Los Angeles lawyers James C. Martin and Benjamin G. Shatz analyze developments in the law of stipulated reversals.

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James C. Martin (left), a partner, and Benjamin G. Shatz, of counsel, practice appellate law in the Los Angeles office of Reed Smith Crosby Heafey. In “Reverse Course,” they discuss the impact of recent legislation on the disposition of motions for stipulated reversal before appellate courts. Their article begins on page 24.

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Mr. Gleitman has practiced sophisticated estate planning for 24 years, specializing for more than 12 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. 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.
lawyers are being muzzled more and more. We are being put on a shorter and shorter leash. Recent and accelerating actions aimed at lawyers and their freedom of representation are disturbing and, in one instance, shocking.

When a U.S. citizen is arrested or physically detained in a foreign country, the first words the citizen utters usually are, “I demand to see the American consul.” This request is usually denied. When this happens, the conflict deepens, because the presence of a representative and advocate is necessary to introduce some fairness into the ensuing proceedings. The American consul is the functional equivalent of the lawyer in the U.S. legal system.

If I am detained, I want to see a lawyer. Until the Miranda decision—an aspect of which is currently under review in the U.S. Supreme Court—is modified or eliminated, police forces in the United States have an affirmative obligation to inform all people taken into custody of their right to a lawyer, and if they cannot afford a lawyer’s services they will be provided with a lawyer at no cost.

Recent events have revealed a shocking exception to the right to see a lawyer. A U.S. citizen detained by U.S. military forces as an enemy combatant may not have this right, presumably because of the government’s fear that the lawyer will quickly tell the detained client to stop talking. That is the lawyer’s universal advice at the beginning of representation, for good reason. For their own good reasons, the police and military authorities would always like to be free to keep interrogating. The police are not free to do so, but the military and related government agencies now may be. That is the lawyer’s universal advice at the beginning of representation, for good reason. For their own good reasons, the police and military authorities would always like to be free to keep interrogating. The police are not free to do so, but the military and related government agencies now may be. The idea that a U.S. citizen can be held indefinitely without access to a lawyer should be unthinkable. If a citizen is charged with a crime, then the right to a lawyer attaches. But if the citizen is not charged, then there is no right to a lawyer. That cannot be right.

Detaining an American engaged in combat or other harmful activities against the United States is as sensible as it is necessary. But the war on terrorism may go on for many generations, a fact that argues for a detained American’s access to a lawyer. Moreover, there is the presumption of innocence. A criminal charge is the government’s choice. Access to a lawyer should be an American’s right.

Another restriction on the activities of lawyers is the expanding movement for so-called tort reform. Reform for whom? This effort at reform should really be called the tort restriction movement. The most recent centerpiece of this movement may have been the enactments to the federal securities laws limiting the ease with which lawsuits may be filed. With hindsight, it may have been better to continue to let predatory trial lawyers continue to have a go at avaricious business executives. Financial accounting in corporate America has proven to be corrupt. Regulators were absent and the lawyers were restrained by reform. The public suffered.

Additional popular cutbacks on the actions of lawyers are the restrictions on the recovery of damages for medical malpractice. California has had caps in place for years, as do other states. More state legislatures are actively considering them. Once lawyers had the threat of huge recoveries to help the marketplace police the practice standards of doctors. With the scope of recovery capped, often at fairly modest amounts, has the standard of care been affected? The desire to limit medical insurance premiums and thereby allow doctors to continue to practice, especially in more risky fields, is understandable and worthy, but the tool to accomplish this goal involves restrictions on lawyers. Aggressive lawyers, whether motivated by public service, political ambition, or money (an acceptable impulse in a capitalist economy), have been agents for social change.

Allow me to note that none of these restrictions affect me, as a transactional lawyer. But they are wrong, and the wrong should be righted.

Take off the muzzles, throw away the leashes. Let a thousand lawyers bloom. ■
Letters

The BSA, the Association, and the Code of Judicial Conduct

I read with dismay the article in the December 17, 2002, Daily Journal that stated that the Los Angeles County Bar has urged the state supreme court to institute a canon banning membership in the Boy Scouts of America (BSA) on the part of judges. I do not recall this issue coming to a vote and do not believe it reflects the opinion of the majority of the membership.

I protest this action by the Bar Association in the strongest terms. The U.S. Supreme Court has already made a determination that the Boy Scouts of America is not a “discriminatory organization” and does not illegally discriminate against anyone, let alone gays. The BSA has the right to choose its own members and does so in a fair and unbiased manner. Anyone may join, so long as they fit the target group that the BSA tries to serve.

The Boy Scouts of America has, as its primary purpose, the mission to build character, citizenship, and personal fitness in boys and girls. It has successfully performed this function for almost 100 years, and the ranks of American leaders with scouting experience is a testament to the effectiveness of this organization at building the leaders for this country. Because the BSA tries to build character, it is inevitable that someone will object to how it does so.

If the BSA finds that its efforts at character building are failing, it has the right, according to the U.S. Supreme Court, to eject those members who are not benefiting from the program. The fact that some members of the community feel that this standard is discriminatory is merely a smoke screen for an agenda to force organizations to discriminate in their own preferred manner. Unlike such activists, the BSA is quite open about its agenda, which is to build men and women in a manner that has been proven to work all over the world for almost 100 years.

Donald S. Roberts
Member,
Los Angeles County Bar Association

The President and Executive Director Respond

Thank you for expressing your concern as a member of the Los Angeles County Bar Association about the Association’s letter to the California Supreme Court asking for a revision in Canon 2C of the Code of Judicial Conduct. To give you a more complete understanding of the basis of our position, we are enclosing a copy of the letter sent to the chief justice on this issue and will also soon be posting a copy of that letter on our Web site (www.lacba.org/canon2C). When you review our submission to the court, we ask you to consider several points:

1. The Association did not ask the supreme court to explicitly ban membership in the Boy Scouts but rather to rescind an exception to its existing ban on membership in discriminatory organizations, which treats differently, and allows for continued membership in, discriminatory youth organizations. Although we recognize that the effect of our proposed change may well be to ban judicial participation in those chapters of the BSA that abide by the national organization’s policy of discriminating on the basis of sexual orientation, the focus of our concern is not the BSA in particular but discrimination in any form. Discrimination by a youth group or any other organization, whatever that group’s other qualities, is still discrimination. Our goal is to ensure that the canon is consistent with its stated goal of avoiding judicial membership in organizations that would give rise to a “perception that the judge’s impartiality is impaired,” Judicial Council Advisory Committee Commentary.

2. The Association’s Board of Trustees (which acts on behalf of the Association) discussed this issue at length on September 25, 2002, and at the conclusion of that discussion voted overwhelmingly to send a letter to the supreme court concerning Canon 2C. During the discussion there was no suggestion that it was inappropriate to seek a change in the canon; the only issue was how the Association might most effectively pursue that goal.

The vote is not surprising, given the Association’s longstanding opposition to all forms of discrimination. Our bylaws end with this paragraph:

The Los Angeles County Bar Association shall not restrict membership, services, or benefits conferred on the basis of race, color, national origin, religious creed, ancestry, gender, sexual orientation, marital status, age, disability and political affiliation, and is committed to eliminating barriers on those bases within the legal profession and in society as a whole. The

Association shall encourage diversity among its leadership and among those participating at all levels of the Association. It shall be a priority of the Association to promote a climate of public understanding and mutual cooperation for achieving equality of opportunity among the membership.

3. The BSA is candid and explicit about the fact that it discriminates on the basis of sexual orientation. While it is true, as you state, that the supreme court has concluded that the BSA does not discriminate “illegally,” the Association’s focus is necessarily broader. We are concerned, at the very core of our mission, with the administration of justice. In addressing that concern, we seek to ensure that everyone who enters a courthouse feels secure in the knowledge that no bias of any kind will taint the decision-making process.

Regardless of a judge’s actual beliefs in relation to the BSA’s policies, it could well appear that a judge’s membership in the BSA bespeaks an endorsement of the BSA’s admittedly discriminatory practices.

We believe the problem is no different from all-too-recent discriminatory practices against women and minorities that prompted concerns about, and canons seeking to avoid, judicial membership in such organizations. The Association took a similar stand in response to those practices and, in the early 1970s, our Board of Trustees reiterated its policy of nondiscrimination by banning Association functions at clubs that discriminated on the basis of race, sex, religion, or national origin (and added sexual orientation or disability in 1987) and urged Association members’ firms and the courts to do likewise. In the following decade, both The Jonathan Club and The California Club reversed their discriminatory membership policies.

In sum, the board’s recent action stems from our collective and abiding view that the Code of Judicial Conduct can and should be crafted to ensure that those who administer justice and seek to enforce the rule of law are not viewed in the public’s mind as endorsing bias or invidious discrimination of any kind.

Thank you again for writing to express your views.

Miriam Aroni Krinsky
President
Richard Walch
Executive Director
11 carriers have withdrawn from the California market. Will your carrier be next? The changes in the marketplace are troubling. It is an unknown future. Non-renewals are commonplace. Some carriers can’t secure sufficient reinsurance to operate their professional liability programs. A major carrier was recently declared insolvent. Other carriers have been downgraded by A.M. Best. Severe underwriting restrictions are now being imposed. Dramatic rate increases are certain. It’s all very unsettling.


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

- **Will your carrier** still be writing professional liability policies in California at your next renewal?
- **Will your carrier** impose a substantial rate increase at your next renewal due to unstable market conditions?
- **Will your carrier** continue to insure “your type” of practice at your next renewal?
- **Will your carrier** leave the marketplace because they can’t secure sufficient reinsurance for their professional liability program?
- **Will your carrier** offer you a tail of unlimited duration if they decide to leave the market?

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Estate Planning for Younger Attorneys

Even recent law school graduates may need to address important estate planning issues

If you have been practicing law less than five years and have a significant amount of student loans, you may think that you are not wealthy enough to need to plan your estate, but if you are a Southern California homeowner, you should think again. Almost any homeowner in Southern California has an estate that is large enough to need planning. This is especially true for those who are parents, those who are contemplating or in a second marriage, those who are living with a partner in a committed relationship, and those who are living alone—in other words, almost everyone.

In the past many attorneys (or at least women attorneys) delayed parenthood until after they attained partnership. Look around your firm now and you will realize that is no longer the pattern. Associates are becoming parents at the same time they are becoming lawyers. Becoming a parent carries with it a number of important responsibilities, not the least of which is ensuring that your children will be well cared for in the event of your death or disability. The best way to provide your family with peace of mind is through careful and professional estate planning.

When a person without a will dies, the estate is distributed according to the state plan that the state of California deems appropriate. This default plan is unlikely to meet the needs of surviving minor children. If you die before your children attain the age of 18 and you have not provided otherwise, your children may obtain their share of your assets as soon as they graduate from high school. I ask my clients to calculate the value of their assets, including life insurance, and consider whether this is an amount of money they could have handled responsibly at the age of 18. I urge you to make the same consideration now. If you believe that your estate will be too large for your children to handle wisely at age 18, then you must plan.

Additionally, when parents with custody of minor children die intestate, the courts are left to decide guardianship issues. If your family or friends disagree about who should raise your children, there could be a legal battle. Even if no dispute occurs, if you have not nominated a guardian your children could be held in foster care while the court decides who is to be their guardian.

Being married does not guarantee that guardianship issues will not arise in the future. About 40 percent of marriages end in divorce, and some sociologists argue that rate is even higher for practicing lawyers. If you have children from a first marriage and expect to remarry, you must plan to protect your children and the relationship between those children and your new spouse. If you do not plan for the distribution of your assets upon your death, your new spouse will have the opportunity to leave all your assets to the children from his or her first marriage, or to friends, relatives, or a future spouse. Estate planning can ensure your ability to provide for your surviving spouse while also ensuring that any assets remaining upon his or her death are distributed in accordance with your wishes.

Financial issues are not the only consideration. Are there certain items, for example, that you have always wanted someone in particular to have upon your death? If so, you must make your wishes known. I have seen many situations in which the biggest family dispute after a death is not over major assets but instead over a personal item of no great monetary value, such as the decedent’s cherished cigar cutter. In a professionally crafted estate plan, you can provide who will receive items of significant sentimental value.

For many attorneys, estate planning will involve not only traditional families but nontraditional ones as well. If you are in a committed relationship but not married, estate planning is an absolute must. For unmarried couples, estate planning includes consideration of a potential dissolution of the relationship or the death of a partner. There are enormous benefits to planning for the dissolution of a relationship while it is healthy and loving as opposed to trying to settle issues at the devastating time of its end. A well-drafted estate plan will address issues of property ownership and support. In addition, if an unmarried couple has children, the plan should address custody, child support, and the parenting relationship. Finally, a plan for unmarried couples must address incapacity, because an unmarried partner lacks a spouse’s priority in conservatorship.

Many lawyers find themselves married to their work. Unmarried individuals need estate planning too. An unmarried individual must plan not only for his or her death but also incapacity. All too often, trust and estate attorneys see how unmarried, incapacitated people can be taken advantage of by caretakers. These situations may be avoided if single people take the time for some planning. Many of my unmarried clients who do not have children have significant charitable goals that can only be achieved through proper planning, and many of the single parents that I work with have a strong desire to ensure that their child’s other parent does not become the unintended heir of their estate.

Lastly, I will mention tax savings as a reason to plan your estate. For many people, tax savings (and they can be substantial) are the least important reason to engage in estate planning. Planning your estate is about more than saving money—it is about providing peace of mind for your family and yourself.
Los Angeles County Bar Association Professional Responsibility and Ethics Committee

Attorney Office Files—Release of Client Psychiatric Records to Former Client

SUMMARY: Subject to the terms of any applicable court order, an attorney who has received mental health records of a client in the course of representing that client must release the mental health records to the former client following termination of the attorney-client relationship when requested by the former client to do so. The attorney does not have the discretion to refuse the request of the former client on the basis that the disclosure of the mental health records is not in the best interests of the former client or others.


STATEMENT OF FACTS: Attorney is a public defender 1 (“Attorney”) who represents defendants in criminal prosecutions. In some cases, Attorney obtains mental health records of Attorney’s clients to assist Attorney in defending them. A former client (“Former Client”) has instructed Attorney to release to Former Client all mental health records of the Former Client obtained by Attorney in the course of Attorney’s representation of the Former Client (the “mental health records”).2 The mental health records include a warning attached by the mental health care provider who transmitted the mental health records to Attorney that the records should not be provided to the Former Client as the records, in the opinion of the originating mental health care provider, contain information which if disclosed to the Former Client, could be detrimental to Former Client’s mental health or treatment, or could put others in danger.

QUESTIONS PRESENTED: Must Attorney release the mental health records to Former Client as the Former Client has requested? May Attorney withhold those mental health records marked by the mental health provider with a restrictive warning not to disclose the records to Former Client? May Attorney take any action to interfere with Former Client’s instructions, such as by bringing the matter to the attention of a court?

DISCUSSION

a. Attorney’s Professional Responsibilities.

Rule 3-700 of the California Rules of Professional Conduct deals explicitly with the duties of lawyers whose former clients request their files. Rule 3-700 states: “(D) A member whose employment has terminated shall: (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. ‘Client papers and property’
includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not...."

Rule 3-700 recognizes that the documents and materials created or compiled by a lawyer during the course of a representation belong to the client, and not to the lawyer, and the lawyer has no legitimate interest in those materials except for the purpose of representing the client in conformity with the client's instructions. It therefore creates the general rule that an attorney is subject to professional discipline for failing to promptly release any client papers or property to the former client following a request for them by the former client.

Rule 3-700 does not by its terms authorize the lawyer to exercise any discretion to override the client's instructions to release. This is consistent with our model of the lawyer-client relationship: The lawyer is the agent of the client and is responsible for carrying out the client's lawful instructions on all substantive matters after the lawyer has utilized her training, skill, and experience to counsel the client.

b. Mental Health Record Legislation

The California Legislature has enacted a comprehensive scheme to encourage and permit patient access to records of their medical condition and treatment, including mental health records. These provisions are found at California Health and Safety Code Sections 123100 et seq.

Section 123100 states the general rule that each person is entitled to access to his or her own health care records. Section 125100 is based on an explicit legislative finding that "every person having ultimate responsibility for decisions respecting his or her own health care also possesses a concomitant right of access to complete information respecting his or her condition and care provided." In addition to the general right of a patient to obtain full information about his or her own health and health treatment, the legislative scheme gives the patient certain specific rights. For example, Section 123111(a) gives a patient who believes his or her health care records are incomplete or inaccurate the right to require that an addendum be attached to his or her records to complete or correct them.

The general rule is subject to two exceptions set forth in Section 123115 limiting patient access to their healthcare records. The first involves healthcare records of minors and is not applicable to this inquiry. The second exception is contained in Section 123115(b), which provides:

When a health care provider determines that there is a substantial risk of significant adverse or detrimental consequences to a patient in seeing or receiving a copy of mental health records requested by the patient, the provider may decline to permit inspection or provide copies of the records to the patient, subject to the following conditions: (1) The health care provider shall make a written record, to be included with the mental health records requested, noting the date of the request and explaining the health care provider's reasons for refusing to permit inspection or provide copies of the records, including a description of the specific adverse consequences or detrimental consequences to the patient that the provider anticipates would occur if inspection or copying were permitted. (2) The health care provider shall permit inspection by, or provide copies of the mental health records to, a licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, or licensed clinical social worker, designated by request of the patient [who signs a receipt for the records acknowledging that he or she] shall not permit inspection or copying by the patient.

Thus, the healthcare provider is given the right in particular circumstances to prevent his or her patient's access to mental health records either by refusing to release them to the patient or by releasing them to other health care providers only when they have agreed not to release them to the patient. To the extent the records are maintained by a state agency, there is a similar statutory scheme that is part of the Information Practices Act at Civil Code Sections 1798.40(f), 1798.41, and 1798.45-53.

Neither of these statutory schemes grants to the healthcare provider any authority to limit the use or disclosure of mental health records by the patient's attorney, to whom the healthcare provider has given the records. Nor do these statutory schemes grant the patient's attorney any authority to limit the release of the mental health records, even if the attorney believes such action would be dangerous to his or her client or to others.

As a result, the written notice that the healthcare provider has placed on the file provided to Attorney appears to have no legal effect and, if not, the notice does not alter Attorney’s general duty under Rule 3-700. We recognize that the healthcare provider is authorized by Section 123113(b) to refuse to allow his or her patient to see the records if the healthcare provider determines that such disclosure would create "a substantial risk of significant adverse or detrimental consequences to [the] patient..."

If this had occurred, then Attorney, on behalf of her client, might have been able to object to the healthcare provider's decision not to release the mental health records under Section 123120. This section gives the patient a right of court action. We do not address the legal issue of whether this procedure might allow a court to limit the right of Attorney to release the mental health records, or portions of them. If a court had issued an order limiting Attorney’s disclosure of the mental health records to Former Client, Attorney would have been obligated to comply with that order under Rule 3-700(D), which states that the duty to make client files available to the client is subject to any applicable protective order.

c. Former Patient’s Possible Lack of Competence

The law recognizes that insane and incompetent clients do not have the same control over substantive issues possessed by other clients. For example, although the client normally controls all substantive decisions, it has been held that counsel may waive jury trial in an incompetency trial over the client’s express objection and may urge the client's incompetency even though the client expressly directs that counsel argue that the client is competent. Shepard v. Superior Court, 180 Cal. App. 3d 23 (1986), approved in People v. Stanley, 10 Cal. 4th 764, 804-05 (1995) and People v. Masterson, 8 Cal. 4th 965 (1994).

The foregoing cases do not create any general rule allowing a lawyer to make substantive decisions on behalf of a client, and they do not state a specific rule that a lawyer may withhold a former client's mental health records from the former client based on the lawyer's opinion of the mental condition of the client.

d. Does Attorney Have the Right to Seek Court Intervention to Interfere with Former Client's Instructions to Attorney?

In its Opinion 1989-112, the California State Bar Committee on Professional Responsibility and Conduct faced a similar issue: May an attorney institute conservatorship proceedings on a client's behalf, without the client's consent, where the attorney has concluded the client is incompetent to act in his best interest? That committee con-
cluded this would be unethical for the attorney because, by doing so, the attorney would be divulging the client’s secrets and representing either conflicting or adverse interests.

Our situation is not precisely the same as that in Cal. State Bar Opinion 1989-112 because here the attorney-client relationship between Attorney and Former Client already has ended. We therefore are dealing with Attorney’s duties to a former client rather than a current client. Nevertheless, it is implicit in Opinion 1989-112 that the attorney could not terminate his attorney-client relationship with his client and then institute conservatorship proceedings against the client. We reach the same conclusion here.

“The attorney-client relationship involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between a client and his attorney.” Cal. State Bar Opinion 1987-93. Because of the duties of confidentiality and undivided loyalty, an attorney may not use or disclose to the disadvantage of a former client any information obtained by the attorney in the course of that relationship, and an attorney may not act against a client in any matter in which the attorney formerly represented the client. Watchumna Water Co. v. Bailey, 216 Cal. 564, 571 (1932); Yorn v. Superior Court, 90 Cal. App. 3d 113, 116 (1979); and Stockton Theatres v. Palermo, 121 Cal. App. 2d 616.7 (1953).”

This opinion is advisory only. The committee acts on specific questions submitted ex parte and its opinions are based only on such facts as are set forth in the questions submitted.

1 Although the inquiry is from an attorney employed by a governmental entity in connection with a criminal matter, the issues raised are not distinguishable from the duties owed by private counsel or in civil matters. As a general principle, the duties of lawyers are the same for lawyers who are and are not employed by governmental entities. Santa Clara County Counsel Attys. Assoc. v. Woodsdale, 7 Cal. 4th 325 (1994); People ex rel. Deukmejian v. Brown, 29 Cal. 3d 150, 157 (1982); Cal. State Bar Op. 2001-156; L.A. County Bar Ass’n Formal Op. 459 (1991).

2 We adopt the definition of HEALTH & SAFETY CODE §123105(b): “Mental health records’ means patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder. ‘Mental health records’ includes, but is not limited to, all alcohol and drug abuse records.”

3 For a list of advisory ethics opinions that discuss what must be released to the client under Rule 3-700 as being part of the client file, see L.A. County Bar Ass’n Formal Opinion 491 n.2 (1997). We conclude that mental health records of a client obtained by the client’s attorney are part of the attorney’s client file for purposes of Rule 3-700. In Formal Opinion 475 this committee stated that the “file belongs to the client. Further the client may, for reasons known or unknown to the lawyer, find something of significant economic or personal value in the file even after the case is over…[There is] an ethical obligation to try to return the files to the former clients or to try to obtain authorization to destroy the files.” Absent an issue as to the potential danger to the client or others from releasing some or all of the mental health records to Former Client the records must be released to the client in compliance with Rule 3-700(D)(1)(I) (see Rose v. State Bar, 49 Cal. 3d 646, 655 (1989); State Bar Formal Opinion No. 1994-134).

4 Whether employee or independent contractor, an attorney will usually be the agent of the client in transactions in which the attorney acts for the client. Sullivan v. Duane, 198 C. 183, 192, 244 P. 343 (1926); RESTATEMENT (SECOND) OF AGENCY §1 & cmt., §261; Blanton v. Womancare, 38 Cal. 3d 396, 406 (1985); State Bar Formal Op. 1989-111.

5 Consistent with this legislative scheme, we assume that Attorney’s Former Client has the legal right to control his or her own healthcare decisions. We do not examine the legal issue of when or how a person might lose that right or what duties Attorney might have in that situation.

6 As stated in n.5, we assume Former Client has the legal right to make his or her own healthcare decisions.

7 To the extent Former Client poses an actual or apparent threat to the safety of others, this opinion is not intended to reach the possible application of the “duty to warn” the California Supreme Court imposed on psychotherapists in Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425 (1976). The committee also recognizes that the possible authority that the case of State Comp. Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644 (1999), may be instructive in our situation. In that case the court held that:

[The obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: When a lawyer who receives materials that obviously appear to be privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact.

The committee notes that the mental health records at issue here are not protected by the attorney-client privilege of an adversary party and have by statute been vested with a preference for disclosure to the client. The committee is not aware of any authority extending State Comp. Ins. Fund v. WPS, Inc., to impose an ethical duty upon Attorney, upon receipt of the marked mental health records or any time thereafter, to notify the healthcare provider of the apparent inadvertent disclosure. The committee declines to express an opinion as to whether or not State Comp. Ins. Fund v. WPS, Inc., would be so extended.]

13
Making the Case for Structured Settlements

The advantages often outweigh the problems of the additional complexity

Structured settlements help settle cases. Because structured settlements can earn tax-free income, claimants can get more money, and because payments are scheduled to suit the claimant’s circumstances, the money will be there in time of need. Using structured settlements can help settle a case that would otherwise go to trial, because plaintiffs are more likely to settle when they see how the money will increase over time. For minors, structured settlements are better than blocked accounts because the rate of return is usually significantly better. Additionally, payouts can be timed to match the young person’s growing maturity. Moreover, structured settlements can preserve the public benefits of a claimant. And attorneys who represent claimants can reap tax benefits by structuring their fees.

Lawyers who avoid structured settlements may simply misunderstand the fundamentals of their application. First, a structured settlement has to be just that—a settlement of a disputed claim. Once the settlement is paid, or final judgment entered and there are no more rights to appeal, it is too late.

Any settlement that calls for two or more installments is a structured settlement. Once a judgment is final—that is, there are no pending postjudgment motions and the time to appeal has passed—the claimant has constructive receipt of the money and can compel payment.

To pay a structured settlement, defendants and insurers typically purchase an annuity from a life insurance company in order to make the deferred payments. Because of this practice, the plaintiff does not have to rely on the defendant’s credit but rather on that of a highly rated major life insurance company. The defendant or its insurer pays for the annuitized portion of the settlement at the same time it pays the up-front portion. In turn, the defendant receives a release at the time of settlement. Once the structured settlement is in place, neither the defendant nor its insurer is obliged to have anything further to do with the claim, nor do they administer the payments.

The annuities used for structured settlements are not the variable ones that financial planners sell. Annuities used for settlements require payments that are fixed, typically guaranteed for a stated period of time. The three most common types are known as lump sums, period certain payments, and lifetime annuities with or without a guarantee period. Payments can start and end at any time the claimant chooses and, subject to minimum payment rules, fund at any amount. In the most common arrangements, period certain payments (payments made for a defined term only) and lump sum payments are guaranteed to be made on the scheduled date whether or not the claimant is living. A guarantee period within a lifetime annuity means that payments in the guarantee period will be made even if the claimant has died. A claimant who survives the guarantee period will continue to receive payments as long as he or she lives. The value of the principal can never decline.

Cases involving settlements of more than $50,000 for adults or $10,000 for minors are good candidates for structured settlements, but smaller cases can also be structured.

If the claimant has constructive receipt of a lump sum settlement, the investment income on the settlement is taxable, but in a structured settlement, there is no constructive receipt until the time of the deferred payment. The terms of a structured settlement provide that the payments cannot be altered or accelerated. The claimant is not the legal
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The most commonly applied statute for this payment—principal and interest—is tax-free. In the form of a structured settlement, the entire compensation for the physical injury and therefore is tax-free. In cases in which the settlement is not tax-free to the claimant, a structured settlement can provide tax-deferred income on the principal while averaging out payments to help avoid high taxation, such as in an employment case that involves payment of back wages or a business case in which the recipients want the settlement to fund their retirements.

**Tax Benefits**

If a lump sum payment to a claimant would be tax-free, then in a settlement that takes the form of a structured settlement, the entire payment—principal and interest—is tax-free. The most commonly applied statute for this exemption is IRC Section 104, which provides that payments made to compensate a physical injury, whether by lump sum or periodic payment, are excluded from gross income. Through the use of a uniform qualified assignment, the obligor (the defendant and/or the insurer) purchases an annuity and assigns the duty to make continuing payments to an affiliate of the life insurance company. All the money—the original settlement plus the investment income—is considered as compensation for the physical injury and therefore is tax-free. In cases in which the settlement is not tax-free to the claimant, a structured settlement can provide tax-deferred income on the principal while averaging out payments to help avoid high taxation, such as in an employment case that involves payment of back wages or a business case in which the recipients want the settlement to fund their retirements.

**Specific Applications**

Structured settlements should always be considered for minors. Because they cannot receive money in their own name, minors have fewer settlement alternatives. One alternative is to invest the settlement in a blocked account at a bank until the child turns 18. However, blocked passbook savings accounts currently are returning little more than 0.5 percent annual interest, while structured settlements can provide a far better investment return. Moreover, blocked accounts are paid in full upon majority. In contrast, structured settlement payments can be timed to keep earning tax-free income until the money is needed, such as over four or more years of college. If the child will need money for future medical expenses (for example, scar revision surgery) a sufficient amount can be deposited in a blocked account, with the balance to be structured.

A structured settlement is also a good choice for a claimant who needs to preserve access to public benefits. Low-income claimants receiving Supplemental Security Income (SSI) often are required to spend the money in their own name or to set it aside. If the money is placed in a blocked account, the recipient can use it to pay for items that are specifically excluded when determining if the recipient is still eligible for SSI or similar income assistance programs. The life insurance company may require the court to order the money to be held in an account that does not allow access to the claimant until their retirement.

**How to Apply Structured Settlements to Obtain Beneficial Results for Clients**

### Bridging the Negotiation Gap

Structured settlements can help settle cases. For example, the parties to a suit may differ greatly on how to evaluate a claim by a 40-year-old male with a lower back disk injury. The claimant is still working and is concerned about his retirement. This settlement proposal bridges the gap between the demand and offer. The payout of this structured settlement design assures him of getting the money he needs. The total net cost to the insurer is $244,630.

<table>
<thead>
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<th>Description</th>
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<tr>
<td>Cash at settlement</td>
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<tr>
<td>Supplemental monthly income: $500 per month to age 65</td>
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</tr>
<tr>
<td>Monthly lifetime income: commencing at age 65, $3,000 per month for life, guaranteed for 10 years</td>
<td>$540,000</td>
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<tr>
<td>Total</td>
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</table>

### Structuring a Medicare Set-Aside Trust

A structured settlement in a workers’ compensation case may involve consideration of Medicare. In specified cases, principally those involving settlements of $250,000 or more, Medicare requires that the primary payer take Medicare’s interest into account. In this example, the structured settlement broker obtains records of the last two years of medical expenditures by the insurer for the applicant, who was born in 1948. These are forwarded to an expert for analysis. The expert’s review projects expenses that would otherwise be paid by Medicare to be $4,000 per year for the life of the applicant. The total cost to the insurer for the settlement is $396,000.

<table>
<thead>
<tr>
<th>Description</th>
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<tbody>
<tr>
<td>Cash at settlement (less attorney fees)</td>
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<tr>
<td>Money to seed Medicare set-aside trust</td>
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<td>Annual payments to Medicare set-aside trust: $4,000 every year for life</td>
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<tr>
<td>Monthly lifetime income paid to the applicant: commencing 45 days after WCAB approval, $1,500 every month for 10 years certain and for life</td>
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</tr>
<tr>
<td>Total</td>
<td>$645,000</td>
</tr>
</tbody>
</table>
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- INCOME
- LIQUIDITY
- SECURITY
- CAPITAL APPRECIATION

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Income (SSI) will stop receiving full benefits upon receipt of a settlement that exceeds the amount allowed by the need-based rules. Receipt of a settlement can also render a claimant ineligible for Medi-Cal benefits. These rules prescribe strict resource and income tests. Using a structured settlement to fund a special needs trust can preserve SSI and Medi-Cal benefits while providing supplemental income to make the benefit recipient’s life more comfortable. Structuring typically produces greater income than depositing a large lump sum in a special needs trust, because the payments funding the trust over time are fully tax-free, and all the money is working for the injured person. Cautious trustees often invest only a percentage of the settlement in order to preserve principal for the beneficiary’s lifetime, thereby producing a lower return than a structured settlement would. Trustees must also consider the tax implications of their investment decisions. With a lifetime structure, income is maximized while providing benefits the claimant can never outlive.

Workers’ compensation applicants face a different set of circumstances that their attorneys need to address when considering structured settlements. As a result of recent developments, lawyers settling workers’ compensation claims must now consider the need for a Medicare set-aside trust to ensure the future access of clients to Medicare benefits. Under Medicare’s secondary payer rules, these trusts create a fund to act as the primary payer of expenses arising from the industrial claim that otherwise would be eligible for Medicare. The trusts are typically funded through a structured settlement annuity to reduce the trustee’s fees, avoid taxation of investment income earned on the settlement proceeds, and provide payouts timed to match need. Once the trust is depleted, for the applicable time period or permanently, Medicare is supposed to pay the remaining eligible expenses. Good practice dictates that the amount that is set aside be approved by the local center for Medicare and Medicaid services (CMS).

Structured settlement brokers, who are trained in the intricacies of funding settlements, can help lawyers settle cases. Structured settlement brokers attend mediations, settlement conferences, and meetings. These specialists can calculate what it will cost to create a benefit stream for a claimant’s future needs. Brokers can assist attorneys in creating special needs trusts and obtaining CMS approval of workers’ compensation settlements. They have access to banks with low minimums for trusts and to custodians who can administer medical expense funds. The parties do not pay for...
the services of these brokers. Rather, the life insurance companies issuing the annuities do. Because these specialists only do one thing—settle cases—lawyers often seek their experience and expertise to help evaluate cases.

In cases involving a lifetime payout, structured settlement brokers can often boost return by obtaining what is called a rated age rather than using a published mortality table to determine life expectancy. For example, consider a 38-year-old male with a congenital condition who settles a physical injury claim arising from a collision. A benefit stream of $1,000 per month for the rest of his life with a 10-year guarantee would cost $172,437 using a published mortality table. However, because the congenital condition reduces his life expectancy, this benefit actually costs $126,132. Using a personalized mortality table produces an investment return that is far in excess of returns offered by generally available investment vehicles.

Structured settlements can also benefit lawyers. Attorneys for claimants often choose to structure their fees as a tax-planning device. Attorneys who structure their fees get the same benefits of security and high returns as their clients. Attorney’s fees are tax-deferred until received; attorneys may structure their fees to save for their children’s college expenses or retirement. Structuring allows attorneys to create tax-deferred funds without regard to IRS rules about contribution limits or payout timing. Payment can occur before age 59½ or after age 70½ without penalty. Moreover, attorneys who structure their fees need not put aside a like amount for their employees, as is the case with qualified benefit plans.

Lawyers who understand the mechanics of structured settlements appreciate the benefits to their clients, whether they are claimants or defendants. These lawyers actively adopt structured settlements as another tool in their negotiation arsenal. Structured settlements are infinitely flexible and can be designed to meet the claimant’s individual needs, limited only by the funds that are available and the imagination of the parties.

1 26 C.F.R. §1.451-2 provides: “Income although not actually reduced to a taxpayer’s possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time.”

2 I.R.C. §104(a) excludes from gross income “the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness.” Also excluded are amounts received as workers’ compensation for personal injuries or sickness.

3 I.R.C. §130 defines a “qualified assignment” as “any assignment of a liability to make periodic payments as damages (whether by suit or agreement) on account of personal injury or sickness, or as compensation under any workmen’s compensation act, on account of personal injury or sickness (in a case involving physical injury or physical sickness).”


5 Prob. Code §§3602, 3611.

6 Social Security Administration, A Desktop Guide to SSI Eligibility Requirements, Pub. No. 05-11001 summaries applicable standards. Information is also available at http://www.ssa.gov.


10 Memorandum from the Center for Medicare Management, Workers’ Compensation: Commutation of Future Benefits (July 11, 2001) (interpreting and clarifying Medicare regulations and manuals defining Medicare as a secondary payer only).

11 Medicare regulation 42 C.F.R. §411.46 provides: “If a lump-sum compensation award stipulates that the amount paid is intended to compensate the individual for all future medical expenses required because of the work-related injury or disease, Medicare payments for such services are excluded until medical expenses related to the injury or disease equal the amount of the lump-sum payment.”

12 Childs v. Commissioner, 103 T.C. 36 (1994), aff’d, 89 F. 3d 856 (11th Cir. 1996).
Complying with California’s New Lactation Accommodation Law

By Elizabeth L. Graves

Employers must allow break time and space for their employees to express milk.

L
abor Code Sections 1030 et seq., which became effective January 2002, mandate that every employer in California provide break time and space for their employees who are nursing mothers desiring to express milk for their infants. Unlike other statutes governing the workplace such as the Americans with Disabilities Act (ADA) or the Family Medical Leave Act (FMLA), Labor Code Section 1030 applies to employers of all sizes. The law does not specify the number of employees that an employer must have to be subject to the law’s requirements and refers in its language to “every” employer. The failure to comply with Section 1030 subjects the employer to a $100 civil penalty for each violation. Practitioners with employer clients should inform them about this responsibility and the potential for liability. Among those who should be particularly cognizant of the new statute are law firms, whose ranks include a growing number of female attorneys and support staff with infant children.

Labor Code Section 1031 states that an employer must make “reasonable efforts” to provide a lactating employee with the use of a room to express milk. Thus an employer’s actions to accommodate an employee will be evaluated under a reasonableness standard.

Similar language is used in the ADA: under that law, an employer must make “reasonable accommodations” to enable an employee with a known disability to perform the essential functions of a position. Unless the employer can demonstrate that the accommodation imposes an “undue hardship on the operation of the business,” an employer will be liable for discrimination under the ADA. In interpreting the ADA, courts have found that an employer must be “willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work.”

What constitutes a reasonable accommodation is one “that would enable an employee with a disability to enjoy an equal opportunity for benefits and privileges of employment as are enjoyed by employees without disabilities.”

Under the ADA, whether an employer is required to undertake the difficulty or expense to accommodate an employee depends on 1) the nature and cost of the accommodation, 2) the overall financial resources of the employer, 3) the size of the employer’s work force, 4) the location of its facilities, 5) the number of persons employed there, and 6) the effect on a facility’s resources and expenses. The reasonableness of the accommodation is determined by applying a cost-benefit analysis, with the employer bearing the burden of demonstrating that the requested accommodation would cause an undue hardship. For a showing of undue hardship, the accommodation costs must be excessive compared to the benefit or a threat to the employer’s financial survival.

In interpreting the reasonableness requirement under the ADA, the employee’s preference is considered but not controlling if it unduly burdens the employer. The employer may choose a less expensive or easier accommodation than the one requested by the employee. For example, the Seventh Circuit held that among the requests of a paraplegic employee, the desire for a handicapped-accessible sink in the office to wash coffee cups was reasonably accommodated by the state employer’s suggestion that the employee use the handicapped-accessible bathroom sink rather than the employer rebuilding the office kitchenette. Although the cost to the employer for lowering the kitchen sink and thereby making it accessible to the employee was only approximately $150, the court found that the “employer [had done] what [was] necessary to enable the disabled worker to work in reasonable comfort,” thereby satisfying the duty of reasonable accommodation.

A similar analysis will likely be applied to an employer’s reasonable efforts to accommodate workplace lactation. While the phrase “undue hardship” does not appear in Labor Code Sections 1030 et seq., whether an employer can reasonably accommodate an employee’s need for space and unpaid break time can be analyzed utilizing the factors and analysis involved in the determination of whether an employee is required to make a reasonable accommodation under the ADA. A small employer with two employees in one office will have a greater difficulty than a larger employer occupying several floors in a building in accommodating the needs of a lactating employee.

Break Time and Private Space

Labor Code Section 1030 mandates that the employer “provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee’s infant child.” The break time is to run concurrently with the employee’s existing break time, if possible. If not, the break time for expressing milk will be unpaid.

The law further requires an employer to “make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee’s work area, for the employee to express milk in private.” For employees with their own offices, an employer usually will be able to comply easily with the lactation accommodation requirements.

Whether an employee will require more than her customary break time depends on several factors, including the type of breast pump she uses (manual, electric, or Medela.)
battery-operated, or electric) and where she must go to express milk. If an employee is allowed to use an area close to the employee’s work area where she can safely leave her pump equipment plugged in and ready, the time it will take the employee to express milk and return to work will be significantly reduced. An employee might require more break time if the room to express milk does not contain a sink and refrigerator or these are not located nearby. Pump parts must be washed after each use and many women prefer to refrigerate their expressed milk. If an employee must express milk in one location, wash her pump parts in another area, and use a refrigerator in yet another place, her break could extend well beyond her authorized time.

Section 1031 specifically states that a toilet stall is not an acceptable “room” for expressing milk. The sanitation and odor concerns are obvious as well as the lack of privacy. Some bathrooms, however, have rooms or areas adjacent to the toilet. Whether such areas would suffice under the Labor Code will likely depend on the degree of privacy afforded to the employee expressing her milk and whether the employee would still be exposed to the sounds and smells of other bathroom patrons. If the area in the bathroom can be closed off, with either a door or partition, this situation might be acceptable. If an employer is proposing that an employee sit in a corner of the bathroom where she can be seen by other patrons or subjected to the smells of the bathroom, that will not likely be acceptable.

It is significant that Labor Code Section 1031 specifically mentions privacy. Employers who fail to accommodate the privacy interest of employees risk being found in violation of the statute. This is not only because of the modesty concerns of employees but also because women must be able to relax in order to pump efficiently. If an employee is concerned that she will expose herself to her coworkers or that someone could intrude while she is pumping, she will have difficulty expressing milk. The ideal breast-feeding room contains a door that can be locked from the inside by the employee to afford her complete privacy.

For the same reasons, a cubicle—even one with a door—offers insufficient privacy. Pumps can be heard outside a cubicle’s walls. Moreover, the noise from outside the cubicle’s walls could hinder a woman’s ability to relax and express milk. However, for an employer with severe and justifiable space limitations, an enclosed cubicle (or alternatively, arrangements that provide additional break time to permit an employee to return home or to another location) may be acceptable as a last resort.

Employers with more than one employee seeking to express milk may have to make special arrangements if there is only one area available for expressing milk. Ideally, an employer should provide more than one room if there is more than one nursing employee. However, if space is a factor and there is only one room for lactating employees, employers may have to adjust employee break times so that each employee can express milk privately. While some women might be comfortable expressing milk in the presence of other women, many are not. No employer should assume that women would feel comfortable expressing milk together.

The statute exempts employers from providing break time “if to do so would seriously disrupt the operations of the employer.” What constitutes a serious disruption is not defined in the statute. Presumably, courts would have to balance an employee’s right to breast-feed against an employer’s operational requirements. Any employer that permits employees to take regularly scheduled breaks should be able to accommodate employee breast-pumping breaks without a serious disruption in the employer’s operations. However, some employees in particular occupations, such as those in the police or medical

Advantages for All

California has a long history of legislation accommodating the right to breast-feed. California law prior to the enactment of Labor Code Sections 1030 et seq. clearly delineates this right by:

- Permitting mothers to breast-feed their babies in any location where they are authorized to be with their babies, except the private home or residence of another person.
- Allowing a breast-feeding mother to postpone jury service for up to a year.
- Promoting breast feeding in a State Department of Health Services public service campaign and making breast-feeding consultation or information available for mothers in hospitals.

Despite these laws in California and comparable legislation nationwide in other states, the rates at which infants are breast-fed have remained low. In 1997, about 62 percent of all infants were breast-fed while in the hospital, yet when the infants were six months old only 18 percent of working mothers were still breast-feeding, as compared to 29 percent of nonworking mothers. One reason the breast-feeding rates are so low is the large number of working mothers. Studies show that without a lactation support program, employment significantly reduces the length of time a woman continues breast-feeding her child. A significant lactation program, on the other hand, can increase breast-feeding duration to 72.5 percent of working mothers at six months and 36 percent at 12 months. Employers can encourage the rates and duration of breast feeding by initiating breast-pumping policies within the workplace.

Employers that accommodate lactating employees are part of a growing trend. The Los Angeles Department of Water and Power, with a 76 percent male work force, began offering a Family Care Lactation Program in 1988 that includes prenatal classes, counselors, a lactation room, and free breast pumps. The DWP also offers a Fathering Program that provides breast-feeding education classes and lactation counseling as a way of recognizing that the “role of the father…is one of the strongest influences on the success of breastfeeding among mothers in the United States.”

Since the initiation of the DWP programs, many of the participating mothers breast-fed their children until each child was at least 6 months old—approximately the same percentage as stay-at-home mothers. With regard to the fathers participating in the Fathering Program, 69 percent of their infants were still breast-feeding at 6 months, with an average of 8 months. The approximate cost to the employer was $500 per employee from the prenatal period to the first six months of the baby’s life (not including the cost of the physical facility for the program). An employer, however, saves approximately $331 to $475 for each infant breast-fed at least three months—a savings due to reduced illness and healthcare expenses. A 1990 survey of DWP’s Family Care Lactation Program participants revealed that 83 percent felt more positive about the DWP as an employer, 67 percent stated that they intended to make DWP their long-term employer, and 71 percent reported taking less time off since participating in the program.

As the DWP statistics indicate, there are benefits for employees and employers from corporate lactation programs. Numerous studies have identified the benefits of nursing for children, including cognitive development, reduced risk of childhood diseases such as respiratory infections and ear infections, and fewer illnesses during the first year of life. In one study, babies who were never breast-fed visited their doctors 1.8 times more frequently than breast-fed infants. The benefits for nursing mothers include reduced risk of breast cancer, ovar-
fields, must respond to emergencies, and regular break times can be delayed. Employers of these and similar types of emergency workers may have a legitimate argument that breast pumping is disruptive to the delivery of necessary services and therefore cannot be accommodated.

Conceivably an employer could be neither required to provide break time nor a place to express milk if the employer could demonstrate a disruption of operations and an inability to reasonably accommodate the employee. These exemptions are not likely to be applicable to most law offices, particularly if courts look to the case law developed under the ADA for guidance.

Enforcing the Law

Despite the broad impact of Labor Code Section 1030, its enactment has received little publicity, and employers may be unaware of their legal obligation to support breast-feeding employees. Attorneys representing aggrieved employees may find that employer education is a more productive first step than an immediate rush to litigation. When applicable, mothers may be well advised to seek assistance from their union, human resources department, or employee liaison. Local groups such as the Breastfeeding Task Force of Greater Los Angeles may be helpful in the implementation of policies that support breast feeding. If an employee takes these initiatives and her employer is unwilling to provide break time or space to express milk, the employee’s attorney may advise her to seek redress by filing a claim with the state labor commissioner.

The employee’s attorney should also evaluate whether an employer’s refusal to provide a suitable space for expressing milk as well as any retaliatory actions taken by the employer against the employee requesting lactation accommodation constitute possible grounds for a claim of discrimination. Although breast feeding is not covered by the federal Pregnancy Discrimination Act of 1978, and courts have held that breast feeding is not a “related medical condition” as defined by the PDA, women “may still have a claim of sexual discrimination under Title VII because lack of accommodation for breastfeeding provides a disadvantage for women.” In addition, California’s Pregnancy Disability Act may provide a cause of action.

Law firms and other employers should explore their space options before an employee requests accommodation. Employers should also designate a human resources person to answer any questions and serve as a liaison between the employer and employee. Lactation accommodation policies should be distributed to employees and included in the employee manual.

The minimum requirements of Labor Code Section 1030 are a room offering privacy with an electrical outlet and unpaid break time. An employer seeking to truly support a breast-feeding employee will ensure that the room has an inside lock, refrigerator, sink, comfortable chair and footstool, wardrobe hooks, and mirror—and might consider that the break period be a paid one. In addition, an employer who wants to encourage breast feeding and contribute to an increase in the rate of breast feeding among its female employees with infants can inform employees of its policies and arrangements for breast-feeding support before employees go on maternity leave. Employers can go beyond compliance with Section 1030 and provide breast pumps and make the services of a lactation consultant available to employees. The benefits for employers who fully accommodate breast-feeding employees are numerous. (See “Advantages for All,” page 21.)

Employers could either purchase or subsidize pumps for each nursing employee or purchase hospital grade electric pumps for multiple uses and individual sterilized kits. Employers that opt to purchase or subsidize the cost of breast pumps should at least consider the electric pump models, even though

(Continued from page 21)

ian cancer, and hip fractures as well as greater bonding between mother and child and increased self-esteem.

The health benefits for both mother and child translate into employer and societal benefits in the form of reduced healthcare, insurance, medical, and welfare costs. One company implementing a lactation accommodation program found a $240,000 reduction in medical costs, with 62 percent fewer prescriptions. Moreover, healthier children and mothers result in reduced maternal absenteeism and lateness in the workplace. Some programs found a 77 percent reduction in maternal absenteeism due to infant illness.

Finally, when practices that encourage breast feeding are adopted in the workplace, breast-feeding mothers “exhibit increased productivity with higher job satisfaction.” Employer policies may encourage women to initiate breast feeding if they believe they will be able to continue breast-feeding upon their return to work. Moreover, since the ability to express milk at work enables women to both work and breast feed, it advances gender equality in employment. The employer’s support could even make a difference in whether a mother returns to the work force after the birth of her child—E.L.G.

2 At least 30 states have enacted legislation to promote breast feeding. See G. Waggett & Rega Richardson Waggett, Breast Is Best: Legislation Supporting Breast-Feeding Is an Absolute Bare Necessity—A Model Approach, 6 Mo. J. CONTEMP. LEGAL ISSUES 71 (1995).
6 Christup, supra note 4, at 481.
9 Rona Cohen et al., A Description of a Male-Focused Breastfeeding Promotion Corporate Lactation Program, 18 J. HUMAN LACTATION 1, 61 (2002).
10 Cohen & Mrtek, supra note 8, at 5.
11 Cohen, supra note 9, at 63.
12 Cohen & Mrtek, supra note 8, at 5.
14 Sanvita Programs Corporate Lactation brochure, at 2. Copy on file with author.
16 CIGNA Working Well, supra note 5, at Documentation.
18 Christup, supra note 4, at 481.
19 Cohen & Mrtek, supra note 8, at 5.
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they are more expensive, because these models enable mothers to express milk more rapidly and thereby reduce the amount of break time that is required.

Labor Code Sections 1030 et seq. offer employees the opportunity to continue working at their jobs while breast-feeding. Most employers can easily accommodate nursing mothers by simply providing a space and time to express milk. Wise employers can use this legislation as an opportunity to reduce their costs while educating staff and supporting their employees who are breast-feeding mothers.

1 The author wishes to thank Mark Meyerhoff of Liebert Cassidy Whitmore and Alexis Martin Neely of Munger Tolles & Olson LLP for their comments on this article.
2 42 U.S.C. §§12111(10)(A), 12112(b).
3 Lab. Code §1030 et seq.
5 42 U.S.C. §12111(8), §12112(a).
6 Vande Zande v. State of Wis. Dep’t of Admin., 44 F. 3d 538, 542 (7th Cir. 1995).
8 42 U.S.C. §12111(10)(A), (B).
9 Id. at 545-46.
10 Id. at 546.
11 Id. at 1030.
12 Id.
13 Id. at 1031.
14 To maintain a full milk supply, breast-feeding mothers require a minimum 20 minutes every 3 to 4 hours to express milk. With an electric double breast pump, most women could pump within 20 minutes. Manual and battery-operated pumps could require more time. Therefore, a breast-feeding mother needs to pump at least twice during an eight-hour work day. An employee probably cannot express her milk sufficiently in 10 minutes (the minimum legally allotted break time for most employees). See www.lalecheleague.com for further information about pumping.
15 However, milk can be safely stored at room temperature, if it is under 72 degrees, for up to 10 hours. Gina Bevinetto, Nutrition Now, American Baby, May 2002, at 10.
16 Id. at 1032.
17 See www.breastfeedingtaskforla.org.
21 Gov’t Code 12945.
22 Prices range from approximately $41 for a manual pump for short-term pumping to $188.95 for a double electric pump. See, e.g., affordable-breast-pumps.com.
A significant number of cases settle while on appeal. In fact, in order to reduce caseloads, both state and federal appellate courts have established settlement or mediation programs to encourage this result. Reaching a settlement at the appellate stage, however, is frequently complicated by the fate of the underlying judgment, which the losing party may insist be reversed, or at least vacated, as part of any settlement.

Litigants can accomplish this end by a stipulated reversal, a procedure by which the parties jointly ask a court to resolve an appeal by reversing the trial court’s judgment. Typically, the reversal is a condition of the parties’ settlement. The California Supreme Court endorsed this procedure in 1992 in *Neary v. Regents of University of California* by creating a presumption that appellate courts should accept such stipulations in the absence of extraordinary circumstances. For the following eight years, *Neary’s* merits were widely debated, with the controversy resolved only when the state legislature enacted Code of Civil Procedure Section 128(a)(8) in 1999. Section 128(a)(8) reverses *Neary’s* presumption in favor of accepting stipulated reversals and instead creates a presumption against stipulated reversals. The statute places the burden on the parties to convince the appellate court to reverse a judgment with the parties’ consent.

As a result of this legislative action, eight years of precedent under *Neary* is slowly being replaced by precedent created under the new statute. Litigants seeking stipulated reversals on appeal accordingly need to be cognizant of the emerging authority and, specifically, its construction of the requirements of Section 128(a)(8).

The enactment of Section 128(a)(8) is only the most recent chapter in the changing history of stipulated reversals in California. Until 1992, California’s appellate courts were divided on their propriety.
Some courts believed that allowing parties to stipulate to a reversal demeaned the adjudicatory process. In one opinion, the court of appeal declined to approve a stipulated reversal, noting that it knew nothing about the merits of the appeal and thus had no reason to reverse a judgment “with which this court has no quarrel at this point.” Other courts viewed stipulated reversal as a proper device, no different from a stipulated judgment. These courts reasoned that whatever the parties could agree on should be upheld, particularly if it furthered the ultimate resolution of the controversy.

These conflicting views were brought to a head in 1992 in Neary. The California Supreme Court settled the conflict in judicial philosophies by not only allowing stipulated reversals but by creating a presumption in favor of accepting them. Neary involved an appeal and cross-appeal of a $7 million libel verdict in favor of Neary, a cattle rancher, against the University of California. While the appeals were pending, the parties reached a settlement. In return for $3 million, Neary would agree to vacate the judgment and dismiss his case. To effectuate this resolution, the parties asked the court of appeal to reverse the judgment and remand the case to the trial court for dismissal with prejudice. The court of appeal refused to do so, noting: “Facilitation of settlement is not the overriding judicial object. The power judges exercise is not defined or conferred by private agreement. . . . The duty of the judicial branch is not to satisfy the parties that appear before it, or even society at large, but to say what the law is and apply it in particular cases.”

The California Supreme Court granted review and began its analysis by confirming the power, the court noted that it could have granted the parties’ motion, but declined to do so in favor of stipulated reversals. Having confirmed the power, the court went on to hold that “as a general rule, the parties should be entitled to a stipulated reversal to effectuate settlement absent a showing of extraordinary circumstances that warrant an exception to this general rule.” The court explained that public policy favors settlement as an efficient method of resolving disputes. Moreover, rejecting stipulated reversals could force a wasteful expenditure of resources by the parties and the courts: “The appellate courts have enough to do without deciding cases the parties no longer wish to litigate.”

The court also favored stipulated reversals as a matter of fairness to the parties. Neary and the university had been litigating for 13 years before reaching a settlement. The court reasoned that because the primary purposes of the judicial system is to resolve disputes, courts should assist parties in settling rather than subjecting them to “the prospect of further battering” in continued litigation. The court then neatly summed up its reasoning in the pithy phrase: “The courts exist for litigants. Litigants do not exist for courts.”

Neary was not unanimous. Justice Mosk concurred in the result but opined that the majority went too far in creating a broad presumption in favor of allowing stipulated reversals. Justice Kennard voiced much stronger objections, dissenting on the grounds that the practice undermines judicial efficiency by encouraging parties to try cases and erodes public confidence by fostering the perception that litigants with sufficient wealth can buy their way out of adverse adjudication. In her view, stipulated reversals should be allowed only if, after balancing public and institutional concerns, there is no reasonable possibility that reversal would adversely affect the interests of nonparties or the public.

The Neary Era

After Neary, some courts applied its rule, allowing stipulated reversals without discussion. Continued criticism of the decision, however, led the California Legislature to attempt to restrict stipulated reversals. In 1994, a proposed statutory amendment (SB 102) would have codified Justice Kennard’s dissent by amending Code of Civil Procedure 128(a) (8) to prevent appellate courts from accepting stipulated reversals unless: 1) there was no reasonable possibility the public could be adversely affected, and 2) the parties could show there would be no erosion of public trust or reduction of incentive for pretrial settlement. The bill passed the legislature but did not make it past the governor’s desk, and Neary remained the controlling law.

While the legislative attempt to constrict Neary met with defeat, several efforts in the courts to expand the circumstances in which stipulated reversals could be obtained proved unsuccessful as well. In State of California v. Superior Court (Love lace), for example, the parties sought a stipulated reversal of an appellate decision after the California Supreme Court granted review. The supreme court noted that it could have granted the parties’ motion, but declined to do so in favor of deciding an important legal issue of statewide importance. And in People v. Barraga, a district attorney and convicted defendant sought a stipulated reversal of a misdemeanor conviction. The court denied the motion, pointing out that the relief sought was not authorized by statute or Neary, and questioned whether Neary could apply in a criminal context at all.

Neary’s reach also received an indirect blow from the U.S. Supreme Court in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership. Just as the doctrine of stipulated reversal is available to California appellate courts, federal appellate courts have a parallel body of law that allows them to vacate judgments on appeal, which in federal parlance is called a “stipulated vacatur.” Before U.S. Bancorp, the federal circuits were split on the propriety of stipulated vacatures, with many circuit courts opposed to the practice.

U.S. Bancorp resolved this split of authority by directly addressing the question whether parties’ voluntary settlements could justify the “extraordinary remedy” of vacatur by stipulation. The Court concluded that the mere fact that parties agreed to vacatur in a settlement would not suffice. Instead, the Court held that parties seeking stipulated vacatur of a federal judgment must demonstrate “exceptional circumstances” for such “extraordinary relief.” The Court reasoned that judicial precedents are valuable to the legal community and are not merely the property of private litigants to erase at will. Thus, by creating a strong presumption against stipulated vacatures, the federal courts adopted a position at odds with Neary.

Certain California courts also chafed under Neary. In Norman I. Krug Real Estate Investment v. Prasser, the First District Court of Appeal reasoned that Neary imposed “an unusual and difficult responsibility” on appellate courts in ascertaining whether extraordinary circumstances existed to justify the rejection of a stipulated reversal. This was so, the court reasoned, because Neary “provides little guidance” in outlining what “extraordinary circumstances” overcome the presumption in favor of stipulated reversals. Also, because Neary did not require the parties themselves to come forward with evidence regarding the public’s interest, it was difficult for a court operating in such a vacuum to know if it was doing the right thing in accepting a stipulated reversal.

In his concurring opinion in Krug, Presiding Justice Kline argued that the blanket presumption in favor of stipulated reversals was “destined to plague the appellate courts,” and he encouraged the supreme court to reconsider the propriety of stipulated reversal. In his view, the stipulated reversal procedure “debas es the judicial coin with the currency of a false expediency,” wastes judicial resources, and undermines respect for judicial institutions.

In Krug, the court of appeal asked the parties to submit letter briefs responding to a series of questions to help the court determine if extraordinary circumstances existed that would justify denying a stipulated rever-
The court refused to allow a broker to essentially “purchase disciplinary immunity.” Thus, the court relied on the public interest exception carved out in Neary. The court did, however, allow a stipulated reversal as to the broker’s agency, which had subsequently been sold to a third party who had nothing to do with the transaction underlying the judgment.

To address the “considerable handicap” in determining whether extraordinary circumstances existed, the First District adopted Local Rule 8 (effective January 1994; amended 2000). This rule required that motions for stipulated reversals be accompanied by 1) a copy of the judgment to be reversed and 2) declarations from counsel stating that the judgment did not involve important public rights or unfair, illegal, or corrupt practices or torts affecting a significant number of persons not parties to the litigation, and that a reversal would not prejudice any third parties.

But even the addition of this local rule proved insufficient to assure Neary’s harshest critics. In Morrow v. Hood Communications, Inc., the parties sought a stipulated reversal on appeal before the record on appeal had been filed and before the issues on appeal had been identified and briefed. Given that the motion for stipulated reversal was accompanied by the declaration from counsel (required by local rule) stating that no third parties would be prejudiced, the majority allowed a stipulated reversal. The majority, however, made clear that it was following Neary only because stare decisis required it to do so, voiced agreement with the fundamental principles set forth in Justice Kline’s concurring opinion in Krug, and encouraged the supreme court to reconsider and repudiate Neary.

Justice Kline himself dissented in Morrow, taking his criticism to a new level. Although Justice Kline acknowledged that Neary required that the stipulated reversal be granted, he wrote that “as a matter of conscience [he could not] apply the rule announced in Neary.”

Section 128(a)(8)

Although the supreme court declined the request of the Morrow court to reconsider Neary, the legislature took up the issue by reviving the bill that the governor had vetoed in 1994 to make stipulated reversal a statutorily disfavored procedure. This time there was no veto, and in 1999 the legislature enacted Code of Civil Procedure Section 128(a)(8), which became effective January 1, 2000. The statute modified the appellate court’s power to accept stipulated reversals. Indeed, in enacting Section 128(a)(8), the legislature effectively disapproved the majority’s holding in Neary and adopted Justice Kennard’s dissenting analysis.

Section 128(a) sets forth enumerated powers of every California Court. Subdivision (8) provides that every court may “amend and control its process and orders so as to make them conform to law and justice” and goes on to provide that “[a]n appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless” two conditions are met. Thus, in contrast to Neary’s presumption in favor of accepting stipulated reversals, the statutory rule is phrased as a presumption against granting stipulated reversals. The two conditions required for a stipulated reversal are:

(A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal.

(B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement.

Section 128(a)(8) puts the burden on the parties seeking stipulated reversals to justify the relief sought, and, as expected, has resulted in denials of stipulated reversal requests. For example, in August 2000, a jury in a racial discrimination lawsuit in San Francisco awarded $132 million to employees of the nation’s largest baking company, Interstate Brands Corporation (makers of Wonder Bread). The trial court later reduced the award to $27 million. While the matter was on appeal, the parties reached a settlement and asked the First District Court of Appeal to approve a stipulated reversal. In January 2002, the court of appeal denied the request of the parties.

Nevertheless, on an appropriate showing, courts still will accept stipulated reversals. For example, in In re Rashad H., the court applied Section 128(a)(8) and approved a stipulated reversal in a dependency matter. Interestingly, Rashad H. presented a variation on the typical theme. The request for a stipulated reversal was not based solely on the parties’ desire to settle. Rather, the parties...
agreed that the trial court had committed reversible error and that reversal was the proper substantive outcome regardless of their agreement to settle. The court of appeal concurred, finding that reversal was inevitable. As a result, the court found that the public’s interest was advanced by allowing the judicial error to be corrected by the settlement agreement.

Despite its holding, Rashad H. did not state whether the parties’ agreement that reversible error existed would become the new touchstone for approval of stipulated reversals.34 This question was addressed in Union Bank of California v. Braille Institute of America,35 which held that reversible error is not required. The Union Bank case arose from a series of judicial disputes between the trustees and beneficiaries of a trust. While the matter was on appeal, the parties reached a settlement in which they agreed to a stipulated reversal of two court orders.

In addressing the parties’ stipulated reversal request, the court parsed Section 128(a)(8) into three statutory requirements: Stipulated reversal will be accepted if 1) there is no reasonable possibility nonparties or the public could be adversely affected, 2) the reasons for the request outweigh concerns about the erosion of public trust, and 3) there is no reduction in the incentive for pretrial settlement. The court found all requirements were satisfied. The court also explained that although Union Bank was unlike Rashad H. because the litigants did not demonstrate reversible error in the orders at issue, “the absence of reversible error is not a bar to the acceptance of a stipulated reversal so long as the appellate court makes the three findings” of Section 128(a)(8).

Recently the California Supreme Court seemed poised to write another chapter in stipulated reversal law when it granted review in Whitmore Union Elementary School District v. Shasta County.36 In Whitmore, the parties reached a settlement sometime after oral argument in the appeal, and they notified the court by letter that they would be seeking a stipulated reversal.37 Three days later, the court of appeal published its opinion. In a footnote, the court of appeal denied the parties’ anticipated request for a stipulated reversal, citing Section 128(a)(8), but without any detailed analysis.38

The supreme court then granted review of two issues, one of which was whether the court of appeal had acted improperly in preemptively denying the parties’ anticipated request for a stipulated reversal without any briefing on the propriety of a stipulated reversal under Section 128(a)(8).39 Later, however, the court dismissed review as improvidently granted,40 leaving undecided the question of whether parties seeking a stipulated reversal are entitled to briefing.

### The Current State of Stipulated Reversal Law

Given the statutory presumption against stipulated reversal and the burden imposed on the parties to justify reversal, appellants should not routinely ask for stipulated reversals as part of appellate settlement. However, stipulated reversals remain obtainable, and as they are effective tools for posttrial settlement because erasure of a trial court verdict is a powerful bargaining chip, they should be pursued when appropriate.

 Parties seeking a stipulated reversal should carefully abide by Section 128(a)(8). Following the analysis of Rashad H., litigants should fashion their motion for stipulated reversal around the three statutory factors contained in Section 128(a)(8) (A) and (B). Litigants in the First District must also follow Local Rule 8.41 And, in light of Whitmore, the parties should set forth their arguments under Section 128(a)(8) in their first letter or motion to the court on the issue, lest they be preemptively precluded from ever doing so.

First, the parties should frame the case as narrowly as possible to emphasize that the stipulated reversal will not affect the public, nonparties, or the precedential development of the law. Taking a cue from California Rule of Court 976(b) governing the publication of opinions, the parties could argue that their dispute does not involve an issue of public interest and that resolution of their dispute would not establish a new rule of law or resolve a conflict in the law. In effect, the argument is that accepting the stipulated reversal would not rob the public of a valuable precedent.

Second, parties should provide reasons to explain that the request will not erode public trust in the court process. Given that one of the primary criticisms of stipulated reversals is that the procedure allows wealthy, repeat litigants to buy their way out of an adverse ruling, it could help to show that both parties to the dispute are not frequent litigants or are at least of equal bargaining power. If warranted, parties may also argue that without a stipulated reversal in the case, there will be a delay in resolution and an inefficient waste of public and private resources. Further, when the parties reach their settlement through a court-ordered or operated settlement or mediation process, the parties may reasonably contend that accepting such a settlement does not erode public trust in the courts, given the court’s assistance in reaching the settlement.

Third, the parties should emphasize how stipulated reversal will not reduce the incentive for pretrial settlement. One way to develop this point is to trace the history of settlement negotiations to show that the parties did not adopt a wait-and-see attitude about the results in the trial court. Describing new developments in the case that lead to a settlement breakthrough also may bolster the showing on this factor. The argument is further strengthened if the parties agree that the judgment at the trial level is legally flawed and would have to be reversed as a matter of law regardless of settlement—as in Rashad H.

Review of precedents governing approval of stipulated reversals is also helpful in determining appropriate circumstances for the procedure. Cases involving violations of professional duties—as in Norman I. Krug—or other public legal obligations with collateral consequences are not good candidates for a stipulated reversal because the court may believe the appellant is attempting to purchase immunity from public responsibilities. The court considered this in Union Bank and specifically noted that a stipulated reversal would not harm the public interest because the case did not involve “allegations of corruption or conduct which would be reportable to licensing and disciplinary agencies.”42

Even so, stipulated reversals involving professional malpractice are still possible. In Saraswati v. Wildes, in which the plaintiff sued a New York law firm in an immigration matter, the court allowed the reversal because the case concerned “the legal representation of only one party and his private interests regarding his immigration status” and the appropriate New York disciplinary authorities already were investigating the matter.43 Conversely, matters involving discrete obligations between specific individuals in their individual capacities may be good candidates for stipulated reversals because the issues generally pertain to the parties only and do not implicate broader public concerns. For instance, the court in Bryer v. Green-Venable, noted that the public or nonparties would not be affected by a stipulated reversal because the case concerned “collection on a debt between private parties.”44 Similarly, in Romo v. Boynton, the court pointed out that the case involved no issue of public concern but was simply “a dispute over compensation resulting from a dog bite.”45 The stipulated reversal may also be available in family law matters, as in Rashad H. and In re L.L. P.46

The tortuous legal history of stipulated reversals in California appears to have ended. Yet despite the statutory presumption against stipulated reversals, they remain a workable component of appellate settlement. Courts are becoming more comfortable with the guidelines of Section 128(a)(8) and when the factors militating against granting a stipulated reversal are not present, the statute’s presumption can be overcome. In that fashion,
Section 128(a)(8) provides a balanced and workable resolution of the intense philosophical debate that ensued after Neary announced its rule.

1 Neary v. Regents of Univ. of Cal., 3 Cal. 4th 273 (1992).
3 Every court shall have the power...[to] amend and control its process and orders so as to make them conform to law and justice. An appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds both of the following: (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal. (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement.
5 E.g., Parker v. Parker, 135 Cal. App. 2d 782, 782-83 (1955).
6 Neary, 3 Cal. 4th at 275-76; see Neary v. Regents of Univ. of Cal., 278 Cal. Rptr. 773, 777-78 (Ct. App. 1991), rev’d, 3 Cal. 4th 273 (1992).
7 Neary, 3 Cal. 4th at 277.
8 Id. at 278.
9 Id. at 281.
10 Id. at 280.
11 Id. at 286.
12 Id. at 294-95.
15 The governor’s veto message stated that “[t]he presumption in favor of settlement should be retained,” and that Senate Bill 102 would “discourage and in most cases prevent postjudgment settlements, forcing the parties to continue to pursue an appeal even though both sides wish to settle and terminate any further litigation.” The veto message is available at http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0101-0150/sb
A narrow means to circumvent the Bancorp rule in some circuits. This involves filing a Rule 60(b) motion in the district court, asking the district court to vacate its judgment, despite the pending appeal. The district court does not have the power to grant this motion, but it could issue a short memorandum indicating that its inclination to do so, which, in turn, might induce the court of appeals to remand the case. See Scott B. Smith, Vanishing Precedents: Settlements Vacate on Appeal: A Trap for the Unwary, 68 FLA. B.J. 18, 21 (Nov. 1994) (outlining the split); Howard Slavitt, Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur, 30 HARV. C.R.-C.L. L. REV. 109, 134-35 (1995) (same).


[30] The governor both in 1994, when the bill limiting stipulated reversals was first vetoed, and in 1999, when a nearly identical bill (AB 1676) was passed, was the same man, Pete Wilson.

[31] See Stipulated Reversal Is Rejected, S.F. DAILY J., Jan. 22, 2002 (discussing Carroll v. Interstate Brands Corp., 1st Dist. Court of Appeal No. A093281 (Div. 5), noting that the parties would not disclose the terms of their settlement). Although the court’s order denying a stipulated reversal was without prejudice and noted that the parties could resubmit the request if they set forth more particularized reasons to support it, the parties never did so.


[34] See Purcell, supra note 14, arguing that stipulated reversal should be allowed only for legally defective judgments.


[38] Id.


[40] See Supreme Court Order, Case S096088 (July 10, 2002).


[42] Whitmore, 104 Cal. Rptr. 2d at 229 n.56.


Imagine a scenario in which parties settle a lawsuit after a contentious battle involving a $1 million claim against a defendant who is in financial difficulty. The plaintiff accepts a settlement of $250,000. Fifty days after the plaintiff cashes the settlement check, the defendant, now the debtor, files for bankruptcy. More than a year later, the plaintiff calls his lawyer with the news that he has received in the mail an adversary proceeding complaint filed in Bankruptcy Court asserting that the entire settlement payment has to be repaid to the debtor’s trustee in bankruptcy since the payment constitutes a “preference.”

A preference is a transfer of a debtor’s property or an interest therein to a creditor in satisfaction of a past-due debt at a time when the debtor is insolvent. More specifically, Bankruptcy Code Section 547(b) provides that, with certain exceptions:

[A] trustee may avoid any transfer of an interest of the debtor in property:
(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before the transfer was made;
(3) made while the debtor was insolvent;
(4) made:
   (A) on or within 90 days before the date of the filing of the petition; or
   (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if:
   (A) the case were a case under chapter 7 of this title;
   (B) the transfer had not been made; and
   (C) such creditor received payment of such debt to the extent provided by the provisions of this title.2

To implement this section of the Bankruptcy Code, the trustee (who is often the debtor in a chapter 11 case) usually will review the debtor’s records for a period within 90 days or longer before the case was filed and then sue to recover payments that were made by the debtor during that period if the payment appears to have been a preference. The underlying policy is to treat all similarly situated creditors equally so as not to “prefer” one creditor of the debtor.

Creditors that agree to a settlement of a debt may find that the payment constitutes a preference in a subsequent bankruptcy proceeding.

By Terence S. Nunan and Jeanne C. Wanlass

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over any other. For this reason, transfers to insiders—who include relatives or officers and directors—that were made one year from the date the petition was filed can be recovered. In contrast, transfers to those not financially or personally related to the debtor can only be recovered if the transfers were made within the 90-day period before the petition was filed. It is usually difficult to explain this procedure to a defendant in a preference action who is struck by the injustice of the request for recovery.

In the scenario, assume that the plaintiff (now the creditor) repays the preference and then decides to file a claim against the debtor’s bankruptcy estate. The size of the creditor’s claim has a major impact on how much the creditor can recover from the debtor’s bankruptcy estate. Assume that the net value of the debtor’s bankruptcy estate to be paid to creditors is $900,000, and there are $3 million in other claims in addition to the creditor’s claim. If the creditor’s claim is approved for $1 million, he will receive $225,000; if the creditor’s claim is for $250,000, he will receive only $69,231.

When Bankruptcy Code Section 547 was enacted in 1978, it represented a significant change in bankruptcy law. Prior to 1978, it seemed that most practitioners did not assume that good faith settlements of litigation could be preferential. In 1986, the legislature established that all five elements of Section 547(b) have been satisfied. The burden then shifts to the creditor to demonstrate the existence of any of the defenses that are available under Section 547(c). Although several defenses are available, most creditors utilize three major defenses: 1) “contemporaneous exchange,” 2) “ordinary course of business,” and 3) “new value.”

Section 547(c) lists when “the trustee may not avoid under this section a transfer.” Under the first defense, Section 547(c)(1) provides that the trustee may not avoid a transfer:

1) to the extent that such transfer was:
(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
(B) in fact a substantially contemporaneous exchange.

The most common example of a contemporaneous exchange is a payment for goods delivered on a C.O.D. or other cash basis. If the creditor was paid at the same time the goods or services were delivered to the now bankrupt debtor, the creditor can retain the payment since it was intended to be, and actually was, a contemporaneous exchange.

The second defense is that the debt was paid in the ordinary course of business between the parties. Section 547(c)(2) provides that the trustee may not avoid a transfer:

2) to the extent that such transfer was:
(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
(B) made in the ordinary course of

and the creditor receives payment in accordance with the established terms, then the creditor has an ordinary course of business defense. For example, a supplier of goods has been sending goods to a manufacturer for more than a year. The terms of the supplier’s invoice provide that the supplier must be paid within 30 days from the date of the invoice. The payment is received within those 30 days. In this circumstance the supplier has been paid pursuant to business terms and the funds need not be returned.

The new value defense is available to a creditor when two events occur: 1) the payment (now being sought as a preference) was received by the creditor, and 2) after receipt of the payment, the creditor delivered new goods or services to the debtor for which the creditor was not paid. According to Section 547(c)(4), the trustee may not avoid a transfer:

4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor:
(A) not secured by an otherwise unavoidable security interest; and
(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

The creditor can reduce the amount of

While there is a rebuttable presumption that a debtor is insolvent 90 days before the bankruptcy petition is filed, a person who has received a preference payment is not without defenses.
A preference is any transfer of a debtor’s property or an interest therein to a creditor in satisfaction of a debt.
True. False.

12. The value of goods or services that are provided to a debtor before a preferential payment is received can reduce the amount of the preference.
True. False.

13. The value of goods or services provided to a debtor for which a creditor is paid can reduce the amount of a preference.
True. False.

14. The value of goods or services provided to a debtor after a preferential payment is received and for which a creditor is not paid can reduce the amount of the preference.
True. False.

15. Structured settlement payments are considered to be part of the debtor’s ordinary course of business.
True. False.

16. The contemporaneous exchange defense always applies to settlement payments.
True. False.

17. A trustee is not required to pursue all potential preference actions.
True. False.

18. Under the Bankruptcy Code, ipso facto provisions are valid in executory contracts.
True. False.

19. A clause that provides that a contract is invalid when a debtor files a bankruptcy petition is an ipso facto provision.
True. False.

20. A debtor’s contract rights become property of the debtor’s estate despite the existence of any ipso facto clauses in an agreement between the debtor and the creditor.
True. False.
the preference by the amount of the new value delivered. For example, a creditor delivers goods worth $5,000 to the debtor with an invoice for net 30-day terms. The creditor is paid in full 60 days later. Two days after the creditor receives the payment, the creditor ships additional goods invoiced at $3,000 to the debtor. The debtor does not pay for the second shipment and files a bankruptcy petition two weeks later. The creditor has a new value defense of $3,000. The creditor can reduce the $5,000 preference payment by the $3,000 value of the second shipment to $2,000. Under these circumstances, a partial defense is better than none.

In most cases, a payment to settle litigation does not qualify for the ordinary course of business defense. In the case of In re Florence Tanners, Inc., for example, the debtor paid a former employee to settle a sexual discrimination lawsuit. The debtor subsequently filed for bankruptcy and was able to recover the settlement proceeds as a preference on the ground that the payment was not made in the ordinary course of business, which for the debtor was the sale of fur and leather goods. In In re Aero-Fastener, Inc., a court determined that a prepetition transfer of goods pursuant to a settlement agreement was preferential. In reaching this conclusion, the court noted that the purpose of the settlement agreement was to resolve a collection lawsuit for goods sold to the debtor and, as a consequence, no new value had been provided. The court opined that forbearing to proceed with a lawsuit did not constitute new value and therefore was not a defense to a preference action.

Structured payments in settlement of litigation are also vulnerable. In In re Maloney-Crawford Inc., the court determined that the debtor’s payments to its creditor during the preference period were not made in the ordinary course of business. Moreover, the reduction of the creditor’s claim in exchange for periodic payments did not constitute new value.

The decisions regarding settlements and preferences are not completely uniform. In Lewis v. Diethorn, the Third Circuit held that the debtors’ prepetition payment to settle a lawsuit and remove a lis pendens was not a preferential transfer, because the payment was not for an antecedent debt. In this case, the creditor had constructed a house for the debtors that the debtors contended was defective. The debtors agreed to pay for the work in exchange for the creditor’s discontinuance of its lawsuit and withdrawal of the lis pendens. In the view of the Lewis court, the debtors’ payment freed them from the risk of litigation and was not for an antecedent debt.

For the creditor in the scenario who settled a million-dollar lawsuit for $250,000, certain issues arise: Does the creditor satisfy the elements of Section 547(b) in this case? Probably yes. What about his defenses? Has he given the debtor any new goods or services? Has he been paid according to a contract entered into in the ordinary course of business? Has there been a contemporaneous exchange? Probably not. Unfortunately, if the creditor has not already returned the settlement payment, the creditor will likely be forced to do so because the payment constitutes a preference.

On the other hand, will the creditor at least have a claim in the debtor’s bankruptcy for $1 million, which comprises the entire amount of the creditor’s loss? Unfortunately, no. The creditor agreed to accept $250,000 in payment of his claim and dismissed his lawsuit as part of the settlement agreement. Under the circumstances of a typical settlement agreement, after repaying the $250,000 to the trustee for the bankruptcy debtor, the creditor’s bankruptcy claim will be limited to $250,000—not $1 million. Therefore, assuming creditors ultimately receive 25 cents on the dollar for their claims, the creditor will be paid $62,500, not $250,000.

**A Claim Preservation Clause**

There may be a way to avoid this unhappy result. Every settlement agreement should include a claim preservation clause with language that protects the recipient of a payment to settle a lawsuit in the event of a subsequent bankruptcy filing. The clause should provide that:

In the event Defendant shall file for bankruptcy within 95 days after the Plaintiff shall not be obligated to file a dismissal of the proceeding unless the Bankruptcy Court having jurisdiction determines that payment of the settlement proceeds does not constitute a preference subject to avoidance. If the Bankruptcy Court determines that the settlement payment was a preference pursuant to Bankruptcy Code Section 547, the plaintiff shall not be obligated to dismiss the proceeding and the Plaintiff’s original claim is reinstated in full.

What if this type of claim preservation clause is incorporated into the settlement agreement in the scenario, and the trustee asserts the right to recover the $250,000 settlement payment as a preference? The creditor, would still be able to file a claim for the $1 million requested in the original lawsuit rather than just $250,000. While it is possible the trustee may contest the original $1 million claim, the creditor is in a much stronger bargaining position and can still seek to prove the validity of the full original claim. With the addition of the claim preservation clause to the settlement agreement, the creditor may be able to recover 25 percent of the $1 million—or $250,000—as his share of the bankruptcy estate of the debtor. It should be noted that for the creditor to recover $250,000, he will probably need to prove the validity of his original $1 million claim. At some point, the creditor may be required to elect to pursue a contested $1 million claim or acquiesce to an uncontested claim for the $250,000 settlement that was turned over to the bankruptcy trustee as a preference.

The inclusion of a claim preservation clause also may discourage thoughtful trustees from bringing a preference action since it may reduce the net recovery to other creditors. A trustee in bankruptcy is not required to commence a preference action—and the existence of a claim preservation clause may be a powerful deterrent to a prudent trustee from filing a preference action.

The claim preservation clause does not appear to challenge the public policy that negates any agreement that seeks to preclude the right to file for bankruptcy. The claim preservation clause instead provides a positive incentive for the debtor not to seek bankruptcy until the preference period expires. Indeed, if bankruptcy is sought within the 90-day period, the creditor will have a claim for the entire amount of the debt rather than the reduced amount that was agreed to in the settlement agreement. Having to relitigate a claim that the plaintiff/creditor thought was settled may be cold comfort, but the outcome is far more attractive than having a claim for less than the amount requested in the original litigation.

**Enforceability Issues**

While it may seem that a claim preservation clause should only be included in settlement agreements when there is a fear that the paying party may seek bankruptcy protection, the recent history of insolvencies of major corporations and public entities such as Enron, WorldCom, PG&E, Orange County, and Texaco suggests otherwise. It is difficult to predict who will file for bankruptcy. Bankruptcy, like death, is often unanticipated and seldom welcomed.

The claim preservation clause does not solve every problem, however. Courts may be unwilling to agree to defer dismissal of a lawsuit if the settlement agreement provides for periodic payments over a long time. In the event the lawsuit is against an insider, few courts are likely to agree to delay dismissal of a settled lawsuit for more than a year.

Practitioners should exercise caution...
regarding the dismissal of the civil lawsuit in the event of a settlement. The lawsuit should not be dismissed until the settlement check actually clears the debtor’s bank to avoid problems determining the transfer date.13 Practitioners should make sure to wait the full 90 days after the funds are transferred before the dismissal of the lawsuit is filed.

Does any provision of the Bankruptcy Code invalidate the claim preservation clause? Bankruptcy Code Section 365 permits a trustee in bankruptcy to assume or reject any executory contract of the debtor. Is a settlement agreement with a claim preservation clause an executory contract that the trustee in bankruptcy can reject?

The established definition14 of an executory contract in the bankruptcy context is a contract that is substantially unperformed by both sides.15 For example, if the plaintiff/creditor in the scenario had agreed to furnish goods and services to the defendant/debtor for the next two years in exchange for periodic payments, the contract would be an executory one and the debtor in bankruptcy could reject the entire contract. A consummated settlement in which the only remaining action required is the dismissal of the case is arguably not executory. Once the defendant pays the plaintiff, the only performance remaining on either side is the dismissal of the lawsuit by the plaintiff/creditor after 95 days. While the settlement is probably not an executory contract, a challenge on this ground is possible nevertheless.

Another challenge may arise based on Bankruptcy Code Section 365(e)(1), which serves to invalidate ipso facto provisions in executory contracts. Ipso facto16 provisions are contractual provisions for the “automatic” termination of the contract due to: 1) the insolvency or financial condition of the debtor at any time before the closing of the case, 2) the filing of a bankruptcy petition, or 3) the appointment of a trustee under Title 11 or a custodian before the filing of a bankruptcy petition.17

The response to these challenges is that a settlement agreement is not an executory contract, since only the creditor has any remaining contractual obligation to perform on the petition filing date. Whether the claim preservation clause is truly an ipso facto provision is debatable. The bankruptcy court—not the mere act of filing for bankruptcy—will determine if a payment was preferential, thus relieving the creditor of the obligation to dismiss the creditor’s lawsuit.

The creditor should be aware that, pursuant to Bankruptcy Code Section 541(c), the debtor’s interest in property (including the debtor’s contract rights) becomes property of the bankruptcy estate notwithstanding any
ipso facto provision in an agreement between the debtor and the creditor. Again, the debtor and the creditor may be forced to address whether the claim preservation clause qualifies as an ipso facto provision, but the creditor at least has the opportunity to dispute the reduction of the creditor’s claim to the amount under the settlement agreement.

In the final analysis, the courts—especially bankruptcy courts—may find claim preservation clauses enforceable because they are fair. Bankruptcy courts are courts of equity. It is manifestly unfair for a plaintiff to settle a dispute and allow the defendant several years later to renege on the settlement and make the plaintiff return the settlement payment. Claim preservation clauses promote the settlement of litigation. The law should and does encourage settlement of disputes short of trial.18 Nevertheless, plaintiffs who are knowledgeable about the bankruptcy preference law would be reluctant to settle disputes if claim preservation clauses are determined to be invalid.

Recently, the U.S. Supreme Court granted certiorari to hear the case of Archer v. Warner,19 a prebankruptcy settlement case that does not involve a preference issue. In Archer, the Fourth Circuit, following the leads of the Seventh and Ninth Circuits, held that

a prepetition settlement agreement that included a release of fraud and tort claims constituted a novation. By doing so, a potentially nondischargeable claim was converted to a claim for breach of contract, which is dischargeable in bankruptcy. The District of Columbia Circuit in United States v. Spicer and the Eleventh Circuit in Greenberg v. Schools, Inc., however, have reached different results, and the Supreme Court should resolve this uncertainty in bankruptcy law.

The Supreme Court’s decision will provide attorneys with a valuable lesson about settlements—and possibly place an even greater emphasis on establishing clawback provisions for both the nature and value of a party’s claims. A claim preservation clause, which would maintain the creditor’s rights to pursue the underlying litigation, could avoid many of the problems inherent in Archer.

While a claim preservation clause may not be a panacea, it may well help a disappointed client minimize the loss of a litigation settlement payment because of a bankruptcy filing.

1 11 U.S.C. §547(b).
2 Id.
3 11 U.S.C. §547(e)(1). See In re Upstairs Gallery, Inc., 167 B.R. 915 (9th Cir. B.A.P. 1994) (A settlement does not necessarily create a new obligation for which a payment may be deemed a contemporaneous exchange for new value.).
5 In re Loretto Winery, Ltd., 107 B.R. 707 (9th Cir. 1989).
10 See also In re Bob Grissett Golf Shoppes Inc., 44 B.R. 156 (Bankr. Va. 1984) (Monthly installments were preferential transfers. Antecedent debt was incurred when original contract was executed.)
12 See In re Lewis Shurtleff, Inc., 778 F. 2d 1416 (9th Cir. 1985).
13 Barnhill v. Johnson, 503 U.S. 303, 112 S. Ct. 1386, 118 L. Ed. 2d 39 (1992) (A transfer by check occurs when the check is honored.).
15 3 COLLIER ON BANKRUPTCY §365.02[1] (15th ed. revised).
16 The legal term “ipso facto” is Latin and means “by the fact itself.”
18 See CAL. BUS. & PROF. CODE §465.5(b).
21 Greenberg v. Schools, Inc., 711 F. 2d 152 (11th Cir. 1983).
On Your Mark

Recent Ninth Circuit opinions indicate what should and should not be included in a trademark licensing agreement

By William J. Seiter

It is only natural that vineyards should be fertile ground for trademark disputes. After all, one of the world’s oldest trademarks—Vesuvvini—may be seen on wine amphorae excavated from the ruins of Pompeii, and its owner was probably battling infringers right up to the day Vesuvius erupted.

In modern times a trademark owner in the United States seeking to enjoy federal trademark law protections under the Lanham Act must use the mark in interstate commerce and do so in a way that does not deceive the public. A federally registered trademark can last forever, but should it cease to identify the source and quality of goods or services, it is vulnerable to loss. Happily for lawyers advising consumer brand owners, abundant guidance on how not to lose a mark can be reaped from a harvest of Ninth Circuit cases recounting the trademark woes of California wineries.

Counsel seeking to help a client launch a new mark must first learn the lesson of Kendall-Jackson Winery, Limited v. E. & J. Gallo Winery, which addressed the issue of distinctiveness. In Kendall-Jackson, the Ninth Circuit offered a veritable primer on this aspect of trademark law.

Kendall-Jackson, a producer of high-quality, mid-priced California varietals, features on its Vintner’s Reserve bottle labels a downward-pointing, stylized grape leaf design in shades of green, yellow, orange, red, and brown, with a banner intersecting the leaf that contains the name Kendall-Jackson. The company sued E. & J. Gallo in the U.S. District Court for the Northern District of California for trademark infringement after Gallo introduced a line of premium wines called Turning Leaf that featured labels, like Kendall-Jackson’s, with a downward-pointing grape leaf design in similar colors.

The district court granted summary judgment in Gallo’s favor. The Ninth Circuit Court of Appeals affirmed, noting that to prevail on a federal trademark infringement claim, a plaintiff must preliminarily show the mark is distinctive, since to be protected under the Lanham Act, a trademark must be capable of...
distinguishing the applicant’s goods from the goods of competitors.2

The Ninth Circuit explained, “Marks are often classified in one of five categories of increasing distinctiveness: (1) generic, (2) descriptive, (3) suggestive, (4) arbitrary, or (5) fanciful.3 Quoting the U.S. Supreme Court decision in Ttwo Pesos, Inc. v. Taco Cabana, Inc.,4 the court of appeals stated:

“The latter three categories of marks, because their intrinsic nature serves to identify a particular source of a product, are deemed inherently distinctive.”…These three categories of marks therefore meet the distinctiveness element automatically. At the other end of the spectrum are generic marks, which can never meet the distinctiveness element.

Marks that are descriptive fall in the middle of these two extremes. Descriptive marks are not inherently distinctive and hence do not initially satisfy the distinctiveness element. But descriptive marks can acquire distinctiveness if the public comes to associate the mark with a specific source. Such acquired distinctiveness, which is referred to as “secondary meaning,” allows [Lanham Act] §43 to protect marks.8

In affirming the district court’s ruling that no jury could reasonably conclude from the evidence that consumers view the colored grape leaf as a mark for wine.9 Following the dictates of Kendall-Jackson, counsel’s advice to a client in the selection of a new mark is simple. In tandem with an appropriate trademark availability search, the client should be urged to choose a mark that will be distinctive in its market. Counsel should tell the client to make the mark fanciful or arbitrary, if possible, and, at the very least, suggestive.

Trademark Abandonment

Once an owner launches a new trademark, the simplest way to lose it is to abandon actual use of the mark. A mark will be deemed abandoned under the Lanham Act if its use is discontinued with “intent not to resume such use.”10 “Intent not to resume” is inferred from the circumstances, and “use” means the bona fide use of the mark in the ordinary course of trade, not token use that is undertaken merely to reserve rights in the mark.11 Nonuse for three consecutive years creates a rebuttable presumption of abandonment.12

Sometimes an owner may have a valid explanation for an interval of nonuse that serves to evidence an intent to resume use. For instance, an owner may take a trademark off the market for a while for the purpose of repositioning it. Nonuse may also be justified when the owner is making bona fide efforts to license the mark.

However, an owner cannot merely license its mark and forego further responsibility while collecting royalty checks, because a trademark owner’s duty under the Lanham Act not to use the mark in a manner that deceives the public entails a duty to control the quality of its licensees’ products.13 Lawyers drafting trademark licenses ignore this duty at their peril after the Ninth Circuit’s ruling in Barcamerica International USA Trust v. Tyfield Importers, Inc.,14 the court of appeals’ most recent case of wine trademarks, in which an inattentive California vintner let its licensed mark wither on the vine.

The plaintiff, Barcamerica International USA Trust, held a 1984 trademark registration for Leonardo da Vinci, a mark for wines, and claimed continuous, albeit scant, use of the mark in the early years after its registration. In the late 1980s, Barcamerica entered into a licensing agreement granting Renaissance Vineyards the exclusive license to use the mark in the United States. The agreement, drafted by Barcamerica’s counsel, contained no quality control provisions.

The challenge to Barcamerica’s mark emerged from an Italian wine cooperative, Cantine Leonardo da Vinci Soc. Coop. a.r.l. of Vinci, Italy—Leonardo’s birthplace. Cantine had sold wine products under the Tuscan savant’s name in Italy since 1972 and to U.S. importers since 1979. In 1996, Tyfield Importers, Inc., became the exclusive U.S. distributor for Cantine’s Leonardo da Vinci wines, booking substantial sales and spending liberally on advertising and promotion of the brand. Around the same time, Cantine filed a U.S. trademark application for its Leonardo da Vinci mark—and first learned of Barcamerica’s registration.15

Due to Barcamerica’s asserted continuous use of its Leonardo da Vinci mark for five consecutive years after registration, by 1989 its trademark had become “incontestable” under the Lanham Act.16 So-called incontestability creates a conclusive presumption of the validity of a registered mark and of the registrant’s ownership of it,17 yet an incontestable mark remains subject to attack on several statutory grounds.18 One such ground is that the mark has been abandoned by the registrant.19

Although Cantine’s first use in the United States of Leonardo da Vinci as a name for wine predated Barcamerica’s first use, it was too late for Cantine to challenge Barcamerica’s incontestable registration on that basis. But Cantine investigated and concluded that Barcamerica was no longer selling any wine products using the mark, so Cantine filed an action at the Patent and Trademark Office seeking cancellation of Barcamerica’s registration based on abandonment. Barcamerica in turn filed suit in the U.S. District Court for the Eastern District of California, moving to suspend the cancellation action and seeking an injunction against Cantine and Tyfield’s use of the mark. Cantine and Tyfield moved for summary judgment, which the district court granted, ruling Barcamerica had abandoned its trademark by engaging in “naked licensing.”20

Barcamerica appealed, challenging the district court’s finding of abandonment. While first noting that “[a] trademark owner may grant a license and remain protected provided quality control of the goods and services sold under the trademark by the licensee is maintained,”21 the Ninth Circuit stated that “[u]ncontrolled or ‘naked’ licensing may result in the trademark ceasing to function as a symbol of quality and controlled source.”22 Therefore, when a trademark owner fails to exercise adequate quality control over licensees, it may be found to have abandoned the mark and be estopped from asserting rights in it.23 Such abandonment is purely an involuntary forfeiture of trademark rights, since it need not be shown that the trademark owner had any subjective intent to abandon the mark.24 Thus, the proponent of a naked license theory must satisfy a stringent standard of proof.25

Barcamerica’s vulnerability to summary
judgment, despite the daunting burden of proof that Cantine and Tyfield had to satisfy, stemmed from the absence of quality control provisions in Barcamerica’s license agreement with Renaissance. Although the lack of an express contractual right to inspect and supervise a licensee’s operations is not conclusive evidence of a lack of control—and the right to inspect and supervise may not be necessary if the licensor is familiar with and relies upon the licensee’s own efforts to control quality—Barcamerica offered no evidence that it was familiar with or relied upon Renaissance’s efforts to control quality, and the two companies lacked the type of close working relationship that is required to establish adequate quality control in the absence of a formal agreement.26 The testimony of Barcamerica’s principal that he had on occasion informally tasted the wine and relied on the reputation of a “world-famous winemaker” employed by Renaissance when the agreement was signed, as well as Barcamerica’s conclusory statement as to the existence of quality controls, were insufficient to create a triable issue of fact on the issue of naked licensing.27

On appeal Barcamerica essentially argued that, because Renaissance makes good wine, the public is not deceived by its use of Barcamerica’s trademark, and thus the license was legally sufficient. The Ninth Circuit bluntly rejected this argument: “Whether Renaissance’s wine was objectively ‘good’ or ‘bad’ is simply irrelevant. What matters is that Barcamerica played no meaningful role in holding the wine to a standard of quality—good, bad, or otherwise.” The court then quoted from McCarthy on Trademarks and Unfair Competition: “It is important to keep in mind that ‘quality control’ does not necessarily mean that the licensed goods or services must be of ‘high’ quality, but merely of equal quality, whether that quality is high, low or middle. The point is that customers are entitled to assume that the nature and quality of goods and services sold under the mark at all licensed outlets will be consistent and predictable.”28

The level of quality control required to survive a naked license assault will vary depending on product type and the relationship between the licensor and the licensee. Nevertheless, the court in Barcamerica hinted that a little common sense can go a long way:

[In this case we deal with a relatively simple product: wine. Wine, of course, is bottled by season. Thus, at the very least, one might have expected [Mr.] Barca to sample (or to have some designated wine connoisseur sample) on an annual basis, in some organized manner authorized by Licensor in writing, and cause to appear on all labels and tags affixed to any licensed Products, and all packaging, advertising, and promotional materials produced or used in connection therewith; such notices and legends as Licensor may direct regarding the license herein granted and Licensor’s trademark and other intellectual property rights.

Trademark licensing agreements should also contain provisions like the following, which spell out the parties’ respective intellectual property rights and enforcement duties:

### INTELLECTUAL PROPERTY RIGHTS

1. **Form of Licensed Mark.** Licensee shall use the Licensed Mark only in the form, colors, and manner authorized by Licensor in writing, and cause to appear on all labels and tags affixed to any Licensed Products, and all packaging, advertising, and promotional materials produced or used in connection therewith; such notices and legends as Licensor may direct regarding the license herein granted and Licensor’s trademark and other intellectual property rights.

2. **Preservation of Licensor’s Rights.** Licensee acknowledges that Licensor is the sole and exclusive owner of the Licensed Mark, and shall not at any time during the term of this Agreement or thereafter challenge or contest directly or indirectly the validity, exclusive ownership, title, or registration of Licensor in and to the Licensed Mark, or the validity of the license herein granted. During the term hereof and at any time thereafter, Licensee shall execute such documents and instruments as Licensor may request to secure and preserve Licensor’s right, title, and interest in and to the Licensed Mark.

3. **Goodwill.** Licensee acknowledges that all uses by it of the Licensed Mark, and any goodwill arising therefrom, shall inure to the benefit of Licensor, and that only Licensor is and shall be entitled to registration of the Licensed Mark in any jurisdiction of the world. Licensee shall take no action detrimental, in Licensor’s sole judgment, to the goodwill associated with the Licensed Mark.

4. **Infringement.** Licensee shall assist Licensor, whenever requested, in protection of the Licensed Mark. Licensor in its sole discretion may commence and prosecute any claims or suits for infringement of the Licensed Mark in its own name, or in the name of Licensee, or join Licensee as a party thereto. Licensee shall immediately notify Licensor in writing of any infringement of the Licensed Mark of which it becomes aware. Licensee shall not institute any suit or take any action on account of any such infringement without obtaining Licensor’s prior written consent.

To the extent Licensor grants such consent, Licensee may at its expense prevent such infringement by legal action. Any award of damages or compensation obtained by Licensee, net of Licensee’s out-of-pocket expenses in obtaining such award, shall be included in Licensee’s Net Sales hereunder if, as, and when collected by Licensee. Licensor may elect to retain counsel and prosecute any infringement, but shall not be obligated hereunder to do so, to bear any costs or expenses, or to institute legal or other action to prevent or remedy same. —W.J.S.
way, some adequate number of bottles of the Renaissance wines which were to bear Barcamerica’s mark to ensure that they were of sufficient quality to be called “Da Vinci.”

The moral of the story for counsel representing trademark licensors is clear. They should draft a proper written license agreement that includes express quality control provisions. These provisions need teeth, yet they also need to achieve a balance. For one thing, a trademark license containing excessively detailed controls risks being deemed a franchise agreement. For another, although a good licensee will not object to reasonable licensor oversight, it will object to its actions being excessively constrained. To work, quality control provisions and the framework implementing them have to manage the costs of quality control in a way both parties are able to live with. The licensor can protect its goodwill and royalty stream without consuming the licensee’s margin.

Trademark licensing agreements should set forth the licensee’s obligation to adhere to the relevant standard of quality, and the licensor’s rights to inspect and approve licensed products, packaging, advertising, and licensee facilities. (See “Sample Trademark License Provisions,” page 39.) Yet while written contractual terms addressing quality control can do much to protect a trademark, Barcamerica at the same time warns licensors to play a meaningful role in the process of quality control. Licensors should craft a sensible program for monitoring and inspecting the actions of their licensees and not rely on the contract as a pro forma fig (or grape) leaf to cover a naked license.

Policing the Market

Another way to weaken and possibly lose a trademark is to fail to deter infringers. Since trademarks identify the source of products, provide quality assurance, and help consumers distinguish among competitors, trademark owners should police their markets for infringing marks so that consumers are not misled. For a licensed trademark, licensee cooperation in protecting the mark against infringers is as crucial as quality control. (See “Sample Trademark License Provisions,” page 39.)

Policing the market need not be costly or laborious beyond what a serious competitor should do in the process of preparing to sell its products. Searching the Internet for marks identical or similar to the owner’s mark is a good way to ferret out infringers. However, a considerable amount of traffic in counterfeit and infringing goods transpires offline in the brick-and-mortar world. A trademark owner needs to read trade publications, peruse print and broadcast advertising directed to its consumer base, attend trade shows, and expend a reasonable amount of shoe leather visiting the retail outlets, high and low, where competing products are offered to the public.

One basic step in deterring infringers is to use the ™ and ® symbols properly, which puts the public on notice of the owner’s rights. The ™ symbol should appear in conjunction with a trademark that has not yet been registered to show that the owner claims the term as a trademark. Once the mark is registered, the ® symbol should appear in conjunction with it. Use of the ™ and ® symbols often stops would-be copycats from launching confusingly similar marks.

The owner should assert an infringement claim under the Lanham Act if an interloper starts using the same or a similar mark for the same or related types of products and the use is likely to cause confusion or mistake or to deceive consumers as to the source of the products. In many instances, a sternly worded cease-and-desist letter will put an end to the problem, and in the ideal scenario will reap a settlement that will make the owner whole. But the owner should stand ready to back up stern words with legal action when necessary.

A classic example of how to protect a mark proactively can be found in E. & J. Gallo Winery v. Consorzio del Gallo Nero. The word “gallo” means rooster—in Italian (and Spanish). In Italy in the 1920s, the Consorzio Vino Chianti Classico, a Florence-based trade association promoting wines from the Chianti region, started using the symbol of a black rooster—gallo nero in Italian—to represent them. The symbol, with historic regional ties, appeared on the neck seal of the Consorzio’s bottles. Six decades later, in 1986, attempting to establish a presence in the United States, the Consorzio purchased a full-page magazine advertisement in the Wine Spectator for its Chianti using the words “Gallo Nero.” E. & J. Gallo sent the Florentines a cease-and-desist letter, warning that the ad constituted infringement of its Gallo trademark. The Consorzio desisted and halted its campaign. However, its successor association formed in 1987 adopted the name Consorzio del Gallo Nero, and in 1989 launched a second U.S. marketing campaign, again using the words “Gallo Nero” in advertisements.

Gallo sued the Consorzio del Gallo Nero for trademark infringement. The U.S. District Court for the Northern District of California granted summary judgment in Gallo’s favor, observing:

Trademark infringement under the Lanham Act is established when the infringer’s use of the plaintiff’s trademark creates a “likelihood of confusion.”...In the Ninth Circuit, courts consider several factors in determining whether an allegedly infringing product creates a likelihood of confusion with a protected one:
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strength of the plaintiff's mark; (2) similarity between plaintiff's and defendant's marks in sound, appearance, and meaning; (3) similarity in the class of goods sold; (4) similarity in the marketing channels used; (5) degree of care likely to be exercised by the purchaser...; (6) evidence of actual confusion; and (7) evidence of defendant's intent in adopting the allegedly infringing mark.

As to the strength of a plaintiff's mark, the court noted that under the Lanham Act, a registered mark is presumed distinctive, and its registration is "conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce." Moreover, "the Gallo mark itself has been held by a sister court of this Circuit to have achieved 'virtually universal recognition as a trademark for wine,...known both nationally and in California, and has become an extraordinarily strong and distinctive mark.'"

As for the similarity between the marks, the court concluded that since Gallo is the single dominant or substantive term used by the plaintiff on all of its products, the defendant's Gallo Nero name, even printed in small script on the neck seal, was, as a matter of law, overly similar.

Regarding the similarity of goods sold, although the Consorzio del Gallo Nero argued that its members produce only Chianti while Gallo produces every type of wine except Chianti, the head office of the Consorzio del Gallo Nero admitted that the Gallo Nero Chiantis compete with every other available red wine. The clincher, as Gallo argued, is that "the Patent and Trademark Office has repeatedly found that wines of all types constitute a single class of goods." Since both parties market their wines through such retail establishments as wine shops and liquor stores, and both use magazine advertising, the court found as a matter of law that both use similar marketing channels.

Addressing the issue of the degree of care exercised by consumers in choosing wines, the court reasoned:

Confusion between marks is generally more likely where the goods at issue involve relatively inexpensive, "impulse" products to which the average, "unsophisticated" consumer does not devote a great deal of care and consideration in purchasing.... Wine has been deemed an "impulse" product, and certainly so with respect to the average consumer, effectively com-
pelling the consumer’s reliance “on faith in the maker.”37

Disregarding with commendable sang-froid the existence of wine snobs in its part of California, the district court characterized the wine-buying public as generally unsophisticated impulse buyers who are an “easy mark for a trademark [infringer],”38 and found that the lack of consumer sophistication significantly enhanced the likelihood of confusion between the two products.

The court observed that if evidence of actual consumer confusion is available, it provides strong support for a finding of a likelihood of confusion. However, this evidence is merely one factor to be considered, and the lack of a showing of actual confusion is not dispositive, since the court must find only a likelihood of confusion.39 In Gallo Nero, evidence of actual confusion was unlikely to emerge given that no bottle of wine bearing the Gallo Nero name had been sold in the United States, and the survey evidence presented by the two sides was inconclusive.

Moreover, a showing of intent to infringe is not necessary to support a finding of a likelihood of confusion, according to the court. However, if an alleged infringer adopts a name with knowledge of the plaintiff’s mark, courts presume that there was an intent to copy the mark.40 Gallo Nero was patently aware of the Gallo trademark prior to beginning its U.S. marketing campaign, given that Gallo had successfully halted the efforts of the Consorzio del Gallo Nero’s predecessor with a cease-and-desist letter a mere three years prior to the Consorzio del Gallo Nero’s marketing efforts. Although the Consorzio del Gallo Nero said it had no intent to infringe and that the adoption of the Gallo Nero name was made in good faith and for sound business reasons, the court concluded that the Consorzio was at least cognizant of the potentially infringing nature of its use of the Gallo name.41

After weighing all the relevant factors, the court concluded the Consorzio’s use of the words “Gallo Nero” in promotion of its wines in the United States would create a likelihood of consumer confusion with Gallo’s products.42

Occasionally, the final outcome of a trademark owner’s failure to act against infringement can be that the untrammeled use of the same or similar marks by competitors causes the owner’s mark to lose all significance as an identifier of the source of a product. In this way an originally valid and valuable trademark is degraded to a mere generic term. A registered mark that becomes the generic name for a product is vulnerable to cancellation under the Lanham Act.43

Hence, a trademark owner should try to prevent the public from referring to the mark in ways that equate it with a generic term.

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This misuse of a mark can lead to dire consequences. Examples of marks that lost their trademark status in this fashion include escalator, kerosene, linoleum, and nylon. Sometimes, however, popular usage simply overwhelms the trademark owner’s best efforts to control the use of the mark, and the name becomes generic, losing trademark protection.

Luckily for Cantine Leonardo da Vinci, its product—wine—has a firmly entrenched generic name. The risk of its Leonardo da Vinci trademark becoming generic for that time-honored beverage seems remote. But who knows? In some Venice Beach pizzeria of the late twenty-first century, a customer may sit down one evening and say, “Waiter, I’ll have a da Vinci and a pepperoni calzone, double cheese.” Sitting at the next table, Cantine’s man in Los Angeles will turn his head and remark diplomatically, “Pardon me, but I think you meant to say, ‘May I please have a bottle of your finest Leonardo da Vinci® wine?’”

1 The author thanks attorney Peter Eriksson, of Groth & Co., Stockholm, for providing this information.
3 A domestic applicant for trademark registration with the United States Patent and Trademark Office may base its application on use in commerce under §1(a) of the Lanham Act, 15 U.S.C. §1051(a). The applicant must use the mark in commerce in connection with all goods and services listed in the application on or before the application filing date. Alternatively, the applicant may file an “intent-to-use” application under §1(b), 15 U.S.C. §1051(b), but then must file a statement of use or an amendment to allege use before the mark may be registered. An applicant asserting the benefit of a foreign application or registration under §44 of the Lanham Act, 15 U.S.C. §1126, which implements various international treaties and agreements, may claim use or intent-to-use as an additional filing basis or may rely solely on the foreign application or registration. In the latter case, the applicant is not required to assert actual use of the mark in the United States prior to registration with the PTO, but to retain a valid registration, the applicant ultimately must establish use in commerce or excusable nonuse. 15 U.S.C. §1058.
4 Kendall-Jackson Winery, Limited v. E. & J. Gallo Winery, 150 F. 3d 1042 (9th Cir. 1998).
5 Kendall-Jackson, 150 F. 3d at 1047 (quoting Two Pesos, 505 U.S. at 778).
6 Id. The court observed, “A producer’s depiction of a grape leaf, may, however, be so distinctive as to warrant protection from copying. If a particular rendering of a grape leaf has the power to distinguish one brand from another, it is the rendering that should be evaluated for its distinctiveness.” Id. at 1049. The court found no distinctiveness in Kendall-Jackson’s rendering of its grape leaf.
8 Id. at 1047.
9 Id. See also n.8.
10 Id. at 1047.
11 Id. See also n.8.
12 Lanham Act §5 provides that “a registered mark or a mark sought to be registered may be used legitimately by related companies... provided such mark is
not used in such manner as to deceive the public.” 15 U.S.C. §1065. Lanham Act §45 defines “related company” as “any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used.” 15 U.S.C. §1127. Hence, in order for an applicant or registrant to enjoy rights to a mark under the Lanham Act when it licenses the use of the mark, its licensee or licensees, which are within the ambit of the term “related company,” must not use the mark in such a manner as to deceive the public, and the licensor must control the use with regard to the nature and quality of the goods or services licensed.

Barcamaerica Int'l USA Trust v. Tyfield Importers, Inc., 289 F. 3d 589 (9th Cir. 2002). 15 Id. at 593.
16 15 U.S.C. §1127. Hence, in order for an applicant or registrant to enjoy rights to a mark under the Lanham Act when it licenses the use of the mark, its licensee or licensees, which are within the ambit of the term “related company,” must not use the mark in such a manner as to deceive the public, and the licensor must control the use with regard to the nature and quality of the goods or services licensed.
19 Id. at 597.
20 Barcamaerica Int'l USA Trust v. Tyfield Importers, Inc., 289 F. 3d 589, 593 (9th Cir. 2002).
21 Id. at 595 (citing Moore Bus. Forms, Inc. v. Ryu, 960 F. 2d 486, 489 (9th Cir. 1992)).
22 Id. at 596 (quoting McCarthy on Trademarks and Unfair Competition §18:48, at 18-79 (4th ed. 2001)).
23 Id. (citing Moore, 960 F.2d at 489).
24 Id. (citing McCarthy on Trademarks and Unfair Competition §18:48, at 18-79).
25 Id. (citing Moore, 960 F. 2d at 489).
26 Id. at 597.
27 Id. (quoting E. & J. Gallo Winery v. Consorzio del Gallo Nero, 782 F. Supp. 457 (N.D. Cal. 1991). No stranger to trademark litigation, Gallo—founded in 1933 and now the largest wine producer in the world—victoriously defended an opposition to its first federal application for registration of the word “Gallo” as a trademark for wines in a Commissioner of Patents case decided under the Trademark Act of 1905. This decision was handed down the week the Lanham Act went into effect.

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Los Angeles Lawyer / February 2003 45
We have all been affected by the digital revolution. Telephones, cars, home appliances, and office equipment have all incorporated digital technology. Is it any surprise that this new technology would find its way into the courtroom? While the venerable old Elmo overhead projector, videotape and poster boards have been valuable tools for litigators, they are rapidly becoming obsolete. Enter the world of database case management, point-and-click presentations, and large-format interactive plasma touch boards—scary for some, exciting for others. Whatever the case, there is an obvious need for litigators to accept and embrace the current technology that is shaping all our lives.

Live Note and Sanction II are good examples of this new breed of case management and trial presentation software. Utilizing this type of software can be valuable for organizing and presenting a case at trial, but these advantages are not gained without a learning curve and some preparation. First, all paper documents must be scanned to create a database, and all traditional tape needs to brought into the digital environment (through a process called encoding) and stored on CDs. These may be video depositions, audiotapes, day-in-the-life tapes, documentary evidence, or animated re-creations. Synchronized video with transcript is also available for depositions that were originally videotaped. This requires an ASCII disc from the court reporter, which is brought into the database and merged with the video. This yields the court reporter's transcribed text at the bottom or side of the video operator's shot of the deponent.

An entire case that might have included expensive picture blow-ups, graphs, and poster boards can be available and presented in a large format with the touch of a fingertip. A point-and-click instantly calls up the data needed. Video searches and editing are also expedited, since rendering to tape is no longer necessary. If a document is needed at trial that was not scanned in as part of the original database, this is not a problem. A scanner connected to the laptop can instantly bring the document into the database.

Using a digital system at trial generally requires an operator. The technician follows the lead of the counsel, bringing up documents, highlighting, underlining, or magnifying as needed. The technology does not preclude counsel from operating the system. Litigators may choose to utilize a bar-coding technique that allows the presenter to access documents by moving a reader pen over a precoded document in order to call it up and project it, usually on a 6- or 10-foot flat screen.

For those desiring the latest in hi-tech courtroom presentation, there is the interactive touch-board system, which takes the place of the traditional flat screen. Counsel may choose to add a little dazzle quotient by approaching the board (which might best be described as an electronic chalkboard) and perform annotating, magnifying, and underlining by simply touching the board with an electronic pen, or even a finger. This is possibly because the board is connected by a cable to the laptop and functions as an extension of the laptop's screen and touchpad.

These are just some of the features of the SMART Board, which, when combined with a laptop, Sanction II, and a projector, eliminates the need for an Elmo, video player, CD player, cassette player, paper documents, posters, video, audiotapes, and CDs. The presenter has the ability to put up a document next to a video (while it is running), annotate it, and either save it and readmit it as a modified or demonstrative document, or erase it with an electronic eraser as if it were on a chalkboard.

Once acclimated to this new technology, attorneys realize how many options they have before and during a presentation. Judges appreciate how much time is saved by the efficiency of the system. Jurors are immediately drawn into any presentation just by the visual excitement and the amount of information they are seeing and listening to. When properly using a digital presentation system, counsel may discover that it requires less time looking through boxes for documents or videotapes and allows more time to focus on the case and the effect it is making on a judge or jury.

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Once a firm has launched its Web site, the next challenge is to keep the site's content updated. Clients, potential clients, and other attorneys need a reason to return to the site on a regular basis. Unfortunately, many attorneys view their site as little more than an extension of their firm’s print brochure, and as a result their sites include the same biographies, practice area descriptions, and list of clients and verdicts as the brochure. A Web site, however, can and should be a more dynamic creation.

Keeping a site fresh can take more effort than a busy attorney can give. Attorneys Karen Sugihara and Larry Tjan soon learned this lesson after launching their site. As a result, they developed Next Client (found at www.nextclient.com), which provides fresh content for the Web sites of attorneys. Their customers choose the design and title of a customizable, private-label newsletter that contains articles written by legal scholars and attorneys (without bylines). The newsletter appears on the customer’s site. For $59 per month (and a one-time set-up fee of $150 that is waived for annual subscribers) attorneys select from a list of 13 practice areas and then receive a link each week to automatically update their site’s newsletter with five new articles. Two thousand attorneys subscribe to Next Client, and the company is now establishing a system to allow customers to send their newsletters via e-mail. E-mail newsletters are unobtrusive marketing tools that keep clients educated about the legal issues affecting their industry.

Another company that provides similar services is Practice Development Institute, with 10 practice area newsletters to choose from (www.pdiglobal.com/lawfirms.html). For firms that want more than newsletter content, Consultwebs.com develops or edits content for law firm sites. The staff includes three writers, one with newspaper writing experience and another with a paralegal background.

Before adding content to your site, it is important to know your target audience. For example, if your target audience includes a significant number of Spanish-speaking clients consider posting your site and newsletter in Spanish as well as English. In addition, consider developing new audiences. Your fellow attorneys, for example, may reward your efforts to draw them to your site. Robert Kohn (Web site: http://www.kohncommunications.com), a well-known marketing coach, is a strong believer in using attorney referrals to increase a firm’s business. A good way to reach this audience can be with an educational site or having a part of your site dedicated to attorneys rather than clients. An informative site can attract attorney referrals in the same way it can attract clients. Most attorneys are likely to feel more confident making a referral to a firm with an educational site than one with nothing more than an online brochure. Biren Katzman is a firm that understands how to use their site for referrals and specifically dedicates a section of the site to attorney referrals (see www.biren.com and then click on Potpourri and then For Lawyers).

Many avenues are available for creating the original articles that can gather clients and referrals. Most attorneys already have the raw material for informational articles about their practice areas. For example, rather than write something entirely new, an attorney can review and copy and paste from motions, briefs, forms, and contracts. Then the attorney can take some time to reshape these writings into plain English for Web site visitors. This is not as daunting a task as it may appear. For newsletters, less is often more. An attorney can select one issue from a brief and write a short article about that single issue, for example. Web site content does not have to be lengthy or scholarly—and, in fact, it should not be. Rather, an article can make a single point, in plain English on approximately one page, about an area of law. Finally, those who do not have time even for repurposing existing material can direct an associate in the firm to write the article. This exercise can serve as a learning experience for the writer as well as for the Web site visitor who reads the final product.

Another avenue for original content is the Web. Lawyers who lack usable background material in-house may create somewhat original content in a relatively short amount of time by writing summaries of recently decided cases or reviews of publications in their practice area. To research articles for review, lawyers may use Findarticles.com, a free full-text database with articles from over 300 popular journals. The National Library of Medicine’s Gateway (at http://gateway.nlm.nih.gov/gw/Cmd) may be useful to medical malpractice attorneys who are searching for scholarly medical articles.

To add summaries of recently decided cases within the firm’s practice area, attorneys can start with the Los Angeles County Bar Association’s Daily EBriefs, a summary of recently decided state and federal cases. (They are free to Association members.) Because the cases are labeled by practice area, attorneys can avoid checking every recent decision in order to find a few pertinent cases. After reading the full case, an attorney can write a summary and an analysis for Web visitors.

Many other free e-newsletters offer fresh ideas. Some are geared to specific courts only and others to specific practice areas. Some newsletters geared to specific courts are Find Law’s e-summaries of recently decided cases (available for California and many others).
other jurisdictions) and Law.com’s California News Alert. Some newsletters that are geared to specific practice areas are Find Law’s topical newsletters and EPIC Alert, a free newsletter of interest to First Amendment litigation attorneys (www.epic.org).

If you do not have time to write summaries, you may add content to your site by creating links to articles that are relevant to your practice but published by others. Another option is to request permission to post other people’s articles (with attribution to the authors). To find suitable articles, use Findarticles.com and other similar sites. A Web page that contains one case summary, a few links, and a boilerplate description of your experience with the matters discussed in the case and links can be updated weekly with a small investment of time.

**Greater Sophistication**

Attorneys whose clients (or potential clients) have a large amount of bandwidth should consider placing Web content into a multimedia format. Attorney Larry King’s site (www.larrykinglaw.com), which has audio clips on over 50 legal topics, offers a good example. Realizing that not all visitors have the bandwidth to take advantage of multimedia, a print version of each clip is also available. Other multimedia ideas to consider for your site include posting the Power Point slides that you presented at a conference or audio or video excerpts from a class or seminar you recently taught. Google indexes Power Point presentations, so search for presentations that others have placed online and ask the authors of the suitable ones for permission to place them on your site.

Google can also be the starting place for a search for law firm sites in your practice area. For example, users who type “immigration attorney” into a search engine and then review the results are likely to note that the Siskind, Susser, Haas & Devine site (www.visalaw.com) is more educational than most. Greg Siskind, who began as a sole practitioner in immigration in Memphis, Tennessee, now has a worldwide immigration practice with offices in the United States, Canada, and Mexico—thanks in part to his early use of the Internet. SSHD claims to be the very first firm on the Web, having established its site in 1994. The site claims to receive more than 200,000 hits every week from over 60 countries. Siskind also claims to be the first to distribute a firm newsletter electronically (Siskind’s Immigration Bulletin has over 30,000 subscribers). Another of SSHD’s online newsletters is restricted to immigration practitioners. The site contains numerous current educational articles, with topics ranging from “B-1/B-2 Visitor Visas” to “Grounds for Asylum and Refugee.” Also available at the SSHD site are various documents, charts, and forms.

Some attorneys may question SSHD’s practice of offering intellectual property for free (especially the forms), but numerous arguments can be made for the good business sense of this policy. First, it is one way of adding valuable content to a site without having to create it from scratch. Second, many attorneys have learned that clients generally appreciate knowing that the forms are there for the taking but prefer to have the attorney do the work. Third, even when clients do choose to use the simple forms on their own, most attorneys find the client will later return to the firm for their more complex transactions. So that visitors may reach an attorney, a site should contain request forms for a consultation. Finally, once a client is signed, many attorneys realize that providing substantive content on their site can help clients become better informed and more satisfied.

Search engines can be a somewhat hazardous way to find sites with excellent content, however, so a firm’s site developer should also research lists of law firm sites. *Law Office Computing* magazine and Internet Marketing Attorney.com (IMA), for example, list top picks. The list on the IMA site is titled “Micah’s Nifty 50.” These 50 sites have been selected solely because they feature a nifty component—something that exceeds the usual attorney biographies, practice area descriptions, or news about the law firm. In contrast, *Law Office Computing* considers the overall quality of a firm site, from aesthetics to navigation to content. IMA’s list of 50 top picks is chosen from 250 of the largest firms, while *Law Office Computing* lists the top five picks among small firms and the top five among large firms. *Law Office Computing*’s 2002 small-firm winner was Parker & Waichman (www.yourlawyer.com), and its large firm winner was Miller Nash (www.millernash.com), a firm of 150 lawyers with offices in Oregon and Washington. IMA also chose Miller Nash as its top 2002 pick. A common feature of the top picks is educational and up-to-date content.

Once you have decided to keep your site current, the following sources provide some tips: the Law Marketing Portal, whose listserv was credited as the place where Miller Nash got many of its best ideas (visit http://www.lawmarketing.com), Find Law’s Lawyer Marketing News newsletter (at newsletters.findlaw.com/sample/marketingnews.html), and the Legal Marketing Association (www.legalmarketing.org/about).
by the book

Reviewed by Stacy D. Phillips

Prominent women lawyers share their experiences and remember those who inspired them

The Counselors
by Elizabeth Vrato
Running Press, 2002
$24.95, 220 pages

Women on the rise, women starting their careers, and women in between will no doubt be highly motivated when they read Elizabeth Vrato’s The Counselors—and not just women attorneys and political figures but all women. The Counselors is an insightful book encompassing candid conversations with 18 recipients of the highly prestigious Margaret Brent Women Lawyers of Achievement Award. In this book, the author examines how these women have changed the world. What’s most appealing about the book, however, is how the author encourages each recipient to explore the whos and whats involved in making her life and accomplishments so extraordinary.

Each interviewee shares her struggles, dreams, and motivations. But most important, each speaks of those who helped her in either a negative or positive way. Vrato’s incisive interviews allow their subjects to mentor the reader. In her introductory remarks, Vrato asks the reader to focus on this or her influences and mentors, asking, “Would you have been able to get this far without them? Could you perhaps benefit from more help from others?” These questions, and a sensitive foreword by former President Bill Clinton, address her purpose in creating the book and motivate readers to explore their professional and personal experiences from a reflective vantage point. It certainly stirred me, and I merely intended to critique her work.

Vrato’s style is compelling and simple. Although the author is an attorney, she does not write specifically for women of the legal community. The book is a fast and entertaining read. The writer starts by offering a confidential, behind-the-scenes glimpse of what she knows about the subject, how she feels about the interview, and her concerns about what to ask and whether she can address what is important. The author need not have worried, because she does a masterful job of inviting each of these 18 women to share her fears, frustrations, and secrets. By so doing, she certainly made me, as a reader, feel more comfortable in my own professional skin.

For example, she addresses the travails of seeking a career and balancing the constant demands of raising a family. This is a nagging issue for any woman who wants to grow and succeed in her occupation and experience the joys of motherhood. Her subjects also talk about handling personal obligations to their significant others. In some instances Vrato also gets them to comment on managing a partner’s ego gracefully. In other books that chronicle the ascent to professional prominence, these details are often overlooked. Vrato is not afraid to ask, however, and these women are not afraid to answer.

What They Overcame

For example, Lynn Hecht Schafran, the director for the National Judicial Education Program to Promote Equality for Women and Men in the Courts, tells Vrato that she concealed her pregnancy as an employee at MOMA. “I hid my pregnancy with baggy clothes,” Schafran relates, and “took a two-week vacation to give birth to my son, and came back to work—a pregnant employee no longer! As a woman at that time, my condition was to outsmart the system to get what I needed, not to change the system.” I am certain that many women, after reading Schafran’s interview, will be able to relate to her professional struggles. Vrato’s ability to strike a tone of appropriate familiarity with the reader is one of the most enjoyable aspects of the book.

Former member of Congress Patricia Schroeder shares her feelings candidly with Vrato about breaking into tears while delivering her speech bidding farewell to her run for president. “Those seventeen seconds were treated like a total breakdown….I went on with my speech, but it was my tears that got the headlines, not my words,” Schroeder confides.

Margaret Hilary Marshall, chief justice of the Supreme Court of Massachusetts and formerly vice president and general counsel of Harvard University, tells Vrato to instruct her readers to “ignore the ‘shoulds’ of your life” and look instead at what “you genuinely enjoy doing every day.” Certainly this message is a shot in the arm to those of us who need to examine if what it is we do gives us fulfillment and pleasure.

Ruth Bader Ginsburg, associate justice of the U.S. Supreme Court, holds nothing back in her interview. “Firms were just starting to turn around on hiring Jews,” she tells Vrato while expressing her frustration about being passed over for a Supreme Court clerkship and not receiving job offers from prestigious law firms in 1959. “Here I was, a woman, a Jew, and a mother—it was a bit much for them!” I found myself cheering her moxie!

As I read the book, each subject became an important mentor to me by offering interesting and applicable advice. In every interview, aside from encouraging the women to share their obstacles and challenges, Vrato asks them to name some of the important
influences in their lives and to comment on how they provided motivation. Some of these guiding presences were fellow professionals, some were family members, and some were neither. In fact, some were adversaries who spurred them to do great things and some magically appeared at pivotal, life-altering moments. All the mentors were fascinating in terms of how they helped and why these women held them in such high esteem.

The Mentors

For example, Schafran cites her mother, a brilliant woman who wanted to do great things with her intelligence but who never had the chance to realize her potential. She nudged Schafran into living her unfulfilled dream. Justice Ginsburg also changed her life. Schafran credits Ginsburg with guiding her on the path of law beginning while Schafran was a law student. Schafran also tells how Ginsburg showed her how the same civil rights laws that were aiding minorities could be used to gain equality for women. Ginsburg, in turn, points to her husband, Martin, with whom she has shared a relationship of equality and who constantly and unselfishly has offered her strength and support.

Schroeder points to former member of Congress Ron Dellums, a Democrat from California and the first African American to be appointed to the House Armed Services Committee. The two found only one chair left available in the committee meeting room, so rather than jeopardize their appointment, they decided to sit on the same chair together. After this politically symbolic meeting, Dellums became Schroeder’s wise and trusted friend.

Marshall cites Martin Luther King Jr. and Senator Robert F. Kennedy as two leaders whose work had great impact upon her. She also mentions how, shortly after leaving Yale and taking a position in a powerful Boston law firm, she closely observed attorneys in different situations to see what she could learn from them. Marshall states that by observing and studying many of those attorneys she learned to value some of them as role models. Later, many of them also became her mentors. Marshall also salutes Neil L. Rudenstine, president of Harvard, who offered her a position at the university that had never before in the institution’s 350-year history been held by a woman.

The most valuable element of the book is that the advice that each subject offers is clear, definitive, and inspirational. Suggestions and recommendations differ, but all the interviewees wholeheartedly agree that without someone to whom they could go for encouragement and support, they may never have reached their noteworthy positions.

There should be more books like The Counselors. Women in the legal community might like to read a similar book on some of the great women who shaped the history of this country—women such as, for example, Abigail Adams and Eleanor Roosevelt. I would beseech Vrato not to restrict such a book to presidential wives or political figures. Rather, I would be enchanted to see sequels that include similar insights from the diaries and recorded conversations of Amelia Earhart, Susan B. Anthony, and Mary Pickford, to name a few. It would be wonderful to learn about who inspired and counseled these notable women—and learn about those whom they mentored in turn.

The Counselors will leave any woman (whatever her opinions about law or politics may be) highly motivated and inspired. It will also leave readers—men included—pondering their personal history of mentoring. Readers will remember who inspired and helped them in their lives and how they can give and have given special gifts back to others. It seems clear that Vrato would like her readers to come to terms with their gratitude toward those who have inspired and mentored them and to consider how they may mentor others.

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**Going Solo**

ON THURSDAY, FEBRUARY 13, the Small Firm and Sole Practitioner Section will present its annual update on the nuts and bolts of starting a small firm or solo practice. The program will cover the practical aspects of starting a small firm or going it alone as a sole practitioner. Speakers Richard Clements, Harold Gould, Kelly Ryan, Gerald M. Sallus, and Cynthia Dersh Schein will cover the various positive aspects of small firms and the difficulties encountered in forming and maintaining a small or solo practice.

This event will be held at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. Parking at the Figueroa Courtyard Garage will be available for $7 with LACBA validation. On-site registration, along with the meal and reception, will begin at 5:30 P.M., followed by the program from 6 to 9 P.M. The event code number is 824DB13. Preregistered CLE+PLUS members attend for free.

- $45—Small Firm and Sole Practitioner Section members
- $55—LACBA members
- $65—All others

**Trial Advocacy Project**

ON TUESDAYS AND THURSDAYS, MARCH 4, 6, 11, 13, 18, AND 20, the Los Angeles County Bar Association will present its introductory TAP (i-TAP) trial advocacy skills course. This is one in a series of three courses constituting LACBA’s acclaimed Trial Advocacy Project, which allows attorneys to get trial experience quickly. This course provides introductory trial advocacy instruction, emphasizing mock trial performance. Participants perform several phases of a jury trial for DUI and domestic violence cases. They learn to mark exhibits, lay evidentiary foundation, deliver opening statements, conduct direct and cross-examination, and deliver closing arguments. This is a 3-week course, starting the first full week in March, on Tuesday and Thursday nights from 6 to 9 P.M. Classes are taught at the LACBA/Executive Presentations Mock Courtroom, 281 South Figueroa Street, Downtown. Parking at the Figueroa Courtyard Garage will be available for $7 with LACBA validation. Course instructors are seasoned prosecutors with local agencies. Successful completion of this course meets the prerequisites for admission to the Association’s six-week traditional TAP course, which is taught in October. Completion and certification of traditional TAP qualifies attorneys for a pro bono practicum trying criminal cases. Written course materials and a course syllabus will be distributed via e-mail prior to the first class. Attorneys who wish to participate in i-TAP/March should send, via e-mail, their correct e-mail addresses to rlamia@lacba.org. Enrollment is limited. The event code number is 1709C04.

- $995—LACBA members
- $1,095—all others

18 CLE hours, including 3 ethics hours and 2 substance abuse and emotional distress hours

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**Tax Court Practice**

ON SUNDAY, FEBRUARY 26, the Taxation Section will present a seminar titled “The Do’s and Don’ts of Tax Court Practice.” This dynamic program offers a rare opportunity to hear Judge Juan Vasquez of the U.S. Tax Court and a distinguished panel of tax attorneys (M. Katharine Davidson, Nancy McCurley, and Dennis Perez) who will represent the perspectives of private practitioners and the government. The program will provide valuable insights for those interested in learning how to succeed in the U.S. Tax Court. The program will take place at the New Otani Hotel, 120 South Los Angeles Street, Downtown. On-site registration will begin at 11:30 A.M. and lunch at noon, with the program continuing from 12:30 to 2 P.M. The event code number is 806LB26.

- Preregistered CLE+PLUS members attend for free (meal not included).
- $65—Taxation Section members
- $80—LACBA members
- $90—all others, including all at-the-door registrants

1.5 CLE hours

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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 February County Bar Update.
Advising Clients about Hacker Insurance

Breaches of computer network security can lead to significant liabilities for companies

The financial losses facing corporate America as a result of network security breaches are staggering—hundreds of millions, if not billions, of dollars each year.¹ A 2002 joint survey by the FBI and the Computer Security Institute estimates that losses for just 44 percent of the 503 survey participants—primarily, large U.S. corporations—already exceeded $455 million, with the theft of proprietary information and financial fraud representing the two most serious categories of losses ($170 million and $115 million, respectively).²

The reality is that these estimates, however considerable, likely represent only the tip of the iceberg, given that companies continue to notoriously underreport network attacks while apparently paying millions in hush-hush out-of-court settlements. Indeed, the financial toll from network breaches mounts each year as a result of threats originating within and outside the firewall, including: 1) viruses, worms, and Trojan horses, 2) system penetration or unauthorized access, 3) denial-of-service attacks, 4) theft of computer transaction information, including confidential customer data, 5) cyber-extortion, and 6) vandalism.

These losses should ensure that attorneys do a better job of educating their clients about the true magnitude of the risk confronting them as well as the key role that new insurance products—known as network-risk, hacker, or cyber policies—can play in protecting company interests. In fact, informed legal guidance is certain to become indispensable for many clients in the 2003 insurance renewal cycle, when many general policies—such as CGL, D&O, E&O, and property—will expressly disclaim losses resulting from network breaches, including those from viruses and e-vandalism. This will leave many clients dangerously exposed and forced to scramble to choose among the available coverage options and vehicles.

By all indications, corporate America continues to misunderstand the dynamics of the network security problem. For example, executives appear to believe that so long as their core business is not dependent on pure e-commerce, their companies remain insulated from significant losses from network security breaches. The reality is that most companies are reliant on some form of in-house technology for transacting important company business. Company computers might be shielding key assets or trade secrets, maintaining or retrieving customer data, providing customer service, or coordinating widespread business operations. Another common misconception is that existing technology alone—such as firewalls, virus software, intrusion detection devices, and encryption systems—can provide sufficient protection. While this technology can help defend against network breaches, it cannot eliminate the risk.

The dangers facing uninformed corporate clients are not simply the result of direct first-party losses from lost income. Companies also face the risk of third-party claims arising from the companies’ failure to maintain proper network security. The scenarios leading to third-party damages abound. For example, hackers launching malicious code into company networks can expose confidential customer information to the public—including credit card numbers—which can lead to claims against a company by its own customers. In a denial-of-service attack, hackers hijack one company’s computer system to launch an attack against a second company, redirecting the first company’s traffic to the second’s site and overwhelming the second company’s servers. This increasingly familiar scenario can lead to a claim by the second company against the first company for inadequately securing the technology that led to the second company’s loss.

Stand-alone network-risk, hacker, or cyber insurance is now being offered by numerous big-name insurers. Depending on the selected coverage, these policies offer protection against intangible data loss from viruses, denial-of-service attacks, and theft of consumer information—and the protection can extend to third-party liabilities. Insurance premiums remain considerable, and prequalifying security assessments can be demanding; moreover, legal advice is often a prerequisite for navigating the various gaps and exclusions written into such policies.

Clearly attorneys cannot afford to leave network security to a client’s IT department. Practitioners cannot simply become involved only after a loss when the client needs to either defend against or settle a hefty claim. Clients must be advised to be proactive on security. Moreover, hacker insurance may be a nearly indispensable business tool. For corporations with well-known brand names, in high visibility industries, with significant Web presences, or sensitive information, a single breach, with the potential for third-party claims, can be financially devastating. For companies less likely to be targets, especially those that cannot easily afford the cost of hacker insurance, practitioners can advise a strategy of self-insurance via technology and procedural upgrades. Either way, the bottom line is that companies need legal guidance.

¹The author wishes to thank Latham & Watkins associate Ilana Makovoz for her assistance with this article.

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