Los Angeles lawyer Nathan J. Hochman presents an overview of strategies used by U.S. government agencies to regulate and control cryptocurrency activity

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Attend LACBA’s Third Armed Forces Ball and help a vet
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Policing cryptocurrencies poses unique challenges to U.S. regulators and law enforcement agencies as they scramble to figure out how to regulate and enforce laws in a virtual currency world that can operate anonymously, electronically, quickly, across borders, and without intermediaries or paper trails.

In the first of a two-part series, Nathan J. Hochman, deputy chair of Morgan, Lewis & Bockius LLP’s White Collar Litigation and Government Investigations practice, explores government enforcement efforts in this area and the difficulty of adapting potentially outdated rules and regulations to a new financial technology. Our cover story, “Policing the Wild West of Cryptocurrency,” starts on page 14.

In one day last spring, the U.S. Supreme Court issued two separate opinions on the patent inter partes review process, the first upholding its constitutionality and the second clarifying the scope of the governing statute. In his article, “The Institution of Inter Partes Review,” on page 22, Kyle Kellar of Lewis Roca Rothgerber Christie’s inter partes review team, explains why *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC* was more closely watched by the patent bar but *SAS Institute, Inc. v. Iancu* may have more impact.

Mesisca Riley & Kreitenberg partner Rena Kreitenberg examines causes of action against attorneys for civil conspiracy with a client. Such claims have always been thorny as they are subject to a prefiling order pursuant to Civil Code Section 1714.10. The statutory mandates and exceptions to the prefiling order within Section 1714.10 are specific, Kreitenberg says, but courts have interpreted their application in ways that are at times unclear. Her article, “When Attorneys and Clients Conspire,” starts on page 30.

In his “President’s Page” column, LACBA President Brian Kabateck details progress on his pledge to significantly increase new membership benefits before the end of his term. Read about recent and coming changes that enhance and benefit LACBA on page 8.

Kristina Fernandez Mabrie of Foley & Lardner writes this month’s “Barrister’s Tips” (page 12) about the National Labor Relations Board’s important new guidance on workplace policies in the wake of the board’s groundbreaking decision in *The Boeing Company*.

Deborah Kelly’s “On Direct” interview on page 10 is with Brenda Feigen, American feminist, film producer, and attorney. A seminal figure in the struggle for gender equality, a former vice president of the National Organization of Women, and a cofounder of *Ms.* magazine in 1972, Feigen also cofounded the ACLU’s Women’s Rights Project with now U.S. Supreme Court Justice Ruth Bader Ginsburg.

In tandem with National Veterans and Military Families Month, Greenberg Traurig litigator and pro bono coordinator Adam Siegler focuses his “Closing Argument” (page 60) on LACBA’s Veterans Legal Services Project that works to identify and address opportunities to assist veterans, active military personnel, and reservists with their legal needs. Mark your calendars: LACBA’s Armed Forces Committee, which Siegler chairs, will host its Third Armed Forces Ball on March 2, 2019.

Rounding out the issue is Los Angeles Lawyer’s Semiannual Guide to Expert Witnesses, which starts on page 36.

Susan Pettit is the Editor-in-Chief of Los Angeles Lawyer.
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New and Expanded Programs Enhance and Benefit LACBA

IN RECENT PRESIDENT’S PAGE COLUMNS, I highlighted things that need to change in order to bring LACBA into the twenty-first century. I have urged an embrace of change. The Board of Trustees is dedicated to effectuating change this year. I have pledged to introduce at least 20 new membership benefits before the end of my term. What do we have to lose by aggressively changing?

This month, I want to focus on recent and coming changes that enhance and benefit LACBA. We have more than 20,000 members, 26 practice sections, and 15 committees that successfully sponsor and support over 250 programs a year. We are the voice of the legal community in Los Angeles for the law student, the new lawyer, the member who needs to be reminded of why he or she became a lawyer, as well as senior and retired lawyers. We are the center of the legal community, and we can help remind lawyers that what they do matters and that when times are tough, they are not alone. Our relationships with each other are professional and personal, and in difficult moments we are a family that looks after one another and advocates for those who cannot.

New and Expanded Programs

Here are some of the programs that are currently being offered and expanded and some that will be offered by the end of the year:

LACBA is developing something special: a way for law firms of any size to sponsor their own programs (either in their offices or a venue of their choice), which will be open to all members. For example, an appellate firm in Burbank may wish to offer a free program on preparing the perfect writ. The firm can hold the seminar in its offices, while LACBA can promote and offer MCLE credit for the program, as well as advertise the program to its members. The program would be free to LACBA members and provide a perfect opportunity to showcase the firm.

We are working hard to increase our unparalleled relationships and access to the federal and state bench. LACBA is unique in its ability to offer a wide range of programs to interact with sitting judges. Many judges are members of section executive committees, and the current presiding judge of the Los Angeles Superior Court is a LACBA assistant vice president. We work with the bench to promote judicial independence and access to justice.

LACBA is promoting financial independence for newer lawyers. This includes student loan consolidation available through affinity partners, where newer lawyers can get advice on reducing the monthly burden of paying high-interest student loans.

The preferred providers program that LACBA has in place includes a number of discounted services from legal providers. We are also implementing e-filing for the Los Angeles Superior Court and our partners. The service will offer discounts to law firms and lawyers who are LACBA members. In LACBA’s downtown offices, members already have free access to our virtual office experience for members. In addition, a members’ lounge and discounted meeting space is available at LACBA headquarters.

We offer free and discounted continuing legal education and one free section program to members participating in our “bring a guest” campaign. Members are encouraged to bring a guest to their section meetings and programs. The guest attends for free.

LACBA is grateful for the Metropolitan News-Enterprise and its ongoing sponsorship and support whereby LACBA members enjoy free access to our daily e-briefs that recap recent case decisions. The e-briefs are available to every LACBA member.

First- and second-year members of the California Bar are now given free memberships to LACBA and we have just reduced the dues for lawyers in their third-through-seventh years of practice.

Bridging the Gap

LACBA has reinstituted the “Bridging the Gap” program, which will be offered next spring. The program was held last spring for the first time in many years and included a star-studded cast of lawyers discussing their own specialties, providing newer lawyers with an opportunity to learn about various practice niches in the profession. This year we are opening the program to law students. We have extended free memberships to all students attending law school in California.

The Barristers Section is in the process of changing its name to the Barristers/Young Lawyers Section. They offer networking for newer lawyers as well as an opportunity to grow in the community and meet other lawyers facing challenges and successes in the first seven years of practice. In addition, we are asking the sections to extend special continuing education to newer lawyers that will explain the practice areas that sections cover.

At the other end of the spectrum, we now offer free memberships to retired lawyers and 50-plus year members of LACBA. In addition, lawyers over the age of 55 are eligible for the senior lawyers division in which more seasoned lawyers meet and network with their contemporaries.

Over its 140 years in existence, LACBA has broken ground on inclusion and diversity, and our current commitment to diversity and outreach is second to none. This year, we added a permanent vice president position for diversity and outreach. Phil Lam is currently serving as the inaugural vice president.

Every year, the litigation section hosts a lunch with more than 100 sitting federal and state judges in attendance. In the last year,

The 2018-19 president of the Los Angeles County Bar Association, Brian S. Kabateck is founder and managing partner of Kabateck Brown Kellner LLP in Los Angeles where he practices in the areas of personal injury, insurance bad faith, pharmaceutical litigation, wrongful death, class action, mass torts, and disaster litigation.
every sitting California Supreme Court justice participated in at least one LACBA program. When every newly appointed or elected judge is enrobed, the current president of LACBA is invited to participate and address the new judges—the only local bar association included.

We have instituted an international travel program with continuing education. This year, our members are traveling to Cuba and, in the near future, Mexico and Nuremberg, Germany—for the 75th commemoration of the trials—and many other opportunities.

LACBA’s commitment to the community is also wide-ranging, offering an open association with four service programs (AIDS Legal Services Project, Domestic Violence Legal Services Project, Immigration Legal Assistance Project, and Veterans Legal Services Project) and pro bono opportunities for member volunteers who serve the needs of nearly 18,000 Angelinos every year.

Social Media
We have a significant presence and opportunity on all social media platforms. We have electronic memberships for attorneys across California and the United States even if they do not live or work in Los Angeles County. A newly launched podcast series, “ADMITTED,” is directed to law students and newer lawyers. The podcast received over 1,000 unique downloads of the first five episodes. More content and subject areas directed to all levels of expertise are in development. In early 2019, we are integrating a mobile app that will allow members to create their own LACBA experience. This will offer members an opportunity to learn about specially curated programs that may be of interest, as well as to promote programs to LACBA members.

Throughout the year we have had many “fun” programs, including in May a reception and private screening of the documentary film RBG, about the life and career of U.S. Supreme Court Justice Ruth Bader Ginsburg, plus basketball games, parties, the Armed Services Ball honoring our war veterans, the annual Shattuck Price Outstanding Lawyer, Outstanding Jurist awards dinner and installation of new officers and trustees.

We are constantly looking for more benefits and programs to bring to our members, including enhancements to existing programs such as discounts on insurance, malpractice insurance, and more. We welcome your suggestions and participation in the execution of our programs. Stay tuned, more changes are just around the corner.
Brenda Feigen American Feminist, Film Producer, and Attorney

Founder of Feigen Law Group in Los Angeles, Brenda Feigen is a seminal figure in the struggle for gender equality whose legal practice areas include constitutional, antidiscrimination, entertainment, employment, environmental, business transactions, and family law. After obtaining a degree in mathematics (Phi Beta Kappa) from Vassar College, Feigen went on to graduate from Harvard Law School. In 1970, she was elected National Vice President for Legislation of the National Organization of Women and became cofounder of *Ms. Magazine*. Feigen also cofounded the Women's Rights Project with now Justice Ruth Bader Ginsburg at the American Civil Liberties Union in 1972, later expanding its scope to include the Reproductive Freedom Rights Project. The author of numerous articles, she has produced a film, *Navy SEALs*, and published her memoir, *Not One of the Boys: Living Life as a Feminist.*

**INTERVIEW BY DEBORAH KELLY**

What is the first thing in the day that makes you smile? When I open the shades and see that the sun is shining.

**IN 1966, YOU WERE OFFERED A FULLY FUNDED JOINT J.D./M.B.A. PROGRAM AT COLUMBIA BUT TURNED IT DOWN. WHY?** I wanted to be in Cambridge. I was getting out of a relationship with a guy who was going to New York University Law School.

At Harvard Law School (HLS), you were one of 32 women in a class of 565. **How did that feel?** It began to be a real issue for me shortly after I got there. I wasn’t allowed to join the only eating club in the whole law school; it only let male students in.

**IS THERE ANOTHER EARLY MEMORY?** I wanted to continue playing squash, which I had done at Vassar. No women were allowed on the squash courts that belonged to HLS. I put my hair into a hat and dressed as baggily as I could and played for about a half a minute before this old man chased me out of the building.

Was there a class in which the professor designated only one day per year to call on female students? **Yes.** You could stand up if you mustered the courage to say something, but the whole idea of the Socratic Method is for the professor to ask a question and the person answers. Then, they go back and forth in a repartee.

Were there daily micro-agressions? **We were just not part of the conversation.**

Was there an epiphany when you knew you were a feminist? **In Professor Paul Freund’s Constitutional Law class, we were talking about a Michigan case. Barmaids were not allowed to work unless their husbands or fathers were proprietors of the bar. The U.S. Supreme Court upheld the statute.** Freund made a big joke of it.

What did you do? I stood up—I was furious. The whole class started laughing at me. I realized I was going to have to do something about this.

**YOUR FATHER WAS A LAWYER, AND YOUR MOTHER A HOUSEWIFE. WERE THEY SUPPORTIVE OF YOUR CHOICE TO BECOME A LAWYER?** My father didn’t think it was a good profession. My mother was supportive of me no matter what I did.

**IN 1968, YOU MARRIED MARC FASTEAU, AND TOGETHER YOU LAUNCHED A CLASS-ACTION LAWSUIT. ABOUT WHAT?** The Harvard Club did not allow any female graduates of Harvard to be members.

**WHAT’S THE TRICKIEST THING FOR A FEMALE FEMINIST TO BE MARRIED TO A MALE FEMINIST?** I don’t think it was tricky; it was a marriage of equals.

**IN THE EARLY 1970S, AS NATIONAL LEGISLATIVE VICE PRESIDENT FOR THE NATIONAL ORGANIZATION OF WOMEN (NOW), YOU COORDINATED TESTIMONY TO THE U.S. SENATE ON THE EQUAL RIGHTS AMENDMENT (ERA). WHAT WENT RIGHT?** There was an enormous groundswell of support. **WHAT WENT WRONG?** Phyllis Schafly—she was so crazy and seriously deranged. She spread lies all over the country. **SUCH AS?** In Illinois, she promised women they would stop getting alimony if they divorced.

**AND NOW?** In 2006, Justice Ruth Ginsburg wrote in the Virginia Military Institute case that for a classification based on gender to withstand judicial scrutiny, there must be “an Exceeding Persuasive Reason” for its continued existence. Right now, the law is as strong as it would be with the ERA being in place. **THEN, NO ERA?** Its ratification and permanent placement in our Constitution will have tremendous symbolic significance.

You worked with Gloria Steinem and Catherine Samuels to form the Women’s Action Alliance, which considered a newsletter that evolved into *Ms. Magazine*. Is the NOW quarterly magazine still relevant? I know it is.

**DO YOU THINK THE HONORIFIC “MS.” HAS STUCK?** Yes. I was stunned when I saw that Wimbledon called Serena “Mrs. Williams.”

**IN 1972, YOU WERE ASKED TO CODEIRECT WITH THEN PROFESSOR GINSBURG THE ACLU**
Women’s Rights Project. Do you recall a special case? *Fronterio v. Richardson* involved a female Air Force officer who was given housing and medical benefits for her husband only if she could show that he was more than half dependent on her for his support. She was discriminated against and so was her husband because he was not getting the same benefits as wives. Ruth loved those double-edged sword cases.

What was it like working with Ruth Ginsburg? She doesn’t chit-chat about the weather or the traffic. Her head is in the law.

In 1978, you ran and lost by 3 percent for the Democratic nomination for a state senate seat, spending $38,000 against your opponent’s $600,000. If you had had more to spend, would you have won? I don’t think so. He would always have been able to get more money.

What was the goal of the first wave of feminism? Getting the vote.

Second wave? Equality and control over our bodies.

How does the MeToo Movement fit in? Aggressively standing up to men who in any way think they can take advantage of any woman.

You said that calling out actual harassment as it happens is extremely effective? How so? You can’t have it both ways. You have to reject it right away.

What was your takeaway from the 2017 Women’s March? We all came together.

What are you working on now? I am representing a group of female dockworkers up and down the Pacific West Coast who have filed charges against Pacific Maritime Association, alleging that when they get pregnant they need to stop work almost immediately.

Do you have a favorite slogan from the movement? The personal is political.

Will *Roe v. Wade* survive the Trump administration? Yes.

If just President Trump and you had a glass of wine together, what would you ask him? If one of your daughters got pregnant and wanted an abortion, would you stop her?

In the 1990s, you produced *Navy SEALS*, a Hollywood action movie. Was Hollywood a friendly place for women? Yes, on the surface. But, as soon as it got going to production, the men took over. Director Lewis Teague told me he would quit if I went on location. He should be run out of town.

What are your favorite movies? *Hidden Figures*, *Carol*, and *Silkwood*.

You’re working on a television series project with Lily Tomlin. Has the industry changed for females? Yes. Creative Artists Agency—the most powerful agency in the city—said that they are devoted to the concept of 50/50 by 2020.

With Justice Anthony Kennedy’s retirement, what concerns you about the future? Justice Kennedy warmed my heart with his strong enunciation of the principle of human dignity—he became the swing vote. We’re not going to have that now. It’s going to be very, very bad. We won’t be able to look to them for justice.

What was your best job? When I worked at the ACLU.

What was your worst job? Working at a law firm that wanted me to lie. I left.

What is one trait you like in yourself? I’m rambunctious.

What trait do you wish you could change in yourself? I wish I were more patient.

How do you get your news? The newspaper, Rachel [MSNBC’s *The Rachel Maddow Show*], the Internet, and a few minutes of ABC’s network nightly news.

What is the one feature do you wish you could work on your iPhone? I wish I could more easily dictate a speech I have to give on my iPhone. If you know how to do that, let me know.

What is your favorite holiday? Thanksgiving.

What is your favorite vacation spot? Hawaii; I love to snorkel.

What do you do on a three-day weekend? Occasionally, go to the Ojai Valley Inn.

What is your Starbucks’ order? Decaf Mocha Frappuccino with nonfat milk.

Which world leaders do you most respect? Golda Meier. Does Ruth Ginsburg qualify as a world leader? I can make the argument.

What is the one thing you would like to change in the world? I want it to be 50/50 in terms of absolutely everything.

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National Labor Relations Board Creates New Social Media Guidance

SOCIAL MEDIA AFFECT EVERY FACET of contemporary life, including how employees interact with coworkers, engage with an employer, and conduct themselves inside and outside of work. While social media can be beneficial to companies, they also can place them at risk. Employers may face challenges with the novel and unpredictable ways in which an employee can unintentionally—or intentionally—jeopardize confidential or proprietary information, engage in harassing or uncivil behavior, or tarnish the company name with even one tweet.

In the past, employers attempting to regulate an employee’s general behavior and use of social media risked running afoul of Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA). The Obama-era ruling by the National Labor Relations Board (NLRB) in Lutheran Heritage interpreted these sections as prohibiting employers from implementing or maintaining policies or rules that an employee could reasonably construe as chilling or discouraging their Section 7 rights. This interpretation was so broad that the NLRB relied on it in invalidating numerous innocuous employer policies, including those prohibiting harassing behavior and promoting a positive workplace environment. Under Lutheran, the board was also swift to strike down many social media policies and workplace civility standards.

The current administration’s board is taking a more employer-friendly approach. In Boeing, the NLRB explicitly overruled the Lutheran test, replacing it with a new standard for evaluating whether facially lawful workplace rules, policies, or employee handbook provisions unlawfully interfere with employees’ exercise of Section 7 rights. In June 2018, the NLRB’s Office of the General Counsel published Guidance on Handbook Rules Post-Boeing, which reiterated the new standard and provided even greater clarity on how the new standard should be applied.

Under the new standard, when evaluating a facially neutral policy, rule, or handbook provision, the board considers: 1) the nature and extent of the potential impact on NLRA rights and 2) the legitimate business justifications associated with the rule. The Boeing board provided three prospective policy categories.

The first category includes rules and policies that the Board designates to be facially lawful. A facially lawful rule is one that, when reasonably interpreted, does not prohibit or interfere with the exercise of any NLRA rights. A rule will also be facially lawful when a legitimate business justification outweighs the potential adverse impact on protected NLRA rights, e.g., a policy prohibiting cameras—as in Boeing—that is supported by legitimate privacy or security concerns. The NLRB also has held that rules requiring harmonious interactions and relationships among employees—and other rules requiring employees abide by basic standards of civility—fall within the first category.

The second category includes rules that require scrutiny on a case-by-case basis as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications. As clarified in the general counsel’s memo, rules in this category will depend on context—how do the rules apply to an employee’s everyday job. An example of a rule that might fall in this category is an overly broad confidentiality rule that encompasses all employer business, rather than just proprietary information.

The third category includes rules that the NRLB will designate as unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of such a rule is one prohibiting employees from discussing wages or benefits with one another.

In light of Boeing and recent NLRB guidance, employers should feel more comfortable implementing reasonable social media and civility policies designed to protect genuine business interests, including confidential information, trade secrets, organizational security, and harassing or uncivil behavior. The goal when drafting a compliant social media or civility policy is to ensure that it fits squarely within Boeing’s first category of rules. Thus, employers’ language should be clear and concise, limiting specific, rather than general, behavior. The policy should be easy to implement, uniformly enforced, and backed by a legitimate business justification that can be easily communicated to employees. Employers should also consider providing employees with any rationalizations that support the new policy.

1 Under Section 7 of the NLRA, 29 U.S.C. §157, employees have the right to engage in protected concerted activity, which includes the right to organize, form, or join a union, bargain collectively, and discuss terms and conditions of employment. Section 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”

2 See Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia and Vivian A. Foreman (343 NLRB No. 646 (Nov. 19 2004)), where the NLRB held that an employer’s civility rules are unlawful if they explicitly restrict activities protected by Section 7. Even if the rule does not explicitly restrict Section 7, it may if: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”

3 In T-Mobile U.S.A., Inc. (363 NLRB No. 171 (2016)), the NLRB found a series of workplace rules in T-Mobile’s and MetroPCS’ employee handbooks unlawful, including provisions requiring positive workplace behavior and prohibiting workplace recordings. The board concluded that those workplace rules would reasonably tend to chill employees in the exercise of their NLRA Section 7 rights.

4 In Boeing, the NLRB analyzed whether a policy prohibiting employees from using cameras violated employees NLRA rights. See The Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001, 365 NLRB No. 154 (Dec. 14, 2017).


Kristina M. Fernandez Mabrie is an associate at Foley & Lardner LLP in Los Angeles in the firm’s business litigation & dispute resolution practice group, labor & employment practice group, and sports industry team.
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Policing The Wild West of Cryptocurrency

In response to nonreporting by cryptocurrency users, DOJ uses the “stick” of criminal prosecutions to drive compliance and IRS presents taxpayers a “carrot” of voluntary disclosure.

May 22, 2010, the first reported Bitcoin transaction occurred when a Florida man offered to pay for two large Papa John’s pizzas with 10,000 bitcoins. Those pizzas cost the British man who took up the offer $25 back then. Today, they would be worth over $60 million as the “Wild West” of cryptocurrency has arrived. Few would have predicted that when the enigmatic Satoshi Nakamoto published a nine-page White Paper in October 2008 laying out the blockchain foundations of Bitcoin, less than a decade later the cryptocurrency market would be measured in the hundreds of billions of dollars, having grown exponentially with the capacity to transform every industry across the globe.

The speed with which cryptocurrency has emerged in the financial world has outstripped the speed with which financial agencies have been able to regulate it and enforce potentially outdated laws to protect financial markets and Main Street participants. In the United States, law enforcement agencies have struggled to decide exactly what cryptocurrency is. To the Internal Revenue Service (IRS), it is “property” potentially subject to capital gains treatment. To the Securities and Exchange Commission (SEC), it may be a “security,” depending on how it is issued or used subject to registration and reporting requirements. To the Commodity Futures Trading Commission (CFTC), it is a “commodity,” while to the Department of Treasury’s Financial Crimes Enforcement Network (FinCEN), it is treated mostly as a “convertible virtual currency.”

Nathan J. Hochman is deputy chair of Morgan, Lewis & Bockius LLP’s White Collar Litigation and Government Investigations practice. He formerly worked as assistant attorney general for the U.S. Department of Justice’s Tax Division and as an assistant U.S. attorney for the Central District of California.
To appreciate how the “crypto-sheriffs” have attempted to enforce the current laws on the books to address “crypto-schemes,” “crypto-fraud,” and other forms of “crypto-crime,” it is important to understand how cryptocurrency works and the types of crimes that may emanate from its use.

**What is Cryptocurrency?**

Cryptocurrency or virtual currency is broadly speaking a digital representation of value that may function as a medium of exchange, a unit of account, and/or a store of value. The revolutionary aspects of this currency are that it does not require a central authority like a bank to act as the gatekeeper for the currency transactions; instead, it runs on a decentralized peer-to-peer global network of computers that rely on network participants to validate and log transactions on a permanent, public distributed ledger, commonly known as a blockchain.

Bitcoin is the most widely known form of cryptocurrency, though there are over 1,500 alternatives (“altcoins”) including the widely transacted Ether, Litecoin, and Ripple. To understand a cryptocurrency transaction, one can use a hypothetical Bitcoin transaction as an example. Assume “Bob” wants to transfer to “Lisa” 10 bitcoins valued at $10,000 each to purchase $100,000 of goods from Lisa. Bob has 10 bitcoins in his Bitcoin wallet, which is like an electronic folder where he stores his digital currency; Lisa also has a digital wallet. Bob and Lisa have “public keys” to their digital wallets, which are cryptographically generated digital addresses analogous to bank account numbers. Bob sends Lisa a message transmitting his 10 bitcoins to Lisa’s public key and “signs” it with his “private key,” a randomly generated string of alphanumeric characters known only to Bob that function like a PIN for his bank account. The difference between a PIN number and a private key, however, is that if Bob loses his private key, there is no way to recover it and thus no way to access any cryptocurrency in his digital wallet. The Bob-Lisa transfer of 10 bitcoins is then broadcast to a decentralized global network for verification. Participants in the network, called miners, use a predetermined verification process to confirm whether Bob is the rightful owner of those 10 bitcoins. If they are the first to solve a mathematical puzzle relating to this transaction, new virtual currency coins are generated and awarded to that miner. After verification, the transaction settles, is time-stamped, and permanently recorded as part of another block on the blockchain. The verification process, which happens very quickly, helps ensure the security of the transaction since no individual entry can be altered without changing every previous entry on the blockchain on the majority of computers in the global network.

The advantages to the financial transaction of Bob and Lisa are manifold. First, the transaction occurs without any intermediary—like a financial institution—but directly between Bob and Lisa. Second, there are no wire transaction fees, credit reports, collateral requirements, or escrow commissions involved in the transaction (other than minor “miner” transaction fees incurred). Third, the transaction transpires in minutes rather than hours or days as the funds do not need to move from one bank to another. Fourth, the transaction does not require Bob or Lisa to know each other; as long as Bob has Lisa’s public key to her digital account, they both can remain anonymous to each other. The blockchain records their digital addresses but does not otherwise reveal any other aspect of identity or location. Fifth, the transaction can occur from anywhere in the world as long as the parties have access to the Internet, whether the parties are literally sitting next to each other in a room or separated across the globe. Sixth, once the transaction is accomplished and recorded on the blockchain, it is final, cannot be reversed, and is transparent since the entire history of the blockchain can be viewed anywhere in the world at any time of the day or night.7

What if Lisa wants to convert her 10 bitcoins into traditional or “fiat” currency (e.g., U.S. dollars, euros, Japanese yen)? There are several options: she can exchange her bitcoins directly with any person willing to buy them for traditional currency or she can exchange them through a virtual currency exchanger—e.g., Coinbase, the largest virtual currency exchanger in the United States. These exchangers function as a link between virtual currencies and traditional currencies since they can accept conventional checks, credit card, debit card, or wire transfer payments in exchange for virtual currency, exchange one virtual currency for another virtual currency, and exchange virtual currency for traditional currency. Through these exchangers, virtual currencies can now be used for purchases from over 100,000 merchants (e.g., Overstock.com, Home Depot, Dell, Amazon, Microsoft, and Expedia). Virtual currency exchangers also provide digital wallet services that help users quickly authorize virtual currency transactions; millions of users have taken advantage of these digital wallets provided by exchangers. For example, Coinbase, which started in 2012, maintains over 5 million wallets with wallet services available in 190 countries and over $50 billion traded on its exchange.8 Its wallets can be readily accessed through a computer or mobile device like a smartphone.

While many champion cryptocurrency as a highly innovative medium for financial transactions, cryptocurrency’s opponents decry it as fraud. For instance, Warren Buffett, the “Oracle of Omaha” and CEO of Berkshire Hathaway, has stated emphatically that “[i]n terms of cryptocurrencies, generally, I can say with almost certainty that they will come to a bad ending.”9 Charlie Munger, vice-chairman of Berkshire Hathaway, has been even more pessimistic about the cryptocurrency craze, calling it “totally asinine” and a “noxious poison.”10 Jamie Dimon, the CEO of JPMorgan Chase, has described cryptocurrency mania as “worse than [the] tulip bulb [craze in the 17th century].… Someone is going to get killed. Currencies have legal support. It will blow up.”11

**Enforcement Concerns**

For U.S. regulators and law enforcement officials, figuring out how to regulate and enforce laws in a virtual currency world that can operate anonymously, electronically, incredibly quickly, across borders, and without intermediaries or paper trails poses unique problems. These problems include using cryptocurrency to: 1) facilitate crimes ranging from narcotics trafficking and child pornography to money laundering, ransomware, and terrorist financing (Christine Lagarde, the head of the International Monetary Fund, has warned that cryptocurrencies can become a “major new vehicle for money laundering and the financing of terrorism”12); 2) promote tax evasion by hiding income; and 3) defraud individuals and companies through Ponzi schemes and similar market manipulations involved in initial coin offerings and cryptocurrency-based businesses.

In addition, outright theft is a serious concern. Since cryptocurrency acts like “cash on steroids” because it is not only anonymous but can be moved instantly to any digital wallet anywhere in the world, thieves have hacked into and stolen cryptocurrency from exchanges. For example, in January 2018, over $500 million of a digital currency called NEM was stolen when thieves hacked into Coincheck, Inc., one of Japan’s biggest cryptocurrency exchanges.13 This followed the 2013-2014 theft of approximately 850,000 bitcoins worth at the time more than $450 million from Mt. Gox, a Japanese bitcoin exchange handling over 70 percent of all bitcoin transactions worldwide in that
As one of the crypto-sheriffs, the IRS has treated cryptocurrencies as “property,” a definition that may well work when the number of crypto-transactions are in the millions but not if they are in the hundreds of millions or billions.

In light of the enormity and diversity of the crimes that may be associated with cryptocurrency, U.S. regulatory agencies—the IRS, the SEC, the CFTC, and the FinCEN—have begun to try a number of approaches to enforce current laws and to modify such laws to adapt to this new technology.

Prior to 2014, the IRS had not weighed in on how cryptocurrencies should be treated for tax purposes. It had a choice: it could treat cryptocurrency as a traditional “currency” like a U.S. dollar or European euro that is designated as legal tender, circulates, and is customarily used and accepted as a medium of exchange, or it could treat it as “property” similar to a stock or bond. If designated as “currency,” cryptocurrencies’ use in financial transactions would not have intrinsic gain or loss that could be taxed upon sale or exchange. If classified as “property,” each time the cryptocurrency was sold or exchanged in any transaction, it would generate a taxable gain or loss depending on the taxpayer’s cost to purchase the cryptocurrency, as adjusted (i.e., the taxpayer’s adjusted tax basis). In IRS Notice 2014-21, the IRS chose the latter option, viz., treating any virtual currency that could be converted into traditional currencies as property. The significance of this ruling cannot be understated. As property, every time a virtual currency is used to buy any goods, pay for any services, or exchanged for any other virtual or traditional currencies, the taxpayer has to determine: 1) its cost basis in the currency (typically, the fair market value (FMV) of the virtual currency at the time he or she obtained it), 2) any adjustments to cost basis after obtaining it, 3) the FMV of the property or service received at the time it is sold or exchanged, and 4) any resulting taxable gain or loss from that sale or exchange. For example, if one buys a pair of $100 shoes on Amazon with virtual currency, one would have to figure out the cost basis of that virtual currency when it is obtained (e.g., $50, assuming it was purchased for $50), any adjustments after obtaining it (assuming none), the FMV of the shoes received for the virtual currency ($100 in this case), and the amount of gain realized ($50, the difference of $100 of FMV received and $50 adjusted cost basis). That $50 gain would then have to be reported on one’s tax return. There is no de minimis exception to this reporting requirement.

With millions of virtual currency transactions happening annually, the IRS expected a torrential rainstorm of reporting after 2014. Instead, less than a light drizzle of 1,000 taxpayers reported a virtual currency transaction in 2014 or 2015. In September 2016, the IRS was criticized by the Treasury Inspector General for Tax Administration for doing very little to identify and address “taxpayer noncompliance issues for transactions involving virtual currencies.”

In light of this criticism and facing an abysmal rate of virtual currency transaction self-reporting, how has the IRS decided to encourage increasing taxpayer compliance? The answers can be found in the playbook of how the IRS has confronted the problem of unreported offshore income. For years prior to 2008, Congress held numerous hearings complaining that there was $100 billion of unreported U.S. taxpayers’ income overseas. Recently, it was estimated that there was approximately $25 billion of cryptocurrency-related taxes owed in 2017 with a tremendous amount of underreporting of such taxes in years prior. As in the present situation, the IRS then lacked financial resources to hire thousands of agents to scour the planet to locate that concealed foreign income. Indeed, the resource issue has only worsened since 2010 as the IRS’s enforcement budget has actually been cut by approximately 20 percent over the past eight years, reducing the number of agents, audits, and investigations substantially. Lacking internal ability to locate these unreported accounts, the IRS turned to third parties—notably large Swiss banks like UBS—to provide that information. Working with the U.S. Department of Justice (DOJ), the IRS participated in having a John Doe summons served on UBS in 2008. A John Doe summons does not identify a particular U.S. taxpayer but a class of U.S. taxpayers that fall within a certain group of those who may have broken the tax laws. With the potential to be held in contempt for not producing records responsive to the summons and facing repercussions to its ability to bank in the United States, UBS eventually agreed to hand over to the DOJ information for over 4,000 Swiss accounts held by U.S. taxpayers as part of a deferred prosecution agreement that included a $780 million penalty. Having driven a prosecutorial spike into the formerly impenetrable body of the “secret Swiss bank account,” the DOJ subsequently entered into agreements with over 80 Swiss financial institutions to obtain an enormous amount of information concerning U.S. taxpayers’ unreported overseas accounts. Over the same time period, 2009 to the present, the DOJ has brought over 100 criminal prosecutions against U.S. taxpayers, their financial advisors, lawyers, and foreign bankers, as well as a number of foreign banks, obtaining felony convictions and billions of dollars in restitution and penalties.

While the DOJ has used the “stick” of criminal prosecutions to drive compliance, the IRS has offered taxpayers a “carrot” of voluntary disclosure to avoid such prosecutions. Starting in March 2009 and concluding on September 28, 2018, the IRS’s Offshore Voluntary Disclosure Program (OVDP) traded criminal amnesty in exchange for taxpayers voluntarily coming forward with their unreported foreign accounts and assets, amending their returns and filing all disclosure forms for the prior eight years, cooperating
with the IRS in disclosing all aspects of their foreign accounts, and paying significant tax, interest, and penalties. To date, the OVDP and its streamlined versions have witnessed over 100,000 taxpayers complete the programs, and the IRS has received over $10 billion in payments. In addition, Congress passed legislation in 2010, the Foreign Account Tax Compliance Act (FATCA), that over the past years has resulted in hundreds of agreements with foreign financial institutions as well as a network of inter-governmental agreements with scores of countries to produce a tsunami of reporting of U.S. taxpayers’ foreign bank accounts to the IRS.

This formula—issue a John Doe summons to an entity that has key information about unreported income and use the “carrot and stick” of criminal prosecutions and voluntary disclosure programs as well as targeted legislation to drive taxpayer compliance—is now beginning in the cryptocurrency world. In November 2016, the DOJ filed a lawsuit in Northern California asking the court to authorize the service of a John Doe summons to Coinbase, the largest cryptocurrency exchange in the United States, seeking information on all of its millions of virtual currency account holders from 2013 to 2015. A year later, in November 2017, the court narrowed the summons and ordered Coinbase to provide the IRS with certain records related to all Coinbase users who bought, sold, sent, or received more than $20,000 worth of cryptocurrencies in a single year between 2013 and 2015. Coinbase estimated that this more circumscribed summons affects 14,355 accounts holders involving 8.9 million transactions.

Then Principal Deputy Assistant Attorney General Caroline D. Ciraolo, head of the DOJ’s Tax Division, warned taxpayers about what was coming: “Tools like the John Doe summons authorized today send the clear message to U.S. taxpayers that whatever form of currency they use—bitcoin or traditional dollars and cents—we will work to ensure that they are fully reporting their income and paying their fair share of taxes.” Treasury Secretary Steven Mnuchin later added: “If you have a wallet to own bitcoins, that company has the same obligation as a bank to know [you as a customer]…. We can track those activities. The rest of the world doesn’t have that, so one of the things we will be working very closely with the G-20 is making sure that this doesn’t become the Swiss bank account.”

If the IRS and DOJ follow their past game plan, they will take the information about virtual currency transactions received from Coinbase, compare it with the taxpayers’ disclosures on their tax returns, and start bringing waves of coordinated civil and criminal prosecutions across the country to try to achieve deterrence through the threat of significant taxes, penalties, and imprisonment. The IRS and DOJ will then seek to serve John Doe summonses on other virtual currency examiners to obtain more information about taxpayers’ malfeasance, seek to have Congress pass legislation concerning third-party reporting of virtual currency transactions, and then have the IRS implement a voluntary disclosure program for those with unreported virtual currency transactions. This potential Virtual Currency Voluntary Disclosure Program will offer the advantages of criminal nonprosecution and minimal penalties if taxpayers with such unreported transactions “come in from the cold,” file amended returns, pay taxes and interest owed, and provide the IRS with details of their virtual currency transactions. The IRS will then build a database of virtual currency transactions, like it did with offshore account information, and use computer analytics and artificial intelligence to determine which taxpayers to audit for noncompliance.

This game plan, premised on the IRS’s designation of cryptocurrency as property, may work as long as the use of virtual currencies as a medium of exchange does not explode into the hundreds of millions or billions of transactions or start being used as a country’s legal tender. However, as evidenced by statements made by authorities in Venezuela and the Marshall Islands that they will launch their own cryptocurrencies in 2018 and by the growing list of companies who are accepting virtual currencies as payment for goods and services, the IRS may need to consider at some point soon updating its 2014 guidance to deal with the realities of the emerging cryptocurrency world. For instance, rather than treat all virtual currency as property, the IRS should consider creating more defined categories that focus on the particular use of the cryptocurrency (e.g., medium of exchange, investment, utility token, etc.) to determine its taxability. Otherwise, the tidal wave of unreported virtual currency transactions will threaten to undermine the foundations of the American tax self-reporting system.

The Wild West was won when the rule of law—based on fairness, justice, due process, and constant enforcement—replaced the rule of anarchy. With the explosion of the Wild West of cryptocurrency over the past several years, the crypto-sheriffs have been trying to adapt rules and regulations enacted for a different age to apply to the unique aspects of virtual currency. As one of these crypto-sheriffs, the IRS has treated cryptocurrencies as “property,” a definition that may well work when the number of cryptocurrency transactions are in the millions but not if they are in the hundreds of millions or billions. Thus, the IRS, like other crypto-law enforcers, will have to quickly adapt to the changing technology to stave off that technology overrunning Main Street and Wall Street.


Certain types of virtual currencies—e.g., those on the Etherium blockchain—can embed smart contracts or self-executing contracts onto their blockchain, requiring certain conditions be met before the financial transaction is complete. For a more detailed explanation on the potential use of these smart contracts, see Ameer Rosic, Smart Contracts: The Blockchain Technology That Will Replace Lawyers, Blockgeeks, https://blockgeeks.com/guides/smart-contracts/ (last viewed Sept. 25, 2018).


MCLE Test No. 282

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at http://www.lacba.org/mcleselftests.

1. Cryptocurrency is a digital representation of value that may function as a medium of exchange, a unit of account, and/or a store of value.  
   True.  
   False.

2. Cryptocurrencies require financial institutions to validate their transactions.  
   True.  
   False.

3. To validate a Bitcoin transaction, participants in the network called “miners” receive bitcoins for being the first to solve a mathematical puzzle related to the verification of this transaction.  
   True.  
   False.

4. The potential advantages to cryptocurrency transactions over financial transactions through banks include being faster, having smaller transaction fees, and the ability to be conducted anywhere in the world as long as the parties have access to the Internet.  
   True.  
   False.

5. Purchasers of cryptocurrencies can never exchange them into traditional “fiat” currencies like U.S. dollars or euros.  
   True.  
   False.

6. A “private key” to a digital wallet is a randomly generated string of alphanumeric characters that functions like a PIN for a bank account.  
   True.  
   False.

7. Virtual currencies cannot yet be used for purchases from retail merchants.  
   True.  
   False.

8. Warren Buffet, CEO of Berkshire Hathaway, is a major proponent of the use of cryptocurrencies.  
   True.  
   False.

9. Cryptocurrencies concern law enforcement officials since those who use them can operate:  
   A. Anonymously.  
   B. Electronically.  
   C. Very quickly across borders.  
   D. Without intermediaries or paper trails.  
   E. All of the above.

10. Cryptocurrency has been used to facilitate crimes ranging from narcotics trafficking to money laundering to terrorist financing.  
    True.  
    False.

11. Since cryptocurrencies are digitally based, they cannot be stolen from those who possess or store them.  
    True.  
    False.

12. The Internal Revenue Service treats cryptocurrencies transactions for income tax purposes as “property” transactions, subject to capital gains treatment.  
    True.  
    False.

13. If one uses cryptocurrency to buy a $20 pizza at the local pizzeria, there is no possibility that that person will owe the IRS capital gains tax on that transaction.  
    True.  
    False.

14. There is a de minimis exception to reporting capital gains on a cryptocurrency transaction on a federal tax return.  
    True.  
    False.

15. Over 1 million taxpayers reported virtual currency transactions on their federal tax returns from 2014 through 2015.  
    True.  
    False.

16. A “John Doe” summons requires a company that receives it to turn over records for a class of U.S. taxpayers that falls within a certain defined group of those who may have broken the tax laws, e.g., those U.S. taxpayers who have not reported their virtual currency transactions.  
    True.  
    False.

17. The IRS was completely thwarted in its effort to get names and records of U.S. account holders from Coinbase, the largest cryptocurrency exchanger in the U.S., when it served Coinbase with a John Doe summons for such names and records.  
    True.  
    False.

18. The IRS and the Department of Justice have used the “carrot and stick” approach of voluntary disclosure programs and criminal prosecutions to incentivize taxpayers in the past (e.g., with offshore unreported bank accounts) to report such accounts or face the potential of criminal consequences.  
    True.  
    False.

19. The IRS has increased its enforcement staff by over 20 percent in the last eight years.  
    True.  
    False.

20. No country has launched its own cryptocurrency.  
    True.  
    False.
November 28, 2017


Several experts have warned that the recent heists and attempted thefts of cryptocurrency are likely to become more common, with one expert predicting that the number of such attacks will increase by 50% in the next year. This is due to the increasing popularity and value of cryptocurrencies, which have become a target for criminal activity.

As the use of virtual currencies in taxable transactions becomes more common, additional actions are needed to ensure taxpayer compliance. The Treasury Inspector General for Tax Administration recently issued a report on the issue, describing the need for increased enforcement and cooperation between the government and cryptocurrency exchanges.

The thefts and attempted thefts of cryptocurrencies have raised concerns about the security of these assets, as well as the need for more robust regulations and oversight. As the use of virtual currencies continues to grow, it will be important for regulatory agencies to keep pace with the evolving landscape and adapt their policies accordingly.

In light of these developments, tax authorities are likely to increase their efforts to enforce compliance with tax laws and regulations related to cryptocurrencies. This may include increased audits, as well as the use of new technologies and methods to detect and prevent tax evasion.

The rising popularity of cryptocurrencies has also led to a rise in criminal activity targeting these assets. Criminals are reportedly abducting the “cryptorich” to steal their Bitcoin, as reported by Business Insider. This has raised concerns about the security of these assets and the need for greater safeguards.

As the use of virtual currencies continues to grow, it will be important for governments and regulatory agencies to adapt their policies to address these new challenges. This will require a coordinated effort between governments, exchange operators, and law enforcement agencies to ensure the security and integrity of the virtual currency market.

Furthermore, increased public awareness and education on the risks of virtual currency use will be necessary to prevent this type of criminal activity. This includes educating the public on the importance of adopting strong security measures and being vigilant against potential threats.

In conclusion, the recent heists and attempted thefts of cryptocurrencies highlight the need for increased enforcement and cooperation between the government and cryptocurrency exchanges. As the use of virtual currencies continues to grow, it will be important for regulatory agencies to keep pace with the evolving landscape and adapt their policies accordingly.

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In conclusion, the recent heists and attempted thefts of cryptocurrencies highlight the need for increased enforcement and cooperation between the government and cryptocurrency exchanges. As the use of virtual currencies continues to grow, it will be important for regulatory agencies to keep pace with the evolving landscape and adapt their policies accordingly.
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The Constitution of the United States grants Congress the power “[t]o promote the progress of science…by securing for limited times to…inventors the exclusive right to their…discoveries.”¹ In furtherance of this constitutional grant, Congress codified the first Patent Act in 1790.² The Patent Acts of 1793,³ 1836,⁴ 1870,⁵ and 1952⁶ followed. While each of these acts built upon and reformulated U.S. patent law in its own way, they all had one limitation in common: they granted the U.S. Patent Office (and the U.S. Department of State before the Patent Office)⁷ limited oversight of granted patents, effectively preventing so-called “post-grant review.”

Notably, neither the Patent Office nor any third party could force reexamination of an issued patent without the patent owner’s consent.⁸ If a third party believed a patent was improperly granted, its only avenue to narrow the scope of, or altogether cancel, the patent was through the courts—a lengthy and expensive process, often concluding with a lay jury’s determining the validity of an inherently technical patent.⁹

In the 1970s, industry leaders in general were of the opinion that the U.S. patent system was failing domestic industry by granting too few and low-quality patents that routinely failed to pass muster at the courts.¹⁰ While these views were undoubtedly subjective, the Patent Office’s yearly statistics reveal a marked period of stagnancy throughout the 1970s.¹¹

In an effort to improve the U.S. patent system, President Jimmy Carter announced that he would seek passage of patent reexamination legislation.¹² In 1979, President Carter warned Congress that “the patent process has become expensive, time-consuming, and unreliable,” and he said he hoped that authorizing the Patent Office to reexamine granted patents would “reduc[e] the need for expensive, time-consuming litigation over the validity of a patent.”¹³

On December 12, 1980, the Patent Act of 1952 was amended to create ex parte reexamination.¹⁴ Ex parte reexamination, still available today, permits anyone to request that an issued patent be reexamined by the Patent Office in view of prior art documents provided by the requester.¹⁵ Prior art documents are essentially those...
documents that were publicly available sufficiently in advance of the invention claimed by the patent.16 If the prior art documents would reveal to someone of ordinary skill in the field of the invention that the invention was not new or only an obvious variation of what had been done before, then the invention is not patentable.17 If, after reviewing the prior art documents, the patent examiner determines that a “substantial new question of patentability” has been raised by the request, the patent is reexamined by the Patent Office, substantially following the procedures for initial examination of a patent application.18

**Ex Parte Reexamination Controversy**

The introduction of ex parte reexamination at the Patent Office was not without controversy, and in 1985, the U.S. Court of Appeals for the Federal Circuit considered the constitutionality of this practice. In *Patlex Corporation v. Mossinghoff* (Gerald Mossinghoff was the then-acting commissioner of the Patent Office), the plaintiff argued that ex parte reexamination deprived patent owners of their right to have the validity of their patents determined by a jury and an Article III court, as had been the tradition for centuries.19 Unpersuaded, the court found that “the threshold question usually is whether the PTO…properly granted the patent” and held ex parte reexamination as a constitutional means to “facilitate the correction of governmental mistakes.”20

During the stagnancy of the 1970s and early 1980s, the annual number of utility patent filings at the Patent Office grew from 103,175 in 1970 to 109,625 in 1982.21 After the introduction of ex parte reexamination in 1980 and the formation of the Federal Circuit Court of Appeals in 1982—together ushering in the modern patent era—the number of utility patent filings grew to 164,558 in 1990, surpassed 200,000 by 1995, and crossed the 500,000 threshold in 2011.22

Faced with this ever-increasing number of patent filings and, once again, “a growing sense that questionable patents are too easily obtained and are too difficult to challenge,”23 Congress set about overhauling U.S. patent law in 2011, culminating in the Leahy-Smith America Invents Act (AIA).24 The AIA created a new set of post-grant review proceedings meant to “improve patent quality and limit unnecessary and counterproductive litigation costs.”25 The most popular of these newly created post-grant proceedings is inter partes review (IPR), a quasi-litigation proceeding conducted before a panel of three administrative law judges of the Patent Trial and Appeal Board (PTAB).26

To initiate an IPR, a third-party petitioner files a petition with the PTAB identifying “each [patent] claim challenged” and “the grounds on which the challenge to each claim is based,” that is, a prior art document or combination of prior art documents that show the unpatrientability of the challenged claim.27 If the PTAB finds that “the ground would demonstrate that there is a reasonable likelihood that at least one of the claims challenged in the petition is unpatrientable,” it will initiate an IPR “trial”; otherwise, the petition is dismissed and no IPR is initiated.28 If IPR is instituted and proceeds to a final written decision—similar to a court’s ruling—the petitioner is estopped from relitigating “any ground that the petitioner raised or reasonably could have raised during that inter partes review” in another proceeding before the Patent Office or at a district court.29

Drawing parallels to the introduction of ex parte reexamination, patent owners soon challenged the constitutionality of inter partes review, arguing that it is “unconstitutional because any action revoking a patent must be tried in an Article III court with the protections of the Seventh Amendment.”30 Finding IPR constitutional, the Federal Circuit stated that the Patent Office’s “sole authority is to decide issues of patent law, which ‘derives from an extensive federal regulatory scheme…and is created by federal law.’”31 Because the Patent Office is “an administrative agency specifically assigned to ‘examination and issuance of patents,’” the court held that “assigning review of patent validity to the PTO is consistent with Article III.”32 Unsurprisingly, the court analogized its holding to prior cases holding ex parte reexamination constitutional.33

**Supreme Court Weighs In**

On April 24, 2018, the U.S. Supreme Court addressed the constitutionality of inter partes review in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC.*34 In 2012, Oil States sued Greene’s Energy alleging that it infringed its patent related to technology for protecting oil wellhead equipment.35 Greene’s Energy responded by challenging the validity of Oil States’ patent at the district court and by petitioning the PTAB to institute IPR of Oil States’ patent.36 In 2015, the PTAB issued its final written decision finding the challenged claims of Oil States’ patent unpatentable.37 Oil States appealed the PTAB’s decision to the Federal Circuit, the designated appellate route for challenging IPR decisions, arguing not only the patentability of the challenged claims but also challenging the constitutionality of IPR.38 The Federal Circuit summarily rejected Oil States’ appeal in view of its prior decision finding IPR constitutional, and Oil States appealed to the Supreme Court.39

Oil States argued that inter partes review improperly permits an administrative agency other than an Article III court—the Patent Office—to resolve disputes involving patent rights, which were traditionally heard in courts at common law.40 Because patent invalidity actions were traditionally “the subject of a suit at the common law, or in equity,” similar to the federal district court’s long-established jurisdiction over patent validity matters, Oil States contended that “Congress may not ‘withdraw from judicial cognizance’ cases adjudicating that matter.”41 Oil States also argued that patent rights are private rights and thus are not properly considered under the public-rights doctrine, analogizing patent rights to private land ownership, with a patent owner’s having the power to exclude others from practicing the owner’s invention just as a land owner has the power to prevent others from trespassing on the owner’s land.42

Greene’s Energy, on the other hand, argued that the act of granting a patent is a public right derived from a “federal regulatory scheme,” namely the Patent Act.43 Because “IPR is a narrow procedural mechanism Congress has chosen to enable the PTO to correct its own patentability determination errors,” Greene’s Energy contended that the correction of erroneously or improperly granted patents is properly within the Patent Office’s authority.44

In a 7-2 decision, the Supreme Court held IPR constitutional.45 Justice Clarence Thomas, writing for the majority, succinctly stated that “[i]nter partes review falls squarely within the public-rights doctrine.”46 From the outset of the majority’s opinion, it is clear they were not swayed by the historical underpinnings of patent validity actions in English tradition, in which Oil States had focused much of its briefing, instead the majority focused on the public-rights doctrine.

Oil States argued that granted patents are “private property, and thus private rights”;47 the Court instead focused on the Patent Office’s decision to grant a patent, emphatically stating that “the decision to grant a patent is a matter involving public rights.”48 The Court recognized that “the grant of a patent is a matter between ‘the public, who are the grantors, and…the patentee.’”49 And, by “issuing patents, the PTO take[s] from the public rights of immense value, and bestow[s] them upon
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that “[p]atents convey only a specific form of property right—a public franchise.”

And because patents are a public franchise that is “derived altogether from statutes, [they] ‘are to be regulated and measured by these laws, and cannot go beyond them.’” The Court pointedly noted that “[o]ne such regulation is inter partes review.”

Justice Neil Gorsuch, writing for the dissent, opined that patents should be considered private rights rather than a public franchise by focusing on the granted patent rather than on the act of granting the patent as the majority had. “Until recently,” Justice Gorsuch wrote, “most everyone considered an issued patent a personal right—no less than a home or a farm—that the federal government could revoke only with the concurrence of independent judges.”

He continued, stating that “[b]ut in the statute before us Congress has tapped an executive agency, the Patent Trial and Appeal Board, for the job.”

In addition to failing to move the needle on IPR, the majority took efforts to explicitly “emphasize the narrowness” of its holding, essentially providing the framework for future challenges. First, the majority stated that “our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.” It did not take long for an ag-

Trade Commission (ITC) is a non-Article III forum employing administrative law judges but, different from the PTAB, has the authority to adjudicate patent infringement matters between private parties. At press time, no notable case challenging the constitutionality of the ITC’s authority to adjudicate infringement matters has been initiated.

Supreme Court Weighs In Again

On the same day it issued its Oil States decision, the Supreme Court issued its decision in SAS Institute Inc. v. Iancu (Andrei Iancu is the current director of the Patent Office). SAS Institute, a private American multinational software company, sought inter partes review of all 16 claims of ComplementSoft’s patent in response to a patent infringement suit brought against SAS. ComplementSoft is a software productivity tool for SAS users and programmers. While the PTAB agreed that inter partes review of ComplementSoft’s patent was warranted based on SAS’s petition, it only instituted review of claims 1 and 3 through 10, not all 16 claims as SAS had requested, a practice known as “partial institution.” In its final written decision, the PTAB found claims 1, 3, and 5 through 10 unpatentable, upheld the validity of claim 4, and, consistent with the practice of “partial institution,” did not address the remaining claims of ComplementSoft’s patent.

SAS appealed the PTAB’s decision, arguing that Title 35 of U.S. Code Section 318(a) requires that the PTAB determine the patentability of every challenged claim. Section 318(a) states that “[i]f an inter partes review is instituted…, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” Justice Gorsuch, now writing for the 5-4 majority, found that the use of “any” in Section 318(a) “means the Board must address every claim the petitioner has challenged.” The majority found this interpretation consistent with Congress’s intent to structure IPR as a petitioner-driven procedure rather than director-driven.

Oil States commanded most commentators’ attention while these cases were pending, but SAS has since seized the patent community’s attention as the driver of major change. That is, although the Oil States case had the potential to end IPR altogether, the final decision keeping IPR alive had no substantive impact on current IPR practice.

SAS, on the other hand, immediately impacted almost half of pending IPRs. Confirming the substantial and immediate impact of SAS, two days after the decision was handed down, the Patent Office issued a memorandum making clear that “if the PTAB institutes a trial, the PTAB will institute on all challenges raised in the petition.” This April 26 memorandum originally appeared to go a step further than SAS by requiring that if an IPR is instituted, institution must address all grounds as well as all challenged claims, but the Federal Circuit quickly confirmed the Patent Office’s understanding of SAS as also requiring institution as to all grounds.

In the immediate aftermath of SAS and the Patent Office’s April 26 memorandum, the PTAB’s then-Chief Judge David Ruschke reportedly stated that “about 45 percent” of cases pending at the PTAB “require some correction” to comply with the requirements of SAS, that is, “to bring institution of all claims and all grounds.” To bring these pending cases into compliance with SAS, the PTAB has been issuing orders supplementing its institution decisions to include all challenged claims and/or grounds, leaving it to the parties to determine if additional briefing or time to respond is necessary. As recently as July, the Federal Circuit was still remanding IPRs to the PTAB for reconsideration in light of SAS. In fact, the Federal Circuit has been addressing deficient IPRs so frequently that it has begun referring to such matters as “request[s] for SAS-based relief”
and “SAS-based action.” 78

Moreover, petitioners for IPR must now seriously consider the estoppel that attaches to IPR decisions. Prior to SAS, the Federal Circuit, in Shaw Industries Group, Inc. v. Automated Creel Systems, Inc., ruled that the estoppel provisions of Section 315(e), which bar a petitioner from requesting or maintaining a proceeding before the Patent Office or in a civil suit “with respect to that claim on any ground that the petitioner raised or reasonably could have raised during that inter partes review,” did not attach to grounds submitted in a petition that were not considered by the PTAB due to a partial institution because “[t]he IPR does not begin until it is instituted.” 79 Thus, grounds not considered by the PTAB were not “raised” nor could they “reasonably [] have been raised” during the IPR because the board determined which grounds were to be raised in its institution decision, creating a so-called estoppel “safe harbor.” 80

Effect on Estoppel Safe Harbor

Before SAS, district courts took primarily two different approaches to the estoppel safe harbor. Some district courts broadly interpreted the estoppel safe harbor as extending to prior art not raised to the PTAB. 81 On the other hand, the notoriously plaintiff-friendly Eastern District of Texas read Shaw as narrowly as possible, holding that art that was or “reasonably could have [been] raised” to the PTAB, in addition to the grounds litigated during the IPR, were subject to estoppel with only those grounds set forth in a petition and explicitly rejected by the PTAB being protected by the estoppel safe harbor. 82

What art “reasonably could [have] been raised”? In one case, a patent owner demonstrated to the court that a simple Internet search of key terms from its patent revealed that three references cited as prior art documents were among the first 10 results, indicating to the court that these references reasonably could have been raised in the prior IPR petition. 83 Generally, the determination comes down to what “a skilled searcher’s diligent search” would have revealed—a rather subjective standard. 84

Under either interpretation, those grounds explicitly not considered by the board were protected in the estoppel safe harbor and available for later proceedings, such as at the district court. With this in mind, IPR petitioners were incentivized to include numerous, redundant grounds in an IPR petition, reasonably expecting that the PTAB would only consider some of the proffered grounds under its “partial institution” policy, thereby effectively protecting backup invalidity arguments for later proceedings. If the petitioner were unsuccessful in having the challenged claims invalidated before the PTAB, it could move forward at the district court with the grounds that had explicitly not been considered in the IPR, relying on Shaw’s interpretation of the estoppel safe harbor to protect these grounds from Section 315(e)’s estoppel provisions.

With SAS effectively ending the PTAB’s partial institution policy, the previous approach to shoehorning multiple, redundant grounds into an IPR petition hoping to protect some invalidity arguments in the estoppel safe harbor is no longer a viable strategy. Now, IPRs are instituted as to all grounds or not instituted at all, effectively blocking Shaw’s safe harbor. Post-SAS, petitioners will want to focus on crafting strong petitions for inter partes review. Rather than advancing redundant grounds as backup positions for later proceedings, that briefing space is better served fully fleshing-out the primary ground(s).

After the SAS decision, IPRs are now closer to being the “all in” proposition that was intended by then-Senator Jon Kyl of Arizona, who believed IPRs “should generally serve as a complete substitute for any prior art reasonably could have [been] raised during the IPR, in addition to the grounds litigated before the Patent Office or in a civil suit with respect to that claim on any ground that the petitioner raised or reasonably could have raised during that inter partes review.” 82

Before the PTAB would only consider some of the proffered grounds under its “partial institution” policy, thereby effectively blocking estoppel safe harbor. 80

7 The U.S. Patent Office was created by the Patent Act of 1836. Trademark registration was added in 1881. Prior to the Patent Act of 1836, the U.S. Department of State was charged with examining and granting patents.
8 Patlex Corp. v. Moshinghoff, 758 F. 2d 594, 601 (Fed. Cir. 1985), on reh’g, 771 F. 2d 480 (Fed. Cir. 1985) (“Before its enactment, the methods of achieving administrative review of an issued patent were very limited. Gould emphasizes that such review could not be achieved other than at the initiative of the patentee. At the time Gordon Gould’s patents were issued, there was no way the PTO or private persons could have forced these patents back into the examination phase against his will (except for their involvement in an interference.”).
9 Patlex, 758 F. 2d at 601 (citing Iowa State Univ. Research Found., Inc. v. Sperry Rand Corp., 444 F. 2d 406, 409 (4th Cir. 1971). See also McCormick Harvesting Mach. Co. v. C. Aultman Co., 169 U.S. 506, 608 (1898) (“The only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent.”).
11 See U.S. Patent Activity, Calendar Years 1790 to the Present, U.S. Patent and Trademark Office Patent Technology Monitoring Team, https://www.uspto.gov/web/offices/ac/ido/oep/tafi/counts.htm (accessed April 23, 2018). In 1970, 103,175 utility patent applications were filed and 64,429 utility patents were granted. In 1979, there were only 100,494 utility patent applications filed with only 48,854 utility patents granted.
12 President Jimmy Carter, Industrial Innovation Initiatives Message to the Congress on Administration Actions and Proposals (Oct. 31, 1979) (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=31628) (“At my direction, the Patent and Trademark Office will undertake a major effort to upgrade and modernize its processes, in order to restore the incentive to patent—and ultimately develop—inventions. I will also seek legislation to provide the Patent and Trademark Office with greater authority to reexamine patents already issued, thereby reducing the need for expensive, time-consuming litigation over the validity of a patent.”).
13 Id.
14 See 35 U.S.C. §§300 et seq.
15 See generally, 35 U.S.C. §302 (2015) (“Any person at any time may file a request for reexamination by the Office of any claim of a patent on the basis of any prior art cited under the provisions of section 301.”).
16 See Gopro, Inc. v. Contour IP Holding LLC, 898 F. 3d 1170, 1174 (Fed. Cir. 2018) (quoting Blue Calypso, LLC v. Groupon, Inc., 815 F. 3d 1331, 1348 (Fed. Cir. 2016)) (“We have interpreted §102 broadly, finding that even relatively obscure documents qualify as prior art so long as the relevant public has a means of accessing them…. Accordingly, [a] reference will be considered publicly accessible if it was disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.”).
17 See Gopro, 898 F. 3d at 1174 (“Section 102(b) provides that a person shall be entitled to a patent unless the invention was described in a printed publication more than one year prior to the date of application for patent in the United States. The printed publication rule is based on the principle that once an invention is in the public domain, it can no longer be patented by anyone.”).
18 35 U.S.C. §§304 (2013) and 305 (2009) (“If, in a determination made under the provisions of subsection 303(a), the Director finds that a substantial new question of patentability affecting any claim of a patent is raised, the determination will include an order for reexamination of the patent for resolution of the question…. After the times for filing the statement and reply provided for by section 304 have expired, reexamination will be conducted according to the procedures established for initial examination under the provisions of sections 132 and 133.”).
19 Patlex Corp. v. Moshinghoff, 758 F. 2d 594, 603 (Fed. Cir. 1985).
20 Id. at 604.
26 Id. at 46-48.
27 37 C.F.R. §42.108(c) (2016).
24 Id. at 1289-90 (quoting Stern v. Marshall, 564 U.S. 462, 494 (2011)) (internal quotations omitted).
23 MCM Portfolio, 812 F.3d at 1291, The Court also noted that “[t]here is notably no suggestion that Congress lacked authority to delegate to the PTO the power to issue patents in the first instance. It would be odd indeed if Congress could not authorize the PTO to reconsider its own decisions.” Id.
22 Id. (citing Joy Techs. v. Manbeck, 959 F.2d 226 (Fed. Cir. 1992)).
20 Id. at 1372.
19 Id.
17 Oil States, 138 S. Ct. at 1372.
16 Id.; see also MCM Portfolio, 812 F.3d at 1288-93 and Oil States Energy Servs., LLC v. Greene’s Energy Group, LLC, 639 Fed. Appx. 639 (Fed. Cir. 2016) (invoking Federal Circuit Rule 36, which permits the court to “enter a judgment of affirmance without opinion” when it determines certain conditions exist and “an opinion would have no precedential value”).
15 Oil States, 138 S. Ct. at 1376-77.
14 Id. at 1376 (quoting Stern, 564 U.S. at 484) (citations omitted).
11 Id. (quoting Murray’s dictionary definition of ‘and’).
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California courts continue to grapple with attorney-client civil conspiracy claims and the application of the prefiling order requirement

Premised on a civil conspiracy between an attorney and his or her client have always been tricky as they are subject to a prefiling order pursuant to Civil Code Section 1714.10. By its language, Section 1714.10 affects a “cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based on the attorney’s representation of the client.” Such a claim may not be included in a complaint unless the court enters an order allowing “the pleading that includes the claim for civil conspiracy.” The court may do so only after a showing by the plaintiff of a “reasonable probability” of prevailing “in the action.”

Originally enacted in 1988, “Section 1714.10 was intended to weed out the harassing claim of conspiracy that is so lacking in reasonable foundation as to verge on the frivolous.”

The purpose of the statute is to “discourage frivolous claims that an attorney conspired with his or her client to harm another. Therefore, rather than requiring the attorney to defeat the claim by showing it is legally meritless, the plaintiff must make a prima facie showing before being allowed to assert the claim.”

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Section 1714.10 on its face appears straightforward. It provides in pertinent part:

No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney’s representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action.6

The only exceptions to this rule are when “(1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney’s acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney’s financial gain.”7

Based on the express language of the statute, a failure to obtain a court order as required “shall be a defense to any action for civil conspiracy” and may be raised by the attorney upon the first appearance by “demurrer, motion to strike, or such other motion or application as may be appropriate.” 8 The defense is dispositive and requires dismissal of all conspiracy claims with prejudice.9

The statutory mandates and exceptions to the prefiling order requirement within Section 1714.10 are specific, but courts have interpreted their application in ways that are at times unclear. As one court of appeal recently put it, these opinions have arguably rendered the statute “practically meaningless.”10 California courts have recognized that once the two exceptions to Section 1714.10 were added, application of Section 1714.10 became more difficult because tort liability arising from a conspiracy “presupposes that the co-conspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty.”11 As such, the independent duty exception will likely be automatically triggered if any valid conspiracy claim is alleged because conspiracy is not an independent tort and “cannot create a duty or abrogate an immunity.”12 Yet, notwithstanding the foregoing characterization of the status of Section 1714.10, case law interpreting and discussing the scope of the requirements of and exceptions to Section 1714.10 continues to accumulate, and California case authority has continued to apply the prefiling requirement to attorney-client conspiracy claims.13

Aiding and Abetting

Case law has also addressed whether Section 1714.10 applies to allegations of “aiding and abetting” a tort as between an attorney and client. The elements to establish a civil conspiracy are somewhat different from those required for aiding and abetting. The California Court of Appeal for the Sixth District addressed this issue in Berg & Berg Enterprises, LLC v. Sherwood Partners.14

The Berg court considered the similarities and differences between conspiracy and aiding and abetting and concluded that even though aiding and abetting does not require a defendant to expressly agree to join in the wrongful conduct, it is similar to a conspiracy because “it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.”15 The court in Berg also pointed out that “a plaintiff’s object in asserting [an aiding and abetting theory] is to hold those who aid and abet in the wrongful act responsible as joint tortfeasors for all damages ensuing from the wrong” and “[t]he aider and abettor’s conduct need not, as ‘separately considered,’ constitute a breach of duty. [Citations.]”16

The Berg court concluded that “[e]ven though aiding and abetting...does not generally require that the defendant owe an independent duty, we believe that as pleaded against an attorney for conduct arising from the representation of a client, and depending on the particular allegations, this tort would still fall within the ambit of Section 1714.10 and would thus be subject to its requirements and exceptions. [Citation omitted.]”17

Based on Berg and the express language of Section 1714.10, it is reasonable to conclude that when general allegations of “aiding and abetting” are incorporated into a cause of action, the cause of action is arguably subject to a prefiling order.18 The more fundamental issue, however, is not the “label” of the claim such as “conspiracy” or “aiding and abetting,” but rather, whether the conduct alleged “arose out of its agreement to represent [the client] and conduct in which it jointly engaged with its client,....in the course of that legal representation.”19 The Berg court was faced with a pleading that incorporated prior general allegations of conduct (including aiding and abetting) into causes of action that by their title may not necessarily have triggered Section 1714.10 and concluded that appellate review was warranted as to all of the causes of action pleaded, regardless of the labels attributed thereto, because general allegations that were incorporated into each and every cause of action involved conduct that fell within the scope of the statute.20

Other Considerations

There are other considerations, however, before concluding that a pleading or claim is subject to Section 1714.10. California law has made it exceedingly difficult to successfully plead an aiding and abetting claim against an attorney who does not otherwise owe an independent duty to the plaintiff or have a financial incentive outside of fees paid for the legal representation.

In Doctors’ Company et al. v. Superior Court of Los Angeles County, the California Supreme Court created the so-called “agent’s immunity rule” that “a conspiracy cause of action cannot lie ‘if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty.’”21 In other words, “an agent is not liable for conspiring with the principal when the agent is acting in an official capacity on behalf of the principal.”22

Section 1714.10 was amended to add subsection e, which codified the two exceptions to the agent’s immunity rule: 1) when the attorney has an independent legal duty to the plaintiff, or 2) when the attorney’s acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney’s financial gain.23 “The relationship of attorney and client is one of agent and principal.”24

Thus, when applying the agent’s immunity rule, courts have consistently rejected claims alleging the requisite financial advantage arising solely from an attorney’s receipt of fees for the services provided to the client as compensation for the representation.25

The Second District Court of Appeal in American Master Lease L.L.C. v. Idanta Partners, Ltd. addressed the exception of independent legal duty to decide whether the plaintiff “could maintain a cause of action for aiding and abetting a breach of fiduciary duty in the absence of a fiduciary duty [owed by defendants].”26 The defendants argued that there was no “sound policy reason to distinguish between liability for conspiracy to breach a
fiduciary duty and liability for aiding and abetting a breach of fiduciary duty by requiring that a conspirator but not an aider and abettor owe a fiduciary duty to the plaintiff.”27

Relying on Howard v. Superior Court of Los Angeles, the court in American Master Lease disagreed and held that an aider and abettor may be held liable for breach of a duty he or she does not owe if he or she provided substantial assistance to the party in breach of a fiduciary duty.28 The Second District discussed the differences between the two theories of liability, and concluded that conduct based on conspiracy and aiding and abetting are similar enough to be subsumed within Section 1714.10 and were subject to its requirements and exceptions and pointed out that “[t]he major significance of a conspiracy cause of action ‘lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.’ [Citations omitted.]”30

Independent Duty Exception

Other cases that have found an independent legal duty under Section 1714.10(c) have addressed causes of action involving breach of fiduciary duty, misappropriation or fraud.31 The “independent duty exception” was addressed recently by the Second District in Klotz v. Milbank, Tweed, Hadley & McCloy.32 In Klotz, the client’s former business associates brought an action against the law firm and attorney for breach of fiduciary duty, conspiracy, and legal malpractice. The court of appeal reversed the trial court’s order denying attorney defendants’ motion to strike the second cause of action for conspiracy and held that the client’s former business associates’ claims against the attorney and law firm required a prefiling order.

The Klotz court acknowledged that “an attorney has an independent legal duty to refrain from defrauding non-clients.”33 However, the court of appeal concluded that the two exceptions to Section 1714.10 did not apply to the conspiracy claim at issue in that case because the complaint did not allege “any duty of defendants…that is beyond the duty inherent in the rendition of services of an attorney to a client, nor does it allege any financial gain that goes beyond that to be realized through compensation paid for professional legal services.”34 The court explained that the independent duty exception to Section 1714.10 “obviously speaks to a relationship beyond that of attorney-client.”35 The Klotz court acknowledged that an independent legal duty may also arise to trigger the exception. In Klotz, however, the exception was not met because the conduct alleged was not intended to “circumvent established legal channels to accomplish a desired result,” nor outside the performance of the “normal services of an attorney.”36 The Klotz court held that such conduct “exposes counsel to a host of tort claims—including a cause of action for attorney-client conspiracy.”37

The court of appeal reversed the denial of the motion to strike and found the conduct in that case “consisted of an allegedly harmful conflict of interest and did not arise out of the breach of any duty independent of the attorney-client relationship” and instead, “from the course of the provision of services in connection with the settlement of a claim or dispute.”38 Thus, a prefiling order was required.

In Favila v. Katten Muchin Rosenman LLP, on the other hand, the Second District reversed the trial court’s order denying leave to amend to allege a conspiracy claim. The Second District held that the pleading was within the “independent legal duty” exception to the statute limiting civil conspiracy claims against attorneys.39 Citing Doctors’ Company, the Favila court concluded that the claim alleged a fraudulent scheme to transfer assets for a grossly undervalued price and thus fell within Section 1714.10(c)’s exception.40

Financial Gain Exception

The Second District in Klotz also addressed the “financial gain” exception whereby an attorney obtains an “economic advantage over and above monetary compensation received in exchange for professional services actually rendered on behalf of a client.”41 The Klotz court stated, however, that the financial gain exception “does not apply to fees charged, even where the fees were excessive or the services unnecessary” because “[s]uch allegations could be made by an adversary in any case, thus significantly weakening the gatekeeping function of the statute.”42 Even if the pleading falls within the ambit of Section 1714.10, there is authority that the plaintiff may amend if the claim can be asserted without reliance on
civil conspiracy between an attorney and client. However, courts have not directly addressed whether a plaintiff can avoid the prefiling order in Section 1714.10 by amending the complaint to remove conspiracy and aiding and abetting allegations or otherwise amend after a motion to strike has been filed but before the ruling on the motion as is the case with a demurrer.

In Favila v. Katten Muchin Rosenman LLP, the court of appeal held that even when the allegations of a complaint fall within an exception to Section 1714.10, the trial court still must make an affirmative ruling whether “the pleading on its face fails to state a viable cause of action against the attorney and the deficiency cannot be remedied by amendment.” The Second District found that the trial court “is in the same position as it would be in ruling on a demurrer and in deciding whether, after sustaining a demurrer, leave to amend the complaint should be allowed.”

Any analysis must also take into consideration the requirements of Code of Civil Procedure Section 472, which addresses the right to amend a pleading. Section 472 states in pertinent part that an amendment is allowed without prior court approval “if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike.” It would appear that under Section 472 an amended pleading may be filed without prior court approval if it is filed within the timeframe permitted to oppose a motion to strike under Section 1714.10.

However, Section 1714.10 does not provide for an automatic right to file an amended pleading in the face of the motion to strike. Indeed, the purpose of Section 1714.10 is similar to an anti-SLAPP motion under Code of Civil Procedure Section 425.16. Section 1714.10 establishes a special proceeding of a civil nature, and an order under the statute is appealable as a final judgment in a civil action. When a motion to strike pursuant to Section 1714.10 is filed, the court must “initially determine whether the pleading falls either within the coverage of the statute or, instead, within one of its stated exceptions.” Thereafter, the trial court may consider whether the plaintiff has a plausible factual basis to amend the complaint so as not to trigger Section 1714.10. If the trial court finds that the claims are not subject to amendment, the claims must be dismissed with prejudice. Leave to amend should not be granted if there is no basis for the court to conclude further amendment would cure the defect. The burden of proving a reasonable probability of amending the complaint to state a cause of action “is squarely on the plaintiff.”

Right to Amend

Based on the foregoing, it is probable that a plaintiff may be permitted to exercise the initial “right to amend” under Section 472 within the time limits provided by this statute. But once a motion to strike under Section 1714.10 is filed, the trial court must evaluate the pleading, allegations, and claims; make a determination whether Section 1714.10 and either of its exceptions apply; and then decide whether the plaintiff can amend the pleading and/or allegations and claims so as to avoid application of Section 1714.10. If the trial court finds that plaintiff has made a showing that the pleading can be successfully amended without triggering Section 1714.10, leave to amend should be granted. However, if the ability to amend cannot be shown, the pleading and/or claim(s) must be dismissed with prejudice.

Notwithstanding the dicta in Pavicich v. Santucci and Favila concerning the viability of Section 1714.10, courts continue to grapple with civil conspiracy claims between attorney and clients and the prefiling order requirement. Thus, where it is anticipated such a claim will be alleged, counsel should be familiar with Section 1714.10 prior to filing and review any allegations and claims in light of its provisions.
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**Veterans Day is almost here again.** I always appreciate it when people say, “Thank you for your service,” because I know it is meant in a good spirit. But there are many veterans in Los Angeles who need more than “thank you”—they need legal help.

Los Angeles is home to one of the largest populations of homeless and at-risk veterans in the country. They are caught in a downward spiral, often starting with psychological issues, including post-traumatic stress disorder, for which they sometimes self-medicate with drugs or alcohol. Some start off with a less-than-honorable discharge, which can reduce their benefits and opportunities. Inevitably, they wind up with legal problems: driving under the influence and traffic offenses; warrants and misdemeanors; and family law issues. These problems frequently result in homelessness and joblessness. Without legal assistance, it is almost impossible to overcome these obstacles.

**Veterans Legal Services Project**

The LACBA Veterans Legal Services Project is helping. The project was created in 2014, and its mission is to help veterans overcome legal obstacles to employment and self-sufficiency. As one of the four key initiatives of LACBA’s Counsel for Justice, the project is overseen by the LACBA Armed Forces Committee, which had been tasked by former LACBA President Alan Steinbrecher to determine what could be done to assist the many veterans in need of legal services. Project Director Andrew Culberson and Managing Project Attorney Tara Hunter, together with committee Vice Chair Michael Owens and numerous volunteers from the legal community, have achieved superb results for hundreds of veterans.

The project holds regular legal clinics for veterans at the iconic Patriotic Hall in downtown Los Angeles, focusing on three key areas: clearing tickets and warrants, expunging misdemeanors, and reinstating driver’s licenses. While these legal matters may sound minor, they can prevent a veteran from passing a background check for employment or driving to work.

**Expanded Services**

The project has continued to expand, partnering with the Levitt & Quinn Family Law Center in 2016 to offer family law clinics for veterans. That same year the project began a partnership with the Proskauer law firm to offer pro bono estate planning services. In 2017, the project teamed up with Wells Fargo Bank to hold financial literacy workshops. In 2018, the project made two significant additions: 1) pro bono placements for veterans seeking discharge upgrades and 2) on-site consultations held in veterans’ centers in West Los Angeles and San Pedro, greatly increasing access to services for veterans in those areas. For 2019, the project will add more off-site locations and implement a new service for small business development under the leadership of Bill Markley, a retired Navy officer and former general counsel.

The project works because of the tremendous support from the legal community, which provides the legal staff for all the clinics. Participating firms include Gibson Dunn, Greenberg Traurig, Foley & Mansfield, Proskauer, Sheppard Mullin, Morgan Lewis, and Arnold & Porter, and the corporate law departments of such leading companies as Activision Blizzard, A&E, Farmers Insurance, and AECOM.

**Urgent Need**

The data from the clinics shows how urgent the need is: Each veteran served has, on average, four outstanding tickets or convictions on their record; 75 percent have incomes below the federal poverty line; 39 percent are homeless and another 11 percent report they are at risk of homelessness; and 42 percent are disabled as a result of their military service.

The need is great, but thanks to the staff and volunteers, the results are great, too. The project has generated thousands of hours and hundreds of thousands of dollars in free legal services, which help hundreds of veterans. More than 80 percent of the project’s clients successfully clear legal barriers to employment, and the project links former clients to community partners specializing in job placement.

Running legal clinics also takes money. Wells Fargo Bank has been a generous supporter of the project throughout the years and has enabled steady growth in the services provided. In addition, Ronald Bae, a former Navy JAG officer now at Aequitas Legal Group, was instrumental in obtaining a substantial cy pres award for the project.

**Veterans Ball**

The costs are ongoing, and the project is seeking to raise additional funds though the Armed Forces Ball. LACBA’s Armed Forces Committee will host its Third Armed Forces Ball on March 2, 2019, at the Millennium Biltmore Hotel in downtown Los Angeles. This is a unique “full dress uniform” and black-tie event that will feature a color guard and a live band, as well as compelling speakers and deserving honorees who have done so much to help our veterans. Each firm that purchases a table will be asked to host a veteran and guest. This means that deserving veterans will literally have a “seat at the table.”

With your help, by the time Veterans Day comes around again in 2019, there will be fewer veterans on the street and more resources to keep veterans in their own residences with the employment, support, and dignity they deserve.

Adam Siegler is a litigator and pro bono coordinator at Greenberg Traurig, LLP in Los Angeles. He was the staff judge advocate for the U.S. Army’s 335th Signal Command, was awarded the Legion of Merit, Bronze Star, Meritorious Service, and Iraq Campaign medals, and retired as a colonel. He currently serves as the chair of LACBA’s Armed Forces Committee.
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