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Christine Byrd is a partner at Irell and Manella LLP, where she specializes in litigation and discovery matters. She is also an arbitrator with the American Arbitration Association. In “Discovery Channel,” she analyzes how practitioners can most effectively use discovery referees in light of recent changes in the law. Her article begins on page 22.

Litigators who know how to use referees effectively can reduce the time and cost of discovery

By Christine Byrd

Issues of confidentiality and relationships between attorneys highlighted last year’s rulings on legal ethics

By John W. Amberg and Jon L. Rewinski


2002 Guide to Law Office Technology
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- Judgments not covered by insurance.
- 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

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.
My year as chair of the Los Angeles Lawyer Editorial Board ends with this issue of the magazine, so this is my last From the Chair column. I am saying good-bye plus about 600 more words.

How does a nation that respects its laws not respect its lawyers? As I look back on a year in which I worked with so many wonderful lawyers, I wonder why it is that lawyers are not held in higher regard by a society that seemingly exalts the law and the legal process and prides itself on being a nation of laws and not of persons. The legally contested election of a president ended swiftly with public acceptance, not rioting in the streets. Lawyers and parties treat the decisions of appellate courts with deference, even if there is no joy in the outcome, and those who disagree with the decisions go to work to reverse them.

Of course, the legal process is not always held in high regard. Ten years ago a jury verdict in the criminal trial of four policemen involved in the beating of Rodney King was followed in Los Angeles by the worst urban rioting in U.S. history. But that catastrophic event seemed more about frustration, long-held anger, and lawlessness than about a systemic disrespect for the jury system.

Maybe the lack of respect for lawyers is not such a big deal. It seems like this attitude has been prevalent for a long time, and lawyers generally have thick enough skin. Still, law schools remain full. Perhaps the applicants either do not care that others in society will get more pats on the back or they do not know how they will be perceived once they pass the bar exam. It is noteworthy that many of today’s law students are choosing the profession in the middle of their lives rather than their youth. Moreover, television continues to feature shows about lawyers. Movies too are populated by characters who are lawyers. Books about lawyers still litter airport lounges.

Even so, I believe most of us who practice law feel there is a general lack of respect for our profession, and this bothers us. What should bother us more is how this perception may affect our attitudes and behaviors. Those of us in public as well as private practice may be choosing to engage in gladiatorial and game-playing tactics as a result of our frustration with the view of the legal profession that is held by our clients and the public. I say to lawyers who behave this way, get over it.

What I also learned from a year working with so many talented lawyers is that pride and satisfaction in accomplishments do not always require outside recognition. A bit more of an inner sense of pride and satisfaction might calm down too much frenzied lawyering. We may dream of a job in which we provide something that the recipients actually want and willingly pay for when they get it—and after they pay they go away happy. But that would not be a law job, at least not most of the time.

Thinking back over the year, September 11 was the defining event. It caused us all to think more carefully and critically about what we do and how we do it.

In thanking the members of the Editorial Board, I am sure they share my private feelings of accomplishment and will accept my public expression of appreciation. In thanking the staff, I am pleased to have written about them early in my year and to have benefited from their assistance throughout it. In thanking Sam Lipsman for his help and friendship in an often difficult year, I join many past chairs and others in crediting his continuing devotion to this magazine. In thanking Lauren Milicov Jomie, I acknowledge her patient and thoughtful editorial guidance of this column. She was always graceful and I will always be grateful.

I thank you, our readers, for your comments to me throughout the year and your continuing and growing interest in our work. Join us on the Editorial Board. It is free and fun and good for the soul.

I have been privileged to have had this past year’s experience. For me, it was a great show, and as the curtain drops, I am the one left wanting more.
Preparing Yourself for Oral Argument

**Attorneys appearing before an appellate court need to speak rather than recite**

In the world of appellate advocacy, oral argument is the reward for the hard work you put into writing your brief. There is nothing more intellectually challenging and satisfying than engaging in a productive discussion about your case with a panel of appellate judges. Your level of enjoyment, however, is usually directly proportional to the effectiveness of your preparation. Preparing properly, of course, is easier said than done even for experienced practitioners.

The most common complaint that appellate judges make about oral argument is lack of preparation by attorneys. I doubt that many attorneys approach oral argument without having at least attempted to prepare. Therefore this complaint likely stems from a lack of proper preparation. Just as some ways of studying for law school exams are better than others, better ways exist to prepare for oral argument.

Proper perspective is necessary at the outset. Effective preparation is impossible if you do not consider oral argument as something more than a regurgitation of the briefs. By the time you reach the podium, the court has already read your briefs. At this stage of the proceedings, the court needs guidance on how to resolve the conflicting legal views presented in the briefs and address public policy issues. The form of this guidance varies from case to case and judge to judge. The court’s questions will often focus on the subjects on which the judges want guidance. Therefore, in preparing for argument, you must anticipate these concerns and formulate articulate responses.

You may falter during oral argument if your preparation consists only of rereading the briefs and trial record and assuming that you can repeat some text to answer the court’s questions. An attorney who does nothing more than study the briefs and the record can probably explain the issues in the case but is ill prepared to answer difficult and probing questions about it. Reviewing the briefs and trial record is always a good starting point, but thorough preparation requires a much more active approach.

Knowing the trial record inside and out should be a major focus of your preparation. If you do not have time to read through the entire record again, at least read through the portions that are relevant to the appeal. Learning the trial transcript requires memorization, and there are countless ways to accomplish this. I like to outline the testimony of key witnesses so that I develop a clear picture of the order in which evidence was produced at trial. In doing so, I pay careful attention to where items of interest are located in the transcripts so that I can quickly direct the court to relevant passages if asked to do so during oral argument. The importance of mastering the trial record cannot be overstated. You can never anticipate every question a court may have, but a firm grasp of the facts will allow you to respond in most situations. The more command you have with the record, the more confidence the court will have in your argument.

An equally important step in preparation for oral argument is identifying and addressing your position’s weaknesses. While you probably did this during the brief writing stage, many weaknesses become more apparent after the case is fully briefed and time has passed for reflection. Assess your case as objectively as possible. If you do not, you can rest assured that the appellate panel will. Ignorance is bliss sometimes, but certainly not when you are standing in front of three appellate judges and your appeal is going down in flames. Being able to identify the weaknesses of your argument and address them will strengthen your argument and credibility. Like all jurists, appellate judges appreciate candor and will lose trust in you if you refuse to acknowledge an obvious weakness.

Do not assume that all the necessary legal research is accounted for in your brief. Before oral argument, research the relevant legal issues again to determine if there have been any new developments. In addition, recheck your authorities to make sure they are still good law. The last thing you want to hear is your opponent arguing for the application of a recent court decision about which you know nothing. Finally, research whether any judge from the panel has written an opinion on a case relevant to your argument. Any such opinion should provide insight on what you need to emphasize during your presentation.

Throughout the analysis of your case, you should brainstorm by yourself or with colleagues for potential questions, areas of concern, and arguments that require emphasis. As you develop these ideas, preserve them in writing. Predicting questions and concerns from the panel is notoriously difficult, but this exercise is valuable because it will force you to think more actively and critically. Do not limit yourself to questions that probe the weaknesses of your case. It is not uncommon for judges to ask you questions that highlight strengths in your case in order to emphasize a point.

When you have your list of questions, concerns, and arguments, start working on responses. Some attorneys find it very helpful to write these responses. The goal is not to create a script for your argument but to edit and revise the key points so that you can discuss them in the most articulate manner possible. The more you write and revise, the more natural and concise you will sound during oral argument. The more you speak, the more you write and revise, the more your argument will flow and the more you will respond to judges’ questions. As you practice your responses, polish them by writing them in your own words and then recite them. This helps you feel more comfortable with your responses and not overly influenced by your notes. The more you practice your oral argument, the less you will feel the need to read from your notes. This will help you maintain an active voice during your oral argument. To the extent that you understand the law in your case, you will be more likely to respond to the court’s questions.

It is also important to emphasize your points in an engaging and persuasive manner. Oral argument is not a speech, but a discussion. You should use your voice to emphasize key points, but you should not read from your notes. Your goal is to speak rather than recite. The more you speak, the more you will connect with the judges, and the more they will be convinced of your position. The key to effective oral argument is to be confident, but not overbearing. You should be able to ask questions and make your points in a clear and concise manner.

Finally, remember that oral argument is a negotiation. You should come to the court with a clear understanding of the law in your case and how it applies to your facts. You should also be prepared to negotiate with the other side. This means that you should be able to articulate your position in a clear and concise manner and be able to respond to the other side’s arguments. The more you can anticipate the other side’s arguments, the better prepared you will be to respond to them.

In conclusion, oral argument is an important part of appellate advocacy. It is a test of your preparation and a chance to persuade the judges of your position. By following the tips outlined above, you can be better prepared for oral argument and increase your chances of success.

*Stephen A. McEwen is a deputy attorney general in the Criminal Division of the California Department of Justice and a member of the Barristers Executive Committee.*
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.

Be Prepared. Be Informed.

Lawyers’ Mutual Policyholders Are.

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?

Our policyholders don’t need to worry about these questions. Do you?

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oral argument. If you wait until oral argument to articulate the theme of your appeal, you may get by, but your responses are likely to be rambling, disjointed, and ineffective.

Famed Los Angeles attorney Vincent Bugliosi employs a similar philosophy when preparing for summation in his trials. In his book *Outrage*, he argues that a summation must either be written in full or set down in an outline. In doing so, the goal is to compose the all-important articulation of each point. According to Bugliosi, it is simply not possible to articulate a number of points extemporaneously. He explains that there is a best way to phrase a point, and to find it “takes sweat.” Bugliosi’s advice applies equally to the preparation of an oral argument, which is about articulating, not reciting. The process of composing, revising, and rehearsing a key legal point or answer to a potential question will increase your comfort level and make your argument far more persuasive.

Once you have your facts, arguments, and answers floating around in your head and on paper, the best way to organize all the material is with an outline. The main purpose of the outline is to help you stay focused during your presentation and ensure that you address the necessary elements of your argument. Your outline should usually be no more than one page per issue and should include the points you need to make in favor of your position, the points you need to rebut, and important record citations. I also find it helpful to leave space on each page of my outline for note-taking during my opponent’s argument. This helps me avoid shuffling pieces of paper while standing at the lectern.

**Moot Court Rehearsal**

After mapping out your argument and completing your outline, arrange a moot court. Provide each member of the court with the briefing from your case and encourage the participants to be skeptical and critical. Moot court should be approached as seriously as the real thing—abide by the applicable time limits, avoid scripts, and do not call for a time out when you get stumped. A moot court is an invaluable element of oral argument preparation because it gives you a chance to practice and refine your argument and highlights potential weaknesses in your presentation.

Finally, familiarize yourself with the appellate court’s oral argument procedures. Each courtroom is run a little differently, so learn in advance what is expected of you upon your arrival to court. The best method for learning about courtroom procedures is to attend a session of arguments in that particular court. Attending an argument in person also gives you an opportunity to familiarize yourself with the court’s location and parking area. The last thing you want on the morning of an oral argument is to be flustered or even late because of missed turns or parking difficulties. Save your energy for the argument.

Keep in mind that no amount of preparation can eliminate the possibility of surprises during oral argument. U.S. Supreme Court Justice Robert H. Jackson once said: “I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.”

Such second-guessing will probably occur after every appellate argument. However, with thorough and thoughtful preparation, you can narrow the gaps between those three arguments significantly and have a much more enjoyable experience in the court of appeal.

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Imagine that the operator of a large industrial facility (for example, a forging company or a wood processing plant) is forced one day to halt operations, perhaps due to an economic downturn or a major industrial accident. The operator plans on starting again as soon as possible. The facility’s equipment is mothballed, but regular inspections and maintenance continue. A guard or two are constantly at the site to make sure all is in order, and the operator continues to pay permit fees. A year or more later, the operator is ready to resume operations. The plant’s permits are still current. The equipment will be ready to run as soon as some maintenance work is done. The facility may not be fully ready, however, to resume production.

Under the reactivation policy that has been established by the EPA, stationary sources that shut down, even temporarily, may be deemed new sources upon reactivation. In particular, if potential emissions meet the regulatory thresholds defining a “major” source, the facility may become subject to the New Source Review (NSR) or the Prevention of Significant Deterioration (PSD) permitting programs under the federal Clean Air Act. When applied, these programs require a reactivated source to install control technology on every single emissions unit and may, in practical terms, prevent the source from resuming operations.

Although the EPA has applied the reactivation policy to sources since 1978, it has never published the policy in the Federal Register for public comment and review. In fact, until recently the EPA relied only on a patchwork of memoranda and letters to private parties and local permitting agencies to explain the scope and applicability of the policy. Without a definitive written summary of the policy, the EPA was free to revise the policy over time to affect an increasing number of sources. These revisions have been subject to controversy. The EPA’s air permitting programs, for example, are currently the topic of serious debate at the agency and may be revised to allow sources to operate with enhanced flexibility.

Regardless of the political and legal rationales for the EPA’s evolving and seemingly ad hoc policy, sources that cease operations may face regulatory complications when they seek to restart operations. However, there are steps that sources can follow to reduce their chances of triggering NSR or PSD.

These two permitting programs concern ambient air pollution and apply to the construction of major new sources and major modifications to existing sources. The PSD provisions apply to pollutants for which the area has attained the national ambient air quality standards, and the NSR provisions apply to pollutants for which the area has not attained ambient air quality standards. The PSD permitting program requires new and modified sources to install the best available control technology (BACT) and undertake an air impacts analysis. NSR requires sources to install pollution control technology that meets the lowest achievable emission rate (LAER). This is more stringent and costly than the BACT standard. Additionally, NSR requires a source to obtain offsets to ensure that the project will not result in increased emissions in the area.

Under the Clean Air Act and current federal regulations, a major source typically triggers...
NSR or PSD only if it meets one of two conditions: It is a major new source, or it is an existing major source that is undergoing a nonexempt modification that will result in a significant net emissions increase. The federal regulations do not define what a new source is, thereby leaving unresolved the status of preexisting, reactivated sources. The regulations provide that a modification is a “physical change” or a “change in method of operation” and establish specific exemptions that do not, by themselves, constitute a modification. These exemptions include routine maintenance activities and increases in hours of operation and production rates, to the extent that such increases are not prohibited by an enforceable permit condition. (State permitting programs, which must be approved by the EPA before they can be incorporated into the State Implementation Plan, generally employ this federal framework as a model.)

**Expanding Reactivation’s Reach**

The EPA’s reactivation policy is a hodgepodge of more than 20 years of letters and memoranda to local agencies and the EPA regions regarding the status of reactivated sources. Over the years, the EPA has expanded the scope of its policy to bring more sources into the PSD and NSR programs. The EPA’s earliest statements suggest that reactivated sources do not generally trigger NSR or PSD.

For example, in 1977 the EPA concluded that the reactivation of a steel plant that had been shut down the previous year would not trigger NSR permitting requirements. The EPA’s conclusion was based on the following three factors: 1) the plant had closed at its own discretion and the applicable State Implementation Plan (also known as a SIP) allowed its continued operation, 2) the plant would not emit more than its allowable limits, and 3) the state had continued to maintain the source in its active emission inventory and control strategy. However, the EPA soon developed a more comprehensive approach.

One year later, the EPA concluded that sources that had been permanently deactivated were, upon reactivation, new sources. The agency announced that reactivated sources may trigger NSR or PSD because they are modified rather than new. EPA Region IX, which includes California, adopted this new standard, dubbed the modification analysis, in 1987, when it reviewed the applicability of PSD to the resumption of operations at an acid plant. The EPA had originally concluded that the acid plant was a new source because it had been permanently shut down. Following a change in ownership at the source, the agency revisited the issue and confirmed in a letter (known as the Cypress Casa Grande Letter) that the source was subject to PSD not only under a new source analysis but also under a modification analysis. The EPA explained that the reactivation was a nonroutine physical change (resumption of operations would involve four months of maintenance work and equipment replacement at a cost of approximately $805,000) and a nonexempt change in method of operation (resumption of operations was deemed a de facto operational change).

Although some subsequent EPA guidance appears to disregard this modification analysis, the EPA recently reaffirmed it. In June 1999, then-EPA Administrator Carol Browner issued the Monroe Electric Order, which required PSD permits for the reactivation of three boilers that had not been regularly operated since 1981. The source had initiated activities in September 1988 to prepare the units for an extended reserve shutdown, including draining, disconnecting, and covering the equipment. The owner maintained the existing air permits, applied for required new permits, and continued to pay air quality

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The EPA has rejected proposed state plans that are less rigorous than this permanent shutdown analysis, and various states have adopted the EPA’s methodology. (De facto, California applies the EPA’s guidelines.)

This permanent shutdown approach has yielded mixed results; many sources have triggered NSR or PSD, but others have satisfied the EPA’s intent-based standard. For example, an incinerator that had been shut down for five years and removed from the state’s emissions inventory was presumed new upon reactivation. Similarly, the closure of a kiln was deemed permanent after the unit had been inoperative for four years, the owner had stated that the shutdown was permanent, and the emissions had been removed from the state’s inventory. A reactivated acid plant was deemed a new source after the unit had been shut down for 10 years, the owner had surrendered the permits, and the emissions from the plant had been deleted from the state’s inventory.

The owner of the acid plant was unable to overcome the two-year presumption, even though he presented a previous statement of intent for long-term operation and evidence of custodial maintenance and searches for materials to restart operations.

Other sources have been able to persuade the EPA that their shutdowns were not intended to be permanent. The EPA concluded in 1982 that a refinery’s eight-year shutdown of boilers and a fluid catalytic cracking unit was not intended to be permanent. In 1991, the EPA determined that a power plant had not been permanently shut down, although the units had been “cold standby” status for 10 years and the source had allowed its operating permits to expire.

The agency relied on the owner’s consistent and longstanding expressions of intent to resume operations, the presence of two full-time employees on the site, the periodic testing and maintenance of the system, and the minimal amount of time and capital needed to resume operations. However, the EPA cautioned, “This is a unique situation given the very long period of the shutdown.”

In 1999, the EPA explained that it would examine, in order to determine whether a reactivated source is new for purposes of PSD or NSR, factors including:

- The amount of time the facility was out of operation.
- The reason for the shutdown.
- Statements by the owner or operator regarding intent.

- The cost and time required to reactivate the facility.
- The status of the facility’s permits.
- The record of maintenance and inspections during the shutdown.

The EPA also noted that owners or operators of facilities that have been shut down “must continuously demonstrate concrete plans to restart the facility sometime in the reasonably foreseeable future...” This explanation may be of somewhat limited use to plant operators that are seeking guidance on what will and will not trigger PSD or NSR, but for the present it offers a measure of direction. Previously, the EPA’s standard of review seemed to many critics of the agency to fluctuate according to the political influences in effect at the moment.

**The Modification Analysis**

In the late 1980s, the EPA diverged from its 1978 conclusion that sources that had been permanently deactivated were, upon reactivation, new sources. The agency announced that reactivated sources may trigger NSR or PSD because they are modified rather than new. EPA Region IX, which includes California, adopted this new standard, dubbed the modification analysis, in 1987, when it reviewed the applicability of PSD to the resumption of operations at an acid plant. The EPA had originally concluded that the acid plant was a new source because it had been permanently shut down. Following a change in ownership at the source, the agency revisited the issue and confirmed in a letter (known as the Cyprus Casa Grande Letter) that the source was subject to PSD not only under a new source analysis but also under a modification analysis. The EPA explained that the reactivation was a nonroutine physical change (resumption of operations would involve four months of maintenance work and equipment replacement at a cost of approximately $805,000) and a nonexempt change in method of operation (resumption of operations was deemed a de facto operational change).
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maintenance fees. In 1996, after the boilers had been offline for between 8 and 15 years, the owner sought approval to restart the units. Reactivation would cost approximately $5.3 million and entail some physical work, including the replacement and repair of various components.

Despite the evidence of the owner’s long-standing intent to restart the facility, the EPA concluded that the reactivation did, in fact, trigger PSD because it was a nonexempt change in the method of operation. The EPA noted, “The mere fact that the plant is changing from a lengthy ‘non-operational’ and ‘unmanned’ condition, to one in which the plant is fully operational, fits the common sense meaning of a ‘change in the method of operation.’” The EPA also reaffirmed its position that reactivation activities do not fall under the exemption afforded to an increase in hours and production rate, because the exemption was intended to address the responses of sources to short-term fluctuations in markets. As a result, the owner could not reactivate the plant without first undergoing PSD review.

Few options are available to sources that seek to avoid PSD or NSR liability under the modification theory. Sources may be able to avoid triggering PSD or NSR under the physical change prong of the modification theory, but only if they persuade the agency that the work associated with reactivation is routine. The EPA’s broad application of the “change in method of operation” prong is more problematic. Sources may be able to avoid PSD or NSR under this theory if they can persuade the agency that their reactivation will not result in a significant net emissions increase. However, such a showing would likely be difficult, because the source’s prereactivation emissions baseline is likely to be low.

Since the mid-1990s, the EPA has been preparing a reform package for NSR and PSD permitting programs. In a prior proposal, the EPA expressed its willingness to allow states to adopt plantwide applicability limits, or PALs, that would give sources greater flexibility in modifying their individual emissions units. The agency has also proposed allowing states to look to earlier emissions as a means of establishing premodification baselines and exempting emissions units from NSR and PSD requirements if the units had installed BACT or LAER plans in the previous 10 years. If the EPA adopts these proposals and if local air districts revise their rules to reflect these more lenient requirements, sources may be less likely to trigger the reactivation policy.

However, recent statements suggest that the EPA remains committed to NSR and PSD enforcement actions under the existing rules. For instance, the agency is proceeding with actions against utilities and refineries around the country for failing to obtain permits for activities that the EPA considers nonroutine modifications, and some of these cases are proceeding to trial. The agency also appears committed to the reactivation policy and (at least for now) to the modification analysis established in the Cyprus Casa Grande Letter and the Monroelectric Order. In addition to drafting additional opinion letters on the policy, the EPA and, in some cases, private plaintiffs have commenced enforcement actions against reactivated sources. Although the policy may be subject to challenge on a variety of grounds, including the Administrative Procedure Act and the fair notice doctrine, at least one court has suggested that the policy may be enforceable. As a result, until the validity of the policy is determined by the courts or until the EPA revises its permitting programs to accommodate source reactivation, sources may find themselves subject to the older, less flexible policies regarding NSR and PSD.

Reducing the Risk

At the present time, no foolproof method exists by which reactivated sources can avoid NSR or PSD. However, there may be ways to reduce the risks. At the outset, a source should review the SIP and local rules to determine whether any permitting or notification requirements affect its deactivation and reactivation activities. In addition, those managing the source may wish to consider the following measures:

- Compile helpful documentation.
- Document intentions to resume operations (in correspondence, internal memora, annual reports, press releases, and other documents) and avoid any expressions of contrary intent.
- Document efforts to resume operations (by securing financing, making repairs, and obtaining necessary equipment).
- Maintain existing permits and pay air quality fees.
- Monitor permit status and apply for new permits as required.
- Maintain the site’s emissions on the state emissions inventory.
- Keep the facility in good condition.
- Minimize the duration of the shutdown—less than two years, if possible.
- Maintain periodic operations at the site, particularly operations related to the primary purpose of the facility.
- Maintain some air emissions from the facility.
- Conduct regular inspections of and maintenance on the deactivated equipment.
- Keep deactivated equipment at the site.
- Undertake decommissioning and mothballing activities in ways that will minimize the effort required to bring equipment back into service.
- Treat the equipment in a way that comports with the stated intent to resume operations at some specific point in the future.
- Retain personnel on the site.
- Minimize the costs, work, and time needed for reactivation.
- Avoid combining reactivation work with other projects unnecessary for the reactivation.
- Work with the permitting agency to ensure that the reactivation complies with applicable requirements.
- Consider the potential benefits and risks of obtaining a determination of nonapplicability from the EPA.

These measures may reduce the likelihood that the agency will consider the shutdown to be permanent. They may also help persuade the agency that the reactivation is a routine physical change and hence not subject to PSD or NSR. Unfortunately, these measures will be less helpful if the permitting agency decides to apply an operational modification analysis to the reactivation project.

The EPA’s reactivation policy has serious potential repercussions for plants that are being reactivated. Until the EPA revises its policy or the courts rule on the validity of the policy, sources may be able to reduce the risks of triggering the requirements by documenting a specific intention to resume operations, maintaining the source’s equipment and permits, and minimizing the work involved in bringing the equipment back online.

1 Clean Air Act, 42 U.S.C. §7401 et seq.
2 See 42 U.S.C. §7475 (PSD requirements) and §7503 (NSR requirements). See also 40 C.F.R. §§51.160(i)-(k) and §§52.21(f)-(j) (PSD); 40 C.F.R. §§51.165(a)(2) and §§52.24 App. S (NSR).
3 See, e.g., 42 U.S.C. §§7405 et seq. §7503(a)(1) (NSR); 40 C.F.R. §§51.160(a), (b), (c), and §§52.21(f)-(j) (PSD).
4 See, e.g., 42 U.S.C. §§7505(a), (b), and 40 C.F.R. §§51.165(a) and §§52.24 App. S.
5 See 42 U.S.C. §7502(c) (NSR); 40 C.F.R. §§51.166(f) and §§52.21(f) (PSD).
6 See 40 C.F.R. §51.166(b)(2) and §§52.21(b)(2) (PSD); 40 C.F.R. §51.166(b)(1)(ii)(A) and §52.24(f)(j) (NSR).
7 See 40 C.F.R. §§51.166(b)(2)(iii)(a) and §§52.21(f)(2)(iii)(a) (PSD); 40 C.F.R. §§51.165(a)(1)(ii)(A) and §52.24(f)(j) (NSR).
8 See 40 C.F.R. §§51.160(i)(2)(iii)(A) and §§52.21(b)(2)(iii)(B) (PSD); 40 C.F.R. §§51.165(a)(1)(iv)(C)(6) and §52.24(f)(j) (NSR).
9 Memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement, to Howard R. Heim, Chief, Air Programs Branch, re Interpretation of Offset Policy, Sept. 15, 1977 [hereinafter the Heim Memorandum], Record of Communication—Phone Call, from Rich Biondi to Roger Pfaff re Old Sources Being Brought On Line—PSD Applicability, June 18, 1980 [Retention of a deactivated source’s emissions...
on the state’s inventory would be sufficient to exempt the source from PSD permitting upon reactivation—even if the source had been deactivated for longer than two years.). These EPA guidance documents are available on the EPA Region VII’s database: http://www.epa.gov/region07/programs/artd/air/policy/search.htm.

See, e.g., 52 Fed. Reg. 38787 (Oct. 19, 1987) (rejecting a Virginia SIP provision more lenient than the EPA’s policy); Memorandum from Ruben Herrera, Technical Specialist, Texas Natural Resource Conservation Commission, to Victoria Hsu, NSRP Division Director, Texas Natural Resource Conservation Commission, re PSD and Non-Affirmation (NA) Applicability to Restart of Sources that Are Down for More Than Two Years (Aug. 4, 1999) (outlining permanent shutdown analysis).


Memorandum from Edward E. Reich, Director, Stationary Source Enforcement Division, to Sandra S. Gardebring, Director, Enforcement Division, EPA Region V, re PSD and NSPS Applicability to a Reactivated Source (Oct. 3, 1988).

Memorandum from John S. Seitz, Director, Stationary Source Compliance Division, to David Howekamp, Director, Air Management Division, EPA Region IX, re Reactivation of Noranda Lakeshore Mine’s RLA Plant and PSD Review (May 27, 1987).

Id. at 3.

Memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement, to Conrad Simon, Director, Air and Waste Management Division, EPA Region II, re Reactivation of Amerada Hess Corporation’s Fort Reading Facility and PSD Review (July 9, 1982).

Memorandum from John B. Rasnic, Director, Stationary Source Compliance Division, to Douglas M. Skie, Chief, Air Programs Branch, re Applicability of PSD to Watertown Power Plant, South Dakota, Shutdown for Nine Years (Nov. 19, 1991) [hereinafter Watertown Power Memo].

Id. at 2.

In re Monroe Electric Generating (Petition No. 6-90-2), EPA Order Partially Granting and Partially Denying Petition for Objection to Permit 10 (June 11, 1999) [hereinafter Monroe Electric Order].

See note 16, supra.

Letter from David Howekamp, Director, Air Management Division, EPA Region IX to Robert T. Connery, Holland & Hart, re Supplemental PSD Applicability Determination Cyprus Casa Grande Copper Mining and Processing Facilities (Nov. 6, 1987).

Id. at 6.

See, e.g., Watertown Power Memo, supra note 19 (relying solely on a permanent shutdown analysis to conclude that source reactivation does not per se trigger PSD).

See Monroe Electric Order, supra note 21.

Id. at 22.

Id. at 13.

The EPA did not decide whether the reactivation was a nonroutine physical change sufficient to trigger PSD.

See id. at 21-22.

See 40 C.F.R. §§166(h)(21) and §§21.21(b)(21)(iv) (PSD); 40 C.F.R. §§165(a)(1)(ixii) and §§21.24(b)(13) (NSR); Monroe Electric Order, supra note 21, at 15 (“EPA...has applied its discretion narrowly in assigning representational periods other than the two years immediately preceding the physical or operational change.”).


EPA Region IX recently settled a reactivation enforcement action against Cenco Refining Company. 2001 EPA Consent LEXIS 23 (Jan. 18, 2001). In November 2000, EPA Region V settled a reactivation claim against Detroit Edison for resuming operations of boilers that had been mothballed for 10 years. 2000 EPA Consent LEXIS 598 (Nov. 9, 2000).

Communities for a Better Env’t v. Cenco Refining Co., 179 F. Supp. 2d 1128, 1143 (C.D. Cal. 2001) (concluding that the plaintiff made a “strong showing that the Reactivation Policy is a reasonable interpretation of the Clean Air Act regulations that does not conflict with any terms of the NSR program”).
A Status Report on the Peculiar Risk Doctrine in California

Does hirer liability apply if an independent contractor is not insured?

On January 31, 2002, the California Supreme Court handed down two long-awaited decisions involving the liability of hirers of independent contractors for injuries sustained by employees of independent contractors under the “peculiar risk doctrine.” In its holdings, the supreme court opened a narrow window of hirer liability after almost a decade of decisions that all but precluded these claims.

In Hooker v. Department of Transportation, the court ruled that a hirer of an independent contractor may be held liable to an injured employee if the contractor fails to maintain workers’ compensation coverage for its employees. In an otherwise innocent hirer then afforded the same liability protection? Although no published California case has directly addressed this issue, sufficient information can be gleaned from past decisions of the Supreme Court to forecast how the court might resolve this issue.

For many years, California followed the minority view that a hirer who engages an independent contractor to perform “inherently dangerous” work can be held liable in tort, regardless of fault, when the contractor’s employee is injured on the job. This theory of liability, known as the peculiar risk doctrine, was grounded in the Restatement (Second) of Torts.

According to Section 413 of the Restatement, a person who hires an independent contractor to do inherently dangerous work, but who fails, contractually or otherwise, to take special precautions to avoid the peculiar risk, may be liable for injuries caused by such failure. Courts often refer to Section 413 liability as “direct” liability, because it is the failure to do some affirmative act that led to the injury.

Under Section 416 of the Restatement, a person who hires an independent contractor may still be liable even if the hirer provides for special precautions but the contractor fails to exercise reasonable care to take such precautions, and someone is injured as a result. Courts often refer to liability under Section 416 as “vicarious” because the hirer’s liability flows from the independent contractor’s failure to take precautions.

The theory behind the imposition of liability, without a finding of fault, was to ensure that employees who are injured while performing inherently dangerous work receive adequate compensation for their injuries, that the person who benefits from the work (most commonly, a landowner) bears responsibility for any risk of injury to others, and that adequate safeguards are taken to prevent injuries. However, in a series of cases beginning with Privette in 1993, the California Supreme Court substantially narrowed this liability.

The Rise and Fall of the Peculiar Risk Doctrine

In Privette, the defendant hired an independent roofing contractor to install a new roof on his property. During the work, the roofer’s employee, Contreras, was instructed to carry buckets of hot tar up a ladder to the roof for installation. While performing the task, Contreras fell from the ladder and was severely burned by the hot tar. Contreras subsequently filed for workers’ compensation benefits, and he sued the landowner, Privette, for vicarious liability under the peculiar risk doctrine, pursuant to Section 416. The trial court denied Privette’s motion for summary judgment, and the court of appeal denied his writ petition.

After granting review, the California Supreme Court unanimously held for the first time that a hirer may not be held liable for injuries to an independent contractor’s employee, in part, because the workers’ compensation system provides for the automatic recovery of benefits for injuries “arising out of and in the course of the employment.”

Privette invokes the common law rule that a hirer employing an independent contractor is not ordinarily vicariously liable for torts committed by the contractor. The court then examined the historical roots and the evolution of the peculiar risk doctrine. As the court pointed out: “Over time, the courts have, for policy reasons, created so many exceptions to this general rule of nonliability that the rule is now primarily
important as a preamble to the catalog of its exceptions.

At first, liability was only extended to innocent bystanders or neighboring property owners who were injured by the acts of an independent contractor hired by the landowner to perform work on the property. Over time, a minority of jurisdictions, including California, expanded liability to allow a hired contractor’s employees to seek recovery from the property owners for on-the-job injuries. Although acknowledging that California followed the minority position by extending liability to hirers of independent contractors whose employees were injured on the job, the Privette court was persuaded to abandon that approach and to preclude liability under the peculiar risk doctrine.

The court reasoned that, under the Workers’ Compensation Act, all employees are automatically entitled to recover benefits for injuries arising out of and in the course of employment. The court specifically cited Labor Code Section 3716, which the court described as “setting up an uninsured employees fund to provide benefits for employees not covered by workers’ compensation insurance.” The court reasoned that the workers’ compensation scheme achieves the same purpose as the peculiar risk doctrine by ensuring that an employee’s injuries will be compensated regardless of fault.

The court concluded that to permit injured employees to recover from both the workers’ compensation system and the hirer of the contractor under the peculiar risk doctrine would contravene public policy, because employees could potentially receive an “unwarranted windfall”—an opportunity, the court points out, denied to other workers. Additionally, hirers would be exposed to liability without the opportunity to seek equitable indemnity from the negligent contractor because the workers’ compensation system shields the contractor from potential liability.

After Privette, lower courts disagreed about the viability of the peculiar risk doctrine in situations in which the hirer made no provision for the use of special precautions on the job as set forth in Restatement Section 413. Apparently, some lower courts believed that hirer liability protection only existed under the scenario laid out in Section 416, when the hirer of an independent contractor makes provisions “in the contract or otherwise” that special precautions be taken with regard to the peculiar risk involved, as was the case in Privette. In Toland, the supreme court stepped in to clarify whether the hirer could be held liable for injuries sustained by the independent contractor’s employee if the hirer failed to make provisions for the use of special precautions.

In Toland, the plaintiff was an employee of a framing subcontractor who was injured when a heavy framed wall fell on him. The plaintiff filed suit against the developer, alleging that raising the wall created a peculiar risk of injury for which the developer should have required the subcontractor to take special precautions. The developer moved for summary judgment under Privette. The trial court granted the motion, and the court of appeal affirmed.

On review in the supreme court, the defendant contended that under Section 416 of the Restatement, it should not be held vicariously liable, because the injury did not result from the hirer’s negligence. Plaintiff argued that under Section 413, direct liability should be found, because the hirer failed to provide special precautions in light of the peculiar risk of the work.

In rejecting the plaintiff’s arguments, the court concluded that there was no meaningful distinction between the factual situations addressed by the two sections of the Restatement for purposes of imposing liability under the peculiar risk doctrine. In reaching this conclusion, the court again relied upon the policy consideration enunciated in Privette. The court stated, “Imposing on the hiring person a liability greater than that incurred by the independent contractor (the party with the greatest and most direct fault) is equally unfair and illogical whether the hiring person’s liability is premised on the theory of section 413…or the theory of section 416…”

Although Toland put to rest the question of liability with respect to the two factual scenarios set forth under Sections 413 and 416, several lower courts continued to question whether an employee of an independent contractor could assert claims against the hirer of the contractor under a different tort-based theory of liability. Once again, the supreme court stepped in to answer this question.

In Camargo, the family of a deceased worker, who was fatally injured when his tractor tipped over while driving over a large mound of manure, brought suit against the hirer of his employer, alleging liability under the theory of “negligent hiring” as set forth in Restatement (Second) of Torts Section 411. The plaintiffs contended that the dairies were liable for the worker’s death, because it was negligent in hiring the contracting, which failed to determine whether the employee was qualified to operate the tractor safely. In rejecting the plaintiffs’ theory of liability, the supreme court relied upon two policy considerations cited in Privette: the exclusivity of the workers’ compensation system and the unwarranted windfall that employees of independent contractors would get (the right to recover tort damages for industrial injuries caused by their employer’s failure to provide a safe working environment).

Against this backdrop, the supreme court this year addressed the application of the peculiar risk doctrine when the hirer affirmatively contributes to the employees’ injuries. In Hooker v. Department of Transportation, a crane operator employed by a general contractor hired by Caltrans was killed when the crane he was operating tipped over. His widow filed suit against Caltrans, alleging that it was liable for her husband’s death because Caltrans “retained control” over the worksite. Specifically, the plaintiff relied upon the existence of a Caltrans safety manual that set forth various guidelines for job-site safety. Caltrans’s motion for summary judgment under Privette and Toland was granted by the trial court, but the court of appeal reversed. The supreme court granted review to consider the issues that arise when the hirer retains control of the worksite.

The supreme court began its analysis by reviewing its prior decisions in Privette, Toland, and Camargo. The court then reviewed the decisions of other state courts that have addressed the issue. Finding little guidance, the court concluded that other states are evenly divided on the question of whether an employee of a contractor may sue the hirer of the contractor for negligent exercise of retained control.

The court then reviewed two California appellate decisions—Grahn v. Tosco Corporation and Kinney v. CSB Construction, Inc. The court noted that although these two cases found that under certain circumstances a hirer may be held liable to an employee of a contractor under a theory of retained control, the courts disagreed on whether mere retention of control was sufficient to establish liability or whether something more, such as active participation, must be shown. Whereas the Grahn court found that a hirer may be held liable when the hirer retains sufficient control over the work of the independent contractor to be able to prevent or eliminate the dangerous condition through the exercise of reasonable care, the Kinney court found that mere retention of control of safety conditions was not enough. Instead, the court found that to establish liability the plaintiff must show that the hirer affirmatively contributed to the use of methods or procedures that caused the injury.

Adopting the more nuanced approach in Kinney, the supreme court found: Imposing tort liability on a hirer of an independent contractor when the conduct of [the hirer] has affirmatively contributed to the injuries of the contractor’s employee is consistent with the rationale of our decisions in Privette.
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vette, Toland and Camargo because
the liability of the hirer in such a case is not in essence ‘vicarious’ or ‘derivative’ in the sense that it derives from the ‘act or omission’ of the hired contractor.” To the contrary, the liability of the hirer in such a case is direct in a much stronger sense of that term.42

In rejecting Caltrans’s argument that hirers should never be held liable under the peculiar risk doctrine, the supreme court specifically dismissed the contention that workers’ compensation exclusivity should prevail because the contract price paid by the hirer would have taken into account the added cost of coverage. The court concluded that the contract price could not have reflected the cost of injuries that are attributable to the hirer’s affirmative conduct and the contractor has no way of calculating an increase in the costs of coverage attributable to the conduct of third parties.43 However, based upon its finding that Caltrans did not affirmatively contribute to the accident, the court affirmed the motion for summary judgment.44

Similarly, in a companion case issued the same day, McKown v. Wal-Mart Stores, Inc.,45 the supreme court ruled that a hirer may be held liable for injuries sustained by the employee of an independent contractor if the hirer provides the worker with tools that affirmatively contribute to the injury-causing event.46 In McKown, the plaintiff was severely injured while operating a forklift provided to him by Wal-Mart, the hirer of his employer.47 At trial, the jury returned a verdict against Wal-Mart and other defendants, finding that Wal-Mart was negligent in providing unsafe equipment and was 23 percent at fault.48 The court of appeal affirmed, finding that Privette v. Toland did not bar recovery when the hirer provides unsafe equipment to the employee of an independent contractor.49 Closely tracking and repeatedly referring to its detailed analysis in Hooker, the court found that “the hirer’s affirmative contribution to the employee’s injuries eliminates the unfairness in imposing liability where the contractor is primarily at fault.”50

Uninsured Contractors

The supreme court has never been called upon to specifically determine whether the peculiar risk doctrine applies to a hirer that engages an uninsured independent contractor whose employee is injured on the job. Nevertheless, the supreme court’s opinions regarding the application of the peculiar risk doctrine give substantial guidance as to how it might resolve the issue.

Nowhere, in its lengthy decisions in Privette, Toland, and Camargo, does the supreme court state that its holdings do not apply if the independent contractor had no workers’ compensation coverage. Instead, throughout those cases, the court repeatedly refers to the redundancy of the peculiar risk doctrine because the workers’ compensation “statutory scheme” and workers’ compensation “system of recovery” apply.51 Those repeated references to the workers’ compensation “scheme” and “system” are no mistake. Indeed, as the court acknowledges, even when an employer fails to obtain or maintain workers’ compensation insurance coverage, an injured employee may still receive compensation under the state’s uninsured employers fund. This fund was established by the legislature “to create a source of benefits to the employee who otherwise would receive no benefits, because of the failure or refusal of his or her employer to obtain workers’ compensation liability coverage.”52

Moreover, in addition to the right to receive compensation from the uninsured employers fund, the injured employee may also sue the uninsured employer for damages pursuant to Labor Code Section 3706. In addition, under Labor Code Section 3708 the employer is presumed negligent and the ordinary affirmative defenses of contributory negligence and assumption of risk are unavailable. Thus, California law guarantees that an employee of an uninsured employer is compensated regardless of the employer’s lack of insurance coverage or ability to pay.

In both Privette and Toland, the supreme court specifically referred to the uninsured employers fund. In Privette, the court explained its decision to prohibit the application of the peculiar risk doctrine to hirers of independent contractors by discussing the workers’ compensation system itself. The court stated: “The workers’ compensation system was created to provide, in the words of our state Constitution, ‘for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment....’”53 According to the court, “Under the Workers’ Compensation Act...all employees are automatically entitled to receive benefits for injuries ‘arising out of and in the course of the employment.’”54

The court then referred to the uninsured employers fund, established under Labor Code Section 3716, which provides for “setting up an uninsured employers fund to provide benefits for employees not covered by workers’ compensation insurance.”55

If the supreme court had intended to limit the application of Privette only to cases in which the employer maintained workers’ compensation insurance coverage, it would...
not have referred to the uninsured employers fund. Any doubt about the court’s thinking on this issue was put to rest by *Toland*.

In *Toland*, the court once again specifically referred to the uninsured employers fund, which the court described as providing “workers’ compensation benefits to workers employed by uninsured employers.” The *Toland* court distinguished the vastly different situations of neighboring property owners or innocent bystanders who may be injured by the negligence of an independent contractor from that of contractor’s employees. The *Toland* court stated, “The neighboring landowner or innocent bystander may have no other source of compensation for injuries resulting from the contractor’s negligence in doing the inherently dangerous work. In contrast, an employee of the negligent contractor can, for workplace injury caused by the contractor’s negligence, recover under the workers’ compensation system regardless of the solvency of the contractor.”

Thus, by repeatedly referring to the uninsured employers fund in discussing the application of the peculiar risk doctrine to hirers of independent contractors, the supreme court signaled that employees of uninsured contractors may not recover from the hirers of independent contractors under the peculiar risk doctrine any more than employees of contractors carrying workers’ compensation insurance may. This distinguishes employees from innocent bystanders and neighboring landowners, who “may have no other source of compensation for their injuries resulting from the contractor’s negligence” except from the hirer of the contractors.

In the two most recent decisions involving the peculiar risk doctrine, *Hooker* and *McKown*, the court again did not address whether the doctrine applies when the injured worker’s employer is uninsured. However, by rejecting the argument that hirers should never be liable for injuries sustained by an independent contractor’s employees, the court demonstrated a more nuanced analysis that focuses upon the level of involvement of the hirer in the injury-causing event—to what extent the hirer “affirmatively contributed” to the employee’s injuries.

In the case of an uninsured independent contractor, when there is no allegation that the hirer affirmatively contributed to the employee’s injuries (whether by retained control or the provision of defective equipment), there is no direct relationship between the employee’s injuries and any act or omission by the hirer. Thus, there is no rationale for holding the hirer vicariously liable for injuries sustained by a worker.

It should also be noted that the supreme court depublished a court of appeal decision.
that found in favor of an injured employee. In
Andreini v. Superior Court,63 the defendant
homeowners hired a licensed contractor to
perform touch-up painting on their home.62
While performing the job, one of the con-
tactor's employees, Solorio, was injured when
he fell off the roof of the property.63 There-
after, Solorio sued the homeowners for neg-
ligence under the peculiar risk doctrine.64
During the litigation, the homeowners' motion
for summary judgment was denied.65
The homeowners then petitioned the
court of appeal for a writ of mandate direct-
ing the trial court to grant summary judg-
ment.66 The First Appellate District, Division
Two, issued a published decision denying
the homeowners' petition.67 The court of
appeal ruled, as a matter of law, that Privette
does not apply when the contractor carries no
workers' compensation insurance.68

The homeowners then petitioned the
supreme court for review.69 Nineteen days
after issuing its opinion in Toland, the sup-
reme court denied the petition for review
and ordered Andreini depublished.70 Although
speculation about the reasons that the
supreme court depublishes a particular deci-
sion is done at great peril, surely the court did
not depublish Andreini merely because of
some simple procedural flaw. Andreini was
depublished because the court disagreed
with its clear holding that a hirer may be held
liable under the peculiar risk doctrine when
the employee of an independent contractor
has no workers' compensation insurance.

It is likely that the supreme court would
find that there simply is no rational basis to
permit a worker to obtain a windfall of double
recovery and to allow a class of individuals to
thwart the reasonable limits imposed by the
workers' compensation system, merely
because the worker's employer failed to main-
tain workers' compensation coverage. This is
especially true in situations in which the hirer
was not responsible for the injury-causing
event and played no role in the failure of the
independent contractor to obtain or maintain
workers' compensation coverage.

1 Hooker v. Department of Transp., 27 Cal. 4th 198
(2002).
2 McKown v. Wal-Mart Stores, Inc., 27 Cal. 4th 219
(2002).
3 Privette v. Superior Court, 5 Cal. 4th 689 (1993).
4 Toland v. Sunland Hous. Group, Inc., 18 Cal. 4th 253
6 Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 508
(1979); Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 585-
86 (1979); Van Arsdale v. Hollinger, 68 Cal. 2d 245, 250
(1968); Woon v. Aerojet Gen. Corp., 57 Cal. 2d 410, 410-11
(1962); Ferrel v. Safway Steel Scaffolds, 57 Cal.
2d 651 (1962).
7 Privette, 5 Cal. 4th at 691.
8 Id. at 692.
9 Id.
One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employee (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Toland, 8 Cal. 4th at 257. RESTATEMENT (SECOND) OF TORTS §414:

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

Toland, 8 Cal. 4th at 257. RESTATEMENT (SECOND) OF TORTS §414:

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons. RESTATEMENT (SECOND) OF TORTS §414.


Id. at 1244-45.


Id. at 202.

Id. at 203.

Id. at 202.

Id. at 205-06.

Id. at 206-08.

Id. at 207.


Id. at 209.

Id. at 211-12 (citations and footnote omitted).
Until recently, California courts had the authority under Code of Civil Procedure Section 639 to require parties to use discovery referees whenever “necessary.” The decision as to when a discovery referee was necessary was left to the discretion of the trial court. However, critics charged that discovery referees were often unnecessary and imposed undue financial burdens on the parties.

Responding to such criticisms, two years ago the California Legislature enacted a new law, AB 2912, that, beginning in 2001, eliminated the trial court’s discretion under Section 639 and imposed specific conditions on the appointment of discovery referees in order to protect parties against unnecessary or inappropriate appointments. The legislation dramatically amended Section 639 and other provisions applicable to discovery referees. The legislature also directed the Judicial Council to collect and report information regarding the use of discovery referees under Section 639. The next year, the legislature extended the reporting deadline but underscored its mandate: “It is the intent of the Legislature that the practice and cost of referring discovery disputes to outside referees be thoroughly reviewed.”

The new requirements for the appointment of a discovery referee without the consent of all parties are clear regarding what a court cannot do and what an appointment order must contain:
- The court cannot appoint a discovery referee absent “exceptional circumstances.”
- The court cannot appoint a discovery referee without express findings regarding the ability of the parties to pay for the referee’s fees.
- The court order appointing a discovery referee must be in writing.
- The court must specify in the order the scope of the reference.
- The court order must include the name, business address, and telephone number of the referee.
- The court order must specify the maximum hourly rate the referee may charge and, if a party requests, the maximum number of

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One of the most significant requirements is the change in the standard under which a discovery referee can be appointed absent the consent of the parties. Under the new law, a discovery referee can be appointed only under “exceptional circumstances…, which must be specific to the circumstances of the particular case.” This amendment should go far in preventing any unnecessary appointments, although what constitutes “exceptional circumstances” justifying a court’s decision to appoint a discovery referee remains to be seen. It is worth noting that the language is substantially similar to the language in Rule 53 of the Federal Rules of Civil Procedure, governing the appointment of special masters, which provides that a reference to a master “shall be the exception and not the rule.”

**Ability to Pay**

A requirement in the new law that is as important as the changed standard for appointment of a referee involves the referee’s fees. Even if exceptional circumstances warrant the appointment of a discovery referee, the court cannot appoint one without first determining whether the parties have the ability to pay the referee’s fees. In fact, the bulk of the amendments enacted in 2000 address this issue. To appoint a discovery referee, the court must find that “no party has established an economic inability to pay a pro rata share of the referee’s fees.” As for the obvious question of whether a lawyer’s ability to pay may be considered, the answer is no. The court is allowed to consider “only the ability of the party, not the party’s counsel, to pay these fees.”

The economic analysis of a party’s ability or inability to pay for a discovery referee must not take place in a vacuum. The court is expressly directed to consider “the estimated cost of the referral and the impact of the proposed fees on the party’s ability to proceed with the litigation.” The purpose of this amendment is to ensure that no party is forced to sacrifice necessary case preparation in order to pay the costs of a discovery referee. Indeed, at the request of a party, the order for the appointment of a discovery referee must set forth clearly the maximum number of hours for which the referee may charge. The maximum may be modified but only upon written application (by a party or by the referee) and only for good cause.

The provision for a cap on a discovery referee’s fees is an obvious response to past criticisms, and its benefit to the parties is clear. It may also help the court by making it easier to assess the economic impact of an appointment, particularly on parties with limited financial resources who might benefit from the appointment of a discovery referee.

If one party is unable to pay, then a discovery referee cannot be appointed unless any other party, even an opposing party, “has agreed voluntarily to pay that additional share of the referee’s fee.” In this circumstance, the court may proceed to appoint the discovery referee. While such cases may not be common, this provision will be a benefit in large multiparty cases in which the larger parties are willing and able to pay a referee’s fees and the smaller parties are unable to do so. The legislature did not address the implications of having a discovery referee paid by only one side in a lawsuit. In that situation, to avoid an appearance of bias, the court may wish to withhold from the discovery referee the identity of the party or parties paying the referee’s fees.

The new law also requires that the court specify the scope of the reference at the time the discovery referee is appointed. This requirement appears twice in the amendments. First, Section 639(c) requires that the order “indicate whether the referee is being appointed for all discovery purposes in the action.” Second, Section 639(d) requires that the order specify “the subject matter or matters included in the reference.” These changes are a significant improvement, because the written order will give clear direction to the referee and to the parties as to the scope of the appointment. However, the use of different language in subsections (c) and (d) is puzzling.

The remaining requirements are informational in nature. The court order now must be in writing, and it must include the name, business address, telephone number, and maximum hourly rate of the referee. Also, a copy of the order must be forwarded to the presiding judge of the court.

In the event that a party disagrees with a discovery referee’s report, a full review by the court is available: “[T]he decision of the referee…is only advisory.” The court may adopt the referee’s decision in whole or in part, change the decision, or disregard it entirely, but only “after independently considering the referee’s findings and any objections and responses thereto filed with the court.” It should be noted that, regarding the review, the statute does not provide the parties with any right to a hearing.

**Benefits of Using a Referee**

These new requirements should eliminate unnecessary appointments, but discovery referees should continue to be appointed in appropriate cases. The types of cases in which discovery referees have traditionally been appointed are those requiring the full-time
attention of a judge, those requiring technical expertise, or both.

For example, environmental cleanup cases can easily involve dozens of parties if all current and prior landowners are named in an action or in the cross-actions. They can also include technical issues. Likewise, construction defect cases, in which numerous contractors and subcontractors are sued, can also contain multiple parties and technical issues.

A discovery referee who understands the technical problems in a multiparty case can handle discovery matters quickly and efficiently. Such a referee can be a tremendous benefit to the parties. However, for parties who are individuals without insurance coverage, the cost of a discovery referee can be burdensome. The changes to Section 639 allow the courts to continue to appoint discovery referees in those cases in which they will be a benefit to the parties, but the changes protect small parties against prohibitive fees.

Of course the appointment of a discovery referee does not guarantee that discovery will proceed more efficiently than it would before a judge. Some judges are excellent at actively supervising discovery matters and rarely appoint discovery referees. For example, Judge J. Stephen Czuleger is reluctant to appoint referees even when lawyers request one. “It is not enough for lawyers to tell me there is a need for a referee in their case,” Judge Czuleger said. “They need to tell me specifically what they want the referee to do, rather than leaving it open-ended.”

Lawyers frequently see the appointment of a referee as leading to a delay of the trial. However, the appointment of a discovery referee should not prolong the resolution of a case. Indeed, one of the benefits of having a discovery referee should be the faster handling of discovery matters. A good discovery referee can allow the parties to obtain legitimate discovery and enforce legitimate objections while minimizing the time and expense normally associated with discovery disputes.

For example, a discovery referee can 1) require that disputes be raised immediately, 2) eliminate “meet and confer” sessions, and 3) streamline the documentation that must accompany a motion to compel. With a discovery referee, counsel can sit down and discuss precisely what information is being sought; what information is relevant; what persons or locations are likely to have that information; what logistics, software requirements, or organizational issues are involved; and what type of search is likely to result in useful information. A discovery referee also can work with counsel to develop a discovery program that serves the interests of all par-
ties. The appointment of a discovery referee should shorten, rather than lengthen, the life of a case.

The Delay Issue
Although the amendments to Section 639 are a definite improvement, they do not address the critical issue of delay. Not one of the changes to Section 639 requires that a referee hear discovery matters promptly. Code of Civil Procedure Section 643 does provide that the referee must report to the court “within 20 days after the hearing, if any, has been concluded and the matter has been submitted.” However, before Section 643 applies, the referee continues to have discretion and control over the speed with which a matter is heard and submitted.

Although legislative changes to address the issue of delay will no doubt be suggested in years to come, the courts can also address this problem in the meantime. One simple way to eliminate delay is for the court to ensure that the discovery referee is both active and knowledgeable. Another way is by including a sunset provision in the appointment order, so that the appointment automatically concludes at a certain date with the issuance of a final report. Judge Czuleger has also developed a simple way to eliminate delay. His policy is to maintain the original trial date, regardless of the appointment of a referee. He believes that this policy is effective in encouraging efficiency in the discovery process.

The changes to Section 639 do not apply to the appointment of discovery referees with the consent of all parties, which is addressed by Section 638. Even so, parties should contemplate using the new amendments as guidelines when consenting to Section 638 appointments. The new Section 639 requirements are thoughtful and worthwhile. Parties also should consider requesting a sunset provision in any appointment of a discovery referee, whether under Section 638 or 639.

The overall impact of the new changes governing the appointment of discovery referees under Section 639 remains open to debate, but data on the implementation of the new amendments will be available soon. The Judicial Council is required to collect all orders appointing discovery referees, both under Section 638 and Section 639. The Judicial Council is then required to report to the legislature on the number of appointments, the cost to the parties, and the time spent by the discovery referees. The deadline for that report is July 1, 2003.

It will be interesting to review the information collected by the Judicial Council and to see what effect, if any, the legislative changes have had on discovery referee appointments.

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2 When all parties consent to the appointment of a discovery referee, Code of Civil Procedure §638 applies, not §639. When the parties do not consent, §639 is applicable. The focus of this article is on §639.
3 CODE CIV. PROC. §640.5. The legislature also expanded its mandate by requiring the Judicial Council to report on the use of referees in discovery matters pursuant to either Code of Civil Procedure §638 or §639.
4 CODE CIV. PROC. §639(d)(2).
5 FED. R. CIV. P. 53(b).
6 CODE CIV. PROC. §639(d)(6). No such finding is required if the referee is serving gratis.
7 CODE CIV. PROC. §639(d)(6)(A).
8 CODE CIV. PROC. §639(d)(6)(B) (emphasis added).
9 Id.
10 CODE CIV. PROC. §639(d)(5).
11 CODE CIV. PROC. §639(d)(6)(A).
12 CODE CIV. PROC. §639(e).
13 CODE CIV. PROC. §639(d)(3).
14 CODE CIV. PROC. §639(d)(4) and (5).
15 CODE CIV. PROC. §639(e).
16 CODE CIV. PROC. §644(b). No such review is available for a consensual general reference pursuant to §638.
17 CODE CIV. PROC. §644(a).
18 CODE CIV. PROC. §644(b); CODE CIV. PROC. §643.
20 CODE CIV. PROC. §639(e), 639(e), 640.5.
21 Id.
by eavesdrop on interviews between lawyers and their clients in derogation of the confidentiality in the lawyer-client relationship.

The Duty of Confidentiality

In California, the duty to maintain client confidence and secrets is of paramount importance. Business and Professions Code Section 6068(e) provides, “It is the duty of an attorney...[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Last year, in Adams v. Aerojet-General Corporation, the Third District Court of Appeal considered this duty in the context of a lawyer’s move from one law firm to another. The lawyer was previously a principal of a law firm that provided legal advice to Aerojet-General Corporation on its disposal and treat-
ment of hazardous wastes. The lawyer had not billed any of his time to Aerojet-General and stated in his declaration that he possessed no client secrets. The lawyer resigned from his law firm and became a principal of a new firm, which represented plaintiffs suing Aerojet-General over alleged groundwater contamination.

Aerojet-General moved to disqualify the lawyer and his new firm. The trial court granted the motion, but the court of appeal reversed. In so doing, the court of appeal rejected Aerojet-General’s contention that there should be a nonrebuttable presumption of imputed knowledge from the lawyer’s previous law firm to the lawyer. Rather, the court of appeal held that if the lawyer did not personally represent the former client who seeks to remove the lawyer from the case, the trial court must determine whether confidential information material to the current representation would normally have been imparted to the lawyer during his tenure at the old firm. To hold otherwise, the appellate court reasoned, would unfairly restrict lawyer mobility and was unrealistic in view of the growth of large law firms in recent years.

The court of appeal did not reject the notion that confidential information possessed by a lawyer can be imputed to the law firm. Instead, the court addressed, and rejected, the reverse— the presumption that the knowledge of a law firm should be imputed to an individual lawyer. Under the facts of the case, the court concluded that the paramount duty to maintain client confidence and secrets did not warrant denying plaintiffs their choice of counsel.

The duty to maintain client secrets may commence upon the initial consultation with a potential client, even before the attorney-client relationship is formalized. This situation is illustrated by an opinion issued on January 2, 2001, by LACBA’s Professional Responsibility and Ethics Committee. According to the facts in Ethics Opinion No. 506, the lawyer learned in an initial consultation with a potential client that the potential client was contemplating filing a bankruptcy petition. While performing a conflicts check, the lawyer learned that his law firm was representing an existing client in unrelated litigation against the potential client. The fact that the potential client was contemplating bankruptcy was presumed to be important to the existing client.

The committee concluded that neither the lawyer nor the law firm could tell the existing client that the potential client was contemplating bankruptcy. This conclusion rested, in part, on the determination that the confidential information was not related to the law firm’s current representation of the existing client within the meaning of Rule 3-500 of the Rules of Professional Conduct, which requires a lawyer to keep a client reasonably informed about “significant developments relating to the employment or representation.”

Secrets of Third Parties

Does an attorney also have an obligation to preserve the confidentiality of information that originates with someone other than the client? California courts addressed this question in a trio of cases in 2001. In Packard Bell NEC, Inc. v. Aztech Systems, Inc., a U.S. district court disqualified the defendant’s lawyers under Rule 3-310 of the Rules of Professional Conduct in order to prevent them from using the plaintiff’s privileged information. Rule 3-310 prohibits lawyers from representing actual or potentially adverse interests without written disclosure and, in many cases, a client’s written consent. The court did this even though both parties agreed that Rule 3-310 did not apply, and the court acknowledged the case was a “square peg which does not fit into the round holes of the rules.”

Packard Bell sued the defendant, Aztech Systems, for breach of warranty and fraud, alleging that Aztech had misrepresented that its printed circuit boards qualified for duty-free importation. Aztech’s defense was that Packard Bell knew the boards did not qualify for duty-free importation, and Aztech supported this contention with the testimony of Metzler, a former Packard Bell officer.

Metzler was represented during his deposition by the Levy firm law firm. Aztech subsequently retained the Levy firm as counsel.

Packard Bell moved to disqualify the Levy firm on the grounds that its representation of Aztech violated the portion of Rule 3-310 that provides that a lawyer shall not, without the informed written consent of each client, accept representation of more than one client in a matter in which the interests potentially conflict. Packard Bell acknowledged that Rule 3-310 did not literally apply because the Levy firm never represented Packard Bell.

Nevertheless, it argued that since Metzler, as a former Packard Bell officer, owed a continuing fiduciary duty not to disclose privileged communications between Packard Bell and its lawyers, the Levy firm, as Metzler’s agent, owed a similar duty to Packard Bell and could not disclose or use this confidential information to help Aztech.

Aztech observed that this argument could prevent a terminated officer from ever finding counsel to sue his or her former employer. Nevertheless, the district court held that the Levy firm’s representation of Aztech, following its representation of Metzler, “undermined the judicial process and will effect [sic] the proceedings before this Court.” The court concluded the lawyers had obtained an “unfair advantage” over Packard Bell. It reached this conclusion with difficulty, citing Gregori v. Bank of America, a case that denied disqualification, and the prescription of the ABA Model Code of Professional Responsibility that a lawyer “should avoid even the appearance of professional impropriety,” which has never been adopted in California.

The confidential information that the Levy firm was presumed to possess consisted of communications between the opposing party, Packard Bell, and Packard Bell’s lawyers. The Levy firm never represented Packard Bell, and as counsel to Aztech, the lawyers arguably had a duty to exploit the information for the benefit of their client. The court acknowledged this clash of principles and disqualified the Levy law firm. “Though such information cannot be unlearned, and the lawyer who obtained it cannot be prevented from giving it to others, disqualification still serves the useful purpose of eliminating from the case the attorney who could most effectively exploit the unfair advantage.”

On the other hand, both the trial court and the appellate court in Fox Searchlight Pictures, Inc. v. Paladino refused to disqualify lawyers with knowledge of the opposing party’s confidential information and secrets. Fox Searchlight sued its former in-house counsel, Paladino, for disclosing privileged communications in the course of preparing a wrongful termination lawsuit against the company. The plaintiff moved to disqualify the defendant’s attorneys because they possessed confidential and privileged information. The superior court denied the motion to disqualify, and the Second District Court of Appeal affirmed.

According to the court of appeal, disqualification was not warranted because the defendant’s attorneys did not learn the confidential information while representing Fox Searchlight. The court noted that California courts had never disqualified attorneys merely because, absent a professional relationship, they were exposed to an opposing party’s confidential information. Furthermore, the court found an implied exception to Business and Professions Code Section 6068(e).

In General Dynamics v. Superior Court, an earlier case, the California Supreme Court had held that an in-house attorney, in the same manner as a nonattorney employee, was permitted to pursue a wrongful termination claim against his former employer. A former in-house counsel may sue his or her employer for wrongful termination “provided it can be established without breaching the
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attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship.”11 Privileged information may be protected from unwarranted disclosure through State Bar discipline, judicial management, and dismissal if the plaintiff’s case could not be fully established without breaching the attorney-client privilege.”12

The Fox Searchlight court weighed the lawyer’s duty of confidentiality under Section 6068(e) against the right of an in-house attorney not to be discriminated against in his or her employment. It concluded that Paladino, the former in-house counsel, may disclose confidences to her lawyers “to the extent they may be relevant to the preparation and prosecution of her wrongful termination claim against her former client-employer.”13 The Fox Searchlight court found that this limited disclosure was contemplated by the supreme court in General Dynamics.14 The attorneys for the former employee are bound by the rules of confidentiality and attorney-client privilege and, therefore, disclosure to them does not constitute a public disclosure.15

Although Section 6068(e) on its face “brooks no exceptions,” the court of appeal in Fox Searchlight found the section was impliedly qualified by other statutes and ethical rules that permit a lawyer to breach client confidentiality.16 As an example, the court cited Evidence Code Section 958, which states the attorney-client privilege does not apply “to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.” If the Evidence Code permits the lawyer to use otherwise privileged communications during trial, the court said, Paladino must be entitled to disclose them before trial to her attorneys. The problem with this argument is that Section 6068(e) requires a lawyer to protect the client’s secrets, which are generally understood to be much broader than privileged communications, and a limited exception to the Evidence Code privilege would not establish a broad exception to lawyers’ statutory duty of confidentiality.

The court of appeal, as additional support for its ruling, asserted the State Bar Court had held that the duty of confidentiality in Section 6068(e) is modified by the exceptions to the attorney-client privilege. However, the State Bar Court decision cited for this proposition, In the Matter of Lilly,17 states nothing of the kind. Except for the court’s ipse dixit, there is no support in the case for the proposition that Section 6068(e) is modified by the Evidence Code.

Unfortunately, the same unsubstantiated assertion from Fox Searchlight was repeated in People v. Dang.18 In Dang, the Second District Court of Appeal held it was not improper for an attorney to testify about confidential communications in which his client made physical threats against witnesses. The court held that Evidence Code Section 956.5 exempts disclosures that would prevent a client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm. The court of appeal noted the conflict between Section 956.5 and Section 6068(e) but concluded: “Since our issue is limited to the admissibility of the testimony by [the lawyer], we need not resolve the conflict.” The court continued, “We note that the State Bar Court has held the duty of confidentiality under Business and Professions Code Section 6068(e) is modified by the exceptions to the attorney-client privilege codified in the Evidence Code.” This is incorrect. The State Bar Court has not held that the duty under Section 6068(e) is modified by the Evidence Code.

In Solin v. O’Melveny & Myers, LLP,19 a different panel of the Second District Court of Appeal permitted a legal malpractice case to be dismissed rather than risk disclosure of confidential information. Published just two days after Fox Searchlight, the Solin opinion derived a different lesson from General Dynamics: “[A]s General Dynamics Corp. v. Superior Court teaches, unless a statutory provision removes the protection afforded by the attorney-client privilege to confidential communications between attorney and client, an attorney plaintiff may not prosecute a lawsuit if in doing so client confidences would be disclosed.”20

Plaintiff Solin, a lawyer, retained defendant O’Melveny & Myers to advise him concerning his representation of two clients. Solin disclosed privileged and confidential information from his clients, implicating them in criminal activities, to the O’Melveny firm. Subsequently, Solin sued O’Melveny for malpractice, and his clients intervened to prevent the disclosure of the incriminating secrets. The superior court determined that the O’Melveny firm could not defend the action without disclosing the third parties’ secrets, and dismissed Solin’s suit. The court of appeal affirmed.

There was no attorney-client relationship between O’Melveny and the intervenors. Nevertheless, the court recognized that Solin, as their attorney, had a duty under Evidence Code Section 955 to claim the privilege on behalf of his clients, which the trial court would sustain. Thus, the plaintiff would gain an unfair advantage: “Solin would be permitted to sue his lawyers for malpractice, yet gag O’Melveny in defending the charge by preventing full disclosure of all matters counseled upon.”21 The court was unwilling to second-guess O’Melveny’s assertion that this

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1. The California Rules of Professional Conduct last underwent a thorough revision in:
   A. 1975.  

2. California lawyers receive guidance on ethics questions in published opinions from:
   A. The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association.  
   B. The Committee on Professional Responsibility and Conduct (COPRAC) of the State Bar of California.  
   C. Both A and B.

3. Under California law, it is the duty of an attorney to preserve the secrets of a client at every peril to himself or herself.
   True.  
   False.

4. When a lawyer moves from one firm to another, there is a nonrebuttable presumption of imputed knowledge from the lawyer’s previous law firm to the lawyer. Thus the lawyer is disqualified from taking a position adverse to a client of the former firm.
   True.  
   False.

5. In considering whether to disqualify a lawyer who moved to another firm and took a position adverse to a client of his or her former firm, a court must consider:
A. Whether the lawyer personally represented the client.
B. Whether confidential information normally would have been imparted to the lawyer.
C. Whether the confidential information is material to the current representation.
D. All of the above.

6. An attorney’s duty to maintain client secrets does not arise until the attorney-client relationship is formalized.
   True. False.

7. A lawyer has a duty to inform his or her client about significant developments relating to the employment or representation.
   True. False.

8. A lawyer in California must avoid even the appearance of professional impropriety, consistent with the ABA Model Code of Professional Responsibility.
   True. False.

9. In-house lawyer X may not sue X’s former employer if it means that X would have to disclose the confidences of X’s former employer to X’s lawyers.
   True. False.

10. Lawyer Y may not sue Y’s lawyers for malpractice if their defense would require the disclosure of the privileged information of Y’s clients.
    True. False.

11. Under Evidence Code Section 958, in the event of a breach of a duty by a lawyer or client arising out of the attorney-client relationship:
    A. There is no attorney-client privilege regarding the breach.
    B. There is no attorney-client privilege.
    C. There is no duty of confidentiality for client secrets.
    D. All of the above.

12. Under Evidence Code Section 956.5, a lawyer can testify about confidential communications in which a client made physical threats against witnesses without breaching the attorney-client privilege.
    True. False.

13. A lawyer employed by the state of California believes an agent of her department is violating the law. In accordance with her duty to her client, which action can she currently not take?
    A. Urge the agent to reconsider the action by explaining the likely consequences.
    B. Refer the matter to higher authority within the organization.
    C. Resign.
    D. Disclose the lawbreaking to the state legislature.

14. An attorney is employed by a city. He was appointed by the mayor and confirmed by the city council, which is the municipal corporation’s governing body. Who is the attorney’s client?
    A. The mayor.
    B. The city council.
    C. The city.
    D. All of the above.

15. A lawyer may divide a fee for legal services with another lawyer who is not a partner, associate, or shareholder, if:
    A. The total fee is not increased by the division of fees and is not unconscionable.
    B. The lawyer discloses to the client in writing that a division of fees will be made and the terms of the division.
    C. The client consents in writing.
    D. All of the above.

16. A lawyer has a First Amendment right to tell a jury during closing argument, without fear of sanction, that his or her client has not received a fair trial.
    True. False.

17. When a lawyer accepts a private reproval under the State Bar’s attorney disciplinary process, the State Bar cannot publicize the lawyer’s discipline on its Web site.
    True. False.

18. Under Rule 1-400(F) of the Rules of Professional Conduct, a lawyer who maintains a Web site must keep all the pages of every version of his or her Web site and make them available to the State Bar, if requested, for:
    A. One year plus one day.
    B. Two years.
    C. 10 years.
    D. The life of the lawyer’s laptop.

19. A task force on multijurisdictional practice recommended to the California Supreme Court that California adopt full reciprocity with other states regarding the admission of lawyers.
    True. False.

20. Multidisciplinary practice would require modification of the Rules of Professional Conduct because the rules currently prohibit a lawyer from:
    A. Forming a partnership with a nonlawyer if the activity of the partnership includes the practice of law.
    B. Sharing legal fees with a nonlawyer.
    C. Both A and B.
    D. All of the above.

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5. □ A □ B □ C □ D
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7. □ True □ False
8. □ True □ False
9. □ True □ False
10. □ True □ False
11. □ A □ B □ C □ D
12. □ True □ False
13. □ A □ B □ C □ D
14. □ A □ B □ C □ D
15. □ A □ B □ C □ D
16. □ True □ False
17. □ True □ False
18. □ A □ B □ C □ D
19. □ True □ False
20. □ A □ B □ C
evidence was necessary to its defense. Citing *General Dynamics*, the Solis court concluded that since the lawsuit was incapable of complete resolution without breaching the attorney-client privilege, the suit against O’Melveny must be dismissed.22

**Loyalty and Whistle-Blowing**

Rule 3-310 of the Rules of Professional Conduct makes it clear that a lawyer owes his or her client a duty of undivided loyalty. What happens, though, when a lawyer for an organization believes the organization is embarking on an unlawful course of action that will harm the public? Rule 3-600 in its current form provides that when a lawyer represents an organization, the lawyer owes duties of confidentiality and loyalty to the organization, and not to individual representatives of the organization with whom the lawyer routinely communicates and receives instructions or to the organization’s constituents. If the lawyer has reason to believe that the organization may be about to violate the law and an individual representative refuses to act, Rule 3-600 permits the lawyer to urge reconsideration of the decision and/or refer the issue to the next highest authority within the organization. If the organization does not change its course, the lawyer may need to withdraw from the representation pursuant to Rule 3-700. In accordance with Section 6088(e), the lawyer is bound to maintain the client’s confidence and secrets.

The recent Department of Insurance scandal involving former Insurance Commissioner Chuck Quackenbush has caused some to reassess this approach. The scandal began brewing in 2000 when, in confidential reports, the Department of Insurance concluded that the practices of several insurance companies handling claims from the 1994 Northridge earthquake violated insurance regulations.23 Nevertheless, the Department of Insurance decided not to impose fines or finalize the reports. Subsequently, the insurance companies allegedly contributed several million dollars to foundations that then-Insurance Commissioner Chuck Quackenbush had created, and the funds were purportedly used in part to pay for television commercials featuring Quackenbush.24 An Insurance Department lawyer, Cindy Alayne Ossias, was outraged that no fines were levied in view of the internal reports’ conclusions. She provided copies of the internal reports to the Assembly Insurance Committee,25 which triggered an investigation, public outrage, and the eventual resignation of Quackenbush.26

Thereafter, the State Bar opened an investigation of Ossias’s conduct. Ultimately, the State Bar terminated its investigation without taking any action. Nevertheless, the tension between a government lawyer’s “duty” to the public and duty to protect confidential information, as illustrated by the Insurance Department scandal, prompted reassessment of Rule 3-600 of the Rules of Professional Conduct. In February 2001, Assemblyman Darrell Steinberg and several coauthors introduced AB 363, which proposed that on or before January 31, 2002, the Rules of Professional Conduct be amended to give guidance to public agency lawyers to disclose privileged communications when necessary to protect the interests of the public.

In response, the State Bar’s Committee on

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**New Forms of Practicing Law**

Last year, California, through two separate task forces, for the first time suggested approaches for permitting multi-jurisdictional practice (MDP)—legal practice across state lines—and multi-disciplinary practice (MDP)—the practice of law in conjunction with other disciplines, such as accounting. The early results satisfied no one, but the process of study and reform is likely to continue.

Many lawyers would no doubt be surprised to learn that they or their colleagues may be engaged in the unauthorized practice of law. Rule 6125 of the California Rules of Court states: “No person shall practice law in California unless the person is an active member of the State Bar.” Yet it is common for lawyers admitted in other jurisdictions to perform legal services in California. For example, in-house counsel give legal advice, assist in transactions, or interview witnesses in California, even though they are not admitted to practice in the state. Out-of-state attorneys come to California to take depositions or to conduct investigations. Still other out-of-state attorneys in law firms with offices in multiple states work together, short of making appearances, on lawsuits pending in California courts or on transactions occurring in the state. As the California Supreme Court Advisory Task Force on Multi-jurisdictional Practice noted, “Today’s reality is that the needs of many clients do not stop at state borders, and neither does the legal practice of the attorneys who represent them.”

The MJF task force issued a preliminary report last year that recommended very modest changes in California law. It did not advocate reciprocity with other states but did recommend allowing out-of-state lawyers to practice in California for limited periods of time and for limited purposes in return for registration. The task force recommended that in-house counsel not admitted to practice in California be permitted to represent their employers in California without taking the bar exam in return for State Bar registration and compliance with various regulations. It recommended that litigators be allowed to work on a lawsuit until it is filed in California and they could apply for admission pro hac vice. The task force also recommended that litigators be permitted to perform tasks in California for suits filed elsewhere. It recommended that transactional lawyers be allowed to apply for temporary admission, similar to pro hac vice admission for litigators, for the purpose of performing limited tasks. These recommendations were the subject of public comment and further study, and on January 7, 2002, the task force issued a Final Report and Recommendations that was consistent with the preliminary report.1

The State Bar of California Task Force on Multi-disciplinary Practice also reported its recommendations last year.2 Proponents of MDP envision a profession in which lawyers deliver legal services in combination with accountants, physicians, scientists, and other specialists, similar to the way the major accounting firms have attempted to operate in recent years. MDP also is common in Europe. Currently, Rule 1-310 of the Rules of Professional Conduct prohibits a lawyer from forming a partnership with a non-lawyer if the activity of the partnership includes the practice of law, and Rule 1-320 prohibits sharing legal fees with a non-lawyer.

The MDP task force was charged with studying whether there were viable models for California. It concluded that MDP would require modification of the Rules of Professional Conduct, but that MDP could be implemented without compromising the legal profession’s “core values” by continued individual accountability of lawyers and through a certification process for MDP entities. The report recognized five models:

1) A cooperative model, in which lawyers employ non-lawyer professionals who are under the lawyers’ control.

2) An ancillary business model, in which a law firm owns a separate, nonintegrated business that provides nonlegal services.

3) A strategic alliance model, in which there is an agreement between a law firm and a professional service firm to purchase goods and
Professional Responsibility and Conduct (COPRAC) issued a report in August 2001, recommending clarification of Rule 3-600, which is titled “Organization as Client.” COPRAC suggested adding a new section to address the special issues regarding government lawyers without weakening the need to maintain the client’s (i.e., the public agency’s) confidence and secrets. The committee in effect urged a government lawyer who believes a public agency is considering unlawful conduct to follow a procedure comparable to the one set forth in existing Rule 3-600 for lawyers serving corporate clients.

Thus, according to Rule 3-600(B), the lawyer may not violate his or her duties under Business and Professions Code Section 6068(e) but “may take such actions as appear to the [lawyer] to be in the best lawful interest of the organization. Such actions may include among others: (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.” To date, there has been no decision on the form of the appropriate amendment to the rules, but it seems likely that an amendment to Rule 3-600 will emerge.

COPRAC also addressed ethics issues relating to public agency lawyers in its Formal Opinion No. 2001-156 on a matter involving the city of Paradise. The Paradise city charter established the city council as the municipal corporation’s governing body. The city also employed a full-time city attorney, who was appointed by the mayor and confirmed by the city council. When the city faced a fiscal crisis, a member of the city council introduced a motion to borrow $100 million in earmarked funds. The city attorney advised both the mayor and the city council that the borrowing would be lawful. The mayor disagreed with the advice and accused the city attorney of representing two different and adverse clients (the city council and the mayor) without written consent pursuant to Rule 3-310(C) of the Rules of Professional Conduct. In Formal Opinion No. 2001-156, COPRAC concluded that the city attorney’s client was the city, not the mayor, and therefore the city attorney did not represent two clients with a conflict of interest. Thus, the city attorney was not required to obtain written consent pursuant to Rule 3-310(C).

### Equitable Indemnity between Lawyers

How powerful is the duty of undivided loyalty owed to a client? Is such a duty so important that cocounsel should be precluded from asserting claims against each other? During a two-week period in 2001, the First District Court of Appeal considered this issue twice, with seemingly contradictory conclusions. The California Supreme Court has granted review in both cases.

In the first case, American Equity Insurance Company v. Beck,28 family members retained lawyer Beck to represent them in a lawsuit against an automobile manufacturer as a result of serious injuries the clients sustained when their pickup truck rolled over and burst into flames. With the clients’ permission, lawyer Beck associated a Texas lawyer experienced in prosecuting “side-saddle” gas tank cases and a law firm as local trial counsel. The three sets of attorneys agreed to split the contingent fee. During trial, the defendant offered to settle for $6 million. The clients wanted to accept and instructed the Texas lawyer to contact the defendant to discuss settlement. The Texas lawyer failed to do so. The jury returned a defense verdict.

The clients sued the Texas lawyer and the trial counsel for malpractice. Both the Texas lawyer and the trial counsel settled. Lawyer Beck claimed that he too suffered a loss (his portion of a contingency fee based on a $6 million settlement) as a result of the other lawyers’ malpractice. The Texas lawyer settled his claims with lawyer Beck. The trial counsel, however, refused. Thereafter, lawyer Beck sued the trial counsel for breach of fiduciary duty. The trial counsel’s insurance carrier responded by asserting a cross-claim against lawyer Beck for indemnity under the theory that the lawyers’ joint representation of the clients constituted a joint venture. Through summary judgment, the trial court concluded that cocounsel do not owe a fiduciary duty to each other and therefore denied lawyer Beck’s claim. The court also found that the arrangement between cocounsel does not constitute a joint venture and therefore denied the cross-claim by the trial counsel’s insurance carrier.

The First District Court of Appeal affirmed. It concluded that cocounsel jointly representing a client do not owe a fiduciary duty to each other and that the relationship...
between cocounsel is not a joint venture permitting one cocounsel to seek indemnity from the other. The court noted that “[t]o avoid any detriment to the jointly represented client, it is imperative that no collateral duties arise to interfere with the duty of ‘undivided loyalty and total devotion’ owed to the client.” 29

In the second case, Musser v. Provencher, 30 a different division of the First District Court of Appeal concluded that the duties owed to a client do not, as a matter of law, prohibit cocounsel from asserting claims for indemnity against each other. The client was a wife seeking a dissolution of marriage. Lawyer Musser filed a petition on the client’s behalf for child and spousal support. The husband filed for bankruptcy. Lawyer Musser arranged for a bankruptcy specialist, lawyer Provencher, to obtain relief from the automatic stay. Lawyer Provencher advised lawyer Musser and the client to go forward with the petition for child support in spite of the stay. This advice was wrong. The award for spousal and child support was set aside on appeal for violation of the automatic stay.

Faced with a claim for punitive damages for violation of the automatic stay, the client settled with her former husband for less than the original support order. She then sued lawyer Musser for malpractice. The former husband also sued lawyer Musser for violating the automatic stay. Lawyer Musser cross-claimed against lawyer Provencher for indemnity. The trial court dismissed the cross-claim, but the court of appeal reversed, noting that “it would be extremely unjust to bar Musser from seeking indemnity or contribution from Provencher when Musser was sued by [the client] for damages allegedly attributable to Provencher’s tortious conduct, absent a real potential for conflict between Provencher’s duty to [the client] and his duty to Musser during the course of their joint representation or of a real impact upon attorney-client confidentiality presented by Musser’s indemnity action.” 31

Fee Splitting

The relationship between cocounsel may be regulated by the Rules of Professional Conduct even when there is no demonstrable harm to the clients. For example, fee splitting is generally prohibited unless, according to Rule 2-200 of the Rules of Professional Conduct, the client has given written consent after full written disclosure of the terms of the division. But when is an agreement to divide fees subject to the rule? Two cases answered that question in diametrically opposite ways in 2001. 32 The supreme court has accepted one case for review.

In Sims v. Charness, 33 both parties were lawyers. Charness was engaged to prosecute his clients’ claims against a motel, and he retained Sims to try the case in return for 60 percent of the attorney’s fees due under Charness’s written retainer agreement with the clients. The retainer agreement between Charness and Sims was oral. The trial resulted in a jury verdict favorable to the clients, and Charness paid Sims a portion of the attorney’s fees. Sims was dissatisfied with the split and sued Charness. Charness argued that the oral fee-splitting agreement was void because it was against public policy and contrary to Rule 2-200.

The Second District Court of Appeal held the oral agreement was not prohibited by Rule 2-200 because it was not a “pure referral.” The court relied on COPRAC’s Formal Opinion No. 1994-138, which defined a “pure referral” as one “which compensates one lawyer with a percentage of a contingent fee for doing nothing more than obtaining the signature of a client upon a retainer agreement while the lawyer to whom the case is referred does all the work…” A pure referral does not encompass an outside lawyer who is employed for his or her expertise in an area of the law, including trial skills, and is paid for these services, the court said. Charness did not relinquish his involvement in the case by referring it to Sims in return for a percentage of the fees. Indeed, Charness continued to participate in the case. The court also concluded that Sims was functioning as Charness’s “associate” within the contemplation of Rule 2-200, which expressly exempts a lawyer’s division of fees with his or her “partners, associates, and shareholders.” The court held the oral agreement was enforceable.

The First District Court of Appeal declined to follow the same rationale in Chambers v. Kay. 34 Chambers and Kay were cocounsel for the plaintiff in the Rena Weeks sexual harassment lawsuit against the law firm Baker & McKenzie. Kay orally agreed to pay Chambers a percentage of the attorney’s fees, but after a disagreement over discovery, Kay removed Chambers from the case. Kay nevertheless confirmed that Chambers would receive the agreed percentage in a letter that was copied and sent to the client, but the terms were not explained and the client’s written consent was not obtained. Following the sizeable verdict, Kay abrogated the agreement and instead offered to compensate Chambers for the hours Chambers had worked on the case. Chambers sued to enforce the agreement, and the superior court granted summary judgment to Kay on the ground the fee-splitting agreement violated Rule 2-200.

The court of appeal affirmed. It held that Rule 2-200 is not limited to pure referrals, and the rule required full disclosure to the client and the client’s written consent. Chambers and Kay were not associates within the meaning of the rule. Because the lawyers did not comply with Rule 2-200, the agreement was illegal and void. 35 On July 11, 2001, the supreme court granted review of Chambers.

Contempt and Lawyer Discipline

A breach of ethical duties may not only subject a lawyer to forfeiture of his or her fees but also to contempt proceedings or formal discipline. In Hanson v. Superior Court of Siskiyou County, 36 a lawyer for the defendant in a criminal trial stated to the jury in closing argument that, among other things, the job of a lawyer is “to bend the facts” and the defendant “has not received a fair trial in this case.” The trial court sustained the prosecutor’s objections to these statements and issued an order to show cause to hold the defendant’s lawyer in contempt. After the jury was discharged, another trial judge held a hearing on the matter, found the defendant’s lawyer in contempt, and ordered the lawyer to pay a $200 fine or to serve four days in the county jail. The court of appeal affirmed, holding that the lawyer’s statement that the defendant “has not received a fair trial” impugned the judge’s integrity by suggesting the judge had failed in his duty to guarantee a fair trial. The court also held that a contempt charge against the defendant’s lawyer was warranted because it was inappropriate for the lawyer “to assert that opposing counsel’s job is to misrepresent the facts.”

Ethical violations can also lead to formal disciplinary proceedings before the State Bar. In two recent cases, the state supreme court reminds lawyers that certain violations constitute grounds for summary disbarment. In In re Cristeta S. Puguiran, 37 a lawyer was summarily disbarred after entering a plea of no contest to one felony count of forgery for affixing a witness’s signature on two declarations that were then filed in opposition to summary judgment motions. The supreme court upheld the summary disbarment. In doing so, it rejected the lawyer’s contentions that summary disbarment required an evidentiary hearing and that the summary disbarment statute violates the principle of separation of powers by usurping the inherent authority of the supreme court over attorney discipline.

Lawyers should be aware that the State Bar posts on its Web site the disciplinary history of lawyers, even though the discipline may be a private reproval. In Mack v. State Bar of California, 38 a lawyer sued the State Bar to remove from its Web site a notice that the lawyer “has a public record of discipline.” The Web site did not describe the nature of
the disciplinary proceedings or the sanctions imposed. Rather, the Web site noted that an interested party could request a copy of the file from the State Bar. Years before, the lawyer settled disciplinary proceedings in exchange for a private reproval, pursuant to which the State Bar agreed not to publicize affirmatively the lawyer’s discipline. The stipulation noted, though, that the lawyer’s discipline was a matter of public record that would be furnished to members of the public upon request.

The trial court granted the State Bar’s motion for judgment on the pleadings. The court of appeal affirmed, concluding that posting the fact that the lawyer “has a public record of discipline” did not violate the terms of the earlier stipulation.

**Web Sites and Lawyer Advertising**

More and more lawyers have Web sites describing their services. The use of a Web site, though, raises several ethical issues, as illustrated by COPRAC’s Formal Opinion No. 2001-155. In the opinion, COPRAC concluded that a Web site constitutes a “communication” within the meaning of Rule 1-400(A) of the Rules of Professional Conduct and, therefore, must comply with all the rules governing communications, such as Rule 1-400(D) (which prohibits false and misleading communications), Rule 1-400(F) (which requires lawyers to retain copies of communications for two years), and Business and Professions Code Sections 6157 et seq. (which prohibit, for example, advertisements including a guarantee of a particular outcome or a promise of quick payment). The committee also noted that according to Rule 1-400(F), lawyers must keep copies of their Web sites, including each page of every version and revision of the Web site, for two years—and these copies must be made available to the State Bar if requested.

COPRAC further states in its opinion that pursuant to Rule 1-300(B), a member lawyer “shall not practice law in a jurisdiction where to do so would be a violation of regulations of the profession in that jurisdiction.” The committee warned that other jurisdictions may construe the posting of a Web site as the unauthorized practice of law if individual lawyers are not licensed in that jurisdiction. To avoid this problem, the committee suggested that lawyers:

- Explain in the Web site where they are licensed to practice law.
- Describe where the firm maintains offices and practices law.
- State that they will appear in certain courts only.
- State that they do not seek to represent anyone based on a Web site visit.

None of these methods, however, provides assurance that a Web site will necessarily comply with the rules of other jurisdictions.

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2 Id. at 1340.
3 Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Ethics Opinion No. 506, Initial Client Interview—Duty of Confidentiality, LOS ANGELES LAWYER, July-August 2001, at 60.
6 Id.
10 General Dynamics v. Superior Court, 7 Cal. 4th 1164 (1996).
11 Id. at 1169.
12 Id. at 1190.
13 Fox Searchlight, 89 Cal. App. 4th at 310.
14 Id.
15 Id. at 311.
16 Id. at 313.
17 In the Matter of Lilly, 2 Cal State Bar Court Rptr. 473, 478 (1995).
20 Id. at 457-58.
21 Id. at 464.
22 Id. at 467.
24 See COPRAC Report, supra note 23.
25 See id. For Ossias’s description of what happened, see http://www.guerrillalaw.com/cindyO.html.
27 See COPRAC Report, supra note 23.
31 Id., 90 Cal. App. 4th at 560.
36 Hanson v. Superior Court of Siskiyou County, 91 Cal. App. 4th 75 (July 31, 2001).
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Pocket PCs Help Traveling Attorneys Lighten Their Load

By Carole Levitt and Mark Rosch

More powerful than a PDA, the pocket PC rivals a laptop and fits in a pocket

Advances in technology continue to pack more and more computer processing power into less and less space. One result of this trend is that over the last few years, the laptop computer has become an indispensable tool for nearly every attorney. It has allowed lawyers to remain in touch with their offices while traveling on business and to carry entire case files in an electronic format. Recent technological developments have shrunk that computing power even more. Handheld computers offer many of the features of laptop and desktop computers in a package that fits in a user’s hand or pocket.

Handheld computers are a step above personal digital assistants (a group that includes the Palm Pilot and the Handspring Visor). Most PDAs have only 2 MB of memory (a standard PC has hundreds) and are limited to black-and-white screens. These limitations alone may prevent some attorneys from using a PDA—although some of the newest and most expensive PDAs have 16 MB of memory and high-resolution color screens. Of more concern to most attorneys, however, is that a PDA’s software, while compatible, does not have the same look and feel as the software they use most (for example, Word, Excel, and Outlook) on their main computer. Unfortunately, PDAs generally oblige their users to learn new applications. Additionally, trading data between a PDA and a regular computer is sometimes an exercise in frustration. Handheld computers occupy the gap between the size advantage of PDAs and the well-known software that attorneys are used to using on their personal computers.

A number of manufacturers have developed handheld computers, known as pocket PCs, to compete with PDAs. These handhelds use an operating system that was developed by Microsoft and include light versions of many of Microsoft’s applications, including Word, Excel, and Outlook (but not Power Point). Since these applications function much like their laptop or desktop counterparts, attorneys who make the transition to a pocket PC are finding the switch to be nearly seamless and report that the transfer of data goes more smoothly than it does with a PDA.

Also assisting the transition from PC to pocket PC is the handheld PC’s ability to allow users to attach a keyboard via a serial connector and employ all the well-known keyboard shortcuts that are used with a desktop computer (such as Control-X to cut selected text). Think Outside’s Stowaway keyboard, distributed by Targus (the company’s Web page is at http://www.targus.com/accessories.asp), is full-sized but folds to a size nearly as small as the pocket PC itself. The keys are the same size as those on a standard keyboard, requiring little or no adjustment when using the folding keyboard. The keyboard also has hot keys that open a variety of the pocket PC’s programs and functions, including Word, Excel, and the calendar.

Pocket PC Features

The newest pocket PCs feature 206 MHz processors, 32 MB of RAM memory (but no hard drive, although one can be added), and full-color, high-resolution screens. With other companies developing hardware and software for pocket PCs, these devices rival recent generations of desktop and laptop computers in both depth of features and computing power. Some of these features are third-party software that allow pocket PC users to send and receive faxes, view Adobe Acrobat PDF documents, create and display Power Point presentations, and conduct numerous other business-related functions for which they currently use laptops.

Wired and wireless Internet access allows attorneys to use the Web for research, to send and receive e-mail, and to find maps and other online information while traveling or even in court. Three pocket PCs (Hewlett-Packard’s Jornada 565, Casio’s EG-800, and UR There Productions’ Amigo) represent a variety of the configurations that are available.

The Jornada 565 fits easily into the palm of one’s hand. Its sturdy metal and plastic case features a flip-open cover that protects the device’s screen. The Amigo’s all-metal case seems more rugged than the Jornada’s but has a square shape that makes it less comfortable in one’s hand. The EG-800 is even sturdier and more rugged, encased in a heavy rubberized material with seals covering its openings. Casio claims that the EG-800 is water-resistant and can be dropped from a height of approximately three feet without damage (as long as it does not land on its glass screen). Not surprisingly, this pocket PC is also the thickest and heaviest of the three. All three devices feature “one-button” recording of voice notes, something that many attorneys appreciate.

A key benefit of the pocket PC is that users can input information—for example, while away from the office—and then transfer the information to a laptop or desktop. To transfer information (including files, contact information, and e-mail) from a pocket PC to a desktop, users must first install Microsoft’s Active Sync utility software onto their full-sized computer. Active Sync is included with all pocket PC purchases. (The name of this utility has led users to describe the transfer of data from a pocket PC to a full-sized computer as “syncing.”) Pocket PC software is usually transferred to the pocket PC from the desktop’s CD drive with a serial cable or what is called a sync cradle. The sync cradle that comes with the Jornada 565, for example, is well worth owning.
because it charges the pocket PC’s batteries at the same time that syncing is in progress. This cradle also holds the pocket PC at an angle that makes it easy to see the progress of the synchronization on the screen.

Apple users can also transfer documents between their pocket PCs and their Mac computers with Pocket Mac software. Users with Mac OS 9.x and 10.x can synchronize Word, Excel, PDF, and other file formats. Synchronization of contact files, however, is not available in the current Regular Edition of Pocket Mac, but a free converter is included that saves contact files as Excel spreadsheets that can be read on the Mac. The ability to sync contact information is a feature promised for the forthcoming Professional Edition of Pocket Mac. Mac fans should note, however, that a Windows PC is necessary to initially install Pocket Mac on the Pocket PC.

**Gadgets and Screens**

A variety of expansion cards allow pocket PC users to add a camera, modem, global positioning device, or hard drive to a pocket PC. The Jornada 565, Casio EG-800, and Amigo all have a built-in expansion slot, but some other pocket PCs require an optional “sled” or “jacket” to add an expansion slot. If you plan on using an expansion slot, you should be aware that there is more than one type. The four common types are not interchangeable, so examine the slot you need, as well as labels and manuals, before buying. Two more common types of expansion slots are the PCMCIA (which is found on most laptops) and the Compact Flash (or CF). The Amigo is the only pocket PC that currently includes a PCMCIA card expansion slot as a standard feature. The Casio and Jornada devices have a CF expansion slot.

In addition to add-on devices, pocket PCs offer attorneys the ability to display information on a computer screen, data projector, or in some cases even a television screen. These display capabilities can be exploited with expansion cards (including the Margi Presenter-to-Go and the Colorgraphic Voyager). Using one of these display adapters, users can show Power Point presentations with their pocket PCs and leave their laptops at home.

Although no pocket version of Power Point exists, presentations can be converted to a format compatible with pocket PCs. The Margi features slide show viewer software and a display adapter in one package, and it makes conversion of a Power Point presentation into a slide show a simple, one-button process. On the other hand, the Voyager is a display adapter only, and thus requires users to buy separate slide show software. One suitable application is Pocket Slides, which also makes
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Keeping the Battery Charged

One weakness of the pocket PC is its lack of a hard drive. The pocket PC stores its data in RAM memory, which requires constant electrical power. All pocket PCs contain a backup battery to preserve the data in case the main battery is drained, but the backup battery can only maintain the data for a day or two before it too is drained and all data is lost. Users must therefore learn to keep some charge in the main battery at all times. This can be accomplished by plugging the pocket PC into an electrical outlet. Those who cannot meet the challenge of always remembering to keep their pocket PC’s charged, however, have two options. The first is available in the Jornada and Casio, which feature some memory that is not dependent on batteries. Users can use this memory for storing their most important files. The second option is to add a hard drive. Units that fit into the pocket PC’s expansion slot are available.

As always with computers, lawyers who are pondering whether to plunge into the pocket PC world may, on the one hand, be tempted to wait until some technological advance makes the devices more powerful and less expensive; on the other hand, they may feel the need to keep pace with the competition. Lawyers who spend considerable time in motion may already know, however, if their tolerance for heavy laptops has reached an end, while other users may simply appreciate a know-it-all gadget that fits in a pocket.
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Malpractice Insurance

ON TUESDAY, JUNE 18, the Los Angeles County Bar Association will present “The Legal Malpractice Insurance Crisis: How Did We Get Here and What Can We Do?” Malpractice insurance rates will be increasing for all attorneys. Those who attend this essential and practical program will learn about this trend from an insurance industry professional and a legal malpractice and ethics expert. The two experts will address the critical issues facing the legal profession. Topics will include the causes for the sudden increase in malpractice insurance rates, what to expect next and how malpractice insurance will change, the different levels of risk and the importance of claim history, the effect on State Bar complaints, what attorneys can do in response to increasing rates, the top 10 most common claims and how to avoid them, claims that are not so obvious, conflicts to avoid, practice pointers on how to avoid malpractice claims, and alternative actions to the crisis. Lawyers should not miss this opportunity to learn what practical and practice-oriented steps they can take in response to higher malpractice rates. The seminar will take place at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 5:30 P.M., with the program continuing from 6:00 to 7:30. Registration code number: 709DF18. CLE+ Plus members free (light refreshments included).

$40—LACBA members
$60—all others
1.5 CLE hours, including 1 ethics hour

Computer Malpractice

ON WEDNESDAY, JUNE 12, the Business and Corporations Law Section will present “Ten Ways to Commit Malpractice with Your Computer,” a program focusing on the do’s and don’ts of using your computer and the Internet in your corporate practice. The program will cover hidden dangers lurking in your word processing documents, file sharing with clients and cocounsel, backups, viruses, and hackers. Speakers Daryl Teshima and Robert E. Braun will lead the discussion at Lawry’s Restaurant, 100 North La Cienega Boulevard in Beverly Hills. On-site registration will begin at 7:30 A.M., with the program continuing from 8 to 9:30. Registration code number: 808BF12. CLE+Plus members free (meal not included). Prices below include meal.

$50—Business and Corporations Law Section members
$60—other LACBA members
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Labor and Employment Law Cases

ON THURSDAY, JUNE 27, the Labor and Employment Law Section will present a program highlighting the Supreme Court’s 2001-2002 term. Cynthia Estlund will review the highlights of the Supreme Court’s 2001-2002 term, including B & K Construction v. NLRB, Chevron U.S.A. v. Echazabal, Edelman v. Lynchburg College, Hoffman Plastic v. NLRB, Ragsdale v. Wolverine Worldwide, and U.S. Airways v. Barnett. The conference will take place at the Millennium Biltmore Hotel, 506 South Grand Avenue, Downtown. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. Registration code number: 817XF27. CLE+Plus members free (meal not included). Prices below include meal.

$55—Labor and Employment Law Section members
$65—LACBA members
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The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://forums.lacba.org/calendar.cfm. For a full listing of this month’s Association programs, please consult the June County Bar Update.
Fighting the Unauthorized Practice of Law

C onsumers in California may soon win needed protection from the growing commerce in the fraudulent delivery of legal services. Earlier this year, State Senator Gloria Romero of Los Angeles introduced SB 1459, which will increase penalties for individuals who present themselves as lawyers when, in fact, they are not licensed to practice law in California.

The unauthorized practice of law (UPL) has been proliferating over the past few decades, and many attorneys, district attorneys, and other law enforcement officials have tried to stem the tide. But as California has grown—and especially as our immigrant communities have grown—the harm caused by the unauthorized practice of law has become more egregious, more blatant, and, sadly, even more destructive to personal lives.

UPL, of course, is not a new issue for lawyers or, for that matter, the State Bar. Public protection has always been the highest priority of the State Bar. The State Bar, however, has limited jurisdiction over nonattorneys who delve into the unauthorized practice of law. It cannot simply extend its regulatory functions to include enforcement against nonlawyers who engage in harmful practices.

What we can do is work with the legislature to increase the criminal penalties regarding UPL. Current law categorizes nonlawyer UPL as only a misdemeanor. This mild prohibition is understandable, as the law was written years ago with the intent of stopping paralegals who sometimes went too far with their good intentions.

This is why SB 1459 is so important. It, in effect, would make a repeat offender who is not an active member of the State Bar or not otherwise authorized to practice law in the state, guilty of a misdemeanor or a felony if he or she willfully and intentionally, with intent to defraud, commits either of the following:
1) Specified actions indicating that he or she is an attorney or entitled to practice law, or
2) Borrows, uses, purchases or appropriates the name, license number, or identity of a member of the State Bar for the purpose of practicing law.

We all recognize that when well-intentioned people are trying to help others, lines are blurred and sometimes crossed. But our sympathy should not extend to the nonlawyer who engages in intentional misrepresentation—the person who, for example, places “esquire” after his or her name on a business card, or willfully and maliciously holds himself or herself out to be a lawyer, or who tells unsuspecting clients that his or her services include appearing in court on their behalf. This is certainly not misdemeanor behavior, and the criminal penalties need to reflect that.

SB 1459 accomplishes this by allowing prosecutors to charge a repeat offender with either a misdemeanor or a felony, which, in turn, will motivate prosecutors to pursue these criminals. SB 1459 would also help police agencies recognize recidivist behavior because a prior conviction would specify UPL and not, as currently is the practice, a catchall grand theft charge. The sentencing structure would work to deter these miscreants from harming unsuspecting people who believe they are hiring legitimate legal representation.

Those whose unauthorized practice of law Senator Romero is addressing act willfully and intentionally. They knowingly set out to deceive the public. They have not passed the bar. Under current law, one of the only means of prosecuting this form of fraud as a felony is by charging grand theft by false pretenses. But frequently the harm to consumers does not involve an exchange of money in excess of $400, which precludes pursuing a felony grand theft conviction.

For example, in one of my last cases before becoming State Bar president, I prosecuted an individual for unauthorized practice of law. One of the victims suffered harm that did not result in an exchange of monies exceeding $400, yet the victim was unable to pursue what he believed to be a legitimate inheritance claim because the defendant never returned the victim’s original documentation.

This is but one example of the type of harm that consumers face when dealing with individuals who intentionally and falsely represent themselves as attorneys. We have heard the egregious stories recounted over and over in the past few years:

- People who give their life savings of $5,000 or $10,000 on the guarantee of getting a green card, but who are left facing deportation.
- People who get sucked into the “slow drain”—paying a $200 fee here, another $500 there—until they have paid thousands of dollars to the nonlawyer, are out of money, and are no closer to what they are seeking than the day they started.
- People who are attracted to illegitimate businesses because they advertise an inside connection to the Immigration and Naturalization Service.

Too often, the nonattorneys who take this money and who occasionally are caught and have their hands slapped, pay their fines as a cost of doing business and are soon back doing the same thing somewhere else—and to someone else. Lawyers are on the front lines and have seen close up the harm these cases bring. We are well equipped to help change California law to stem this tide. That is why we should fully support Senator Romero’s laudable efforts.
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