Los Angeles lawyers Kevin Boyle (left) and Robert Glassman evaluate what effect Purton v. Marriott International, Inc., may have on respondeat superior litigation.
2015 Chapman Law Review Symposium

Trolls or Toll-Takers: Do Intellectual Property Non-Practicing Entities Add Value to Society?

Friday, January 30, 2015 • 9AM - 5PM • Reception to Follow

Special Lunchtime Keynote Presentation By
Andrew Byrnes, Chief of Staff, U.S. Patent and Trademark Office

Scheduled Panels:

Panel 1
The Practitioner’s Perspective: The Effect of Patent Non-Practicing Entities on Industry

Panel 2
The Scholar’s Perspective: Theories of Patent Trolling

Panel 3
Copyright and Trademark Trolls: Fable or Fact?

Note that panel topics are subject to change.

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To whom it may concern,

My name is Alison Triessl. I am a criminal defense attorney specializing in murder, third strike and drug cases. Without a doubt, Jack Trimarco’s polygraphs have been an invaluable asset to my practice.

I recently represented USTA Tennis official Lois Goodman who was accused of murdering her husband. She did not commit the crime and Jack Trimarco’s polygraph was instrumental in negotiations with the District Attorney which resulted in a dismissal of all the charges.

Whenever I consider whether to have a client take a polygraph, there is only one name in the conversation -- Jack Trimarco. His level of credibility, professionalism, and experience is unparalleled in the field and garners the respect of prosecutors and defense attorneys alike.

I have worked with Mr. Trimarco for over twelve years and simply put, I adore him. Not only is he the best in the field, he is an absolute pleasure to work with. He is a hardworking, dedicated professional with unquestioned qualifications and integrity.

Warm regards,

[Signature]
Alison Triessl
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BY KEVIN BOYLE AND ROBERT GLASSMAN
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The Jones Act, the Seaman’s Wage Act, and the duty of maintenance and care guard the rights of seafarers.
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Los Angeles Lawyer December 2014

FROM THE CHAIR

In the Closing Argument for this holiday issue, Andres C. Hurwitz describes the inspiring effect that LACBA’s pro bono projects have on access to justice in Los Angeles. “Last year alone, the projects helped more than 23,000 people and provided more than 15,000 pro bono hours with a total value of over $4,400,000.” Since inception more than 50 years ago, the Los Angeles County Bar Foundation, which recently became the LACBA Counsel for Justice, has helped many thousands of economically disadvantaged people gain access to justice through direct representation, advice, counseling, and mediation.

Like most important missions, LACBA’s pro bono projects require volunteer time and substantial donations. December is the month for nonprofit fund-raising. Many LACBA members have seen an uptick in the number of requests for contributions from a diverse range of noble causes. Recognizing that these competing and deserving causes tug at our hearts and financial resources, I urge you to make a financial contribution to the LACBA Counsel for Justice. Delivery of legal services by LACBA’s pro bono projects to those of limited means helps meet their most urgent needs.

If you are unable to donate financially (and even if you are able), please consider donating your time. The American Bar Association’s Model Rule 6.1 regarding pro bono service states that every lawyer has a professional responsibility to provide legal services to those who are unable to pay, with an aspirational goal of “at least 50 hours” of pro bono services per year.

Model Rule 6.1 also provides that a substantial majority of the 50 hours of legal services should be rendered, without fee or expectation of fee, to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means. Some law firms have robust pro bono programs and expect attorney compliance with Rule 6.1, and many sole practitioners and attorneys with small and medium firms also perform pro bono legal services.

In spite of these efforts, the aspirational goal is not being met. As Associate Justice of the California Supreme Court Justice Goodwin Liu poignantly reminded a group of pro bono award recipients, “Just think of what we would accomplish if even half of the bar met this guideline.” Justice Liu also noted that the recent financial crisis exacerbated the “huge gap between the law on paper and the law we practice.” Justice Liu quoted a portion of a speech that President Jimmy Carter gave over 30 years ago that still applies. Carter noted that “90 percent of lawyers serve 10 percent of our people. We are over-lawyered and underrepresented.” (See “Liu calls for more pro bono work,” available at http://www.californiaprobono.org.)

When Justice Liu delivered a commencement speech at a law school, he asked the graduates to recall why they wanted to become a lawyer. “Chances are it had something to do with serving humanity…the disadvantaged” and to speak for those who cannot speak for themselves. Justice Liu’s remarks are particularly apt this time of year.

LACBA’s pro bono projects, now funded through LACBA’s Counsel for Justice, afford attorneys the means by which attorneys may achieve the aspirational goal of at least 50 pro bono service hours each year. These projects literally have saved the lives of those denied access to basic human needs. Please give LACBA’s Counsel for Justice a donation this month. You will be giving the gift of access to justice to those most in need.

Mary E. Kelly is a nurse attorney and an administrative law judge II with the California Unemployment Insurance Appeals Board. She is cochair of the California Access to Justice Commission’s Administrative Agency Committee.

Mary E. Kelly

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What is the perfect day? When many important problems in the city that appear to have no solution get solved.

What is overrated about being a politician? Many people think it’s a very glamorous job. If public service is performed well, it’s arduous.

What is underrated? To be able to express your sense of purpose, every day, can be magical.

What is the biggest misconception about your current job? I think most people don’t understand what the city attorney does. A key role of this office is to deeply connect the work of our office to what matters most to the neighborhoods of the city.

What was your best job? There’s been no best job. In each job I’ve had, I’ve tried to find a way to matter in the most effective way I can.

What was your worst job? As satisfying as my private sector law firm work has been, my sense of who I am and where I hope to make the most difference is expressed much better in public service.

What characteristic do you most admire in your mother? A very deep-seated sense of social justice.

You went to Harvard for undergraduate work and for law school, but both of your children went to Yale. Is there a family rivalry? No, it’s wonderful.

Why did you go to law school? Being conversant in the law, being an effective advocate, being a good listener—these were the kinds of skills I wanted to develop.

If you were handed one million dollars tomorrow, what would you do with it? Is “donate it to the LA County Bar” right?

What book is on your nightstand? I’ve been making my way, inch by inch, through Doris Kearns Goodwin’s Lincoln book.

Which magazine do you pick up at the doctor’s office? The magazines I would like to pick up are no longer in print—*Time*, *Newsweek*.

What scared you the most when you first went in front of a judge? That I wouldn’t know the nuances of the procedures that I had to invoke.

In 1995, you first served as a member of the Los Angeles City Council. What was a typical work matter that came across your desk? There was no typical matter, on purpose. I wanted to take on the most I could take on.

In 2001, you narrowly lost in a runoff to Rocky Delgadillo for city attorney, but later you initiated a second campaign. Why? Because the reasons I ran for the job in 2001 were even more significant in 2013. Our office has a role in pretty much every major issue confronting the city.

In 2006, you were elected to the California State Assembly. Were you nervous about anything? No, not at all. It was exciting.

You worked with Mothers Against Drunk Driving. Why was that important to you? I worked closely with MADD on a key issue—repeat drunk driving. I know that there are some lives that have been saved because an ignition interlock device has been installed.

You were executive director of Bet Tzedek. What was your biggest accomplishment while there? Bet Tzedek was marvelous. We were able to take it to the next level in multiple ways—litigation, legislative advocacy, and developing new programs responsive to emerging needs.

What is the biggest challenge facing the city attorney’s office now? When I took office, this office had been decimated by budget cuts. The major challenge is to rebuild it. At the same time, we are pushing forward multiple important new initiatives.

Your office filed a lawsuit against JPMorgan alleging discriminatory mortgage lending. Was that an unusual move for a city? We actually filed multiple lawsuits against four of the nation’s major banks. I think that the city attorney’s office should be the leading public law firm of the country, and certainly the leading public interest law firm in our region.

What are your retirement plans? I don’t want to retire.

What is your favorite radio station? KPCC.

Which person in history would you most like to take out for a beer? Gandhi. I don’t know that beer would be the right thing.

If you had to choose only one dessert for the rest of your life, what would it be? Napoleon.

What are the three most deplorable conditions in the world? Hunger. Homelessness. Global warming.

Who are your two favorite U.S. presidents? Lincoln, Franklin Delano Roosevelt.

What word you would like on your tombstone? Compassion.
Estate Planning Guidance in a Marital Dissolution

KNOWLEDGE OF FAMILY LAW AND ESTATE planning issues are essential to practitioners in either area due to the limitations placed on estate planning after a spouse files for divorce. Estate planning for marital dissolution is too often ignored especially as retirement age couples filing for divorce continue to increase.1 Every initial divorce consultation should cover the client’s current estate plan and testamentary wishes; conversely, an estate planning consultation should involve questions regarding the couple’s marital status.

Upon petitioning for marital dissolution or being served with the petition and summons, automatic temporary restraining orders (ATROs) take effect, and, in part, restrain both parties from transferring, encumbering, or disposing of any property, including separate, quasi-community, and community property, without mutual written consent or by court order.2 The ATROs are intended to protect the parties’ rights during the dissolution proceeding by maintaining the status quo. Postfiling spouses are restrained from “creating or modifying a nonprobate transfer in a manner that affects the disposition of property” but may do so with spousal consent or by court order.3 A postfiling spouse is precluded from unilaterally amending the family trust to change the disposition of his or her half-interest in community property and separate property upon death. Often, trusts distribute the deceased spouse’s estate to the surviving spouse, either outright or in trust, leaving the postfiling spouse unable to dispose of his or her trust estate in favor of minor children or otherwise. Therefore, it is imperative to understand the impact of ATROs on a client’s estate planning objectives.

If a spouse dies before judgment is entered terminating the marital status, the marriage terminates by operation of law, and the spouse’s property passes as if a petition for dissolution had never been filed, likely in favor of the surviving spouse. Postfiling spouses are restrained not only from modifying the family trust in a manner that affects the disposition of assets but also from changing beneficiary designations on life insurance policies, retirement plans (IRAs, 401ks, etc.), annuities, POD accounts, and other similar beneficiary designations.4 These restraints also apply to the spouse’s separate property, including separate property trusts and life insurance policies.

Postfiling spouses may create, modify, or revoke their wills without notice, spousal consent, or court approval.5 A spouse may create a new will disposing of his or her estate upon death and nominate new executors and successor guardians for the minor children. If a spouse retained a general power of appointment over the family trust, he or she may be able to accomplish what was not possible through trust amendment by exercising the power of appointment in the new will. Alternatively, if a spouse reserved the right to revoke the family trust without the other settlor’s consent, he or she may unilaterally revoke the trust by filing notice and serving it on the other party or with court order.6 Concurrently, the spouse should create a pour-over will and establish a new trust, although he or she will be restrained from funding it even with his or her separate property. After the parties’ respective property interests have been adjudicated and the judgments have been entered, the divorcee may transfer his or her property into the new trust.

In either case, an appropriately drafted pour-over will and a new revocable trust will enable the spouse to effectuate a transfer of assets to the new trust upon death. A spouse is permitted to create a new durable power of attorney (DPA) and advance health care directive (AHCD) without notice, spousal consent, or court approval.

With important exceptions, upon entry of judgment terminating marital status, nonprobate transfers to, and nominations of, the former spouse are revoked, including testamentary transfers in prior wills, family trusts, assets held in joint tenancy or community property with right of survivorship (CPWROS), and nominations under DPAs and AHCDs.7 There are several exceptions to automatic revocation, including life insurance designations8 and ERISA-governed plans.9 Counsel must be proactive in revising the estate plans of clients, making the desired changes before, during, and after divorce.

Spouses considering filing for divorce may modify their estate plans without court restriction, but the prefiling spouse remains limited by the fiduciary duty owed to the other spouse of the highest good faith and fair dealing.10 With advice of counsel, a prefiling spouse may revoke an existing trust as to his or her interest, fund a new trust with the property, create a new will, and effect severance of assets held in joint tenancy and CPWROS, as well as changes to beneficiary designations on retirement accounts and life insurance policies.

2 FAM. CODE §2040.
3 FAM. CODE §2040(a)(4).
4 A spouse may be able to change provisions of the family trust not pertaining to the disposition of property, such as provisions regarding successor trustees. Id.
5 FAM. CODE §2040(b)(1).
6 FAM. CODE §2040(b)(2).
7 PROB. CODE §§4154, 4697, 5600 et seq.
8 PROB. CODE §2024; PROB. CODE §5600(e).
9 PROB. CODE §§5600(e), 6122.
10 FAM. CODE §721.

Zachary S. Dresben and Jessica Ghirardo Gordon are trusts and estates attorneys at the Kramer Law Group and Rosenbloom Law Firm, respectively. Both serve on LACBA’s Barristers Executive Committee.

Counsel must be proactive in revising the estate plans of clients, making the desired changes before, during, and after divorce.
GRAY MARKET GOODS, also known as parallel imports, present an expensive problem to brand owners and authorized distributors. A 2009 study estimated that annual gray market goods sales across industries were more than $63 billion. However, brand owners may employ various strategies to combat the gray market, including trademark infringement actions, business strategies, and partnering with the U.S. Customs and Border Protection (CBP).

Gray market goods are branded goods that are sold into a market without the brand owner’s consent. They are not counterfeit goods, as they bear authentic trademarks or copyrights, or both. These goods may cause harm to the consumer, the brand owner, or the licensee in a variety of ways. For example, gray market goods may confuse the U.S. consumer, cause damage to the brand owner’s goodwill, may not be covered by warranty, and may jeopardize the relationships of brand owners with the U.S. distributors. Additionally, gray market goods may impede the brand owner from controlling the branding strategy and pricing controls for their products.

Procuring appropriate intellectual property (IP) rights can protect products by providing brand owners and their exclusive licensees with legal theories to defend against the unauthorized resale of their products. Due to the decision in a recent U.S. Supreme Court case, Kirtsaeng v. John Wiley & Sons, Inc., copyright protection does not offer much ammunition to combat gray market goods. Therefore, it has become increasingly important that brand owners obtain strong trademarks or patents on their products.

Although a copyright grants the copyright owner the exclusive right to distribute copies of the copyrighted work to the public, the first sale doctrine limits the scope of the copyright owner’s distribution right to the initial disposition of the work. This means that an owner who has sold copies of his or her work may not interfere with the later sale of those copies. Beginning in 1991, the Ninth Circuit heard a number of cases that presented copyright infringement claims related to the first sale doctrine and the importation of goods manufactured and sold abroad. In BMG Music v. Perez, BMG Music, CBS Inc., and A&M Records sued Edmundo Perez for importing and reselling records that the plaintiffs manufactured and sold abroad. The court found that for goods manufactured abroad the first sale doctrine does not provide a defense to infringement under Section 602 of Title 17 of the U.S. Code. The decision overlooked an important point: a company could always avoid the first sale doctrine by manufacturing all of its products abroad. Thus, for a number of years, the BMG Music case made copyright law a powerful tool for companies dealing with the import of gray market goods. The court in Denbicare USA Inc. v. Toys “R” Us attempted to amend this oversight, stating that a sale within the United States authorized by the copyright owner would trigger the first sale doctrine, regardless of the place in which the product was manufactured.

The cases coming through the Ninth Circuit culminated in the Supreme Court case Quality King Distributors, Inc. v. L’anza Research International, Inc. L’anza sold its products to a foreign distributor at prices 40 percent below the prices for the American distributors. Quality King Distributors would buy the products from the foreign distributor and sell them to U.S. retailers at a discount. The Court held that for products manufactured in the United States, the first sale doctrine applies. However, this case only addressed the importation of domestically produced goods. Four years later, in Omega S.A. v. Costco Wholesale Corporation, the Ninth Circuit relied on L’anza to focus on a new set of facts involving goods manufactured abroad. Omega watches manufactured in Switzerland were sold to a foreign distributor. After a series of transactions, the watches were purchased by a New York company and sold to Costco. The court granted summary judgment to Costco on the grounds that it was protected by the first sale doctrine, holding that the doctrine did not apply to products manufactured and first sold abroad. To support the ruling, the Ninth Circuit emphasized that copies made abroad, but first sold within the United States, were subject to the first sale doctrine. Despite the outcome in Omega, courts continued to struggle to establish the status of the first sale doctrine.

In 2013, the Supreme Court clarified the first sale doctrine as it applies to goods manufactured and first sold abroad. In Kirtsaeng, the Supreme Court rejected a publisher’s copyright infringement
claims in a gray market goods case. The defendant Kirtsaeng had his relatives purchase books in Thailand, and then he resold those books in the United States on the Internet for higher prices. Like the cases before it, Kirtsaeng turned on a provision of the Copyright Act that permits the owner of a copy that was lawfully made under the Copyright Act to resell the work.10 The publisher argued that the books printed in Thailand were not made under the Copyright Act and that the defendant cannot lawfully resell them. The Supreme Court, however, sided with Kirtsaeng, maintaining that the books were “lawfully made” given that they were printed in Asia under a license from Wiley. The Supreme Court held that the resale of copyrighted foreign edition textbooks in the United States, which were lawfully manufactured abroad, is protected by the first sale doctrine. Thus, post-Kirtsaeng, a U.S. copyright holder is unlikely to succeed in preventing the importation of gray market products manufactured for overseas markets by filing a copyright infringement lawsuit against the infringer.

**Lanham Act Actions**

The first sale doctrine does not apply as a defense in a Lanham Act action in which unauthorized imports differ materially from goods authorized for sale in the domestic market. Under the Lanham Act, a trademark owner can seek an order of exclusion under Section 42,11 and a domestic distributor can obtain monetary relief under Section 3212 or Section 43.13 Thus, brand owners should consider selling different versions of their products in the United States and abroad.

In *Hyundai Construction Equipment USA, Inc. v. Chris Johnson Equipment, Inc.*,14 the defendant purchased construction machines in Korea from Korean dealers that had purchased the machines from the manufacturer, the parent company of the plaintiff. The gray market seller sold the machines at a much lower price than the authorized U.S. dealer. However, there were a number of material differences between the gray market machines and their American counterparts. First, the gray market machines did not have the same warranty as the U.S. machines. Second, the serial numbers for the gray market machines were altered. Finally, many of the gray market machines had labels and manuals that were not in English, contained non-EPA compliant engines, and included model numbers not sold in the United States.

The gray market seller claimed that there was no actual consumer confusion. The court explained that this did not matter because actual confusion is not a requirement under the Lanham Act and because the consumers’ knowledge “would not protect subsequent customers.”15 The court also held that although the trademark in question was owned by Hyundai’s parent, Hyundai had an interest in protecting its products and its goodwill. The gray market seller was permanently enjoined from importing or selling any Hyundai equipment, and Hyundai was awarded the seller’s profits.

In another recent case, *Bose Corporation v. Ejaz*, the First Circuit affirmed summary judgment on the plaintiff’s trademark infringement claim and found that the presumption of consumer confusion was supported by evidence of material differences between products intended for sale in the United States and products intended for sale in other countries.16 The Court reiterated the point made in *Hyundai* that “[t]he law requires only that the infringement is likely to cause consumer confusion, not that it actually does so.”17 Despite a settlement agreement signed by Ejaz and Bose prohibiting Ejaz from reselling Bose electronics, Ejaz resold Bose home theater systems intended for sale in the United States on eBay to customers in other countries, including Australia.

Bose presented evidence of several material differences between its Australian products and the American products that Ejaz sold in Australia. Those product differences included regional coding, electrical power requirements, capabilities of the remote controls, duration of product warranties, and the design and functionality of the products’ radio tuners. The defendant attempted to minimize Bose’s evidence of material product differences between products by arguing that his eBay customers were not actually confused. However, the First Circuit concluded that the defendant’s statements explained why eBay consumers would not be confused about the identity of the sellers of the products they bought but that his statements gave no reason to believe that the eBay consumers would expect the products sold by Ejaz to function differently from products sold by authorized distributors.18

In *Hokto Kinoko Company v. Concord Farms, Inc.*, the Ninth Circuit affirmed a finding against a California company that imported and distributed mushrooms intended for the Japanese market, finding that “[b]ecause the likelihood of confusion increases as the differences between products become more subtle, the threshold for determining a material difference is low.”19 Furthermore, the court stated that “differences in language, quality control, and packaging may each be sufficiently material to render imported goods not ‘genuine.’”20

The court compared the U.S. mushrooms against the Japanese mushrooms and found that the gray market mushrooms were produced and packaged differently for the U.S. and Japanese markets. The U.S. mushrooms were identified as being organic in both English and Japanese, whereas the Japanese mushrooms were not organic and the packaging had only Japanese lettering. These distinctions established a material difference between the mushrooms, and the court issued a permanent injunction against the gray market importer.

Accordingly, *Hyundai, Bose, and Hokto Kinoko* illustrate an IP strategy commonly used by brand owners of selling different versions of their products abroad and in the United States, which allows for successful trademark infringement claims.

**Business Strategies**

In addition to IP strategies, attorneys may advise brand owners to utilize business strategies to minimize exposure to the gray market. Prior to selling goods internationally, each brand owner may want to conduct pricing analysis to determine whether its international pricing makes its goods susceptible to gray market goods importation. After realizing that there is a gray market goods issue, a worldwide pricing analysis for the goods may yield a list of countries in which gray market goods may originate. The brand owner may then use various strategies to dissuade the gray market importer by reducing the importer’s profit margins.

Before entering into contractual obligations, brand owners should carefully screen the foreign distributors. This will lower the risk of the foreign distributors’ selling the products to third parties that may import those products into the U.S. market. To obtain further protection, brand owners should negotiate contract terms that will limit the foreign distributors’ resale activities. For example, liquidated damages provisions can compel foreign distributors to pay brand owners if the owners identify goods in the U.S. market that were originally sold by the foreign distributor.

Some brand owners have taken the approach of partnering with online retailers such as Amazon, which provides them with some control over how their merchandise is sold.21 For example, by partnering with Amazon, some companies have been able to limit the sale of goods from third-party resellers. In particular, by striking direct distribution deals with the online retailer, the company may be able to obtain various benefits, including decreased number of listings from resellers, better product visibility, and more attractive general presentations of pictures and other visuals.

**U.S. Customs and Border Protection**

After meeting the requirements of the Tariff Act,22 a brand owner or exclusive licensee may partner with the CBP to prevent gray
market goods from entering the United States. The CBP is charged with implementing Section 42 of the Lanham Act according to the Lever rule and has various requirements for preventing gray market goods from entering the United States.23

Using the guidelines of the Lever rule, a brand owner may take affirmative steps during the manufacturing process to thwart gray market goods importation. For example, when feasible during the manufacturing process of the U.S. products, the brand owner may use materials, production mechanisms, and quality check standards that are different from those used when manufacturing products for foreign markets. Accordingly, manufacturing the U.S. goods to be materially different for different geographic markets may prevent gray market goods importation. Creating a material difference such as a different customer service number or a different warranty may not require much effort for the manufacturer of the goods.

The Lever rule originated from the 1993 case Lever Brothers Company v. United States, in which the CBP denied seizure of gray market soap products manufactured for sale in the United Kingdom.24 The soap used a different formulation from products that were made in the United States, but the CBP refused to seize them, citing that the Tariff Act regulations allow the importation of goods when the U.S. and foreign trademark owners are affiliated. The court found in favor of the Lever Brothers, ruling that foreign products that were manufactured using a different formula were materially and physically different from similarly trademarked products intended for the U.S. market and that these differences rendered the goods “non-genuine” and in violation of the Lanham Act.25 Moreover, the court held that infringing gray market goods could be seized even if the U.S. and foreign trademark owners were affiliated. The court found in favor of the Lever Brothers, ruling that foreign products that were manufactured using a different formula were materially and physically different from similarly trademarked products intended for the U.S. market and that these differences rendered the goods “non-genuine” and in violation of the Lanham Act.25 Moreover, the court held that infringing gray market goods could be seized even if the U.S. and foreign trademark owners were affiliated. In other words, according to the court, there is no affiliated company exception to seizure. (Not long after the decision, the Coalition to Preserve the Integrity of American Trademarks proposed regulations to implement the Lever Brothers decision to block importation of gray market products whenever there is a “demonstrable difference in the pre- or post-sale characteristics or treatment.”26)

To seek Lever rule protection, a brand owner or licensee must first meet various requirements under the Tariff Act.27 The Tariff Act defines restricted gray market articles as “foreign-made articles bearing a genuine trademark or trade name identical with or substantially indistinguishable from one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States and imported without the authorization of the
U.S. owner.” Restricted gray market goods include goods bearing marks applied by 1) a licensee independent of a U.S. owner, 2) a foreign owner independent of the U.S. owner, or 3) a U.S. owner to goods that the Customs Service has determined to be physically and materially different from articles authorized for sale in the United States.

To be able to take advantage of the protections offered by the Lever Rule, a brand owner must acquire or have trademark rights associated with the product sold both in the United States and abroad. If the goods bear the brand owner’s trade name, then the trade name may be recorded with the CBP. Goods bearing the trade name may be eligible for Lever rule protection, even if the trade name is not a registered trademark.

Under the Lever rule, the trademark owner can prevent unauthorized importation of gray market goods if the gray market goods are physically or materially different from the authorized U.S. goods sold under the same trademark or trade name. The CBP uses the following nonexclusive list of categories of physical and material differences between the authorized and gray market product: 1) composition, 2) formulation, construction, structure, or whether composite, 3) characteristics of performance and/or operation, 4) any differences that result from legal or regulatory requirements, certification, etc., and 5) other “distinguishing and explicitly defined factors that would likely result in consumer deception and confusion as proscribed under application law.”

To obtain Lever rule protection, trademark holders must state the basis of their claim “with particularity” and provide “competent evidence” to demonstrate that one or more of the categories of physical or material differences listed above exist. The CBP has recognized the following material differences: 1) differences in packaging and labeling, 2) languages other than those used on U.S. product packaging or product information, 3) different ingredients being used to produce the products, 4) a significantly reduced price from the price set by the authorized U.S. distributor, and 5) disparities in warranty protections. The term “physical” refers to tangible product qualities. Accordingly, after meeting the above standard under the Lever rule, the CBP will seize the gray market goods.

If Lever rule protection is granted, future imports of materially different products are presumptively detained. However, there are exceptions. If the unauthorized importer attaches a disclaimer—for example, a label—that complies with CBP regulations, the goods may be allowed to enter the United States. The permanent, nonremovable label

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indicating that the imported goods are materially different has become known as the “Lever label,” and an importer may add it to the goods after they have been detained, thereby obtaining their release. The removal of the Lever label after importation and prior to resale can result in seizure. The CBP claims that the Lever label eliminates the likelihood of confusion upon which the Lever rule is based.

Despite this safe harbor provision, federal courts and the International Trade Commission (ITC) still find that importers cannot avoid a likelihood of confusion simply by affixing the label—this is in line with how labels and disclaimers are often assessed in other trademark cases. A notable example is a case involving Kubota Tractors, in which Kubota petitioned the ITC for relief with a gray market importation problem.36 The ITC found that labels failing to avoid a likelihood of confusion are a disfavored remedy. The ITC also stated that when there is a high likelihood that the label will be removed and/or destroyed, labeling is not an effective remedy. Thus, although Lever labels are used to skirt the Lever rule, companies may sometimes seek recourse.

Although gray market goods pose a serious threat to brand owners’ profitability, control over pricing, and branding strategy, there is an array of legal and business options available to owners to expose, monitor, and combat the effects of gray market activity.■

5 The importation of copyrighted material obtained outside the United States is prohibited, unless the copyright holder grants permission. 17 U.S.C. §602.
10 Id. at 1354-55.
15 Id. at *8.
16 Bose Corp. v. Ejaz, 732 F. 3d 17 (1st Cir. 2013).
17 Id. at 27.
18 Id.
20 Id. at 1094.
23 19 C.F.R. §§133.2-133.27.
25 Id. at 1338.
27 19 C.F.R. §133.23(a).
28 Id.
29 Id.
30 19 C.F.R. §§133.2 to 133.27.
31 19 C.F.R. §133.2(e).
32 Id.
34 19 C.F.R. §133.2(b).
35 In this case, the trademark owner may seek protection under the Tariff Act.
Understanding Rule 201 of the Federal Rules of Evidence

WHILE THE FEDERAL RULES OF EVIDENCE erect numerous hurdles to the admission of evidence in a federal trial, many procedural devices can be employed to overcome—or at least sidestep—those hurdles. One of the more customary mechanisms used to clear evidentiary hurdles such as authentication and hearsay is a request for judicial notice pursuant to Rule 201 of the Federal Rules of Evidence. Although requests for judicial notice sometimes will solve the evidentiary problem facing a practitioner—for example, how to admit into evidence data from a government agency’s Web site or a previously filed declaration—many requests seem to demonstrate a lack of understanding of the proper function of a judicial notice or how to correctly make a request. A request for judicial notice is more than a substitute for formal proof but far less than an all-purpose cure for admissibility defects. Thus, it is important for practitioners to be aware of the device’s limitations and its procedural requirements.

Rule 201 establishes the method for obtaining judicial notice of adjudicative facts, which are facts relevant to a particular case. Judicial notice can be used to take notice of facts generally known within the community that are not subject to reasonable dispute. The statements “the sun rises in the East and sets in the West” and “water freezes at 32 degrees Fahrenheit” exemplify this use. Alternatively, judicial notice is also used to take notice of facts that are not subject to reasonable dispute and that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” In other words, notice can be taken of facts that can be looked up in a reliable source. This form of judicial notice has been used to obtain judicial notice of information contained in court records, public records, other government documents, and various other sources.

Of the two, it probably is more common in motion practice to encounter a request for judicial notice of a fact that can easily be verified by a reliable source. It is central to understanding either form, however, that courts take judicial notice of facts, not documents. This point is frequently overlooked by practitioners, and courts often are asked to take judicial notice of a document as opposed to a fact contained within that document. For example, “Party A hereby requests that the Court take judicial notice of the document attached hereto as Exhibit B.” The moving party bears the burden of persuading the court that judicial notice is proper because Rule 201(d) explicitly requires that the court be provided with the necessary information to take judicial notice of a fact. Without more information, the request for judicial notice of an entire document containing a judicially noticeable fact probably will not satisfy this burden. However, Rule 201(d) does not explain what constitutes necessary information. At a minimum, any request probably should 1) identify the specific fact to be noticed, 2) attach the reliable source containing that fact, 3) provide a pinpoint citation to the reliable source, and 4) explain why it is appropriate for the court to take judicial notice of that specific fact.

Significantly, notice of a fact that can easily be verified from a reliable source also allows a court to take notice of its own records, as well as records from a prior, related proceeding in state or federal court. If the fact to be noticed concerns an order that was entered or a document filed in a prior related proceeding on a certain date, the request should ask the court to take notice of that fact as reflected in the attached document downloaded from PACER or a similar state Web site. More often than not, though, a request will seek something more and ask the court to take notice of the truthfulness of the contents of the court record. This is another way in which many requests may go awry. Some confusion over this issue may stem from California’s rules regarding judicial notice of court orders, judgments, and findings of fact and conclusions of law, given that there is at least some authority standing for the proposition that judicial notice may be taken of the truth of the facts asserted in those documents. As numerous courts have observed, taking judicial notice of a court record or its contents is not the same as taking judicial notice of the truthfulness of its contents.

Judicial notice nevertheless remains useful for admitting documents into evidence because the taking of “judicial notice of court records” is actually a convenient shorthand for two distinct concepts—importing the documents into the record of the matter at hand and establishing their authenticity. Importing the documents into the record really is not a matter of judicial notice at all; it is a matter of offering evidence.

Concerning obtaining notice of documents from the court’s own records, several recent decisions have concluded that a request for judicial notice is not required to establish authenticity when a document is already part of the docket in the instant action. Moreover, while courts may take judicial notice of declarations previously filed in the instant action, they generally would prefer that the movant make the effort to obtain and file a new declaration rather than require the court to take judicial notice of the old one.

Importing a document into the record and establishing its authenticity by themselves will not render it admissible under the rules, and other grounds may exist that still could prevent its admission into evidence. A hearsay statement, for example, is not transformed into

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a statement of fact because it appears in a previously filed document.13 While a court may take judicial notice of its own files and records, it may not take judicial notice of the truth of any fact(s) or findings contained within the document. The contents of those records may still be admissible pursuant to other rules, but they are not admissible solely because judicial notice is granted pursuant to Rule 201.

The Internet

The latest frontier for judicial notice has been the Internet. When presented with facts or documents obtained from a government Web site, courts usually will take judicial notice of them.14 For example, in Seeley v. Cumberland Packing Corporation, the court took judicial notice of statistics available on the Web site of the administrative office of the courts because “these statistics are an official report of the United States government” and “are ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’”15 Similarly, in Aspenland v. American Servicing Company, the court took judicial notice of documents obtained from the Web site of the California State Bar showing that defense counsel were licensed to practice law.16

Thus, courts routinely take judicial notice of government-compiled statistics, as well as official reports and publications from agencies of the United States and state governments.17 There is no rule, however, that a court must accept as true all statements contained on a government Web site or in government documents, and a party must be allowed the opportunity to dispute their authenticity and the accuracy of any facts.18

A request for judicial notice of facts or documents obtained from a Web site should be accompanied by a declaration setting forth the process used to obtain the facts or documents, including the specific address (uniform resource locator, or URL) of the Web site in which the document was published, the date the Web site was accessed, and attesting that the document is a true and correct copy of the Web page downloaded from that Web site on that date, and that the printout containing the facts is an accurate reflection of what appeared on the Web site. Without this kind of declaration, it may prove impossible for a court to determine that a fact is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned” in the face of an objection.

Courts are less likely to take judicial notice of facts or documents obtained from a private Web site. For example, courts have expressed concerns regarding the authenticity of a Web site and who is maintaining the Web site, as well as whether statements from the Web site are “mere puffery.”19 So long as authenticity is not disputed, however, some courts have taken judicial notice of facts available on a private Web site.20 For example, in O’Toole v. Northrop Grumman Corporation, the court took judicial notice of a retirement fund’s earnings history taken from Northrop Grumman’s Web site because the company could not explain “why its own website’s posting of historical retirement fund earnings is unreliable.”21

Surprisingly, Wikipedia has been relied on by several courts, but most courts have concluded that due to its open-source nature, which allows that content can be written, edited, and revised by anyone, Wikipedia is inherently unreliable and cannot satisfy the requirements for judicial notice.22 The Internet Archive’s Way Back Machine poses similar issues with some courts’ admitting documents for certain purposes, such as prior art in the patent context.23 For a fee, the Internet Archive will provide an affidavit describing how it uses software programs to “surf the Web and automatically store copies of website files, preserving these files as they exist at the point of time of capture” and states that the attached documents “are true and accurate copies of printouts of the Internet Archive’s records of the HTML files for the URLs and the dates specified in the footer of the printout.”24 Most courts have found that this declaration is sufficient to authenticate a document, which means that the declaration also could be sufficient to demonstrate that the Way Back Machine is a source “whose accuracy cannot reasonably be questioned” for purposes of judicial notice.25

Regardless of whether judicial notice is sought from court records, government records, or the Internet, and no matter the extent of authentication submitted, judicial notice under Rule 201 is limited to facts, not documents. With that distinction in mind, and with sufficient effort to ensure that the court has the necessary information to take judicial notice, parties can put themselves in the best possible position to identify any potential evidentiary pitfalls and to determine whether judicial notice is an appropriate evidentiary shortcut. If these precautions are taken, a party can address any issues in the preliminary stage and avoid an unfortunate surprise at the hearing or trial if the court unexpectedly declines to take judicial notice of a fact integral to the party’s case.

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1 See Fed. R. Evid. 201(b)(1).
7 Compare Kilroy v. State, 119 Cal. App. 4th 140, 147 (2004) (finding it was error to take judicial notice of facts contained in an order, finding of fact, or conclusion of law unless “the order or judgment establishes a fact for purposes of law of the case or...res judicata or collateral estoppel”), with Magnolia Square Homeowners Ass’n v. Safeco Ins. Co., 221 Cal. App. 3d 1049, 1056 (1989) (finding court may “take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.”) (quoting Judge Bernard S. Jefferson, CALIFORNIA EVIDENCE BENCHBOOK §47.3 (1972)).
12 See In re James, 300 B.R. 890, 895 (W.D. Tex. 2008).
13 See In re Harmony Holdings, LLC, 393 B.R. 409, 413 (2008).
19 See Victrical Co. v. Tieman, 499 F. 3d 227, 236 (3d Cir. 2007).
21 O’Toole, 499 F. 3d at 1225.
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The Party's OVER

**Purton v. Marriott International, Inc.,** has expanded employer liability for the drunken negligence of employees.

According to a recent poll, about two-thirds of employers in this country hosted a holiday or end-of-the-year party for their employees last year. Alcohol was served at a majority of them. Shockingly, almost 30 percent of the attendees at these parties witnessed at least one of their coworkers driving home drunk. Company-sponsored holiday parties can be a great way to boost employee morale and reward employees for a year of hard work but also can lead to disaster. While everybody knows that unchecked alcohol consumption, especially if mixed with driving, can jeopardize the safety of the intoxicated worker and innocent third parties, many employers do not know the conditions under which they can be liable for the harm caused by their intoxicated employees or how to minimize liability.

An exemplary case originated in December 2009, when the Marriott Del Mar Hotel in San Diego hosted its annual holiday party for employees. Attendance at the party was voluntary. One of its employees, a bartender who was not on duty that day, attended the party and got drunk. He eventually left the party along with a coworker, and they arrived safely at the bartender’s home. Approximately 20 minutes later, however, the bartender left his house to drive his coworker home. On the way, the bartender got into an accident that killed another driver, whose family sued the hotel and the bartender. The Fourth District Court of Appeal, in *Purton v. Marriott International, Inc.*, found that Marriott could be held liable for the bartender’s actions.

The *Purton decision* expanded the concept of respondeat superior. Now, employer-hosted parties with free-flowing alcohol may result in employers’ being liable for the drunken negligence of employees after the party is over and everyone has gone home. The decision highlights why it is critical for California employers, including law firms, to understand the increased risk they face when employees drink at employer-sponsored events as well as what measures employers can take to mitigate these risks.

Under the doctrine of respondeat superior, an employer may be held vicariously liable for torts committed by an employee within the scope of employment. Respondeat superior departs from the general tort principle that liability is based upon fault, and the justification for this has varied over time. Early in the development of the respondeat superior doctrine, it was justified by the theory that the employer (master) exercised control over the employee (servant). The more modern justification for the doctrine is that an employer seeking to profit from a business enterprise is

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better able to absorb the costs of its employee’s negligence than an innocent injured party.7 This is true regardless of whether the employer is negligent or has control over the at-fault employee.8 The common law doctrine of respondeat superior is reflected in Section 2338 of the California Civil Code, which provides that a principal is responsible to third parties for the negligence of its agent in the transaction of the business of the agency.9

Quoting Prosser on torts, the California Supreme Court explained the underlying rationale for the doctrine of respondeat superior:

“[T]he modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer’s enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.”10

The doctrine is not simply a way to shift costs to a deep pocket—“[i]t is grounded upon ‘a deeply rooted sentiment that a business enterprise cannot justly disclaim respon-sibility for accidents which may fairly be said to be characteristic of its activities.”’11

Other reasons that support imposing liability on businesses for the risks created by the enterprise include that the doctrine 1) encourages accident prevention, 2) provides greater assurance of compensation for accident victims, and 3) provides reasonable assurance that, like other costs, accident losses will be broadly and equitably distributed among the owners and beneficiaries of the enterprises.12 In order for liability to be imposed under the theory of respondeat superior, however, the injured party bears the burden of establishing that an employment relationship existed between the defendant employer and the wrongdoer, and that the employee’s tortious act was committed within the scope of employment.13

Whether an employee’s wrongful acts were committed during the scope of employment is determined in one of two ways: 1) was the act either required by the employer or incidental to the employee’s duties (commonly referred to as the nexus test), or 2) was the employee’s misconduct reasonably foreseeable by the employer (even if not required or incidental)?14 If the employee’s conduct meets either test, the employer is vicariously liable for the employee’s conduct.15

Foreseeability

To establish scope of employment under the first test, there must be some nexus between the employment and the act in question (e.g., the act was required by the employer or it was incident to the employee’s duties).16 In the alternative, the foreseeability test is met when an employee’s conduct, in the context of a particular enterprise, is not so unusual or startling that it would seem unfair to factor the liability into the employer’s cost of doing business.17 This is true even when an employee acts outside his or her normal position or authority.18 Indeed, minor deviations for personal reasons do not bring the employee outside the scope of employment.19

For example, when a gas station attendant caused an accident during normal work hours while on a personal errand to purchase materials for the repair of his own vehicle, the court of appeal found that he still may be acting in the scope of employment since a jury could find that it was foreseeable that he would perform repairs on his personal vehicle during work hours and take the necessary steps to make those repairs.20 Similarly, a tractor driver was deemed to be within the scope of his employment even though he took his nephew as a passenger while performing his assigned task and a company rule forbade nonemployees from riding on the tractors, since it was foreseeable that employee drivers frequently violated rules against carrying passengers.21

However, when an employee substantially or materially deviates from normal work duties for private or unlawful reasons, respon-deat superior will not be invoked, and the employer’s actions are deemed unforeseeable. For example, a hospital was not liable for a sexual molestation committed by its ultrasound technician during a gynecological exam, even though intimate physical contact was inherent in the technician’s job, since the molestation was an “independent product of [the technician’s] aberrant decision to engage in conduct unrelated to his duties.”22

In another example, an employer was not vicariously liable for a plaintiff’s emotional distress resulting from threatening e-mail and Internet postings sent from its employee’s workplace computer since the e-mail and postings had nothing to do with the employer’s job duties.23

Also, foreseeability notwithstanding, it is well established that an employee is not acting within the course and scope of employment when commuting to and from work. Accordingly, accidents caused during the employee’s normal transit between home and work cannot support respondeat superior liability.24 This is widely known as the “going and coming” rule, of which the “special errand” and the “required vehicle” are among the few exceptions.25

It is important to note, however, that because courts have traditionally interpreted the term “scope of employment” broadly, and it ordinarily presents a question of fact for the jury’s determination, “the fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer.”26 An employer’s vicarious liability may extend to the employee’s negligence, willful and malicious torts, or acts that contravene an express company rule and confer no benefit to the employer at all.27

Intoxicated Employees

In California, a supplier of alcohol generally cannot be civilly liable for providing alcoholic beverages to an intoxicated person who then inflicts injuries upon another as a result of his or her intoxication.28 Only in cases in which an establishment sells or serves alcohol to an obviously intoxicated minor or where a social host knowingly serves alcohol to a person under the age of 21 at the host’s home can a plaintiff recover damages from the supplier of alcohol for injury or death proximately caused by furnishing the alcoholic beverages.29

However, it is well established in California that an employer may be vicariously liable for the acts of its intoxicated employee if the employee became intoxicated within the scope of his or her employment.30 What makes the employer liable in respondeat superior cases is not that the employer served the employee alcohol but rather that the employee consumed alcohol within the scope of employment and the consumption of alcohol was a proximate cause of the plaintiff’s injuries.

In McCarty v. Workmen’s Compensation Appeals Board, the California Supreme Court considered whether an employee’s intoxication at an office party arose in the course of his employment within the meaning of workers’ compensation law.31 In McCarty, an inebriated plumbing company employee was killed when he drove into a pole on his way home from a Christmas party at the office of his employer. The widow of the employee brought an action to recover worker compensation death benefits from the employer. The supreme court concluded that “[e]mployee social and recreational activity on the company premises, endorsed with the express or implied permission of the employer, falls within the course of employment if the
“activity was conceivably of some benefit to the employer...” or otherwise was a customary incident of the employment relationship.32 The McCarty court found that the employer’s purchase of alcoholic beverages for gatherings on the premises demonstrated that it considered the gatherings to be company activities that benefited the company by promoting camaraderie and the discussion of company business.33 Ultimately, the McCarty court found that “if the proximate cause is of industrial origin, the time and place of injury or death even if foreign to the premises does not serve to nullify recovery.”34

In Harris v. Trojan Fireworks Company, an employee of the Trojan Fireworks Company attended the company’s Christmas party and became intoxicated to the extent that his ability to drive a car was substantially impaired. Nonetheless, the employee attempted to drive home and got into an accident that resulted in the death of the other car’s driver and injuries to the children who were passengers in that car. The court of appeal held that the plaintiffs pleaded sufficient facts that, if proved, would support a jury’s determination that the employee’s intoxication occurred at a party, that the employee’s attendance at the party and the intoxication occurred within the scope of his employment, and that it was foreseeable that the employee would attempt to drive home while still intoxicated and might have endangered the other motorists on the highway.

In Childers v. Shasta Livestock Auction Yard, Inc., an auction yard employee got drunk at work after hours and then drove her car from the office to feed her horses. The plaintiff was riding as a passenger. The employee drove off the road and died. The plaintiff was injured and sued the employer. The court of appeal held that the employer was vicariously liable for the conduct of an employee who drinks alcohol at the workplace or at a work holiday party. In all three cases, however, the tortious acts occurred immediately after leaving the workplace or employer-sponsored event and before arriving home. What if an employee who is still intoxicated from a work party safely makes it home but leaves again and causes an accident? Purton supplies the answer.

The Holiday Party

Before the 2009 party, the management of the Marriott in San Diego decided to serve only beer and wine and limit alcohol consumption by providing two drink tickets to each employee in attendance. Before arriving at the event, Michael Landri, one of the hotel’s bartenders, drank a beer and shot of whiskey. He also packed a flask holding about five ounces of whiskey and was driven to the party by a coworker. While at the party, he consumed more alcohol. The hotel’s management did not enforce the two-drink limit, and a manager bartending the party began serving liquor from the hotel’s liquor supply, including refilling Landri’s flask with more whiskey. After a few hours, Landri and three other hotel employees left the party and drove back to Landri’s house. There was conflicting evidence at trial regarding whether Landri or somebody else drove the car home, but it was undisputed that the foursome arrived at his house without incident. Landri did not drink any more alcohol after leaving the party.

After spending approximately 20 minutes at home, Landri left his house again to drive an intoxicated coworker home. He was allegedly driving over 100 miles per hour when he rear-ended a vehicle driven by Dr. Jared Purton, who died from the collision. Following the accident, police determined that Landri’s blood alcohol level was .16, twice the legal limit. Although one of Landri’s coworkers stated that Landri did not appear to be drunk before he got behind the wheel, a police officer at the scene testified that Landri smelled of alcohol, slurred his speech, and had red, watery eyes. On the way to the hospital, he also shouted: “I’m a bartender and I know I shouldn’t have been driving.” He later pleaded guilty to vehicular manslaughter and went to prison. Purton’s parents filed a wrongful death lawsuit against the Marriott and Landri. The plaintiffs alleged that the hotel was vicariously liable for Purton’s death.

Marriott moved for summary judgment on the ground that the accident did not occur within Landri’s scope of employment. The trial court agreed with the hotel and granted summary judgment in its favor. On appeal, the plaintiffs argued that the trial court erred
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because Landri became intoxicated within the scope of his employment and that the Marriott’s liability followed the risk created by the intoxication.

Marriott contended that the trial court correctly decided that Landri was outside the scope of his employment when the accident occurred because his purpose for leaving his home was unrelated to his job. Marriott further argued that even if he became intoxicated within the scope of his employment, any vicarious liability of the hotel terminated as soon as Landri arrived home. In particular, the Marriott argued that because Landri made it home safely from the party, as distinguished from the employees at issue in McCarty, Harris, and Childers, the hotel could not be liable.

The Fourth District began its analysis by examining what the alleged negligent act was that occurred within Landri’s scope of employment. Was it his drinking to the point of intoxication at the party or his driving while intoxicated? Essentially, two legal positions have emerged on this issue. Under the first, the accident in question must occur at a time that the employee is acting within the scope of his or her employment. This is the theory the Marriott advocated, urging the court to focus on whether Landri’s act of driving while intoxicated was within the scope of his employment. Clearly, at the time Landri collided into the other car well after leaving the holiday party, he was not on the clock.

The second position, argued by the Purton plaintiffs, holds that it is sufficient that only the alcohol consumption occurred within the scope of employment. Citing McCarty, Harris, and Childers, the court of appeal found that California case law clearly establishes that:

[A]n employer may be found liable for its employee’s torts as long as the proximate cause of the injury (here, alcohol consumption) occurred within the scope of employment. It is irrelevant that foreseeable effects of the employee’s negligent conduct (here, the car accident) occurred at a time the employee was no longer acting within the scope of his or her employment.

Essentially, the court focused on the act on which respondeat superior could be based and not on when the act results in injury. Accordingly, the court found that no legal justification existed for terminating the employer’s liability as a matter of law simply because the employee arrived home safely from the employer-hosted party.

The court of appeal next considered whether a reasonable trier of fact could conclude that Landri was acting within the scope of his employment when he became intoxicated at the party. In analyzing this issue, the court, relying on McCarty, stated that this conclusion could be reached if Landri’s negligent actions “were undertaken with the employer’s permission and were of some benefit to the employer or, in the absence of proof of benefit, the activities constituted a customary incident of employment.”

After reviewing the evidence presented in the case, the court of appeal concluded that a jury could find that Landri was acting within the scope of his employment while becoming intoxicated at the work party. The court stated that a jury could conclude that the party and drinking of alcoholic beverages benefitted Marriott by improving employee morale and furthering employer-employee relations.

The court not only observed that the evidence could support a finding that the Marriott actually benefitted from its employees, including Landri, drinking at the holiday party but also concluded that the evidence showed that the drinking of alcoholic beverages by Marriott employees was a customary incident to the employment relationship. In particular, there was evidence presented that suggested Marriott impliedly permitted employees to consume alcohol while on the job. The court noted that employees would finish alcohol left over from parties after their shift, taste new drinks, or have drinks purchased for them; that employees had Marriott’s express permission to consume beer and wine at the holiday party; that Marriott did not follow its plan to limit consumption of alcohol to two drinks per person at the party; that Marriott managers consumed hard alcohol with employees at the party; and that deposition testimony revealed that “historically there has been a lot of drinking and not a lot of control at these types of [employee] parties.”

The Purton court reversed the lower court’s decision favoring Marriott.

Purton does not, however, constitute a complete win for plaintiffs suing employers for the negligent acts of their intoxicated employees, regardless of when those acts occur. While the court observed that “alcohol abuse is foreseeable and extremely dangerous and innocent people are injured or killed as a consequence of the negligence of those who have consumed alcohol at events that otherwise benefit a commercial enterprise,” the court did not impose respondeat superior liability on Marriott but rather placed the decision in the hands of a jury. Specifically, “the trier of fact will need to determine, based on the totality of the evidence presented, whether Landri’s act of leaving his home shortly after arriving from the party to drive a fellow employee to that employee’s home was ‘so unusual or startling’ so as to render the car accident unforeseeable.”

Following the court of appeal’s decision in Purton, Marriott filed a petition for review with the California Supreme Court that was denied on October 16, 2013.

Mitigating Liability at Holiday Parties

In many ways, Purton leaves employers with more questions than answers. It does not provide guidance on how far the employer liability can extend into the future. Could an employer also face liability if, the day after a holiday party, a hungover employee falls asleep at the wheel after a night of sleep at home? What if an employee does not drink but after staying very late at the party, drifts into oncoming traffic on the way to work the next day?

In the meantime, employers are confronted with a dilemma—they celebrate the season with their employees with parties that include alcohol? If they do, what other steps must they take to reduce or even eliminate their potential liability for the conduct of employees? In the course of deciding Purton, the court did offer some suggested courses of action that could provide employers with ways to minimize the risk they face when hosting their next holiday party.

In Purton, Marriott argued that imposing liability on the hotel would be unfair since the hotel had no right to control the personal conduct of its employees after they safely reached home. The hotel contended that the plaintiffs were essentially asking the court to create new law that any employee drinking alcohol at his or her place of employment or employer’s party must be escorted home and kept there. The court disagreed and found that the Marriott ignored the fact that it created the risk of harm at its party by allowing an employee to consume alcohol to the point of intoxication. The court determined that there were numerous ways to mitigate the risk posed by intoxicated employees at parties. In particular, the court stated that the hotel could have taken several steps to lessen risk. The hotel could have had a policy prohibiting smuggled alcohol; enforced its drink ticket policy; served drinks for only a limited time; served food; and forbidden alcohol at the party altogether.

For employers, other examples of ways to mitigate risks include providing taxis, car service, or hotel accommodations to employee attendees, or requiring that they sign a pledge that they will not drive that night if they consume alcohol at the holiday party, holding a holiday lunch instead of an evening event, thereby making it less likely that employees will overindulge, and designating trusted managers to monitor employees to ensure that no one gets overly intoxicated.

After Purton, employers must bear in mind that if an employee becomes intoxicated in his or her scope of employment, the employer may be exposed to liability for anything that employee does until he or she becomes sober.
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California employers, including law firms, need to evaluate how—or if—they plan to serve alcohol at work holiday parties. If alcohol is served, employers should implement and enforce policies regulating the use of alcohol. Doing so will also help minimize exposure to civil liability if someone gets hurt by an intoxicated employee after the party. Better yet, an employer can budget for sending employees home by hired transportation. That is the safest kind of holiday spirit employers can serve their employees this year.


7 Hinman, 2 Cal. 3d at 960; Jeewarat, 177 Cal. App. 4th 427.

8 Jeewarat, 177 Cal. App. 4th at 434.
Re-Searching

While search engines have made it easy to find facts, legal research still benefits from a methodical approach

THANKS TO GOOGLE, anyone with an Internet connection can access huge amounts of information at the click of a button, but this has not had entirely positive effects for legal research. Overreliance upon search engines can lead to the assumption that legal questions can be researched with little forethought, planning, or skill. Perhaps this is behind the perception that legal research skills have been eroding in recent years. The default starting point for legal research projects should not be to type key words into Westlaw, Lexis, or another legal database, even if West and Lexis implicitly encourage this practice through their new WestlawNext and Lexis Advance platforms, which mimic Google.

This is not an efficient or reliable way to research. It may lead to an answer eventually, but the researcher will likely spend a lot of time sitting with glazed eyes, overwhelmed by the sheer number of results. Moreover, the researcher will likely be less than confident in the end product of the research, since researching by this method is, by its nature, only as strong as the particular combination of key words used and the scope of one’s Westlaw or Lexis subscription. These problems are entirely avoidable. Instead of relying solely upon key words, a search engine, and hope, attorneys should employ a legal research method.

Like many complex tasks, legal research is best approached with a strategy. Strategic research—as opposed to relying on serendipity as one does when typing key words into a search engine—“maximizes efficiency and accuracy through a systematic approach to problem solving. It is the methodical approach to the query...that elevates the quality of the result.” The basic framework, presented in outline form in the sidebar on page 28, is recommended for legal research. Different legal research tasks will require different methods, depending upon the topic and such practical issues as how much time and how many resources are available, but the basic plan outlined in the sidebar may be employed with flexibility and can evolve as the project progresses.

According to this method, before beginning to research, it is useful to write down an

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outline of the sources to be consulted, and in what order. It is also advisable to keep notes of the results of one's search of each source and the search terms used. These practices keep the researcher focused and organized and avoid unnecessary replication of the work. Taking notes also helps the legal researcher remember what has already been found and where, which helps the writing process later. Staying organized on paper also allows a freer range of thought and more room for in-depth analysis.

After writing down the initial plan, the next step in a legal research project is to engage in preliminary analysis. Before starting to search, the researcher formulates the question or questions to be answered and assesses his or her knowledge of the subject. In other words, one does some thinking before one starts typing into a search engine. Based upon how much knowledge the researcher has, the next step is usually to consult a secondary source in order to gain the background knowledge necessary to complete the research task effectively.

If one is already an expert in the field, or the particular task is simple, perhaps secondary sources can be skipped, but this is not often the case. If one’s background knowledge in the area is minimal, one should first consult a less in-depth source such as California Jurisprudence, 3d before proceeding to more in-depth sources. If one’s background knowledge goes deeper, one can go straight to a well-known multivolume treatise such as Collier on Bankruptcy, Milgrim on Licensing, or Miller & Starr California Real Estate. If the issue is procedural, practice guides such as those published by the Rutter Group or CEB will likely prove helpful. Two reliable, all-in-one sources for procedure, legal background, and forms are the extensive Lexis publications, California Forms of Pleading and Practice (for litigation) and California Legal Forms: Transaction Guide (for transactional matters), which include in-depth but still accessible commentary spanning hundreds of topics.

It is necessary to develop knowledge through secondary sources for a few reasons. First, a researcher cannot properly frame the legal question involved unless he or she knows the doctrinal landscape of the subject area. For example, in a suit for defamation, one cannot begin to effectively research whether a particular publication is likely to be defamatory unless one first has an understanding of the elements of a defamation suit, the privileges and First Amendment protections that may apply to protect the statement, and so on. One cannot simply start typing the facts of the case into a search engine with the words “defamatory” and “libel” or “slander” and expect to find an answer in a time-efficient and reliable way. By contrast, if one has reviewed a secondary source like Smolla’s Law of Defamation and identified the potential applicability of, say, the common interest privilege, one can then query the relevant facts and “common interest,” obtaining a much more focused and useful set of results.

Preliminary analysis through review of secondary sources also benefits the researcher by providing the vocabulary needed for a search of primary authority. For example, even if one is confident about the proper search terms to use, it is important to keep in mind that many commonly used terms have other, less commonly used permutations that can be discovered through review of the secondary materials. Examples of these interchangeable terms abound, such as “writ of mandamus,” or its close relative, the “writ of prohibition,” in place of the more common “writ of mandate.”

Secondary sources also provide a useful shortcut to the major statutes, cases, and regulations governing a particular area. The fact that these authorities have been identified as important to a particular area of law by a recognized source can save time by narrowing the number of primary sources to be reviewed. Being able to identify relevant cases early can also provide an entrée into the larger body of case law. Much useful case law can be discerned by reviewing a major case cited in a secondary source, and then Key-Citing or Shepardizing that case.

However, identifying and gaining access to needed secondary sources can be challenging. Fortunately, there are several tools available to help a researcher find the right source. First, many law school libraries publish online subject-specific research guides that list major sources on a topic. Google (which is useful) can help the researcher locate these guides. For example, terms such as “tax law research guide” can lead the researcher to the robust guide written by Kevin Gerson at UCLA School of Law. These research guides often list sources of primary law, as well, which can be very helpful. If one is dealing with a federal or common law issue, Georgetown Law Center maintains a handy treatise finder that is organized by topic.

California’s county law libraries are open to the public and free to use. Reference librarians at county law libraries have expertise in identifying appropriate sources and can be reached by phone, e-mail, or chat. In many cases, they can also put the source material on hold at the reference desk or e-mail the pertinent pages to the researcher. One can also access law school libraries, especially if one is an

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**An Outline for Legal Research**

**A generally applicable method** for legal research consists of:

1. Preliminary analysis and review of secondary sources.
2. Locating primary law.
   a. Statutes or other controlling law, through use of
      i. Secondary sources,
      ii. Code indexes, and
      iii. Key word searching;
   b. Cases, through use of
      i. Secondary sources,
      ii. Annotated codes,
      iii. Digests, and
      iv. Key word searching;
   c. While, either along the way or at the end, Shepardizing or updating the primary law.
3. Refining the analysis through scholarly commentary and government data.—R.M.

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When selecting a secondary source in an unfamiliar area, it is a good idea to start with a multivolume treatise.

One can use a research guide to identify primary and secondary sources in the area of law one is researching.

A good way to locate a relevant research guide is to search Google for “[area of law] research guide.”

KeyCite or Shepard’s should be used at the end of a research project when checking the status of a case and earlier to help locate other relevant authority.

Most practitioners in Los Angeles do not have easy access to a reference librarian.

It is often quite expensive to subscribe to or purchase a recognized secondary source.

County law libraries in California charge attorneys a fee for on-site access to databases like Westlaw and Lexis.

Reviewing the contents of a relevant section of the shelf at a law library is a good way to get a sense of the treatises, practice guides, and other sources available on a given subject.

Using an index to identify relevant sections of a treatise or code is functionally the same as doing an online key word search of a database containing that treatise or code.

Key Numbers are useful for identifying relevant cases without the uncertainty and laboriousness of key word searching.

Relevant Key Numbers can be identified from any of the following sources: West’s Annotated Code, relevant cases on Westlaw, and some secondary sources published by West.

Lexis’ Topics and Headnotes system allows one to search for potentially relevant cases assigned to a given headnote or topic.

By using established research tools like digests, annotated codes, and secondary sources, one can safely forgo key word searching on databases like Westlaw or Lexis entirely.

LegalTrac is a useful database for reading law review articles.

It is advisable to search for relevant cases first, before moving on to statutes.

When one knows only the popular name of a federal statute, the best way to find that statute in the U.S. Code is to search on the Internet for that name as a phrase.

When starting to identify relevant cases, narrowing relevant key words into Westlaw or Lexis.

When one knows only the popular name of a federal statute, the best way to find that statute in the U.S. Code is to search on the Internet for that name as a phrase.

To locate other relevant authority.

By using established research tools like digests, annotated codes, and secondary sources, one can safely forgo key word searching on databases like Westlaw or Lexis entirely.

LegalTrac is a useful database for reading law review articles.
alumnus of the school. Additionally, many law libraries make their catalogs available online, which can prove a valuable tool in identifying sources. If one has the time to go to the law library, the call number system allows one to browse the shelf for a comprehensive overview of the publications classified within a given subject area. Since accessing materials at all county law libraries and many law school libraries is free, libraries can be remarkable cost-savers when one considers the steep prices of most recognized secondary sources.

When searching for statutes—which is, generally, a researcher’s first step, even if the presence of statutory authority in the area seems doubtful—the index to the controlling code, either in print or online, can prove more efficient than key word searching. This is because human creators of code indexes have already done an enormous amount of work.

Primary Sources

Once a sufficient base of background knowledge is acquired, a researcher’s second step is to locate the relevant primary law. This usually means statutes and cases, but regulations, administrative decisions, court rules, constitutions, or international treaties and accords may also be considered. Usually, locating this primary authority will proceed in two steps: finding statutes or other controlling law, and then finding mandatory or persuasive precedents interpreting that law.10 The secondary sources consulted in the first step will likely have uncovered some of the relevant primary law, but a researcher needs to search sources of primary law directly to be certain that all the relevant and controlling law has been found.

It is at this stage that a researcher may benefit from a general key word search on Westlaw or Lexis. However, other tools may prove faster and more reliable when beginning the search for primary law. When searching for statutes—which is, generally, a researcher’s first step, even if the presence of statutory authority in the area seems doubtful11—the index to the controlling code, either in print or online, can prove more efficient than key word searching. This is because human creators of code indexes have already done an enormous amount of work that researchers can use to their advantage. First, human indexers have often thought of some equivalent terms that researchers may use instead of the actual language of the statutes, providing an advantage over simple key word searching. The indexers have also broken up index entries into headings with topics and subtopics (including the helpful “Generally, see…”), making index entries much more organized and accessible than a list of results generated by an algorithm. Related subtopics under a topic heading can also give the researcher ideas for further investigation.

If the researcher already has a statutory citation, the finding tools that accompany the code offer advantages over a key word search. Often, relevant law is referred to by the popular name or a section of the statute—for example, Title 7 of the Civil Rights Act. However, neither of these refers to the code itself, necessitating use of the popular name table to find the corresponding code sections. If one only has a session law rather than a code reference, one may use conversion tables to find where a session law has been codified. Researchers may also find that using the print code makes it easier to flip between an index and different code sections and to see individual code sections in the context of surrounding sections. This may prove easier than looking at individual sections discretely, as one must on Westlaw or Lexis.

Annotated Code and Digests

Once a researcher is satisfied that the search for statutes is complete, often the best starting point in the search for case law is the annotated code. Annotated codes have Notes of Decisions that list the major decisions interpreting a particular section. These case citations are organized by topic and include short summaries of the basic facts and holding. The annotations to the code include additional, often overlooked, content that is of value to researchers. First, immediately following the end of the text of the statute, one finds a list of all of the session laws that enacted or modified that section, along with, usually, a narrative history of the changes made to the statute over time. This is a gold mine should a researcher have to investigate legislative history. After this and prior to the Notes of Decisions, one can find a variety of references to treatises, practice guides, and law review articles that address the section. These can be helpful should a researcher need to return to secondary sources for further explanation, or if the researcher needs to find a form or template. (West’s version of the annotated code, however, refers primarily to West publications, as does Deering’s annotated code for Lexis.)

One last important feature of the annotated code should also be mentioned that leads into a third important and underutilized tool for finding primary law. When using West’s annotated code, one will find a Library References section with numbered key citations. These citations also follow each case citation under the Notes of Decisions. Most lawyers will recognize these as citations to West’s Key Number system, but many may not realize or remember how useful this system is. (Lexis has a similar system of searching by topic or headnote.)

West’s Key Number system (frequently called the Digests) originated in the late nineteenth century as a solution to the problem of finding relevant case law by topic within and across the country’s many jurisdictions and case reporters. It was the first such system to do so, and it started the rise of West Publishing Company. Essentially, the Key Number digest system organizes all published case law within the United States into a hierarchical tree of 400 major topics and 80,000 subtopics. Once a relevant key number is identified, results can be limited to particular jurisdictions, either by going to the digest for that state in print or setting limits manually on Westlaw. The same number is assigned to the same topic in every jurisdiction, allowing easy identification of cases across jurisdictions.12

This system can provide a major advantage to researchers looking to avoid the uncertainty and laboriousness of key word searching. Identifying a relevant key number provides access to a set of cases on a narrow topic that have already been interpreted and given short summaries by research attorneys at West. In other words, much of the work has already been done. This set of results can then be searched by key word or simply scanned if not too long.

Because the key number system is inte-
grated throughout West publications online and in print, there are many ways to identify relevant topic numbers. West’s annotated codes are one way, but if a researcher is using a secondary source published by West, these will also sometimes refer to key numbers. In the West version of a published case, each headnote will be assigned to a specific key number, which on Westlaw will enable the researcher to click through to that key number immediately for a list of other potentially relevant cases.

A researcher can also go straight to the digests without intermediary, either in print or online. One can view the top-level major topics, and from there focus on specific topics through the key number hierarchy. This approach has the advantage of bringing closely related issues to the researcher’s attention. Alternatively, if using the digests in print, a researcher can use the words and phrases finding tool (essentially an index) to locate relevant key numbers by topic. If using the key number system online, one can accomplish the same thing by searching key numbers for relevant terms.

The topic and headnote system of Lexis operates similarly to West’s key number system, although it does not have a print counterpart. One can use the Lexis system by selecting the Topics tab from the homepage under Browse, access a full hierarchical tree of U.S. legal topics, and from there narrow the search to specific topics on which one needs case law. Alternatively, a researcher may search for relevant forms among the topics and headnotes themselves. Once a relevant topic is found, one can display the cases on that topic by jurisdiction. For example, if a bankruptcy practitioner in California needs case law on lack of good faith as a basis for dismissal, he or she can select the topic Bankruptcy Law from the By Topic or Headnote page, select the subtopic Conversion & Dismissal, the sub-subtopic Lack of Good Faith, the jurisdiction Ninth Circuit, and press Get Documents to display—and search only within—the cases from the Ninth Circuit addressing this subject.

The Topic and Headnote system can also be accessed indirectly when reading a case in Lexis online. This can be done by clicking on the View in Topic Index icon next to the relevant headnote topic to display other cases that address the same or similar points of law.

By using the simple but underutilized research tools of secondary sources, indexes, annotated codes, and digests, a researcher can usually locate the majority of relevant primary law quickly, systematically, and reliably. This is not to say, however, that a key word search on Westlaw or Lexis should be avoided entirely. To the contrary, this research technique certainly has its advantages. It can
be useful at the end of one’s search for primary law as a way to be certain that nothing important has been missed. Because the researcher is aware of the basics of the topic, performing a key word search toward the end of the process makes sifting through results much less time-intensive than it would likely prove at the beginning.

Lastly, the search for relevant primary law would conclude with Shepardizing or otherwise updating all the statutes, cases, and any other authority upon which the researcher plans to rely. Although print resources are underutilized, electronic research clearly has the edge when it comes to checking for recent updates. In years past, updating could be a complex task that involved consulting print Shepard’s reports, advance sheets for statutes and cases, and legislative service publications. Now the validity of a case or statute can be determined quickly through use of KeyCite on Westlaw or Shepard’s on Lexis. For the most part, statutes are kept up-to-date on these databases, including notes indicating pending legislation that may affect the statute. However, it is still advisable to search recently passed session laws (or pending regulations in the notice register for the jurisdiction if dealing with regulations).

The third step is to refine the analysis. After a researcher has located and reviewed the relevant primary law, it will often prove fruitful to engage in a final, big-picture analysis of the issue. At this point, a researcher should know what the law is, but often it will be useful to find support for one’s position on how the law should be interpreted or applied, as a matter of public policy. This support can come from different places. Law review articles are a major source of scholarly commentary, and they can be found via annotated codes and through Shepard’s or Key Cite. Perhaps the best resource, however, is a database called LegalTrac, which is available at many law libraries. The most complete indexing service for law reviews, LegalTrac allows the researcher to search by key word and subject heading. Subject headings can enable a researcher to see (but not read) all the articles on a specific subject or limit a search to a specific subject.

LegalTrac may be used with HeinOnline, another commonly available database at law libraries. HeinOnline contains virtually all law reviews and bar journals, making it a good source for obtaining relevant articles. If one has access to a Lexis or Westlaw subscription that includes law reviews, LegalTrac allows the researcher to search by key word and subject heading. Subject headings can enable a researcher to see (but not read) all the articles on a specific subject or limit a search to a specific subject.

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identified by consulting an online research guide or the Georgetown Treatise Finder.

**Government Data**

Finally, public policy arguments can often be bolstered through statistical and other government data. The easy-to-use census.gov site contains a huge amount of publicly available data on a great number of topics concerning business, employment, health, income, poverty, and international trade, among many others. The handy *Statistical Abstract of the United States* is available at any law library and collects many of these statistics. It should also be noted that some larger law and general libraries employ a specialized government documents librarian who can be consulted to find specific government information.

A time-tested legal research method can still save attorneys time and frustration, and print tools such as code indexes, digests, and treatises still have tremendous value. Online databases may have made locating and accessing many types of legal information easier and faster than before, but it is important to remember that they have not at all changed which sources one should generally consult, and in what order, if one hopes to carry out effective and efficient research.


2. Osborne, supra note 1, at 55.


4. Osborne, supra note 1, at 55.


6. Cohen, supra note 5, at 385-86.

7. See, e.g., Rombaier, supra note 5, at 144-46; Osborne, supra note 1, at 55.


10. See, e.g., Rombaier, supra note 5, at 144-46.

11. Id. at 147.


13. Rombaier, supra note 5, at 146.
THE MARITIME INDUSTRY employs in excess of 1.2 million crew members who assist with the transportation of approximately 90 percent of global trade. The work of these men and women is the main engine that drives economic activity in ports across the United States; however, the work of a seafarer has always been difficult and extremely dangerous, requiring long stays working away from home and exposure to the perils of the sea. Under conditions that have been described as a jail with the chance of drowning, seafarers are vulnerable to exploitation and abuse, nonpayment of wages, noncompliance with contracts, exposure to poor diet and living conditions, and even abandonment at foreign ports. Thus, from the earliest times, special protections have been enacted relating to seafarers, with these protections in the United States and Britain going back over 200 years.3

In Isbrandtsen Company v. Johnson, the U.S. Supreme Court explained why our historic national policy, both legislative and judicial, has made seafarers a protected class for over two centuries:

Whenever congressional legislation in aid of seamen has been considered since 1872, this Court has emphasized that such legislation is largely remedial and calls for liberal interpretation in favor of the seamen….Our historic national policy, both legislative and judicial, points the other way (from burdening seamen). Congress has generally sought to safeguard seamen’s rights. The maritime law, by inveterate tradition has made the ordinary seafarer a member of a favored class. He is a “ward of the admiralty,” often ignorant and helpless, and so in need of protection against himself as well as others….The ancient characterization of seamen as “wards of admiralty” is even more accurate now than it was formerly.6

Since the foundation of the republic, therefore, “[t]he policy of Congress, as evidenced by its legislation, has been to deal with [seamen] as a favored class.”7 In 1790, the First Congress enacted laws to prevent shipowners from indiscriminately withholding a seafarer’s wages. These laws were subsequently strengthened in scope for the benefit of seafarers in amendments passed in 1872, 1898, and 1915.9 Congress also enacted the Merchant Marine Act, also known as the Jones Act, in 1920 to give seafarers a cause of action.
action for negligence against employers and shipowners who fail to provide a safe work environment to their crewmembers.

From the beginning, federal courts, acting similarly to Congress, have remained guardians of seafarers. The Fifth Circuit explained in Castillo v. Spiliada Maritime Corporation: “We are convinced that federal courts must remain vigilant in protecting the rights of seamen, whether foreign or domestic, in their relationship with their employer. This protection comports with our nation’s long history of concern and solicitude for seamen, whether foreign or domestic—a cause of action against employers for negligence, provides: A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of a trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

Thus, the Jones Act grants seafarers who suffer personal injury in the course of their employment the right to seek damages in a jury trial against their employers in the same manner as railroad employees may under the Federal Employers Liability Act (FELA). Just as provided under FELA, the employer under the Jones Act is liable in damages for injury or death resulting in whole or in part from the negligence of its officers, agents, or employees. This means that if a qualified seafarer is injured by the negligent act of a fellow crew member or the captain, the employer is vicariously liable. Further, under the Jones Act, the employer has a fundamental duty to provide a seafarer with a reasonably safe place to work. The duty to provide a reasonably safe place to work is absolute and nondelegable. The Jones Act also benefits from FELA’s “featherweight” standard of causation. Recently reaffirmed by the Supreme Court in the matter of CSX Transportation, Inc. v. McBride, under the featherweight standard, employers are liable for employee injuries resulting from the negligence “no matter how small” of the carrier. Under this standard, if negligence by the carrier is proved and shown to have played even the slightest part in producing the injury, the carrier is liable for damages whether or not the injury was probable or foreseeable. That the injury may be attributable to other causes is not relevant.

The Jones Act also provides for a claim for the failure to treat medical claims. The shipowner or employer has a duty to take all reasonable steps to provide a seafarer who qualifies as a seaman with prompt, proper, and adequate medical care. A seafarer’s cause of action for “failure to provide prompt, adequate or proper medical treatment” is a negligence claim against the employer. Under these principles, a shipowner is vicariously liable for the negligence of a physician (whether a shipboard or shore side doctor) selected by it to treat an injured or sick qualified seafarer.

A Jones Act lawsuit may be properly filed only against the seafarer’s employer. Although the employer and the shipowner are usually the same, in some cases a seafarer may be employed by a company other than the shipowner. In such a case, the shipowner is liable in rem. Resolving who constitutes the proper Jones Act employer is a mixed question of law and fact, within the province of the jury upon instructions by the trial court. The questions of fact include ascertaining 1) who had the power to engage the seafarer, 2) who determined the wage to be paid, 3) who had the power of dismissal, and 4) who had the right to control the seafarer’s on-the-job conduct. Thus, a seafarer may have “more than one Jones Act employer, and under the borrowed servant doctrine a seafarer may sue a number of employers, forcing these to argue their culpability to the jury.” In that respect, the borrowed servant doctrine is the functional rule that places the risk of a worker’s injury on his or her actual rather than nominal employer. The rationale for the rule is to prevent the use of nominal employers (entities that exist only on paper) to hide or shield the workers’ actual employer. Otherwise, real employers could simply form shell companies with no assets as fronts, leaving the seafarer without the ability to recover.

The Seaman’s Wage Act

To shield qualified seafarers against unfair conduct by shipowners, Congress enacted special wage protection statutes and did not limit this statutory coverage to American seafarers who qualify as seamen; rather, Congress extended protection to all qualified seafarers who serve on a foreign vessel when located in a U.S. harbor. Two relevant portions of the Seaman’s Wage Act govern when a shipowner must pay a seafarer’s wages: “At the end of a voyage, the master shall pay each seafarer the balance of wages after he or she is discharged, whichever is earlier.” If a shipowner withholds a seafarer’s wages and lacks “sufficient cause” for withholding them, “the master or owner shall pay to the seafarer 2 days’ wages for each day payment is delayed.” Under Section 10313(f) of the act, a qualified seafarer is entitled to reimbursement of all wages unlawfully withheld by the shipowner, and Section 10313(g) authorizes payment of additional penalty wages if the withholding is found to be
without sufficient cause.

Once the seafarer establishes a wrongful deprivation of his or her wages, the burden of proof shifts to the shipowner to demonstrate that its failure to pay the wages was justified. If the defendant shipowner fails to meet its burden to show that the withholding was made with sufficient cause, “the unadorned language of the statute dictates that the shipowner ‘shall pay to the seaman’ the sums specific for each and every day during which payment is delayed.”

A withholding is without sufficient cause when it is premised on bad faith, or a negligent, willful, unreasonable or arbitrary attitude upon the master or shipowner in refusing to pay earned wages. In the seminal statutory penalty wages case, Griffin v. Oceanic Contractors, the Supreme Court explained the statutory intent behind the penalties, stating that “Congress has chosen to secure prompt payment of seamen wages through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment.” Applying this reasoning, the Supreme Court ordered a statutory penalty of $302,790.40, to an employer who had failed to pay $412.50 for 4 years.

### The Duty to Provide Maintenance and Cure

In Flores v. Carnival Cruise Lines, the Eleventh Circuit explained the maintenance and cure policy as follows:

The seaman’s action for maintenance and cure may be seen as one designed to put the sailor in the same position he would have had he continued to work: the seaman receives a maintenance remedy because working seamen normally are housed and fed aboard ship; he recovers payment for medical expenses in the amount necessary to bring him to maximum medical cure; and he receives an amount representing his unearned wages for the duration of his voyage or contract period.

“Maintenance” represents a per diem subsistence allowance designed to provide the seafarer with compensation sufficient to cover his or her food and lodging until the time of “maximum medical improvement.” It is intended to encompass the cost of food and lodging comparable to that received aboard the vessel.

“Cure” represents the cost of medical and nursing care during the seafarer’s affliction, again until the point of maximum medical improvement. This includes the cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines, and medical apparatus.

A shipowner’s obligation to provide cure to an injured seafarer is an implied term of a maritime-employment contract and does not depend on any determination of fault. Thus, an owner of a vessel is almost automatically liable for the cost of medical treatment when a seafarer in its employ is injured. In other words, a seafarer is entitled to maintenance and cure even if the seafarer is unable to establish that an injury was the result of any negligence on the part of the employer or an unseaworthy condition existing on the vessel. Indeed, the cause of injury or sickness is irrelevant, and tort rules of contributory negligence, comparative fault, assumption of the risk and unseaworthiness do not apply.

The shipowner’s obligation to pay for the seafarer’s maintenance and cure, however, is generally not indefinite. Instead, the seafarer is entitled to receive maintenance and cure from the date of departure from the vessel until the seafarer reaches the point of “maximum possible cure” or “maximum medical improvement” under the circumstances—the point at which no further improvement in the seafarer’s medical condition is to be reasonably expected from medical treatment.

“Maximum medical improvement” is a medical determination, not a legal one. As a matter of procedure, therefore, the rule requires the shipowner to seek a written declaration stating that the seafarer has reached the point of maximum medical cure from the seafarer’s treating physicians. The obligation usually ends when a qualified medical opinion provides that maximum possible cure has been effected.

The duty of payment is imposed on the seafarer’s employer. The determination of who is the seafarer’s employer for the purpose of claiming maintenance and cure is the same as for liability under the Jones Act. Therefore, even though the employer and the shipowner are usually the same, in cases in which the seafarer is employed by a person or company other than the shipowner, the ship is liable for medical costs in rem.

Additionally, the Supreme Court in Atlantic Sounding v. Townsend recently reaffirmed a qualified seafarer’s right to an award of punitive damages and attorney’s fees due to a shipowner’s willful, callous, or arbitrary refusal to provide maintenance and cure.
tackle, and all kinds of equipment either belonging to the ship or brought on board by stevedores. It also includes the ships’ stores—provisions of food, water, furniture, apparel—on board for the crew’s consumption or use, as well as the materials in which the ships’ stores are wrapped.

Members of the crew are also warranted as seaworthy, and there may be liability of the shipowner for crew assaults, brutality, negligent orders, or utilizing an understaffed or ill-trained crew. Thus, a vessel is seaworthy if facts show that a crew member has a savage and vicious nature, a propensity to evil conduct, or a wicked disposition.

All in all, while seaworthiness is a relative term, the general rule is that the vessel must be staunch, strong, well-equipped for the intended voyage, and manned by a competent and skillful master of sound judgment and discretion.

Traditionally, the doctrine of seaworthiness only protected maritime workers who could claim seaman status under the law. Thus, persons who came aboard a vessel, such as passengers and visitors, could not benefit from the doctrine because they were not “seamen.” In *Seafarer’s Wrongful Death and Survival*

In 1972 Congress amended the Longshore and Harbor Workers’ Compensation Act (Longshore Act), prohibiting harbor workers from asserting causes of action under *Sieracki* for unseaworthiness. Despite the statutory prohibition, however, in *Aparicio v. Susan Lake* the Fifth Circuit held that persons excluded from the Longshore Act (because they are beyond its territorial limits, federal employees, or other persons otherwise not covered) may qualify as seamen under *Sieracki* for the warranty of seaworthiness.

In simple terms, the *Sieracki* seaman doctrine protects workers in limbo: those who do not fall under the traditional definition of seaman—a worker who spends more than 30 percent of his or her time in the service of a vessel in navigation—and who are also excluded from the Longshore Act.

**Seafarer’s Wrongful Death and Survival**

If a seafarer dies in the service of the vessel, his estate and survivors can bring a claim for wrongful death under the Jones Act. The appropriate party to bring suit for wrongful death under the Jones Act is the personal representative of the deceased. The beneficiaries are the surviving spouse and children. Damages for wrongful death under the Jones Act are limited to pecuniary losses. As a result, the decedent’s beneficiaries cannot recover damages for loss of society and consortium. Instead, their damages are limited to financial support and contribution, monetary value of services around the home, funeral expenses, lost past and future wages, and predeath medical expenses. Survival recovery is also allowed under the Jones Act. This gives the personal representative the opportunity to seek damages for the decedent’s conscious pain and suffering before death.

The hazards of working and living on a ship have not changed much in the last century. Seafarers still work 6- to 10-month contracts, isolated and far away from the scrutiny of governments and regulators. In *Aguilar v. Standard Oil Company*, the Supreme Court eloquently described the unique nature of maritime work:

From the earliest times, maritime nations have recognized that unique hazards emphasized by unusual tenure and control, attend the work of seamen. The physical risks created by natural elements and the limitations of human adaptability to work at sea enlarge the narrower and more strictly occupational hazards of sailing and operating vessels. And the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seafarer of the comforts and opportunities for leisure, essential for living and working that accompany most land occupations. Furthermore, the seafarer’s unusual subjection to authority adds the weight of what would be involuntary servitude for others to these extraordinary hazards and limitations of ship life.

The laws enacted by Congress and the general maritime law doctrines developed by the federal courts—maintenance and cure, and seaworthiness—seek to ameliorate these problems with the aim of creating fair employment practices and safer working conditions for seafarers.

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2. In general, the gender-neutral term “seafarer” has been used in the narrative instead of the legal term “seaman,” which is found in the statutes and much of the case law cited herein. However, since the establishment of seaman status, as defined in law, is an essential prerequisite to the legal rights under discussion, the term is applied when application of the legal theory is required.
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1790, passed by the First Congress.

Wage Act, which owes its origins to the act of July 20, 572 (1982), analyzing the history of the Seaman’s Wage Act, which was recodified as §30104.


Id.


Chandris, 113 S. Ct. at 2191. For additional considerations regarding seaman status, see SCHREINER.

In McBride, the Supreme Court reaffirmed the application of the featherweight standard of causation in FELA cases. Because the FELA is the underlying statutory structure of the Jones Act for purposes of recovery for death and personal injury cases, this standard will continue to apply to negligence claims of “seamen” under the Jones Act. See Williams v. Carnival Cruise Lines, 907 F. Supp. 403 (S.D. Fla. 1995) (The Jones Act fully incorporates by reference the Federal Employers Liability Act), citing Miles v. Apex Maritime Corp., 498 U.S. 19, 32 (1990).


Matoe v. MIS Kios, 41 F. 3d 1283 (9th Cir. 1994).

Griffin, 458 U.S. at 572.

Id. at 575.

Flores v. Carnival Cruise Lines, 47 F. 3d 1120, 1127 (11th Cir. 1995).


Id. at 1548.

ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS 364 (2005).

Maderson v. Chet Morrison Contractors, Inc., 666 F. 3d 373, 380 (5th Cir. 2002).


35 Schoenbaum, supra note 5, at 322.

36 Morales, 829 F. 2d 1355.


39 The Osceola, 189 U.S. 158 (1903).


42 Schoenbaum, supra note 5, at 288-89.

43 Id.


46 Tug Ocean Prince, Inc. v. United States, 584 F. 2d 1151, 1155 (2d Cir. 1978).

47 Schoenbaum, supra note 5, at 300.


49 The Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§901–950, is the statutory workers’ compensation scheme that covers certain maritime workers, including most dock workers and maritime workers not otherwise covered by the Jones Act. In addition, Congress has extended the Longshore Act to cover nonappropriated fund employees (Army and Air Force Exchange Service employees), Outer Continental Shelf workers, and U.S. government contractors working in foreign countries. Generally speaking, a worker covered by the Longshore Act is entitled to temporary compensation benefits of two-thirds his or her average weekly wage while undergoing medical treatment, and then either to a scheduled award for injury to body parts enumerated in 33 U.S.C. §908(c) or two-thirds of the workers’ loss of earning capacity. More specifically, the Longshore Act entitles a worker to compensation for medical bills, permanent total disability, temporary total disability, permanent partial disability, temporary partial disability, nonscheduled permanent partial disability, government partial disability for retirees, and rehabilitation.

50 Aparacio v. Swan Lake, 643 F. 2d 1109 (5th Cir. 1981).


52 When the death occurs more than one marine league (three nautical miles) offshore, the Death on the High Seas Act, 46 U.S.C. §§761-768, is also applicable. See Schoenbaum, supra note 5, 244 (citing 46 U.S.C. §761-768). Inside the three-mile limit, the general maritime law provides a wrongful death remedy for unseaworthiness. See Schoenbaum, supra note 5, 24, (citing Miles v. Apex Marine Corp., 498 U.S. 19 (1990)), and Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970)).


54 Miles, 498 U.S. at 33.

55 Schoenbaum, supra note 5, at 245, (citing Deal v. A.P. Bell Fish Co., 728 F. 2d 717, 1985 AMC 446 (5th Cir. 1984)).

Practicing Immigration Law before the Ninth Circuit and U.S. District Court

ON SATURDAY, DECEMBER 13, the Immigration and Nationality Law Section will host a program consisting of top immigration litigators and Judge Jacqueline H. Nguyen of the U.S. Court of Appeals for the Ninth Circuit on how to prepare and argue cases in the Ninth Circuit and U.S. district court. The topics covered will include Ninth Circuit procedure (including motion and brief writing), jurisdiction, hot topics in the Ninth Circuit, general district court practice, and an update on developments in substantive and judicial review. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th Floor, Downtown. Parking is available at 1055 West 7th Street and nearby lots. On-site registration and reception, including breakfast, will begin at 8:30 A.M., with the program continuing from 9 A.M. to 1:15 P.M. The registration code number is 012488. The prices below include the meal.

$100—CLE+ member
$160—Immigration and Nationality Law Section member
$200—LACBA member
$240—all others
4 CLE hours

Ethics: All You Need to Know

ON SATURDAY, DECEMBER 6, the Professional Responsibility and Ethics Committee will present its 10th annual ethics seminar. Participants will have the opportunity to learn from the top practitioners in the field about the important ethical issues that have a direct impact on the practice of law. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th Floor, Downtown. Parking is available at 1055 West 7th Street and nearby lots. On-site registration and reception, including breakfast, will begin at 8:30 A.M., with the program continuing from 9 A.M. to 1 P.M. The registration code number is 012484. The prices below include the meal.

$100—CLE+ member
$140—Small Firm & Sole Practitioner Section member
$180—LACBA member
$240—all others
4 hours CLE credit, including 4 hours of ethics

Introduction to the Law of Personal Property Secured Transactions

ON THURSDAY, DECEMBER 4, the Commercial Law and Bankruptcy Section will host a program that presents a preliminary understanding of Article 9 of the Uniform Commercial Code and discusses issues of attachment, perfection (including the various types of personal property collateral and the means of perfection), and priority issues between contending security interests and other lien claimants. The speaker will be James D. Prendergast of the First American Corporation. This program is designed for the newer attorney, who may or may not have taken a personal property secured transactions class in law school. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th Floor, Downtown. Parking is available at 1055 West 7th Street and nearby lots. On-site registration and reception, including lunch, will begin at 11:30 A.M., with the program continuing from noon to 1 P.M. The registration code number is 012493. The prices below include the meal.

$25—CLE+ member
$45—Commercial Law and Bankruptcy Section member
$60—LACBA member
$90—all others
1 CLE hour

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/where you will find a full listing of this month’s Association programs.
Introducing the LACBA Counsel for Justice

THE LOS ANGELES COUNTY BAR FOUNDATION has been dedicated to serving Los Angeles through direct legal representation, advice, counseling, and mediation since its founding more than 50 years ago. In that time, we have raised over $8 million to help more than 100,000 people—many of whom had nowhere else to turn—access the judicial system at a critical point in their lives.

We have also seen a dramatic change to the legal landscape during that time, due in part to the public’s increased need for legal services at a time when budget cuts are negatively affecting the services the courts can offer. The Los Angeles County Bar Association’s projects face these realities as they are helping more people each year and, in order to continue to remain an effective provider of legal services, we must also evolve to meet the needs of our community.

With this in mind, on October 23, at a gala to celebrate over 50 years of public service to the community, it was announced the Foundation officially became the LACBA Counsel for Justice. This reflects not only a name change but a change to the organization as well. Briefly, this restructuring involves merging the Foundation, LACBA’s fund-raising arm, and Projects, Inc., LACBA’s legal public service arm (which oversaw the four projects) into a single entity.

This merger creates a more streamlined structure to implement a new policy by the Foundation Board of Directors to direct its fund-raising efforts and revenue to fully funding LACBA’s projects:

- The Domestic Violence Project, which gives victims of abuse and their families a better opportunity for a safe life;
- The Veterans Project, which provides free legal assistance and representation to our veterans;
- The Immigration Legal Assistance Project, which helps keep families together;
- The AIDS Legal Services Project, which provides a lifeline to dignity and protects the fundamental rights of those living with HIV and AIDS; and
- The Center for Civic Mediation, which is dedicated to promoting a more harmonious and civil Los Angeles community by teaching, inspiring and helping people find peaceful ways to resolve conflict.

This restructure warranted a new name. Because of the changes our organization is undergoing, we took this opportunity to revitalize how we communicate who we are and why we matter—not just to the community but to the members of LACBA, without whose support we would not exist. Finally, this restructure allows Counsel for Justice to further define and align our relationship with LACBA and the projects we support.

The Center for Civic Mediation, a fifth project of LACBA and its own 501(c)(3), will be merged into Counsel for Justice in the next few months, bringing all of LACBA’s public service projects under one organization. This is an exciting time for us as we focus our efforts on fund-raising solely for LACBA’s projects, with one board that will support fund-raising and potential growth and evolution of each of the projects. The new name and branding will depict this change clearly. In the name Counsel for Justice, the word “counsel” stands for the collective insight, resources, time, and talents of staff, volunteers, and donors, who contribute to the organization in different ways. The word “justice” is core to our purpose; it is the direct outcome of the work of the projects, and it is why we are all engaged. Counsel for Justice will also have a new tagline which clearly identifies its purpose…that we are working together for a more just LA.

As part of the rebranding process, all projects will now have a consistent visual system that will tie in with the Counsel for Justice brand and the LACBA master brand. This will serve to show that all projects are part of a greater cause—one of service in the name of better access to legal services throughout the Los Angeles community. As we more clearly communicate both visually and verbally our core purpose, we expect it will allow for better brand recognition, increased donations, and organizational alignment over time.

The LACBA Board of Trustees and the past and present members of the Foundation board of directors have come together to create a stronger organization to support the legal services the projects provide, which have a dramatic impact on our community. Last year alone, the projects helped more than 23,000 people and provided more than 15,000 pro bono hours with a total value of over $4,400,000.

While we have accomplished much over the past 50 years, yet more work remains to be done. Thanks to your support of the Foundation and the projects with both time and donations, the Foundation has been able to serve those in our community with the fewest resources. As we move forward with this new structure and name, we will increase our impact each year.

Counsel for Justice will bring together law firms, foundations, corporations, donors and volunteers in support of a more just Los Angeles. Together, we will stand at the forefront of providing legal services in our community by raising funds and contributing to justice in the key areas of domestic violence, support of our veterans, help for people with AIDS, immigration assistance, and civic mediation.

With your help, we will create a more just Los Angeles. To learn more about the Counsel for Justice, please visit the Web page at www.lacba.org/counselforjustice.

Andres C. Hurwitz is president of the Los Angeles County Bar Foundation and senior counsel at Atkinson, Andelson, Loya, Ruud & Romo, where his practice focuses on commercial and employment litigation and the representation of employers.
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