior adoptive parent.”

**Taking the Lead in Los Angeles**

While the SIJS process is swift and effective, it clearly requires those who work with SIJS-eligible children to identify and assist them. This is precisely what happens within the Los Angeles County Department of Children and Family Services. DCFS’s Special Immigrant Status (SIS) Unit—established decades ago and headed since its founding by Cecilia Saco—processes hundreds of SIJS cases annually. It takes referrals of juvenile court dependents from attorneys and social workers and obtains SIJS findings and handles immigration filings from start to finish. It organizes quarterly SIJS stakeholder meetings with USCIS. DCFS’s approach is innovative. Indeed, it is rare to find legalization workers within a child welfare agency.

Yet the approach is not without its limitations. DCFS does not have immigration attorneys on staff and so cannot represent children in immigration court proceedings. As a result, it partners with Public Counsel, Southwestern Law School, Kids in Need of Defense (KIND), and the Immigration Center for Women and Children (ICWC). KIND, for its part, spurred the Los Angeles Immigration Court to create a children’s docket now staffed by three SIJS-knowledgeable immigration judges. National attention has focused on the SIS Unit.

Other states have recognized it as an efficient model for serving SIJS-eligible children. Although the SIS Unit is not a one-size-fits-all template—other child welfare agencies may lack the staff or sizeable immigrant population to sustain an in-house immigration unit—it has put Los Angeles prominently on the SIJS map.

This strong DCFS SIJS program set the tone for other Los Angeles-based innovation. For years, advocates recognized that some abused, neglected, and abandoned children missed out on SIJS because the probate court—not the dependency court working with DCFS’s SIS Unit—handled their cases. Now, SIJS eligibility through guardianships is well established. Children around the country have obtained SIJS and lawful permanent residency by following Los Angeles’s lead. Although the SIJS guardianship cases lack a strong agency player like DCFS’s SIS Unit, collaboration among for-profit law firms and volunteer attorneys has made these cases viable.

By contrast, children in juvenile delinquency proceedings struggle to be identified and assisted with SIJS. Many of these children not only have been abused, neglected, or abandoned but also have been in the United States for years—and their best interests clearly involve remaining here. Nevertheless, because they come into the juvenile court system through an arrest rather than a child welfare petition, they often are viewed as undeserving of immigration help—and may even be targeted for ill-conceived immigration enforcement. SIJS, however, does not discriminate. The statute plainly covers all types of juvenile court proceedings, and the federal government has acknowledged that children can gain SIJS through delinquency courts.

Once again, for children in delinquency proceedings, Los Angeles is on the cutting edge. Los Angeles County delinquency court judges have been trained regarding SIJS, and they have made SIJS findings since 2002. The Los Angeles County Probation Department and Public Defender have collaborated with Public Counsel—one of the few organizations with expertise on the intersection of juvenile delinquency and immigration—to obtain SIJS for youth. While the number of SIJS cases through the Los Angeles County delinquency courts is very small, each case represents a new beginning for a formerly undocumented child.

**SIJS and Adoption**

A fresh start also is at the core of a more recent SIJS innovation in Los Angeles: SIJS through adoption proceedings. While the adoption of children from around the globe...
is not a novel way to create a family, adoptive parents often are surprised that adopting an undocumented child within the United States comes with its own immigration hurdles. Indeed, many U.S. citizens with an adopted child have been shocked to learn—often years after the adoption is completed—that their child does not gain citizenship automatically through adoption.43 Social Security Administration officials may deliver the news when U.S. citizen parents unsuccessfully apply for a child’s Social Security number.44 Or, State Department officials may drop this bomb when the U.S. citizen parents try to obtain a child’s U.S. passport. At that point, citizen parents learn that their child is undocumented, and the parents’ own U.S. citizenship is not enough to shield the child from possible deportation.

The hurdles to immigrating an adopted child are not overcome easily. Notably, immigration law does not recognize the adopted child as a U.S. citizen’s child for immigration purposes until the child has been in the new parent’s legal custody and resided with the new parent for two years.47 With one narrow exception, the child must be under 16 when adopted to qualify as a “child.”48 Once these requirements are met, the adoptive parent can file a family-based visa petition for the child. If USCIS approves the petition, it makes a visa number immediately available to the child—but the child must still apply for lawful permanent residency.49

At this point the process often breaks down. Unless the child entered the United States with the federal government’s permission—and many adopted children from other countries do not, through no fault of their own—the child cannot adjust his or her status in the United States.50 Instead, the child must return to his or her country of nationality and overcome any inadmissibility grounds before the U.S. government may permit the child to reenter as a permanent resident. This requirement applies to all children, no matter their age. It often causes disruption, expense, and dismay to U.S. citizen parents and their adopted children. But the situation can be even more dire. If the Hague Adoption Convention51 applies and the attorney handling the adoption fails to follow its complex requirements, the completed adoption will not be a vehicle for the parent to immigrate the child.52

SIJS can prevent these problems. A child who seeks SIJS before adoption need not wait two years, or any time, to do so. The child is not in a family-based visa category, and visa numbers are nearly always immediately available to the child.53 The child obtains lawful permanent residency in the United States, with no need for a consular process abroad, regardless of his or her manner of entry.54 The parents then adopt a lawful permanent resident child, not an undocumented child who may be subject to deportation. And if the finalized adoption is valid and one or both parents are U.S. citizens, the permanent resident child later gains U.S. citizenship by operation of law rather than naturalization.55

Children in Los Angeles have been obtaining SIJS before adoption for years. DCFS’s SIS Unit legalizes undocumented children in foster care before their adoptions are complete.56 However, until recently, children going through “independent” adoptions that are not within the reach of DCFS have been less fortunate. When attorneys identified some children in adoption proceedings as SIJS eligible, the children’s adoption petitions were typically withdrawn, and the children were sent to probate court to obtain SIJS findings. Only after the children became permanent residents were their adoption petitions refiled.57 In 2007, this approach changed. Levitt & Quinn Family Law Center, in partnership with Public Counsel, obtained the first SIJS findings in a Los Angeles adoption proceeding—and this victory may be the first of its kind in the nation.58 Seeking SIJS findings within an adoption case, rather than outside of it, made perfect sense. A California court handling an independent adoption clearly meets the federal definition of a juvenile court.59 In most cases the court can place the child into the prospective adoptive parent’s custody.60 Further, the court is positioned to make reunification and best interest findings. Not all children being adopted were abused, neglected, or abandoned, but those who were can and should pursue SIJS before finalizing their new family relationship.

Recent Developments and the DREAM Act

The effectiveness of the SIJS program in Los Angeles also set the stage for Garcia v. Holder, the Ninth Circuit’s recent and only precedential SIJS opinion.61 In Garcia, the court addressed the intersection of SIJS and cancellation of removal—a form of immigration relief for some lawful permanent residents who might otherwise face deportation.62 The case addressed whether SIJS’s unique characteristics rendered a former Los Angeles County juvenile court dependent “admitted in any status” so that he accrued the seven years of continuous residence needed for cancellation of removal. The Ninth Circuit resolved that issue clearly in the affirmative in the only federal court opinion tackling this topic.63 Judge Ronald M. Gould, writing for a unanimous panel, recognized that the former dependent’s SIJS-based parole trigger was the running of the seven-year continuous residence clock.64 Thus, the former dependent was statutorily eligible for cancellation of removal.

The court noted that Congress has given Special Immigrant Juveniles “recognition and opportunity to make contacts in this country, and for that reason [they] should not be wrenched away without adequate process.”65 This opinion, binding courts and advocates within the Ninth Circuit and offering guidance to those outside, is important for all Special Immigrant Juveniles. Additionally, it demonstrates the powerful combination of the SIJS Unit’s support for its former dependents with the creative advocacy of pro bono attorneys.66 Los Angeles not only follows but also helps to make the law governing SIJS.

Although SIJS thrives in Los Angeles, the SIJS system in this county is not perfect. Some eligible children fall through the cracks and learn of this relief only after they are too old to obtain it. Also, while Los Angeles’s SIJS programs in dependency, delinquency, guardianship, and adoption proceedings should be emulated, a significant gap would still exist even if every city and state developed SIJS programs to match those in Los Angeles. Thousands of immigrant children simply do not qualify for SIJS. They may not have been abused, neglected, or abandoned, or they may not be under juvenile court jurisdiction. Some may apply for other relief, like the U Visa, relief under the Violence Against Women Act, or asylum—but under current law, many promising young people raised in the United States have no way to become lawful permanent residents or U.S. citizens. Absent comprehensive immigration reform, their best hope is the DREAM Act.68

As drafted in the Senate, the DREAM Act would allow certain immigrant students who have grown up in the United States to apply for lawful conditional residency. If they complete two years of college or U.S. military service, they later could apply for lawful permanent residency and eventually U.S. citizenship.69 Fortunately, Congress retained the child-centered approach it adopted in SIJS and incorporated it into some aspects of the DREAM Act. The act allows students to adjust their status in the United States regardless of their manner of entry—the same approach that has benefited many SIJS-eligible children who were brought to the United States at a young age.70 The act, like SIJS, applies fewer inadmissibility bars to students, and most remaining bars are waivable under the generous SIJS standard.71 Although the DREAM Act lacks the best interest standard articulated in SIJS, Congress essentially has taken it into account by extending protections to children as young as five who may one day qualify for DREAM Act adjustment.72

As the DREAM Act remains in committee, Congress should look further at the
lessons SIJS teaches. On the one hand, it should incorporate even more of SIJS’s statutory strengths. It should institute a deadline for USCIS’s DREAM Act adjudications, like the 180-day limit it instituted for adjudicating SIJS petitions. With this deadline, students are more likely to obtain relief quickly and consistently across the country. Congress also should remove the formal “good moral character” requirement for DREAM Act eligible students.76 It is true that the federal Legal Services Corporation (LSC)’s restrictions on attorneys’ representing undocumented persons,77 has functioned successfully without. On the other hand, Congress should craft the DREAM Act to avoid SIJS’s primary pitfall—uneven implementation due to a lack of public awareness combined with the federal Department of Homeland Security’s restrictions on attorneys’ representing undocumented persons.75

Failure to act will have predictable results. As it stands, the DREAM Act requires no out-of-court opportunity for the best interest of children and our nation’s future. SIJS has not opened the floodgates to unauthorized immigration, but it has changed thousands of children’s and adoptive parents’ lives. The DREAM Act has the same potential to transform politics, policy, and the futures of many people.


2 Telephone interview with Ken Borelli, Former Deputy Director, Department of Family and Children’s Services of Santa Clara County (June 13, 2011).


6 No one knows the precise number of children who should qualify for SIJS each year. Hard data on immigrant children is rarely collected. See YAI LINCRFT ET AL., UNDERSERVED, UNDERSERVED, IMMIGRANT AND REFUGEE FAMILIES IN THE CHILD WELFARE SYSTEM 4 (Annie E. Casey Foundation 2006) [hereinafter LINCRFT].

7 Telephone Interview with Cecilia Saco, Supervisor, Special Immigrant Status Unit, Department of Family and Children’s Services of Los Angeles County (June 13, 2011).


11 See N.O. v. Superior Court of Cal., County of Alameda, No. A122430, at 2-3 (Cal. Ct. App. Sept. 25, 2008) (“Given this authority, regardless of the department in which they sit, judges of the superior court have concurrent jurisdiction. Thus, under the federal legislation, any superior court judge would have jurisdiction to hear the SIJS petition.”).


13 See WELF & INST. CODE §5727(a).


17 USCIS issued proposed SIJS regulations last fall, and the public comment period closed on November 7, 2011. See Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54, 978 (Sept. 6, 2011). It is not known when USCIS will finalize the regulations.

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See Cynthia Hempel et al., Intercountry Adoptions: Understanding the Procedures One Year After the Implementation of the Hague Adoption Convention, in IMMIGRATION & NATIONALITY LAW HANDBOOK 885, 898 (2009-2010 ed.).


Telephone Interview with Cecilia Saco, supra note 9.

Telephone Interview with Lucia Reyes, Legal Services Director, Levitt & Quinn Family Law Center (June 27, 2011).

Id.

See 8 C.F.R. §204.11(a) (2011).

See FAM. CODE §§7820-7829.

Garcia v. Holder, 659 F. 3d 1261 (9th Cir. 2011) (petition for panel rehearing pending).


Garza is the only published Ninth Circuit opinion on SIJS. This is not unusual. Only two other federal appellate circuits have issued binding decisions involving SIJS. See Yeboah v. INS, 345 F. 3d 216 (3d Cir. 2003); M.B. v. Quarantillo, 301 F. 3d 109 (3d Cir. 2002); Zhao-Hua Gao v. Jender, 185 F. 3d 548 (6th Cir. 1999). Only a handful of federal district courts have addressed SIJS in published decisions. As a result, those working on SIJS regularly consult the statute, regulations, and administrative decisions but maneuver largely without federal court guidance.

Garcia, 659 F. 3d at 1263.

Id. at 1271.

Attorney Claudia Bowley-Fuentes represented Garcia before the immigration court and the Board of Immigration Appeals. The SIS Unit provided support letters for Garcia, which became part of the case’s administrative record.

See JUNCK, supra note 53, at 10:1-12-40.


NATIONAL IMMIGRATION LAW CENTER, DREAM ACT: SUMMARY (May 2011), http://www.nilc.org/immlaw-

See ANGE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH R19-20 (2010) [hereinafter JUNCK].


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AS OUR INCREASINGLY digital world encompasses everything from banking to birthdays, the personal information available on Web sites and stored in electronic databases continues to grow exponentially. Many of us have the intimate details of our lives stored in online databases, including our addresses, phone numbers, birth dates, Social Security numbers, credit card and bank account information, and Web site user names and passwords. All this data is vulnerable to theft, through means as simple as stealing the hardware on which the data is stored or through complex, remote cyber-theft by sophisticated hackers.

In the past few years, the frequency of data security breaches has skyrocketed. One estimate puts the number of records breached since 2005 at over 500 million. Some of the largest security breaches occurred at:

- TJX Company, with an exposure of 45 million customer credit and debit card account numbers.
- TD Ameritrade, involving 6 million files of customer contact information.
- The Gap, unveiling the private information of over 750,000 job applicants.
- Starbucks, revealing the private information of over 97,000 Starbucks employees.
- Citibank, involving the potential exposure of names, account numbers, and contact information for 360,000 credit card customers.
- Sony, with a potential compromise of the confidential account and financial information of 144 million Sony PlayStation, Qriocity, and Sony Online Entertainment Network users, including over 1 million unencrypted credit card numbers.

When consumers’ personal information is breached, they face an immediate and immeasurable injury involving the loss of security, and Sony Online Entertainment Network.

Carolyn A. Deverich, an associate at Strange & Carpenter, specializes in class action and data breach litigation. Brian R. Strange, the founding partner of Strange & Carpenter, focuses his practice on class action and complex business litigation, with a specialty in Internet privacy and antitrust class actions. He is currently serving on the plaintiffs’ steering committee in In re Sony Gaming Networks and Customer Data Security Breach Litigation. David A. Holop, an associate at Strange & Carpenter, specializes in class action litigation.
increased risk of identity theft, and potential invasion of privacy. With the loss of security, consumers may suffer emotional distress worrying about lost privacy and identity risks. They may spend money and time to forestall these dangers by purchasing credit monitoring services, monitoring credit and bank accounts, and seeking to cancel current debit and credit cards. They also may lose opportunities due to unavailable credit or a decline in their credit ratings. Businesses, too, suffer enormous losses whenever sensitive and confidential company data has been breached. Damages arising from the exposure of confidential corporate financial and business information can be enormous, not to mention the potential liability that arises when confidential consumer or employee information maintained on a company’s system is breached.

Courts have tried to apply traditional damage models in assessing these damages, with mixed results. A number of courts have turned to the economic loss doctrine in analyzing injuries from potential identity theft, finding that plaintiffs are barred from recovery for alleged breach of tort duties when a contractual relationship exists between the plaintiff and the defendant and the losses are purely economic. Other courts are finding that the dangers and risks associated with exposing a plaintiff’s private and personal information to hackers may be cause to expand the parameters of online security breach liability. Courts appear increasingly willing to offer at-risk plaintiffs what they really seek—security.

This trend first emerged when courts analyzed the reach of Article III of the U.S. Constitution to cases involving a breach of online security. Federal courts have an independent obligation at the outset of every case to ensure the plaintiff has standing.5 Along with causation and redressability, one of the key elements of standing is injury-in-fact. A plaintiff must show that he or she “has suffered an injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.4 This requirement is an important issue in data breach cases when the plaintiff alleges harm based on the increased risk of identity theft that arises from the breach.

The courts that have addressed the standing issue are split. Some find the risk of future harm to be enough to meet the injury-in-fact test, while others do not. The Seventh Circuit first recognized standing based on this type of alleged injury in 2007 in Pisciotta v. Old National Bancorp, with the Ninth Circuit following suit in 2010 in Krottner v. Starbucks Corporation.6 Both the courts in Pisciotta and Krottner found that an act that harms the plaintiff only by increasing the risk of future harm to the plaintiff is enough to confer standing.

The courts reached this result by relying on a line of cases finding injury-in-fact in analogous situations in which the defendant’s actions had increased the plaintiff’s risk of future harm, including exposure to toxic substances,7 the use of a defective medical implant,8 environmental harms,9 and even an increase in discretion given to an ERISA plan administrator.10 The Ninth Circuit also cited Doe v. Chao,11 in which the Supreme Court found Article III standing based on the plaintiff’s allegation that he “was torn...

The fact that a plaintiff has suffered a breach of his or her data security but has not experienced actual identity theft should not bar recovery. Courts have long held that the risk of injury is compensable when there is an adequate remedy for the risk.

Tort Damages

The classic negligence claim requires proof of harm to the plaintiff: “Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.”12 Negligence does not compensate individuals for the general nuisances of life but ordinarily requires proof of some personal injury or property damage. Some argue that the loss of time and effort expended dealing with a potential security breach (including the need to request new credit and debit cards, monitor accounts for fraudulent charges, and convince banks and credit card companies that any fraudulent charges should be reversed) and the heightened risk of identity theft constitute a nuisance and nothing more. Indeed, some courts examining the issue of damages resulting from the exposure of private and sensitive consumer data have found that when there is no actual theft of identity, mere economic losses caused by the heightened risk of theft are not compensable.13

These courts have attributed their findings to state common law damage requirements and to the oft-misapplied economic loss doctrine.14 While state common law differs from federal law in the definition of the level of necessary harm,21 the general principle expressed by these courts is that the harm suffered by those whose personally identifiable information is compromised may be enough to meet the standing requirement, but the traditional negligence requirements of actual, present, and cognizable injury are not sufficiently present to state a claim.22 Nevertheless, this automatic bar from tort recovery seems inconsistent with other author-
MCLE Test No. 211

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. Over the past five years, the frequency of data security breaches has decreased.
   True
   False.

2. Pursuant to Article III of the U.S. Constitution, a plaintiff has standing in federal court if the plaintiff has suffered an “injury in fact” that is “concrete and particularized” and “actual or imminent.”
   True.
   False.

3. The Seventh Circuit was the first circuit to recognize Article III injury-in-fact based upon risk of future harm caused by a data breach.
   True.
   False.

4. All circuits have followed the Seventh Circuit finding that a data breach that harms a plaintiff only by increasing the risk of future harm is enough to confer Article III standing.
   True.
   False.

5. Plaintiffs have brought claims for increased risk of identity theft due to data breach under various theories except:
   A. Negligence.
   B. Defamation.
   C. Unfair consumer practices.
   D. Breach of contract.
   True.
   False.

6. The Sixth Circuit has stated that waiting for a plaintiff to suffer injury before allowing any legal recourse may be harsh and economically inefficient.
   True.
   False.

7. Courts have held that plaintiffs who have been exposed to health or medical risks are entitled to medical monitoring, even when the plaintiffs have not yet shown physical harm.
   True.
   False.

8. The Ninth Circuit considered—but did not grant—monitoring relief to data breach plaintiffs in Stolenwork v. Tri-West Health Care Alliance.
   True.
   False.

9. Emotional distress damages are typically not available in contract cases even when actual harm is proved.
   True.
   False.

10. More than 40 states have passed laws that create a civil cause of action for failure to secure data.
    True.
    False.

11. Texas enacted the first data breach security law.
    True.
    False.

12. The California Security Breach Information Act does not require businesses to notify consumers when their data has been breached.
    True.
    False.

13. Illinois expressly allows for recovery of economic losses in data breach cases by deeming a violation of the state’s data breach statute to also be a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.
    True.
    False.

14. Which state recently considered a bill that would authorize “any person who is affected by a security breach that creates a risk of harm of identity theft” to sue for actual or statutory damages?
    A. Montana.
    B. New York.
    C. California.
    D. Hawaii.
    True.
    False.

15. California recently passed a bill that requires restitution payments from criminal defendants to their identity theft victims.
    True.
    False.

    True.
    False.

17. The HITECH Act allows covered entities to wait up to a year before notifying individuals whose “protected health information” has been breached.
    True.
    False.

18. The Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Department of Veterans Affairs to provide free credit monitoring to parties affected by a data breach if there is a “reasonable risk” for misuse of the information.
    True.
    False.

19. In data breach settlements approved by courts over the past few years, the relief includes free credit monitoring services to at-risk parties and identity theft funds to reimburse losses and related expenses stemming from the security breach.
    True.
    False.

    True.
    False.
ity. The Restatement (Second) of Torts states that one “whose legally protected interests have been endangered by the tortious conduct of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened.”23 The Sixth Circuit has noted that “there is something to be said for... prevention, as opposed to... treatment. Waiting for a plaintiff to suffer physical injury before allowing any redress whatsoever is both overly harsh and economically inefficient.”24 At least one court has held that a plaintiff who alleged “that she spent considerable time, as well as money, making long distance calls, contacting the various credit rating agencies in order to get the fraudulent accounts closed and prevent future fraudulent activity under her name” stated a claim,25 though the court did not indicate how her damages were to be calculated.

The fact that a plaintiff has suffered a breach of his or her data security but has not experienced actual identity theft should not bar recovery. Courts have long held that the risk of injury is compensable when there is an adequate remedy for the risk.26 For example, the Southern District of Ohio found in Day v. NLO that when the plaintiffs had been exposed to excessive radiation due to the defendants’ negligence, the plaintiffs were entitled to medical monitoring—even though the plaintiffs had not shown any physical harm but were merely at risk from the exposure.27 The court explained:

From a certain perspective this remedy seems to violate the courts'['] traditional reluctance to allow recovery for “risk of injury.” However, the courts'['] concerns over damages which are uncertain, speculative, or conjectural are overcome by the reasonableness of compensation for diagnostic tests in cases where liability has been established. The safeguard against speculative recovery is the reasonableness of the procedures ordered in light of the tortious act.28

Other courts, including some in California, have held the same: At-risk plaintiffs who have been exposed to harm but have not yet exhibited injury may recover the costs of monitoring the potential injury to ensure that if the injury does occur, it will be properly treated.29 This principle fits perfectly within the circumstances of security breaches. Plaintiffs are not exposed to harm in the form of physical injury but instead to harm in the risk to the injury of their personal identities. The relief for this risk of injury is analogous too. Instead of medical monitoring, the remedy for the risk is credit monitoring to ensure the customer’s economic health.

The Ninth Circuit has considered this type of monitoring relief.30 In Stollewerk v. Tri-West Health Care Alliance, the plaintiffs alleged that the defendant failed to secure their personal information when burglars broke into the defendant’s headquarters and stole equipment and hardware, including computers on which the plaintiffs’ personal information was stored.31 The court noted that “one [might] apply a similar [medical monitoring] standard to determine the availability of damages for the cost of credit monitoring in instances of exposure of personal information.”32 However, under the particular facts of that case—the only proof of personal data exposure was the burglary, which involved “a range of hardware...not just the servers containing customers’ personal information,” and there was “no evidence the thieves had any interest in their personal information, rather than just the hardware”—the court held that “the risk of identity theft...was low,” so the plaintiffs could not recover.33

In contrast, a number of the more recent security breaches involve intrusion directly into the databases containing users’ personal data, so the risk of identity theft or other misuse is high. Credit monitoring is the ideal relief in these situations.

Contract Damages

Contract-based claims have faced a similar dilemma. Like the requirements for tort claims, some courts have held that plaintiffs must prove actual damages resulting from the alleged breach.34 Contract damages are typically even more limited than tort damages. The usual relief is to give the aggrieved party the benefit of his or her bargain. Emotional distress damages are generally not available in contract cases even when actual harm is proved.35 Some courts analyzing contract claims have found that, as with negligence claims, the increased risk of identity theft does not give rise to compensable damages.36 Nevertheless, contract claims have not been completely barred in security breach cases. In a suit against AOL for the disclosure of users’ search histories, a federal district court upheld a number of California statutory claims on a motion for judgment on the pleadings.37 The court found that the plaintiff’s purchase of AOL’s services, coupled with AOL’s failure to provide what was bargained for—keeping the plaintiffs’ information private—proved sufficient to sustain the claims.38 In another case involving Unicare Life and Health Insurance’s breach of its customers’ private information, numerous claims, including breach of implied contract, survived a motion to dismiss.39 The plaintiffs’ injuries involving severe emotional distress, increased risk of future harm, credit monitoring, and harm to their possessory interest in their personal health information met the federal pleading standard.40

Last year, U.S. District Court Judge Phyllis J. Hamilton in the Northern District of California allowed claims for breach of contract and negligence based on the potential for identity theft to proceed in Claridge v. RockYou, Inc.41 Defendant RockYou, a developer of online services, allegedly failed to secure and protect its users’ sensitive personally identifiable information, including e-mail addresses, passwords, and login credentials. The plaintiffs brought a number of claims. The state statutory claims were struck down, but the breach of contract, breach of implied contract, and negligence claims were not. Specifically, the court held that the “plaintiff has sufficiently alleged a general basis for harm by alleging that the breach of his [personally identifiable information] has caused him to lose some ascertainable but unidentified ‘value’ and/or property right inherent in the [personal information].”42 Judge Hamilton’s decision opens the door for other judges to follow suit.

Statutory Damages

Statutory-based claims generally require lost money or property damages or some other tangible form of injury.43 However, many statutes do not require a showing of actual damages.44 No state has yet passed a statute giving rise to statutory damages based specifically on the increased risk of identity theft from a data breach, but this type of law may be enacted in the future.

Legislation is beginning to play a role in the area of damages for data breaches. Many states have passed laws that create a civil cause of action for failure to secure data. The first law of this kind, which served as a model for many other state laws, was California’s Security Breach Information Act (California SBIA). Passed in 2003, the California SBIA imposes on businesses a duty of notification to those who suffer an unauthorized intrusion into their personal data.45 At last count, there are 46 states—as well as Washington, D.C.; Puerto Rico; the U.S. Virgin Islands; and New York City—that impose a duty of notification when a security breach has occurred. The California SBIA also contains a data protection obligation and expressly authorizes the maintenance of a suit for damages for breach of that duty—a trend followed by other states in their laws. However, these laws provide no guidance on what damages are available. Moreover, other states with notification statutes do not provide for private causes of action,46 while others only assess civil penalties.47
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Commercial Real Estate Markets in the U.S.: Value Trends, Capital Markets, and Managing Risk
● The California Economy and Future Trends in Real Estate Investment ● Using Available Land Use Tools to Thrive in Uncertain Times ● Office and Retail Lease Protections for Landlords and Tenants ● The Peaks and Valleys in the Investment Landscape of California ● Bonus Breakfast Session: Career Options After Ten Years of Practice

AFTERNOON
Luncheon Keynote by USC Law Professor Edward McCaffery ● What’s Going on in Redevelopment ● Practical Tips for Maximizing the Benefits of a CMBS Financing ● Is Chapter 11 a Viable Option for Real Estate Companies? ● CEQA Reform in 2011 and the Future ● Opportunities for Hotels in a Volatile Market ● Outlook for Investments in Distressed Debt ● Quick Hits on Hot Topics

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At least one state, Illinois, allows for recovery of economic losses in data security cases by expressly providing that a violation of the state’s data breach statute is deemed to also be a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The Illinois Deceptive Trade Practices Act permits a “person who suffers actual damage…to recover” actual economic damages or any other relief which the court deems proper, including “reasonable attorney’s fees and costs.” This still requires actual damages but allows for recovery upon merely a showing of economic loss.

No state to date has passed a law providing for statutory damages without a showing of actual damages from identity theft. Early in 2011 Hawaii considered a bill that would authorize “any person who is affected by a security breach that creates a risk of harm of identity theft” to sue for actual or statutory damages. Nevertheless, its future is unclear. A bill was passed in 2011 in California that requires restitution payments from criminal defendants to their identity theft victims, including credit report monitoring and credit repair costs. These bills may indicate a trend toward potential statutory relief for victims of the increased risk of identity theft.

Federal security breach laws are not far behind. The American Recovery and Reinvestment Act of 2009 includes a nationwide data breach notification law as part of its Health Information Technology for Economic and Clinical Health Act (the HITECH Act). The HITECH Act requires entities covered by the statute to immediately notify individuals whose “protected health information,” including medical records and other individually identifiable health information, has been breached. Both the Department of Health and Human Services and the Federal Trade Commission have issued rules or regulations designed to implement the notification requirements of HITECH. The Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Department of Veterans Affairs to provide notice to veterans of a breach of their personal data. Moreover, the department also must notify law enforcement and certain congressional committees when a data breach occurs, perform a risk analysis if unauthorized access to sensitive personal information occurs, and notify and provide free credit monitoring to those affected if there is a “reasonable risk” for misuse of the information.

A number of other bills have been introduced in Congress that would require companies to safeguard sensitive personal data and notify consumers about data security breaches. Consistent federal legislation providing statutory relief for victims of increased risk of identity theft may be following soon.

### Injunctive Relief

Presuming that courts and statutory law continue to move toward remedying injured data breach victims, what is the proper form of relief? When plaintiffs’ private information has been exposed, putting them at risk of identity theft, the primary relief that plaintiffs seek is security. In the handful of data breach settlements approved by courts over the past few years, the parties and the courts (in approving the settlements) have consistently found that the best way to remedy the risk of identity theft is to provide injunctive relief. This involves free credit monitoring services to attract parties along with identity theft insurance or funds to reimburse identity theft losses and related expenses that stem from the security breach. These remedies rectify immediate damages to plaintiffs who have already suffered identity theft from the breach as well as provide protection to plaintiffs who are at risk for identity theft. In some cases, the relief also will cover future damages to plaintiffs who experience identity theft after the settlement.

For example, in the Countrywide breach litigation settlement, class members were offered two years of credit monitoring and identity theft insurance, as well as reimbursements of out-of-pocket expenses resulting from the theft of their private information (such as costs for replacement checks, driver’s licenses, and the like) and reimbursements for losses from identity theft. This relief was contingent on the loss being actual and not already reimbursed and more likely than not a result of the alleged theft of private information through Countrywide’s breach. The court approved this settlement, noting that it “offers a reasonable resolution that properly addresses the tricky issues presented by data breaches.”

The court approved similar relief in the TJX breach case. In the TD Ameritrade litigation, the court rejected two settlements but has approved a third settlement that sets up a fund to pay for identity theft claims. Courts in these settled cases have viewed the provision of credit monitoring services and funds for payment of future losses to be adequate forms of security to ensure that the harmed plaintiffs can recover for their losses. These settlements illustrate the type of injunctive relief judges should consider in security breach cases moving forward.

The **RockYou** holding may be the beginning of a move toward an expanded understanding of damages in these cases. In addition, the security monitoring injunctive relief approved by multiple courts in settlements suggests that the threat of identity theft is a remediable injury with concrete available relief.

Plaintiffs seeking to recover money damages based solely on the increased threat of future identity theft and their accompanying expenses incurred in increased monitoring have faced a tough battle in the courts. The damage requirements of tort and contract law, as well as many statutes, have prevented a number of claims from proceeding. At the same time, no clear consensus and no authoritative decision preclude these cases, and some courts have shown a willingness to move away from traditional damage models to remedy untraditional security breach injuries.

The **RockYou** holding may be the beginning of a move toward an expanded understanding of damages in these cases. In addition, the security monitoring injunctive relief approved by multiple courts in settlements suggests that the threat of identity theft is a remediable injury with concrete available relief. This is a burgeoning area of law that will play out in courtrooms and legislatures in the years to come.

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2. Id.; In re Sony Gaming Networks & Customer Data Sec. Breach Litig., MDL No. 11-2258 (S.D. Cal. 2011); Krotzer v. Starbucks Corp., 628 F. 3d 1139, 1140 (9th Cir. 2009).
The blending of aesthetics and usefulness in design can result in challenges to the theoretical foundation of trademark law.
Not surprisingly, Fleischer I prompted a flurry of amicus briefs by licensing industry powerhouses, including the Motion Picture Association of America and the International Trademark Association, who all joined Fleischer Studios in imploring the Ninth Circuit to reconsider its decision. They argued that the Ninth Circuit had ignored recent precedent that limited the doctrine, and they expressed concern about the potentially devastating effect that the decision could have on licensing. As noted by the rights holder of Tarzan, the decision stood to “become a dangerous invitation to third parties to flood the marketplace with knock-offs of...officially licensed character merchandise whenever copyright protection has expired or been lost.”

On August 19, 2011, the Ninth Circuit withdrew its prior opinion and issued a new one. Fleischer II again affirmed the district court’s decision—but its reasoning was entirely different from Fleischer I. This time, the Ninth Circuit held that the district court did not abuse its discretion in finding that Fleischer Studios had failed to timely submit evidence of its trademark rights in Betty Boop’s image.

On its face, Fleischer II is an unremarkable decision. It affirms a lower court decision on routine procedural grounds. What is significant, however, is how the Ninth Circuit chose to deal with Fleischer I. Rather than decide the petitions for rehearing, or address any of the concerns raised in the petitions or in the amicus briefs, the court of appeals withdrew its prior opinion and replaced it without comment. By doing so, the court mooted the petitions and left the doctrine of aesthetic functionality alive and well. The unwillingness to pass judgment on its prior opinion suggests that the Ninth Circuit remains committed to the continued viability of the doctrine of aesthetic functionality—and trademark owners would do well to keep this in mind.

**Functionality**

The principal role of trademark law is to ensure that consumers are able to identify the source of a product. Consistent with this goal, trademark protection extends to a symbol, name, or logo (and in some instances the appearance of a product) that is used to inform the public that a particular producer is the source of the product.

Trademark protection does not extend to a product feature that serves a function other than denoting the source of goods. Thus, when there is a practical reason for the feature other than to identify the product’s origin, the feature cannot be trademarked.

Consider, for example, a red fire extinguisher. The color red serves a clear purpose: The extinguisher will be easily spotted during a fire. Accordingly, manufacturers of fire extinguishers or other similar emergency equipment are not able to commandeer the color red as a source identifier and enforce it as a trademark.

The reason for this is the functionality doctrine. Functionality applies when a feature serves a purpose other than source identification. The U.S. Supreme Court has defined a functional feature as one that “is essential to the use or purpose of the article [or] affects [its] cost or quality.” A finding of functionality has precluded trademark enforcement of useful product components such as a dual-spring mechanism in a road sign, the shape of a French fry, and the color yellow on an antifreeze jug.

While trademark law promotes competition by protecting a producer’s reputation, the functionality doctrine prevents a producer from using trademark law to inhibit competition by permanently monopolizing a useful product feature that others need to use to compete effectively. The ability to control a useful feature falls within the exclusive province of patent law, which affords an inventor the right to exclude others from using his or her invention for a limited time.

Even when the useful aspects of a feature are not so obvious, the functionality doctrine may step in to preclude trademark protection. Another use of the color red is illustrative. Designer Christian Louboutin uses a vivid red for the outsoles of his women’s footwear. The color does not affect wearability or make the soles less slippery, so it would appear that the red soles serve no purpose other than to identify Louboutin as the maker of the shoes that bear the red soles. The U.S. Patent and Trademark Office reached this conclusion and issued Louboutin a registration exclusively reserving to him the right to use a lacquered red sole on women’s high-fashion designer footwear.

However, a New York federal judge disagreed. He denied Louboutin’s request for an injunction against rival couturier Yves Saint Laurent. Acknowledging that color may serve as an indicator of source in some scenarios, the court found that color was indispensible to the fashion industry, which depends on “artistic freedom and fair competition” and serves the “significant nontrademark function” of “giving the right touch of beauty to common and necessary things.” According to the court, the designer’s reasons for selecting red—the color was sexy and attracted men—reflected this nontrademark function. As a result, the court decided that granting Louboutin the exclusive use of red on women’s outsoles would threaten competition in the designer shoe market and women’s fashion in general.

Functionality also may preclude trademark protection for features that serve an aesthetic rather than a utilitarian purpose. As noted by the Seventh Circuit, “Aesthetic appeal can be functional; often we value products for their looks.” This principle underlies the doctrine of aesthetic functionality, which holds that trademark law does not protect those features of a product that constitute the actual benefit that the consumer wishes to purchase. Trademark law offers the consumer assurance that a particular entity made, sponsored, or endorsed a product. The aesthetically functional feature—the alleged trademark—is the product, not the source of the product.

In TrafFix Devices, Inc. v. Marketing Displays, Inc., the U.S. Supreme Court articulated that a feature is aesthetically functional if its protection as a trademark would impose “a significant non-reputation-related disadvantage” on competitors. Some courts refer to this as the “competitive necessity” test, because the emphasis is on the effect on competition rather than the pure appeal of the design.

Unlike utilitarian functionality, aesthetic functionality assumes that the feature for which protection is sought has no conventional use, such as making the product work better or reducing manufacturing cost. Rather, its purpose is to compel people to buy the product. Incentivizing consumer demand is not related to a producer’s reputation and is thus a nontrademark function. A New York federal court applied the doctrine and refused trademark protection to the words “DAMN I’M GOOD” used on a bracelet because people only bought the bracelet because of the phrase. Similarly, a federal court in Rhode Island found that the design of a heart and arrow-shaped spoon was aesthetically functional because its appeal triggered consumer demand, and to grant trademark protection would “interfere with legitimate (nontrademark related) competition through actual or potential exclusive use of an important product ingredient.”

**The Doctrine and the Ninth Circuit**

In its first statement on the aesthetic functionality doctrine, the Ninth Circuit in Pagliero found that a manufacturer of vitrified china could not prevent a competitor from knocking off its designs because people only bought the china because of the “attractiveness and eye-appeal” of the design. Thus, according to the court, the design beautified the china rather than identified the manufacturer. The rule set forth in Pagliero posits that if “the particular feature is an important ingredient in the commercial success of the product, the interest in free competition permits its imitation in the absence of a patent or copyright.”

As the concepts of branding, licensing, and trademark enforcement evolved, so did the doctrine of aesthetic functionality. In later
decisions, the Ninth Circuit clarified that a feature did not fall prey to aesthetic functionality simply because it was pretty or commercially desirable. Such a rule would “viscerate the very competitive policies that functionality seeks to protect” because it would have the undesired effect of penalizing the most attractive designs. The more appealing the design, the less protection it would receive.

One of the later opinions involved the famed intertwined “LV” logo and fleur-de-lis insignia of Louis Vuitton. In *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, the defendant argued that these marks were functional because they were “related to the reasons consumers purchase [the] product” and necessary for competition in sales of Louis Vuitton-marked purses. The Ninth Circuit disagreed, rejecting the notion that “any feature of a product which contributes to the consumer appeal and saleability of the product is, as a matter of law, a functional element of that product.” The mere fact that a mark is “the benefit that the consumer wishes to purchase” does not per se bar trademark protection—provided the mark also operates as a source identifier. So long as the trademark identifies the source of the goods, it could serve another function such as increasing product desirability and not lose its trademark status.

At the time of the decision’s issuance, some commentators considered *Vuitton* to mark the end of the Ninth Circuit’s “fifty year flirtation with the aesthetic functionality theory.” But that was not the case. In 2006, the Ninth Circuit revisited aesthetic functionality in another decision involving famous logos—and again, the court found the doctrine did not bar trademark protection.

In *Au-Tomotive Gold, Inc. v. Volkswagen of America, Inc.*, a maker of key chains and license plate covers bearing exact replicas of the Volkswagen and Audi logos alleged that it had the right to do so because the marks were the benefit that the customers wished to acquire. To accept this reasoning, the Ninth Circuit held, would be the “death knell for trademark protection. It would mean that simply because a consumer likes a trademark, or finds it aesthetically pleasing, a competitor could adopt and use the mark on its own products.” Because *Au-Tomotive Gold* conceded that its customers wanted Audi and Volkswagen accessories, not “beautiful” accessories, consumer demand could not be quarantined “from the source identification and reputation-enhancing value of the trademarks themselves.”

*Au-Tomotive Gold* and *Vuitton* had similar facts. Both cases involved high-profile logos that consumers find highly desirable and for which the trademark holders had obtained federal registrations. Since the marks were presumed valid by virtue of the registrations, the burden of proving functionality fell on the adverse parties.

A case that did not have similar facts and was barely addressed by the *Au-Tomotive Gold* court is *International Order of Job’s Daughters v. Lindeburg & Company*, a 1981 decision in which the Ninth Circuit found that a jewelry maker’s use of a mark (an insignia of a women’s fraternal organization) was permissible under the doctrine of aesthetic functionality. In ruling for the defendant, the court concluded that the Job’s Daughters name and emblem were “functional aesthetic components of the jewelry, in that they are being merchandised on the basis of their intrinsic value, not as a designation of origin or sponsorship.” The court also noted that the jewelry maker had been making the jewelry for nearly 20 years with the knowledge of the trademark holder. Read narrowly, *Job’s Daughters* holds that a trademark right does not extend to a use of a mark to denote allegiance to an organization rather than the source of the product. *Job’s Daughters* introduced a new component to the aesthetic functionality analysis. “Defensive” aesthetic functionality hinges on the defendant’s use of the mark. In defensive aesthetic functionality cases, the focus is on the alleged infringer’s mark. Courts query whether the alleged infringer is using the mark to effect an impermissible alignment with the trademark holder, or the use is purely aesthetic.

Defensive aesthetic functionality is a precarious doctrine. On the one hand, it favors the trademark holder, because the doctrine provides a defense to an infringement claim rather than a divestiture of trademark rights in the mark. But it also gives an admitted infringer a get-out-of-jail-free card, because the more prominent the trademark, the more convincingly a defendant can argue that it constitutes the primary benefit the consumer desires to purchase.

The Ninth Circuit’s formulation of defensive aesthetic functionality in *Job’s Daughters* marked a departure from *Pagliero*. The *Pagliero* court did not address the defendant’s use. Indeed, the plaintiff was unable to establish a trademark right in the china plate design because it was aesthetically functional. Although some courts look to the defendant’s use, the doctrine of defensive aesthetic functionality is rarely applied outside the Ninth Circuit.

Other federal courts of appeal have criticized *Job’s Daughters*, including the Seventh Circuit, which rejected *Job’s Daughters* as unreasonably denying trademark protection to a manufacturer “who had the good fortune to have created a trade name, symbol, or design that became valued by the consuming public for its intrinsic pleasingness as well as for the information it conveyed about who had made the product.” In *Au-Tomotive Gold*, the Ninth Circuit noted that *Job’s Daughters* was a “somewhat unique” case that was soon clarified and limited by *Vuitton*. Thus, the Ninth Circuit’s February 2011 decision in *Fleischer I*, which cited neither *Vuitton* nor *Au-Tomotive Gold* and instead relied...
on Job’s Daughters as controlling precedent, was unexpected.

The Fleischer Decisions

Cartoon icon Betty Boop is a shapely young woman with “a large round baby face with big eyes and a nose like a button, framed in a somewhat careful coifure…”41 Betty’s creator, the late Max Fleischer, developed a number of cartoon films featuring Betty Boop in the 1930s. His company Fleischer Studios licensed Betty’s image on toys, dolls, and other merchandise before selling the rights to both her cartoons and her character approximately 10 years later.42

In the 1970s, Max Fleischer’s family formed a new entity, also called Fleischer Studios, and attempted to repurchase the intellectual property rights to the Betty Boop character. Believing that it had reacquired all rights to Betty Boop, Fleischer Studios began merchandising her. Fleischer Studios became aware that A.V.E.L.A. and other defendants were licensing Betty Boop merchandise pursuant to their rights in a vintage poster featuring Betty’s image.43

Fleischer Studios sued the A.V.E.L.A. defendants for copyright and trademark infringement and unfair competition. In granting the defendants’ motion for summary judgment, the district court found that Fleischer Studios was unable to show a clear chain of title regarding the copyrights. The court also held that the trademark claims were similarly barred due to the failure of Fleischer Studios to establish any trademark rights that had been infringed.44

The Ninth Circuit affirmed the district court’s rulings as to both claims. With regard to the trademark claim, however, the court affirmed on a new theory: The use was aesthetically functional under Job’s Daughters. After conducting an inquiry into the defendants’ use, the court found no evidence of consumer confusion or that A.V.E.L.A. designated the merchandise as “official” merchandise or otherwise affirmatively indicated sponsorship by Fleischer Studios. As used on A.V.E.L.A.’s goods, the court found the Betty Boop character “[a]s a prominent feature of each item so as to be visible to others when worn...” Thus, the Betty Boop name and image “were functional aesthetic components of the product, not trademarks.”45

While Fleischer I delighted fans who wanted to wear T-shirts bearing their favorite characters, the decision caused tremors within the licensing industry because the Ninth Circuit essentially said that beloved characters could be placed on consumer goods without permission from the trademark holder.46 While a character’s creator can still take advantage of copyright protection— which extends to characters if they are components of a copyrighted work—that copyrights are of a limited duration, whereas trademark protection can last in perpetuity. Additionally, trademarks assume a source-identifying role that provides assurance to customers and producers: A customer will be confident that he or she is buying a genuine article, and the article’s producer will be sure that “it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.”48

Fleischer I raised more questions than it answered. First and foremost, why did the court rely on Job’s Daughters—a “somewhat unique” decision nearly 30 years old that more recent precedent had been careful to limit? Job’s Daughters involved a collective mark and a decades-long practice by the plaintiff of not enforcing its trademarks.49 The unlicensed selling took place after the expiration of a license. Fleischer I involved none of these scenarios. Nevertheless, the Ninth Circuit found Job’s Daughters “directly applicable.”

By analogizing Fleischer I to Job’s Daughters rather than Vuitton or Au-Tomotive Gold, the Ninth Circuit suggested that an unregistered mark is more likely to be deemed aesthetically functional than a registered one.50 Unlike Fleischer Studios, the trademark holders in Vuitton and Au-Tomotive Gold had established federal registrations for their marks.

The Ninth Circuit also turned back the clock on the aesthetic functionality doctrine. Fleischer I did not address the TrafFix test or mention competitive necessity. The Fleischer I decision essentially adopted Pagliero’s holding that a mark is aesthetically functional if it is the key commercial ingredient in a product’s success. Au-Tomotive Gold and Vuitton made clear that a feature did not become functional simply because it was commercially desirable as well as an indicator of source—a clarification that brought the Ninth Circuit’s application of the aesthetic functionality doctrine closer to what other appellate circuits utilized.51 By doing so, the two decisions served the dual purpose of unifying federal law and preventing forum-shopping. The Au-Tomotive Gold opinion was careful to warn courts not to prejudice the makers of famous marks such as the Ferrari stallion or Playboy bunny ears even though consumers sometimes buy products with those features for the appeal of the marks themselves.52 In contrast, Fleischer I focused on the popularity of the asserted mark.

When the Ninth Circuit withdrew Fleischer I six months after its issuance and replaced it with Fleischer II, the court avoided the doctrine of aesthetic functionality altogether. It did so by affirming the trial court’s decision on procedural grounds: The plaintiff did not submit sufficient evidence to support its assertion of trademark rights to Betty Boop’s image.

What is significant about Fleischer II is not its conventional holding; it is how the Ninth Circuit chose to deal with its controversial opinion in Fleischer I—and more specifically, what the court did not do. The court could have granted the petitions for rehearing and addressed the concerns raised about the Fleischer I reasoning or Fleischer II’s expansion of the aesthetic functionality doctrine. The Ninth Circuit also could have analyzed the doctrine and responded to its critics who claim the doctrine is passé, or it has no place in modern trademark law, among other negative assessments. The court of appeals did none of these things. Instead, by withdrawing Fleischer I, the Ninth Circuit intentionally avoided an opportunity to resolve the issues regarding the uncertainty of the doctrine and the court’s own precedent.

Why did the court of appeals do that? Was it embarrassed about Fleischer I and trying to obscure its decision? This may be true, but the more likely inference is that the court was unwilling to refute the reasoning in Fleischer I or pass judgment on Job’s Daughters. In electing to take the unusual posture of replacing Fleischer I with Fleischer II, the Ninth Circuit pledged its affinity to a doctrine that rarely applies but can have devastating effects when it does.

Should the reasoning of Fleischer I make its way into another opinion, it could jeopardize the continued protection of characters and other popular trademarks and otherwise turn the licensing business on its head. The doctrine of aesthetic functionality likely will be invoked more frequently in the future, because defendants will hope to give the Ninth Circuit another chance to apply it again.

Fleischer I gave the aesthetic functionality doctrine a place of respectability and prominence. Then, after the mass outcry, the court, without rejecting the doctrine, removed it from the discussion. While the doctrine of aesthetic functionality may be erratic and unpredictable, the Ninth Circuit seems to find the doctrine still too appealing to abandon. The court is simply waiting for the right opportunity to dust it off once again and bring it back into the spotlight.

1 Pagliero v. Wallace China Co., 198 F. 2d 339, 343 (9th Cir. 1952).
2 Fleischer Studios, Inc. v. A.V.E.L.A., Inc. (Fleischer I), 636 F. 3d 1115 (9th Cir. 2011).
3 The Ninth Circuit Court of Appeals also affirmed the dismissal of the copyright claim because Fleischer could not prove ownership of the copyright to the Betty Boop character.
4 Motion for Leave to File and Brief Amicus Curiae of Edgar Rice Burroughs, Inc. in Support of Appellant
Inc. v. Volkswagen of Am., Inc., 457 F. 3d 1062 (9th Cir. 2006).


Fleischer Studios, Inc. v. A.V.E.L.A., Inc. (Fleischer II), No. 9-10-6317,... 3d 3d 1067, 1069 (9th Cir. 2011).

American Forever, 56 F. 3d 711, 716 (D.C. Cir. 1997). (The court, applying defensive aesthetic functionality, stated, “The Pitt insignia, as used by Champion prominently emblazoned on soft goods, are functional.”).

W. T. Rogers Co. v. Keene, 778 F. 2d 334, 340 (7th Cir. 1985).

Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc., 457 F. 3d 1062, 1069 (9th Cir. 2006).

Fleischer Studios, Inc. v. A.V.E.L.A., Inc. (Fleischer II), 636 F. 3d 1115, 1117 (9th Cir. 2011).

Id. at 1117.

Id. at 1112.

Ligation over character rights is not uncommon. As of July 2011, the rights to Superman, Winnie the Pooh, Dick Tracy, Captain America, and Alvin and the Chipmunks, among others, were all in dispute. Eriq Gardner, Characters in Dispute: Porn? THR breaks down the heroes and heroines mired in litigation and why, The Hollywood R., July 22, 2011, at 52-53.

Warner Bros. Entm’t Inc. v. X One Prod., 644 F. 3d 584, 597 (8th Cir. 2011) (citing Gaiman v. McFarlane, 360 F. 3d 644, 661 (7th Cir. 2004) (“[A] stock character, once he was drawn and named and given speech [in a comic book series]...became sufficiently distinctive to be copyrightable.”)); Olson v. National Broad. Co., Inc., 835 F. 2d 1446, 1452 (9th Cir. 1988) (holding that “copyright protection may be afforded to characters visually depicted in a television series or in a movie for “characters who are especially distinctive”). Interestingly, the defendant in Warner Bros. v. A.V.E.L.A., which had used altered images from the Wizard of Oz, Gone with the Wind, and Tom & Jerry short films on consumer goods. The Eighth Circuit Court of Appeals found in favor of Warner Bros. when it sued A.V.E.L.A. for copyright infringement. Warner Bros., 644 F. 3d at 597.

Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc., 457 F. 3d 1062, 1067 (9th Cir. 2006).

In its amicus brief in support of a panel rehearing or rehearing en banc, the Motion Picture Association of America argued that the holding of Job’s Daughters is limited to collective marks—marks that identify a person’s membership in an organization. Brief of Amicus Curiae Motion Picture Association of America, Inc. in Support of Plaintiff-Appellant’s Petition for a Writ of Certiorari, 636 F. 3d 1115, 1117 (9th Cir. 2011).

All of the cases referenced in this article in which the doctrine of aesthetic functionality barred trademark protection involved common law (i.e., unregistered) marks.

See Au-Tomotive Gold, 457 F. 3d 1073 (citing Pebble Beach Co. v. Tour 18 Ltd., 155 F. 3d 526, 539 (5th Cir. 1998) (“To define functionality based upon commercial success...does not promote innovation, nor does it promote competition”), superseded on other grounds as recognized in Eppendorf—Netheler—Hinz GMBH v. Ritter GMBH, 289 F. 3d 351, 356 (5th Cir. 2002); W. T. Rogers Co. v. Keene, 778 F. 2d 334, 341-43 (7th Cir. 1985); Keene Corp. v. Paraflex Indus., Inc., 653 F. 2d 822, 825 (3d Cir. 1981).

See Au-Tomotive Gold, 457 F. 3d at 1067.
AS THE MEDIA CAPITAL OF THE WORLD, Los Angeles is understandably at the forefront of trial presentation—from the O.J. Simpson and Robert Blake murder trials to the Dodgers divorce trial of Frank and Jamie McCourt, and the recent trial in the Michael Jackson case against Dr. Conrad Murray. If a high-profile trial happens in Los Angeles, chances are the rest of the world is watching.

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Posttrial juror surveys reveal that the use of technology and visual presentations are widely appreciated and (perhaps thanks to the CSI television franchise) expected. Many of our courtrooms are already equipped for media, so you can just plug in your laptop and go to trial. You should consider all available options for enhancing your mediation, settlement conferences, hearings, and trial. Here are a few highlights.

**Litigation Support**

Once you’ve identified all or part of your potential trial exhibits, you’ll need to have them scanned into a digital format, such as PDF or TIFF images. Most litigation-specific vendors will know what to do and how to do it properly. Simply taking your exhibits to a copy vendor may result in files that are not compatible with trial presentation software. It is not uncommon to bring in a trial presentation consultant at the beginning of case workup or prior to production and discovery to help ensure that everything is done properly from the beginning. Failure to follow common protocols may result in lost time and money, embarrassment, and even sanctions.

Database organization and file structure are critical, and if not done properly, may result in having to do it over—or worse yet, problems during the trial. From adding Bates numbering to affixing electronic exhibit stickers, technology can be utilized to perform what were once time-consuming manual tasks.

**Demonstrative Exhibits, Animations**

There is no topic that cannot benefit from visual display—even "boring" documents. Simple bullet-point slides, document callouts, timelines, or even complex animations may be used to get your message to the jury. Studies have repeatedly shown that we learn and retain more information visually—when we can see what is being explained. Blowups may be used for a few key items, and a large quantity of demonstratives may be displayed very rapidly on-screen. This is particularly helpful for opening statements and closing arguments, as well as with expert witnesses in explaining complex issues.

**Deposition Video, Day-In-the-Life**

You may think it is boring to watch an absentee witness testify via video—it is far worse to read the testimony into evidence. With video, the actual witness testifies to the jury, and exhibits may be displayed simultaneously so the jury can follow along. For impeachment purposes, the jury sees two versions of the same witness—a very powerful tool for damaging credibility. It is recommended that you videotape any witness of importance to your case, whether for impeachment or absentee witness purposes. Video may also be used for site inspections and day-in-the-life segments.

**Trial Presentation**

All the aforementioned techniques may be used in trial, mediation, settlement conferences, or other forms of ADR. Trial presentation technology can be used effectively and efficiently to communicate to your audience, be it the judge, mediator, opposing counsel, or the jury. Your jurors will better understand and retain your message, your trial will go much faster, and you will be able to get far more evidence introduced, displayed, and admitted, compared to working with hard copy binders and exhibits.

Regardless of the type or size of your case, you should always offer the best available tools to your client. Check each vendor’s reputation, get references, and remember that each vendor in this guide is an active supporter of your LACBA.
COMPUTER ANIMATION

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3231 North Valley Drive, Suite 201, Aimes, IA 50010, (515) 296-6900, fax (515) 296-6121, e-mail info@demonstratives.com. Web site: www.demonstratives.com. Contact Chuck Fox, Ph.D. With doctorate-level experts, animators and artists, Demonstratives, Inc. (formerly Engineering Animation, Inc.) applies sound science to win cases. Our deep experience (over 1500 cases) and our scientific and artistic talent produce the most accurate and persuasive animations in litigation. D’s animations are powerful courtroom tools and effective catalysts for settlement. Initial consultations are free and we provide a detailed budget before we begin work. No surprises, just high value expertise. See examples at www.demonstratives.com. See display ad on this page.

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On February 3, 4, and 11, the Center for Civic Mediation will host an interactive course on advanced mediation skills that includes 12 hours of litigated case training, 9 hours of lecture, and 9 hours of role-playing with observation, coaching, and feedback. Lecture topics include assessing the conflict, consensus building, problem-solving techniques, managing multiparty and multi-issue agendas, legal ethics, and distributive and integrative bargaining. The course will include case studies from a range of areas, such as personal injury, employment, contracts, real estate, and property. The practice of mediation is highly focused on the interactions not only between the disputants but also between the disputants and the neutral. Group rates are available for groups of 5 or more. The program will take place from 9 A.M. to 4 P.M. each day at the Los Angeles County Bar Association mock courtroom, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. The registration code number is 011498.

$515—general price
18 CLE hours, including 12 hours of general CLE, 4 hours of ethics, and 2 hours of elimination of bias

EB-5 Strategies and Recent Developments
On Saturday, February 11, the Immigration Law Section will host a program on the EB-5 employment-creation green card, the hottest topic in immigration law today. Wealthy investors from around the world see the EB-5 visa as a convenient opportunity to invest in the United States and get an immigrant visa in the bargain. Handling EB-5 offers rich rewards for an attorney, and many potential pitfalls too.

This rarely offered program features some of the nation’s leading experts on the subject. Robert P. Gaffney, Young J. Kim, H. Ronald Klassko, Ira Kurzban, Linda W. Lau, Suzanne Lazicki, Brandon Meyer, Lincoln L. Stone, and Bernard P. Wolfsdorf will lead a discussion on the basics of the EB-5 visa as well as provide many tips from the trenches, including information on the differences between the private $1 million and $500,000 investments, and regional center investments. Sessions will cover how to prepare a retainer agreement, establishing source of funds, traditional EB-5 petitions, establishing and working with regional centers, defining targeted employment areas, removal of conditions, NTAs and appeals, ethics, and investor scams.

The program will take place at the Los Angeles Marriott Downtown, 333 South Figueroa Street. Parking costs $15 per car per day and is by valet only. Additional parking is available across the street. On-site registration and breakfast will be available at 8 A.M., with the program continuing from 9 A.M. to 5 P.M. The registration code number is 011548.

$110—CLE+ member
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The Trouble with Time-Pressed Settlements

According to the Judicial Council of California, more than 1.7 million civil claims are filed every year in superior courts throughout the state. On average, only 12,000 proceed to trial. One of the primary reasons is that trial courts favor settlement. Indeed, the California legislature has crafted a number of statutes specifically to encourage settlement rather than a trial on the merits. Such well-known devices include the statutory offer to compromise and good-faith settlement determinations.

Aside from these procedural statutes designed to facilitate settlement, if all else fails, courts can simply order the parties to mediation before the presiding judge or an appointed mediator. These mandatory settlement conferences are almost always held within close proximity to trial. The favored approach is to keep the looming specter of a trial—its risks, costs, and time investment—fresh in the parties’ minds while trying to hammer out a settlement at a mandatory conference. As the statistics suggest, this under-the-gun approach apparently works—only a small fraction of cases proceed to a trial on the merits after they are filed.

However, is it enough for courts to simply favor settlement? According to Dutch psychologist, Carsten de Dreu, the current mandatory settlement conference system, while producing settlements, may also be producing poor results for the litigating parties. De Dreu’s research indicates that in adversarial proceedings hard deadlines tend to foreclose creative solutions. Instead, mediators and negotiators settle for closure in order to just get a deal done. In litigation, this often boils down to the lowest common monetary denominator in order to reach a conclusion acceptable to all parties and prevent a trial. De Dreu’s research further indicates that settlements negotiated under such brinksmanship-like conditions often produce results that are less favorable to all parties involved.

Conducting similar research, Dr. Arie Kruglanski, a psychology professor at the University of Maryland, performed field experiments with negotiators attempting to obtain agreements under variable time pressures. The results were as expected. Negotiators who were aware of immediate fixed deadlines often sought to attain closure as quickly as possible, limiting their ability to think creatively and dynamically in order to solve problems. As time pressures increased, negotiators stopped assimilating valuable information that could have resulted in better outcomes. These field experiments indicate that negotiators working under time pressures begin substituting substantive goals with the need to attain conflict finality as deadlines approach.

For litigators, the ultimate meaning of the research is clear. While undoubtedly more deals are made with a looming trial date, the quality of the deal suffers. The flip side of this finding is that the opposite practice may be equally problematic. Setting settlement conferences too early in litigation produces poor settlement success rates. Counsel are loathe to enter into good-faith negotiations without first acquiring all relevant information available for analysis. They fear that they may compromise a settlement too favorable to the opposing party when additional discovery would have revealed a lower settlement value. This is often the case when a pivotal witness has yet to be deposed or a party is waiting for documentation to substantiate an amount of claimed damages.

The solution is to find a sweet spot for the mandatory settlement conference that allows the parties to enter into good-faith negotiations without time pressures so strong that they negatively affect the quality of a settlement. Such an ideal timing may be at the conclusion of allowable discovery, which is 30 days before trial. This would relieve some of the time pressure a mandatory settlement conference poses when set, for example, the week preceding trial. In addition, it would allow the parties to have completed their written discovery and percipient witness depositions prior to entering into settlement negotiations.

Unfortunately, this 30-day period will not always be ideal. For example, expert witness depositions can occur within 15 days of trial. This may be problematic because the strength of an opposing party’s expert witness testimony is often a key component when analyzing the value of a settlement. But it remains true that delaying negotiations until the players involved are on trial’s doorstep diminishes the quality of a negotiated settlement. The answer may be as simple as agreeing to take expert depositions well before the statutory discovery cut off date.

Unfortunately, our civil judicial system does not easily assimilate third-party research. However, when it comes to the timing of mandatory settlement conferences, why not improve their scheduling in order to facilitate better quality settlements.

Michael A. D’Andrea is an associate in the Los Angeles office of Bremer Whyte Brown & O’Meara, LLP, practicing in the areas of complex civil litigation, business litigation, and product liability actions.
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