Los Angeles lawyer G. Warren Bleeker discusses the recent U.S. Supreme Court decision in *TC Heartland v. Kraft Foods Group Brands LLC* regarding venue in patent infringement cases.
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reinforce this identification, including the notion that success in representing a client will increase one’s compensation either directly (e.g., under a contingency fee arrangement) or indirectly (e.g., by enhancing one’s ability to attract business, one’s status within a partnership, or the odds of being admitted to that partnership). Logically, those attorneys more closely connected to clients (e.g., billing partners who manage the relationships and direct the work of other attorneys) will come to identify more closely with their clients’ interests.

But what of those attorneys further removed? It is of them I thought while watching July’s season seven premiere of the HBO series *Game of Thrones*. (Apologies to those for whom this seems a stale reference. The publication process necessarily imposes a gap between when I write this column and when you read it. Apologies also to those who don’t know or care about *Game of Thrones*. I ask that both of you indulge me.) The episode opens in a large hall, where the assassin Arya Stark poisons what seems like every grown male of the Frey clan. The scene parallels the “Red Wedding” sequence from season three. There, the Freys, in conspiracy with the southern rulers, the Lannisters, quash the Starks’ northern rebellion by massacring Arya’s brother, her mother, and the bulk of the Stark army, all of whom are unsuspecting wedding guests at the Frey’s castle.

Later in the season seven opener, Arya encounters a band of Lannister soldiers in the woods. She accepts their invitation to join them for a meal, and one wonders whether she will kill them, too. But she warms to them as she hears their tales of woe and gripes about their leaders. It quickly becomes clear that these men—all of them tired, homesick, and hungry, but generous with their meagre rations—are mere pawns in a “game of thrones” being played at the direction, and for the benefit, of others. They just want to be done with the war and go home.

Anyone who has ever been at the bottom of a large litigation team (and presumably a deal team) can easily relate. As a salaried associate working under the direction of more senior lawyers, your interests are less identified with those of the firm’s clients. Your compensation is (mostly) set. Your bosses are likely to take the lion’s share of credit for any success, and blame for any failure. Often, it felt as if your primary concerns were not looking stupid, not getting fired, and getting out of the office at a decent hour so you could try to have some kind of a life. But, of course, there was always more than that. Most of us would not have become attorneys if we were not to some extent innately hard-working, conscientious, and willing—even driven—to do good work, just for the sake of it. We attorneys might all be happier with ourselves and our colleagues if we were better at recognizing and cultivating that aspect of our personalities while also recognizing that we are not our clients. Instead, we are ourselves, and we are also part of a broader legal system that hopefully will outlast us and any particular client we might represent today.

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It is axiomatic that, as attorneys, we have a duty to advocate for our clients’ interests zealously within the bounds of the law. It is inherent in our role that we fight other peoples’ battles, but this duty encourages us to identify with our clients and view their battles as our own. Other factors reinforce this identification, including the notion that success in representing a client will increase one’s compensation either directly (e.g., under a contingency fee arrangement) or indirectly (e.g., by enhancing one’s ability to attract business, one’s status within a partnership, or the odds of being admitted to that partnership). Logically, those attorneys more closely connected to clients (e.g., billing partners who manage the relationships and direct the work of other attorneys) will come to identify more closely with their clients’ interests.

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Securing Pathways to Justice at a Critical Time

THE DOOR OPENS AT 8 A.M., and already there is a long line down the corridor outside Room 235 of the Los Angeles County Superior Courthouse. Concerned, anxious, worried faces—some shielded to hide the evidence of recent physical abuse—populate the hallway. All are there because they have heard help is inside.

Room 235 is small and filled with volunteers and staff from the Los Angeles County Bar Association. As the morning progresses, the stories are told of those who came to the Domestic Violence Legal Services Project. Declarations are written. Thick packets of court papers are prepared. Explanations about restraining orders, ex parte hearings, and service of process are provided. The stories are often harsh, and sometimes a volunteer needs to step away for a moment alone to regain composure.

Each day, the court issues restraining orders—more than one would expect. The Domestic Violence Legal Services Project is an indispensable pathway between the community and the courthouse. Last year, this project helped 4,250 victims of domestic violence.

A few blocks away, on the third floor of the U.S. Citizenship and Immigration Services Offices (USCIS), a similar scene unfolds. This time, immigrants line the hallways. Some are “Dreamers,” while others have questions about keeping their families together. Most just need help with nationalization, travel permits, and work permits. They need help because the law is complex and constantly changing.

Inside one of two small rooms, a wall is covered with crayon drawings made by the children of those who came with questions. Sometimes the answer is not what a questioner wants to hear. Many times, however, there are ways under the law to help a parent or child gain legal status. The advice given is the same reliable advice that staff and volunteers of the LACBA Immigration Legal Assistance Project have been giving for 40 years, this time to a new generation of immigrants. The USCIS relies on the assistance of the Immigration Legal Assistance Project to handle the daily surge of immigrants outside its doors and to provide an essential pathway to legal assistance for those in need. Unfortunately, the projects are in jeopardy due to inadequate funding. Recently, LACBA closed its domestic violence clinic at the Pasadena Superior Courthouse. It also has reduced staff and shut down a fifth project that provided mediation services to local communities and schools. It should not have been necessary to do this.

The cause—legal services for those in Los Angeles County who cannot afford them—should be at the heart of every charitable effort of every successful lawyer in the community. At this critical time, LACBA members can make a lasting impact in Los Angeles. The four legal services projects, now more than ever, need your support. If every LACBA member donates $100, we can turn the corner. If every LACBA member donates the dollar equivalent of “one billable hour” of his or her time, we can sustain the projects into the future.

Please support Counsel for Justice (CFJ), the charitable arm of LACBA, by donating $100 or, even better, writing in the dollar equivalent of “one billable hour” on the dues form. There is also a “Donate” button on the LACBA and CFJ web pages so that you can make your donation today.


This month’s President’s Page was contributed by Mark Garcia, president of LACBA’s Counsel for Justice and a partner in Lewis Roca Rotherger Christie’s intellectual property practice group in Los Angeles.
Kelly moved slowly while walking into the Domestic Violence Legal Services Project (DVP). She had reason; her torso had three bullet wounds; shot by her ex-boyfriend. Even though he was arrested, her children would be taken from her if she didn’t get a restraining order. With the help of one of our DVP volunteers, Kelly was granted a temporary restraining order (TRO).

October is National Domestic Violence Awareness Month – a time to reflect, not only on the staggering statistics, but on solutions as well.

You are part of the solution.

- Every 9 seconds – in the U.S. – a woman is assaulted or beaten.
- An average of 3 women are killed nationwide because of domestic violence every day.
- 1 in 15 children are exposed to domestic violence every year.
- 83% of victims who receive legal help are granted a TRO - without assistance, only 32% were successful.

You can provide a solution for the 300 victims DVP will help this month – about 15 EACH day. By supporting LACBA’s DVP you provide victims their first legal tool for safety.

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The Value of Knowing the Law Before It Becomes the Law

**Barristers Tips**

Young attorneys often find themselves overwhelmed with the vast amounts of laws and legal concepts they are expected to learn quickly. Sometimes this crash course in the current state of the law comes at the expense of learning about where the law is headed. Of course, it is important to delve into the laws of your specific practice area or case, but it is equally important to become apprised of proposed legislation that may affect your studied area of law and the clients you serve.

Not every bill becomes a law, but when one does, the legal landscape may enter unfamiliar territory, resulting in great uncertainty. This uncertainty creates a unique opportunity for attorneys familiar with the change to step up and stand out. New attorneys are generally limited in ways they can add value by virtue of their inexperience, but being apprised of proposed legislation and understanding the key parties lobbying for and against it can play an integral role in becoming a valuable member of a team and a “go-to” person for clients.

Attorneys interested or currently working in entertainment, specifically the music industry, are well positioned to take advantage of this tip since the music industry has undergone major changes in the last several years. It is no secret that music streaming and other digital formats have established a new standard for music consumption. Many copyright laws affecting music rights, however, were drafted before SiriusXM and Pandora were a part of everyone’s lives, and some even before the Internet was born.

Attorneys specializing in this area are challenged by having to keep up with intricate differences in state and federal copyright laws and to find ways to apply old concepts to an ever-changing industry, all while trying to figure out how to monetize their clients’ business in the process. A legal makeover to address dated music laws is overdue and likely imminent, as evidenced by proposed legislation that has received serious attention. New lawyers in the entertainment field would do well to familialize themselves with the proposed legislation.

For example, the Compensating Legacy Artists for their Songs, Service and Important Contributions to Society Act (CLASSICS Act) was introduced by U.S. Representatives Darrell Issa of California and Jerrold Nadler of Florida in late July 2017. It requires digital radio service providers to compensate owners of pre-1972 recordings when their songs are played. Currently, digital stations only pay royalties for post-1972 recordings. The 1972 divide is due to the fact that Congress added sound recordings to the scope of federal copyright protection in 1972 but did not make this protection retroactive. Attorneys for copyright owners of pre-1972 recordings therefore have had to rely on state-specific legislation to protect such recordings. This has been the basis of a series of recent lawsuits in California, New York, and Florida spearheaded by the 1960s rock band, the Turtles, who sued SiriusXM under the respective state copyright laws to recover royalties for the performance of their pre-1972 recordings.

The cases have resulted in settlement and inconsistent rulings, and, to date, there is no clear, uniform rule about whether (and how much) digital broadcasters have to pay for playing pre-1972 recordings. The CLASSICS Act would resolve this inconsistency and allow for Sound Exchange—the performance rights organization that collects and distributes royalties earned through digital transmission—to distribute royalties for pre-1972 recordings just as it does for post-1972 recordings.

Another bill to watch is the Allocation for Music Producers Act (AMP Act), which was reintroduced by U.S. Representatives Tom Rooney of Florida and Joe Crowley of New York in 2017. Its purpose is to provide music producers royalties from the digital performance of the recordings they produce. Pursuant to the Digital Performance Rights Act of 1995, artists and performers receive a 45-percent royalty whenever their songs are played in a digital format. Producers, however, are not statutorily entitled to royalties despite the fact that so much of creating and readying a song for mass production rests on their shoulders.

Producers must advocate and negotiate for entitlement to a royalty with the record label or artist by entering into an agreement known as a “letter of direction,” which directs a certain agreed upon percentage of the royalty for a particular song to the producer. The AMP Act creates the statutory right to receive compensation, in effect codifying the letter of direction process. Thus, for the first time, music producers’ rights and creative contributions would be acknowledged by law, and the process by which they would be entitled to compensation would be uniform and consistent.

The proposed legislation demonstrates that legislatures are actively seeking more consistency in the protection and regulation of music amidst the industry’s evolution. Knowing whether or not your clients support these proposals and what the ultimate impact on their interests may be will allow you to better understand their business. For example, SiriusXM and Pandora have lobbied heavily against the federal protection of pre-1972 sound recordings while the Recording Industry Association of America, Sound Exchange, and most record labels now support such protection.

Clients nowadays are looking for attorneys who are more than just good lawyers. Using your understanding of cutting-edge technology and being apprised of new developments will allow you to turn the tables on more experienced lawyers and quickly add value to your clients’ business.

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Diana Sanders is an entertainment litigator at DLA Piper. She is assistant vice president of outreach for the LACBA Barristers and a member of the Barristers Executive Committee.
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Exploring the Foundations of Effective Brief Writing

OUR ADVERSARIAL SYSTEM is based on the belief that “the fairest results and the best rules of law are discovered by the vigorous presentation of opposing viewpoints.”1 In trial and appellate advocacy the primary presentation is done through written briefs, which are only as effective as they are helpful.2 The effective brief is grounded in thorough research and requires outlining, writing, and editing.

Research identifies the essential elements of the case, which dictate what facts need to be developed in the trial court and emphasized in the appellate brief. Research also identifies relevant case law—the cases most factually relevant, which likely will become the core authorities for the arguments, and those directly adverse to the case, which must be discussed and distinguished.3 Research also identifies any “magic language” of an issue that appears repeatedly in published opinions and that, for persuasive advocacy, should appear in the briefs.

This legal foundation helps to frame the core question being presented to the court. Lawyer and writer Bryan Garner calls this the “deep issue.”4 He explains that the deep issue is concrete: it “sums up a case in a nutshell.”5 Determining the core issue leads to tighter, more cogent writing because it establishes the context for the facts and arguments.6 It is especially important to spend time thinking about and crafting a statement of the issue because the one who controls the issue generally prevails.7 The importance of properly stating the issue raised on appeal cannot be overemphasized.8 Indeed, some would say that they would take either side of any case as long as they could pick the issues.9

The Outline

After the research and conceptualization, the actual writing begins with an outline. The outline is the blueprint for each section of the brief or memorandum of points and authorities. Writing “off the top of one’s head” leads to circular arguments and redundancy because the writing has begun before the thinking is completed. Justice Thomas Hollenhorst of the California Court of Appeal speaks of some briefs as “whirly-bird briefs,” which seem to start in the middle of the story and go in circles or disconnected tangents, giving the court no guidance or direction. An outline prevents such a brief.

The outline should begin with listing the key facts for the statement of facts and legal authorities for the argument—without regard for organization. After this free-floating list is completed, the order in which to address each point can be determined. The informal listing of the facts and arguments allows for developing ideas from a broad perspective. Related themes and ideas become apparent and enable critical analysis: which cases should be cited for which idea, which ideas are weak or flawed or need further development, and which progression of the facts or arguments would be most persuasive.

The outlining process is where the struggle with the facts and the law is engaged. The outline directs how to tell the story of the case effectively; which facts should be highlighted, which go first (i.e., which must be understood before other facts will make sense), and which are irrelevant. For appellate briefs, California Rules of Court require that all factual statements be supported by references to the record.10 This rule serves two important functions: it enables the court and opposing counsel to verify the factual statements easily, and it “protects the court and opposing counsel from unfounded assertions of fact.”11 In preparing the outline, counsel should work closely with the record to be scrupulously certain that the factual statements are correct. For pleadings in the trial court, the commitment to stating the facts correctly should be no less scrupulous.12

As to the legal argument, the outlining phase provides an opportunity to reconcile seemingly inconsistent cases and to distinguish cases that are troublesome. In the outline, ideas may be expanded, e.g., borrowing from other areas of law to resolve an issue or to suggest how the law might be developed. The outline is where the holes in reasoning are exposed and resolved.

It is very important to avoid the temptation to take language out of context to make a point. Concerning this precaution, Justice Arthur Gilbert of the California Court of Appeal is compelling. Quoting William Shakespeare, “Even [t]he devil can cite scripture for his purpose...,” Justice Gilbert warns against misinterpreting an opinion to make it applicable to the client’s case. “[S]ome misimpressions are created by the reader or critic who takes a sentence or paragraph from an opinion, sometimes out of context, and analyzes it as a Shakespeare scholar would, or as though it were a verse from Holy Writ, discovering hidden meanings, innuendoes, and subtleties never intended.”13 As to extending

Honey Kessler Amado is a certified appellate law specialist in Beverly Hills. She represents clients in state and federal courts of appeal and supreme courts.
It is more effective to weave a coherent story from the facts, perhaps taking bits from different testimony or evidence. In an appellate brief, barring a specific reason to the contrary, the order in which the facts were presented in the trial need not dictate the way the story is told. Similarly, in preparing legal memoranda for the trial court, the facts can be gleaned from the supporting declarations or deposition transcripts, although they need not be told through dry references to each source.

When referencing the parties, their positions must first be identified in the litigation (for example, “plaintiff” in the trial court, “appellant” in the review court), and thereafter a name or title used that is helpful to telling the story. An abbreviation should be defined when first used. Only well-known initial abbreviations, e.g., BoA for Bank of America or CEO for chief executive officer, should be used. A false economy of abbreviations should be avoided. Few things are more irritating to a reader or distracting to the story than getting lost in a haze of meaningless abbreviations. If the plaintiff is ABC Hardware Store, which subleased space to XYZ Landscaping, and the defendant is Able Suppliers, it will not take long before ABC is confused with XYZ or with Able and the reading slows as the reader pauses—a second or two—telling who is who or which is which. It would be clearer and reinforces the parties to use shortened names like “Hardware Store,” “Landscaping,” and “Suppliers.”

As the reader of the brief is the court, the reader is the last one who should be distracted, lost, or annoyed.

The statement of facts should be objective. Compelling facts should carry the story without vilifying or denigrating the opposition or the lower court. Therefore, “screaming” adjectives and adverbs intended to convey an intensity of feelings or indignation should be avoided. These types of adjectives and adverbs are not persuasive. “[O]verheated rhetoric is unpersuasive and ill-advised. Righteous indignation is no substitute for a well-reasoned argument.”

Indeed, courts generally dislike the tenor of such pleadings. “Counsel violates the cardinal rule of effective appellate legal writing when he or she disparages the lower court. Even in zealous advocacy, attorneys are required to maintain respect to the courts of justice.”

Similarly, it is advisable to refrain from disparaging opposing counsel or the opposing party. If the facts or challenged rulings are bad, the trial or review court will see that without colorful adjectives or adverbs pointing the way.

In the declarations or statement of facts, headings should be used to indicate the relevant topic and to signal that the topic has changed. When the reader is looking for that point again, the reader can easily find it. Also, headings provide natural white space on the page, giving the reader some relief from what otherwise appears to be dense text. Similarly, in the legal argument section, headnotes should separate the various points in the argument. Good headnotes and subheadings serve a number of purposes. First, they give the reader cues that aid comprehension. The reader immediately knows the subject or point of the section. Second, headnotes help make a long brief or argument digestible. The reader is not overwhelmed with pages of text that contain no visual breaks and no markers indicating a new point.

Third, headnotes assist the writer by exposing organizational weaknesses in the argument section, as well as sections with mixed ideas that need to be treated separately. (In this context, it is crucial that the argument under the headnote relates to that headnote only. Subsections within a headnote may be employed to underscore a discrete point or to signal a subtopic.) Fourth, headnotes serve as a useful summary of the arguments when set out in the table of contents. The reader can quickly and easily see the direction and key elements of the argument from the headnotes and subtopic headlines.

When addressing a complex topic that has its own jargon, terms must always be defined; it should never be assumed that the reader is familiar with the subject. Defining terms helps the reader understand the discussion. A simple explanation of the language, concepts, or theories of the topic will add substance to the written discussion.

The conclusion should state the major points in a phrase or two in addition to the ruling or relief being sought. For example, “For the reasons stated, that the motion is untimely, that it fails to meet the requirements of the statutes, and that the relief requested is unwarranted, Petitioner requests that Respondent’s motion for reconsideration be denied in entirety.” Or “For the reasons stated, that the evidence supports the factual findings of the court, that the court considered the required, statutory factors for granting spousal support, and that the amount awarded for spousal support was not an abuse of discretion, Respondent requests that the Order be affirmed in entirety.”

Editing

The final component of clear, concise writing is editing. This aspect, like outlining, can take almost as long as the initial draft.
The draft should be edited for clarity and organization. Do the central points stand out? Does the statement of facts tell a coherent story? Does it include unnecessary, extraneous information? If so, eliminate the nonessential points. To paraphrase Anton Chekhov: If the rifle on the wall is not the murder weapon, don’t discuss the rifle. It makes little sense to ask the reader to retain useless information. Does the legal argument present consistent arguments? Do they follow a reasoned progression? Are key points buried in words or presented too late in the brief?

Finally, the brief needs to be edited for grammar and word usage. Mistakes in this area are irritating and can distract from the effectiveness of the brief. It is also important to edit for length, considering that “[e]ye fatigue and irritability set in well before page 50.”

The purpose of a brief is to enlighten the court and elucidate the issues. A well-written brief can be the difference between winning and losing. It leans towards winning when it is a pleasure to read.

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3 See Tyler, 47 P. 3d 1095 for an excellent discussion of the duty to disclose adverse decisions.
5 Bryan A. Garner, Advanced Legal Writing and Editing, §1.3 (2001) [hereinafter Garner].
6 Id. §1.1.
9 Garner, supra note 5, §1.6.
10 See, e.g., CAL. R. CT. 8.204(a)(1)(C).
12 The trial court pleadings and the hearing or trial comprise the universe of the appeal. If the declarations are factually unreliable, the appeal is compromised before it begins.
14 Harris, 3 Cal. App. 4th at 667 (citing Lewis Carroll, Alice’s Adventures in Wonderland ch. 6).
15 Tyler, 47 P. 3d at 1106, discussing ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 280 (1949).
16 Tyler, 47 P. 3d at 1107 (citing Robert H. Aronson and Donald T. Weckstein, Professional Responsibility in a Nutshell (2d ed. 1991)).
17 Tyler, 47 P. 3d at 1108 (citing to the ABA Annotated Model Rules of Pro’l Conduct R. 3.3 (1999) (internal punctuation omitted)).
18 Tyler, 47 P. 3d at 1108. Justice David Mannheimer, Chief Justice of the Alaska Court of Appeals, stated that a lawyer’s paramount duty to pursue a client’s interests vigorously “must be met in conjunction with, rather than in opposition to, the lawyer’s other professional obligations. Implicit in the lawyer’s role as officer of the court is the general duty of candor.” (Id.)
19 This author was first informed of this idea from Judge Janice Rogers Brown of the U.S. Court of Appeals, District of Columbia Circuit, when Judge Brown was an Associate Justice of the California Supreme Court.
20 Kimble, supra note 4, at 103, 104.
21 Some people say that to write a story well, one should read a lot. Two excellent writers of nonfiction come to mind: David McCullough and Erik Larson.
22 “Screaming adjectives” is a phrase of the late Irving Younger, a professor at New York University School of Law and the University of Minnesota Law School.
25 See Cannon for a discussion on respect for the courts as an important component of a civil society.
26 See CAL. R. CT. 8.204(a)(1)(B).

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Considerations for Filing a Motion to Seal

Imagine for a moment the busy trial judge with a case load that stretches into the hundreds, with dozens of pending substantive motions at any given time, many of them case-dispositive. The imagination need not be taxed, as this description applies to virtually every superior court judge in the more populous counties of California. Budget cuts to the judiciary have increased the workload exponentially while reducing the number of law clerks to which judges may turn for assistance with legal research. Across a busy judge’s desk comes a motion that seeks to seal the entirety of a simultaneously filed motion for summary judgment, along with all of its supporting exhibits. The motion is obviously boilerplate and has been submitted previously—in cases of every description—by the lawyer filing it. The accompanying memorandum does not articulate the proper legal standard and lacks an analysis of the factual basis for the request to seal. The counsel’s argument also fails to identify the specific sections of the summary judgment motion and supporting exhibits that are the subject of the request to seal.

The opposing counsel’s failure to contest the motion further burdens the court’s resolution of the sealing request. If the client’s interests are not impacted by the proposed order to seal, the opposing counsel likely cannot justify the time and expense involved in challenging the proposed order. The lack of opposition or the parties’ stipulation to the requested sealing order, however, does not obviate the court’s duty to weigh the competing interests and analyze the impact of less restrictive alternatives to sealing—a time-consuming process that often proves to be a waste of judicial resources, which are already taxed by matters of far greater significance.

This scenario is repeated many times a week in the superior courts of California and illustrates why ruling on motions to seal is the bane of many a trial judge. These types of motions must satisfy stringent standards in order to overcome the preference of American jurisprudence for open courts. Public access to judicial records is the bedrock legal principle that requires a court to employ to avoid damaging a client’s case by bringing a meritless motion to seal independent of the litigants’ views. The lawyer who fails to marshal an analysis of the evidence and the applicable legal standard loses the opportunity to convince the court that the motion should prevail.

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pay attention to the special, narrow circumstances that permit sealing before deciding to bring such a motion.

Records may only be sealed by a court order that 1) makes specific factual findings showing why sealing is justified and 2) limits the material sealed to necessary documents only, or their relevant parts. An agreement among the parties to seal, or the fact that a motion to seal is unopposed, is not enough. Courts maintain an independent duty to ascertain whether the standards demonstrating the necessity of sealing have been satisfied. This requires a court to find, before it can grant a sealing motion, that 1) there is an overriding interest to overcome the right of public access and 2) the proposed sealing is narrowly tailored and no less restrictive means exist to achieve the moving party’s interest. Essentially, the party seeking to have records sealed must establish that the information should be kept secret and that the absolute minimum amount of data has been redacted. These twin showings must be made on the basis of admissible evidence—allegations alone, without facts, are insufficient.

Information that May Be Sealed

What types of materials meet these requirements? An individual’s confidential medical information and financial information may be suitable for filing under seal. Other sensitive identifying information, such as bank account numbers and social security numbers, are also covered. So are actual trade secrets, as defined in Civil Code Section 3426.1, with emphasis on the word “actual.” The terms “trade secret” and “confidential business information” are some of the most abused bases upon which sealing is sought, since the exception only applies to information that is the subject of reasonable efforts to maintain its secrecy and that derives independent economic value from the fact it is actually kept secret. Legitimate examples of trade secrets include computer source code and certain sensitive client information, like stock positions. Trade secrets do not include, however, nonspecific financial or business information, regardless of whether the party seeking to protect the information maintains the material is in some general sense “commercially sensitive” or “proprietary.” When business information has already been disclosed in a different context, the argument that it is a trade secret loses its force, and the information cannot properly be sealed.

Confidential settlement agreements may come within the protection of the sealing rules. Nonconfidential portions of those agreements, however, must remain open and accessible to the public once the confidential data has been redacted. Lawyers therefore need to be judicious in their sealing requests and should attempt to seal no more than is necessary. It is an unusual case when sealing entire documents, or even whole pages, is justified. Unsealed documents from separate court proceedings—which are by definition already publically available—are not protected by the sealing rules at all. Admissions of wrongdoing and information regarding the identity of witnesses are also generally not subject to sealing.

The Mechanics of Sealing

How is the issue of sealing properly presented to a court? California Rule of Court 2.551, which lays out the procedure, is the rule to look to. A party requesting that a record be filed under seal must file a motion or application, accompanied by a supporting memorandum and declaration, justifying the request. All parties must be served with a copy of the motion. Unless ordered otherwise, any party that already has access to the records must be served with a complete, unredacted version of all the moving papers as well as a redacted version. Any other parties to the suit should be served with only the public, redacted version of the motion.

A nondesignating party that intends to file with the court records subject to a confidentiality agreement or protective order without seeking to have the records sealed must lodge unredacted copies of the records and any moving or supporting papers that disclose the purportedly confidential information. Simultaneously, the nondesignating party must file publically redacted versions of the same documents as well as a notice that the designating party has 10 days (plus additional time if service is to be made via mail, electronic service, or overnight delivery) to file a motion to seal to protect the information before it will be made public. The provision of such notice is especially important (though often overlooked) since it starts the 10-day clock running. While it would be helpful if there were an official Judicial Council form for providing such notice, no such form presently exists. Consequently, counsel needs to draft his or her own notice document.

Until the court rules on a motion to seal, lodged records are maintained conditionally under seal. Sealed records must be securely filed and kept separate from the public file in the case, a process that imposes significant burdens on the court personnel on whom this task falls. Once sealed, a record may not be unsealed except by a court order following a party’s motion, a motion by a member of the public, or on the court’s own motion. Further details describing the procedure to seek to seal or unseal records are found in Rule of Court 2.551.

Practice Pointers

In light of the burden inherent in attempting to seal records and the narrow circumstances under which such motions may be granted, here are some important tips to avoid the need to file a motion to seal or, when sealing is appropriate, to increase the likelihood that the motion will be granted:

• At the outset of a case, any proposed protective order should recite that the California Rules of Court govern sealing. This not only makes it more likely the court will grant the protective order but also puts all parties on notice that any motions to seal will need to meet the strict requirements those rules impose.

• It is important to be judicious in the provision of confidentiality designations. Rather than designating a whole page or document as confidential, consideration should be given as to whether only a word, number, sentence, or paragraph should be protected. When appropriate, a party should be challenged and forced to justify the designations provided. This should be done well enough in advance that the validity of the designations is determined before the material is needed in a filing.

• If the specific material to be protected is unnecessary to the substantive motion or other issue pending before the court, it should not be included with the motion to seal. For instance, if not germane to the issue before the court, the confidential part of the information should be omitted from the brief and redacted from any supporting exhibits. Sealed or not, irrelevant evidence is of no value. A classic example is the inclusion of a social security number on a form in which the number itself is of no evidentiary value to the issues before the court.

• When filing a motion to seal, it is also important to be thoughtful in drafting the request. For example, counsel should seek to seal only the type of information that is protectable under the law. A “Delta Document”—that is, a redlined comparison between the redacted and unredacted versions of documents—should be lodged with the court (for the court’s use only) so the court can consider any proposed redactions in context and without having to physically compare the two versions.
With respect to the timing of the request, a motion to seal, whenever possible, should be heard before the underlying motion to which the documents at issue are relevant. It will be difficult, if not impossible, for the court to decide the substantive motion without first deciding the accompanying motion to seal. Until the sealing motion has been ruled on, it will be unclear what evidence can be included in the record.

By reviewing carefully the sealing rules and following these few simple pointers, various pitfalls commonly faced by practitioners may be avoided. In particular, these involve issues that arise from counsel’s filing motions to seal without marshaling the requisite evidence, articulating the proper legal standard, or thinking carefully about which discrete portions of a motion (or its supporting documents) satisfy that standard.

Clients will be grateful when they discover that more prudent counsel has saved them money by getting the motion right the first time. Although they may be displeased at the inability to have the entirety of a particular document sealed by court order, an explanation to them about the reasons why the court would be certain to deny such a request should suffice. Also, the judge will appreciate the care taken in preparing the sealing submission, which will likely be in stark contrast to the many defective motions to seal he or she is likely to encounter routinely. The efficiency of California’s legal system will be increased by not wasting the time of busy bench officers and court personnel, leaving them free to concentrate on more pressing matters—such as deciding the case-dispositive motion that has concurrently been filed on behalf of the client.

2 NBC Subsidiary, 20 Cal. 4th at 1208-09 (citations omitted).
4 See Cal. R. Ct. 2.550(c).
5 See Cal. R. Ct. 2.550(e).
6 See Cal. R. Ct. 2.551(a).
7 See Cal. R. Ct. 2.550(d).
11 Id.
13 See Cal. R. Ct. 2.551(b).
14 Id.
15 See Cal. R. Ct. 2.551(b).
16 See Cal. R. Ct. 2.551(f).
17 See Cal. R. Ct. 2.551(h).
Despite its new ruling in TC Heartland, the high court leaves “wiggle room” regarding what constitutes a “regular and established place of business”

FOR THE PAST few decades, determining venue in a patent infringement case was a fairly straightforward matter. Under Federal Circuit precedent going back to 1990 in VE Holding Corporation v. Johnson Gas Appliance Company, venue was proper in any judicial district in which the defendant was subject to the court’s personal jurisdiction.1 This past May, however, the U.S. Supreme Court revisited the issue. In a much-anticipated decision in TC Heartland v. Kraft Foods Group Brands, LLC, the Supreme Court overturned the long-standing Federal Circuit case law and, relying on its prior precedent, held that venue is proper only in a judicial district in the state in which the defendant is incorporated or “where the defendant has committed acts of infringement and has a regular and established place of business.”2

The Court’s ruling in TC Heartland, on its face, appears to narrow the venue choices for patent cases previously permitted by the Federal Circuit under VE Holding. However, the Court left plenty of wiggle room for patent owners asserting infringement claims to continue to bring suit in the judicial district of their choice, even if that district falls outside of the state in which the defendant is incorporated. The key venue issue now being litigated is what constitutes a “regular and established place of business.” In TC Heartland, the Supreme Court did not provide any guidance on how this phrase should be interpreted.

History of the Patent Venue Statute
The Judiciary Act of 1789—the initiating federal law regarding patent suits—“permitted a plaintiff to file suit in a federal district court if the defendant was ‘an inhabitant’ of that district or could be ‘found’ for service in that district.”3 Then, in 1887, the statute was amended to allow “suit only in the district of which the defendant was an inhabitant or, in diversity cases, of which either the plaintiff or defendant was an inhabitant.”4 Finally, in 1897, Congress enacted a patent-specific venue statute, which was a predecessor to the current patent venue statute, 28 USC Section 1400(b). The predecessor statute permitted suit in the district in which the defendant was an “inhabitant” or in which the defendant both maintained a “regular and established place of business.”

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of business” and committed an act of infringement.5

In 1942, the Supreme Court held in Stonite Products Company v. Melvin Lloyd Company that the patent venue statute was the exclusive venue provision for patent infringement suits, and Congress did not intend for the patent venue statute to “dovetail with the general provisions relating to the venue of civil suits.”6 Rather, the patent venue statute “alone should control venue in patent infringement proceedings.”7 In 1948, Congress recodified the patent venue statute as Section 1400(b), and the Supreme Court reaffirmed the Stonite opinion in 1957, holding in Fourco Glass Company v. Transmirra Products Corporation that Congress enacted Section 1400(b) as a standalone venue statute and that nothing in the 1948 recodification evidenced an intent to alter that status, even the fact that 28 USC Section 1391(c) by “its terms” embraced “all actions.”8

According to the Supreme Court in TC Heartland, “[t]his landscape remained effectively unchanged until 1988, when Congress amended the general venue statute, §1391(c).”9 The revised provision stated that it applied “[f]or purposes of venue under this chapter.”10 The same year, the Federal Circuit held that the amendment to Section 1391(c) established the definition for all other venue statutes under the same “chapter,” including the patent venue statute, Section 1400(b).11

In 2011, Congress adopted the current version of Section 1391, which provides that its general definition applies “[f]or all venue purposes.”12

**TC Heartland**

In January 2014, Kraft Foods Group Brands, LLC sued TC Heartland for patent infringement in the U.S. District Court for the District of Delaware.13 TC Heartland moved to transfer venue to a district court in Indiana, citing Fourco, and arguing that it did not “resid[e]” in Delaware and had no “regular and established place of business” in Delaware under Section 1400(b).14 The district court rejected these arguments. The Federal Circuit, citing VE Holding, denied a petition for a writ of mandamus, concluding that the general venue statute, Section 1391(c), supplies the definition of “resides” in Section 1400(b). The Federal Circuit concluded that subsequent statutory amendments had effectively amended Section 1400(b) as construed in Fourco, such that Section 1391(c) now supplies the definition of “resides” in Section 1400(b).15

Thus, because the District of Delaware could exercise personal jurisdiction over TC Heartland, it “resided” in Delaware under Section 1391(c) and, therefore, under Section 1400(b).16

In TC Heartland, in a unanimous decision,17 the Supreme Court reversed the Federal Circuit precedent first stated in VE Holding and held that venue is proper in a patent infringement case only in a judicial district in the state in which the defendant is incorporated or “where the defendant has committed acts of infringement and has a regular and established place of business.”

The Court, citing Fourco, stated that it had “definitively and unambiguously held that the word ‘residen[ce]’ in Section 1400(b) has a particular meaning as applied to domestic corporations: It refers only to the state of incorporation.”18 Further, “Congress has not amended §1400(b) since Fourco, and neither party asks the Court reconsider our holding in that case. Accordingly, the only question we must answer is whether Congress changed the meaning of §1400(b) when it amended §1391.”19 The Court went on to note:

When Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent in the text of the amended provision. The current version of §1391 does not contain any indication that Congress intended to alter the meaning of §1400(b) as interpreted in Fourco. Although the current version of §1391(c) provides a default rule that applies “[f]or all venue purposes,” the version at issue in Fourco similarly provided a default rule that applied “for venue purposes.”20

Finally, the Court noted “there is no indication that Congress in 2011 ratified the Federal Circuit’s decision in VE Holding. In this context, we do not see any material difference between the two phrasings.”21

**Place of Business**

For patent litigators, a key issue for determining proper venue in light of TC Heartland is how to interpret “regular and established place of business.” If that term is construed narrowly, venue in patent cases will be more restricted. However, if interpreted more broadly, proper venue post-TC Heartland might not differ considerably from venue law pre-TC Heartland.

In June 2017, U.S. District Judge Rodney Gilstrap, from the Eastern District of Texas, who reportedly handles the greatest number of patent cases in the United States,22 issued an opinion denying defendant Cray, Inc.’s motion to transfer the case from Texas to Washington, where Cray is incorporated.23 In his written opinion, Judge Gilstrap discusses the state of the case law regarding “regular and established place of business” prior to the Federal Circuit’s ruling in VE Holding. Judge Gilstrap notes that before VE Holding, courts “had developed competing and conflicting interpretations of § 1400(b).” One court even noted that “[w]e can discern nothing even remotely approximating a uniform approach in the case law to the problem of...[what] constitute[s] a ‘regular and established place of business.’”24

One line of cases “held, or at least suggested, that an established place of business required a physical presence in the district.”25 Judge Gilstrap notes that “[s]ome courts also required this physical presence to be land the defendant owned, leased, or controlled”26 and others “required the physical presence to be a ‘substantial part’ of a defendant’s business.”27 However, a separate line of cases “found venue proper even where the defendant lacked a physical presence in the district.”28 These cases often focused on whether a defendant’s employee, operating out of his or her home, could constitute a “regular and established place of business.”29

The Federal Circuit also weighed in on this issue at that time. In its opinion in In re Cordis Corporation, the Federal Circuit held that “the appropriate inquiry is whether the corporate defendant does its business in that district through a permanent and continuous presence there and...whether it has a fixed physical presence in the sense of a formal office or store.”30 In Cordis, the Federal Circuit declined to issue a writ of mandamus, leaving in place the District Court’s ruling that Cordis, a Florida corporation, could be sued in Minnesota.31

The record established that Cordis, which sold cardiac pacemakers, employed two full-time sales representatives in Minnesota.32 The sales representatives maintained home offices in Minnesota and stored literature, documents, and products in those offices. They performed administrative tasks in their home offices and claimed an income tax deduction for these offices. They kept between $30,000 and $60,000 worth of Cordis products in their home offices at any given time.33 Cordis also engaged a secretarial service in Minnesota to receive messages, provide typing services, mail Cordis literature, receive shipments of Cordis sales literature, issue business cards, and answer the phones as “Cordis Corporation.”34 The Federal Circuit concluded that a “rational and substantial legal argument may be made in support of the court’s order denying
1. Venue is proper in a patent infringement case if the case is brought in federal court in a state where a corporate defendant is incorporated.
   - True.
   - False.

2. In *TC Heartland v. Kraft Foods Group Brands, LLC*, the U.S. Supreme Court outlined a four-factor test to determine whether a defendant has a “regular and established place of business” in a state.
   - True.
   - False.

3. Under the *TC Heartland* holding venue is proper in a patent infringement case if the corporate defendant conducts business in that district through a permanent, continuous presence there and not whether it has a physical presence.
   - True.
   - False.

4. In *Johnson Gas Appliance Co. v. Melvin Lloyd Co.*, held that venue was proper in a patent infringement case in any judicial district in the state in which the defendant derived benefits from its place of business for patent purposes.
   - True.
   - False.

5. The Federal Circuit, in *VE Holding Corporation v. Johnson Gas Appliance Co.*, held that venue was proper in a patent infringement case only in a judicial district in the state in which the defendant was subject to the court’s personal jurisdiction.
   - True.
   - False.

6. In *In re Cordis Corporation* the Federal Circuit held that for a defendant to be subject to the court’s personal jurisdiction it must have a “regular and established place of business” in the district.
   - True.
   - False.

7. In 1942, the U.S. Supreme Court held in *Stonite Products Co. v. Melvin Lloyd Co.* that the patent venue statute was not the exclusive venue provision for patent infringement suits.
   - True.
   - False.

8. In 1957, the U.S. Supreme Court held in *Fourco Glass Co. v. Transmirra Products Corporation* that the patent venue statute was not altered by the general venue statute, which includes language stating that it applies to “all actions.”
   - True.
   - False.

9. In *VE Holding Corporation v. Johnson Gas Appliance Co.*, held that venue was proper in a patent infringement case if the corporate defendant conducts business in a district where the defendant has been sued previously in that district.
   - True.
   - False.

10. Following *TC Heartland*, U.S. District Judge Rodney Gilstrap identified four factors courts should consider in determining whether the defendant has a regular and established place of business in the district.
    - True.
    - False.

11. One of Judge Gilstrap’s factors is whether a defendant has a physical presence in the district.
    - True.
    - False.

12. One of Judge Gilstrap’s factors is the extent to which a defendant derives benefits from its presence in the district.
    - True.
    - False.

13. One of Judge Gilstrap’s factors is whether the defendant has a physical presence in the district.
    - True.
    - False.

14. One of Judge Gilstrap’s factors is the extent to which a defendant has a physical presence in the district.
    - True.
    - False.

15. One of Judge Gilstrap’s factors is the extent to which a defendant derives benefits from its presence in the district.
    - True.
    - False.

16. One of Judge Gilstrap’s factors is whether a defendant has a regular and established place of business in that district.
    - True.
    - False.

17. Corporations or other entities that are potential targets of patent infringement cases that want to make it more difficult to be sued in a particular state should consider minimizing their conduct in that state. The rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-study activity.
    - True.
    - False.

18. A plaintiff can establish venue in a patent infringement case by proving the defendant has a regular and established place of business in that district.
    - True.
    - False.

19. Courts have taken a uniform approach in determining what constitutes a regular and established place of business for patent purposes.
    - True.
    - False.

20. Judge Gilstrap has been criticized for setting venue rules for patent cases in a way that may keep many cases in his district.
    - True.
    - False.
Cordis’s motion to dismiss for lack of proper venue,” and the Court declined to issue a writ.  

In his recent opinion, Judge Gilstrap identifies four factors that courts should consider in making the determination whether the defendant has a regular and established place of business in the district. One factor is physical presence—“the extent to which a defendant has a physical presence in the district, including but not limited to property, inventory, infrastructure, or people.” Thus, a “retail store, warehouse, or other facility in the district weighs strongly in favor of finding a regular and established place of business” but the lack of physical building “is not dispositive.” A second factor to consider is the extent to which a defendant represents, internally or externally, that it has a presence in the district. For example, if a defendant has agents or representatives located in a district, and represents to the public that it can communicate with the defendant through those agents or representatives, this factor would weigh in favor of proper venue in that district. A third factor to consider is “the extent to which a defendant derives benefits from its presence in the district, including but not limited to sales revenue.” Judge Gilstrap notes that “courts have often looked to the benefits a defendant has received from its business in a particular district as a factor supporting a regular and established place of business, especially where a defendant has generated significant revenue from such business.” A fourth factor to consider is the “extent to which a defendant interacts in a targeted way with existing or potential customers, consumers, users, or entities within a district, including but not limited to through localized customer support, ongoing contractual relationships, or targeted marketing efforts.” Judge Gilstrap states that no one factor should be dispositive, and this determination “should be driven by a fair consideration of the totality of the circumstances.”

Even though Judge Gilstrap has been criticized for purportedly “set[ting] venue rules for patent cases in a way that may keep many cases in his district,” his detailed opinion and historical look at how courts have interpreted the phrase “regular and established place of business” is a helpful starting point for litigators faced with determining where to file suit, whether to challenge venue, and what advice to give to their clients on these issues. In addition, other district courts, following TC Heartland, have construed the “place of business” requirement more narrowly. A district court in the Western District of Texas has held that venue is not proper even when the defendant is authorized to do business in Texas, has distributors in Texas, and sells products to those Texas distributors. The court held that the “kind and degree of defendants’ contacts do not support a finding that defendants have a permanent and continuous presence which shows a regular and established place of business in the Western District of Texas.” A district court in the District of Arizona recently transferred a case to North Carolina, where the defendant is incorporated, despite allegations that the defendant sold infringing products at Home Depot in Arizona and had at least one sales manager and an engineer located in Arizona. The court also declined to permit discovery relating to venue, concluding that discovery, additional briefing, and an evidentiary hearing “would be contrary to the just, speedy, and inexpensive determination of the merits of the action.”

Plaintiffs who have an interest in pursuing claims against a defendant not incorporated in the state in which the venue is located should try to develop a factual record to support their choice of venue, either through presuit investigation and research or through early discovery, if permitted. The facts should include whether the defendant has agents or representatives physically located in the state—and the nature of their actions within the state, whether the defendant has any physical presence in the state (e.g., buildings, warehouses, call centers, offices), the volume of sales in that state, if the defendant targets customers in that state, or has made representations about their presence in that state. On the flip side, corporations or other entities who are the targets of patent infringement cases may want to consider taking steps to minimize their conduct in states to make it more difficult to be sued in those venues. While it might be impossible or impractical for some companies to stop sales to entire states or judicial districts, they may be able to take other steps to minimize conduct with certain venues. They could avoid setting up retail stores, warehouses, or other facilities in those districts. They could avoid retaining agents or representatives or call centers in those districts. And they could avoid or minimize public statements about their activities in those districts.

Ultimately, the question of what constitutes a regular and established place of business will be litigated and decided by the district courts, the Federal Circuit will review many of those decisions, and pos-
sibly the Supreme Court will have to weigh in again on this issue.

1 VE Holding Corp. v. Johnson Gas Appliance Co., 917 F. 2d 1574 (Fed. Cir. 1990).
3 Judiciary Act, §11, 1 Stat. 79 (1789).
4 TC Heartland, 581 U.S. at ___, 137 S. Ct. at 1518 (citing Patent Act, Ch. 391, 29 Stat. 695 (1897)).
5 TC Heartland, 581 U.S. at ___, 137 S. Ct. at 1519 (citing Syndicated Motion Pictures v.83, Inc., 821 F. 2d 189, 193 (9th Cir. 1987)).
7 Justice Gorsuch took no part in the consideration or decision of the case.
8 Id.
10 Id.
12 TC Heartland, 581 U.S. at ___, 137 S. Ct. at 1520.
14 TC Heartland, 581 U.S. at ___, 137 S. Ct. at 1517.
15 In re TC Heartland, LLC, 821 F. 3d 1338, 1341-43 (2016).
16 Id.
17 Justice Gorsuch took no part in the consideration or decision of the case.
18 TC Heartland, 581 U.S. at ___, 137 S. Ct. at 1520.
19 Id.
20 Id. (citations omitted).
21 Id. (citing Pure Oil Co. v. Suarez, 384 U.S. 202, 202-05 (1966)).
The political thinkers who founded America designed a government to serve as a barrier against the tyranny they had experienced under King George III and the history of European despots they knew only too well. They understood that a government based on popular sovereignty needed to guarantee fundamental rights and that high among them was freedom of the press. In fact, foreshadowing the Declaration of Independence, on June 12, 1776, the Virginia House of Burgesses adopted the Virginia Bill of Rights, which declared those rights that pertain to “the good people of Virginia” and “their posterity as the basis and foundation of government,” including that “the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.”

The First Amendment

After winning independence, the founders convened in Philadelphia from May to September 1787 to debate and draft a new constitution. The challenge they faced was how to construct a strong national government with a president in charge without sacrificing personal freedoms. Charles Pinckney of South Carolina warned that “the Executive” might become “a Monarchy, of the worst kind, to wit an elective one.” Eventually, Edmund Randolph of...

Stephen F. Rohde, a constitutional lawyer and author of the books Webster’s New World American Words of Freedom and Freedom of Assembly, has served as president of the Beverly Hills Bar Association and chair of the ACLU Foundation of Southern California and Bend the Arc: a Jewish Partnership for Justice.
Virginia refused to sign the Constitution because he could not “promote the establishment of a plan which he verily believed would end in Tyranny.” George Mason, the author of the Virginia Bill of Rights, joined Randolph in refusing to sign the proposed Constitution, declaring that the “power and structure of the Government” would “end either in monarchy, or a tyrannical aristocracy,” unless it were amended to include a Bill of Rights. Among those rights Mason first listed “the Liberty of the Press.”

While not a delegate to the Constitutional Convention, Thomas Jefferson took great interest in the proceedings. In his famous December 20, 1787, letter to James Madison, Jefferson argued that “a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference,” listing “freedom of the press” among the most cherished of rights. Samuel Osgood, a Massachusetts Antifederalist, feared that the people would have “very little Knowledge” of “Bribery and Corruption, & and an undue Use of the public Monies” in the national capital without a Bill of Rights protecting “Liberty of Speech, of the Press, of Religion, &ca.”

Madison, as astute a politician as he was a student of history and government, heard these Antifederalist voices of opposition loud and clear. He promised that if the Constitution were ratified (and he was elected to Congress), he would introduce a Bill of Rights. He got his way and he kept his promise. As he introduced proposed constitutional amendments to the first Congress, Madison described freedom of the press as one of the “choicest” of the “great rights of mankind.” His first draft of what would become the First Amendment submitted on June 8, 1789, declared that “the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.” Eventually, through the legislative process and ratification, those who feared the possibility of an American tyranny won the debate, and the Bill of Rights became the law of the land on December 15, 1791, with the First Amendment as the crowning achievement, guaranteeing fundamental rights, including freedom of the press.

No one can study this history without understanding how profoundly the founders feared that a powerful national government headed by a powerful executive could become “a Monarchy, of the worst kind, to wit an elective one.” They demanded and secured through the First Amendment the best defense against tyranny in the form of a robust, uninhibited press. According to constitutional scholar Leonard W. Levy, freedom of the press meant “the right to criticize harshly the government, its officers, and its policies as well as to comment on matters of public concern.” By freedom of the press, “the framers meant a right to engage in rasping, corrosive, and offensive discussions on all topics of public interest” including even “foul-tempered, mean-spirited expression.” The very existence of personal liberties depended on “the vigilance of the press in exposing unfairness, inequality, and injustice” and consequently, freedom of the press “had become part of the matrix for the functioning of popular government and the protection of civil liberties.” The challenge was whether this grand design would work in practice.

**Alien and Sedition Acts of 1798**

The ink was barely dry on the Bill of Rights, when our second president, John Adams, signed the infamous Alien and Sedition Acts of 1798. These repressive measures were adopted in an atmosphere, similar to the present, of heightened nationalism, intolerance of foreigners, and fear of impending war (back then with France). Among various nativist provisions, these acts made persons from “enemy” nations ineligible for naturalization. For those enemy aliens already here, the laws authorized their deportation if they were deemed “dangerous to the peace and safety of the United States” and their indiscriminate incarceration or expulsion by presidential executive order during wartime.

Under the Sedition Act, which encompassed citizens and noncitizens alike, persons were prohibited from assembling “with intent to oppose any measure…of the government,” and it was illegal for anyone to “write, print, utter, or publish…any false, scandalous, and malicious writing” against the government, Congress or the President, “with the intent to…bring them…into contempt or disrepute; or to excite against them…the hatred of the good people of the United States.” Adams justified the law because he claimed the opposition Republican press went to “all lengths of profligacy, falsehood and malignity in defaming our government,” and demanded that the “misrepresentations which have misled so many citizens…must be discomptentuated by authority.” Adams wielded the Sedition Act as a partisan weapon. In a period described by Jefferson as “the reign of witches” (although “witch hunt” might better describe it), the Adams administration issued 14 indictments under the act—all against supporters of the opposition Republican Party, including four of the five most influential Republican journals, two of which were forced to fold. Several others suspended operations while their editors languished in jail.

Adding to its partisanship, the Sedition Act by its terms expired on March 3, 1801, Adams’s final day in office. When Jefferson was sworn in the next day, he sought to contrast himself with his predecessor. In his first inaugural address, he pointedly reminded his audience that while “the will of the majority is in all cases to prevail,” the “minority possesses their equal rights, which equal law must protect and to violate would be oppression.” He famously declared, “We are all Republicans, we are all Federalists” and said of those who would express differing opinions, “let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.” Among the “essential principles of our Government,” upon which Jefferson intended to base his administration, he began with “[e]qual and exact justice to all men, of whatever state or persuasion, religious or political,” and went on to name “the diffusion of information and arraignment of all abuses at the bar of the public reason; freedom of religion; and [and] freedom of the press.” Jefferson subsequently pardoned all those who were convicted under the acts.

In a lesson overlooked by future presidents at their peril, the Alien and Sedition Acts, designed as an expedient political measure, ultimately backfired. Federalists at all levels were rejected, and the party soon ceased to exist. In 1840, Congress repaid all fines levied under the Sedition Act, declaring that the act had been a “mistaken exercise” of power.

**Lincoln and Disloyal Speech**

A month before Abraham Lincoln was inaugurated president, six states had seceded from the United States and established the Confederacy. The country was deeply divided. In the summer of 1861, in what historian Harold Holzer calls the “Salem Witch” hunt of the Civil War, some 200 newspapers and their editors were subjected to scattered harassment by agencies of Lincoln’s government, civilian mobs, and Union soldiers. Several editors of papers aligned with the opposition Democratic Party were imprisoned at Fort Lafayette in Brooklyn, which became known as the “American Bastille.”

On September 24, 1862, Lincoln suspended the writ of habeas corpus nationwide. Among the estimated 13,000 to 38,000
imprisoned by military authorities, many, including several journalists, were arrested for expressing their political beliefs. By May 1863, when Lincoln learned after the fact that his critics were being arrested merely for saying things like, “anyone who enlists is a God Damn fool” or that “not fifty soldiers will fight to free Negroes,” and a newspaper editor in St. Louis had been arrested, Lincoln instructed military officials that “unless the necessity” for such arrests is “manifest and urgent,” they “should cease.” According to historian Geoffrey Stone, Lincoln “did not act decisively to prohibit such arrests” but instead deferred “to his military commanders, and allowed the arrests for seditious speech to continue.”

Throughout the Civil War, an estimated 300 Democratic newspapers were shut down by military authorities—at least for brief periods—for expressing sympathy for the enemy. Meanwhile, emboldened by what they saw their government doing with impunity, Union soldiers and vigilante citizens attacked newspaper offices and editors. On one occasion, the editor of the Essex County Democrat was dragged from his home, covered with a coat of tar and feathers, and ridden through town on a rail.

In 1864, during his bid for a second term, Lincoln was faced with a real case of “fake news.” A document falsely attributed to Lincoln pretended he was proclaiming a national day of “fasting, humiliation and prayer” and calling up 400,000 new troops. Armed with broad wartime powers, Lincoln ordered the arrest and imprisonment of the editors of the fraudulent proclamation. By and large, however, Lincoln exhibited a thick skin, even when newspapers accused him of being “that compound of cunning, heartlessness and folly” and castigated him as a “despot,” “liar,” “usurer,” “thief,” “monster,” “perjurer,” “ignoramus,” “swindler,” “tyrant,” “fiend,” “butcher,” and “pirate.” According to Stone, “Lincoln was the most exoriated president in American history.” (At least until now, according to some contemporary critics.)

The Censorship of Dissent

Unlike Lincoln, President Woodrow Wilson had little tolerance for criticism. Once he decided to abandon his policy of neutrality in the Great War and seek a declaration of war, he ominously warned that “if there should be disloyalty, it will be dealt with a firm hand of stern repression” since disloyal individuals “had sacrificed their right to civil liberties.” Three weeks after Congress declared war, it began debating the proposed Espionage Act of 1917. When opposition grew to provisions that would authorize press censorship, Wilson appealed to Congress arguing that the “authority to exercise censorship over the press...is absolutely necessary to the public safety.” But in a rare show of independence, Congress refused Wilson’s entreaties and rejected those provisions. Nevertheless, Wilson largely got his way and the final Espionage Act included a provision authorizing the postmaster general to exclude material from the mails “advocating or urging treason, insurrection or forcible resistance to any law of the United States.”

In one of the most notorious prosecutions of the war, Postmaster General Albert Burleson ordered the August 1917 issue of The Masses excluded from the mail. The Masses was a monthly journal of socialist politics featuring prominent writers including Max Eastman, John Reed, Vachel Lindsay, Emma Goldman, Carl Sandburg, and Bertrand Russell. The Masses immediately went to court and won a temporary injunction from U.S. District Judge Learned Hand who ruled that the law could not be construed to allow “the suppression of all...criticism, and all opinion except what encouraged and supported the existing policies.”

Judge Hand found that the antiwar articles and cartoons in The Masses magazine “are all within the range of opinion and of criticism” and “fall within the scope of that right to criticize either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority. The argument may be trivial in substance, and violent and perverse in manner, but so long as it is confined to abuse of existing policies or laws, it is impossible to class it as a false statement of facts of the kind here in question.”

As far as whether The Masses willfully caused “insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States,” Judge Hand found it would interpret the word “cause” too broadly to include “all hostile criticism, and of all opinion except what encouraged and supported the existing policies, or which fell within the range of temperate argument. It would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper.”

The U.S. Court of Appeals for the Second Circuit reversed Judge Hand on the grounds that whether or not the court was satisfied that The Masses contains “matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States,” or “involves an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces” or “willfully to obstruct the recruiting or enlistment service...the case would be governed by the principle that the head of a department of the government in a doubtful case will not be overruled by the courts in a matter which involves his judgment and discretion, and which is within his jurisdiction.”

The case was not appealed to the Supreme Court, and within a few days of the court of appeal decision seven of The Masses’ editors and staff were indicted for conspiracy to violate the Espionage Act. By the end of the year, The Masses had ceased publication.

During the war, the Wilson Administration prosecuted more than 2,000 dissenters on charges of disloyal, seditious, or incendiary speech and writing. For example, in Shaffer v. United States, Frank Shaffer was convicted for mailing copies of a book, The Finished Mystery, which argued that the “war itself is wrong” and that “its prosecution will be a crime.” The Reverend Clarence H. Waldron was sentenced to 15 years in prison for distributing a pamphlet questioning whether Christians are forbidden to fight in war.

Despite these prosecutions, Wilson pushed for even more authority to punish “disloyal” speech. Congress readily obliged with the Sedition Act of 1918, which forbade any person, “when the United States is in war,” to utter or write any “abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States.” Wilson’s Justice Department aggressively enforced the new law. In the most notorious prosecutions, a newspaperman and prominent Socialist Eugene Debs were convicted and sent to jail for criticizing the government. At first, even enlightened jurists like Supreme Court Justices Oliver Wendell Holmes, Jr. and Louis Brandeis joined in upholding each of these convictions. Within a few months, however, they changed their minds. In words that would come to be seen as a damming epitaph for Wilson’s systematic violation of freedom of speech and the press, in one of the most influential dissents in the Court’s history, which Brandeis joined, Holmes wrote...
that “the best test of truth is the power of the thought to get itself accepted in the competition of the market....”50 Indeed that is the theory—“the experiment”—of our Constitution.51 “While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions we loathe and believe to be fraught with death....”52

Indeed, more than a century after Congress righted the wrong created by the Alien and Sedition Acts, in the seminal First Amendment case of New York Times v. Sullivan, the U.S. Supreme Court declared, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”53 In 1964 the Supreme Court was called upon to review a $500,000 libel judgment which L.B. Sullivan, the Montgomery Alabama city commissioner, had won against a group of civil rights leaders who had taken out a full page ad in The New York Times, criticizing Sullivan for his actions against Dr. Martin Luther King Jr. and other civil rights activists.

Speaking for the majority of the Court in reversing the judgment, Justice William J. Brennan Jr declared in words that have come to represent a cornerstone of First Amendment law when it comes to the role of the press in criticizing elected officials: “[T]here is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”54 It is against this “profound national commitment” that the current attacks on the press from the highest office in the land need to be judged.

Nixon and the Pentagon Papers

It was Republican President Richard M. Nixon, however, not Trump, speaking to the Joint Chiefs of Staff in 1972, who first charged that the “press is the enemy.” Nixon’s hostility to the press was legendary and culminated in his failed attempt to impose an unconstitutional prior restraint on the publication of the Pentagon Papers. From the earliest days of his career, Nixon blamed the press for his political setbacks. When he lost the 1962 gubernatorial race in California, he famously (but incorrectly) told the press they would not “have Nixon to kick around anymore.” Amid fears that Apollo 11 astronauts had returned from the moon with deadly germs, Nixon told a foreign leader he would like to send “contaminated” moon rocks to his critics in the press.55 During the Watergate scandal, it was revealed that Nixon kept an “enemies list” of his political opponents, including Daniel Schorr, an Emmy award-winning journalist for CBS News, who had been secretly investigated by the FBI during the Nixon Administration.56

Writing for The Atlantic during the height of the Nixon years, journalist David Wise argued that Nixon saw television as a “conduit” to deliver his message to the public, not as an independent form of “electronic journalism.” According to Wise, the “moment that television analyzes his words, qualifies his remarks, or renders news judgments, it becomes part of the ‘press,’ and a political target.”57 By applying “constant pressure, in ways seen and unseen, the leaders of the government have attempted to shape the news to resemble the images seen through the prism of their own power.”58

Nixon’s most overt exercise of presidential pressure to shape the news came in 1971, during the Vietnam War, when he sought to restrain The New York Times and the Washington Post from publishing the Pentagon Papers, a history of American involvement in Vietnam from 1945 to 1967 prepared by the U.S. Department of Defense. Citing the Espionage Act, Nixon claimed executive authority to force the newspapers to suspend publication of any classified information to prevent alleged “irreparable injury to the defense interests of the United States.”59

On June 30, 1971, in a historic 6-3 decision in New York Times v. United States, the U.S. Supreme Court rejected Nixon’s arguments and upheld the right of the newspapers to publish the Pentagon Papers.60 In his concurring opinion, Justice Hugo Black wrote that in “the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.”61 As Justice Black saw it, in “seeking injunctions against these newspapers...the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment,” which entrusted a free press with “the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”62 Justice Black insisted that to “find that the President has ‘inherent power’ to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure.’”63 Likewise, Justice William O. Douglas noted that the “dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.”64

Justices Potter Stewart and Byron White reminded us that in: “[T]he absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”65

The justices’ forceful admonitions that under the First Amendment the press had a duty to hold presidents and other elected officials accountable would prove prescient, since less than a year later, Nixon’s presidency would be brought down by the Watergate scandal, in which the press played its vital role in baring the secrets of government, informing the people, and exposing Nixon’s deceptions.

Television news anchor Walter Cronkite was convinced that the Nixon administration attacked the news media “to raise the credibility of the Administration. It’s like a first-year physics experiment with two tubes of water—you put pressure on one side and it makes the other side go up or down.”66 History has shown that Nixon lost that experiment.

The Current Climate

There is no evidence that President Trump has seriously studied the presidencies of Adams, Lincoln, Wilson, and Nixon, in general, or the damaging consequences of their hostility toward freedom of the press, in particular. Ignoring the cautionary tales posed by these four presidents, any successor, including Trump, runs the risk of repeating their mistakes apparently oblivious to the fact that in each case the judgment of history condemned their unwarranted attacks on the press.

In this climate of concern about First Amendment issues and
freedom of the press, in particular, within days of Trump’s inauguration, Stanford University gathered several of its leading scholars to discuss the new president’s relationship with the media.67 James Hamilton, professor of communications and director of the Stanford Journalism Program, noted that the disdain for the press President Nixon expressed in private is “exactly the type of vitriol that Trump uses in public.”68 On his first full day in office, Trump said in an address to the media, “I have a running war with the media. They are among the most dishonest human beings on Earth.”69 According to Hamilton, the belief that the media is the enemy was the undoing of Nixon, and the “danger for the Trump administration is that a similarly callous view of democratic insti-

utions can ultimately lead to violations of laws, including those governing conflicts of interest.”70

As another participant, Theodore Glasser, also a professor of communications, sees it, an “oppositional press—an adversarial press—is a vitally important tradition in American politics” because “the job of the journalist...is to create and sustain the public conversation democracy demands.”71 For Hamilton, the media’s job today is clear: “Give people an accurate picture of government actions, show your work and make it transparent about how you verified your facts, and be willing to risk ridicule and censure and surveillance and arrest by public officials who prefer supremacy to scrutiny.”72

Will the press serve as the bulwark the founders intended against a potentially tyrannical executive? Will it “criticize harshly the government, its officers,” and “engage in rasping, corrosive, and offensive discussions on all topics of public interest.”73 The very existence of personal liberties depends on “the vigilance of the press in exposing unfairness, inequality, and injustice.”74

In December, 2016, a New York Times article predicted that if “Donald J. Trump decides as president to throw a whistle-blower in jail for trying to talk to a reporter, or gets the FBI to spy on a journalist, he will have one man to thank for bequeathing him freedom of the press—Barack Obama.”75 During the Obama administration, in addition to the much-publicized prosecutions of Edward Snowden76 and Chelsea Manning,77 the Department of Justice brought charges against six other people accused of leaking information to the media—Thomas Drake, Shamai Leibowitz, Stephen Kim, Jeffrey Sterling, Donald Sachtleben, and John Kiriakou.78

Thomas Drake, a senior executive at the National Security Agency, who started his job on September 11, 2001, repeatedly complained about waste and lack of privacy protections at NSA.79 In 2005, he allegedly started talking to Siobhan Gorman, a reporter for The Baltimore Sun, and provided her with unclassified documents for a story detailing how the NSA wasted hundreds of millions of dollars on a spying program that infringed on Americans’ privacy. In 2010, a grand jury formally indicted Drake under the Espionage Act, not for providing classified information to any one, since he only shared unclassified information with Gorman, but for taking a few classified documents home. Just before the case was set to go to trial in June 2011, the DOJ dropped all charges in exchange for Drake’s pleading guilty to a misdemeanor.80

A month after Drake was originally indicted, Shamai Leibowitz, a linguist at the FBI, was accused of leaking information to blogger Richard Silverstein.81 Charged under the Espionage Act, he took a plea deal in 2009 and was sentenced to 20 months in prison. Leibowitz said he had provided Silverstein with evidence that the FBI “was committing illegal acts,” and Silverstein later revealed that Leibowitz had given him transcripts of secretly wiretapped conversations at the Israeli embassy in Washington, D.C.82

Stephen Kim was a State Department contractor accused of leaking information about North Korea’s nuclear program to Fox News reporter James Rosen in 2009.83 After fighting the case for years, Kim took a plea deal in 2014 and was sentenced to 13 months in prison.84

Jeffrey Sterling, a former CIA agent, was accused of leaking information about the CIA’s botched attempts to disrupt Iran’s nuclear program to New York Times reporter James Risen in 2005.85 In 2011, as the Obama administration ramped up its war on leakers, Sterling was indicted under the Espionage Act. In 2015, Sterling was convicted of violating the Espionage Act and sentenced to three and a half years in prison.86

Donald Sachtleben, a former FBI agent, was accused of confirming information about a foiled terrorist plot in Yemen to Associated Press reporters in 2012 after the DOJ secretly seized two months’ worth of AP reporters’ work phone, cell phone and home phone records.87 News outlets and journalism groups condemned this invasion of journalists’ privacy, and Attorney General Eric Holder later agreed to adopt new internal DOJ regulations limiting when the department could seize reporters’ communications. Sachtleben pleaded guilty in 2013 to violating the Espionage Act.88

In addition to charging journalists’ sources under the Espionage Act, both the Obama and Trump administrations have explored the possibility of using the law directly against journalists. In 2010, as part of its investigation into Stephen Kim in 2010, Obama’s DOJ obtained a search warrant for Fox News reporter James Rosen’s private e-mail. In an affidavit supporting the search warrant, an FBI agent accused Fox News reporter Rosen of conspiring to violate the Espionage Act. “There is probable cause to believe that the Reporter has committed a violation of 18 U.S.C. § 793 (Unauthorized Disclosure of National Defense Information), at the very least, either as an aider, abettor and/or co-conspirator of Mr. Kim,” FBI special agent Reginald Reyes wrote in an affidavit, shocking freedom of press groups at the time.89

John C. Kiriakou was the first CIA officer to be imprisoned for leaking classified information to a reporter and served nearly two years in federal prison in Pennsylvania.90 As a CIA analyst and a counterterrorism officer from 1990 to 2004,91 he helped lead the operation that captured Abu Zubaydah, an alleged Al Qaeda militant. In a 2007 interview with ABC News, Kiriakou became the first former CIA official to publicly discuss the agency’s use of waterboarding, a suffocation technique with a prominent place in the history of torture. Documents later showed that other CIA operatives subjected Abu Zubaydah to waterboarding 83 times.92

Kiriakou was charged in 2012 with disclosing classified information to journalists.93 In a plea deal, he later admitted to one of the leaks, viz. he had disclosed the name of an undercover CIA officer to a freelance journalist, Matthew Cole, though Cole did

“[To] find that the President has ‘inherent power’ to halt the publication of news by resort to the courts would wipe out the First Amendment….”—Justice Hugo Black.
Terry Allen 101

1 See, e.g., Donald J. Trump@real Donald Trump, Twitter (Feb. 17, 2017). The full tweet reads: “The FAKE NEWS media @nytimes, @CNN, @NBC and many more) is not my enemy, it is the enemy of the American people. SICK!”


3 Sedition Act, supra note 16.


7 Stone, supra note 17, at 31-32.

8 Id.; Mark E. Neely Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties 60 (1991); Abraham Lincoln: Military Arrests, May 17, 1861, in 4 Lincoln, supra note 24, at 372.

9 STONE, supra note 23.

10 Stone, supra note 17, at 38-39.

11 See, e.g., Donald J. Trump@real Donald Trump, Twitter (Feb. 17, 2017). The full tweet reads: “The FAKE NEWS media @nytimes, @CNN, @NBC and many more) is not my enemy, it is the enemy of the American people. SICK!”


13 Sedition Act, supra note 16.


15 Stone, supra note 17, at 12.


18 Stone, supra note 17, at 31-32.

19 Id.; Mark E. Neely Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties 60 (1991); Abraham Lincoln: Military Arrests, May 17, 1861, in 4 Lincoln, supra note 24, at 372.

20 STONE, supra note 23.

21 Stone, supra note 17, at 38-39.

22 See, e.g., Donald J. Trump@real Donald Trump, Twitter (Feb. 17, 2017). The full tweet reads: “The FAKE NEWS media @nytimes, @CNN, @NBC and many more) is not my enemy, it is the enemy of the American people. SICK!”


24 Sedition Act, supra note 16.


28 Stone, supra note 17, at 31-32.
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Available at


STONE, supra note 17, at 52.

Masses Pub'l Co. v Patten, 244 F. 535, 539-40 (S.D. N.Y. 1917).

Id. at 539.

Id. at 539-40.

Masses Pub'l Co. v Patten, 246 F. 24, 35, 36 (2d Cir. 1917).

STONE, supra note 17, at 54.

Id.

Shaffer v. United States, 253 F. 886 (9th Cir. 1919).

STONE, supra note 17, at 55.


Id. See also STONE, supra note 17, at 57.

Frohwerk v. United States, 249 U.S. 204 (1919).


It was in his opinion for a unanimous Court in Schenck, that Holmes wrote one of the most memorable (and often misquoted) sentences in Supreme Court history: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic.” Schenck, 249 U.S. at 52. Pandits usually overlook that in Holmes’s hypothetical, the speech was both false and actually caused a panic. Stone asks, “Suppose the ‘cry of fire’ were true? Would it still be punishable? If not, does that suggest a possible error in Holmes’s reasoning?” STONE, supra note 17, at 59.


Abrams, 250 U.S. at 630.


Id. at 270.

Wise, supra note 51.


Wise, supra note 51.

Id.


Id. at 717 (Black, J., concurring).

Id. at 716-17.

Id. at 719.

Id. at 723-24 (Douglas, J., concurring).

Id. at 728 (Stewart, J., and White, J., concurring).

Wise, supra note 51.


Id.

Id.

Id.

Id.

Id.


Id.


See, e.g., Mark Norris, Bad “Leaker” or Good “Whistleblower”: A Test, 64 W. Va. L. Rev. 693 (2013) [hereinafter Norris]. Since Chelsea Manning was serving in the U.S. military, the matter was handled internally.


For greater detail on the Drake case, see, e.g., Norris, supra note 77, at 699.


Sterne, supra note 78.


Sterne, supra note 78.

United States v. Sterling, 724 F. 3d 482, 509 (4th Cir. 2013); see also Risen v. United States, 134 S. Ct. 2696 (2014).

Sterne, supra note 78.


Sterne, supra note 78.

Id.

United States v. Kiriakou, No. 1:12cr127 (LMB) (E.D. Va. Aug. 8, 2012); see also Feuer, supra note 76.


Id.

Kiriakou, No. 1:12cr127 (LMB).

Shane, supra note 91.

Id.

Risen, supra note 75.


Id.

Risen, supra note 75.

Sterne, supra note 78.


102 Lawrence Britt, The 14 Defining Characteristics of Fascism, Free Inquiry, Spring 2003, available at http://www.free-inquiry.com/generals37/fascism.htm. Other characteristics that resonate ominously today are powerful and continuing nationalism, disdain for human rights, identification of enemies/capegoats as a unifying force, supremacy of the military, rampant sexism, obsession with national security, religion and government are intertwined, corporate power is protected, labor power is suppressed, disdain for intellectuals and the arts, obsession with crime and punishment, rampant cronymism and corruption, and fraudulent elections.

A promotional offering that becomes a viral hit can significantly alter, either positively or negatively, the fortunes of a company.

limitless access to the Internet and social media have brought a new age for companies not only to publicize information on their products and services but also countless ways to connect with the public, improve customer relations, and strengthen their brands. A viral hit—whether intended or not—can significantly alter, either positively or negatively, the fortunes of a company.

For instance, a clothing company called Sunny Co recently promised its customers free swimsuits if they reposted an Instagram image of a model in one of their swimsuits and tagged Sunny Co. Predictably, the notion of receiving an approximately $65 item for free was very popular. In fact, it was so popular that the company was forced to post an Instagram update within 20 hours featuring some significant changes to the terms of the promotion: “[D]ue to the viral volume of participants,” Sunny Co “[reserved] the right to cap the promotion if deemed necessary” and limited the code to being valid for only 24 hours. Sunny Co ultimately decided to honor only the first 50,000 entries as opposed to awarding a swimsuit for each repost.

While the viral nature of the promotion presented complications—disgruntled customers due to the high volume of orders, order backlog, and changing the terms after the promotion started—it also took a relatively unknown company and brought it to national prominence (e.g., news reports as well as countless memes on social media mocking the participants and the company’s poor management of the promotion). Time will tell whether the ultimate effects of this promotion will have a positive or negative impact on the brand.

The lesson to learn from the Sunny Co promotion as well as countless other promotions being offered is that with the availability and convenience of social media also come numerous opportunities to run afoul of the law, including violations of gambling prohibitions, consumer protection requirements such as necessary official rules provisions, and state registration and bonding requirements.

**Gambling in the United States**

The federal government traditionally has not played a major role in the regulation of gambling. Instead, regulation has been viewed as more appropriate for state and local jurisdictions. Accordingly, with only a few notable exceptions (e.g., the federal Wire Act), rather than preempting state gambling laws, federal laws that govern gambling crimes were designed to aid indi-
vidual states in the enforcement of state gambling laws.

In the United States, gambling has many subcategories, including lotteries, unlawful wagering, and bookmaking. Each state can adopt its own versions of laws governing these various subcategories, and such laws often are inconsistent among states. Of particular importance in promotional activities is the prohibition against offering lotteries. Prohibited lotteries (or games of chance) typically involve any activity in which the following elements are present: 1) the award of a prize, 2) determined on the basis of chance, 3) where consideration is paid. For instance, California defines a prohibited lottery as “a scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property.”

If, however, any one of these three elements is removed, then the activity is generally lawful. For example, removing the element of chance creates a lawful contest of skill in most states. Removing the element of consideration from a prohibited gambling activity is of particular relevance here since it generally creates a lawful activity commonly known as a sweepstakes. A sweepstakes always contains the element of chance and the award of a prize, but the element of consideration is eliminated.

What Constitutes Consideration

With regard to determining whether the element of consideration is satisfied, states typically follow one of three tests: 1) pecuniary/economic value jurisdictions, 2) traditional contract principals jurisdictions, and 3) any consideration jurisdictions. However, most states, including California have now adopted the pecuniary/economic value approach to analyzing consideration—some measurable economic value flowing from participants to promoters (e.g., transfer of money). Under this pecuniary/economic value approach, consideration “means something of value and not merely the formal or technical consideration, such as registering one’s name or attending a certain place, which might be sufficient consideration to support a contract.”

A key turning point in the distinction of consideration for contract law and gambling purposes occurred in a 1954 U.S. Supreme Court case, *FCC v. American Broadcasting Company*. The Supreme Court assessed whether a promotional activity requiring only that listeners accept a phone call from the radio station had sufficient consideration to constitute an illegal lottery. Chief Justice Earl Warren acknowledged that the mere act of listening to the radio was sufficient consideration under contract principles; however, Chief Justice Warren adopted the inference that when determining whether an act is consideration for criminal purposes, consideration under lottery laws should be interpreted in the defendant’s favor. In determining that the act was not consideration under the statute, Chief Justice Warren stated, “[I]t would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime.”

On the other hand, a promotion requiring a purchase or payment to participate presents a clear example of consideration for gambling purposes. A less clear situation arises when participants are required to expend some degree of effort that ultimately benefits the promoter (e.g., completing a questionnaire, referring friends, completing a product survey, among others). While no definitive standard exists, the rule of thumb is that the more effort required, the greater the likelihood that it will be deemed consideration.

Removal of Consideration

Two common models for removing consideration exist. Under the first method, the company does not charge participants to enter the offering. Here, a company’s revenues are derived from the increased sales of goods created by the advertising value of the promotion or collecting fees from third parties, such as a promotional sponsor.

A second and more common model is referred to as a “flexible entry sweepstakes.” This type involves some participants’ paying direct or indirect economic value, but the company provides an opportunity for anyone to enter for free. A common illustration of this model is a promotion at a fast food restaurant in which participants receive game pieces in exchange for purchasing hamburgers or soft drinks. These game pieces, either by themselves or in combination, provide an opportunity for the purchaser to win valuable prizes in lottery-type games. The key feature to this type of promotion, which distinguishes it from constituting an unlawful lottery, however, is the alternative opportunity to participate without having to purchase anything (e.g., a mail-in request for a free game piece). This alternative method of entering the promotion for free is known as an “AMOE.” Use of an AMOE is generally effective in terms of legally eliminating the consideration element, although most entries into the promotion will be through the purchase of the promoted product or service.

The flexible entry sweepstakes model is recognized in California. In particular, in *California Gasoline Retailers v. Regal Petroleum Corp.*, the California Supreme Court held that a promotional scheme lacked consideration because it included a free AMOE that allowed participants to play without purchasing the sponsor’s products. The supreme court noted that because any person could have had the ability to participate for free, “it would seem that the relative numbers of tickets distributed with purchases or without purchases should not be determinative of the issue involved which is whether the holder, or holders, of the tickets paid, or promised to pay a valuable consideration for the chance of winning a prize.” The court further concluded that participants who made a purchase “could not be said to have paid a consideration for the prize tickets since they could have received them free.”

In addition to making an AMOE available for all, there are several other factors that must be satisfied to ensure that the AMOE will be recognized as a permissible method of removing consideration. First, most state promotional laws require companies to disclose the no-purchase method of entry in a clear and conspicuous manner. Often, the phrases “no purchase necessary” and “purchase will not increase your chances of winning” are required to be displayed prominently in the rules as well as all accompanying promotional materials. For instance, Section 17353.15 of the Business and Professions Code requires the “NO PURCHASE OR PAYMENT NECESSARY” language be set out in a separate paragraph from the rest of the official rules. In addition, the statement must be in all capital letters, in contrasting typeface, and it must be no smaller than the largest typeface used in the rest of the official rules. If the official rules are not printed on the marketing materials, then the “NO PURCHASE OR PAYMENT NECESSARY” language must be included on the entry form.

Another key is that nonpaying participants must have “equal dignity” with purchasers (i.e., equal opportunity to enter, to win, and to win the same prizes). This means, for example, a person who enters by purchase cannot get a disproportionate number of entries compared to a nonpaying participant. Additionally, nonpaying participants should have an equal opportunity to win all prizes offered in the promotion. That is, the use of separate prize pools for nonpaying participants would invalidate the AMOE, because they would not have the opportunity to win the same prizes. Likewise, nonpaying participants should not face greater odds or obstacles to winning the prizes. For example, California law pro-
vides that “[s]weepstakes entries not accompanied by an order for products or services shall not be subjected to any disability or disadvantage in the winner selection process to which an entry accompanied by an order for products or services would not be subject.” Any material disparity (actual or perceived) can invalidate this model.

**Official Rules and Advertising**

Even after designing a lawful promotion that removes the element of consideration, the process does not end. Quality official rules governing the administration of the promotion as well as clear, deceptive free advertising are also critical. California requires certain disclosures when a prize is offered as part of a sweepstakes, such as the dates in which the promotion will end and prizes are to be awarded and all rules, regulations, terms and conditions of the promotion. At a minimum, official rules should include 1) start and end dates, 2) eligibility restrictions, 3) entry methods, 4) winner selection details (including selection and notification dates), 5) the description and approximate retail value of the prize(s), 6) the odds of winning, 7) where to obtain a winners’ list, 8) the limitations of liability, 9) the name and address of the sponsor, and 10) the dispute resolution provisions. Sponsors may consider having entrants check a box affirming that they have read the official rules and agree to be bound by such rules. Requiring such affirmation helps ensure that entrants understand all aspects of the sweepstakes, including required sponsor disclosures, before entering.

Obtaining affirmation that entrants have read the rules is insignificant, however, if the rules are not clear and free of deception. Therefore, a company must be careful when drafting official rules to avoid any potential misinterpretation of its intent and anticipate foreseeable issues, such as prize unavailability, prize damage during shipment, and cheating by participants. It is essential to clearly state all aspects of the promotion as courts will likely not be kind to companies that mislead participants. Claims for breach of contract, fraudulent misrepresentation, and violation of false advertising statutes may arise if prize interpretation is in dispute. California law also deems it an unfair practice for a sweepstakes sponsor to misrepresent in any manner the odds of winning any prize or to misrepresent the official rules of the promotion.

Ensuring that the promotional advertising complies with legal requirements is equally important. California, for example, has both requirements for what must be in advertisements as well as prohibitions against certain representations being made in advertisements. First, California requires the exact nature and approximate retail value of the prizes to be disclosed in promotion materials. Advertisements also must include, immediately adjacent to the first identification of the prize, the odds of winning a prize—e.g., “See Official Rules, (reference location), for the odds of winning a prize,” “Odds of winning a prize depend upon the number of entries received,” or “Odds of winning 1:100,000.” Moreover, after winners have been determined, sponsors are required to obtain the express written consent of each winner before such names may be used in promotional materials.

Sponsors also must be careful not to represent that the entrant pool is significantly limited or that a particular individual has been specially selected to receive a prize unless the statement is true. Unless a person is actually entitled to a prize, promotional advertising may not represent that a person is a winner or has already won a prize. Representations that a person has won a prize without actually disclosing the exact nature and approximate retail value of the prize is prohibited. Sponsors must also avoid describing entries with the word “lucky” to imply that the entrant has a higher likelihood of winning a prize.
Words that promote a sense of urgency, such as “Act Now!” and “Open Immediately,” are prohibited, unless there is actually limited time in which a person must act to claim, or be entitled to a prize, and the promotional materials clearly and conspicuously disclose the date by which such action is required. California also prohibits sponsors from using promotional materials that create a false impression that such documents are authorized, issued, or approved by any court, official, or agency of a state or the United States, or by a lawyer, law firm, or insurance or brokerage company. Likewise, promotional materials cannot create a false impression as to their source, authorization, or approval or be in the form of simulated checks or currency unless “SPECIMEN-NONNEGOTIABLE” is clearly and conspicuously printed on the simulated currency. Lastly, sponsors may not impose a fee as a condition to an entrant’s entitlement to a money prize or impose a fee as a condition of acquiring prize or sweepstakes information.

With a deeper understanding of the intricacies of offering a promotion, companies should understand that official rules are like any other binding contract, except that instead of contracting with another sophisticated company, the company is potentially contracting with thousands of users. Thus, detail, clarity, and accuracy are crucial in drafting rules. This is evidenced by attorney general enforcement actions and substantial fines that are levied against companies found to be promoting fraudulent schemes and engaging in other forms of false or deceptive advertising on the Internet (i.e., official rules that do not accurately reflect the promotion).

In particular, a misdemeanor charge will be imposed on any person found to have violated any of California’s sweepstakes provisions, and the California Attorney General or a district attorney may prosecute such persons. Private parties, district attorneys, city attorneys, county counsel, the California Attorney General and other agencies of the state may enforce the provisions governing the operation of sweepstakes through civil court actions. The nature of the action will determine the available remedies, which may include civil penalties of up to $2,500 for each violation, injunction, and restitution. Additional civil penalties of $2,500 for each violation may be charged as an unlawful business practice if a promotion is found to be in violation of the sweepstakes provisions.

**Social Media Platforms**

When using social media, a company also must be aware of the applicable social media platform’s restrictions and draft the promotion’s rules in compliance with them. This is important because a promotion could be terminated prematurely for non-compliance with the platform’s restrictions, which may lead to a violation of applicable state law because the promotion did not adhere to its operational framework as set forth in its official rules.

Finally, while California does not, several states do require registration and bonding of a chance-based promotion if the prizes awarded exceed a set amount. To register with a state, among other items, a company must submit the promotion’s official rules as well as pay registration fees. In addition to registration requirements, separate bonds and trusts based on the total approximate retail value of all prizes are required for Florida and New York. Sufficient time for registration and bonding should therefore be allotted when planning a promotion. Failure to do so may result in postponement of the promotion to allow for the necessary registrations or in the blocking of these states in order to proceed in the timeframe initially proposed.

With the power of social media comes the lure of producing the next viral promotion to set the company apart from its competitors. Companies must be cog-
nizant, however, of the legal constraints in the promotional space. In particular, companies are exposing themselves to a specialized and regulated industry with substantial penalties for violations. Retaining counsel familiar with this area of the law to help develop and vet promotions is not only a prudent tactic to circumvent promotional mishaps (e.g., customer confusion), but, in more severe circumstances, to stave off criminal penalties resulting from improperly implemented promotions.

1 The customers would be able to receive a $65 swimsuit for free and only needed to pay shipping and handling.

2 “GAMETIME! Promo Rules As Follows: 1. No Exchanges/Returns, All Promo Orders Final. 2. Code Valid for 24 hr. only, No Exceptions. 3. Due to the viral volume of participants we reserve the right to cap the promotion if deemed necessary. 4. Participants must pay Shipping & Handling. 5. Due to the overwhelming volume of orders we will work as fast as we can to process & ship (approx. 3-6 weeks) but there may be delays. 6. Promo Code will only work for Participants who reposted and tagged us. Limited to 1 Suit per participant. 7. Shout out to @twazerapp for sponsoring this promotion. 8. Promo Code: Sunny Xoxo, Sunny Team.” Shortly after the promotion ended, Sunny Co’s Instagram was temporarily shut down.

3 Penal Code §319.


7 Id.

8 Id. at 296.

9 Id. at 294.

10 Cabot, supra note 4, at 15.


12 Id. at 786.

13 Id. (quoting People v. Carpenter, 297 P. 2d 498, 500-01 (Cal. Ct. App. 1956)).

14 BUS. & PROF. CODE §17539.15(b).

15 Id.

16 Id.

17 Id. §17539.15(c).

18 Id. §17539.1(a)(4)(D), (F).

19 Id. §17539.1(a)(3)-(4).

20 Id. §17539.1(a)(6).

21 Id. §17539.5(e).

22 Id. §17539.1(a)(13).

23 Id. §17539.1(a)(8).

24 Id. §17539.15(a).

25 Id. §17539.1(a)(9).

26 Id. §17539.1(a)(11).

27 Id. §17539.15(b).

28 Id. §17539.15(i)(1).

29 Id. §§17539.15(i)(2), 17539.1(14).

30 Id. §17539.15(l)(1).

31 See generally §17534.

32 Id. §§17355, 17356.

33 Id. §§17200, 17206.

34 Id. §17534.
ATTORNEYS HAVE A UNIQUE SET OF SKILLS and knowledge that can be used to expand access to justice through pro bono work. All lawyers can do pro bono, and your help is needed. The term pro bono publico means “for the public good” and generally refers to providing free legal services directly to persons of limited means or to nonprofit organizations in matters designed to address the needs of persons of limited means. Legal work with one of the legal services projects of the Los Angeles County Bar Association or that has been screened and referred by a legal services organization qualifies as pro bono.

People really need your help. A huge unmet need for pro bono legal services in our community continues to exist. As lawyers, we are extremely fortunate to be able to practice law, to possess a license to practice, and to have skills that many lack. It is well accepted that every lawyer has a professional responsibility to provide legal services to those unable to pay. Each of us should aim to provide a minimum of 50 hours of pro bono services each year.

There are many other reasons to do pro bono work, including the benefits to be obtained from service. Pro bono opportunities help build skills. With in-person hearings and trials far and between in typical commercial work, lawyers find opportunities to interact with clients, judges, and the court system through pro bono work. In turn, clients in need benefit, as do the pro bono lawyers themselves and the firms and companies that employ them. Studies have repeatedly shown that attorneys get better results than litigants who are forced to represent themselves. Networking opportunities through pro bono efforts also increase interpersonal relationships, confidence, and substantive expertise and can boost referral potentials and business opportunities. There is something about pro bono work that creates a sense of instant credibility with others.

Also, it feels good to do pro bono work. It is often the most personally rewarding work a lawyer does. Pro bono work connects you to people with issues you can help address. It makes you feel like a lawyer. Your experience, training, and unique knowledge are put to use in a tangible way. Yes, our jobs and other activities can allow us to make a difference in the world, but doing pro bono work for people who truly need it is a concrete, attainable achievement specific to lawyers, and one that breeds a deep personal satisfaction. Even if it doesn’t always feel like it, we are fortunate and privileged to be lawyers. Our community is home to many with critical legal issues and less means. Our justice system depends on our involvement. We have the knowledge and talents to ensure that every person has an opportunity to achieve justice.

The LACBA Access to Justice Committee recently added resources to the LACBA website, under the “GIVE BACK” tab, to support increased involvement in pro bono service. You can directly link up with LACBA’s legal services projects where you can get involved in various issues such as domestic violence restraining orders, veterans legal services, immigration legal assistance, and legal assistance to people living with HIV/AIDS, depending on your interests. The LACBA website now also provides information about other pro bono opportunities, including a list of Los Angeles legal services programs and a link to a searchable online directory of statewide legal services organizations, answers to frequently asked questions, as well as other resources. LACBA also updated its Pro Bono Policy and Commentary...
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