Miriam Krinsky is the Association’s 2002-03 president.

Leading the Way

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DEADLINES
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Miriam Krinsky, the executive director of Dependency Court Legal Services, Inc., is the president of the Los Angeles County Bar Association for 2002-03. Her President’s Page column begins on page 10.

Cover photo: Tom Keller
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Yes, it's true. By properly restructuring your clients’ estate plan, their assets and the assets they leave to their family will be protected from judgment creditors. Here are some of the situations in which our plan can help protect your clients’ assets:

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- Children suing each other over your client’s estate.
- A current spouse and children from a prior marriage suing each other over your client’s estate.
- A child’s inheritance or the income from that inheritance being awarded to the child’s former spouse.

STEVEN L. GLEITMAN, ESQ. 310-553-5080
Biography available at lawyers.com or by request.

Mr. Gleitman has practiced sophisticated estate planning for 23 years, specializing for more than 11 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Five. He has submitted 36 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 36 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.
Is A Malpractice Insurance Crisis Looming In Your Horizon?

Are You Ready?

11 carriers have withdrawn from the California market. Will your carrier be next? The changes in the marketplace are troubling. It is an unknown future.

Non-renewals are commonplace. Some carriers can’t secure sufficient reinsurance to operate their professional liability programs. A major carrier was recently declared insolvent. Other carriers have been downgraded by A.M. Best. Severe underwriting restrictions are now being imposed. Dramatic rate increases are certain.

It’s all very unsettling.


CHECKLIST
You owe it to yourself to find the answers to these critical questions!

Will your carrier still be writing professional liability policies in California at your next renewal?

Will your carrier impose a substantial rate increase at your next renewal due to unstable market conditions?

Will your carrier continue to insure “your type” of practice at your next renewal?

Will your carrier leave the marketplace because they can’t secure sufficient reinsurance for their professional liability program?

Will your carrier offer you a tail of unlimited duration if they decide to leave the market?

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It may seem strange to begin a new year in the month of July. But with this issue of Los Angeles Lawyer, I begin my year-long tenure as the 2002-03 chair of the magazine’s Editorial Board.

It is truly an honor to follow in the footsteps of the 24 other men and women who have acted as chair since the inception of Los Angeles Lawyer in 1978. I am privileged to have been chosen to chair the outstanding group of volunteer editors who make up the Editorial Board and who, over the years, have made Los Angeles Lawyer arguably the most respected and admired bar association magazine in the nation. Working with my predecessor, Steven Hecht, also was an honor and a privilege. Steven’s hard work and good humor will be a tough act to follow. However, I eagerly accept the challenge.

Indeed, this month, the board is fortunate to welcome to the magazine several talented new editors with solid legal backgrounds and publications experience. For the second year in a row, we will publish four special issues of the magazine. In addition to the publication of our annual special issues on real estate law (January 2003) and entertainment law (May 2003), we will be bringing you two other special issues covering unique topics. Both issues promise to provide us with an opportunity to reflect on our past, our society, ourselves, and our future.

In September 2002, the magazine will publish a comprehensive special edition devoted entirely to the numerous legal issues arising from the September 11 tragedy. No single event in recent history has led to more important legislation in a one-year period. And, in the spring of 2003, we will proudly publish a special issue celebrating the 125th anniversary of the Los Angeles County Bar Association. We will take a hard look back at gender and racial discrimination throughout the years and focus on the evolution of diversity within the Association itself.

The magazine has been undergoing several editorial changes in its regular editions as well that began last year and are expected to continue. Our readers might have noticed that, in the past, each edition of the magazine began with a monthly column by the president of the Association called the President’s Page, followed by a column by the Barristers president called the Barristers Bulletin. However, following a readership survey a few years ago, it was clear that our readers were not nearly as interested in these two columns as they were in other elements of this magazine. So, in a direct response to the comments of our readers, we have made some adjustments.

For instance, young lawyers indicated that they preferred that the Barristers Bulletin provide useful practice tips aimed directly at the newly admitted attorney instead of a recap of Barristers activities. As a result, we replaced the Barristers Bulletin column with Barristers Tips. The Barristers Tips column now offers practical advice and how-to information for the young attorney. And when our readers told us that they found the President’s Page column to be of limited use, the magazine responded by making it an annual column.

In addition to these changes, we are in the process of expanding our readers’ ability to access the magazine on the Internet. All future editions of the magazine will be available in PDF format on the Web and will be completely searchable by key word. Our readers will be able to type any word into a query box in order to do a complete search of all online issues of the magazine. Currently, issues going back to March 2001 are searchable by key word, but eventually each issue going back to July/August 2000 will be included in the search engine. Only selected portions of editions published before July/August 2000 are available online. Visit the magazine’s section of the Association’s Web site at www.lacba.org/lalawyer and check out the new features.

During the next year, feel free to e-mail me at abil333@yahoo.com and let me know what you think. The magazine appreciates and values your feedback.
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Funding the Future of Los Angeles County Since 1915
Celebrating a Milestone Anniversary

In our 125th year, we will renew our efforts to translate our founders’ vision into reality

Jean Monet, the French economist and statesman often credited with being the father of the Common Market, once said, “Without people, nothing is possible; without institutions, nothing is lasting.” No words could be more apt as our Association approaches a historic mark. It was 125 years ago that two dozen civic leaders in our community joined together to make their vision of the legal profession a reality. They founded an association aimed at creating and supporting a law library to collect in one central location the laws governing the justice system and thereby to assist Los Angeles lawyers in their professional endeavors.

Over time, the lasting legacy of that organization—our Los Angeles County Bar Association—led not simply to the creation of the Los Angeles County Law Library but to countless other reforms in, and valuable contributions to, our local legal community and legal institutions. Today our Association proudly serves as the largest metropolitan voluntary bar association in the country. We are a recognized national leader in advancing the interests of our profession and promoting reforms designed to ensure the continued fair and prompt administration of justice for all members of our society.

I am honored to have the opportunity to lead our Association as we celebrate our 125th anniversary. Through the tireless efforts and dedication of our members, a phenomenal staff led by our exceptionally capable and committed Executive Director Richard Walch, and the energy of our many volunteers, our organization has continued to have a significant and enduring impact on our community.

Our Association’s Lasting Accomplishments

The history of our Association is marked by a longstanding tradition of commitment not simply to the interests of our members but also to the betterment of our profession, our surrounding community, and the legal system in which we practice.

We continue to serve as one of the most vigorous and credible advocates for the profession both locally and nationally. Through our sections and committees, we have ensured that the voice of our profession is heard in the debate on significant issues of concern to the legal community. Our efforts have helped mold numerous laws over the years, including many that have led to important reforms that help ensure access to justice and legal services for the less privileged members of our community.

Through our online services, e-mail bulletins, and high-quality publications, we have maintained our role as a primary resource and focal point within the legal community for education, information, and other products and services useful in the practice of law in Los Angeles. Most recently, our computerized and searchable Civil Register has enabled lawyers in our community to access valuable information regarding Los Angeles state court cases, litigants, and judges. In the coming year, we also intend to make available to our members daily e-mail bulletins containing summaries of significant appellate court decisions.

Our Association has consistently recognized the importance of maintaining a broad focus and reaching out to our surrounding community through our time-tested public service projects. These many invaluable initiatives—including the Barristers Domestic Violence Project, the AIDS Legal Services Project, the Immigration Legal Assistance Project, the Lawyer Referral and Information Service, the Dispute Resolution Services, Inc., the Indigent Criminal Defense Appointments Program, and a host of other worthy endeavors—continue to touch and leave an indelible mark on the lives of countless members in our community.

The Opportunities Ahead

In the coming year, we face numerous challenges and a wealth of opportunities. I intend to follow in the footsteps of the many capable leaders of the Association by promoting our continued involvement in matters of importance to our community and our legal system.

Under the able leadership of Federal District Court Judge Audrey Collins, our Task Force on the State Criminal Justice System—a group created in the wake of the Rampart crisis to consider reforms to the state justice system—will complete its review and analysis and issue its report and recommendations in the year ahead. With the continued cooperation and support of the key institutional components of the justice system (the superior court, the district attorney, the public defender’s office, and the private criminal defense bar), the task force will endeavor to identify reforms that will ensure the continued integrity of criminal convictions and instill renewed public confidence in our criminal justice system.

With the support of the Department of Children and Family Services, I intend to revive the Association’s Bridges to the Future project, a mentoring program that provides support to our county’s abused and neglected foster children as they age out of the foster care system. I also intend to examine other ways our legal community can provide support to the beleaguered and overburdened dependency and delinquency court systems.

As our organization embarks on a cel-

Miriam Krinsky is the 2002-03 president of the Association. Her e-mail address is krinskym@dclsinc.org.
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I intend to use this historic occasion as an opportunity to reflect on our past history and our struggle over the years to achieve diversity in our own organization as well as the obstacles and challenges on our horizon. To further those efforts, we will launch a six-part Breakfast with Giants discussion series, chaired by Samantha Phillips Jessner. These programs will afford an opportunity for the newer members of our community to interact in an intimate setting with some of our community’s most accomplished lawyers and leaders and share in their perspectives, wisdom, and reminiscences.

As in past years, we will continue to pursue efforts to support our local courts and maintain the high quality and independence of our judiciary. In particular, the superior court leadership has identified the county-wide implementation of one-trial jury service as one of the greatest challenges facing the local justice system. I intend to redouble our Association’s support of the court’s efforts in this area. Our Association will also examine how we can help secure reasonable compensation for those who perform their civic duty and serve on juries.

After the shattering events of September 11, all of us inevitably sought to return to our daily routines; yet many of us still struggle to attach some forward-looking perspective to the tragedy that shook our country to its very foundations. That infamous day has created newfound opportunities not simply for self-reflection but also for invaluable discussions with our youth about the liberties and values that make our country unique. To that end, I have tapped Los Angeles County Superior Court Judge Laurie Zelon and former Barristers President Laura Farber to spearhead the September Dialogue in the Schools project—an outreach program that will take place near the anniversary of that tragic day. The project will recruit lawyers, judges, and civic leaders to participate in a structured dialogue with local high school students focusing on the critical liberties and values our country is attempting to defend and preserve.

Winston Churchill once opined that we “make a living by what we get,” but we “make a life by what we give.” We all have ample opportunities in the course of our daily professional endeavors to make and receive a living. In the coming year, I invite all of you to participate in making a life by giving your time and your energy to one of our Association’s many exciting and important initiatives. Together, we can transform seemingly impossible and yet-to-be-achieved objectives into worthy and lasting realities.
Make the Most of Court-Ordered Arbitration

**A court’s order to arbitrate is not a setback but another step toward resolution of the case.**

At some time nearly every litigator will stand before the court at a status conference and hear the court characterize the case as appropriate for court-ordered arbitration. Often before counsel can respond, the court orders the matter to arbitration and calls the next case. The speed with which a case may be sent to arbitration makes it important to understand the process beforehand.

Pursuant to Code of Civil Procedure Sections 1141.11 and 1141.12, any case with claims of less than $50,000 per plaintiff is eligible for court-ordered arbitration. Parties may also request court-ordered arbitration. For example, a plaintiff may request arbitration in writing and agree that the award will not exceed $50,000. Another route is for all parties to stipulate to arbitration, in which case there is no upper limit on the potential award.1 The crucial difference, however, between court-ordered arbitration and private arbitration is that with court-ordered, the defendant or the plaintiff can reject the arbitrator’s decision and request a trial de novo.

Once the determination is made that the case is suitable for arbitration, the court directs counsel to proceed immediately to the ADR office to initiate the arbitration process. At the ADR office, counsel complete intake forms that request, among other information, a brief description of the case, the amount in controversy, potential arbitration and request a trial de novo.

The ADR office maintains a list of neutrals who are active members of the State Bar, retired judges, or court commissioners.2 This list can be accessed online from the ADR office or via the Los Angeles Superior Court Web site at www.lasuperiorcourt.org. The educational and professional background of each panelist can be obtained through a name search on the ADR page. Arbitrators on the ADR list have agreed to donate three hours of hearing time per case.

Arbitrators are chosen in several ways. In all but limited civil cases, the parties may select a neutral directly from the ADR panel list or they can use a private neutral at their own cost.3 The parties can also perform a random search on the ADR Web site. The search will produce a list of three neutrals. In the event the parties cannot agree on a neutral, the ADR staff is available to assist in the selection. In limited civil cases, the ADR office randomly assigns neutrals.4

The best way to choose an arbitrator is to know which neutral to choose prior to being directed to the ADR office. Be thoroughly familiar with the list of panelists beforehand. Because the list is available online, the profiles of the panelists may be reviewed anywhere and anytime. Show the list to colleagues. Often other lawyers who practice in the same area, office, or side of the bar are the best source of information about neutrals. Colleagues can provide invaluable insight into how an individual neutral conducts arbitrations and can tell which neutrals might be most sympathetic to a particular case.

Knowing which neutrals are acceptable (or unacceptable) for a case makes the process of choosing a neutral simpler. If you have access to the Association’s new searchable Civil Register database, you can enter a potential arbitrator’s name in the appropriate field in the customized search feature and obtain a list of cases to which the neutral has been assigned. You can then contact the attorneys of record in the case to gain insights into the arbitrator. (For more information about the Civil Register, go to www.lacba.org and click on Searchable Civil Register on the right-hand navigator.)

The first task in preparing for arbitration is to obtain a hearing date. Under Rule 1611 of the California Rules of Court, the arbitrator sets the time and place for the arbitration after consultation with the parties, and arbitration hearings should be scheduled so that they may be completed no sooner than 35 days or later than 90 days from the date of the assignment of the arbitrator. If the parties do not hear from the arbitrator within 10 days of the assignment, the plaintiff’s counsel should contact the defense counsel to obtain three possible hearing dates and then inform the arbitrator of the dates in writing.

After the arbitration is scheduled, counsel should complete all necessary discovery. Pursuant to Rule 1612 of the California Rules of Court, all discovery must be completed no later than 15 days prior to the date set for the arbitration. In addition, counsel must be familiar with Rule 1613, which describes rules and important deadlines for the hearing. Under Rule 1613, the rules of evidence governing civil actions apply to arbitration hearings, with certain limited exceptions. These include that a party may offer certain written reports of expert witnesses, medical records and bills, and other documentary evidence prepared in the ordinary course of business. A party may also present deposition testimony as well as the written statements made under the penalty of perjury of any other witness. The arbitrator may receive this evidence if copies of it have been delivered to the opposing parties at least 20 days prior to the hearing. The opposing party may subpoena the author, document custodian, declarant, or deponent to appear.5

Preparation for arbitration also requires that counsel submit an arbitration brief that is no longer than 10 pages and that contains 1) a summary of the procedural background of the case, describing the claims and defenses, 2) a statement of the disputed and undisputed facts, 3) a statement of the issues with

By Rebecca Delfino
is presented, counsel make final arguments. Counsel should submit briefs to the arbitrator and opposing counsel at least two days prior to the arbitration. Preparing a brief is also the best way to clarify the legal theories and factual issues; it discloses weaknesses and strengths in the evidence and helps counsel formulate a theme for the case.

As with any court appearance, making a good impression on the arbitrator is key. Counsel should be prepared to present all evidence and arguments. Bring clients (and an interpreter, if one is needed), necessary witnesses, and all documentary evidence. At the outset of the arbitration, the arbitrator will explain the process. In general, each side will be given an opportunity to present an opening statement. Parties will present their evidence and witnesses; the arbitrator administers the oath to the witnesses and makes rulings on the admissibility of the evidence. Bring original documents to the arbitration, but do not leave originals with the arbitrator. If counsel intends to seek an award of costs, present proof of costs. After all the evidence is presented, counsel make final arguments.

No formal record will be made of the proceedings, but counsel should take full advantage of the opportunity to question witnesses and challenge evidence. For witnesses who have not been deposed, the arbitration is an excellent opportunity to see how they will perform at trial. It is also a chance to put your themes and arguments to a pretrial test.

At the conclusion of the hearing the arbitrator takes the case under submission, and within 10 days files the award with the ADR office and sends copies to all parties. The form for the award may be viewed online at the Los Angeles Superior Court Web site ADR page. The form provides no information except to identify the prevailing party and the amount of the award, if any. If counsel desires a more detailed award allocating damages into economic and noneconomic classes or an explanation as to the various causes of action, counsel should make a request to the arbitrator.

It is extremely important to be aware that the award is final and entered as a judgment unless a request for a trial de novo is filed within 30 days of the date on which the arbitrator files the award with the ADR office. The fact that a trial de novo can be requested leads some counsel to think that they need not take court-ordered arbitration seriously. This rationale can keep counsel from fully or carefully preparing for arbitration and is a disservice to the court system, the profession, and the client. The arbitration hearing gives the client a rare pretrial opportunity to be heard by a neutral judicial figure. The hearing also allows the client to observe and interact with opposing counsel, witnesses, and the evidence. A client’s full understanding of the case is extremely important, especially if settlement is the ultimate goal.

Arbitration is an invaluable way for counsel to learn about the opponent’s case. Moreover, the arbitrator’s reactions to the evidence, and the final disposition can provide a preview of how a trial court or jury will view the case; putting forth a complete case for arbitration is the best way to get a clear picture of how the case may resolve at trial. The ADR process may not be exciting, but attorneys who take court-ordered arbitration seriously serve their clients well.

Using the Appraisal Process to Resolve Insurance Disputes

By Herbert Dodell

The key to virtually every appraisal is the neutral appraiser or umpire.

Currently every fire insurance policy issued in California requires that certain disputes be submitted to a process known as appraisal if demanded by either party to the policy. Many other types of policies, including earthquake policies, require the use of the appraisal process in certain circumstances. Insurance Code Section 2070 mandates the use of a statutory form for all fire insurance policies in California. Section 2071 contains the form and all the terms of the insurance agreement, including the appraisal process. On October 5, 2001, Governor Gray Davis signed SB 658, a law that is effective for all policies issued or renewed after January 1, 2002. The new legislation amended Section 2071 and codified the appraisal process in certain particulars.

Insurers and insureds and their counsel should understand the specific procedures that are involved in the appraisal process. The parties must address a variety of issues, including:

- The composition of the appraisal panel, including the selection of an appraiser by each party and the selection of a neutral appraiser or “umpire” (the standard form fire insurance policy’s term for a third-party or neutral appraiser and a term that appears in other types of insurance policies).
- The bases for objecting to the selection of an appraiser.
- Whether the appraisal will be formal or informal.
- The powers of the appraisers.
- The grounds for attacking an unfavorable appraisal award.

Case law often uses the words “arbitrator” and “appraiser” interchangeably, but there are substantial differences as well as similarities between the terms. Although an appraisal proceeding is a form of arbitration and is governed by the general rules of arbitrations—including Code of Civil Procedure Sections 1280 et seq., and case law—an appraiser has far greater leeway than an arbitrator in evaluating a matter.

Typically, an insurance policy requires each party to select one appraiser, who is termed a “party” appraiser. Under the old law, which governs all policies issued before January 1, 2002, and not renewed after that date, when the two appraisers are unable to reach agreement regarding loss and damage, they must jointly select a third person, the neutral appraiser or umpire. The new law eliminates the requirement of a disagreement between the appraisers as a condition to the selection or appointment of a neutral arbitrator.

Under amended Section 2071, party appraisers must select an umpire, and the parties can seek court intervention solely on the basis of the parties’ inability to agree on the selection of an umpire:

[The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon the umpire, then, on request of the insured or [the insurance] company, the umpire shall be selected by a judge of a court of record in the state in which the property covered is located.

The proceedings can be formal or informal, at the option of either of the parties. However, under amended Section 2071, for policies issued or renewed effective January 1, 2002, the proceedings must be informal unless the parties mutually agree to the contrary.

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The proceedings can be formal or informal, at the option of either of the parties. However, under amended Section 2071, for policies issued or renewed effective January 1, 2002, the proceedings must be informal unless the parties mutually agree to the contrary. [Informal] means that no formal discovery can be conducted, including depositions, interrogatories, requests for admissions, or other forms of formal civil discovery. A court reporter cannot be used to record the proceedings. The appraisal panel members can counter an argument that evidence may be applied. The only real benefit of an informal appraisal is the reduced cost and a more speedy resolution of the dispute.

Formal proceedings involve the taking of evidence, including the examination of witnesses, and a record can be made by a court reporter for use in subsequent proceedings, such as a bad faith action. A formal appraisal is akin to a minitrial, with the usual costs and expenses. The benefit of a formal appraisal is that it serves as prelitigation discovery and can provide a written record of proceedings in which the opposing party has offered evidence that may or may not be accepted by the trier of fact.

Practitioners should consider two recent cases, Fraley v. Allstate and Guerra v. Allstate, in deciding whether to use the appraisal process in anticipation of a bad faith case resulting from an insurer’s unwillingness to pay the full value of a claim. The two cases hold that if there is a “genuine dispute,” including reasonable reliance on experts, bad faith is not present as a matter of law. However, the failure to conduct a thorough and timely investigation is not included in the genuine dispute category. Therefore, the use of an appraisal process in which evidence can be developed that reflects delays and a failure to thoroughly investigate can counter an argument that...
there was a genuine dispute and that a claim for bad faith was thereby negated. The reasonableness of the experts also can be tested in a prelitigation setting by probing the relationship between an expert and the insurer as well as the depth and quality of the evaluation.

**Selection of the Appraisers**

Appraisers are required to be both "competent and disinterested," words specifically mentioned in Insurance Code Section 2071 and in case law. Most of the cases dealing with the selection process arise from the question of disinterest rather than competence. The reason is simple: An appraiser may be anyone selected by the parties, as long as the appraiser is capable of understanding the proceedings. This would include nonlawyers with special expertise in a particular field. Even if the appraiser does not hold a contractor’s license, a law degree, or an adjuster’s license, he or she is still likely to be found competent.

The more interesting question occurs when the issue of disinterest is raised. What constitutes sufficient interest to disqualify an appraiser? Cases throughout the United States are all over the map on this issue. In some jurisdictions, the definition is broadly construed, and in others the opposite is true. Interestingly enough, however, an appraiser is universally held to a higher standard of impartiality than an arbitrator, who in turn is held to a higher standard of impartiality than a judge.10 This is because of the tremendous latitude given to an appraiser in performing his or her function.

Further, even though California’s contractual arbitration statutes may differentiate between a party appraiser and the neutral appraiser selected by the two party appraisers, the courts have held that all must adhere to the same “competent and disinterested” standard.11 In Gebers v. State Farm General Insurance Company,12 the court stated that the duties imposed on appraisers generally, coupled with the insurer’s duty of good faith and fair dealing, required that all appraisers, even the party appraisers, be disinterested.

Despite this lofty language, many insurers have their favorite appraisers who are regularly hired because they can be relied upon to express opinions favorable to the insurers. Opposing parties should make an effort to disqualify these appraisers, even though the reality is that an appraiser will probably remain on the case unless a strong showing can be made of bias in accordance with the standards set forth in case law.13

To the extent that a party anticipates filing a bad faith suit in a matter, either because of a lowball offer or other improper conduct, the selection of an appraiser subject to objection will be yet another example of tortious conduct, even though the appraiser may be able to withstand a challenge. While the admissibility of such conduct is subject to the vagaries of a court ruling, there is nothing to lose by making the challenge. It is imperative that an objection to an appraiser be made at the time of the appraiser’s selection or at the time of the required disclosure of the identity of a party’s appraiser—or the objection may be considered to be waived.14

While many cling to the ideal that appraisers should be neutral and disinterested, this is unlikely in the real world. The insurer selects a known quantity, someone expected to be partial, and the insured does likewise. It is difficult for some appraisers to be non-biased because they have been selected by a party and are being paid by that party. Since compromises often occur, the strength of the party appraiser’s advocacy is important. Certainly an opposing party does not want an appraiser who is well known as a forceful advocate for the party selecting him or her.

The key to virtually every appraisal is therefore the neutral appraiser or umpire. An award can be rendered by any two appraisers, including a selected party appraiser and the neutral appraiser. Occasionally, the two party appraisers agree, but it is far more common for the selected neutral appraiser to side with one or the other party’s appraiser in rendering an award. Obviously, if the insurer’s selected appraiser and the neutral appraiser agree to an award, the opinion of the insured’s selected appraiser is meaningless. It is also common for the neutral appraiser to pressure one of the appraisers to agree, thereby allowing for the entry of an award. The dynamics vary from case to case. One thing, however, is absolutely certain: Careful attention should be paid to the selection of the neutral appraiser.

If the two appraisers are unable to agree on a neutral appraiser, the parties have the right to petition the court for the appointment of a neutral appraiser. When that happens, both parties face the risk of a neutral appraiser who is well known as a forceful advocate for the party selecting him or her. Either party may petition the court to make the appointment at the expiration of this 15-day period.

**Disinterest and Disclosure**

What happens when there is some indication of a relationship between an appraiser or the supposedly neutral appraiser and someone else—a party or an attorney—in the proceeding? Cases vary from jurisdiction to jurisdiction regarding the degree and nature of the relationship used to determine whether or not an appraiser is truly disinterested. Some jurisdictions permit a member of the same country club and even a social friend to qualify as an appraiser and do not find this type of relationship to rise to the level of interest. Indeed, the majority of the cases focus on a financial interest in the outcome.

Does an appraiser who has been selected by a party in the past qualify or should that appraiser be disqualified? The leading case on the subject is Commonwealth Coatings Company v. Continental Casualty Corporation,15 a 1968 U.S. Supreme Court case regarding federal law that was adopted into California law in 1970 in Johnston v. Security Insurance Company.16 In Commonwealth Coatings, the Supreme Court interpreted the Federal Arbitration Act regarding the issue of disinterest. The Court held that it is sufficient to prove interest when the relationship between the arbitrator and one of the parties is “of such a nature to give clear grounds for suspicion of the proceedings” and “render it unlikely that the proceedings constituted the fair and impartial tribunal to which the other party is entitled.”

Last year, in Michael v. Aetna Insurance Company,17 the California Court of Appeal held that the standard under Commonwealth Coatings was identical to that imposed by state law: Appraisers are required to disclose to the parties any reason that might cause a person aware of the facts to reasonably entertain a doubt that the appraiser would be able to be impartial—and the failure to do so constituted evidence of “corruption,” which was sufficient to vacate an award.

Although this standard appears to make sense, its application to a particular set of facts is not always certain. The standard does not give sufficient guidance regarding the nature of the relationship that should be disclosed. “Suspicion” is a fairly nebulous word without a concrete and universal definition. The court was clear on one point: The remedy for this problem is not for appraisers to sever themselves from the marketplace but instead to disclose their relationships. It is the duty of the appraiser to reveal facts that might create the impression of bias; the parties need not engage in discovery on the issue.18

In determining whether to disqualify an appraiser, it is not necessary to establish actual fraud, bias, or any improper motive on the part of the appraiser. Rather, it is sufficient to establish merely an “impression of possible bias.”19 Under that standard, the issue is whether a reasonable person would objectively entertain doubts about that appraiser’s
neutrality based upon the appraiser’s history and past actions.20

In California, the older cases provided standards for determining whether an appraiser was truly disinterested, but they were not particularly concrete. By the mid-1990s, the arbitration statutes were amended to require detailed disclosure from a neutral arbitrator. Thus, under Code of Civil Procedure Section 1281.9, within 10 days of service of notice of the proposed nomination, the proposed neutral appraiser must disclose all of the following for the preceding five years:

- The names of the parties to all prior or pending cases in which the neutral appraiser is or was acting as a party appraiser or neutral appraiser.
- Any prior attorney-client relationship between the neutral appraiser and any party or attorney involved in the pending appraisal.
- Any professional or significant personal relationship between the neutral appraiser or the neutral appraiser’s spouse and any party or attorney for a party.

Generally, if a party wishes to object to the selection of a neutral appraiser because the disclosure raises the impression of possible bias, the objection should be raised at the earliest opportunity; if a party elects to refrain from Unveiling their knowledge of bias in order to later attack an unfavorable award, the courts will bend over backwards to find that the right to object was waived by not asserting that right on a timely basis.21 The statute does not affect a party’s right to seek to vacate an award for “undue means,” under Code of Civil Procedure Section 1286.2. Objections based on information appearing on the face of the disclosure statement should be made immediately, but if the disclosure itself is inadequate, all rights should be reserved until after the award.

These objections and disqualification procedures apply only to the neutral appraiser rather than to the party appraisers.22 However, case law standards remain crucial for parties seeking to ensure the disinterest of a party appraiser. A motion to disqualify a selected party appraiser may become necessary if disclosure patently provides a reasonable basis for disqualification, and the party objecting does not want to wait for the outcome of the appraisal to seek relief. The failure of a party appraiser to disclose information that might be relevant to the question of competence and disinterest may provide a basis for attacking an award. Cases involving the disqualification of an appraiser are very fact-intensive, and the waiver cases are extremely tricky; therefore, there is no hard-and-fast rule.

Despite the disclosure requirements, the outcome of a challenge is based on many unpredictable variables. When there is a request for an adjudication of whether there has been a proper disclosure, if there is a question of interest, or if there is a basis sufficient to rise to the level of the “impression of possible bias” test outlined in Commonwealth Coatings, much depends on the interpretation of the circumstances given by a particular judge deciding the issue. The problem is that every case will be viewed differently by the reviewing judicial officer. Therefore, there is no certainty.

A question remains whether the specific disclosure statutes replace or add to the general “impression of possible bias” test set forth in Commonwealth Coatings. What would happen if, for example, a neutral appraiser had a twin brother who had a significant personal relationship with the insurer’s attorney, and the relationship is not disclosed? If an insurer later argues that an award for the insurer cannot be set aside because the relationship did not have to be disclosed, what is the likely result? There is no case yet on point. It is far better to make a disclosure than to subject an award to later attack for failure to disclose.

Although there is no time period provided by statute regarding the disqualification of a party appraiser, a party seeking to disqualify the neutral appraiser has 15 calendar days to serve a notice of disqualification. Under no circumstances can a notice of disqualification be served after an award has been rendered. The remedy in that instance is an attack on the award itself.

Conduct of the Appraisers

In California, the appraisal process is limited to determining one factual question only: the amount of the loss, or the actual cash value of the insured item. The appraisal panel may not consider anything else. On the other hand, an arbitration can be used to decide any dispute the parties agree to submit.

SafeCo Insurance Company v. Sharma23 illustrates the principle. In Sharma, the insured claimed theft of a matched set of 36 paintings. The insured and insurer began the appraisal process. The appraisal panel found that the stolen paintings were not a matched set and thus were of lesser value than the insured’s claim. The appellate court reversed confirmation of the appraisal award, stating: “In no authority is it suggested that an appraisal panel is empowered to determine whether an insured lost what he claimed to have lost or something different.” Thus, although the question decided in Sharma obviously affected the value of the paintings, it was held to be beyond the scope of the appraisal. While an insurer is free to litigate questions of the insured’s misrepresentations in a courtroom, the insurer cannot raise those questions in an appraisal setting. Courts may use various terms—such as “amount of loss,” “actual cash value,” or “total loss”—but they all mean the same thing.

Unetco Industries v. Homestead Insurance Company24 also illustrates the limited power of the appraisal panel. In Unetco, the earthquake policy in question tied the deductible to the replacement cost. The court held that the insurer was entitled to an appraisal of the actual cash value of an earthquake loss for the purpose of determining the amount of the loss but was not entitled to an appraisal to determine the replacement cost for the purpose of determining the amount of the deductible.

The appraisal process cannot be used to decide coverage issues unless the parties stipulate to empower the appraiser panel to do so. If the insured and insurer are debating whether a fire loss was caused by a covered windstorm or uncovered arson, neither party can demand appraisal of that issue. As a practical matter, this means if the insurer is demanding an appraisal, the insured should understand that the parties are only arguing over dollars and cents; at least there is no coverage battle to fight.25

Appraisers have one power that judges do not. Appraisers are free to make their own independent investigation, while a judge is limited to deciding only the issues that are presented by the parties based on admissible evidence. The appraisal panel must give notice to the parties that it is considering evidence outside the hearing, although such notice rarely occurs. Code of Civil Procedure Section 1282.2(q) provides: “If a neutral arbitrator intends to base an award upon information not obtained at the hearing, he shall disclose the information to all parties to the arbitration and give the parties an opportunity to meet it.” In Sapp v. Barenfeld,26 the California Supreme Court definitively stated:

Arbitrators may inform themselves further by privately consulting price lists, examining materials, and receiving cost estimates. This procedure may be ex parte, without notice or hearing to the parties. It is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skills such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information.

If an insurer is claiming that, for example, a valuable Persian rug can be replaced with
a rug of like kind and quality for $99 at the local swap meet, the appraisers are free to do their own pricing of Persian rugs. It is risky to automatically assume that the appraisers will conduct their own investigation, and if they do, almost anything can be valued on Ebay at garage sale prices. Thus, the insured should produce competent evidence of the proper valuation of expensive Persian rugs.

The court in *Griffith Company v. San Diego College for Women* permitted one arbitrator, acting alone, to consult with a disinterested attorney about legal conclusions. Although the case is somewhat obscure, it appears that the consultation was well known to the other party arbitrator and the neutral arbitrator, because the other party arbitrator filed a lengthy declaration in support of a motion to set aside the award. (There is no requirement that all three arbitrators act as a body.) Although there are no cases addressing the issue of an appraiser who communicates with an interested person, such as a party or the party’s attorney, it would seem logical that such an ex parte communication would represent undue means, thereby allowing for the vacating of the award. One big problem for parties is that the deliberations of the appraisers are confidential and not subject to discovery. Therefore, there is little that can be done to monitor the appraisal panel’s conduct without conducting ex parte communications with the party’s selected appraiser or inquiring of the neutral appraiser, and practitioners’ options here are limited. While certain ex parte communications, such as requests for a status report, are proper, anything beyond the request would likely be held improper and may subject an award to attack. Moreover, the neutral appraiser is under no obligation to reply to inquiries from any party unless there is a specific request for a particular action to take place.

**Challenges to the Award**

After the panel of competent and disinterested appraisers has been selected, has listened to or reviewed the evidence, and has made its own independent investigation, the panel will render an award, which can be confirmed, vacated, or corrected. The parties have 100 days in which to seek to correct or vacate the award and four years to confirm it—a clear indication of the courts’ bias toward confirmation.

If the insured suspects improper conduct and bad faith in the appraisal process, the time to respond is while the proceedings are incomplete and before an award is rendered than seek to attack it afterwards. The courts view the latter as akin to sour grapes.
In addition, the courts follow the judicial principle that a proceeding under attack was conducted properly unless there is substantial evidence to the contrary. Overturning an award or obtaining relief during the proceedings are both difficult.

In California, an appraisal award may be confirmed by filing a petition with the superior court. Once confirmed, the award becomes a judgment and can be enforced in the same way as any civil judgment.

An appraisal award can be corrected only if there is an obvious mathematical error. It cannot be corrected to fix an error of fact or law, even if the error is obvious on the face of the document.28

According to Code of Civil Procedure Section 1286.2, an appraisal award can be vacated only if one of the following six grounds is present:
1) The award was obtained through corruption, fraud, or undue means.
2) There was corruption on the part of any of the appraisers.
3) The rights of a party were substantially prejudiced by the misconduct of a neutral appraiser.
4) The award exceeded the powers of the appraisers.
5) The rights of a party were substantially prejudiced by the refusal of the appraisers to postpone the hearing upon sufficient cause being shown or by the refusal of the appraisers to hear evidence material to the controversy or by other conduct of the appraisers contrary to the provisions of law.
6) A neutral appraiser who was subject to disqualification failed, upon receipt of a timely demand, to disqualify himself or herself.

While ground four might sound like fertile ground for attacking appraisal awards, it has been virtually eliminated by the decision in Moncharsh v. Heily & Blase.29 In Moncharsh, the employee-attorney signed an employment agreement regarding the handling of fee disputes if the attorney left the employer law firm. The agreement had both an arbitration clause and a fee-splitting clause that seemed to violate professional legal ethics. The arbitrator upheld the validity of the fee-splitting arrangement when rendering the award. On appeal, the state supreme court specifically emphasized the need for finality in arbitration agreements, even when a clear error in law exists. The court did not disturb the erroneous award. In short, courts do not want to retry the merits of any arbitrated dispute.

Thus, the most successful attacks on an appraisal award focus on whether the award was obtained through undue means. This ground for attack arises if an appraiser fails to make adequate disclosures or is not disinterested. Undue means also includes ex parte

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communications between a party appraiser or neutral appraiser and one of the parties or attorneys. Attacks based on undue means have met with success if evidence provided to the court shows the failure of the neutral appraiser to grant a continuation for the purpose of the introduction of new evidence.

A party seeking to vacate an unfavorable award should carefully examine the adequacy of the disclosure statements. Again, as with other aspects of appraisal disputes, each case, including those involving vacating an award based on undue means, is decided on its facts.

From a practical perspective, almost everything in an appraisal will depend on the motive of the neutral appraiser. With retired judges, financial considerations should not be ignored. The likelihood that a retired judge will be called upon to serve as a neutral appraiser by an insurer in the future is far greater than the likelihood that the retired judge will be selected again by the insured or the insured's counsel. For that reason alone, a careful evaluation should be made of the proposed neutral appraiser before proceeding. It is unlikely that a party appraiser will be disqualified, and a neutral appraiser selected by the court is generally unknown to the parties. Therefore, uncertainty and unpredictability loom large in any appraisal.

To attack an award via a petition to vacate is difficult. The courts are loath to set aside any award without the clearest of evidence of fraud, corruption, or undue means. Confirmation of an award, however, generally occurs unless the facts are so egregious that the judge ruling on the petition to vacate cannot reconcile the conduct with the award. ■

2 Specifically, the legislation amends Ins. Code §§790.034 and 2071 and adds §§790.031, 2071.1, and 10082.3.
5 Id.
8 Guerbara v. Allstate, 237 F. 3d 992 (9th Cir. 2001).
12 Id.
13 See text, infra.
21 Louise Gardens v. Truck Ins. Exch., 84 Cal. App. 4th 648 (2000). In Louise Gardens, a dissatisfied insured lost an early attempt to disqualify a party appraiser, did not appeal, went to appraisal, and then filed a petition to confirm the appraisal in order to appeal from the earlier decision regarding disqualification. The court held that these procedural shenanigans amounted to a waiver of the insured's rights to object to the appointment and to vacate the award.
22 See id.
25 If an insurer first demands an appraisal and then tries to deny coverage through, for example, an action for declaratory relief, the result would require two proceedings.
28 Moshonov v. Wash, 22 Cal. 4th 771 (2000) (Even if a contract provides for an award of attorney's fees to the prevailing party, and a party prevails on the contract but the award fails to include attorney's fees, the award cannot be corrected to add the fees.).
Obtaining Government Records under the Public Records Act

By Jonathan H. Anschell

The aim of the law is broad disclosure, but it contains limitations and a catch-all provision

A motorist is stopped and handcuffed by the police. The motorist is then released and no charges are filed. Should the motorist be allowed to review police records regarding the detention? A parent whose children are attending a day care center wants to know whether the employees of the day care center have criminal histories. Should the parent be allowed to review the government records on the employees who are licensed by the state to work at the center? When a taxpayer-funded university sells high-priced luxury boxes at its stadium, does the public have a right to know who purchased them and how much they paid?

In 2001, California courts considered each of these questions regarding access by the public to government records. The resulting decisions reflect the tension between the public’s hunger for information and the government’s frequent claim of confidentiality. When asked to resolve this tension, the courts have ordered disclosure under circumstances in which a perceived public safety benefit or an issue of governmental accountability favored it. If disclosure was perceived as threatening public safety, disclosure was denied.

Public access to government records in California is governed by the California Public Records Act, which is codified at Government Code Sections 6250 through 6270. The PRA was modeled on a federal law, the Freedom of Information Act. In light of the PRA’s roots in FOIA, “federal legislative history and judicial construction of the FOIA may be used in construing the PRA.”

Section 6250 of the Government Code articulates a policy of broad disclosure underlying the PRA and provides that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” To implement that right, Section 6253 provides that “every person has a right to inspect any public record,” subject only to the express limitations contained elsewhere in the PRA. In practice, this provision is frequently invoked by news organizations, which have the same standing as individual citizens to seek government records.

The PRA identifies specific exemptions from disclosure, which one court described as “islands of privacy upon the broad seas of enforced disclosure.” Those protected categories include, among others, records regarding litigation to which a public agency is a party, personnel or medical records on agency employees, records concerning law enforcement investigations, and records that are protected from disclosure pursuant to other provisions of federal or state law, such as evidentiary privileges. Under general interpretive principles of the PRA, these exemptions are to be narrowly construed, with the burden placed on the government to demonstrate that a requested record falls within a protected category.

In addition to the express exemptions from disclosure, the PRA contains a “catch-all” exemption that permits a public agency to withhold its records from inspection when “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” Like the express exemptions of Section 6254, the courts have narrowly construed the catch-all exemption, placing the burden on the government agency opposing a PRA request to justify the need for non-disclosure.

The courts have applied the catch-all exemption to deny disclosure if production of the records could compromise the safety of police officers, government officials, or ordinary citizens. Examples of information that was held to be protected from disclosure include the identities of confidential law enforcement informants, the governor’s daily appointment schedule, the California Highway Patrol’s internal manuals regarding the safety and security of officers, and home address and telephone information of complainants regarding airport noise.

To request public records under the PRA, an interested party may write an informal letter to the agency holding the records in question. If that request is denied, the requesting party may seek a court order for disclosure of the records by filing a verified petition for declaratory or injunctive relief.

A prevailing plaintiff is entitled to an award of reasonable costs and attorney’s fees against the opposing public agency—and the agency, in turn, is entitled to an award of its reasonable costs and attorney’s fees if the plaintiff’s case is found to be “clearly frivolous.” Superior court decisions on petitions for public records are reviewable by petition for writ of mandate to the court of appeal under a de novo standard of review.

Law Enforcement

The PRA’s disclosure exemptions apply to a wide range of police records. Indeed, in 2001 the California Supreme Court in Haynie v. Superior Court reaffirmed the sphere of confidentiality for law enforcement. The Haynie case has its roots in an
incident that took place in July 1999, when a Los Angeles County sheriff’s deputy stopped a van moments after a citizen reported seeing three Asian teenagers carrying pistols and getting into a similar vehicle. Elgin Haynie, the 42-year-old African-American driver of the van stopped by the sheriff’s deputy, was handcuffed, questioned along with his three passengers, and then released. No charges were filed against Haynie or any of his companions. Haynie filed a tort claim with Los Angeles County and submitted a complaint to the Los Angeles County Sheriff’s Department alleging that he was injured while being questioned and required hospitalization for several days after his roadside detention.21

Haynie later submitted a public records request to the sheriff’s department seeking all documents related to his detention, including officers’ notes, witness statements, and other material containing information regarding the decision to detain Haynie. After the sheriff’s department refused to produce these records, Haynie filed a verified petition to compel their disclosure.24

The Los Angeles Superior Court denied Haynie’s petition, finding the records in question to be protected under the PRA’s exemption for records of law enforcement investigations.25 On appeal, Haynie argued that his detention was not an “investigation” within the meaning of Government Code Section 6254(f), because there was no real or concrete prospect of law enforcement proceedings against him at the time he was detained. The court of appeal agreed and issued a writ of mandate directing the superior court to vacate its denial of Haynie’s petition.26

The California Supreme Court reversed the court of appeal’s decision,27 holding that Section 6254(f)’s protection for records of law enforcement investigations extends beyond situations “where the likelihood of enforcement has ripened into something concrete and definite” and includes “everyday” and “routine” police activity.28 Handed down just three weeks after the September 11 attacks amid highly charged public sentiments regarding security and law enforcement, the Haynie opinion described a series of dangers that could arise from a limited view of the PRA’s exemption for records of law enforcement investigations:

- Limiting the section 6254(f) exemption...would expose to the public the very sensitive investigative stages of determining whether a crime has been committed or who has committed it....
- Complainants and other witnesses whose identities were disclosed might disappear or refuse to cooperate.
- Suspects, who would be alerted to the investigation, might flee or threaten witnesses. Citizens would be reluctant to report suspicious activity. Evidence might be destroyed.29

Alluding to another moment in history in which routine police activity took on national significance, the Haynie court observed that “[o]ne ‘third rate burglary,’ for example, ultimately topped a president.”30 This reference to the Watergate scandal is not without irony. President Richard Nixon was “toppled” not by police work alone but by a Washington Post investigation that ultimately linked the Watergate burglary to the Nixon administration—the sort of investigative reporting that could be curtailed by Haynie’s broad grant of confidentiality to police records.

While expanding the application of Section 6254(f) to include virtually all records of police activity, the Haynie court stopped short of abrogating the longstanding rule, articulated in Uribe v. Howie, that a public agency may not “shield a record from public disclosure regardless of its nature, simply by placing it in a file labeled ‘investigatory.’”31

Uribe arose from a PRA request for reports filed by farmers regarding their use of pesticides. The county agricultural commissioner from whom the records were requested resisted disclosure, arguing that the reports were compiled for law enforcement purposes. Rejecting this argument, the Uribe court held that the reference in Section 6254(f) to “investigatory or security files” applies only “when the prospect of enforcement proceedings is concrete and definite. It is not enough that an agency may label its file ‘investigatory’ and suggest that enforcement proceedings may be initiated at some unspecified future date or were previously considered.”32

Rather than revisit the issue the Uribe court considered, the supreme court in Haynie distinguished Uribe by pointing to the fact that Uribe interpreted Section 6254(f)’s reference to “investigatory or security files,” not its reference to “[r]ecords of investigations.”33 So while recognizing that Section 6254(f) does not protect all files remotely connected to law enforcement from disclosure under the PRA, the Haynie court cast a broad cloak of protection over documents generated by a law enforcement agency, such as police officers’ notes and reports regarding a traffic stop and detention. Still intact are the access rights granted by the court in Uribe, including third-party documents or public submissions that are not linked to a concrete and definite prospect of law enforcement proceedings.

Competing Interests

Although the disclosure policies and requirements set forth in the PRA grant no favor to public interests over private interests, application of the PRA reveals that disclosure is more likely to be compelled when the interest at stake is public and has an impact on an identifiable group. This practice is exemplified when an agency withholds information about an individual from a group representing a public interest.

In 2001, the court of appeal underscored this trend in a case involving government records of day care workers. Thousands of parents entrust their children to licensed day care facilities in California. As a result of a PRA request submitted in the fall of 2000, KCBS-TV in Los Angeles discovered that the California Department of Social Services (DSS) had licensed at least 8,700 convicted criminals to work in day care centers during a five-year period. Until the decision of the court of appeal in CBS Broadcasting Inc. v. Superior Court,34 the DSS refused to disclose the identities of those workers with criminal backgrounds. In contrast to the supreme court’s emphasis in Haynie on public safety to support denial of a PRA request, CBS Broadcasting illustrates that public safety concerns may, in appropriate cases, override a state agency’s claim of confidentiality.

CBS Broadcasting arose from a news investigation by KCBS-TV into the safety of California’s licensed child care facilities. As part of that investigation, CBS requested that the DSS provide a list of convicted criminals who were allowed to work in licensed day care centers between 1995 and 2000, as well as a list of the facilities that employed them. The DSS refused to disclose the names and day care center locations CBS requested, claiming that disclosure could lead the public to “mistakenly assume the worst about [a] child care provider” who “only has a conviction for a minor crime that happened years ago.”35 Instead, the DSS offered a description of the procedure it followed in evaluating the requests of convicted criminals for permission to work in child care facilities, as well as a summary of statistics regarding that evaluation process. Notably, the DSS conceded that it had granted permission to no fewer than 8,700 convicted criminals between 1995 and 2000 alone.36

The superior court denied CBS’s petition to compel disclosure of the requested information, citing concerns that news coverage might not include information that would ensure balanced reporting. Specifically, the court expressed the fear that the coverage may omit “the rehabilitative efforts that [an] individual had made” before applying for permission to work in a child care center despite a prior criminal conviction.37

The court of appeal reversed and directed the superior court to order disclosure of the lists CBS requested.38 The court ruled that the
lists were not “personnel, medical or similar files” protected from disclosure under Section 6254(c). The court also noted that information about a criminal conviction, and the identities of persons licensed to work in child care facilities, are matters of public record.30

In addition, the court ruled that the lists CBS requested did not constitute confidential information about criminal history that is protected from disclosure under the Penal Code40 and the PRA.41 Reiterating its observation that criminal convictions are matters of public record, the court distinguished the lists CBS sought from “privileged information, such as the date of birth of [an] individual, and his or her physical description.”42

Finally, the court rejected the contention by the DSS that the catch-all exemption justified withholding the information. The court explained that, to the extent an individual has any privacy interest in his or her criminal history, “he or she has subjected himself or herself to public review by virtue of applying for a license to work at, operate, or own a child care facility.” Although the fear that the requesting party might misuse the information being sought is not a recognized ground for denial of a PRA request, the DSS raised this specter to justify its position. In response, the court reiterated the rule that the purpose of a party requesting information under the PRA cannot be considered by a court evaluating the request.44

The Fifth Appellate District reached a similar conclusion in California State University v. Superior Court.45 That case emerged from a request by the Fresno Bee newspaper for records regarding the sale of luxury boxes at the Save Mart Center, a sports arena to be constructed at California State University at Fresno. The university denied the Bee’s request, claiming that “[d]onors expect that the University will keep their donations private,” and that disclosure of luxury box donors could cause the university to “lose the benefit of many donations.”46 The superior court granted the Bee’s petition to compel disclosure of the information about the Save Mart Center luxury boxes.

The court of appeal affirmed, holding that the catch-all exemption did not justify nondisclosure. First, the court emphasized the public interest in the information the Bee requested:

[Dis]closur allows the public to discern whether its resources have been spent for the benefit of the community or only a limited few. The public also should be able to determine whether any favoritism or advantage has been afforded certain individuals or entities...and whether any discriminatory treatment exists.47

The court then contrasted the public interest in disclosure with the university’s claim that disclosure would violate its donors’ privacy. Noting that “[t]he purchase of luxury suites is more akin to a commercial transaction” than to unconditional charitable donations, the court concluded that “the individuals who purchased luxury suites in the Save Mart Center, a public facility, entered into the public sphere. By doing so, they voluntarily diminished their own privacy interests.”48

Guidance for Practitioners

PRA requests and petitions may be required in many areas of legal practice, from civil litigation to labor and employment disputes to real estate matters. CBS Broadcasting and California State University both offer encouragement for counsel seeking information about conducting due diligence on the government and interactions between the government and the private sector. At the same time, the supreme court’s decision in Haynie sounds a distinctly more cautionary note to counsel seeking government records containing information that at least arguably pertains to law enforcement investigations.

Taken together, these PRA decisions offer lessons to the practitioner who is called upon to obtain government records. To withstand a government assertion that the information requested falls within the PRA’s exemptions, particularly in the law enforcement arena, a request for records should anticipate the most likely objections and, if feasible, refrain from seeking information that the PRA expressly delineates as confidential. CBS successfully employed this strategy in CBS Broadcasting by confining its request to the names and employers of convicted criminals working in licensed day care centers without requesting details of specific criminal histories or precondition information found in rap sheets.

Similarly, a PRA request should anticipate resistance on the basis of the catch-all exemption and be framed to defeat the assertion that the public interest served by nondisclosure outweighs any public interest in disclosure. Although a PRA request is not required to state the purpose or interest it serves, counsel should set forth in any request the broadest and most compelling interest that could be served by disclosure of the records in question. The requesting party should employ the same approach that the Fresno Bee successfully employed in California State University, which involved underscoring the degree to which businesses or persons whose names are contained in public records have voluntarily entered the public sphere and assumed the risk that their identities, and the nature of their dealings with the government, could be disclosed under the PRA.

3 GOV’T CODE §6250.
4 GOV’T CODE §6253(a). Section 6252 defines “state agency” to include every organ of state government except the legislature and judiciary, and defines “public record” as including “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state agency regardless of physical form or characteristics.”
6 GOV’T CODE §6254.
8 GOV’T CODE §6254(b).
9 GOV’T CODE §6254(c).
10 GOV’T CODE §6254(f).
11 GOV’T CODE §6254(k).
12 Fairley v. Superior Court, 66 Cal. App. 4th 1414, 1420 (1998) (“The general policy reflected in the PRA can only be accomplished by narrow construction of the statutory exemptions.”).
13 GOV’T CODE §6255.
15 American Civil Liberties Union v. Deukmejian, 32 Cal. 3d 440, 444 (1982).
18 City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1014 (1999).
19 GOV’T CODE §§6258, 6259.
20 GOV’T CODE §6259(d).
21 GOV’T CODE §6259(e).
24 Id.
25 Id. at 1066.
26 GOV’T CODE §6254(f).
27 Haynie, 26 Cal. 4th at 1064.
28 Id. at 1070-71.
29 Id.
30 Id.
31 Id. at 1070.
33 Id. at 212-13.
34 Haynie, 26 Cal. 4th at 1069.
36 Id. at 896.
37 Id.
38 Id. at 904.
39 Id. at 909 (citing City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1018 (1999)).
40 Id. at 907.
41 PENAL CODE §11142.
42 GOV’T CODE §6254(k).
43 CBS, 91 Cal. App. 4th at 907-08.
44 GOV’T CODE §6255.
45 CBS, 91 Cal. App. 4th at 909 (citing City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1018 (1999)).
47 Id. at 819.
48 Id. at 833.
49 Id.

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Questioning the Prompt Judicial Review Requirement

The prompt judicial review requirement undermines local authority

One of the important tasks traditionally performed by cities and other local government entities is regulation of free speech activities. Regulation ensures, for example, that use and enjoyment of public property is not hampered by disorderly street parades, excessively loud park concerts, or hazardously placed sidewalk newsracks. It also protects communities from adverse effects of free speech activity on private property, most notably the operation of adult entertainment businesses.

Unfortunately, local authority to regulate free speech activities has been jeopardized in recent years by a legal doctrine known as the prompt judicial review requirement. This legal doctrine mandates that entities of the government cannot require that parties obtain a permit before engaging in constitutionally protected expressive conduct—unless there is a guarantee of prompt judicial review of the permitting decisions. In the Ninth Circuit, the guarantee is not satisfied by simply affording prospective speakers access to the courts.

The review standard entails a higher standard—specifically, “a prompt hearing and a prompt decision by a judicial officer.” The prompt judicial review requirement has resulted in a phenomenon worthy of the absurdist logic of Alice in Wonderland. Some courts now routinely invalidate laws affecting free speech activity solely because those laws do not compel courts to render a decision quickly enough. Reconsideration of the prompt judicial review requirement is warranted to resolve a conflict among the circuit courts and to eliminate an infringement upon the legitimate regulatory prerogatives of local government.

The origins of the requirement can be traced back to the U.S. Supreme Court’s 1965 decision in Freedman v. Maryland. This case arose when a Baltimore theater owner opted to show the film Revenge at Daybreak without first submitting it to Maryland’s movie screening agency (which was unabashedly named the State Board of Censors). Maryland law assigned the censorship board with the duty of separating “moral and proper” films from those that were obscene or that were likely “to debase or corrupt morals or incite to crimes.” The theater owner contended that the requirement of submission to the board effectively barred exhibition of disapproved films without any judicial participation and therefore constituted an invalid prior restraint.

The Supreme Court overturned Maryland’s movie censorship regime. The majority opinion reasoned that a non-criminal government process for prescreening films passes constitutional muster only if three procedural safeguards are incorporated. First, the censor must bear the burden of proving that the movie is unprotected expression. Second, the censor must be obligated to choose within a specified brief period between issuing a license or going to court to restrain showing of the film. Lastly, to minimize the deterrent effect of an interim license denial that might be erroneous, the procedure must assure “a prompt final judicial decision.”

For a time after Freedman, movie censorship remained the target when the Supreme Court applied the decision’s safeguards. For example, three years following the decision, the Court struck down Chicago’s motion picture censorship ordinance due to the protracted administrative process that took 50 to 57 days before the onset of judicial proceedings, and the “absence of any provision for a prompt judicial decision by the...
trial court.” Months later, the Court noted in dicta that a Dallas motion picture classification ordinance assured a “prompt final judicial decision” by guaranteeing that a trial judgment would occur within nine days of the city’s determination whether a film was “suitable for young persons.”

**Going Beyond Movies**

In short order, however, the Supreme Court applied the test established in *Freedman* to free speech regulations not relating to films. In *Blount v. Rizzi,* the Court ruled that the safeguards established in *Freedman* were lacking in the Postal Reorganization Act provisions that allowed the Postmaster General to halt use of the mails and postal money orders for commerce in obscene materials. Significantly, the Court characterized the *Freedman* decision as requiring “prompt judicial review,” which it described as “a final judicial determination on the merits within a specified brief period.” In *United States v. Thirty-Seven Photographs,* the Court applied *Freedman* by affixing time limits to Tariff Act provisions that authorized customs agents to seize obscene materials at the border. Finally, in *Southeastern Promotions, Ltd. v. Conrad,* the Court used *Freedman* to find a prior restraint in the Chattanooga Memorial Auditorium’s rejection, on grounds of obscenity, of a production of the musical *Hair.* Once again, the Court described *Freedman* as requiring “a prompt final judicial determination.”

In this way, the prompt judicial review requirement expanded from a safeguard against movie censorship to a test applied in challenges to the suppression, without judicial participation, of allegedly obscene speech. A further expansion, however, occurred in 1990.

**A Further Expansion**

The prompt judicial review requirement reached full fruition 25 years after *Freedman.* In *FW/PBS, Inc. v. Dallas,* a divided Supreme Court applied the *Freedman* safeguards to licensing laws affecting businesses engaged in free speech activity. *FW/PBS* concerned the validity of a Dallas ordinance regulating the operation of sexually oriented businesses. The licensing component of the ordinance obligated such enterprises to obtain from the chief of police an annual permit that would be issued only after health, fire, and building department inspections. While the ordinance prescribed a 30-day period for processing permit applications, it also forbade approval if the inspections had not been conducted, and it set no deadline for the completion of the inspections.

By a 6-3 vote, the Supreme Court held the Dallas licensing scheme to be an unconstitutional prior restraint. A majority could not agree, however, on the extent to which the *Freedman* safeguards should apply in the licensing context. Justices O’Connor, Stevens, and Kennedy concluded that only two of the three safeguards were warranted, because the subject ordinance did not present the dangers of a censorship system. They deemed it unnecessary for Dallas to bear the burden of going to court to effect a permit denial or to bear the burden of proof once in court. In contrast, Justices Brennan, Marshall, and Blackmun reasoned that all the safeguards were indispensable to protect speech adequately. The three dissenters (Chief Justice Rehnquist and Justices White and Scalia) objected to the application of any of the safeguards.

Following *FW/PBS,* lower courts have applied a truncated version of *Freedman* scrutiny to a variety of local government regulations that impose some form of permit requirement on free speech activity. The case law is replete with examples involving the licensing of adult entertainment businesses. Yet the criteria also have been utilized to evaluate the enforceability of restrictions governing expressive conduct on public property in situations involving political rallies in parks, newsstands on sidewalks, and religious proselytizing in subway stations.

The significance of *FW/PBS* stems only in part from its extension of the *Freedman* safeguards to a situation that did not involve the potential suppression, without judicial participation, of allegedly obscene speech. Equally important is that the decision formally established the requirement of prompt judicial review.

O’Connor’s plurality opinion in *FW/PBS* studiously avoids directly quoting the judicial review element of the *Freedman* safeguards. *Freedman* had demanded that Maryland’s movie censorship statute provide for “a prompt final judicial decision.” In contrast, O’Connor’s *FW/PBS* opinion describes *Freedman* as necessitating “expeditious judicial review.” Next, the opinion characterizes the safeguard as “the possibility of prompt judicial review in the event the license is erroneously denied.” The opinion then faults the Dallas ordinance for failing to provide “an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial.” Lastly, the opinion concludes that “the availability of prompt judicial review,” in conjunction with time limits on permitting decisions, is sufficient to protect free speech in the licensing context. The redundancy of these statements strongly suggests that O’Connor intended to redefine the judicial review component of *Freedman.* Unfortunately, the ambiguity of her language has confused lower courts trying to decide whether the redefinition is substantive or limited to nomenclature.

**Ninth Circuit Decisions**

The Ninth Circuit addressed the meaning of the prompt judicial review requirement in three cases: *Baby Tam I,* *Baby Tam II,* and *Baby Tam III.* The litigation concerned enforcement of an adult bookstore licensing ordinance in Las Vegas against a store known as Hot Stuff. The city’s ordinance expressly advised unsuccessful license applicants that mandamus review could be sought in state court. At the time the litigation began, however, Nevada law did not impose a deadline for a judicial hearing to be held or for a decision to be rendered.

In *Baby Tam I,* the Ninth Circuit invalidated the Las Vegas ordinance for not satisfying the prompt judicial review requirement. The court held that the ordinance did not ensure “a prompt hearing and a prompt decision by a judicial officer.” The court remanded the case with instructions that Las Vegas be enjoined from denying a license for Hot Stuff at its existing location. This decision is remarkable both for its failure to acknowledge the city’s lack of jurisdiction over state courts and for its authorization to Hot Stuff to operate at a location where adult bookstores were prohibited by the city’s zoning ordinance.

In *Baby Tam II,* the Ninth Circuit held that the prompt judicial review requirement had been satisfied. The about-face on the prompt judicial review issue, which still did not save the Las Vegas ordinance, reflected the enactment of a variety of legislative amendments following *Baby Tam I.* Specifically, Las Vegas had revised the ordinance to provide for issuance of a temporary bookstore license in the event a court decision had not been rendered within 30 days of the filing of a petition. Additionally, both the Nevada legislature and the local judicial district court had created an expedited process for judicial review of claims involving prior restraint allegations. The fatal defect for Las Vegas this time was that the ordinance allowed indefinite postponement of decisions on license applications.

After the travails of *Baby Tam I* and *Baby Tam II,* the Ninth Circuit upheld the Las Vegas ordinance in *Baby Tam III.* This decision was noteworthy because the Hot Stuff proprietors raised the novel argument that, notwithstanding *Baby Tam II,* the prompt judicial review requirement remained unsatisfied due to the lack of a guarantee of an expedited hearing in federal court. In response to this suggestion, the Ninth Circuit tersely answered that there is “no constitu-
tional requirement of prompt judicial review by both court systems. 27

Seven other circuit courts have considered the meaning of the prompt judicial review requirement in the wake of FW/PBS. Only two of them concur with the Ninth Circuit’s position that the requirement demands a decision by a judicial officer. 28 The remainder instead have ruled that the requirement is satisfied by access to the courts. 29 These other circuits have acknowledged that, while the prompt judicial determination principle is meritorious in the context of obscenity suppression, it is not an appropriate constitutional imperative in other settings.

The evolution of the prompt judicial review requirement from Freedman to FW/PBS produced the current situation in which some courts will invalidate laws affecting free speech activity solely because the laws do not compel courts to render a decision quickly enough. This outcome was predictable, given the combination of the extension of the judicial review safeguard to the licensing context and the ambiguousness of O’Connor’s redefinition of the safeguard. The outcome was not inevitable, however, as demonstrated by the many circuit courts that have interpreted the requirement as calling for access rather than a decision.

The consequences of the prompt judicial review doctrine can be dire when the requirement is deemed to necessitate a court decision. Even though there may be legitimate content-neutral reasons for denying a permit for a particular free speech activity, a local government entity may have no alternative but approval. Consider, for example, this suggestion by the Fourth Circuit: “[T]he County could avoid the constitutional problem engendered by its present scheme by permitting adult bookstores to operate until a judicial determination is rendered affirming a denial of a special permit.” 30 Such a solution effectively negates the longstanding authority of local government, acting in the public interest, to regulate free speech activity.

California cities and local governments might be able to escape this predicament by relying on Code of Civil Procedure Section 1094.8 to rebut prompt judicial review challenges. Enacted in 1999, that statute creates an expedited procedure for mandamus review of claims involving permits for free speech activity. Whether or not the procedure satisfies the prompt judicial review requirement remains an open question, however.

Fortunately, the Supreme Court has already begun the process of reconsidering the prompt judicial review requirement. In Thomas v. Chicago Park District, 31 the court unanimously held that the requirement is
inapplicable to regulations governing the use of a public forum such as a permit prerequisite for large-scale events in a park. This ruling allowed the court once again to avoid resolving the circuit court split on the meaning of the requirement. Still, the fact that in Thomas the court describes the Freedman safeguards as “extraordinary” is cause for hope that it will soon narrow the reach of the doctrine.

7. Id. at 52 n.2.
8. Id. at 59.
12. Id. at 417.
15. Id. at 560.
17. See, e.g., Nightclubs, Inc. v. City of Paducah, 202 F. 3d 884 (6th Cir. 2000); Boss Capital, Inc. v. City of Casselberry, 187 F. 3d 1251 (11th Cir. 1999); 4805 Convoy, Inc. v. City of San Diego, 183 F. 3d 1108 (9th Cir. 1999); 11126 Baltimore v. Prince George’s County, 58 F. 3d 988 (4th Cir. 1995); Grand Brittain, Inc. v. City of Amarillo, 27 F. 3d 1068 (5th Cir. 1994).
22. Id. at 228.
23. Id. at 229.
24. Id. at 230.
27. Baby Tam III, 247 F. 3d at 1007.
28. See Nightclubs, Inc. v. City of Paducah, 202 F. 3d 884 (6th Cir. 2000); 11126 Baltimore v. Prince George’s County, 58 F. 3d 988 (4th Cir. 1995); East Brooks Books, Inc. v. City of Memphis, 48 F. 3d 229 (6th Cir. 1995).
29. Boss Capital, Inc. v. City of Casselberry, 187 F. 3d 1251 (11th Cir. 1999); Beal v. Stern, 184 F. 3d 117 (2d Cir. 1999); Grand Brittain, Inc. v. City of Amarillo, 27 F. 3d 1068 (5th Cir. 1994); TK’s Video, Inc. v. Denton County, 24 F. 3d 705 (5th Cir. 1994); Graff v. City of Chicago, 9 F. 3d 1309 (7th Cir. 1993); Jews for Jesus, Inc. v. MBTA, 984 F. 2d 1319 (1st Cir. 1993).
30. 11126 Baltimore, 58 F. 3d at 1001 n.18. See also 4805 Convoy, Inc. v. City of San Diego, 183 F. 3d 1108, 1185 (9th Cir. 1999); Nightclubs, Inc., 202 F. 3d at 894. Thomas v. Chicago Park Dist., 122 S. Ct. 775 (2002).
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Two Rehnquists

In a recently discovered manuscript, Stanley Mosk offers some provocative observations about William Rehnquist the jurist.

Among my father’s papers to be deposited in the archives of the Library of the California Supreme Court, I found an unpublished paper he delivered at a symposium on September 17, 1998, at the University of Tulsa Law School, an institution he often visited because of his warm relationship with its dean, Morton Belsky. (See M. Belsky, ed., The Rehnquist Court: A Retrospective.) My father, widely regarded as a “liberal,” was on good terms with Chief Justice Rehnquist—indeed, he had provided welcome support to the very conservative justice during his contentious confirmation proceeding to become chief justice. He did so because he liked Justice Rehnquist and admired his intellect. This paper was delivered before Gore v. Bush, 531 U.S. 98 (2000), a decision my father found regrettable. However, my father’s respect and friendship would not have been diminished by even the most divergent views. Part of my father’s success was due to his ability to like and be liked by those with whom he disagreed. There is a lesson there for all of us.—Justice Richard M. Mosk

Chief Justice Rehnquist and I may come from different poles in the political spectrum, but let me begin by revealing the great respect I have for him as a person, as the leader of the Supreme Court, and as a devotee of relative consistency in the judicial process. Knowledge of precedent and the High Court’s direction, whether deemed right or wrong, are of inestimable importance to those in the state trenches.

I also express admiration for the dignity with which Chief Justice Rehnquist directs the court and leads his colleagues. He obviously believes in the American judicial system and what it does for society.

I have personal appreciation for the chief justice as a result of a recent incident. I had been invited to a constitutional conference at the University of Hong Kong, precisely one month prior to the Chinese takeover. I thought of my father, who was a judge of the California Supreme Court, and a great admirer of American democracy. It occurred to me that a message of encouragement from the head of the judiciary in the world’s greatest democracy would be of some relevance. I was sur-

Dennis Irwin

Justice Stanley Mosk was a justice of the California Supreme Court from 1964 to 2001. On June 10, 2002, the Los Angeles County Civil Courthouse was renamed the Stanley Mosk Courthouse in his memory.
prised; all it took was a simple request. The chief justice responded with a thoughtful message to the judges gathered from throughout the world. It was sent to me and I had the opportunity to read it to the assembled delegates in Hong Kong.

That is rather typical of Chief Justice Rehnquist. He makes himself available to take any reasonable steps to further respect for the law and democratic institutions. In his message to the delegates at the constitutional conference in Hong Kong, Chief Justice Rehnquist expressed his views on the origin of the American structure. Here is part of what he told the judges and academics assembled in Hong Kong:

[Constitutional transition] is a subject that not only is interesting from an historical perspective, but also is important from a contemporary point of view. Few periods of American history are as inherently exciting as the founding era. Living during a time of fundamental change and revolution, the framers of the new American Constitution had to examine critically many traditional assumptions and convictions as well as many new untested ideas and theories. Out of this ferment, two unique institutions were born: an independent executive branch of government that is not responsible to the legislative branch and an independent judiciary with the authority to declare laws passed by the legislative branch unconstitutional. The first of these unique institutions—and the notion that the chief executive officer should not be responsible to the legislature—has not been widely copied by other nations. The second, however, has fared very differently.

Since the end of World War II, many countries around the world that have undergone a period of constitutional transition have decided to empower an independent judiciary with the authority to interpret a written constitution. The reasons underlying why so many of these countries have made independent judiciaries a part of their future are a fascinating topic for study and discussion.

He concluded by urging that study and discussion by the Hong Kong participants. I can tell you that such analysis did occur. Of course, what the ultimate effect will be on the future Hong Kong remains unpredictable.

Let me now return to the more mundane aspects of the chief justiceship. I must be candid. I believe there is the good Rehnquist, one who recognizes states’ rights and true federalism. And there is the bad Rehnquist, one who takes a narrow view of individual rights in the criminal law setting. Let me elaborate on the good and the bad, or, to be more delicate, the plus and the minus. Or the yes and the no.

In a 1996 Indiana Law Review article, Laura Ray wrote of William Rehnquist’s judicial philosophy:

The hallmark of Rehnquist’s opinions is their air of certainty, their conviction that the result he endorses is not only correct but inevitable. Other Justices have at times expressed publicly their private anguish at finding that their judicial principles compel a result at variance with their personal convictions: Justice Frankfurter voting to uphold the school board’s right to compel the children’s flag salute in West Virginia State Board of Education v. Barnette despite his membership in “the most vilified and persecuted minority in history,” or Justice Kennedy voting to strike down an unconstitutional state flag burning statute despite his keen sense that this case, like others before us from time to time, exacts its personal toll. Rehnquist’s opinions are unmarked by such inner tensions…

One consequence of Rehnquist’s philosophy is the predictability of his votes…Rehnquist scholars have attributed his consistency to a core of governing principles that are applied with regularity. In a seminal article that reviewed Rehnquist’s first four terms on the Court, David Shapiro identified three such principles: resolution of conflicts between an individual and the government in favor of the government; resolution of conflicts between state and federal authority in favor of the state; and resolution of questions of federal jurisdiction against the exercise of that jurisdiction. Although subsequent scholars have defined these governing principles in slightly different ways, the point has been made with Rehnquistian regularity that the body of Rehnquist’s opinions holds few surprises for the experienced reader of his work. I agree with Laura Ray. But she does recognize that Justice Rehnquist’s opinions do contain occasional surprises, and I am going to mention one of them today.

The Predictable Rehnquist

First, we have the predictable Rehnquist—the one who resolves conflicts between an individual and the government in favor of the government. A prime example is Arizona v. Fulminante (1991). In Fulminante, Justice Rehnquist declared that appellate courts are to review for harmless error the improper presentation to the jury of a defendant’s coerced and involuntary confession.

This decision has been deplored by legal scholars and editorial writers alike, and for good reason. Harvard Law Professor Charles Ogletree, Jr., said: “[T]he practical effect of Fulminante is that an accused is no longer constitutionally guaranteed a trial free from a coerced confession. After Fulminante, an accused may be convicted of a crime by a jury that has heard a coerced confession, as long as an appellate court find[s] its admission harmless. This is an affront not only to the jury, but also to the notion of justice.”

In an article in the American Journal of Criminal Law, Hedieh Nasheri and Victor DeMarco collected some of these views on the Fulminante decision. They wrote:

La[ure]nce Tribe finds it to be “very dismaying.” Jeffrey Weiner of the National Association of Criminal Defense Lawyers labels it an “abomination.” He argues that, notwithstanding that the standard of coercion may have been lowered, the Supreme Court is sending a negative message to all actors involved in the criminal justice system. To the police, the Supreme Court sends the message that it may, under the right circumstances, overlook a confession that has been coerced from a suspect. This may give the police “an incentive to pressure, threaten, or even beat a confession out of a prisoner.”

Fulminante may also lead police to view the coerced confession as a way to announce that they have “cleared” another crime, one of its most dangerous results thus being that the
police will de-emphasize the value of hard evidence. This potential raises the concern expressed by Charles Peterson, a one time New York City police official: “When you rely on oral statements or jailhouse confessions over a period of time, your investigative skills atrophy. You lose the other skills.” Yale Kamisar suggests that Fulminante will encourage prosecutors to gamble by using coerced confessions to clinch good cases.

[Finally,] Fulminante saddles the trial courts with the added burden of having to decide such issues as whether they can proceed with trial once a coerced confession has reared its head. Fulminante will similarly affect appellate courts. The new coerced confession standard will force the judges to “undertake complex, hot-sensitive assessments of often extended trial transcripts to determine how harmful the confession was.” These difficulties make the warning of Steven Shapiro, associate legal director of the American Civil Liberties Union, all the more salient: “Even with a dozen eyewitnesses, you can never, never be sure that the presence of the coerced [confession] did not play a pivotal role in the conviction, [because] of its emotional impact.” As a way out, appellate courts may “all too easily slide[] into a decision to affirm a conviction simply because the judges themselves think it was right on the facts.”

Fulminante may cause courts and juries alike to disregard or minimize the importance of a confession’s provenance. As Jana J. Green’s student comment in the Oklahoma City University Law Review explained:20

Under early common law, a confession was admissible during trial without question. Surprisingly, even a confession obtained by torture was not excluded. In the middle of the eighteenth century, English trial judges began restricting the admissibility of confessions. The formal rule appears to have been first stated by Justice Nares in The King v. Warickehall,11 which is an English decision from 1783: “A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so question

of its fruits would make a fair trial impossible. Retrials without the tainted evidence were automatic.”12

Instead, the New York Times continued, “[P]olice, prosecutors and trial judges are now invited to search for rationales for obtaining and using them in the hope that judges will manage to find the trial fair anyway. That’s harm enough, but the greater and more lasting harm is to the high court’s reputation for delivering justice.”

I suspect that my feelings about Fulminante are by now quite clear. In People v. Cahill,14 a 1993 case in which a majority of the California Supreme Court followed Fulminante under our state constitution, I dissented. I wrote, “It has been said that fundamental truth is the first casualty of war. Now a fundamental principle of justice has become a casualty of the synthetic war on crime.” I adhere to that view.15

The popular view is that confessions are rarely extracted by third-degree methods in the modern era. Let us hope so. In a recent case, People v. Jones,16 in which I discussed the corpus delicti rule, I quoted a venerable treatise: “If confessions could prove a crime beyond doubt, no act which was ever punished criminally would be better established than witchcraft; and the judicial executions which have been justified by such confessions ought to constitute a solemn warning against the too ready reliance upon confessions as proof of guilt in any case.”17

Despite Fulminante, there is a better side to Justice Rehnquist, and judging from the law reviews I have perused in preparing this talk, it seems to be somewhat overlooked.

The Surprising Rehnquist

An extremely difficult problem arises in the judicial system when two rather simple basic rights appear to collide and the judiciary must choose between them. Take a rather commonly occurring conflict: A group or an individual seeks to pass out leaflets or to obtain signatures on a petition at a commercial shopping center. The shopping center proprietor orders the solicitors to leave his property. His philosophy is, simply, “shut up and shop.”

Whose rather basic right is to prevail: the individual’s or the shopping center owner’s? In Diamond v. Bland,16 a case before our court in 1974, we decided in favor of the petition circulator, so long as he did not interfere with normal business operations. The shopping center sought certiorari and it was denied. Thus we were confident that our conclusion was correct, even though two years earlier, in Lloyd v. Tanner,18 the U.S. Supreme Court had reached a conclusion contrary to ours in Diamond v. Bland.

The problem would not disappear. It arose
again in California in the case of Pruneyard Shopping Center v. Robins. 29 We again rather cold-bloodedly indicated we would not follow the Supreme Court’s lead in Lloyd v. Tanner and would instead decide the matter under what we perceived to be state law. Cer-tiorari was granted in Pruneyard, and I must tell you that we sensed doom to our California theory of states’ rights. We were pleasantly surprised.

The basic question in Pruneyard was whether our state court could interpret the California Constitution as providing a right to exercise free speech on the premises of a private shopping mall. In his decision, Justice Rehnquist reaffirmed the principle that state high courts may interpret their own constitutions to confer greater individual freedoms than the federal constitution would permit. Citing the Lloyd v. Tanner case that involved an Oregon mall, he noted that the First Amendment did not create such a right. But he wrote:

Our reasoning in Lloyd, however, does not...limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. In Lloyd,...there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court here. It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. 31

It is interesting to note that subsequently, in 1989, the Oregon Supreme Court relied on the Pruneyard decision to hold that the Lloyd Center in Portland—the very shopping center at issue in Lloyd v. Tanner, which held there was no federal constitutional right to engage in free-speech activity—must permit signature-gathering for an initiative under two provisions of the Oregon Constitution, subject to reasonable time, place, and manner restrictions.

Similarly, the New Jersey Supreme Court relied significantly on the Pruneyard decision in deciding a free speech case under that state’s constitution. The court wrote, “Defendant asserts that under the State Constitution he is afforded protection of his expressive rights even if it is not clear that the First Amendment would serve to grant that protection. The United States Supreme Court has recently acknowledged in the most clear and unmistakable terms that a state’s organic and general law can independently furnish a basis for protecting individual rights of speech and assembly. [Citing Pruneyard.] The view that state constitutions exist as a cognate source of individual freedoms and that state constitutional guarantees of these rights may indeed surpass the guarantees of the federal Constitution has received frequent judicial expression.” 32

In reaching this decision, the New Jersey Supreme Court quoted an opinion I authored in 1975 for the California Supreme Court in People v. Brisendine. 33 In Brisendine, I wrote, “It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.” 34

Unfortunately, a recent opinion reveals that Justice Rehnquist does not defer to state court interpretations of their own constitutions as much as I would prefer. In a 1996 case, Ohio v. Robinette, he wrote that a deputy who stopped a driver for speeding but decided not to cite him could nevertheless ask to search the car for drugs. Drugs were found and the driver arrested. His opinion reaffirmed another 1996 case, written by Justice Scalia, that permits an officer, who sees only a traffic violation, to search for drugs, even if the traffic stop is a pretext for the search. (I don’t how about Oklahoma, but in California that means about 95 percent of drivers are subject to search at any time!) Worse yet, he brushed aside the Ohio Supreme Court’s opinion, which held that the Ohio Constitution forbade this practice. 35

It was left to Justice Ginsburg, in a concurrence, to make these two points. First, she noted:

Formerly, the Ohio Supreme Court was “reluctant to use the Ohio Constitution to extend greater protection to the rights and civil liberties of Ohio citizens” and had usually not taken advantage of opportunities to “us[e] the Ohio Constitution as an independent source of constitutional rights.” Recently, however, the state high court declared: “The Ohio Constitution is a document of independent force... As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.” 36

One Ohio appellate court noted: “[H]undreds, and perhaps thousands of Ohio citizens are being routinely delayed in their travels and asked to relinquish to uniformed police officers their right to privacy in their automobiles and luggage, sometimes for no better reason than to provide an officer the opportunity to practice his drug interdiction technique.” Against this background, the Ohio Supreme Court determined, and announced in Robinette’s case, that the federal and state constitutional rights of Ohio citizens to be secure in their persons and property called for the protection of a clear-cut instruction to the State’s police officers: An officer wishing to engage in consensual interrogation of a motorist at the conclusion of a traffic stop must first tell the motorist that he or she is free to go. 28

There are numerous commentators who are critical of Justice Rehnquist and his consistent support for states’ rights when those rights conflict with federal limitations. In my view, however, that principle of his is a plus, not a minus. Take the matter of jury selection and the exercise of peremptory challenges to prospective jurors. I recall cases during my days as a trial judge in which there would be a black defendant, a white prosecutor, and white witnesses. The prosecutor would exercise peremptory challenges to any black called into the jury box. He would make certain that the black defendant would be tried by an all-white jury.

As the trial judge, I was appalled by that practice. But I could do nothing about it because the U.S. Supreme Court held in Swain v. Alabama27 that there could be no limitations whatsoever on the exercise of peremptory challenges. When I came to the state supreme court I had the opportunity, with the help of my colleagues, to produce People v. Wheeler, 30 in which we held that despite Swain, we would not permit peremptory challenges to be exercised for a racially discriminatory purpose. We outlined the procedure for trial courts to follow when it appears that race is the only factor causing challenges to be exercised.

Eight years later the Supreme Court followed our lead in Batson v. Kentucky. 31 I can tell you that we felt understandable pride in reaching a rational conclusion on a subject some years prior to the High Court adopting a comparable rule. That, I suggest, is the value of states’ rights and their ability to grant to their citizens more, or different, rights than are required under federal law. However, I would probably part company with those who have expressed occasional approval of
states' ability to provide their citizens with fewer than federal rights.

State Constitutionalism

I must concede that state constitutionalism is a relatively new phenomenon. It grew in scope in the 1970s as the U.S. Supreme Court retreated somewhat from the Warren-era protection of individual rights.

The role of state constitutionalism is neither simple nor fully recognized. When Justice Souter was on the Supreme Court of New Hampshire, he wrote:

It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a mere row of shadow; if we place too little, we will render State practice incoherent. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.32

Injection of religion into the public schools often provokes such a federal-state conflict. Our court had that very problem in Sands v. Morongo Unified School District,33 a case involving prayers at a high school graduation ceremony. The result was five separate opinions, all agreeing that religion has no proper place in public schools. But we could not decide definitively whether that represents a strictly federal issue or a state constitutional problem. Needless to add, I opted for the latter.

Chief Judge Judith Kaye of the New York Court of Appeals has been a staunch defender of state constitutionalism. In People v. Scott,34 she clearly expressed her belief in the right, indeed the duty, of state justices to rely on their state constitution. She wrote:

Time and again in recent years, the Supreme Court as well as its individual Justices have reminded State courts not merely of their right but also of their responsibility to interpret their own Constitutions, and where in the State courts' view those provisions afford greater safeguards than the Supreme Court would find, to make plain the State decisional ground so as to avoid unnecessary Supreme Court review. The Supreme Court is not insulted when we do so.
The president recognized the role of the states in our federalist system of government. In the Executive Order of Federalism, President Clinton proclaimed, on May 14, 1998, (for whatever value an executive order has) the following: 

(d) The people of [the] States are at liberty, subjected only to the limitations in the Constitution itself or in Federal law, to define the moral, political, and legal character of their lives.

(e) Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. States and local governments are often uniquely situated to discern the sentiments of the people and to govern accordingly.

(f) Effective public policy is often achieved when there is competition among the several states in the fashioning of different approaches to public policy issues. The search for enlightened public policy is often furthered when individual States and local governments are free to experiment with a variety of approaches to public issues. Uniform, national approaches to public policy problems can inhibit the creation of effective solutions to those problems.

Finally, I note that in cases too numerous to enumerate here, Justice Rehnquist has opted for judicial restraint. As a general proposition that concept appears desirable. Whether that is always desirable or is subject to criticism depends upon one’s personal, or perhaps political, point of view and one’s interpretation of judicial restraint. Time, history, and future events may give us appropriate answers. I hope so.

1 Justice Stanley Mosk, Speech at the Constitutional Developmental Hong Kong 1997: Global Perspectives Conference (May 29 to Jun. 1, 1997).


5 Ray, supra note 3, at 568-69.


14 Id. at 511.


16 Id. at 324 (quoting Cooley, CONSTITUTIONAL LIMITATIONS 653-54).


20 Id. at 75.


24 Id. at 550.


26 Id. at 43.

27 Id. at 40-41.


Despite the increased media and judicial attention paid to sexual harassment over the last decade and the growing recognition that California employers may be held strictly liable for abusive behavior by their employees holding leadership positions, claims of sexual harassment due to a hostile work environment are at an all-time high. These claims are based on the conduct of power holders and coworkers alike. Newspapers still contain headlines announcing the latest sexual harassment verdict. Reading past the headlines, it is clear that liability frequently results from an employer’s failure to take immediate and appropriate corrective action over months or years.

A trio of sexual harassment cases decided in 1998 by the U.S. Supreme Court—Ellerth v. Burlington Industries, Inc., Faragher v. City of Boca Raton, and Oncale v. Sundowner Offshore Services, Inc.—underscore the continuing significance of this area of the law. The Supreme Court addressed a wide range of issues in these cases. Moreover, California employment law specialists are acutely aware of the broad bases under state law for imposing vicarious liability on employers when their supervisors or employees harass others’ and personal liability on the individual harassers themselves. While federal cases brought under Title VII of the Civil Rights Act of 1964 are limited to employers with 15 or more employees, even very small employers are within the reach of the California Fair Employment and Housing Act. Unlike Title VII, the FEHA explicitly mentions harassment as an unlawful employment practice, and while the FEHA generally defines “employer” as a person who regularly employs five or more people, the harassment standards apply to organizations with a single employee.

Law offices as employers have not escaped

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the rise in harassment complaints. In fact, sexual harassment and retaliation in the law office, and the increased willingness of employees to sue a law firm and individual harassers within the firm, are matters of growing concern.13

Significant exposure for sexual harassment occurs more often from the employer’s response to a complaint than from the behavior that triggers the protest. It is not so much the underlying behaviors, such as those that involve unwelcome physical, verbal, or visual conduct of a sexual nature, that create significant damage awards. Many of these behaviors, particularly jokes, innuendo, and graphic e-mail, occur in workplaces every day.14 Most employees confronted with offensive behavior in the workplace do not immediately file formal complaints, unless and until the situation becomes untenable.15 Rather, it is the way management handles the issue, or fails to deal with a complaint, that subjects an employer to far greater legal exposure. The employer’s legal responsibility to conduct an immediate investigation and then to take prompt and appropriate corrective action is the focus of most sexual harassment cases.16

In KellyZurian v. Wohl Shoe Company,17 for example, a trial judge found an employer accountable for its supervisor’s pattern of harassment. The California Court of Appeal was especially critical of a senior manager who, in response to the employee’s initial complaint of sexual harassment, insisted that she confront the harasser directly before invoking the company’s complaint process. This failure to treat the employee’s complaint seriously constituted independent grounds for liability.

Likewise, in Weeks v. Baker & McKenzie,18 the jury returned a verdict of $7.1 million in favor of a secretary in a law firm who was subjected to a sexually hostile environment for less than 70 days. The significant punitive damages awarded in Weeks were based on evidence that the firm had ignored complaints about the same offender for several years. In upholding more than $3.5 million of the original award, the trial judge found the firm failed to meet its legal obligation to take immediate and appropriate corrective action to stop the offending behavior. Had the firm done so, new employees such as the plaintiff in Weeks would not have been confronted with a legally hostile work environment.

Case after case upholding employer liability for sexual harassment emphasize three common violations:
- The absence of separate sexual harassment policies and accessible reporting procedures.19
- Inconsistent or ineffective enforcement of existing policies and procedures.20
- Inappropriate reactions to formal and informal complaints. These reactions include failing to treat the complaint seriously,21 discouraging the offended employee from coming forward,22 threatening or abusive behavior, or acts of retaliation.23

Plaintiffs can sue for both compensatory and punitive damages. However, the purpose of workplace harassment laws is neither to compensate victims nor to punish offenders. These are by-products of the legal system and secondary to what should be the primary objective: to stop the offending behavior and maintain a harassment-free work environment.24 The U.S. Supreme Court focused on prevention in Ellerth:

Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer’s effort to create such procedures, it would effect Congress’ intention to promote conciliation rather than litigation in the Title VII context….To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe and pervasive, it would also serve Title VII’s deterrent purpose.25

Taking legal action beyond the employer’s internal complaint process should be reserved for situations in which the employer cannot—or will not—abide by legal obligations to address workplace harassment. Accordingly, both federal and California courts will continue to scrutinize the efforts of employers to maintain a harassment-free environment and their internal responses to complaints.

In every sexual harassment case, there are two basic issues. First, did any form of sexual harassment occur? Second, if sexual harassment is proven, who may be held liable? If the harasser is a supervisor, and the harassment results in “tangible job action”26 to the detriment of the victim of the harassment, the employer will be automatically liable under the theory of vicarious liability. If there is harassment but no tangible job action, the employer may be able to establish an affirmative defense.

**Defining Sexual Harassment**

The Equal Employment Opportunity Commission (EEOC), the federal agency that enforces Title VII of the 1964 Federal Civil Rights Act,27 defines sexual harassment as: Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment,
2. submission to or rejection of such conduct is used as the basis for employment decisions affecting such individuals, or
3. such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.28

Sexual harassment is not confined to female victims. Men have brought charges of sexual harassment in increasing numbers when they are faced with hostile or offensive sexual behavior.29 The number of sexual harassment complaints filed by men with the EEOC quadrupled in the last decade, and in the year 2000, they accounted for 13.6 percent of all sexual harassment complaints filed with the federal agency.30

In California, the FEHA expressly outlaws harassment “because of sex, [which] includes sexual harassment.....”31 Employees most often file their complaints with the California Department of Fair Employment and Housing (DFEH), which investigates complaints of conduct that, whether intentional or unintentional, violates the FEHA's...
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prohibition against harassment.32

Conditional or quid pro quo harassment is the most commonly recognized form of sexual harassment. It occurs when an employment benefit is conditioned on sexual favors: “Sleep with me or else.” It also occurs when actual or threatened job detriment follows rejection of sexual advances: “Remember who writes your performance appraisal.”

This type of harassment involves a differential in power—although not necessarily a situation in which the employee directly reports to the alleged harasser—as well as unwelcome sexual advances and explicit or implicit job-related threats. An employee faced with a sexual advance under these circumstances has essentially three choices: quit, submit, or take the chance that the threats will be carried out. For sexual harassment to exist, adverse employment action need not materialize, nor is any direct threat of harm or physical coercion required. The harasser’s weapon is the credible exercise of power over the employee’s job.

The twin Supreme Court rulings in Faragher and Ellerth held that for purposes of imposing vicarious liability on an employer for the harassing acts of a supervisor, the distinction between quid pro quo and hostile environment harassment is immaterial. When tangible job action stems from any type of supervisory harassment—even in the absence of sexual advances or job-related threats—the employer will be automatically liable.33

The definition of “supervisor” is correspondingly broad. According to the EEOC, a supervisor is someone who “has authority to undertake or recommend tangible employment decisions affecting the employee; or who has authority to direct the employee’s daily work activities.”44 Essentially, for vicarious liability purposes, a supervisor is an individual who has direct power over an employee’s job status or the work environment in which the employee must perform. In the law office, partners fall squarely within the definition. Associates and even senior paralegals who direct the work of junior professionals and/or support staff—in the office, or at remote locations for depositions or trial—may also qualify as supervisors.

Actionable hostile environment harassment occurs when an employee is forced to work in an offensive, intimidating, or hostile setting that is created by unwelcome sexually explicit or demeaning behavior. It is not necessary for a plaintiff to establish either tangible job action or sexual advances.36

Most significantly, a claim for hostile environment sexual harassment does not require proof of intent to harass. Many people accused of harassment genuinely believe their behavior is “funny,” “cute,” or “attractive.” Some even believe it is welcome by everyone. What the harasser thinks, believes, or intends is wholly irrelevant in determining whether sexual harassment has occurred. What matters is the victim’s reasonable perception of what is offensive, intimidating, hostile, or abusive.35 Not surprisingly, many cases focus on the perceptions and reactions of the parties. Individuals have different thresholds of tolerance for behavior that is sexual in nature. The trier of fact must determine whether it was reasonable for the victim with an individual set of life experiences to have found the conduct offensive, intimidating, hostile, or abusive. The same standard applies to claims of offensive conduct based on race, religion, age, and disability.38

Claims of hostile environment harassment lead the way in the recent surge in sexual harassment claims. The elements constituting hostile environment harassment claims fall into four categories:

1) Physical conduct of a sexual nature, including touching, pinching, blocking a person’s passage in aisles and walkways, leering, gestures, and suggestive body language.39
2) Verbal conduct, such as jokes, insults, sexual comments, innuendo, and the repeated use of terms of affection. Verbal conduct also can include more subtle behavior, such as compliments, repeated requests for dates (which are declined), or slightly suggestive comments that are perceived negatively.40
3) Visual materials, such as personal notes that are graphic or intrusive, cartoons, posters, and pinups.41 A wave of new visual harassment cases focuses on abusive e-mail, inflammatory messages,42 downloads of offensive digital materials, and multimedia messaging, which allows users to add audio, video, and still photo elements to their e-mail messages.43
4) Gender-based animosity, created by either sexually graphic derogatory speech that is directed toward members of a particular gender, or threats and hazing that are not overtly sexual.45

Because hostile environment harassment is not a question of power, liability is not confined to conduct by managers or supervisors. Inappropriate sexual behavior is actionable when the harasser is a coworker46 or a third party47 who interacts with the employee in the latter’s work environment. As with other employers, a law firm will be liable for co-

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1. Sexual harassment by a coworker cannot occur without direct physical contact. True. False.
2. The intent of the alleged harasser is not a relevant consideration in determining whether sexual harassment has occurred. True. False.
3. A California court can impose liability for sexual harassment when there is evidence that the employer’s corrective action is not sufficiently harsh to make an example of the harasser. True. False.
4. A workplace harassment investigation is only required after a lawsuit is served on the employer. True. False.
5. An employee who observes, but does not participate in, offensive or inappropriate workplace behavior of coworkers cannot be held personally liable for sexual harassment. True. False.
6. An individual may state a cause of action for sexual harassment whether or not he or she was directly targeted by the offensive conduct. True. False.
7. When a supervisor is aware of improper or offensive conduct or other witnesses come forward, an investigation must proceed regardless of the victim’s cooperation. True. False.
8. An employee who makes a good faith internal complaint about sexual harassment that cannot be substantiated through a neutral investigation is protected from all forms of retaliation. True. False.
9. A law firm is not liable for a hostile work environment created by a senior associate attorney when a partner is not aware of the harassing behavior.
   True. False.

10. A California employer is not legally responsible for a hostile work environment created by a third-party vendor unless a supervisor knows or reasonably should know about the behavior.
   True. False.

11. The California Legislature effectively overruled the California Supreme Court by passing a statute providing that a nonsupervisory employee may be personally liable for sexual harassment.
   True. False.

12. An employee must prove a loss of pay or benefits to successfully sue for harassment due to hostile work environment.
   True. False.

13. Under federal law, an employer may establish an affirmative defense to a harassment lawsuit by proving that it enacted a sexual harassment policy prior to the alleged harassing behavior by a supervisor.
   True. False.

   True. False.

15. The sexual harassment provisions of the California Fair Employment and Housing Act apply to employers with five or more employees.
   True. False.

16. A paralegal employee confides to a first-year partner that he was offended by the lewd and suggestive remarks of a good client of the law firm while he was preparing a document production. The conduct was a single episode and he has been able to avoid any further contact with the client by asking an associate on the case to communicate with the client. The responsibility of the first-year partner is to:
   A. Tell the paralegal employee to report the conduct to the billing partner on the case.
   B. Advise the paralegal employee of the law firm’s sexual harassment policy and the various complaint avenues it provides.
   C. Tell the paralegal employee he is probably too sensitive and may have misunderstood the remarks. The employee should be reminded that he is still required to do his job, but because of the law the first-year partner should make sure that the billing partner is told of the incident.
   D. Take the complaint seriously and make sure it is addressed through the appropriate channels and that an investigation is undertaken.
17. In response to a complaint by a law firm employee about offensive language, including swearing, by opposing counsel at a deposition, the firm must:
   A. Investigate the circumstances and take appropriate corrective action if harassing behavior is substantiated.
   B. Tell the employee that it was probably just an isolated situation because the opposing counsel’s witness was ineffective. If the same behavior occurs a second time, the employee should report it.
   C. Notify the opposing counsel’s firm and let that firm investigate the situation.
   D. Take no action because an isolated incident of swearing can never constitute sexual harassment.

18. An associate attorney in a law firm tells a member of the executive committee of the firm that he was embarrassed by the sexually explicit jokes told by representatives of a consulting firm who regularly come into the office to work on litigation support projects. The joking has increased over the last few weeks because the consulting firm representatives are working long hours preparing for another trial. The associate said nothing to the consultants directly. Six months ago he brought the joking behavior to the attention of the billing partner on one of the cases involving the representatives. The associate acknowledges, “I just wanted her to know about it, but because we were preparing for trial, we agreed not to do anything at that point.” No other employees have complained. California law requires the member of the firm’s executive committee to:
   A. Take immediate steps to fire the consultants.
   B. Make sure that a neutral fact-finding investigation is conducted in order to determine whether sexual harassment has occurred or is occurring.
   C. Tell the associate that he must make a complaint under the law firm’s harassment policy.
   D. Wait until the current project is completed before asking for an investigation, unless another employee makes a formal complaint.
   E. None of the above.

19. A law firm can use the Faragher/Ellerth affirmative defense to vicarious liability for persistent off-color e-mail messages sent by a partner to a new associate, if:
   A. The firm has a policy prohibiting harassment in any form and providing accessible complaint procedures.
   B. The policy is consistently enforced.
   C. The harassing partner has told other partners that the associate’s work is substandard but there is no tangible job action.
   D. A and B.
   E. None of the above.

20. Sexual harassment in a California workplace is prohibited when the employer has:
   A. At least 15 employees.
   B. Five or more employees.
   C. At least one employee.
   D. None of the above.

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6. □ True □ False
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16. □ A □ B □ C □ D
17. □ A □ B □ C □ D
18. □ A □ B □ C □ D □ E
19. □ A □ B □ C □ D □ E
20. □ A □ B □ C □ D
worker harassment if a supervisor (law firm partner or otherwise) knows or reasonably should know about unwelcome sexual behavior and fails to report it or to see that an investigation takes place.46

Affirmative Defense to Vicarious Liability

The central question before the U.S. Supreme Court when it decided Faragher and Ellerth in tandem was whether an employer could be held vicariously liable for the harassing acts of a supervisor that created a hostile working environment if the employee had not made an internal complaint before filing the lawsuit. Under these rulings, the basis for recovery against an employer for the harassing acts of a supervisor does not depend solely on the existence of job-related threats. When a supervisor’s harassment results in a tangible job action that constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits, the company may be automatically liable. This is so even if the employee has not complained to higher management.

When there is no adverse job action, the company may still be liable unless it had an enforceable harassment policy and internal complaint procedure, trained supervisors on harassment prevention, and the victim reasonably failed to use the internal complaint procedure. An employer thus can invoke what has come to be known as the Faragher/Ellerth affirmative defense under these circumstances.

In Faragher, the plaintiff, who was working as a lifeguard, was subjected to a hostile environment as a result of the actions of two supervisors. The elements of the hostile environment included off-color comments, sexual innuendo, and threats of retaliation if the plaintiff made a complaint. Although the employer had a sexual harassment policy, it was not consistently enforced and did not provide effective means for making a complaint. In Ellerth, the plaintiff’s supervisor made sexual advances that included threats regarding her job. These threats were never carried out, and the plaintiff received an earned promotion. Still, the Supreme Court concluded that the plaintiff’s supervisor created a hostile and offensive work environment and determined that the lack of a tangible job action did not preclude a cause of action for sexual harassment. However, the Court held that the plaintiff's employer could attempt to prove the elements of the newly created affirmative defense.

Under the standard set forth in Faragher and Ellerth, employers are required to enact an effective, accessible, and consistently enforceable and enforced harassment policy and complaint procedure. When an employee complaint arises, the employer must promptly investigate complaints through a neutral fact-finding process, and if harassment is substantiated, take immediate and appropriate corrective action. Retaliation against the complainant must be strictly prohibited during and following the investigation process.

Additionally, the employer must effectively communicate the essentials of the harassment policy to all employees. Some indicators of an effective employer response include evidence that the employer instituted training programs for managers and employees about sexual harassment, proof of active measures to uncover harassing actions without waiting for a formal complaint, and evidence that the employer’s disciplinary process treats the problem of sexual harassment at least as seriously as other types of workplace misconduct.

The Supreme Court set forth specific guidelines for internal complaint procedures that will qualify for the Faragher/Ellerth affirmative defense. First, the procedure must not require that the complaint be made to, or handled at any stage by, the accused harasser and must not be directly or indirectly controlled by the accused harasser. Second, the procedure must be capable of stopping any harassment by seriously addressing the concerns of all parties and providing effective corrective action. The complaint procedure must be reasonably prompt and still allow enough time for a complete investigation. Finally, the employer must take affirmative steps to prevent any retaliation against the complainant, the accused harasser, and all independent witnesses.

Addressing the bases for finding that the employee had “reasonable grounds” not to complain prior to filing an external complaint, the Court focused on:
- Procedures that are controlled by the alleged harasser.
- Evidence that the employer tolerated retaliation against prior complainants or dilatory responses to past complaints.
- Denying treatment of past complainants.
- Failures in the past to conduct meaningful investigations.
- Prior unreasonable failures to find harassment.
- The provision of unreasonable or inadequate relief for harassment in the past.

Courts interpreting the Faragher/Ellerth affirmative defense suggest that management’s previous inaction or failure to treat complaints seriously, an ineffective investigation process, or the existence of actual or threatened retaliation against employees who complain may be used as evidence that the harassment victim’s failure to invoke an internal policy was not unreasonable. This interpretation is used by the EEOC when it investigates a harassment complaint.50

The applicability of the Faragher/Ellerth affirmative defense under California law is unclear. California appellate courts have consistently imposed strict liability on employers for the harassing conduct of their supervisors or managers.53 Currently there are only two reported decisions that address the applicability of the affirmative defense to a cause of action for sexual harassment under the FEHA—and the results are split. In Kohler v. Inter-Tel Technologies,52 the Ninth Circuit held that a California employer was not liable for sexual harassment under the FEHA because the employee did not suffer any adverse employment action and quit without using the company’s complaint procedures. Kohler focuses squarely on the Faragher/Ellerth affirmative defense, noting that although the applicability of the defense under the FEHA had not yet been addressed, state courts consistently look to Title VII in interpreting the FEHA. The court was apparently persuaded that the defense should apply in California, because “the language of FEHA provides an even stronger basis for applying the federal affirmative defense than does Title VII itself.” The decision refers to the FEHA’s “requirement that employers ‘take all reasonable steps to prevent harassment from occurring.’”53

Accordingly, the Ninth Circuit concluded that the FEHA’s preventative approach mirrors the first prong of the affirmative defense and found on the factual record that the employer exercised reasonable care to prevent and promptly correct sexual harassment against the plaintiff. The Ninth Circuit, at least, was persuaded that the California Supreme Court would eventually adopt the affirmative defense.

Indeed, a definitive ruling on the applicability of the Faragher/Ellerth affirmative defense in California by the California Supreme Court is pending and expected this year. A decision by the court of appeal that is the only case decided by a California state court addressing the issue reached a conclusion contrary to the one by the Ninth Circuit in Kohler, and the supreme court is reviewing the court of appeal’s decision. On November 29, 2001, the Third District Court of Appeal held that the Faragher/Ellerth affirmative defense is not available to an employer in a sexual harassment case brought under the FEHA. In Department of Health Services v. Superior Court,54 the court held that despite the fact that the plaintiff suffered no tangible job action and that the employer conducted
a prompt investigation and took corrective action, the employer was nevertheless strictly liable for the supervisor’s harassing behavior. The court concluded that the FEHA and Title VII differ in their treatment of employer liability for supervisory harassment. On February 13, 2002, the California Supreme Court vacated the opinion and granted review. While waiting for the decision, California employers should continue taking proactive steps to ensure their work environments are free from harassment and retaliation. Careful, consistent enforcement of internal complaint procedures remains the best method for preventing harassment and promptly correcting inappropriate workplace conduct.

Retaliation

Retaliation, also referred to as reprisal, is a separate cause of action based on discrimination. Both Title VII and the FEHA expressly prohibit direct or indirect retaliation against anyone who engages in protected actions, including the complainant, the defending party, and all independent coworker witnesses. The remedies under these statutes would be hollow if employees had to fear retribution, adverse treatment by supervisors or coworkers, or other harmful results from making a good faith harassment claim. In addition, the existence of retaliation, express or implied, for exercising the right to complain in good faith about workplace harassment often results in awards of punitive damages. Retaliation complaints are rapidly increasing, as they are often raised concurrently with a harassment claim. The stringent prohibitions against retaliation are designed to keep employers from punishing an individual who makes a complaint for harassment or discrimination or who participates in the investigation process as the claimant, the target, or an independent witness. Employees are protected against retaliation if they have a reasonable and good faith belief that the alleged discrimination has occurred, even if the charges are later unsubstantiated.

Direct retaliation includes a wide variety of adverse actions, including changed work assignments, differential treatment, refusal by supervisors to communicate about work performance, unwarranted changes in performance reviews, demotion, and threats by management and supervisors. Indirect retaliation may include repeated ridicule by supervisors; ostracism by coworkers that is ignored, tolerated, or incited by supervisors; taunts; threats by coworkers; or other coercive activities.

One of the significant retaliation cases under Title VII involved the law office of the Securities and Exchange Commission. In Broderick v. Ruder, the plaintiff was a staff attorney at the SEC. She complained to management that the work environment was “sexually charged” due to rampant consenting behavior among several attorneys and staff. The conduct included persistent verbal and physical conduct in the office during the work day. Her complaints were consistently rebuffed and passed off as “overly sensitive.” The plaintiff was then denied a promotion that she had objectively earned. The three-judge panel concluded that the plaintiff had proved the existence of a hostile working environment and retaliation. In addition to damages for the harassment itself, the plain-

Nuts and Bolts of a Sexual Harassment Policy

Law firms should create comprehensive and enforceable policies prohibiting all forms of workplace harassment (including harassment based on race, religion, ethnicity, age, disability, and sexual orientation). The policy should be in writing and distributed to all attorneys and support staff. A policy should define the problem carefully so that all attorneys in the firm and other law firm employees will know what type of conduct is unacceptable, and the policy should offer an effective complaint procedure.

Sexual harassment law places an emphasis on prevention, and law firms should certainly lead the way in this area. Also, an effective policy and complaint procedure may provide an affirmative defense for employers against a claim of vicarious liability. The sexual harassment component of a workplace harassment policy should include the following points:

**Briefly define prohibited harassment.** The description should cover:
- Unwelcome sexual advances that include threats of job detriment or promises of job benefits.
- Unwelcome physical, verbal, or visual behavior of a sexual nature that creates an offensive, intimidating, hostile, or abusive work environment.

Law firms without a separate e-mail policy should expressly prohibit attorneys and other law firm employees from sending or retrieving on law firm computers 1) inflammatory messages, 2) downloaded jokes, 3) digital pictures, and 4) other offensive material.

**Identify the persons who are covered by the policy.** The law firm should specify in its policy that the firm will investigate all reports or complaints of harassment that occur in any of the firm’s work environments. The policy should be clear that the firm will investigate claims against any alleged harasser, including partners, associates, managers, coworkers, third-party vendors, visitors, or clients.

**Provide several avenues for making an internal complaint about harassment and require that managers and supervisors with knowledge of possible harassment report it to proper personnel.** Attorneys or other law firm employees who wish to make a complaint about harassment should be assured of access to the appropriate decision makers. Employees should have the ability to bypass the harasser when making a sexual harassment complaint. The policy should require that any person who knows or learns of unwelcome harassing behavior should report it to the firm administrator or managing partner, whether or not there is a specific complaining party. The policy also should provide for an immediate, neutral fact-finding investigation of reports and complaints.

**Unequivocally prohibit all forms of retaliation.** The law firm should specify that all individuals who participate in the investigation process (the complaining party, the alleged harasser or harassers, and all independent witnesses who may have relevant information) will be protected from retaliation. The policy should state that complaints of actual or threatened retaliation will be separately investigated, and the law firm will provide several channels for raising these issues.

**Express the law firm’s commitment to take immediate and appropriate corrective action.** The law firm should inform attorneys and other law firm employees that the firm will take prompt and proper corrective action following its investigation of all substantiated claims of workplace harassment. Disciplinary policies should be objective and consistently applied.

**Provide for training and information.** The policy should make training a top priority. The law firm should provide appropriate training for partners, associates, paralegals, and others who have power over other people or the environment in which firm employees will be working (including remote locations). The training should include both the substance of the policy and the firm’s commitment to consistent enforcement. The law firm should inform attorneys and other law firm employees about the policy when they are first hired and periodically during employment. —P.S.E.
Policies are powerful tools in managing any professional workplace. See “Nuts and Bolts of a Sexual Harassment Policy,” page 45. Like other employers, law firms must address the issue of sexual harassment comprehensively and definitively. A law firm must protect the people who work at the firm as well as the firm itself. The breadth of conduct that can create hostile work environments, coupled with the prospect of liability that can result in significant awards for damages, make it more important than ever for law firms to enact effective prevention policies, educate attorneys and staff about them, and enforce them consistently.

2 The number of harassment charges filled with the EEOC has mushroomed. In 1991, the EEOC logged 6,883 sexual harassment complaints, and by 1998 the number of new filings swelled to 15,618. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002, at 6,883 sexual harassment complaints, and by 1998 the number of new filings swelled to 15,618. EEOC
3 The Government Code defines unlawful employment practices, including harassment, Gov’t Code §12940(j)(1).
4 Gov’t Code §12940(j)(3).
5 In 1999, the California Supreme Court held that a nonsupervisory harassing conduct and fails to take immediate and appropriate corrective action.
6 The California Fair Employment and Housing Act, Gov’t Code §12940 et seq.
7 Gov’t Code §12940(j)(4).
Harassment Suit for $2.2 Million, L.A. Times, Feb. 22, 1995, at Business 2. In other recent cases, employees used workplace computer systems to store their personal journals or diaries, including those revealing sexual fantasies about coworkers or other company representatives.


See, e.g., Ellison v. Brady, 924 F. 2d 872, 875 (9th Cir. 1991) (coworker’s personal notes); Cronin v. United Serv. Stations, Inc., 809 F. Supp. 922 (M.D. Ala. 1993) (subordinate’s sexual overtures and demeaning comments toward his boss); Noland v. McDaid, 39 F. 3d 328 (10th Cir. 1994) (coworker harassment).


See, e.g., Splunge v. Shoney’s, Inc., 97 F. 3d 488, 490 (11th Cir. 1996) (employer obligated to take corrective action when harassment was so pervasive that higher management could be deemed to have constructive knowledge).


See note 1, supra.

Kohler v. Inter-Tel Techs., 244 F. 3d 1167 (9th Cir. 2001).

Id. at 1174 (quoting Gov’t Code §12940(a), (j)(1)).

Department of Health Servs. v. Superior Court, Sacramento Superior Court No. 98AS02085 (2001), certified for publication and then vacated when review was granted by the California Supreme Court, Feb. 13, 2001.

Id.

Gov’t. Code §12940(h).

EEOC charges alleging retaliation for participation in Title VII protected activity increased from 10,499 in FY 1992 to 20,407 in FY 2001. This represents an increase from 14.5% to 25.2% of all Title VII claims. See http://www.EEOC.gov/stats/charges.html.

See Trent v. Valley Elec. Ass’n, 41 F. 3d 524, 527 (9th Cir. 1994). The Ninth Circuit held that the retaliation claim should be considered by a jury, because the plaintiff reasonably believed that she had a viable harassment claim. Even if the underlying complaint could not be substantiated, if it was brought in good faith, the broad policy of the antidiscrimination laws is to provide an effective avenue to raise the issue of retaliation.

See, e.g., Hirase-Doi v. US West Communications, Inc., 61 F. 3d 777, 784 n.3 (10th Cir. 1995) (“alleged threatening stares…in apparent retaliation for the complaints about sexual harassment”); Birschtein v. New United Motor Mfg., Inc. 92 Cal. App. 4th 994 (2001) (over acts of sexual harassment were “transmuted” into a “daily series of retaliatory acts”).


Id.
any practitioners have no doubt experienced cases with parties who seem to have somehow concealed a significant amount of money. Why would someone want to hide, say, $5 million, and from whom? Could the person be shielding that money from the eyes of the government, or an ex-spouse, or a soon-to-be ex? What about an embezzler secreting that money away from an employer or partner? Are creditors closing in?

Perhaps the idea of transferring funds to offshore havens seems like a good one for someone looking to hide funds. Opening an account at a brokerage house under a false identity or fictional company name also may seem like a wise strategy. These activities, however, require the person to have the knowledge and capability to move a large sum of money without leaving a trail.

Following the events of September 11, the media paid considerable attention to the concept of money laundering. Still, the specific details of this practice may be beyond the knowledge of many. Not everyone can converse intelligently about the ancient practices of parallel banking such as fei chen (Chinese for “flying money”) or hawala.

To experienced investigators, however, money laundering, or the act of making illegal proceeds appear legitimate, is no mystery. They understand and recognize methods of concealment as well as illegal sources of funds. The same principles and approaches to money laundering are the ones that are utilized in hiding assets from creditors, trustees, and the like. Investigators know and understand the thought processes that launch these creative schemes, and they are capable of undermining the strengths of money laundering strategies by identifying the weaknesses behind them.

The typical case involves hidden assets, such as embezzled funds from investors for a company project. In approaching this type of case, investigators develop as much information concerning the target as possible. Investigators begin with information such as a Social Security number, date of birth, employment history, and residence history. From there, investigators build a matrix of intelligence that includes educational background, hobbies, sports, and other interests. Investigators want to know whether the person has a pilot’s license, who the person’s friends are, including old high school pals, and what current associations the person belongs to. It is important to remember that every person, no matter how likeable they may seem, has an enemy. Enemies can include a variety of contacts that a person has encountered over time, including scorned lovers, ex-wives, ex-secretaries, personal assistants, and former employees who were confidantes of the target before a rift occurred. An invaluable tool for investigators is conducting a thorough litigation search, which includes combing through pleadings, exhibits, and declarations as well as speaking with opposing litigants, in order to gain insight into the mindset and habits of the target.

In addition to these sources, investigators also seek and make careful note of facts that may reveal the target’s routines. This information may include the person’s travel agent, favorite airline, and other nuggets that may provide clues to the means by which assets are hidden.

On many occasions investigators explore myriad sources of information and still hit the proverbial wall. Investigators build a mountain of details about the target of their investigation but rarely will simply one piece of information buried within that mountain lead investigators to the prize. Rather, numerous pieces of information painstakingly strung together provide the clues investigators need to reach their objective and uncover hidden assets. The role of the investigator is to continually develop theories throughout the duration of a case, and these theories in turn suggest new avenues of discovery or fact finding.

Investigating money laundering and hidden assets is not an exact science, nor is it a formulaic method. It is a lot like cooking. Some recipes require more spice, some require more flour, and some require more baking time. Investigators learn through experience that simple discovery methods, while providing important clues, rarely serve the purpose of tracing hidden assets.

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Internet Ethics and Netiquette for Attorneys and Law Firms

By Carole Levitt

E-mail and Web sites qualify as communications and advertising under ethics rules

Most attorneys are familiar with the term “netiquette,” which is the code of proper behavior online. Basic netiquette applies as much to the legal professional as it does to a lay person, but more specific rules have been crafted to guide the online behavior of attorneys. As early as 1996, many state bar associations began issuing opinions on Internet ethics, often focusing on law firm Web sites. Most of the rules and opinions relating to online communications apply the advertising rules that already exist for print advertising. The State Bar of California issued an opinion on the matter in 1998. As with other jurisdiction’s regulations and may also be considered the unauthorized practice of law in that jurisdiction.

To avoid being regulated by another jurisdiction or facing an accusation of unauthorized practice of law, COPRAC suggests that attorneys use a disclaimer on the site stating that they are advertising only in California and that they do not seek to represent someone based solely on that person’s visit to the Web site. The disclaimer should include a statement indicating where the attorney is licensed, what the attorney practices, where the attorney maintains an office, and in which courts the attorney is licensed to practice. (Users may locate the opinion, which is advisory only, by visiting http://www.calbar.org/Data/01-05.pdf). The opinion also indicates that a for-profit law firm domain name should not use the .org suffix or use a domain name that implies that the law firm is affiliated with a particular nonprofit or governmental entity. Thus, a private firm’s request to call itself arizonalawyer.org was rejected.

It is likely that the California bar would agree with these holdings if presented with the question. For example, if a California attorney were to use domain names such as bestresults.com or bestattorney.com, the act may be considered unethical under Section 6157.2 of the Business and Professions Code, which prohibits any guarantee of outcome, or Section 6157.1, which prohibits false or misleading advertising. It is possible that a naive consumer may assume that an attorney with these domain names is promising to be the best or is guaranteeing the best results. Using the domain name bestattorney.com may also violate ABA Model Rule 7.1, which prohibits using superlatives to distinguish one law firm from another without factual proof. A bankruptcy attorney who uses the domain name paynobbills.com can expect to face ethical problems if, for example, the domain name misleads a client who is reorganizing instead of declaring outright bankruptcy. ABA Model Rule 7.1 also prevents attorneys from creating unjustified expectations about results—as does Rule 1-400, Standard 1 of California’s Rules of Professional Conduct. Rule 1-400...
prohibits communications that contain "guarantees, warranties, or predictions regarding the result of the representation." Thus, advertising past client successes on an attorney’s Web site may be deemed unethical because it may indicate to a potential client that he or she can expect similar results. Personal injury attorneys who use their sites to detail past successes or advertise damage awards may therefore want to reconsider.

What type of graphics or images on an attorney’s site could be considered unethical? Placing a picture of a person on your site that implies that the person is either a member of your firm or is an actual client, when in fact the person is not, may be considered misleading. This would violate Rule 1-400, Standard 13, unless you label the photograph as a dramatization.

Keep Copies of Web Pages

Many attorneys do not realize that Rule 1-400(F) (which dictates that attorneys must retain for two years copies or recordings of any communications they have made by written or electronic media) applies to their Web sites and any revisions of their sites. The easiest way for attorneys to comply with this rule is to simply print a copy of each new or revised page that is added to the Web site and keep all the printouts in a chronological file. Attorneys who prefer less paper could save the HTML files that constitute the Web site on a separate disk or in a separate folder on a hard drive. Attorneys may thereafter make a habit of transferring pages as they are created or revised. For those who have not kept copies of each earlier version of their sites, the omission might be rectified with a visit to the Internet Wayback Machine (http://web.archive.org/collections/web.html). This Internet archive, dating back to 1996, recently made its collection of outdated Web pages available to the public. By entering the firm’s URL into the wayback machine’s search box and clicking the Take Me Back button, attorneys can determine if their Web sites are included in the archive. Attorneys who locate the desired site there can print their old pages and keep them in a paper file in order to satisfy Rule 1-400(f).

Since Web sites are considered communications and advertisements, other online communications may be too. Attorneys’ online communications that do not appear on their Web page could pose ethical problems. For example, many attorneys send e-mail invitations for seminars or e-mail newsletters about an area of law. Should they label the e-mail as an advertisement in the subject line? Probably yes, if one is to extrapolate from regular mail to e-mail. With print materials, attorneys are instructed under Standard 5 of Rule 1-400.
that “[n]ewsletters, recent legal development
advisories, and similar materials...transmitted
in an envelope...shall bear the word
‘Advertisement,’ ‘Newsletter’ or words of sim-
ilar import on the outside thereof.”

A cautious attorney would also apply Rule
1-400 to e-communications. A Tennessee attor-
ney was disbarred when he e-mailed an adver-
tisement about the firm’s immigration ser-
vices to more than 5,000 Internet groups and
thousands of e-mail lists without the required
words: “This Is an Advertisement” (see
http://www.legalethics.com/articles.law?auth-
-canter.txt). He also violated several other
professional responsibility rules in the same
matter.

Attorneys should also consider the ethics
of their e-mail signature line or tag line (a
signature block that includes “King of Torts,”
for example, is probably not a good idea).
An attorney’s e-mail signature should not
include anything that could be interpreted
as false, deceptive, or tending to confuse or
mislead the public.

Another ethics issue for attorneys online
is giving legal advice or soliciting clients in
chat rooms or discussion groups. The Florida
Bar Standing Committee on Advertising held
(www.flabar.org/newflabar/memberservices
/Ethics/A-00-1.html) that “[a]n attorney may
not solicit prospective clients through Internet
chat rooms, defined as real time commu-
ications between computer users.” Thankfully
for attorneys who write for magazines, articles
that are published online—with or without the
author’s knowledge—are probably protected
by the First Amendment. If someone in or out
of state reads the article and relies upon the
information to his or her detriment, the attor-
ney author may not be liable for either the
unauthorized practice of law or malpractice.

This ethical area becomes more problematic,
however, when attorneys begin expressing
their opinions in chat rooms or discussion
groups that feature, as most do, two-way com-
munications.

The ethical principles that apply to attor-
ney advertising and communications in older
media may serve as a guide for attorneys
seeking to avoid ethics difficulties online.
Attorneys and firms should keep copies of
their Web sites (including every different
page) and consider the ethical ramifications
of their e-mail content, domain names, e-mail
addresses, and discussion group and chat
room posts. Finally, it pays to observe com-
mon netiquette. The Tennessee attorney, for
example, violated it by spamming (i.e., send-
ing out an unsolicited e-mail message to many
recipients), thus drawing complaints from
offended computer users. One’s manners
online can matter just as much as they do in
person.
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607ZG26

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REQUIRED CREDIT SERIES
DAY (Ethics, Elimination of Bias, Prevention of Substance Abuse)
Registration: 8:30 A.M.-9:00 A.M.
Coffee and Bagels: 8:30 A.M.
Lawyers, Loyalty, Lies and Liability
(originally presented 4/13/02)
Program: 9:00 A.M.-1:00 P.M.
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ELIMINATION OF BIAS:
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607ZH09

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(Lunch: 12:00 P.M.-1:00 P.M. on your own)
6 CLE hours; includes 6 hours of credit in Family Law Legal Specialization
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AUGUST 23, 2002
BUSINESS & CORPORATIONS
Internet/Web/E-Commerce Agreements
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When Arbitration Loses Its Appeal

Practitioners should consider a private appeal mechanism in arbitration clauses

Is there anyone in the legal system who wields more unchecked power than an arbitrator who has been appointed without careful planning on the part of the parties in interest? In such instances, the arbitrator reigns virtually supreme. California law provides for no appeal or other form of review on the merits of an arbitrator’s decision. This is because so long as the arbitrator does not act beyond his or her powers and provides full disclosure of any conflicts, a review on the merits is not possible unless the contractual arbitration clause expressly creates an appeal process.

Who gives one individual so awesome a power as to not be subject to review? No superior court judge or justice of the court of appeal is beyond review. Nor does any single justice of the California Supreme Court possess such authority. Our judicial system achieves justice because it recognizes that those in high positions can err and has therefore designed well-established procedures to review judicial decisions. In contrast, only a few arbitration tribunals provide for a review mechanism to guard against honest error made in ruling on the merits in an arbitration hearing.

Many companies, large and small, look to arbitration for its well-known benefits: avoiding the unpredictability of jury verdicts and the time and expense of formal litigation. However, those who do not adopt some form of arbitration appellate review will face that arbitrator alone. That means that all the savings of arbitration—indeed, the company, itself—could be wiped out by a single award made by a single arbitrator who is psychologically moved by a particular set of facts. And there would be no appeal even from a rogue decision.

The Hidden Danger

When parties to a contract agree to an arbitration clause, do they focus on this danger? Are they aware that they are giving up the protective process of a judicial forum? There, parties who think they have been aggrieved by a judicial decision have somewhere else to go. An appeal is available to give them a last chance. Yet no legal principle prevents contracting parties from agreeing to an arbitration clause that includes a system for review on the merits of an award. The parties can designate a panel of other arbitrators to be their “court of last resort.”

Recently, California legislators have awakened to the ever-growing importance of arbitration in ADR processes. Arbitration now affects massive numbers of citizens, and legislative efforts are geared to curb purported abuses. At the same time, the legislature should also be concerned that parties often do not understand the vast power they grant to an arbitrator when they agree to arbitration clauses that they probably have had no input in drafting. Unsophisticated signers of contracts containing most of the commonly used arbitration clauses often do not expect to enter so uncontrolled a forum. Sophisticates, too, accept the system, and only later begin to really wonder what happened to their appeal.

Certainly, many of the fine retired judges who now serve as arbitrators wonder and marvel at the expanded power they wield as arbitrators. They would be the first to admit that arbitrators can, from time to time, reach an erroneous conclusion. As the Ninth Circuit stated forcefully in Grammer v. Artists Agency, “[A]n arbitrator’s ‘improvident, even silly, factfinding’ does not provide a basis for a reviewing court to refuse to enforce the award.”

Agreements containing arbitration clauses can, and many do, designate a private tribunal that will have the power to review the arbitration award. The parties appoint one arbitrator and can provide for another, neutral, or even three others for review. Arbitration is a creature of contract; there is an opportunity to voluntarily set up the means for arbitration appellate review. Without such a provision, it is, at best, uncertain whether an aggrieved party would ever be able to turn to an appellate court to review an arbitrator’s awards.

The federal courts have offered some hope for appellate review. Under the terms of the arbitration clause at issue in Lapine Technology Corp. v. Kyocera Corp., the Ninth Circuit honored a provision that made the arbitration award subject to judicial appellate review. However, in Crowell v. Downey Community Hospital Foundation, the first California Court of Appeal decision addressing a clause authorizing judicial review of an arbitration award, the court rejected the clause. The court held that the California Arbitration Act precludes judicial review. Even the dissent recognized that parties could contract for an arbitration review panel. In a recent case, the court of appeal has gone so far as to sanction as a frivolous action an appeal of an arbitrator’s decision.

Whatever the merits of these court decisions, we as practitioners need to begin a dialogue—among ourselves and with our clients—on these issues. Let it start here.

2 Lapine Tech. Corp. v. Kyocera Corp., 130 F. 3d 884, 889 (9th Cir. 1997) (2-1 decision). The dissent argued that rather than using the public courts, the parties could “contract for an appellate arbitration panel.”
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