

Los Angeles Lawyer

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The Road Ahead

Los Angeles lawyer Brian S. Kabateck is the 2018-19 president of the Los Angeles County Bar Association

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Jack Trimarco Polygraph, Inc.

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November 17, 2014

Jack Trimarco & Associates
Polygraph / Investigations, Inc.
9454 Wilshire Blvd., 6th Floor
Beverly Hills, CA 90212

Dear Mr. Trimarco:

In the winter of 2010, an environmental disaster occurred off the west coast of the island of Oahu in the State of Hawaii. Heavy rainfall caused millions of gallons of contaminated water—including toxic soil, trash and human medical waste—to pour from the Waimanalo Gulch Sanitary Landfill into the ocean waters. Federal officials launched an investigation into the landfill's operator, Waste Management of Hawaii ("WMH"). The U.S. Attorney's Office alleged there was a conspiracy between members of the WMH and its environmental consulting firm to submit false information to regulators about the adequacy of the landfill's storm water management system.

I represented an employee of the environmental consulting firm hired by WMH to perform construction quality assurance. During the investigation, all evidence pointed to the fact that my client was innocent of any wrongdoing. Nevertheless, the Assistant U.S. Attorney insisted that my client pass a polygraph, or else risk being indicted as a participant in the criminal conspiracy.

In 2012, you conducted a polygraph examination of my client, unequivocally establishing that no deception was indicated. The Assistant U.S. Attorney then demanded that my client pass a polygraph examination administered by FBI agents in Honolulu. The FBI alleged my client failed their polygraph examination, but you responded with a thorough and compelling critique demonstrating how the FBI's polygraph examination was deficient and should be disregarded.

Last year, I was notified by the U.S. Attorney's Office of the District of Hawaii that their office would not seek an indictment of my client, nor would any charges against him be pursued. I believe your carefully and competently constructed polygraph examination and critique of the FBI's polygraph results played a central role in our advocacy that prosecution should be declined in my client's case.

Sincerely,

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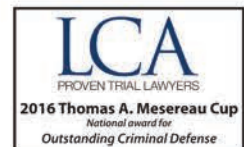
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FROM THE CHAIR

The July/August issue of *Los Angeles Lawyer* celebrates the beginning of a new year at the Los Angeles County Bar Association, a time of new leadership, new section and committee appointments, new goals, and new directions. LACBA has weathered big changes in recent

years and more change is coming. "Change is hard. Change is tough. Change is good," writes LACBA President Brian Kabateck, who took office July 1. In his President's Page this month, Brian lays out a detailed "roadmap" to greater financial stability and prosperity for LACBA in the year ahead.

New Barristers President Jessica Gordon proudly notes that the Barrister Section now has more than 11,000 members, making it the largest of LACBA's 26 practice sections. The Barristers have an ambitious agenda for the year ahead and myriad opportunities for new and young lawyers to participate.

The pro-business Tax Cuts and Jobs Act of 2017 signed into law by President Trump in December will impact nearly every tax-paying and tax-exempt entity in the United States as well as many outside the country. LACBA member Daniel L. Hess, a tax attorney and CPA, walks us through key provisions that affect professionals, high-net worth individuals, and businesses.

California is the largest legal marijuana market in the country, but because pot is illegal under federal law, federally insured banks cannot handle money from marijuana sales without risking criminal charges. In his article, "Cannabis, Cash, and Crime," LACBA member Richard P. Ormand, who represents businesses, banks, and investors in this emerging industry, examines the "the ugly patchwork of inconsistent regulatory and legal approaches taken by different federal agencies" that create a dangerous climate for marijuana entrepreneurs forced to operate on an all-cash basis.

In 2010, *Los Angeles Lawyer* published an article titled "Death of Copyright" by Los Angeles intellectual property lawyer Steven T. Lowe. Of the 48 copyright infringement cases against studios or networks that resulted in a final judgment, "the studios and networks prevailed in all of them," Lowe wrote. Eight years later, Steven is back with an updated report on the state of copyright infringement cases. This time, the news is a little better.

Where were you on this day in 1988? Imagine that you were arrested, wrongly convicted of murder, and that you spent the next 30 years on death row. Constitutional lawyer Stephen F. Rohde reviews *The Sun Does Shine: How I Found Life and Freedom on Death Row*, Anthony Ray Hinton's harrowing story of spending half his life in just such a nightmare.

In the great 1957 courtroom drama, *Witness for the Prosecution*, Charles Laughton cross-examines Marlene Dietrich and, at the end, expresses his opinion of her testimony: "The question is whether you were lying then or are you lying now...or whether in fact you are a chronic and habitual liar." In his Closing Argument, Los Angeles family law attorney and LACBA member Franklin R. Garfield narrates how he attempted to fulfill a dream that someday he would get to deliver that line in court.

Deborah Kelly's "On Direct" interview with top trial lawyer Tom Girardi rounds out our coverage.

Rena E. Kreitenberg is the 2018-19 chair of the *Los Angeles Lawyer* Editorial Board. She is a partner in the Los Angeles law firm of Mesisca Riley & Kreitenberg LLP where her practice focuses on civil litigation and appeals, emphasizing real estate, negligence, and employment actions.

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The Road Ahead: Where LACBA Is and Where We are Going

IF YOU BELONG TO ENOUGH VOLUNTEER ORGANIZATIONS, you have read countless messages from a new president taking charge of an old organization. On a lot of those pages, the new president promises to keep up the good work and hold the organization steady for the next year. This is not one of those.

Change is hard. Change is tough. Change is good. A year ago, Michael Meyer took over as president of the Los Angeles County Bar Association (LACBA) when things were in turmoil. Michael has made us stronger, ushering in an era of openness and transparency. We need to continue to evolve our organization in the coming year. This will be our road map.

Fiscal Responsibility

Where We Are: Under Michael's leadership and with the work of people such as Bill Winslow and John Hartigan, LACBA has a balanced budget. The association's expenses and operation costs have been brought under better control. Michael's installation event in December for the first time in many years not only broke even but also made a \$90,000 profit, which was donated to LACBA's Domestic Violence Legal Services Project. LACBA's charitable arm, Counsel for Justice, is raising money and by the end of the year will be on track to fund all operational costs and expenses. In addition, we have given our sections new freedom to run their own programs as long as they break even by the end of the year.

Where We Are Going: We must exercise austerity in operating LACBA. We must do more with less while controlling costs and expenses at a time when people are being asked to give us their hard-earned dollars in the form of membership dues. We need to do the best we can to spend that money wisely. LACBA Executive Director Stan Bissey and senior staff are coming up with innovative ways every day to save money.

Counsel for Justice needs to become not only completely independent but also a fund-raising machine. Its nonprofit programs should be wildly attractive to benefactors in Los Angeles County—including those who are not lawyers—who are interested in protecting the victims of domestic violence, assisting those living with HIV and AIDS, helping veterans in court, addressing immigration issues in a tumultuous time, and the continuing problem of providing legal services to those less fortunate. There is no reason Counsel for Justice each year cannot raise millions to support these programs from individual donors, members of LACBA, and foundations and charitable organizations.

Finally, we need to launch an aggressive capital campaign. LACBA carries \$1 million to \$2 million in debt on a revolving line of credit. This needs to be retired. The most successful and profitable lawyers in Los Angeles need to participate in this pro-

gram by donating money to LACBA and helping us in this capital campaign to retire the debt. We are going to look to former LACBA leaders to run this program.

Member Outreach

Where We Are: We will institute a new dues structure for all members in the 2019 LACBA year to encourage new membership and make the organization stronger. LACBA sections have been encouraged to grow membership in both the sections and in LACBA by instituting a new "bring a guest" program. The

During the coming year, you can expect more change. Not everyone may like the change, some people may be resistant to the change, but we must change and move forward.

Bridging the Gap program, which introduces new lawyers to the practice of law, was reinstated in April after being dormant for many years.

Where We Are Going: In my concurrent roles as president of LACBA and chairman of the Loyola Law School Board of Directors, I have a growing appreciation for the next generation of lawyers. They need to find LACBA relevant. Vibrant young lawyers who want to be great lawyers and want to embrace the practice of law in all aspects need a home where they can share ideas and work with their colleagues. We need to do a better job of providing that forum.

Our new dues structure will make LACBA membership more affordable for newer lawyers. Not only are first-year new admittees now given free membership to LACBA, but second-year lawyers are extended the same free membership. We will continue to offer free membership for all law students in California.

The Organization

Where We Are: We are privileged to have a phenomenal new executive director, Stan Bissey, former executive director of the California Judge's Association. In addition, we now have a vice president, Philip Lam, dedicated exclusively to diversity and

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.

inclusion. Steve Statathos joins us as part-time general counsel in recognition that LACBA does not need a full-time general counsel on staff. We have begun using more volunteer lawyer members as outside counsel for legal matters that are relevant and important to LACBA. In addition, there are no executive committee sessions of the LACBA Board of Trustees.

Where We Are Going: The sections need to continue with complete independence and to be allowed to grow and succeed while driving more prospective members to join LACBA.

The association has many committees, and they have to be analyzed and considered. Some may be stale while others need to be revitalized to become relevant to the people of the County of Los Angeles, not just lawyers. We need to immediately launch a deep dive into the bylaws and policies and procedures of LACBA. While that may seem dry and uninteresting to some, it is critical for us to modernize our rules and make them easy to understand and follow.


Our magazine, *Los Angeles Lawyer*, while revered by some, needs a facelift. We plan to explore the possibility of adding shorter intellectual articles, a wider range of topics, and human interest stories about lawyers of all ages succeeding in their personal and professional lives.

We must increase access through digital LACBA, membership online, e-membership for out-of-county members, outreach to affinity associations and other associations, and membership summits. We will continue the outstanding work we are doing through the Domestic Violence Legal Services Project, Immigration Legal Assistance Project, Veterans Legal Services Project, and AIDS Legal Services Project, supported by the Counsel for Justice with the full support of the LACBA leadership.

Moving Forward

This is just the beginning of the needed change to bring LACBA forward. During the coming year, you can expect more change. Not everyone may like the change, some people may be resistant to the change, but we must change and move forward.

I want to single out Michael Meyer for the phenomenal job he did as LACBA president and will continue to do over the course of the next year as the immediate past president. Michael, at a time when he had no need to give back selflessly to this organization, rolled up his sleeves, made a huge personal commitment, and saw his life change. I urge all of you to reach out to Michael and thank him. ■



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Thomas V. Girardi Trial Attorney



THOMAS V. GIRARDI, founding partner of Girardi & Keese, has obtained numerous multimillion dollar verdicts and settlements, handling claims involving wrongful death, commercial litigation, products liability, bad faith insurance, and toxic torts. In 2003, he was inducted into the Trial Lawyer Hall of Fame by the California State Bar. Girardi is a member of the board of directors and former president of the International Academy of Trial Lawyers. He is also the first trial lawyer to be appointed to the California Judicial Council, the policymaking body of the state courts.

What makes you the happiest? To see a wonderful law firm, everybody getting along so well, and the good work we do to change bad stuff that happens.

You attended Loyola Law School and finished with an L.L.M. from New York University School of Law. Why did you want to become a lawyer? Perry Mason was on television, with his secretary, Della Street, and investigator, Paul Drake. I said, “Man, that’s what I want to do. I want to be Perry.”

You were admitted to practice law in Janu-

ary of 1965. What has stayed the same for you? It’s so exciting...from the first trial until today. When the jury buzzes three times, it means you’re about to get your report card.

What is the biggest change in the law you’ve noticed over that last 50 years?

When I was a young lawyer, lawyers treated each other nicely. The vast majority of the legal profession—certainly adversarial—were nice. Now, there is so much hostility—even on things that are routine. There has been a terrible breach with respect to decency in the trial factor.

Why? I’m not sure. Maybe there are too many lawyers, and there becomes a big desire to bill the heck out of it.

In 1970, you were the first lawyer in California to win \$1 million for a medical malpractice case. What did that feel like? Incredible! This young person I represented was the president of Compton High School. He got in a fight and was taken to the hospital. The hospital called his parents and said, “Percy is drunk. Come take him home.” The mom and dad said he didn’t drink, but the hospital loaded Percy into the back of their car. He woke up a quadriplegic.

Do you prepare differently for high-profile cases? I prepare the clients differently; they have to know they are being watched.

Thousands of cases, hundreds of trials—what do you look for before taking on a case? You need to be a good guy or gal, and I want to help.

During the *Erin Brockovich* movie, your part in the story was played by Peter Coyote. Not Brad Pitt? I was mad; I was going to sue them.

You were on set for the filming of the Oscar-generating movie. What did you like about that? I got to know Julia Roberts really well.

Your firm has recovered more than \$11 billion in settlements and verdicts. What is your advice to young attorneys? Make sure that you love it. It’s an unbelievable amount of work, but it’s a fun job. I’m just as happy about doing things today as I was when I first started.

Were you frightened the first time you stood in front of a judge? Of course. If you don’t have some emotion, you’re not really involved.

Do you sleep the night before a trial? I can but not for very long.

What is misunderstood about your practice? We try to help people who have been harmed by the bad conduct of somebody else. What the trial lawyers have done is really important.

What was your first job? It was pretty profitable—Tommy’s Popsicle Stand. My mom made them with two different flavored layers.

What is the characteristic you most admired in your mom? My dad was the sweetest, kindest, and nicest person in the world. My mom—I think this is where the drive comes from—she was tough. I hope I have a little bit of both of them.

“Super Lawyer,” “Trial Lawyer Hall of Fame,” and “Lawyer of the Decade”: What do these mean to you? It means so much because these awards come from your peers. Others in your profession say, “This guy deserves this.” That’s why it’s so nice. The medal, the trophy—that’s irrelevant.

Do you have another goal? No, not like that. My only goal is that trial lawyers are perceived in the way they should be perceived.

You were the first trial lawyer to be appointed to the California Judicial Council. What is the most challenging issue faced by our state courts? Not enough judges or staff. Who cares about the court when

you have to do something about the pot-holes in the road?

Your firm produces the radio show *Champions of Justice*? What are our obstacles to justice? One is the judges who are appointed at the federal level. To have the philosophical bent of the jurist to be the deciding factor is terrible.

Two of your specialty areas are toxic torts and products liability. Do corporate giants care about consumers? In almost all of the cases that I have now, there is a moral issue involved. We can prove knowledge that the product is going to harm people. A lot of times, we'll get something in the mail—no return address, printed, with some very devastating stuff that they knew about.

Are government regulations capable of keeping big business in check? They are a joke.

California legislated medical malpractice with a pain-and-suffering cap of \$250,000. Thoughts? I was up in Sacramento in the 1970s when Jerry Brown said, "Tom, don't worry about it, Rose (Bird) already told me it was unconstitutional." Somehow, decades later, it's still here. The taxpayer ends up paying for the damage instead of the guy who did the harm.

Some people believe tort reform should include elimination of the contingent fee. Do you agree? I don't think there is one person on a contingent fee who wants it to be eliminated. They are primarily for people who have been harmed, and the last thing they have is \$2 million for a lawyer.

Arbitration clauses? Disgusting.

Is there one particular case that remains close to your heart? While a husband and wife were sleeping in their camping tent, white hot gas came pouring down from the lantern, massively scarring the lady. At the trial, she was eight months pregnant, and Coleman proved it wasn't a defective lantern. Two months later, I got a picture of a baby in the mail from my client. She wrote, "Tom, we hope our son has the same heart that you have, so we named him Gerard."

Erika Jayne, your wife, is a busy entertainment star on *The Real Housewives of Beverly Hills*. When do you manage to get a date night? She's not just busy with the TV shows. She also tours with her singing and has had 11 number one hits on Billboard's Dance Club Songs chart. So, we schedule our time together.

For example? We go to Madeo's in Beverly Hills.

What do you order there? You can walk in there and say, "Just bring me something." Everything is good.

What is your favorite hotel? In New York, it's the St. Regis.

Do you have a private chapel on your property? It was Erika's idea and it's really pretty.

You donate to worthy causes. Is there one that is special to you? Loyola Law School is important to me. I built a building there and named it after my dad.

Who is on your music play list? Frank (Sinatra).

Do you have a favorite song? "My Way." If you listen to that, Holy Toledo!

How do you get your news? TV.

What book is on your nightstand? Pages from the book my wife is writing: "Pretty Mess."

Which magazine do you pick up at the doctor's office? *People*, because I don't read it at home.

What do you do to enhance your longevity? Work out and keep my mind active.

What is your favorite exercise? I exercise with a trainer five days per week, and he changes the exercises every time.

Any retirement plans? I hope not; I'm finally getting good at this.

What is the one feature you wish you could operate on your iPhone? I think phone dependency is a problem. How can you persuade with the phone?

If you were alone with President Trump, what might you ask him? Would you possibly step down?

What are the three most deplorable conditions in the world? Poverty and hunger in the world. Opiate problems in the United States. Young people not being able to get the proper education to be able to truly fulfill dreams that they have.

Who have been our two strongest world leaders? Abraham Lincoln, who said, "If slavery is not wrong, then nothing is wrong," and Martin Luther King. He was the first real step in unifying this country.

What would you like written on your tombstone? He cared.

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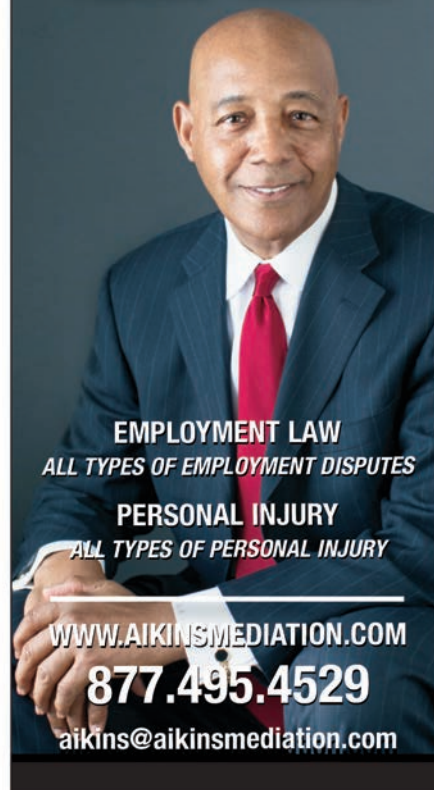
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Getting Involved with LACBA Barristers

YOU NEVER KNOW where a cup of coffee can lead. Five years ago, my former boss asked me to join him for a quick meeting over coffee with an officer of the Los Angeles County Bar Association (LACBA). I can't remember all of the details of the meeting, but I do remember that it quickly turned to a cross-examination about my involvement (or lack thereof) in LACBA. Fast forwarding to the present, I am president of the LACBA Barristers Section. I am still not sure how this happened (and neither is my eternally patient husband), but what I do know is that my openness to discussing an opportunity changed the trajectory of my career and paid immeasurable dividends in the process.

For many of us, the transition from law school to the practice of law is somewhat akin to being dropped in an unknown location without an iPhone. What we learned in law school has, at best, a nodding acquaintance with what we do now. And, after excelling at every level of school, the first year of practice can be humbling.

In a region where many of us drive to work, go home, and do it all over again (and again), it is easy to fall into a rut. Monday becomes Thursday becomes Sunday, and suddenly years have passed and you have not broadened your legal network. That, in part, is when the Barristers come in. Dedicated exclusively to new and young attorneys, the Barristers Section provides opportunities for its members to make meaningful connections they would otherwise not make. I experienced this firsthand, as many of my best professional relationships began at Barristers programs.

Barristers Section eligibility is limited to attorneys under 37 years of age or within their first five years of practice, assuring a membership of similarly situated colleagues. Our membership includes attorneys working at prestigious firms of all sizes; ambitious public sector attorneys at local, state, and federal levels; in-house counsel at major corporations; public interest attorneys at local and national legal services organizations; and others. These are the people you will find at our events, which are always free and often offer complimentary adult beverages.

The Barristers Section has more than 11,000 members and is the largest of LACBA's 26 active sections. Our size brings opportunities to meet new friends and colleagues in venues other than offices and courtrooms, to learn from the brightest minds in our profession, to help members of our community in direct and tangible ways, to teach, and to write articles in publications like *Los Angeles Lawyer* magazine.

Each January, we host the Barristers Bench Meets Bar event with more than 30 esteemed members of the judiciary—an event that allows and encourages young attorneys to meet and mingle with judicial officers in an informal setting. We also host quarterly “socials” where more than 100 Barristers meet and form connections to their peers in other practice areas. Both events are

free to Barristers.

We also host educational events offering continuing legal education on topics specifically aimed at newer attorneys. A program on different legal career paths, for example, may feature a distinguished panel including the general counsel of a major company, chairs of major law firms, and prominent public officials.

We also offer pro bono training by partnering with LACBA's Veterans Legal Services Project where experienced attorneys train Barristers on expunging tickets, warrants, and other infractions, in addition to assisting veterans in need of these legal services at

The Barristers Section provides opportunities for its members to make meaningful connections they would otherwise not make.

a monthly clinic.

Finally, our committee dedicated to law student outreach offers local law school students a long list of Barristers willing to conduct mock interviews. We would love to add even more of you, so please let us know if you are willing to be on this list. The committee also partners with local law schools on social events.

This year, I am excited to introduce two new committees: a Membership Committee and a Social Media Committee. The Membership Committee is charged with putting on at least three fun social events—a curling tournament, for example, or a comedy show of lawyer-comedians. The Social Media Committee will manage our social media accounts and promote our events online. For more information about these committees, please contact me directly at jgordon@thompsoncoburn.com or by phone at 310-282-2507.

Involvement with the Barristers can break up your routine and connect you to people you would otherwise never meet and push you to do things you would otherwise never do. We are all busy, and while the default position is to save your limited free time for known quantities like Netflix, I would encourage you to begin building your professional network as soon as possible. You are not in law school anymore, and the legal community, outside of your firm, is no longer handed to you. Make the time to start participating in organizations like the Barristers. Start with one cup of coffee with someone in the Barristers and, who knows, maybe you will be writing this article in five years. ■

The 2018-19 president of the Los Angeles County Bar Association Barristers Section, Jessica G. Gordon is a trusts and estates attorney at Thompson Coburn LLP. She also serves on the Executive Committee of the LACBA Trusts & Estates Section.

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BY DANIEL L. HESS

Tax Cuts *and* Jobs Act of 2017

Key provisions are likely to affect professionals, high-net worth individuals, and businesses

THE highly anticipated Tax Cuts and Jobs Act (TCJA) was signed into law by President Trump on December 22, 2017.¹ Although a number of proposals were changed or rejected prior to final passage to enable the bill to pass in the Senate on a narrow 51-48 vote,² the TCJA will impact nearly every tax-paying and tax-exempt entity in the United States as well as many outside the country. Nevertheless, most of the changes that affect individuals expire after 2025, many of the business provisions change over time, and many items are indexed for inflation.³ Moreover, since the passage of the act was entirely partisan, the provisions are likely to change if there is a change in the controlling party, which makes long-term planning uncertain.⁴

Beginning in 2018, taxable income on a married filing jointly basis of \$400,000 to \$600,000 is subject to tax of \$91,379 (22.8 percent) plus 35 percent of the excess over \$400,000. Joint taxable income over \$600,000 is subject to tax of \$161,379 (26.9 percent) plus 37 percent of the excess over \$600,000.⁵ Taxable income on a single filing basis of \$200,000 to \$500,000 is subject to tax of \$45,689.50

(22.8 percent) plus 35 percent on the excess over \$200,000. Single income over \$500,000 is subject to tax of \$150,689.50 (30.1 percent) plus 37 percent on the excess over \$500,000.⁶

The long-term capital gains rate for most capital assets and the rate on qualified dividends remain at a maximum of 20 percent.⁷ Carried interests in partnerships must now be held for three years to qualify for the 20 percent rate.⁸ The alternative minimum tax (AMT) was retained for individuals only with a rate of up to 28 percent and increased exemption amounts of \$109,400 for married joint taxpayers and \$70,300 for single taxpayers.⁹ Most AMT long-term capital gains are still taxed at a maximum of 20 percent.¹⁰ With the new controversial limit on deductions for state and local taxes by individuals of \$10,000 per year, fewer individual taxpayers will be subject to the AMT. The net investment income tax (NIIT) of 3.8 percent continues to apply to investment

Daniel L. Hess is director of taxes and has served as chief financial officer for Sunrider International in Torrance, California. He is a certified specialist in taxation law and a CPA.

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and passive income if the taxpayer's modified adjusted gross income exceeds \$250,000 joint and \$200,000 single.¹¹ The additional Medicare tax of .9 percent also remains.¹² Earned income of a child is taxed at the single rates, and net unearned income of a child is now taxed according to the less favorable trusts and estates brackets.¹³

Alimony or separate maintenance payments will no longer be deductible to the payor or taxable to the recipient for agreements executed after December 31, 2018, or for earlier agreements modified to apply the change in the law.¹⁴

Out-of-pocket medical expenses over 7.5 percent of adjusted gross income (AGI) are deductible for 2017 and 2018.¹⁵ It has been well publicized that the state and local tax deduction for individual income and nonbusiness property and sales taxes will now be limited to a total of \$10,000 per year.¹⁶ Deductible mortgage interest on qualified residence debt issued after December 15, 2017, is limited to interest on principal up to \$750,000 (the mortgage interest deduction for mortgages up to \$1 million is grandfathered in for mortgages in effect prior to December 15, 2017).¹⁷ Beginning in 2018, the deduction for interest on home equity debt up to (and even exceeding) \$100,000 is generally only deductible so long as the combined \$750,000 of debt threshold is not exceeded.¹⁸ Cash donations to public charities may now be deductible up to 60 percent of AGI.¹⁹ Charitable deductions will no longer be allowed for payments for college athletic event seating rights.²⁰ Casualty and theft losses will only be allowed for presidentially declared disaster areas.²¹ The individual health insurance mandate penalty is repealed beginning in 2019.²² Miscellaneous itemized deductions will not be allowed from 2018 to 2025, which potentially affects law firm employees and partners who incur unreimbursed employee business expenses. Other examples of nondeductible miscellaneous expenses include tax preparation fees, investment advisory fees, and union dues.²³ The phase-out on itemized deductions has been suspended from 2018 to 2025.²⁴

The standard deduction has been increased to \$12,000 for individuals, \$18,000 for heads of households, and \$24,000 for joint filers for 2018 to 2025.²⁵ Personal exemptions are suspended from 2018 to 2025.²⁶ With the increased standard deduction and the new limits on itemized deductions, the great majority of individuals will be able to avoid itemizing and thereby simplify their federal tax returns. The child tax credit has been increased to \$2,000

per child (\$1,400 of which is refundable) and \$500 for other dependents.²⁷ This credit is available to joint filers with AGI up to \$400,000 and single filers with AGI up to \$200,000.²⁸ The TCJA allows Section 529 plans to distribute up to \$10,000 per student per year for enrollment in a public, private, or religious elementary or secondary school.²⁹

The act did not repeal the estate and gift tax. However, it doubled the estate and gift tax exemption amount from \$5 million to \$10 million per person (\$11.2 million per person and \$22.4 million per married couple after adjusting for inflation) beginning in 2018 with any excess subject to tax at 40 percent.³⁰ This increased exemption amount remains indexed for inflation but expires in 2026 (like most of the individual changes), so wealthy individuals should consider making gifts before the increased amount expires.

Example: Harry and Jessica are married with two young children and earn annual salaries as law firm associates of \$180,000 and \$210,000, respectively. They have interest income of \$12,000, interest expense of \$46,000 on mortgage debt of \$1.4 million (which includes \$100,000 as a home equity line of credit), charitable contributions of \$13,500, California state income tax of \$24,000, and Los Angeles County property tax of \$13,000. Their projected U.S. income tax for 2017 (pre-TCJA) and 2018 would be \$79,356 and \$73,985, respectively.³¹ Their projected California income tax for 2017 and 2018 would be \$26,408 and \$26,377, respectively.

Professional and Business Taxpayers

The TCJA has the potential to greatly benefit profitable domestic-based businesses. This includes C corporations, which are generally subject to tax at the corporate level with their shareholders paying tax on dividends, and certain pass-through (flow-through) businesses, including S corporations, limited liability companies, partnerships, and proprietorships in which the tax is generally only incurred at the shareholder, member, partner, or proprietor level. Thus, law firm clients will likely be affected by the act in varying degrees. However, California attorneys with high earnings may not notice a significant reduction in their own or their firms' federal income tax liabilities on earnings from their law practice. Some may see an increase in federal tax based on the new limitation on deducting personal state and local taxes.

Despite the potential business tax sav-

ings under the act for C corporations, the choice of entity decision for U.S. tax purposes would generally be expected to remain the same except in narrow circumstances. Considerations that may affect the decision include the extent to which the C corporation or its shareholders would be subject to state income tax, whether the C corporation intends to distribute its income currently, the extent to which the new IRC Section 250 37.5 or 50 percent exclusions would be available to the C corporation, and whether the new Section 199A 20 percent deduction would be available to the flow-through entity. California attorneys are generally most tax-efficient as sole proprietorships, professional corporations with S corporation elections, or as registered limited liability partnerships.³²

The taxable income of C corporations will now be taxed at a flat rate of 21 percent effective January 1, 2018.³³ Also, the corporate AMT has been repealed.³⁴ The combined 2018 rate for a California C corporation that distributes qualified dividends to California shareholders can range from 45.3 to 54.7 percent if the corporation distributed all of its income currently, depending on how much of the new foreign derived intangible income deduction (FDII) allowed under Section 250 of the Internal Revenue Code is available to the domestic C corporation. The combined rate for a California-based pass-through entity for California residents in 2018 can range from 42.9 to 50.3 percent, depending on the extent to which the new IRC Section 199A qualified business income deduction is available to the individual taxpayer. The highest combined federal and California rates would have been 60.9 percent for C corporations as opposed to 47.6 percent for individually owned pass-through entities, respectively, in 2017 (i.e. pre-TCJA).³⁵

The TCJA will have an impact on current and deferred tax balances of publicly traded and private companies under GAAP beginning in the fourth quarter of 2017.³⁶ Annual compensation in excess of \$1 million each paid to certain officers of publicly traded corporations is no longer deductible regardless of whether it is paid as commissions or as performance-based compensation.³⁷ The act allows a qualified employee to elect to defer income for up to five years from qualified stock received from his or her employer.³⁸

Taxpayers that have average annual gross receipts of \$25 million or less for the three prior tax years can now use the cash method of accounting regardless of whether the purchase, production, or sale

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1. The Tax Cuts and Jobs Act of 2017 (TCJA) passed Congress on a bipartisan basis.
True.
False.
2. Most provisions in the TCJA that affect individuals are permanent changes.
True.
False.
3. Effective January 1, 2018, the highest federal individual income tax rate is 37 percent.
True.
False.
4. The TCJA repealed the net investment income tax of 3.8 percent.
True.
False.
5. Under the TCJA, individuals may still deduct state and local income taxes in excess of \$10,000 so long as such taxes are attributable to their trade or business.
True.
False.
6. Effective for 2018, the estate and gift tax exclusion amount is \$10 million per person before adjusting for inflation, which increases the exclusion amount to approximately \$11.2 million per person.
True.
False.
7. Beginning in 2018, the federal income tax rate for domestic subchapter C corporations is 21 percent.
True.
False.
8. Beginning in 2018, only the corporate alternative minimum tax has been repealed.
True.
False.
9. The new qualified business income deduction under Section 199A of the Internal Revenue Code is generally up to 20 percent of qualified business income from pass-through entities other than most professional and investment service providers with high levels of income.
True.
False.
10. Manufacturers with average annual gross receipts of \$25 million or less for the prior three years may now use the cash method of accounting.
True.
False.
11. Domestic businesses can expense 100 percent of the cost of eligible property placed in service from September 27, 2017, through December 31, 2022.
True.
False.
12. Beginning in 2018, the deduction for investment interest expense will generally be limited to 30 percent of a taxpayer's adjusted taxable income.
True.
False.
13. The limitation on the deduction for business interest expense does not apply to an electing real property trade or business.
True.
False.
14. The TCJA limits the deduction for net operating losses to 70 percent of taxable income before net operating losses.
True.
False.
15. Beginning in 2018, active excess business losses for noncorporate taxpayers will now be limited to the extent they exceed \$500,000 on joint returns and \$250,000 on single returns.
True.
False.
16. The TCJA did not modify the existing rules with respect to "like-kind" exchanges of property under IRC Section 1031.
True.
False.
17. The TCJA generally denies a deduction for amounts paid at the direction of a government or governmental entity in relation to the violation of any law or the investigation or inquiry by the government or entity into the potential violation of any law.
True.
False.
18. The TCJA's provisions comprise a modified territorial system of taxation of foreign earnings as not all foreign income is exempt.
True.
False.
19. The tax for the transition to the modified territorial system of taxation is generally payable over 8 years by 10 percent or greater U.S. corporate and individual shareholders of most foreign corporations with such shareholders.
True.
False.
20. Under the TCJA, domestic C corporations may be taxed at a federal rate as low as 13.125 percent on foreign-derived intangible income from serving foreign markets.
True.
False.

of merchandise is an income-producing factor.³⁹ The current-law exceptions from the use of the accrual method of accounting were retained, so qualified personal service corporations and most partnerships without C corporation partners, S corporations, and other pass-through entities continue to be allowed to use the cash method even if they exceed the \$25 million gross-receipts test, as long as the use of the cash method clearly reflects income.⁴⁰ This includes large law firms. The \$25 million gross-receipts threshold is indexed for inflation after 2018.⁴¹ Note that accrual-method taxpayers subject to the all-events test must now recognize gross income for tax purposes in the year they recognize the income on their applicable or IRS-specified financial statement.⁴²

The act allows domestic businesses to immediately deduct 100 percent of the cost of eligible property in the year placed in service.⁴³ This now includes new and used property.⁴⁴ This increase in bonus depreciation applies for property placed in service from September 27, 2017, through 2022 and includes a wider class of property than under prior law.⁴⁵ The similar IRC Section 179 expense amount has been increased to \$1 million with the phase-out of the expense beginning when the cost of property placed in service exceeds \$2.5 million.⁴⁶ Luxury auto depreciation deductions were increased for taxpayers who do not want to or do not qualify to fully expense the cost of their luxury vehicles under the bonus depreciation rules.⁴⁷

Pass-Through Businesses

While certain individually owned U.S. pass-through businesses will now be allowed to deduct 20 percent of their qualified domestic business income, it is generally limited to 50 percent of the reported wages paid to employees.⁴⁸ New Section 199A, which taxes qualified domestic business income at rates as low as 29.6 percent (assuming the taxpayer is in the highest bracket) and benefits a broader range of taxpayers than the repealed Section 199 Domestic Production Activities deduction that favored manufacturers. This complex new provision applies to each separate qualified business and includes a number of limitations. Qualified business income is nonwage income that is calculated according to a formula, and the benefit is applied at the partner, member, shareholder, and individual level.⁴⁹ In lieu of the 50 percent of wages limitation, taxpayers may use 25 percent of allocable wages plus 2.5 percent of the unadjusted basis in qualified property for each quali-

fied business.⁵⁰ Note that the 20 percent benefit is phased out for professional services and consulting businesses such as attorneys whose taxable income exceeds \$315,000 for married individuals filing jointly or \$157,500 for single filers.⁵¹ For taxpayers who fall under those taxable income thresholds, the 20 percent deduction is not subject to the wage limitation.⁵²

Example: John is a partner at a four-man law partnership. His share of income from the partnership is \$120,000. His share of W-2 wages paid to employees is \$40,000. His reduction in income under new Section 199A is \$24,000.⁵³

The deduction for business interest expense will now be limited to the sum of 1) business interest income plus 2) 30 percent of the taxpayer's "adjusted taxable income" for the tax year and 3) auto dealers' floor plan financing interest for the tax year.⁵⁴ Business interest is interest allocable to a trade or business that is not investment interest.⁵⁵ Adjusted taxable income is trade or business income before interest, depreciation, and amortization, the Section 199A 20 percent deduction, and net operating losses (NOLs).⁵⁶ Any disallowed business interest expense may be carried forward indefinitely.⁵⁷ Taxpayers that meet the \$25 million gross-receipts test are exempt from the interest deduction limitation.⁵⁸ The business interest expense limitation also does not apply to a trade or business that consists of performing services as an employee or any electing real property trade or business, among others.⁵⁹

The act limits the deduction for NOLs created after December 31, 2017, to 80 percent of pre-loss taxable income.⁶⁰ The two-year NOL carryback provisions were repealed.⁶¹ Unused NOLs may be carried forward indefinitely.⁶² Further, net "excess business losses" for non-C corporation taxpayers will now be limited to the extent they exceed \$500,000 on joint returns and \$250,000 on individual returns.⁶³ This provision limits taxpayers with large losses from their active businesses from offsetting other income such as from wages, interest, and dividends.

This new active loss limitation is effectively an expansion of the passive loss rules under Section 469 of the Internal Revenue Code. Like-kind exchanges under Section 1031 will be limited only to exchanges of real property that is not primarily held for sale.⁶⁴ The act disallows deductions for 1) an activity generally considered to be entertainment, amusement, or recreation; 2) membership dues for any club organized for business, pleasure, recreation, or other

social purposes; or 3) a facility or portion of a facility used in connection with such items.⁶⁵

The act repealed rules providing for the technical terminations of partnerships.⁶⁶ Specified domestic research or experimental expenditures must be capitalized and amortized ratably over a five-year period for tax years beginning after December 31, 2021.⁶⁷ The act denies a deduction for amounts paid or incurred to, or at the direction of, a government or governmental entity in relation to the violation of any law or investigation into the potential violation of any law.⁶⁸ This increases the scope of nondeductible fines and penalties. Restitution payments are excluded from this provision.⁶⁹ New reporting rules apply to payments that may constitute nondeductible fines and penalties.⁷⁰

For 2018 and 2019, employers may claim a credit equal to 12.5 percent of wages paid to qualifying employees on family and medical leave if the payment is 50 percent or more of the employee's normal wages.⁷¹ Contributions to the capital of a corporation by a customer, potential customer, governmental entity, or civic group are now taxable unless the contribution is by a shareholder or is a contribution pursuant to a government preapproved master development plan.⁷²

Foreign Income

Foreign income subject to a low foreign tax rate tends to accumulate offshore. A major purpose of the TCJA was to reengineer the taxation of foreign corporations' non-U.S. trade or business income into a territorial system in which such earnings would not be subject to U.S. tax when distributed to U.S. corporate shareholders.⁷³

This was in conjunction with the act's attempt to incentivize U.S.-based businesses to increase the scope of their domestic activities and increase U.S. employment and gross national product. The act's provisions comprise a modified territorial system as not all foreign income is exempt, the Subpart F provisions continue to tax passive income, the passive foreign investment company⁷⁴ rules remain, and foreign branch income that flows through to a U.S. owner is still subject to U.S. tax. The act also makes foreign tax credit utilization more difficult.

It is unknown whether the act's provisions will lead to increased U.S. employment given that existing foreign corporations that use low-cost foreign labor and pay a low foreign income tax rate have limited additional incentive to move jobs back to the U.S. The act generally allows post-2017 foreign earnings in for-

eign corporations to be distributed back to the foreign corporations' U.S. corporate shareholders without incurring U.S. tax. However, with the U.S. corporate tax rate at 21 percent or less, there is more of an incentive for profits to remain in the U.S. (e.g., via transfer pricing) on sales of products or services rendered to foreign affiliates.

The toll charge for the transition to a territorial system is a onetime tax of 8 to 15.5 percent on the deemed repatriation of accumulated post-1986 foreign earnings and profits as of year-end 2017.⁷⁵ This tax is on all 10 percent or greater U.S. shareholders of most foreign corporations.⁷⁶ The tax is generally payable over eight years on a backloaded basis and foreign tax credits are allowed at a reduced rate.⁷⁷

Example: Smith & West LLP, is an eight-partner law firm that operates in Los Angeles. Four of the partners own 20 percent each of the firm and the other four own 5 percent each. All partners are unrelated. Smith & West LLP opened a Hong Kong office in 1998 to provide services to their clients based in Asia. The Hong Kong office is held in a controlled foreign corporation owned by the limited liability partnership known as S&W (HK) Ltd. S&W (HK) Ltd. has been profitable and has accumulated the U.S. equivalent of US\$24 million in foreign earnings and profits without making any distributions through December 31, 2017. The greater of the cash and net receivables balances as of December 31, 2017, or the average of the prior two years is \$18 million. S&W (HK)'s basis in other assets is \$8 million. For 2017, each 20-percent partner will be required to recognize US\$4.8 million of the previously untaxed earnings and profits. The tax will be \$654,000 for each of these parnters but may be paid in installments over eight years.⁷⁸ Later distributions of cash will be free of federal tax to the extent of the \$4.8 million subject to the transition tax.⁷⁹

In general, distributions of post-2017 foreign-source earnings from most foreign corporations that have 10 percent or greater U.S. C corporation shareholders are excluded from income.⁸⁰ Disguised as a tax reduction, so called "global intangible low-taxed income" (GILTI) is actually a potential zero to 37+ percent tax on a foreign corporation's post-2017 unrepatriated income that exceeds certain thresholds.⁸¹ The GILTI tax rate for a U.S. C corporation



is only 10.5 percent on the gain before foreign tax credits that would reduce the GILTI tax to zero so long as the foreign tax rate on the GILTI is at least 13.125 percent.⁸² Individuals are potentially subject to full 37 percent rates on GILTI.⁸³ California tax may apply to the actual distributions. The GILTI is based on all income regardless of whether there are foreign intangibles. GILTI serves as a limit on post-2017 territorial income that would have otherwise been exempt from U.S. tax for U.S. corporate shareholders.⁸⁴

Example: In 2018, S&W (HK) Ltd settles a contingency fee case in Hong Kong for the equivalent of US\$80 million after costs. S&W earns a net US\$83 million for the year before Hong Kong income tax of US\$12.3 million. S&W has depreciable assets with an adjusted basis of US\$10 million. For 2018, the four U.S. 20 percent partners noted in the former example will each be subject to tax of up to \$5.2 million on the unremitted income.⁸⁵

The TCJA also provides domestic C corporations with a reduced tax rate as low as 13.125 percent on foreign derived intangible income (FDII) earned from serv-

ing foreign markets.⁸⁶ FDII is intended to encourage U.S.-based businesses to generate income from foreign activities and is the domestic version of the GILTI provision. To qualify as foreign market income, the U.S. corporation must earn the income 1) from the sale, exchange, lease, or license of property to foreign persons for a foreign use; or 2) from services provided to foreign persons or with respect to foreign property. The income must be earned through the United States as opposed to a foreign office.⁸⁷

There is also a new 10 percent (5 percent in 2018) "base erosion minimum tax" on a corporation's "modified taxable income" to the extent the 10 percent amount exceeds the corporation's regular tax, as adjusted.⁸⁸ Modified taxable income is defined as income without deductions for certain "base erosion" payments to 25 percent or more commonly owned foreign entities.⁸⁹ This applies to C corporations with average annual U.S. receipts of \$500 million for the prior three years.⁹⁰ Section 367 of the Internal Revenue Code now applies to tax certain transfers of foreign goodwill including going concern value, workforce in place, and other designated items. Post-2017

branch losses deducted for U.S. tax purposes must be recaptured if the branch assets are transferred by the U.S. shareholder to a specified 10-percent owned foreign corporation.⁹¹

State Conformity

The extent to which California and other state and local jurisdictions will conform to the TCJA's provisions is unknown. The act includes tax savings provisions such as the deduction for qualified business income and enhanced bonus depreciation as well as tax-raising provisions such as the active loss limitation, interest disallowance, and the deemed repatriation of foreign earnings. Such items may or may not be of interest to the California legislature.

The TCJA is a pro-business enactment that has the potential to benefit a wide spectrum of Americans. However, the projected deficit from the bill of \$1.5 trillion over 10 years is problematic. The various effective dates in the act will need to be addressed by future houses of Congress. Also, given the length and complexity of the bill, there will likely need to be a number of technical corrections by Congress. The Treasury Department and the IRS will be issuing detailed notices and regulations pursuant to the act's many grants of interpretive and legislative authority. The resource-constrained IRS may find it difficult to meet the challenges of providing timely regulatory guidance on the new legislation and policing its provisions. ■

¹⁵ I.R.C. §213(f). The temporary reduction in the threshold does not apply for AMT purposes. The threshold is 10.5 percent of AGI for regular and AMT purposes beginning in 2019.

¹⁶ I.R.C. §164(b)(6).

¹⁷ I.R.C. §163(h)(3)(F). Interest on home equity debt is disallowed to the extent such debt plus other mortgage debt exceeds the \$750,000 threshold.

¹⁸ Press Release, Interest on Home Equity Loans Often Still Deductible Under New Law (IR-2018-32), IRS (Feb. 21, 2018), available at <https://www.irs.gov>.

¹⁹ I.R.C. §170(b)(1)(G).

²⁰ I.R.C. §170(l).

²¹ I.R.C. §165(h)(5). I.R.C. §165(h) allows deductions for casualty losses that exceed 10 percent of AGI plus \$100 per loss.

²² I.R.C. §5000A(c)(2)(B)(iii) (effective after 12/31/2018).

²³ I.R.C. §67(g).

²⁴ I.R.C. §68(f).

²⁵ I.R.C. §63(c)(7).

²⁶ I.R.C. §151(d)(5)(A).

²⁷ I.R.C. §24(h). These changes apply from 2018-2025.

²⁸ I.R.C. §24(h)(3).

²⁹ I.R.C. §§529(c)(7) and (e)(3)(A).

³⁰ I.R.C. §2010(c)(3)(C).

³¹ 2017 and 2018 would also include NIIT of approximately \$420 and additional Medicare of \$1,260.

³² From William C. Staley, outline from "Choice of Entity for Practicing Law in California," address before the Business Law Section of the San Fernando Valley Bar Association (December 9, 2015).

³³ I.R.C. §11(b).

³⁴ I.R.C. §55(a).

³⁵ I.R.C. §§1, 11; REV. & TAX CODE §§23151(f), 17041 *et seq.*

³⁶ See Staff Accounting Bulletin No. 118, 17 C.F.R. Pt. 211, SEC, available at <https://www.sec.gov/interps/account/staff-accounting-bulletin-118.htm> (last viewed May 14, 2018).

³⁷ I.R.C. §162(m).

³⁸ I.R.C. §83(i).

³⁹ I.R.C. §§448(b)(3), (c). Accrual-based taxpayers that want to use the cash basis must file for an automatic change in accounting method with the adjustment for the change in method to be taken over 6 years. The attribution rules in I.R.C. §448(c)(2) continue to apply to prevent commonly controlled businesses whose combined sales exceed \$25 million from taking advantage of the new increased limit. Per I.R.C. §471(c)(1)(B), taxpayers that meet the \$25 million gross-receipts test will not be required to account for inventories under I.R.C. §471. Instead, they will be allowed to treat inventories as nonincidental materials and supplies or to conform their method of accounting for inventories to their financial accounting treatment of inventories. Similarly, taxpayers that meet the cash-method \$25 million gross-receipts test are exempted from the uniform capitalization rules of I.R.C. §263A. I.R.C. §263A(i).

⁴⁰ I.R.C. §448(a).

⁴¹ I.R.C. §448(c)(4).

⁴² I.R.C. §451(b).

⁴³ I.R.C. §168(k).

⁴⁴ I.R.C. §168(k)(2)(A)(ii).

⁴⁵ I.R.C. §168(k)(2)(A)(iii).

⁴⁶ I.R.C. §179(b).

⁴⁷ I.R.C. §280F(a)(1)(A).

⁴⁸ I.R.C. §199A. The deduction is not available to "...any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, ath-

letics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees" except on lower income thresholds. Architectural and engineering firms are not subject to these restrictions. Income from real estate investment trusts, cooperatives, and publicly traded partnerships also qualifies for the 20 percent benefit. The wage and basis limitations do not apply to taxpayers at the \$315,000 joint and \$157,500 single thresholds.

⁴⁹ *Id.*

⁵⁰ I.R.C. §199A(b)(2)(B)(ii).

⁵¹ I.R.C. §199A(e).

⁵² I.R.C. §199A(b)(3)(A).

⁵³ \$120,000 * 20% = \$24,000. The wage limitation does not apply as the income is under the \$315,000 joint threshold (\$157,500 single) of I.R.C. §199A(e)(2). I.R.C. §199A(b)(3).

⁵⁴ I.R.C. §163(j).

⁵⁵ I.R.C. §163(j)(6).

⁵⁶ I.R.C. §163(j)(8).

⁵⁷ I.R.C. §163(j)(2).

⁵⁸ I.R.C. §163(j)(3).

⁵⁹ I.R.C. §163(j)(7)(a).

⁶⁰ I.R.C. §172(a).

⁶¹ TCJA §13302(b).

⁶² I.R.C. §172(b)(1)(A)(ii).

⁶³ I.R.C. §461(l).

⁶⁴ I.R.C. §1031(a).

⁶⁵ I.R.C. §274(a). Meals for the convenience of the employer are no longer deductible under I.R.C. §274(o).

⁶⁶ TCJA §13504(a) repealed I.R.C. §708(b)(1)(B).

⁶⁷ I.R.C. §174(a)(2)(B) and TCJA §13206(e).

⁶⁸ I.R.C. §162(f)(1).

⁶⁹ I.R.C. §162(f)(2).

⁷⁰ I.R.C. §6050X.

⁷¹ I.R.C. §45S.

⁷² I.R.C. §118(b).

⁷³ Prior to enactment of the TCJA, repatriated income from a foreign corporation was subject to U.S. tax at the U.S. shareholder level with possible foreign tax credits.

⁷⁴ See I.R.C. §§1291 *et seq.*

⁷⁵ I.R.C. §965.

⁷⁶ I.R.C. §965. S corporations generally qualify for an indefinite deferral of the payment of the tax.

⁷⁷ I.R.C. §965(g).

⁷⁸ Foreign earnings & profits \$24,000,000 * 20% ownership = \$4,800,000. Cash \$18,000,000 * 20% ownership = \$3,600,000 * 15.5% tax rate on cash or near cash equals \$558,000 plus \$4,800,000 - 3,600,000 * 8.0% tax rate on other assets = \$96,000. \$558,000 + 96,000 = \$654,000.

⁷⁹ I.R.C. §959. Additional California tax may be due by the partners when cash is distributed to the LLP.

⁸⁰ I.R.C. §245A.

⁸¹ I.R.C. §§250, 951A. GILTI income can then be repatriated to U.S. C corporations without further U.S. tax. Foreign withholding tax and state income tax may apply to actual distributions.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Foreign income \$83,000,000 - Hong Kong Taxes \$12,300,000 - 10% of Adjusted Basis \$1,000,000 = \$69,700,000 * Per 20 percent partner * 37 percent = \$5.2 million.

⁸⁶ I.R.C. §250.

⁸⁷ *Id.*

⁸⁸ I.R.C. §59A.

⁸⁹ I.R.C. §59A(c).

⁹⁰ I.R.C. §59A(e)(1)(B).

⁹¹ I.R.C. §367(a)(1).

¹ Tax Cuts and Jobs Act (TCJA), H.R. 1, 115th Cong. (2017), Pub. L. No. 115-97. Final statutory language is available at: <https://www.congress.gov/115/bills/hr1/BILLS-15hr1enr.pdf>. The House Ways and Means, Senate Finance, and Joint Committee reports are available at: <http://docs.house.gov/bills/thisweek/20171218-Joint%20Explanatory%20Statement.pdf> (last viewed May 14, 2018).

² See *id.* (the table at the end of the Joint Committee explanation: Estimated Budget Effects of the Conference Agreement for H.R. 1, the "Tax Cuts And Jobs Act" Fiscal Years 2018 - 2027) (last viewed May 14, 2018) [hereinafter Estimated Budget Effects].

³ I.R.C. §1(f)(6).

⁴ Estimated Budget Effects, *supra* note 2.

⁵ I.R.C. §1(j)(2)(A). There are seven tax brackets: 10, 12, 22, 24, 32, 35, and 37 percent. The compressed trust tax brackets are now 10, 24, 35, and 37 percent per I.R.C. §1(j)(2)(E).

⁶ I.R.C. §1(j)(2)(C).

⁷ I.R.C. §1(h)(1)(D). I.R.C. §1202 gains on sales of qualified small business stock continue to qualify for zero percent tax.

⁸ I.R.C. §1061.

⁹ I.R.C. §§55(b)(1)(A), (d)(4)(A).

¹⁰ I.R.C. §55(b)(3).

¹¹ I.R.C. §1411(b)(1), (3).

¹² I.R.C. §3101(b)(2).

¹³ I.R.C. §1(j)(4).

¹⁴ TCJA §11051(a) repeals I.R.C. §215, and TCJA §11051(b) repeals and replaces I.R.C. §61(a)(8).

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BY RICHARD P. ORMOND

CANNABIS, CASH, and CRIME

BANKING, LENDING, AND INSOLVENCY RESTRICTIONS RELEGATE THE LEGITIMATE CANNABIS INDUSTRY IN CALIFORNIA TO AN ALL-CASH BUSINESS, VULNERABLE TO CRIME

ON OCTOBER 2, 2012,

kidnappers robbed and abducted a marijuana dispensary owner from his Newport Beach home. They then drove him to the Mojave Desert where they tortured him and demanded that he reveal where he had buried his medical marijuana proceeds (rumored to be in the millions of dollars). After concluding that the dispensary owner was not going to reveal his “secret stash” buried in the desert, the kidnappers cut off his penis and threw it from the window of their getaway van.¹ Since the dispensary owner had been lawfully licensed and was operating in compliance with the laws of the State of California, why did his dispensary not keep its money in a bank like other businesses generally do?

This grievous risk to life and limb is not exclusive to this unfortunate man. His episode is just one of many frightening and shocking events that are occurring throughout the emerging legitimate cannabis landscape. Marijuana-related businesses (MRBs), even after being legally established under state law and operating under strict regulations and oversight, nonetheless cannot open a simple deposit account at a bank owing to incon-

sistent, conflicting federal regulations.

Under the current federal prohibition of marijuana² many banks, fearing potential repercussions, simply refuse to do business with marijuana growers, extractors, distributors, and sellers—even ones that operate legally in their own respective states.³ As a result, MRBs are forced to operate on a cash-only basis, making them prime targets for robberies, kidnappings, and extortion.

The inability of an MRB to deposit monies at a bank thus may pose serious risks to its principals, increase risk to the surrounding community, and force legal, legitimate businesses to conduct operations only in cash or with other risky instruments. The inability to bank also restricts the type of commerce an MRB can undertake, including leasing real estate or equipment, acquiring assets, processing payroll, and paying taxes. Economically, this represents largely untapped potential to participate in the market at large.

The biggest pitfalls and risks that impact the nascent cannabis industry in California and nationwide originate from the patchwork of inconsistent regulatory and legal approaches taken by different federal agencies, beginning with the Department of Justice (DOJ) itself, which just a few years ago under the prior

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administration was carefully creating a legitimate path for state-compliant MRBs and banks to operate lawfully within certain strict parameters.⁴ The current DOJ has not only walked that progress back but affirmatively indicated it would prefer to prosecute lawful state operators, once again raising the specter of uncertainty and possible criminal prosecution for many players in the cannabis industry, despite the fact that MRBs for many years relied on that path to establish and operate their businesses along the lines set forth by past incarnations of the DOJ.

On January 4, 2018, only four days after California enacted the Adult Use of Marijuana Act (AUMA or Proposition 64),⁵ U.S. Attorney General Jefferson B. Sessions rescinded the DOJ's previous nationwide guidance that had relaxed certain types of enforcement in connection with the cultivation, distribution, and possession of marijuana as set forth in the Controlled Substances Act (CSA).⁶ The rescission under Attorney General Sessions included the revocation of the important 2013 memorandum issued by Deputy Attorney General James M. Cole, (Cole Memo), which provided that, if cannabis businesses operated legally within the "four corners" of their respective states' laws and complied with the eight primary directives listed in the Cole Memo (referred to in the industry as the "Eight Deadly Sins," not without some tongue-in-cheek humor), the DOJ would, in essence, create a safe harbor, albeit a narrow one, for compliant cannabis business operators whereby federal officials would refrain from seeking enforcement of the CSA with respect to these operators. What were once reasonably clear guidelines for MRBs to follow has now been replaced with uncertainty.

In a somewhat surprising and contradictory move, just three weeks after Sessions rescinded the Cole Memo and its progeny, the U.S. Department of the Treasury declined to follow the DOJ's lead. In a public letter dated January 31, 2018, sent to U.S. Representative Denny Heck of Washington, the Treasury Department reaffirmed that the Financial Crimes Enforcement Network (FinCEN) would continue to follow the Cole Memo as set forth in its 2013 FinCEN Guidance Memorandum, despite the rescission of the Cole Memo by the DOJ. While good news for lawful cannabis operators, the announcement complicated the regulatory picture even further, for now instead of the relatively straightforward landscape in which state law conflicts with federal law, MRBs have to contend with the additional layer of complications that arise when federal

agencies and bureaucracies do not agree with one another.

In the FinCEN Guidance Memorandum, which remains in effect, the Treasury Department agreed that the safe harbor from prosecution as set forth in the Cole Memo was necessary. The FinCEN guidance requires that banks engaged in banking cannabis businesses file special-purpose Suspicious Activity Reports (SARs) that distinguish among: 1) marijuana businesses lawfully operating in a state (requiring the filing of a "marijuana limited" SAR), 2) marijuana businesses that may not be operating in a manner compliant with state laws (requiring the filing of a "marijuana priority" SAR), and 3) marijuana businesses for which the bank concludes that a cannabis business was operating in violation of one or more of the Cole Memo's Eight Deadly Sins (requiring the filing of a "marijuana termination" SAR).

These inconsistencies, not to mention the CSA elephant in the room, create an environment in which finance, banking, lending, and creditors' rights face a possibly confusing array of rules, restrictions, and smart guesswork. Most banks err on the side of caution and typically do not take deposits from MRBs or from businesses that receive funds, as their primary source, from MRBs (including, e.g., landlords collecting rents from an MRB and cultivation and grow equipment lessors).⁷

Banks fear that the inconsistent regulations could risk their ability to insure deposits through the FDIC or restrict access to FedWire (the system that facilitates the wiring of funds between banks and other financial institutions). Also, a national association (a federally chartered bank) may unnecessarily risk its federal charter by getting caught up in the CSA if it is accused of a violation of the Bank Secrecy Act (BSA)⁸ or of anti-money laundering (AML) regulations.⁹

Some state-chartered banks and some local credit unions are attempting to step in to fill the void, seeking to create access to banking services for MRBs, but even that intrastate activity is becoming difficult. In *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*, Fourth Corner, a Colorado-based credit union, in compliance with the Cole Memo and the FinCEN Guidelines, had formed its credit union specifically to "bank" the Colorado cannabis industry.¹⁰ Before Fourth Corner could commence operations, the Federal Reserve rejected Fourth Corner's application for a master account that would have allowed it to transact business and transfer funds through FedWire.¹¹

Fourth Corner filed suit and sought to

compel the Federal Reserve, by way of injunction, to issue it a master account. The district court remarked that "[c]ourts cannot use equitable powers to issue an order that would facilitate criminal activity."¹² The court concluded that the Cole Memo and FinCEN Guidelines "simply suggest that prosecutors and bank regulators might 'look the other way' if financial institutions don't mind violating the law. A federal court cannot look the other way."¹³ Fourth Corner appealed, and the Tenth Circuit recently remanded the matter back to the district court. Currently, Fourth Corner is seeking to bank businesses that are not actively cultivating or selling cannabis or cannabis products until such time that its case can move through the federal court. As one observer noted, "Fourth Corner cannot provide services to marijuana businesses. That is: business [sic] that deal with the consumption of marijuana products—such as dispensaries. So while the lawsuit brought the credit union one step closer to giving the industry financial inclusion, they [sic] did not walk away with a total victory, leaving a financial services gap that still needs to be filled."¹⁴

Other key decisions in federal courts, including the U.S. Supreme Court, add to the patchwork and uncertainty. In *United States v. Oakland Cannabis Buyers' Cooperative*, the Supreme Court held that there is no medical necessity exception to the CSA's prohibitions against manufacturing and distributing marijuana, stating that the statute reflects a "determination that marijuana has no medical benefits worthy of an exception[.]" and that "medical necessity is not a defense to manufacturing and distributing marijuana."¹⁵ In the matter entitled *Gonzales v. Raich*, the Supreme Court went even further and held that the Commerce Clause gave Congress the authority to prohibit the local cultivation and use of marijuana, despite California's state law to the contrary.¹⁶

There is also the Rohrabacher-Farr amendment (also known as the Rohrabacher-Blumenauer amendment), legislation approved by Congress and incorporated into the federal budget, that prohibits the DOJ from spending funds to interfere with the implementation of state medical cannabis laws.¹⁷ It passed the House in May 2014, becoming law in December 2014 as part of an omnibus spending bill and was recently renewed in March 2018 stating, in full, that:

None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connect-

icut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.¹⁸

In *United States v McIntosh*, the DOJ prosecuted the largest medical marijuana dispensary in the United States, which is located in Oakland, California.¹⁹ The Ninth Circuit pushed back, holding that the Rohrabacher–Farr amendment prohibited the DOJ from spending money granted by the appropriations bill to prosecute organizations or otherwise prevent certain states “from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana,” thus effectively preventing the federal government from prosecuting people whose medical marijuana activities were legal in their states and who had fully complied with that state’s laws.²⁰

There remains a substantial degree of risk for a financial institution to take in deposits from MRBs without the manpower (and resources to pay for that manpower) to review the relevant BSA issues and AML issues as well as to comply with the Know Your Customer (KYC) requirements. The DOJ is highly unlikely to back off from its early aggressive stance under the new administration any time soon, which will only keep more wary financial institutions away from the cannabis space. Coupled with the FedWire, FDIC Insurance, and charter risks, it currently is not recommended for most banks to take deposits in the present cannabis-related legal environment. Legally operating MRBs will continue to be the hardest hit.

Lending

Lending to an MRB is also risk-inherent as any collateral secured by the lender may be subject to civil asset forfeiture, presenting a significant credit risk for banks that may otherwise want to provide services in this industry. Civil asset forfeiture may include “All real property, including any right, title, and interest...which is used... in any manner or part to commit, or to facilitate the commission of [violation of the CSA] shall be subject to forfeiture.”²¹ And lenders must know that lienholders themselves may be considered “owners”



of seized property. Recovery of seized property is possible, but a lender must satisfy the conditions of the “Innocent Owner” defense under the Civil Asset Forfeiture Reform Act,²² which has two key elements: 1) the owner before illegal conduct giving rise to forfeiture occurs is an “innocent owner” if that owner was not aware of illegal conduct giving rise to forfeiture, or upon learning of such conduct, did all that reasonably could be expected under the circumstances to terminate the illegal use of property; and 2) an owner who acquires property after illegal conduct occurs is an innocent owner if at time of acquisition it was a bona fide purchaser or seller for value, and did not know, and was reasonably without cause to believe, that the property was subject to forfeiture.²³

Because cannabis is a Schedule I drug pursuant to the CSA and thus illegal at the federal level, enforcement rights for lenders may also be curtailed by limiting loan enforcement remedies only to state available remedies and only in state court. A federal court is unlikely to grant a writ of attachment on behalf of a lender seeking to attach assets that consist of or are derived from an illegal narcotic (at least as long as the CSA remains on the books without mitigation). Moreover, if the nature of the collateral is unlawful, it may raise an illegality of contract issue in that the subject matter of the loan agreement (and its security) is illegal and thus the entire contract or loan itself is unenforceable.²⁴

California, in anticipation of an illegality of contract defense being raised in its state courts, preemptively issued and signed into law Assembly Bill 1159, which was enacted as California Civil Code Section 1550.5 and provides that:

[C]ommercial activity relating to

medicinal cannabis or adult-use cannabis conducted in compliance with California law and any applicable local standards, requirements, and regulations shall be deemed to be all of the following: (1) A lawful object of a contract[;] (2) Not contrary to an express provision of law, any policy of express law, or good morals[; and] (3) Not against public policy.”²⁵

Lenders can thus rest assured—at least in California state courts—that their loan agreements will not be summarily deemed unenforceable by virtue of conflicting federal law.

Federal Bankruptcy

Adding to the complexity of creditors’ rights is the fact that it is nearly impossible for an MRB to seek protection under the Bankruptcy Code, conversely eliminating the many creditor protections available to a lender in a bankruptcy proceeding. A number of rulings from the Ninth Circuit and other federal courts effectively close the door to bankruptcy protection for struggling MRBs. As one court firmly declared, bankruptcy courts “should not be ‘a haven for wrongdoers.’”²⁶ This ruling appears to conflict with 28 USC Section 959(b), which states in pertinent part:

[A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor-in-possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.²⁷

On its face, this statute appears to rely on state law to permit the continuance of a business legal in that state. However, if the activity of the debtor is illegal federally, then state law notwithstanding, the trustee or debtor-in-possession cannot violate that federal law.

Bankruptcy courts, however, are inconsistent in their interpretation of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. For example, *In re George and Nansee Lanning* is a case in which a bankruptcy court appears to have rejected the illegality issue.²⁸ In this case, which was filed March 7, 2011, and dismissed on May 7, 2012, joint debtors owned and operated a medicinal marijuana dispensary and owned the real property on which the dispensary was located. Their secured lender filed a motion to dismiss the bankruptcy case alleging that the debtors-in-possession could not comply with Section 959(b) due to illegality under the CSA. However, and somewhat surprisingly, the court denied the motion to dismiss the bankruptcy case on that basis because the business was operating legally in its respective state.²⁹ (Later, however, the case was dismissed due to the debtors' inability to file a plan of reorganization.³⁰)

However, a bankruptcy court in the district of Oregon reached the opposite result when deciding *In re McGinnis*, denying confirmation of a chapter 13 plan in which the plan payments would be funded by the debtor's marijuana business in violation of the requirements of the Bankruptcy Code.³¹ In *Northbay Wellness Group v. Beyries*, an adversary proceeding was dismissed because the plaintiffs/petitioners—a medicinal marijuana dispensary and its principal—were engaged in the unlawful sale of marijuana in violation of federal law.³² That court stated: “A federal court should not lend its judicial power to a plaintiff who seeks to invoke [that] power for the purpose of consummating a transaction in clear violation of law.”³³ Further, the court added that although “the conduct of the parties may have been legal under state law, in the eyes of a federal court they were conspiring to sell contraband.”³⁴ These inconsistent results unsurprisingly reflect the differing stances taken by state and federal lawmakers and agencies. The only predictable outcome is continued uncertainty.

A critical issue for dealing with a marijuana-related bankruptcy is the inability, in many circumstances, to appoint a trustee or debtor-in-possession and, even if appointed, what constraints he or she will have while operating an MRB or liquidating its “contraband” assets. Specifically,

*In re Arenas*³⁵ addresses this issue head-on, when the court ruled that a chapter 7 debtor could not operate his business legally under the CSA even though he possessed all the required licenses and permits necessary for producing and distributing marijuana in the state of Colorado. The court opined that “[f]or the Trustee to take possession and control of the Debtors' Property and marijuana inventory would directly involve him in the commission of federal crimes.”³⁶ Further, the court held that the inevitable illegality of the trustee's administration of illegal estate assets constituted cause to dismiss under Section 707(a).³⁷

In a chapter 11 context, a number of practical concerns arise including the inability to open debtor-in-possession bank accounts and a restricted or complete lack of access to debtor-in-possession financing (commonly referred to as “DIP financing”). An interesting example is *In re Rent-Rite Super Kegs West Ltd.*, in which a chapter 11 debtor derived roughly 25 percent of its revenues from leasing space to tenants who were known to be engaged in the business of growing marijuana.³⁸ The court painstakingly considered whether leasing to these MRBs should be characterized as “unclean hands” alone or simply as part of a larger “totality-of-the-circumstances” analysis.³⁹ The court finally determined that the debtor's cannabis-related activity satisfied the requirement of “cause” and dismissed the bankruptcy case altogether. Recently, however, some federal court cases are not being dismissed wholeheartedly. In *Mann v. Gullickson*, the court denied a motion for summary judgment in a breach-of-contract action in which the defendant asserted that the plaintiff's marijuana-related business had unclean hands because the plaintiff engaged in violations of federal law.⁴⁰

To add to the patchwork of inconsistencies, some bankruptcy courts have allowed chapter 13 cases to proceed, despite the fact that creditors will be paid by cannabis-derived funds. In *In re Johnson*, the U.S. Trustee moved to dismiss a chapter 13 case of a debtor who operated a medical marijuana business under the Michigan Medical Marijuana Act.⁴¹ The court denied the U.S. Trustee's motion, finding that, “[t]he Debtor filed his case in good faith, and it is quite obvious from his credible testimony that he is in dire need of bankruptcy relief and the court's assistance.”⁴² It further held:

To balance the court's (and the Debtor's) obligations under federal law...the Debtor's legitimate need for relief under chapter 13, and

Michigan's policy choices reflected in the MMMA, the court will refrain from dismissing the Debtor's case at this time, but will enjoin him from conducting his medical marijuana business (and violating the CSA) while his case is pending.⁴³

Taking into account the inherent dangers to anyone working in an unbanked industry, it is refreshing to see a court so clearly recognize an MRB principal's plight. Only time will tell if other courts will take note and follow its lead.

Looking Forward

Despite the restrictions and limited access to bankruptcy court, there are remedies available to creditors through different state mechanisms—but these must come with the caveat that none of them is perfect. For example, a lender is not precluded from seeking a receiver in state court to harbor and hold the obligor's assets *in custodia legis* and possibly seek the authority for the receiver to liquidate the assets or sell them to a new operator.⁴⁴ However, the receiver would need to be comfortable operating in large amounts of cash (as it is unlikely a bank will take on those deposits). The receiver needs to understand the conflict between state and federal law as well as the implied risks of that conflict, including seizure of assets and criminal liability.

An assignment for benefit of creditors (ABC) is also an option.⁴⁵ An ABC is a business liquidation device available to insolvent debtors as an alternative to formal bankruptcy proceedings. It is analogous to a chapter 7 liquidation proceeding under the Bankruptcy Code. An assignment vests title to all of the debtor's assets in an assignee who liquidates the debtor's property for cash and then distributes the cash to the debtor's creditors in accordance with priorities established by California law. However, like a receiver, the assignee faces similar risks with banking and conflict-of-law issues.

Another option for secured personal property is a public sale pursuant to Article 9 of the Uniform Commercial Code—confined within the four corners of the state in which the collateral is located.⁴⁶ In this situation it is unlikely that any fiduciary (e.g., a receiver or assignee) would hold or deposit funds, and the burden of payment and deposit would rest solely with parties to the sale.

Realistically, the uncertainty that currently defines the nascent cannabis industry will continue and nothing will be resolved until Congress acts. There is some recent cause for cautioned optimism on that front.

Recent efforts by Congress seek to create a “safe harbor” for banks so that banks can comfortably and, without regulatory risk, receive deposits from MRBs—the House proposal sponsored by Virginia Representative Thomas A. Garrett, Jr. is titled the Ending Federal Marijuana Prohibition Act of 2017, while the Senate’s proposal sponsored by Senator Jeffrey Merkley of Oregon is called the SAFE Banking Act.⁴⁷ These proposed bills range from changing the CSA schedule of cannabis to providing new laws and guidelines to banks and other financial institutions so that they can engage with MRBs. However, even though approximately 10 potential bills that could change the cannabis landscape are churning around in the legislative hopper, not one of the recent bills proposed has yet to make it to committee, rendering any short-term resolution impossible.

Meanwhile, the DOJ under Attorney General Sessions, through a series of letters and requests to Congress, is seeking the creation of even stricter penalties, demanding that Congress repeal the Rohrabacher-Farr amendment, and for Congress to pass new laws that would, in effect, unwind many of the state laws already adopted in favor of cannabis commerce, whether medical or recreational.⁴⁸ It is not difficult to forecast how the DOJ would use that power, which is keeping the industry on edge as it watches new developments with a very close eye.

Advising financial institution clients, MRB clients and MRB-adjacent clients (those that do business with MRBs without directly dealing in cannabis themselves) requires a deep understanding of the inconsistent patchwork of laws and regulations as well as the continuing conflict of law between the states and the federal government. Advice regarding corporate governance, tax, banking, finance, real estate, bankruptcy, and other business law needs requires surgical precision and must be constantly supplemented with up-to-date information. This advice should always be coupled with an appropriate number of caveats and restrictions (and especially the conflict of laws ever present in this new and growing industry). In advising cannabis clients, favorable state laws are just the beginning. The only constant is change. ■

¹ Kate Briquet, *Escaped California Inmate Cut Off Pot Dealer’s Penis*, THE DAILY BEAST (Jan. 25, 2016), <https://www.thedailybeast.com/escaped-california-inmate-cut-off-pot-dealers-penis>.

² DRUG ENFORCEMENT ADMIN., DRUG SCHEDULES, <https://www.dea.gov/druginfo/ds.shtml> (listing Cannabis as a Schedule 1 narcotic) (last viewed June 6, 2018).

³ See, e.g., Press Release, Cal. Bankers Ass’n, *Businesses Serving the Marijuana Industry Are Not Unbanked—They Cannot Be Banked* (Aug. 5, 2015), *available at* <https://www.calbankers.com/press-release/cba-state-ment-businesses-serving-marijuana-industry-are-not-unbanked-they-cannot-be>.

⁴ Memorandum from David W. Ogden, Deputy Att’y General, Dep’t of Justice, to Selected United States Attorneys On Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), U.S. Dep’t of Justice Archives, *available at* <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>; Memorandum from James M. Cole, Deputy Att’y General, Dep’t of Justice, for all U.S. Attorneys on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), *available at* <https://www.justice.gov/sites/default/files/oipl/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>; Memorandum from James M. Cole, Deputy Att’y General, Dep’t of Justice, for all U.S. Attorneys on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; Memorandum from James M. Cole, Deputy Att’y General, Dep’t of Justice, for all U.S. Attorneys on Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), *available at* <https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf>; and Memorandum from Monty Wilkinson, Dir. of the Executive Office for U.S. Att’y, Dep’t of Justice, for all U.S. Attorneys et al. regarding Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), *available at* <https://dfi.wa.gov/sites/default/files/monty-wilkinson-memo.pdf>.

⁵ The full name of the measure is the “Control, Regulate and Tax Adult Use of Marijuana Act.”

⁶ Comprehensive Drug Abuse Prevention and Control Act of 1970 §§401 et seq., 21 U.S.C. §§841 et seq. (2010). As set forth in the formal rescission memo issued by the Attorney General, these previous guidelines include all five of the DOJ memoranda listed in note 4, *supra*.

⁷ Aaron Klein, *Banking regulations create mess for marijuana industry, banks, and law enforcement*, BROOKINGS INSTITUTION (Apr. 23, 2018), *available at* <https://www.brookings.edu/research/banking-regulations-create-mess-for-marijuana-industry-banks-and-law-enforcement>.

⁸ Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act, 31 U.S.C. 5311 et seq. (2001) (commonly referred to as the Bank Secrecy Act).

⁹ Anti-Money Laundering regulations are derived from the following Federal Acts: Money Laundering Control Act, Pub. L. No. 99-570, §§1351 et seq., 100 Stat. 3207, 3207-18 – 3207-39 (1986); Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181, 4181-4545 (1988); Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, §§1500 et seq., 106 Stat. 3672, 4044-74 (1992); Money Laundering Suppression Act, Pub. L. No. 103-325, §§401 et seq., 108 Stat. 2160, 2243-55 (1994); Money Laundering and Financial Crimes Strategy Act, Pub. L. No. 105-310, 112 Stat. 2941, 2941-49 (1998); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, §§351 et seq., 115 Stat. 272, 320-36 (2001); Intelligence Reform and Terrorism Prevention Act, Pub. Law No. 108-458, §§6101, 6102, 6201-05, 118 Stat. 3638, 3744-48 (2004). An overview of these laws’ history is available on FinCEN’s website. See *History of Anti-Money Laundering Laws*, FIN. CRIMES ENFORCEMENT NETWORK, <https://www.fincen.gov/history-anti-money-laundering-laws> (last visited May 21, 2018).

¹⁰ Fourth Corner Credit Union v. Fed. Reserve Bank of Kan. City, 154 F. Supp. 3d 1185, 1187 (D. Colo. 2016).

¹¹ Fourth Corner Credit Union v. Fed. Reserve Bank of Kan. City, 861 F. 3d 1052, 1077 (10th Cir. 2017).

¹² Fourth Corner, 154 F. Supp. 3d at 1188.

¹³ *Id.* at 1189.

¹⁴ Evan Faggart, *Addressing the Financial Issues in the Marijuana Industry*, BITSONLINE (Apr. 28, 2018), <https://bitsonline.com/financial-issues-marijuana-industry>.

¹⁵ U.S. v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 493, 494 (2001).

¹⁶ Gonzales v. Raich, 545 U.S. 1, 9, 29-30 (2005).

¹⁷ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §538, 128 Stat. 2130, 2217 (2014).

¹⁸ *Id.*

¹⁹ U.S. v. McIntosh, 833 F. 3d 1163, 1169 (9th Cir. 2016).

²⁰ *Id.* at 1175.

²¹ 28 U.S.C. §881(a)(7).

²² Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, 202 (2000).

²³ *Id.* at §2, 114 Stat. 206-07.

²⁴ The Doctrine of Illegality holds that a person should not benefit from his or her own wrong and that the law should not condone illegality. See, e.g., *Bovard v. American Horse Enters. Inc.*, 201 Cal. App. 3d 832 (1988).

²⁵ CIV. CODE §1550.5; see also A.B. 1159, ch. 530, 2017-2018 Sess. (2017).

²⁶ *Lockyer v. Mirant Corp.*, 398 F. 3d 1098, 1107 (9th Cir. 2005) (quoting *Universal Life Church, Inc. v. U.S.*, 128 F. 3d 1294, 1297 (9th Cir. 1997)).

²⁷ 28 U.S.C. §959(b).

²⁸ See generally *In re George and Nansee Lanning*, No. 2:11-bk-19760 (Bankr. C.D. Cal. 2011); see also *George Lanning and Nansee Lanning*, PACERMONITOR, https://www.pacermonitor.com/public/case/35952/George_Lanning_and_Nansee_Lanning (last visited May 23, 2018).

²⁹ *Id.*

³⁰ *Id.*

³¹ *In re McGinnis*, 453 B.R. 770, 773 (Bankr. D. Or. 2011).

³² *Northbay Wellness Group v. Beyries*, No. 10-13482, 2011 Bankr. LEXIS 4710, at *4-6 (Bankr. N.D. Cal. 2011).

³³ *Id.* at *3 (citing *Johnson v. Yellow Cab Co.*, 321 U.S. 383, 387 (1943)).

³⁴ *Id.* at *5.

³⁵ *In re Arenas*, 514 B.R. 887, 890-91 (Bankr. D. Colo. 2014), *aff’d*, 535 B.R. 845 (B.A.P. 10th Cir. 2015).

³⁶ *Arenas*, 514 B.R. at 891-92.

³⁷ *Id.* at 892.

³⁸ *In re Rent-Rite Super Kegs West Ltd.*, 484 B.R. 799, 802 (Bankr. D. Colo. 2012).

³⁹ *Id.* at 806-09.

⁴⁰ *Mann v. Gullickson*, No. 15-cv-03630-MEJ, 2016 U.S. Dist. LEXIS 152125, at *33-34, 2016 WL 6473215 (N.D. Cal. 2016).

⁴¹ *In re Johnson*, 532 B.R. 53, 54 (Bankr. W.D. Mich. 2015).

⁴² *Id.* at 59.

⁴³ *Id.*

⁴⁴ CAL. R. CT. 3.1179.

⁴⁵ CIV. PROC. CODE §§493.010 et seq.

⁴⁶ COM. CODE §§9610 et seq.

⁴⁷ See H.R. 1227, 115th Cong. (2017); S. 1152, 115th Cong. (2017).

⁴⁸ Letter from Jefferson B. Sessions, Att’y General, Dep’t of Justice, to Sen. Mitch McConnell, U.S. Senate Majority Leader, et al. (May 1, 2017), *available at* <https://arstechnica.com/wp-content/uploads/2017/06/Sessions-Letter.pdf> (last accessed May 23, 2018).

by Steven T. Lowe

DEATH OF COPYRIGHT 3: *The Awakening*

Substantial similarity analysis continues to be the death knell for copyright infringement cases against major studios and television networks

FEDERAL courts throughout the United States have kept entertainment litigators in a state of confusion for the past 25 years as to which standard will be applied in copyright infringement cases concerning literary works. Courts continue to apply multiple conflicting tests to determine substantial similarity. Not only is there a split among the different circuits as to which test is to be applied, but the law of the Ninth Circuit also is in internal conflict, often in further conflict with the last ruling on this issue by the U.S. Supreme Court.

Literary infringement cases that have come down in the last seven years indicate that by consistently applying the wrong test, blatant copying is often obfuscated.¹ As a result, courts may continue to rule in favor of defendants at least 95 percent of the time. (See Appendix A (An Infringer's World) and Appendix B (Glimmers of Hope) on page 32.)

What has become clear is that unless the Supreme Court rules on these issues again or a plaintiff wins a high-profile case in the area of literary copyright infringement (as opposed to music), unfair and incorrect rulings in favor of studio and network defendants will continue to rule the day.

A Brief History

In 1991, the Supreme Court confirmed in *Feist Publications, Inc. v. Rural Telephone Services Company* the Ninth Circuit rule that an original selection and arrangement of non-copyrightable elements is enough to enjoy copyright protection and that the copying of the original selection and arrangement of another work gives rise to copyright infringement.² In the decades that followed, U.S. circuit courts deciding infringement cases have intermittently ignored this binding precedent and devised their own tests to determine whether two works are substantially similar. For example, the Ninth Circuit now employs four different substantial similarity tests: 1) the selection and arrangement test;³

2) the filtration test;⁴ 3) the selection and arrangement test with preconditions;⁵ and 4) a recent judicially created test of substantial dissimilarity.⁶ The latter three of these tests run afoul of *Feist* and other Ninth Circuit precedents.

The Supreme Court explained the selection and arrangement test in its 1991 ruling:

Originality requires only that an author make a selection or arrangement independently, (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity.... Factual compilations generally are copyrightable, because factual compilations may possess the originality required by Federal Constitution Article I, 8, cl 8 which authorizes Congress to secure to for limited times to authors the exclusive right to their respective writings—for copyright protection, since (1) the compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers, and (2) these choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws;...thus, even a directory that contains absolutely no protectable written expression, but only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement;...thus, notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.⁷

The most important feature of this test is that it does not exclude non-copyrightable elements in the analysis and, in fact, includes them.⁸

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DEATH OF COPYRIGHT 3: THE AWAKENING



The holding in *Feist* was consistent with the Ninth Circuit's 1990 holding and reasoning in *Shaw v. Lindheim* to the effect that if two screenplay plots share a substantially similar sequence of events, it does not matter that the plot is comprised of unoriginal, non-copyrightable elements.⁹ Then, three years after *Feist*, the Ninth Circuit in *Apple Computer, Inc. v. Microsoft Corporation* interpreted *Feist* to mean that a "selection and arrangement of otherwise uncopyrightable elements may be protectable."¹⁰ In line with the holding and reasoning of *Feist* and *Shaw*, the Ninth Circuit decided the *Metcalfe v. Bochco* case in 2002, in which that court also found copyright protection in the selection and arrangement of non-copyrightable elements:

The particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element. Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection. A common pattern [that] is sufficiently concrete...warrant[s] a finding of substantial similarity.¹¹

While *Metcalfe* seemed to clear the air, correctly applying the selection and arrangement test and distinguishing *Cavalier v. Random House, Inc.*, (the case in which the filtration test was first introduced) less than a year later the tides turned.

Cavalier and the Filtration Test

Since *Metcalfe*, the Ninth Circuit now mostly applies the filtration test for substantial similarity (but interestingly only in literary infringement cases), even though it runs afoul of Ninth Circuit and Supreme Court precedent.¹² That test is as follows: "[We] must take care to inquire whether the 'protectable elements, standing alone, are substantially similar.' In so doing, we filter out and disregard the non-protectable elements in making our substantial similarity determination."¹³

Yet, this test originated by means of flawed reasoning that defies the principles of *stare decisis*.¹⁴ *Cavalier* was the first Ninth Circuit decision to explicitly require that courts "disregard the non-protectable elements" in the analysis, and it claimed to find authority for doing so in the 1994 Ninth Circuit *Apple* case.¹⁵ However, *Apple* never mentioned that the court should disregard nonprotectable elements in its analysis; instead, it simply stated that courts should identify the nonprotectable elements in the plaintiff's work.¹⁶ In fact, *Apple* explicitly asserted that infringement could be found in the "original selection and

arrangement of unprotected elements."¹⁷

All of this should be a moot point, however, since *Metcalfe* correctly limited the filtration test to a scenario in which a plaintiff failed to assert infringement based upon a selection and arrangement of unprotected elements.¹⁸ However, the filtration test as promulgated in *Cavalier* nevertheless became the law of the Ninth Circuit with respect to copyright infringement of literary works, substantially relegating *Metcalfe* to obscurity.

*Rice v. Fox Broadcasting Company*¹⁹ (and, later, *Funky Films, Inc. v. Time Warner Entertainment Co., Inc.*²⁰), require plaintiffs to show undisputed access to the plaintiff's work before applying the selection and arrangement test. This constitutes the selection and arrangement test with a precondition (one of two preconditions courts have grafted on before applying the selection and arrangement test).²¹ However, the *Rice* and *Funky Films*'s requirement of a condition precedent of undisputed access is not supported by any other case and was not even followed when plaintiffs have established undisputed access.²²

The Second Circuit recently highlighted the problematic nature of the filtration test, asserting that "[e]xcessive splintering" of the elements of a work would result in almost nothing being copyrightable because original works broken down into their composite parts would usually be little more than basic non-protectable elements."²³

The Hollywood Circuit²⁴

After substantially abandoning the selection and arrangement test and erecting new defendant-friendly tests, the Ninth Circuit courts now seem to apply any one of these conflicting tests to determine the substantial similarity of two literary works.²⁵ The result is even more confusion and uncertainty for plaintiff entertainment litigators. Ninth Circuit courts have gone even further in eradicating the selection and arrangement test, as illustrated by a recent district court decision in California's Central District (affirmed by the Ninth Circuit on appeal) in which the court refused to apply the selection and arrangement test even with strong evidence of access.²⁶ In that case, *Shame on You Productions, Inc. v. Elizabeth Banks*, the court acknowledged that since the plaintiff specifically alleged direct access by the defendants, "it need satisfy a 'lower standard of proof to show substantial similarity'" between the two works.²⁷ The *Shame on You* court nevertheless went on to apply the filtration test, citing to *Cavalier* to assert that "when applying the extrinsic test [at summary

judgment], the Court must filter out and disregard the non-protectable elements in making its substantial similarity determination."²⁸ The court declined to apply the *Metcalfe* analysis because there was not enough similarity between the works.²⁹ However, this is circular reasoning. If the court is refusing to apply a certain test for similarity because there is not enough similarity, how does a plaintiff get the court to apply the correct test? This basis to withhold application of the selection and arrangement test is logically defective on its face but was nevertheless endorsed by the Ninth Circuit.³⁰

Furthermore, in the 2015 case *Counts v. Meriwether*, the court applied the same condition precedent to using the selection and arrangement test.³¹ In *Counts*, a lawsuit over the hit Fox television series, *New Girl*, the district court acknowledged the existence of the selection and arrangement test as applied in *Metcalfe* but explained that "[s]ince *Metcalfe*...courts within [the Ninth Circuit] have been reluctant to expand the concept of finding copyright protection for a pattern of unprotected elements in literary works beyond the clear-cut case in *Metcalfe*."³² The court highlighted that in *Metcalfe* the two works "had the same setting in the same city, dealt with identical issues, had similar-looking characters in identical professions, facing identical challenges, and had an identical sequence of events."³³ Thus, in *Counts*, the court once again refused to apply the correct test for similarity because there was not enough similarity. No plaintiff has ever won a case in which the filtration test was applied.

Successful Infringement Lawsuits

In a few cases in recent years, plaintiffs have survived dispositive motions.³⁴ In the 2013 case, *Dillon v. NBC Universal*, a district court in the Ninth Circuit explained that it would be inquiring "only whether the protectable elements, standing alone, are substantially similar," citing to *Cavalier*.³⁵ Yet in its analysis, the court noted a string of various similarities shared between the two works that prior courts in the Ninth Circuit would likely have found to be nonprotectable: general reverence for men and women in the armed forces and their dedication to becoming proficient in the service they perform; celebrity contestants completing military tasks in a game-show format at a military training facility, guided by coaches who are members of the military; and a group of celebrity contestants with similar backgrounds (e.g., both feature contestants such as a former pop singer, a former professional wrestler,

and a model).³⁶ The *Dillon* court ruled in favor of the plaintiff on a motion to dismiss.³⁷

Additionally, in the 2015 case *Wilson v. Walt Disney*, the district court of Northern California declined to enter summary judgment for the defendant whose trailer for its film *Frozen* allegedly infringed on the plaintiff's short film.³⁸ The court relied on the *Funky Films* analysis but did not apply the filtration test.³⁹ The pattern of similarities between the two works was enough for the plaintiff to survive a motion for summary judgment. The court declined to consider "whether the protectable elements, standing alone, [were] substantially similar."⁴⁰ This analysis resembles the selection and arrangement test. The court considered each plot sequence together as a whole instead of deconstructing it and eliminating each element that was not separately protectable.

Also, in *Wilson*, the court expressly rejected the Ninth Circuit's substantial dissimilarity analysis. The court highlighted several important differences between the works yet held that the similarities in the sequence of events "is too parallel to conclude no reasonable juror would find the works substantially similar."⁴¹ This is a major step forward from prior decisions within the Ninth Circuit in which courts improperly focused on dissimilarities in their substantial similarity analysis.⁴²

Cases Involving Non-Literary Works

Meanwhile, in infringement cases involving non-literary works, the Ninth Circuit correctly applies the U.S. Supreme Court-mandated selection and arrangement test to determine substantial similarity.⁴³ This stark contrast between the courts' analyses in literary and non-literary infringement actions highlights a subject matter exceptionalism on the part of the Hollywood Circuit that does not find support anywhere in the Copyright Act or case law.

One recent high-profile recent case concerning musical infringement perfectly illustrates the Ninth Circuit's subject matter discrimination. In *Williams v. Bridgeport Music, Inc.*, the "Blurred Lines" case, the court applied the selection and arrangement test, stating on four separate occasions that "substantial similarity can be found in a combination of elements, even if those elements are individually unprotected."⁴⁴ The district court denied the plaintiffs' motion for summary judgment, finding protection in several nonprotectable elements of the defendants' song.⁴⁵ The Ninth Circuit recently affirmed.⁴⁶

Furthermore, in the Second Circuit, a district court recently found copyright pro-

tection in a drum beat.⁴⁷ The court used the selection and arrangement test, explaining that "unoriginal elements, combined in an original way, can constitute protectable elements of a copyrighted work."⁴⁸ Analyzing whether the respective drum beats of the parties' works were substantially similar, the court acknowledged the plaintiff would fail under the filtration test, stating that the components of the drum beat could be characterized as nonprotectable scènes à faire.⁴⁹ Yet, it still opted to use the selection and arrangement test, refusing to rule in favor of the defendant.⁵⁰

Ripe for Review

Substantial similarity analysis will continue to be the death knell for virtually every copyright infringement case against major studios or television networks unless the Supreme Court rules on this issue again or a major high-profile case is won by a plaintiff in a literary work scenario. As to the former, this issue is ripe for Supreme Court review. Not only are many district and circuit courts violating the express ruling of *Feist* (which is a basis for Supreme Court review),⁵¹ but there also is substantial conflict among the different circuits.⁵² The latter is also an excellent basis for Supreme Court review.⁵³ Regarding a high-profile case, in March 2017, the *Zootopia* case was filed by Quinn Emanuel Urquhart and Sullivan, LLP. The case, involving numerous similarities, was highly publicized.⁵⁴ Requesting that the court apply the filtration test (which always leads to a win for defendants), defendants moved to dismiss. In its ruling, the district court used both tests.⁵⁵ Ultimately, the court dismissed the case on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).⁵⁶

While every finding in favor of a defendant is not wrong, many deserving plaintiffs are denied a just remedy when the filtration test is applied or the court refuses to apply the correct test for substantial similarity because there is insufficient similarity.⁵⁷ Situations such as the one in dystopian horror film *The Purge*, where illegal conduct is allowed by the state, will be a parable for the entertainment industry.⁵⁸ That is essentially the awakening; without Supreme Court review, there will be no predictability as to the likely outcome, and it will simply be a subjective decision by the judge, as it basically has become. ■

¹ See Steven T. Lowe, *Death of Copyright*, L.A. LAWYER (Nov. 2010) for a collection of cases over the 20 years prior to 2010.

² *Feist Publ'ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 348-49, 358 (1991).

³ See *Williams v. Gaye*, No. 885 F. 3d 1150, 1163-65 (9th Cir. 2018); *Paramount Pictures Corp. v. Axanar*

Prods., Inc., No. 2:15-cv-09938-RGK-E, 2017 WL 83506 (C.D. Cal. 2017); *L.A. Printex Inds., Inc. v. Aeropostale, Inc.*, 676 F. 3d 841, 848-52 (9th Cir. 2012) (textile designs); *Swirsky v. Carey*, 376 F. 3d 841, 847 (9th Cir. 2004) (music); *Satava v. Lowry*, 323 F. 3d 805, 811-12 (9th Cir. 2003) (sculptures); *Metcalfe v. Bochco*, 294 F. 3d 1069, 1074 (9th Cir. 2002) (TV show); *Fleener v. Trinity Broad.*, 203 F. Supp.2d 1142, 1148-51 (C.D. Cal. 2001) (book); *Miller v. Miramax*, No. CV 99-08526 DDP (AJWx), 2001 U.S. Dist. LEXIS 25967 (C.D. Cal. Sept. 26, 2001) (film); *Three Boys Music Corp. v. Bolton*, 212 F. 3d 477, 485 (9th Cir. 2000) (music); *Apple Computer, Inc. v. Microsoft Corp.* 35 F. 3d 1435, 1441-48 (9th Cir. 1994) (computer); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F. 2d 194, 197 (9th Cir. 1989) (organizer); *Worth v. Selchow & Righter Co.*, 827 F. 2d 569, 572-74 (9th Cir.1987) (trivia fact books); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354, 361 (9th Cir. 1947) (film), *accord Copeland v. Bieber*, No. 14-1427, 2013 WL 12145005 (E.D. Va. Dec. 17, 2015) (music); *Manufacturers Techs., Inc. v. Cams, Inc.*, 706 F. Supp. 984, 993-98 (D. Conn.1989) (computer software programs); *Bellsouth Adver. & Pub. Corp. v. Donnelley Inform. Pub., Inc.*, 719 F. Supp. 1551, 1556-58 (S.D. Fla.1988) ("yellow pages" directory); *Hearn v. Meyer*, 664 F. Supp. 832, 845, 850-52 (S.D. N.Y. 1987) (book); *M. Kramer Mfg. Co., v. Andrews*, 783 F. 2d 421, 438 (4th Cir. 1986) (computer video game); *Southern Bell Tel. and Tel. Co. v. Associated Tel. Directory Publishers*, 756 F. 2d 801, 809-10 (11th Cir. 1985) (telephone directories); *Eckes v. Card Prices Update*, 736 F. 2d 859, 862-63 (2nd Cir. 1984) (book); *Apple Barrel Prods., Inc. v. Beard*, 730 F. 2d 384, 388 (5th Cir. 1984) (country music program); *National Bus. Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 94 (N.D. Ill. 1982) (reference book); *Miller v. Universal City Studios, Inc.*, 650 F. 2d 1365, 1368-70 (5th Cir. 1981) (made-for-television motion picture); *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 413 F. Supp. 385, 387 (S.D. N.Y. 1975) (novel); *Kuddle Toy, Inc. v. Pussycat-Toy Co., Inc.*, 70 C 1569, 1974 WL 20185, at *22 (E.D. N.Y. Oct. 4, 1974) (toy bears); *Baldwin Cooke Co. v. Keith Clark, Inc.*, 383 F. Supp. 650, 656 (N.D. Ill.1974) (calendar); *Roth Greeting Cards v. United Card Co.*, 429 F. 2d 1106 (9th Cir. 1970) (greeting cards); *PIC Design Corp. v. Sterling Precision Corp.*, 231 F. Supp. 106 (S.D. N.Y. 1964) (catalogs); *MacDonald v. Du Maurier*, 144 F. 2d 696, 702-03 (2nd Cir.1944) (novel); *Crocker v. General Drafting Co.*, 50 F. Supp. 634, 635-37 (S.D. N.Y. 1943) (maps); *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F. 2d 143, 147 (7th Cir. 1963) (educational games).

⁴ See *Cavalier v. Random House, Inc.*, 297 F. 3d 815 (9th Cir. 2002); *Funky Films, Inc. v. Time Warner Entm't. Co., L.P.*, 462 F. 3d 1072 (9th Cir. 2006); *Benay v. Warner Bros. Entm't, Inc.*, 607 F. 3d 620 (9th Cir. 2010). See also Appendix A herein.

⁵ See *Counts v. Meriwether*, No. 2:14-cv-00396-SVW-CW, 2015 WL 9594469, at *11-12 (C.D. Cal. 2015); *Rice v. Fox Broad. Co.*, 330 F. 3d 1170, 1178 (9th Cir. 2003); *Shame on You Prods., Inc. v. Elizabeth Banks*, 120 F. Supp. 3d 1123 (C.D. Cal. 2015), *aff'd* 2017 WL 1732279 (9th Cir. 2017).

⁶ See *Funky Films*, 462 F. 3d 1072; *Benay*, 607 F. 3d 620.

⁷ *Feist*, 499 U.S. at 348-49, 358.

⁸ *L.A. Printex*, 676 F. 3d 841 (the court applied the selection and arrangement test in a fabric design infringement case, and explained that plaintiff's "original selection, coordination, and arrangement of such [non-protectable] elements is protectable.") (citing to *Feist*, 499 U.S. at 362). See also *Paramount Pictures*, 2017 WL 83506.

⁹ *Shaw v. Lindheim*, 919 F.2d 1353, 1363 (9th Cir.

1990) (citing NIMMER ON COPYRIGHT, §13.03[A] at 13-31). Interestingly enough, the plaintiff in *Shaw v. Lindheim* was the only plaintiff to win at trial in a literary copyright infringement case against a major studio (to this author's knowledge) in the last 30 years, but then had that victory taken away from him by the trial judge via a judgment notwithstanding the verdict. *Shaw v. Lindheim*, 809 F. Supp. 1393 (C.D. Cal. 1992). Thus, no plaintiff has actually won a copyright infringement case at trial involving a literary work (that this author has been able to locate) in the last 25 years. This is unlike music. See *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004JAK (AGR-x), 2015 WL 4479500 (C.D. Cal. July 14, 2015).

¹⁰ *Apple Computer, Inc. v. Microsoft Corp.* 35 F. 3d

1435, 1443-46 (9th Cir. 1994); as discussed *infra*, the holding in *Apple* was later distorted in the case that birthed the filtration test, viz., *Cavalier v. Random House, Inc.*, 297 F. 3d 815 (9th Cir. 2002).

¹¹ *Metcalfe v. Bochco*, 294 F. 3d 1069, 1074 (9th Cir. 2002). *Metcalfe* was consistent with the holding in *Miller v. Miramax*, No. CV 99-08526 DDP (AJW-x), 2001 U.S. Dist. LEXIS 25967 (C.D. Cal. Sept. 26, 2001), and *Fleener v. Trinity Broadcasting*, 203 F. Supp.2d 1142 (C.D. Cal. 2001). It is also consistent with a long line of cases applying the selection and arrangement test in the 9th circuit as set forth in note 3, *supra*.

¹² Another exception to the court's application of the filtration test in recent years is when the plaintiff was

a major studio. *Paramount Pictures*, 2017 WL 83506 (defendant's movie was derivative of *Star Trek*).

¹³ *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F. 3d 1072, 1077 (9th Cir. 2006) (citing *Cavalier*, 297 F. 3d at 822-23).

¹⁴ See Steven T. Lowe, *Death Of Copyright: The Sequel*, THE COMPUTER & INTERNET LAWYER (Sept. 2012).

¹⁵ *Apple*, 35 F. 3d at 1445 ("[T]he unprotectable elements have to be identified, or filtered, before the works can be considered as a whole."). However, *Apple* did not and does not require that they be "filtered out" or disregarded.

¹⁶ *Id.* Many infringement cases decided subsequent to *Apple* cite to it for the proposition that an original selection and arrangement of nonprotectable elements

Appendix A: An Infringer's World

- **Abdullah v. Walt Disney Company**, 2016 WL 5380930 (C.D. Cal. 2016) (Motion to Dismiss granted for defendant). (*Frozen*).
- **Althouse v. Warner Bros., Entertainment**, 2014 WL 2986939 (C.D. Cal. 2014) (Motion for Summary Judgment granted for defendant). (*The Matrix Trilogy*).
- **Bar v. Sandler et al.**, WL 828941 (C.D. Cal. 2013) (Motion for Summary Judgment granted for defendant). (*Just Go With It*).
- **Basile v. Sony Pictures Entertainment Inc.**, 2014 WL 12521344 (C.D. Cal. 2014) (Motion to Dismiss granted for defendant). (*Men in Black III*).
- **Basile v. Twentieth Century Fox Film Corp.**, 678 Fed. Appx. 576 (9th Cir. 2017) 2015 WL 12711658 (Motion to Dismiss granted for defendant). (*Prometheus*).
- **Basile v. Warner Bros. Entm't, Inc.**, 2016 WL 5867432 (C.D. Cal. Jan. 1, 2016) (Motion to Dismiss for defendant). (*The Dark Knight Rises*).
- **Bernal v. Paradigm Talent and Literary Agency**, 788 F. Supp. 2d 1043 (C.D. Cal. 2010) Motion for Summary Judgment granted for defendant. (*Desperate Housewives*).
- **Braddock v. Jolie**, 2013 WL 12125754 (C.D. Cal. 2013) Motion for Judgment on the Pleadings in for defendant. (*In the Land of Blood and Honey*).
- **Briggs v. Blomkamp**, 70 F. Supp. 3d 1155 (N.D. Cal. 2014) Motion for Summary Judgment granted for defendant. (*Elysium*).
- **Brown v. Twentieth Century Fox Home Entertainment**, 2015 WL 5081125 (E.D. Ky. 2015) (Motion to Dismiss granted for defendant). (*Devil's Due*).
- **Canal+ Image UK Ltd. v. Lutvak**, 773 F. Supp. 2d 419 (S.D.N.Y. 2011) Motion to Dismiss granted for defendant. (*A Gentleman's Guide to Love and Murder*).
- **Counts v. Meriwether**, 2015 WL 9594469 (C.D. Cal. 2015) Motion for Summary Judgment granted for defendant. (*New Girl TV Series*).
- **DuckHole Inc. v. NBC Universal Media LLC**, 2013 WL 5797279 (C.D. Cal. Sept. 6, 2013) Motion to Dismiss for defendant. (*Animal Practice TV series*).
- **Edwards v. Cinelou Films et al.**, 696 Fed.Appx.270 (9th Cir. 2017) Motion to Dismiss for defendant. (*Witch*).
- **Effie Film, LLC v. Murphy**, 932 F. Supp. 2d 538 (S.D. N.Y. 2013) ** Motion for Summary Judgment granted for plaintiff. (*Effie*).
- **Effie Film, LLC v. Pomerance**, 909 F.Supp.2d 273 (S.D. N.Y. 2012) ** Motion for Judgment on the Pleadings in for plaintiff. (*Effie*).
- **Foundation for Lost Boys v. Alcon Entertainment, LLC**, 2016 WL 4394486 (N.D. Ga. 2016) Motion to Dismiss without prejudice granted for defendant. (*The Good Lie*).
- **Gadh v. Spiegel**, 2014 WL 1778950 (C.D. Cal. 2014) Motion to Dismiss granted for defendant. (*Her*).
- **Gallagher v. Lions Gate Entertainment Inc.**, 2015 WL 12481504 (C.D. Cal. 2015) Motion to Dismiss granted for defendant. (*Cabin in the Woods*).
- **Goldberg v. Cameron**, 787 F. Supp. 2d 1013 (N.D. Cal. 2011) Motion for Summary Judgment granted for defendant. (*The Terminator Film Series*).

- **Hallford v. Fox Entertainment Group, Inc.**, 2013 WL 541370 (S.D. N.Y. 2013) Motion to Dismiss granted for defendant. (*Touch*).
- **Heusey v. Emmerich**, 2015 WL 12765115 (C.D. Cal. 2015) Motion to Dismiss with prejudice granted for defendant. (*Anonymous*).
- **Kenney v. Warner Bros. Entertainment Inc.**, 984 F. Supp. 2d 9 (Mass. 2013) Motion to Dismiss with prejudice granted for defendant. (*Ghostman*).
- **Kullberg v. Pure Flix Entertainment LLC**, 2016 WL 7324155 (C.D. Cal. 2016) Motion to Dismiss granted for defendant. (*God's Not Dead*).
- **Lawrence v. Sony Pictures Entertainment Inc.**, 534 Fed. Appx. 651 (9th Cir. 2013) Motion for Summary Judgment granted for defendant. (*Death at the Funeral*).
- **Mena v. Fox Entertainment Group, Inc.**, 2012 WL 4741389 (S.D. N.Y. 2012) Motion to Dismiss granted for defendant. (*Past Life TV Series*).
- **National Center for Jewish Film v. Riverside Film LLC**, 2012 WL 4052111 (C.D. Cal. 2012) Motion for Summary Judgment granted for defendant. (*Sholem Aleichem: Laughing in Darkness*).
- **Newt v. Twentieth Century Fox Film Corporation**, 2016 WL 4059691 (C.D. Cal. 2016) Motion to Dismiss granted for defendant. (*Empire TV Series*).
- **Quirk v. Sony Pictures Entertainment Inc.**, 2013 WL 1345075 (N.D. Cal. 2013) Motion for Summary Judgment granted for defendant. (*Premium Rush*).
- **Shame on You Productions v. Banks**, 2017 WL 1732279 (9th Cir. 2017) Motion to Dismiss with prejudice granted for defendant. (*Walk of Shame TV Series*).
- **Silas v. Home Box Office, Inc.**, 2016 WL 4251599 (C.D. Cal. 2016) Motion to Dismiss with prejudice granted for defendant. (*Ballers TV Show*).
- **Tedesco v. Sandi Pepe et al.**, 2012 WL 13012419 (C.D. Cal. 2011) Motion for Summary Judgment granted for defendant. (*Plain Jane: From Greek to Glam TV Series*).
- **Tiscareno v. Netflix, Inc.**, 2014 WL 12558125 (C.D. Cal. 2014) Motion for Summary Judgment granted for defendant. (*Kill Speed*).
- **Webb v. Stallone**, 555 Fed. Appx. 31 (2d. Cir. 2014) Motion for Summary Judgment granted for defendant. (*The Expendables*).
- **Weiss v. DreamWorks SKG**, 2015 WL 12711658 (C.D. Cal. 2015) Motion to Dismiss granted for defendant. (*Smash TV Series*).
- **White v. Alcon Film Fund**, 52 F. Supp. 3d 1308 (N.D. Ga. 2014) Motion for Summary Judgment granted for defendant. (*Lottery Ticket*).
- **Williams v. A&E Television Networks**, 122 F. Supp. 3d 157 (S.D. N.Y. 2015) Motion to Dismiss granted for defendant. (*Married at First Sight TV Series*).
- **8th Wonder Entertainment, LLC v. Viacom International, Inc.**, 2016 WL 6882832 (C.D. Cal. 2016) Motion for Summary Judgment granted for defendant. (*Love & Hip Hop TV Series*).

(**) Studio/Film Company was the plaintiff seeking a declaratory judgement that it did not infringe on defendant's copyright, and succeeded.

() Plaintiff appeared pro se.

Appendix B: Glimmers of Hope

- **Dillon v. NBC Universal Media LLC**, 2013 WL 3581938 (C.D. Cal. 2015) Motion to Dismiss denied to defendant Stars Eam (*Stripes TV Series*) (2012)
- **Goodness Films LLC v. TV One LLC**, 2014 WL 12594201 (C.D. Ca. 2014) Survived MSJ, but jury verdict for defendant. (*Belle's TV Series*) (2012)
- **Metcalfe v. Bochco**, 294 F. 3d 1069 (9th Cir. 2002) Motion for Summary Judgment

for defendant. Reversed. (*City of Angels TV Series*) (2000)

- **ONZA Partners SL v. Sony Pictures Entertainment Inc.**, 2:16CV07269 (C.D. Cal. 2016) Motion to Dismiss denied to defendant Pending case going to Jury Trial (*Timeless TV Series*) (2016)
- **Wilson v. Walt Disney Company**, 123 F. Supp. 3d 1172 (N.D. Cal. 2015) Motion for Summary Judgment denied to defendant. (*Frozen*) (2013).—S.T.L.

is protectable as long as the court identifies the non-protectable elements. *See, e.g.,* Dream Games of Ariz., Inc. v. PC Onsite, 561 F. 3d 983, 988 (9th Cir. 2009). Thus, *Cavalier's* interpretation of *Apple* is highly flawed.

¹⁷ Apple Computer, Inc. v. Microsoft Corp. 35 F. 3d 1435, 1446 (9th Cir. 1994) (“[T]his does not mean that infringement cannot be based on original selection and arrangement of unprotected elements. However, the unprotectable elements have to be identified, or filtered, before the works can be considered as a whole.”).

¹⁸ *Metcalf v. Bochco*, 294 F. 3d 1069, 1074 (9th Cir. 2002).

¹⁹ *Rice v. Fox Broadcasting Co.*, 330 F. 3d 1170, 1178 (9th Cir. 2003); *Funky Films, Inc. v. Time Warner Entm’t Co., Inc.*, 462 F. 3d 1072, 1081 n.4 (9th Cir. 2006).

²⁰ *Funky Films*, 462 F. 3d 1072.

²¹ The alternatively applied precondition is that the similarities be as compelling as the ones found in *Metcalf*. *See* *Shame on You Prods., Inc. v. Elizabeth Banks*, 120 F. Supp. 3d 1123 (C.D. Cal. 2015); *aff’d* *Shame on You Prods., Inc.*, No. 15-56372, 2017 WL 1732279 (9th Cir. May 3, 2017); *Counts v. Meriwether*, No. 2:14-cv-00396-SVW-CW, 2015 WL 9594469 (C.D. Cal. Dec. 30, 2015).

²² *Id.*

²³ *New Old Music Group, Inc. v. Gottwald*, 122 F. Supp. 3d 78, 94 (2nd Cir. 2015) (citing *Mena v. Fox Entm’t Group, Inc.*, No. 11-CV-5501 (BSJ) 2012 WL 4741389 at *4 (2012) (citation omitted)).

²⁴ In his dissent to the Ninth Circuit’s 1993 decision in *White v. Samsung Electronics America*, now-Chief Justice Alex Kozinski remarked that “for better or worse, we are the Court of Appeals for the Hollywood Circuit.” *White v. Samsung Elecs. America*, 989 F. 2d 1512, 1521 (9th Cir. 1992).

²⁵ *Compare* *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-cv-09938-RGK-E, 2017 WL 83506 (C.D. Cal. 2017) with virtually every case in Appendix A.

²⁶ *Shame on You Prods.*, 120 F. Supp. 3d 1123.

²⁷ *Id.* at 1148.

²⁸ *Shame on You Prods.*, 2017 WL 1732279, at *1.

²⁹ *Shame on You Prods.*, 120 F. Supp. 3d at 1150.

³⁰ *Shame on You Prods.*, 2017 WL 1732279, at *1.

³¹ *Counts v. Meriwether*, No. 2:14-cv-00396-SVW-CW, 2015 WL 9594469, at *11-12 (C.D. Cal. 2015).

³² *Id.*

³³ *Id.* at *11.

³⁴ *See* Appendix B (Glimmers of Hope).

³⁵ *Dillon v. NBC Universal Media LLC*, No. CV 12-09728, 2013 WL 3581938, at *5 (C.D. Cal. 2013).

³⁶ *Id.* at *5-7.

³⁷ *Id.* at *12.

³⁸ *Wilson v. Walt Disney Company*, 123 F. Supp. 3d 1172 (N.D. Cal. 2015).

³⁹ *Wilson v. The Walt Disney Company*, No. 14-CV-01441-VC, 2014 WL 4477391, at *1-2 (N.D. Cal. 2014); At the summary judgment stage, the district court referred to its substantial similarity analysis at the dismissal stage instead of reiterating it yet again. Thus, the basis of the Court’s decision in *Wilson* is based upon the 2014 unpublished decision partially denying the defendant’s motion to dismiss.

⁴⁰ *Id.*

⁴¹ *Id.* at 2.

⁴² The test used to be “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 56 (2nd Cir. 1936); *Shaw v. Lindheim*, 919 F. 2d 1353 (9th Cir. 1990). Now courts will look at dissimilarities in their analysis. *See* *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F. 3d 1072, 1078 (9th Cir. 2006); *Benay v. Warner Bros. Entm’t, Inc.*, 607 F. 3d 620, 625-29 (9th Cir. 2010).

⁴³ *See, e.g.,* L.A. Printex Inds., Inc. v. Aeropostale, Inc., 676 F. 3d 841, 848-50 (9th Cir. 2012) (citing *Feist Publ’ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340,

348-349, 358 (1991)); *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F. 3d 983, 988-89 (9th Cir. 2009) (citing *Apple Computer, Inc. v. Microsoft Corp.* 35 F. 3d 1435, 1441-48 (9th Cir. 1994)); *Swirsky v. Carey*, 376 F. 3d 841, 846-50 (9th Cir. 2004); *Three Boys Music Corp. v. Bolton*, 212 F. 3d 477, 485 (9th Cir. 2000); *Williams v. Gaye*, 885 F. 3d 1150, 1163-65 (9th Cir. 2018).

⁴⁴ The procedural history of this case is rather complicated, as the “Blurred Lines” composers filed a motion for declaratory relief seeking a court order (as plaintiffs) that its song did not infringe the copyright of “Got to Give It Up” by Marvin Gaye. *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015) (citing *Swirsky*, 376 F. 3d 841). The plaintiffs filed a motion for summary judgment.

⁴⁵ *Id.*

⁴⁶ *Williams*, 885 F. 3d at 1197.

⁴⁷ *New Old Music Group, Inc. v. Gottwald*, 122 F. Supp. 3d 78 (2nd Cir. 2015).

⁴⁸ *Id.*

⁴⁹ *Id.* at 96-97.

⁵⁰ *Id.*

⁵¹ Sup. Ct. R. 10, 28 U.S.C.A.; *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).

⁵² First Circuit “Ordinary Observer” test: *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F. 2d 600, 608 (1st Cir. 1998); Second Circuit “Ordinary Observer” test: *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F. 2d 487, 489 (2d Cir. 1960); Third Circuit “Ordinary Observer” test: *Universal Athletic Sales Co. v. Salkeld*, 511 F. 2d 904, 907 (3d Cir. 1975); Fourth Circuit “Intended Audience” test: *Dawson v. Hinshaw Music Inc.*, 905 F. 2d 731, 733 (4th Cir. 1990); Fifth Circuit “Ordinary Observer” test: *Peel & Co., Inc. v. Rug Mkt.*, 238 F. 3d 391,

398 (5th Cir. 2004); Sixth Circuit “Filtration/Comparison” test: *Kohus v. Mariol*, 328 F. 3d 848, 854 (6th Cir. 2004); Seventh Circuit “Ordinary Observer” test: *Atari, Inc. v. N. Am. Phillips Consumer Elecs. Corp.*, 672 F. 2d 607, 614-15 (7th Cir. 1982) (superseded on other grounds); Eighth Circuit “Extrinsic/Intrinsic” test: *Hartman v. Hallmark Cards, Inc.*, 833 F. 2d 117, 120 (8th Cir. 1987); Ninth Circuit “Extrinsic/Intrinsic” test: *Sid & Marty Krofft Television Prods. V. McDonald’s Corp.*, 562 F. 2d 1157, 1164 (9th Cir. 1977); Tenth Circuit “Abstraction/Filtration/Comparison” test: *Gates Rubber Co. v. Bando Chem. Industries, Ltd.*, 9 F. 3d 823, 834; Eleventh Circuit (Unsettled), see *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F. 3d 1129, 1148 (11th Cir. 2007); D.C. Circuit “Filtration/Comparison” test: *Sturza v. United Arab Emirates*, 281 F. 3d 1287, 1297 (D.C. Cir. 2002); Federal Circuit (No test) applies test used by circuit of the district court from which appeal originated: *Hutchins v. Zoll Med. Corp.*, 492 F. 3d 1377, 1383 (Fed. Cir. 2007).

⁵³ *Id.*; see also note 3, *supra*.

⁵⁴ Ashley Cullins, ‘Zootopia’ Lawsuit: Plot Similarities Detailed by Writer Suing Disney, *The Hollywood Reporter* (June 06, 2017), available at <http://www.hollywoodreporter.com/thr-esq/zootopia-lawsuit-plot-similarities-detailed-by-writer-suing-disney-1010715>, which appeal originated).

⁵⁵ *Esplanade Prods., Inc. v. The Walt Disney Co.*, No. CV 17-02185-MWF (JCx), 2017 WL 563024 (C.D. Cal. July 11, 2017).

⁵⁶ *Id.*

⁵⁷ *See* Appendix A (An Infringer’s World); *see also* Robert Helfing, *Substantial Similarity in Literary Infringement Cases: A Chart for Turbid Waters*, 21 UCLA ENT. L. REV. 2 (2014).

⁵⁸ *See* *Jordan-Benel v. Universal City Studios, Inc.*, 859 F. 3d 1184 (9th Cir. 2017).



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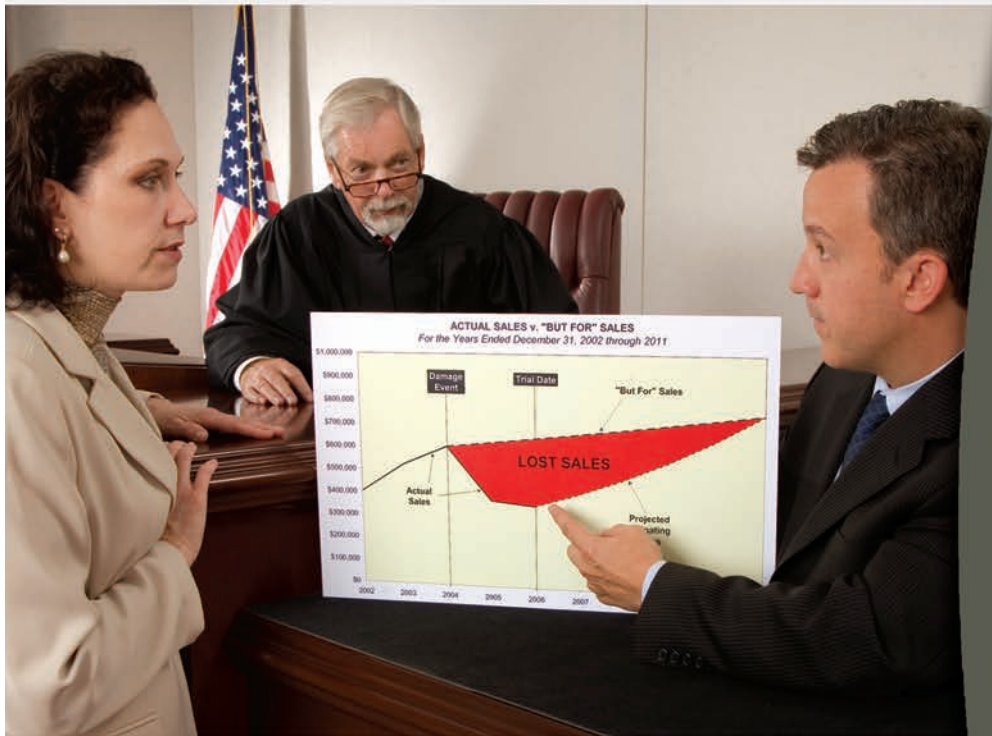
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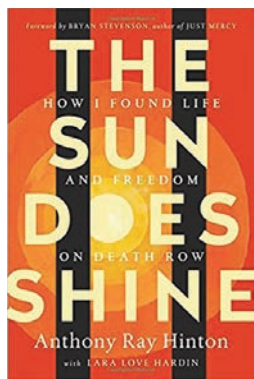
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person. Thirty years. *Thirty years!* So much you would have been denied. And knowing all the while you had committed no crime. You killed no one. You are innocent.

In *The Sun Does Shine: How I Found Life and Freedom on Death Row*, Anthony Ray Hinton tells the harrowing and exasperating story of spending half his life in this nightmare and how he survived. Blessed with an abiding faith in God and humanity and an extraordinary sense of humor, Hinton's book is heart-breaking and heartwarming all at the same time. It is essential reading for anyone who is concerned that our criminal justice system in general and capital punishment in particular have tragically failed to live up to the ideals of American justice.

In the summer of 1985, Hinton, living with his mother in Burnwell, Alabama, was mowing the front lawn when two policemen approached him, patted him down, and cuffed his hands behind his back. "Am I going to jail? I didn't do anything," he told them. Hinton readily gave permission for the police to search his car and his bedroom. They found nothing. He was charged with armed robbery, wounding a restaurant manager, and killing two others, in three different crimes. The police said all three were committed with the same gun. In a subsequent search of Hinton's mother's home, police found her old revolver and claimed it matched all three shootings. When Hinton arrived at the Birmingham County jail, he told a lieutenant they had the wrong man. On the night of the second armed robbery, he was cleaning floors at a supermarket warehouse where he was locked in during the entire night shift. The lieutenant replied, "You know, I don't care whether you did or didn't do it. In fact, I believe you didn't do it. But it doesn't matter. If you didn't do it, one of your brothers did. And you're going to take the rap. You want to know why?" Hinton shook his head, but the lieutenant went on. "I'll give you five reasons why they are

going to convict you. Number one, you're black. Number two, a white man gonna say you shot him. Number three, you're gonna have a white district attorney. Number four, you're gonna have a white judge. And number five, you're gonna have an all-white jury."

Hinton was assigned a court-appointed lawyer, Sheldon Perhacs, who Alabama paid \$1,000. Not \$1,000 a day. Not a \$1,000 a week. A flat fee of \$1,000 for the entire investigation and trial. When Hinton asked Perhacs to check out some alibi witnesses, the lawyer replied, "Yeah, I'll look into it. They're only paying

"I'll give you five reasons why they are going to convict you.

Number one, you're black."

me \$1,000 for this, and hell, I eat \$1,000 for breakfast."

Knowing he was innocent, Hinton offered to take a lie-detector test. The polygraph examiner concluded that Hinton "told the truth during the polygraph examination." The examiner told a prison guard, "He showed no signs of deception. He didn't do it. He doesn't know anything about these murders, I can tell you that for a fact." The guard grunted in agreement and added, "You know, I've been doing this for 27 years, and I've seen a lot of killers. He's no killer." But the prosecutor reneged on an agreement that both sides could use the results, and the jury never heard that Hinton passed with flying colors.

Since the prosecution was based on the theory that the gun police found in Hinton's mother's home was used to commit all three crimes, his defense depended on presenting a strong ballistics expert. But Hinton couldn't afford to hire an expert, which would cost \$15,000. Alabama only provides inmates facing execution the munificent sum of \$500. For Hinton, it was \$1,000. He was lucky enough to be accused of two murders.

Perhacs found a retired Army colonel, Andrew Payne, to serve as his ballistics expert. Hinton describes how the prosecutor sliced and diced him during cross-examination: At Alabama's Department of Forensic Sciences where the test was conducted, at first Payne did not know how to use the comparison microscope. He admitted that during the test he initially was not able to see the bullets. Finally, he confessed he had only one eye and had a problem with his vision.

Stephen F. Rohde, a constitutional lawyer, lecturer, and writer, has served as president of the Beverly Hills Bar Association and chair of the ACLU Foundation of Southern California and Bend the Arc: A Jewish Partnership for Justice.

Hinton “could do nothing but lay my head down in my arms and cry. I knew at that moment, I was going to be convicted of murder. I was innocent. And my one-eyed expert had just handed the prosecution a guilty verdict.” Hinton was right. Two hours later, the jury found him guilty and after another 45 minutes, sentenced him to death.

Hinton skillfully describes the agonizing process of his endless appeals through the Alabama courts while he languished on death row. After three years, the Alabama Supreme Court turned him down. Perhaps told Hinton that his court appointment was now over and he would need \$15,000 in advance to pursue his next appeal. Hinton could not afford that and he refused to let his mother mortgage her house.

While waiting for an execution date, out of the blue, Hinton had a legal visit from Santha Sonenberg, a lawyer from Washington, D.C. She said she would file the next appeal. He said he had no money, but she said she was not asking for any money. He told her he was innocent, and she said she believed him. He gave her permission to represent him but asked how she found out about him. She responded, “Bryan Stevenson sent me. He knows about everything.”

Sonenberg filed a comprehensive petition for a new trial citing no fewer than 31 grounds including prosecutor misconduct, racial discrimination, ineffective assistance of counsel, not being able to hire a competent ballistics expert, and newly discovered evidence. While the petition was pending, Sonenberg was replaced by Alan Black, another lawyer recommended by Stevenson, who succeeded in getting the trial judge to grant some funds for experts to investigate the case.

Meanwhile, Hinton tried to survive on death row. He befriended fellow inmates and prison guards alike. Some of the most poignant parts of his book describe the friendships he nurtured under unbearable circumstances, only to see his new friends killed: “There was no real ventilation or air conditioning, so the smell of death—like a mixture of shit and rotting waste and vomit all mixed up in a thick smoke of putrid air that you couldn’t escape—seemed to settle into my hair and in my throat and mouth.”

To relieve the tortuous existence, Hinton got permission to form a book club and recruited his buddies. “We need to be able to read something other than the Bible,” he writes. “Not everyone cares for the Bible like we do.” Eventually, the book club read and discussed such books as *I Know Why the Caged Bird Sings* by Maya Angelou,

To Kill a Mockingbird by Harper Lee, and *Go Tell It on the Mountain* by James Baldwin.

The endless legal process dragged on. Black had been working on the case for seven years—*seven years!* One day he visited Hinton and said he had good news. “I’m working on a deal. I think I’ve got the State to the point where they will consider life without parole. I’m pretty sure we can get you off death row.”

Hinton said, “But I don’t want life without parole. I’m innocent. I can’t get life without parole. That’s like admitting I did something that I didn’t do.”

“Ray, they’re going to kill you,” Black said.

“What about them experts? What about the bullets?” Hinton asked

“I need \$10,000,” Black said.

“I want to thank you for your time and for your help, but I won’t be needing your services anymore,” Hinton said.

A few days later Hinton wrote a short letter to Bryan Stevenson. “I don’t have any money to pay you for your time, but if you would come see me, I can pay you for your gas. I am an innocent man.”

Stevenson did come to visit, and Hinton said he felt “like I could take a deep breath for the first time in over 12 years.” *Twelve years!* Stevenson promised to read the trial transcript and said he would do everything he could to help. After Stevenson left, Hinton writes that he went back to his cell, fell to his knees, folded his hands, bowed his head, and said a prayer: “Thank you, God. Thank you for sending Bryan Stevenson.”

Stevenson, author of the best-selling book *Just Mercy*, is a towering figure in the movement for criminal justice. He heads the Equal Justice Initiative and has saved the lives of many of his clients. He wrote the foreword to Hinton’s book in which he unequivocally states that “no one I have represented has inspired me more than Anthony Ray Hinton and I believe his compelling and unique story will similarly inspire our nation and readers all over the world.”

Stevenson reinvestigated every aspect of the case and most importantly retained three highly qualified ballistics experts. One had been head of the FBI’s ballistics unit for many years and was former president of the Association of Firearm and Tool Mark Examiners. The other two worked for the U.S. military, the State of Texas, and Dallas County. All three generally testified for the prosecution.

They unanimously agreed that none of the bullets from the three crimes matched the gun. They also found worksheets from

the prosecution’s experts that showed they had not followed proper procedures. In addition, the State of Alabama had failed to turn over any exculpatory worksheets to the defense. On the eve of the hearing to present this shocking new evidence, however, the Alabama Attorney General secured a stay arguing that the hearing would waste taxpayer money. “What kind of a world was it,” Hinton asked, “where an innocent man can lose 16 years of his life and it’s a waste of time to let him prove he’s innocent?”

Stevenson fought the stay and eventually got a hearing but the judge discounted it as “a swearing contest between experts.” Hinton writes, “In that moment, I realized that the real killer could walk into this courtroom with pictures of himself committing the crime, and the judge wouldn’t accept the evidence. The attorney general would just say, ‘That’s an old story wrapped up in a new cover.’”

The judge took the matter under submission, but sat on it for two and a half years—*two and a half years!*—and then denied the motion. Worse, his ruling was simply a word-for-word reprint of the state’s proposed order. Outraged, Stevenson told Hinton it was another layer in “the worst example of corrupt, unjust administration of the death penalty anywhere.”

As five more years passed—*five more years!*—Stevenson doggedly appealed to the Alabama Court of Criminal Appeals (where Hinton took great satisfaction that the ruling was 3-2) and then to the Alabama Supreme Court, which remanded the case to the trial court, followed by another appeal to the Court of Criminal Appeals and then the supreme court again, where Hinton finally lost. In a somber mood, Stephenson told Hinton that ordinarily the next step would be a petition for writ of habeas corpus in federal court, but they had very limited claims that Alabama had violated his federal rights. Even worse, federal habeas did not provide the same opportunity to prove his innocence and it would involve years more of litigation and appeals.

“There’s only one last opportunity for us to talk about your innocence,” Stevenson explained, “and that is if we go to the U.S. Supreme Court now. Listen, though. If they deny the cert, then nobody’s going to ever listen to your innocence claim again.”

Hinton interrupted him. “Do you have money for the vending machine? I’d like a drink. A man needs a drink when he’s making a big decision.” He took a long swig of the soda and told Stevenson: “Bryan, I’m innocent. I want the courts

to admit I'm innocent. I want the world to know I'm innocent."

Six months later, Stevenson filed a comprehensive petition to the Supreme Court squarely raising Hinton's innocence in the context of the other errors that had tainted his conviction. In February 2014, 28 years after Hinton's conviction—28 years!—Stevenson called Hinton and told him, "Ray, I only have a few minutes, but I need to tell you—"

"What is it, Bryan? Did Kim Kardashian call looking for me?"

Stevenson laughed and said "No, Ray. The U.S. Supreme Court ruled." The Court did not say it would accept the case for review. It skipped that step and ruled unambiguously on the merits in favor of Hinton. The Court found that the Alabama courts had applied the wrong legal standard and held that "Hinton's trial lawyer rendered a constitutionally deficient performance."

It would take another 14 months for Hinton to be released. The Alabama courts first had to find that Perhacs' incompetence was "prejudicial" and, shockingly, at one point the district attorney's office could not find the gun and the bullets. (They accused Stevenson of stealing them!) In the end, the prosecution dropped all charges.

On April 3, 2015, as Hinton was about to leave jail, Stevenson asked if he was ready. "I've been ready for 30 years." He stepped into freedom and told the crowd of well-wishers, "The sun does shine." But someone was missing. His mother had died almost 13 years earlier. The first place he went was her grave.

While defending Hinton, Stevenson had written a scathing attack on the death penalty for *The Birmingham News*. He pointed out that the Hinton case was not an outlier. Court-appointed defense lawyers for 70 percent of those on death row in Alabama are routinely paid only \$1,000 to prepare their entire capital defense. As of 2005, with 34 executions and seven exonerations since 1975, one innocent person has been identified for every five executions. Would you get on a plane if 20 percent of flights crashed? Would you have surgery if 20 percent of patients died on the operating table? Yet the 31 states that still have the death penalty tolerate the astronomical risk of executing an innocent person.

In *Just Mercy*, Stevenson writes that "[w]e have a choice. We can embrace our humanness, which means embracing our broken natures and the compassion that remains our best hope of healing. Or we can deny our brokenness, forswear compassion, and, as a result, deny our humanity." ■

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Deposing Witnesses: Who's Lying Now?

EVEN AFTER GRADUATING FROM LAW SCHOOL, everything I knew about practicing law—being a lawyer as opposed to a law student—I learned from the movies, and the one that impressed me the most was *Witness for the Prosecution*. In that movie, Charles Laughton cross-examines Marlene Dietrich and, at the end, expresses his opinion of her testimony: “The question is whether you were lying then or are you lying now...or whether in fact you are a chronic and habitual liar.” One of my few dreams was that I would someday get to deliver that line in court.

In 1984, I represented Mary Smith¹ in her divorce from Dr. John Smith. Included in their community property were four season tickets on the 50-yard line for the Los Angeles Raiders. (The Oakland Raiders had moved to Los Angeles in 1982.) Somehow, after my client had filed for divorce, the Raiders tickets disappeared. At his deposition, Dr. Smith denied any knowledge, saying only: “We couldn’t afford them, so I didn’t renew them. I just let them go. I have no idea what happened to them.”

On the off chance that the Los Angeles Raiders had a file, I subpoenaed it. Somewhat to my surprise, they did have a file. In that file was a letter from Dr. Smith to the Raiders requesting that they transfer his season tickets to his friend Bill Jones.

As part of my case, a ticket broker testified that based on Mrs. Smith’s life expectancy, the value of four season tickets on the 50-yard line was \$250,000. When it was his turn, Dr. Smith’s attorney led him through his direct examination. There was no mention of the Raiders tickets. On cross-examination, I asked Dr. Smith if he remembered his deposition testimony. “Not really,” he replied. This gave me the opportunity to read it back to him. He stood by his testimony. Once again, he stated that he had no idea what had happened to the tickets.

At that point, I pulled out his letter to the Raiders, handed copies to the clerk (for the judge) and opposing counsel, asked permission to approach the witness, and handed a copy to Dr. Smith. “Doctor, please read that letter to the court,” which he did. I then asked, “Dr. Smith, have you ever seen this letter before?”

“No.”

“No?”

“No.”

I was getting ready to deliver my line: “The question is whether you were lying then or are you lying now...or whether in fact you are a chronic and habitual liar.” But first, I had to ask a few more questions. “Doctor, isn’t that your signature?”

“No.”

“No?”

“No. My secretary must have used my signature stamp.”

The moment had arrived, and I was prepared. As I was about to deliver the line that would be the culmination of my career as a litigator—the line I had dreamed of delivering since I first saw *Witness for the Prosecution* in 1957—the judge stepped on it.

“Counsel, I’ve heard enough. Chambers.”

In chambers, the judge told Dr. Smith’s lawyer that he had a choice: Either the doctor could show up the next morning with his friend Bill Jones and the tickets, or the tickets would be awarded to him, and he would be ordered to pay Mrs. Smith \$250,000 based on the testimony of Mrs. Smith’s expert.

The next morning, Dr. Smith and Bill Jones were sitting on a bench outside the courtroom when I arrived. It was a rainy day.

“Good morning, gentlemen,” I said cheerfully.

Bill Jones replied for both of them: “Frank, see this umbrella. When this is all over, I’m going to stick it up your ass.”

The tickets were divided, and the trial concluded. I didn’t get what I wanted, but I would like to think that I got what I needed. Mrs. Smith got a very good result—thanks partly to the judge’s low opinion of Dr. Smith’s integrity. As for the doctor, he was dumbfounded that California law required him to divide the parties’ community property equally and support his ex-wife and son. He was particularly outraged when the judge ordered him to pay \$25,000 of my fees.

The lessons I learned from this case stayed with me for the rest of my career as a litigator. It illustrates that otherwise law-abiding individuals in the throes of a divorce are tempted to resort to self-help that can sometimes backfire. In extreme cases, it leads them to commit fraud and then to commit perjury to cover up the fraud. It also explains why many family law bench officers develop a healthy skepticism when it comes to the uncorroborated testimony of the parties. Finally, it reminds us, as lawyers, that if a client serves up a version of reality that doesn’t make sense (“We couldn’t afford them, so I just let them go”), it is unlikely to make sense to the lawyer on the other side of the case. There is something to be said for cross-examining your client before he or she testifies at deposition or in trial.

Closing argument did not take place until many years later. In 2016, some 30 years after the trial ended, I bumped into Dr. Smith on a courtesy shuttle at the Burbank Airport. In an effort to be friendly, I said: “Hello, John. How ‘bout those Raiders?”

He didn’t hesitate: “Hello, Frank. Still have your hands in other people’s pockets?”

At the time, I decided to let him have the last word. Now that it’s my turn, I’ll end with the refrain from a Rolling Stones song that sums it up best:

You can’t always get what you want

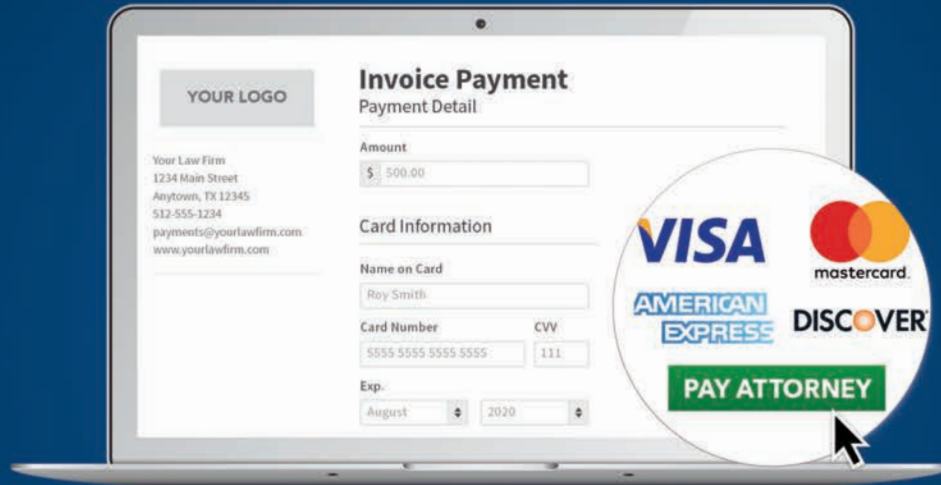
You can’t always get what you want

But if you try sometimes you might find

You get what you need.

¹ The names used in the narrative have been changed to protect the parties’ identities.

Franklin R. Garfield is a family law mediator in Los Angeles.



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