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Is A Malpractice Insurance Crisis Looming In Your Horizon?
Are You Ready?

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CHECKLIST
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from the chair

By Jerry Abeles

“Out with the old, in with the new.” Granted, this is a rather clichéd introduction to my first column as the 2003-04 chair of the Los Angeles Lawyer Editorial Board. The phrase is no less a cliché, however, than the tired phrases oft repeated at last month’s high school, college, and law school commencement ceremonies: “This is not the beginning of the end, but the end of the beginning.” “This day marks a new chapter in your lives.” “Today is the first day of the rest of your lives.”

As attorneys, we are taught to avoid clichés in favor of pithy phrases that are more precise, more persuasive, and more accurate. Yet, as practitioners, we constantly strive to achieve the ultimate cliché in our work. For example, litigators engage in the never-ending search for a case on all fours to support their position in the trial of the century. Corporate transactional attorneys, for their part, daily seek out the deal of a lifetime. Probate attorneys are constantly striving for…I’m not sure what, but probably something trite, like the rest of us.

At Los Angeles Lawyer, we endeavor each month to realize a cliché of our own: the best, most up-to-date legal analysis available on a broad range of topics pertinent to our legal community. To reach our goals, we depend on several groups of professionals. Los Angeles lawyers submit the bulk of our articles. We rely on attorneys from a wide range of practices to write substantive continuing legal education articles that analyze current developments in the law and provide practice tips for both novice and veteran practitioners.

Nothing is published, however, without surviving the review of one or more members of the magazine’s Editorial Board, which consists of approximately 40 overworked volunteer attorneys who represent nearly every practice area of the law. We discuss, revise, and pan story ideas, some of which originate from within the ranks of the board while others simply, and thankfully, arrive unsolicited via telephone, e-mail, or regular mail.

The highest hurdle, though, is the one presented by Los Angeles Lawyer’s professional staff, which edits the articles, solicits the advertising, designs the magazine, and ensures that it arrives in your mail slot 11 times each year. I used to think that the hardest aspect of producing any article for the magazine was finding attorneys who had sufficient time to draft and revise substantive pieces of legal research, all for the ephemeral reward of seeing their names in print. I was wrong. Staffing an editorial board with qualified attorneys who find time to participate in monthly meetings and edit multiple articles each year is also a breeze compared to the final scrutiny of all articles by the professional staff. This is not a complaint; rather, it is an acknowledgement of how the magazine is able to consistently publish articles that are widely read, routinely cited, and frequently clipped for future reference.

If you want to be a published attorney, please do not be shy. Put your thoughts on paper, even in outline form, and send them to the magazine. Prospective articles can be of general interest or tailored toward our annual Real Estate Law issue or Entertainment Law issue. This year, we will also have a special issue dedicated to the interplay between civil and criminal law (sorry, contributors, the articles for that issue have already been written). We also welcome your comments, critiques, and, of course, corrections. Though we are lawyers, we are, at times, also human.

As someone who rarely reads editors’ notes in magazines, I figure that I can exploit clichés in this column. So I will end as I began. “I am looking forward to a great year.” “I’m really excited about working with the new Editorial Board.” “I can’t wait to begin.” Trouble is, though, these sentiments are all true, even if they are clichés.

One final note: I will miss the friendly banter and humor exuded by my predecessor, Steven Hecht, during his leadership of our monthly meetings. Steven served as chair for two glorious terms and now returns to the ranks as an ordinary board member. I hope to live up to the standard he set.

Jerry Abeles is a litigation partner in the Los Angeles office of Friedemann O’Brien Goldberg & Zarian LLP. He is the chair of the 2003-04 Los Angeles Lawyer Editorial Board.

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What is the unique genius of the American system of government? What has made it a model for every nation aspiring to freedom? Most lawyers do not have to think long about the answer: It is the separation of powers and its bodyguard, an independent judiciary.

This should not be so hard for people to figure out, particularly at a time when every day brings a deluge of stories about a country, Iraq, that, by design, singularly lacked even the pretense of these cornerstones of our way of life. But the state of California does not seem to get it—in a big and very dangerous way. And so far, no one seems to be listening.

I hope it comes as no surprise to you to hear that California is in the midst of an unprecedented budget crisis, one that reaches into every corner of government operations and will affect everyone in a variety of unpleasant ways. What is surprising, however, is the widespread silence that has greeted the disproportionately disastrous effect that the crisis threatens to have on the judicial system. Even under the most optimistic assumptions about what the budget will ultimately look like, the courts will have to drastically scale back their services. The most pessimistic projections will send the courts right over a cliff. By one reckoning, the Los Angeles County Superior Court would lose half of the budget supporting its civil and family law courts. Any lawyer who was trying cases in the 1980s already has a taste for what that means: Trials don’t start until a case is up against the five-year rule; trials get rescheduled numerous times at enormous cost to clients; judges are not available to hear emergency motions; the list goes on and on.

But the broader impact will go far beyond inconveniences for lawyers and their clients:

- Families, children, and victims of elder abuse will suffer. By jeopardizing prompt access to our courts for those in need of domestic violence and child welfare protective orders or protection from elder abuse, reduced funding will expose those most defenseless in our community to potentially life-threatening harm. It will curtail the availability of custody and visitation orders that protect children from parental conflict and from parental resort to such crude self-help tactics as abduction and concealment. And hearing delays and diminishing court supervisory powers will provide elder abusers with unprecedented opportunities to dissipate estates and commit fraud against the elderly.

- Emergency civil judicial relief may seek other, more problematic means of resolving their disputes.

- Many in need will lose access to justice. The burden of reduced funding will likely weigh most heavily on the poor who rely on court-sponsored equal-access programs. Cutbacks would also result in the reduction of services for self-represented litigants—services that, for example, assist over 100,000 persons a year in family law matters in Los Angeles County alone. Disputes that can no longer find resolution in small claims courts, in court-sponsored mediations, or with the assistance of court informational services may erupt into destructive self-help.

- Courthouse and courtroom security will be compromised. Reduced funding will substantially undermine the courts’ ability to provide reasonable public security within our courthouses, even as our society faces increasing threats to its security. The danger extends beyond the obvious security concerns in the criminal courts. Tempers are often highest, and the potential for violence greatest, in family law and juvenile courts.

Leading the Battle

Lawyers are guardians of our court system. We cannot sit passively by and allow such wanton destruction. Your Association has already been active. In an effort to formulate a unified legislative strategy, the Association has been engaged in extensive dialogues with the Los Angeles County Superior Court, the Administrative Office of the Courts, and the State Bar. The Association recently hosted a well-attended conference that featured speakers from every part of the system: Senator Joe Dunn, chair of the Senate Budget Committee’s subcommittee on the judiciary; Bill Vickery, director of the Administrative Office of the Courts; Jim Herman, president of the State Bar; Hon. Robert Dukes, presiding judge of the Los Angeles County Superior Court; Steve Cooley, Los Angeles district attorney; Mike Judge, Los Angeles public defender; Dan Grunfeld, president of Public Counsel; Steve English, incoming chair of the Association’s Litigation Section; and Edith Matthai, Association vice president. We are building on that effort by reaching out to bar leaders all across Southern California, asking them to join the Association in demanding that the leg-
MR Neurography is an important advance in the assessment of all areas of injury in which nerves may be involved. In the past, the term 'soft tissue injury' has been used to imply that a problem can not be proven in medico-legal disputes such as those resulting from work related injuries or injuries from accidents. This is by contrast with bone injuries which show well on X-rays. Obviously, there is nothing inherent about soft tissues which makes them less important. The brain and spinal cord are soft tissues but they are shown well on standard MRI scans.

Nerves generally cannot be seen well on standard MRI scans. From the point at which a spinal nerve is about one centimeter from the spinal canal, and on out through the rest of the body, standard imaging cannot be used to confirm or disprove an injury.

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islature recognize the special needs of the judicial system and the indispensable role it plays in the life of our society.

You Can Help

What can you do? Among the illuminating remarks made at the conference was Senator Dunn’s explanation of why the judicial system is facing this battle—why the legislature, in his words, is such a “tough jury.” Senator Dunn is an experienced trial lawyer who understands both the judicial system and the legislature from the inside. He knows what he is talking about, and we need to take his words to heart. In a nutshell, he noted that legislators—much younger than they used to be and with far fewer lawyers in their ranks than there used to be—do not see the courts and the millions who use them as part of their constituencies. Those people, the members of the legislature seem to believe, do not vote.

We know better. People who depend on the courts are voters, and many of them are people and businesses with extraordinary power. The legislature needs to learn that. One obvious thing you can do is write to your legislator and ask your friends and clients to do so as well. The State Bar will be posting information and suggested talking points and facts on its Web site (www.calbar.ca.gov), but a personally crafted appeal is always the most effective.

However, as dramatic as the need for this kind of action is, it really is not the main event. There is a more systemic problem that we also must address, because if lawyers do not address it, no one will.

The courts are facing this crisis because, despite their status as an independent branch of government, the legislature holds their purse strings. In one sense, this is inevitable; after all, only the legislative branch has the power to tax. But, in Chief Justice Marshall’s timeless phrase in *McCulloch v. Maryland*, “The power to tax involves the power to destroy.” I do not believe that any legislator intends to destroy the judicial system, but whether that destruction comes by design or neglect will make little difference once it has happened.

We should be particularly concerned about the possibility that now or in the future the legislature may try to use the unprecedented power that the budget crisis has conferred upon it to exact concessions from the judicial system that it should never be asked to make. A legislature that is not attuned to the demands of litigation and is largely devoid of lawyers who understand the judicial system cannot be expected to restrain itself in limiting the ability of lawyers to represent their clients and of courts to do justice.

This risk—and I do not think we should deceive ourselves into believing that it is illusory—should persuade us that our goal must be not just to survive the current budget crisis, but also to strive for systemic restructuring that will provide the courts with at last some protection from the vagaries of economic caprice and political convenience. But beyond this—or perhaps in order to accomplish this—we have a far greater task. We face this crisis because the legislature’s ignorance of the importance of the judicial system only mirrors that of the public at large. The public is not only uninformed but uninterested, as we can see with the unmistakable trend toward lower voter turnouts with succeeding elections. I do not have an answer to ignorance and apathy, and I harbor no quixotic belief that the Association can solve this society-wide problem. But I do know that if lawyers do nothing—lawyers who are the most knowledgeable about the judicial system and the most sensitive to its indispensability—then we might as well begin resigning ourselves to living in a third-rate, third-world system of justice.

I hope we will not let that happen.
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The Complexities of Suing Uncle Sam

The FTCA and the Tucker Act offer examples of the procedural hurdles that plaintiffs face

Many an attorney will never have an occasion to sue the United States. However, for those who do, it is important to have an understanding of the many issues that may be involved. Two critical examples are the Federal Tort Claims Act (FTCA) and the Tucker Act. Unlike a private defendant, Uncle Sam may be sued only with his permission, or, more prosaically, a statutory waiver of sovereign immunity. In a tort suit the enabling statute is the FTCA, which states: “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.” In addition, “the only relief available under the FTCA is money damages.”

The statutory language seems simple enough—if your client was harmed by an agency of the United States you can sue the agency as you would a private tortfeasor, with the only restriction being the types of damages that are available. However, the FTCA has a few additional hurdles, and if you do get into court you will face a federal judge rather than a jury.

It is also worth noting that your cause of action will not be based on the FTCA, which is merely a jurisdictional statute. Once the FTCA has been satisfied, the actual suit must be based on either state tort law or “federal law that is analogous to a duty of care recognized by state law.”

Getting Started

The first step is to file an administrative claim with the agency responsible for the tort. It is a jurisdictional requirement that the claim be for a “sum certain” and the amount requested serve as a cap to damages. If the agency decides to grant your client’s claim, your story has reached a happy ending. Otherwise, if either the agency has issued a final decision that is unfavorable to your client or more than six months have passed since the filing of the claim, you may file suit against the United States. If you need some time before filing suit, or if you want another try at the administrative claim process, you can file a request for reconsideration pursuant to Volume 14, Section 14.9 of the Code of Federal Regulations, and you can even include an amendment to the original claim pursuant to Section 14.2.

The next hurdle, which is a challenging one, is overcoming the many exceptions to the FTCA. The exception that the United States most frequently invokes is discretionary function, which insulates the government from suit over torts “based upon…the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”

Courts use a two-part test developed by the Supreme Court—the Berkowitz test—to determine whether the discretionary function exception is implicated. First is the question of whether the alleged tortious act involved an element of judgment or choice. If it did not, there is no discretionary function exception. If it did, the next part of the test is to examine whether that judgment is of the kind that the discretionary function exception was designed to shield.

One way to overcome the exception is to show that the tortious activity involved a violation of the U.S. Constitution, a federal statute, or an agency regulation, because such conduct cannot be discretionary. Unfortunately, while state law usually provides the underlying tort theory for an FTCA suit, violations of state law by themselves are insufficient to overcome the discretionary function exception. However, some state law violations are simultaneously federal law violations. For example, certain federal regulations and statutes obligate federal agencies to comply with state environmental laws. Therefore, if you foresee difficulty in overcoming the discretionary function exception, try to connect the tort to a violation of a federal law, either directly, or indirectly through a state law violation.

The Tucker Act

The Tucker Act delineates the jurisdiction of the U.S. Court of Federal Claims and waives sovereign immunity in disputes with the United States over contracts, the U.S. Constitution, and certain acts of Congress. However, like the FTCA, the Tucker Act serves only as a jurisdictional device. The relief sought must be based not on the Tucker Act itself but on some other legal theory.

For example, an attorney may file a claim for breach of contract, and, as every first-year law student should know, there are three ways to establish standing in a breach of contract suit: privity of contract, promissory estoppel, and intended direct third party beneficiary status. However, in contract disputes with the United States a litigant can never seek recovery that is based on promissory estoppel. Therefore, if your client was not a party to the contract in dispute, you must establish the client’s status as an intended direct third party beneficiary. The key elements are intent and directness. Knight v. United States and National Leased Housing Association v. United States offer a good starting point for research.
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If a single set of facts leads you to file causes of action under the FTCA and the Tucker Act, it is very important that you file the Tucker Act action first. If you fail to do so, your filing of the FTCA action in federal district court will deprive the Court of Federal Claims of jurisdiction over the Tucker Act action. In some cases (e.g., contract disputes) the Court of Federal Claims has exclusive Tucker Act jurisdiction, so the federal district court will have no jurisdiction over the Tucker Act action either. It is also a mistake to file the FTCA and Tucker Act actions simultaneously.

These details are only a tiny sliver of sovereign immunity jurisprudence. For this reason, no lawyer should consider wrestling Uncle Sam without the knowledge of what it takes to make him cry uncle.

10 Suits against individual agencies are not authorized under the FTCA. Denney v. United States Postal Serv., 916 F. Supp. 1081, 1083 (D. Kan. 1996).
12 OSI, Inc. v. United States, 285 F. 3d 947, 950 (11th Cir. 2002).
15 See, e.g., 32 C.F.R. §650.110.
22 See, e.g., A. E. Finley & Assoc., Inc. v. United States, 898 F. 2d 1165 (6th Cir. 1990).
23 United States v. County of Cook, 170 F. 3d 1084, 1090-91 (Fed. Cir. 1999).
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Every lawyer has probably been approached by someone who asks something like: “I met this guy who told me he avoids all his creditors with a Cook Islands trust that is owned by a Belize limited liability company that is managed by a Cayman Islands trust. Does this work?” It might, but in the world of asset protection planning, one size definitely does not fit all.

Before determining what asset protection strategy will work for a particular individual, several issues need to be explored. A strategy that has a pretty good chance of working for one person may be wholly inappropriate—or unnecessary—for another.1 Thus, before designing a strategy that fits the needs of a client, the careful practitioner must answer, at a minimum, the following key questions:

- Who (or what) is the likely debtor?
- What is the nature of the claim against the debtor?
- Who is the likely creditor?
- Which of the debtor’s assets need to be protected?

Even after considering these questions, the tax implications of the strategy must be weighed, because any asset protection plan will change the ownership of assets. Incurring an additional tax liability to stave off future creditors is generally considered to be poor planning.

Hovering over all these questions is an even greater threshold issue: California’s Uniform Fraudulent Conveyances Act. In its simplest terms, a fraudulent conveyance is any gratuitous transfer made for the purpose of “delaying, defeating or hindering” a creditor.2 Oceans of ink have been spilled attempting to determine what this means in practice. Courts generally use a “smell test.” If the transfer looks and feels to a judge like it has been made for the purpose of defeating a creditor, the transfer will likely be deemed fraudulent. If the transfer can be justified as having been made for other purposes, such as estate planning, it likely will not. Transfers that are made long before a creditor’s claim matures have the best chance of passing muster. Asset protection planners may disagree on many things, but they are unanimous that timing is everything. The planning options diminish rapidly as the creditor’s claim matures from a mere possibility to a threat, to a complaint, and, finally, to a judgment.

Often, the consideration of whether a transfer is fraudulent is deficient in two significant aspects. One mistake is to focus the inquiry solely on the transferor. However, an action brought to rescind a fraudulent transfer, if it is to have any effect at all, must be brought against the transferee. If the transferee did not have the intent to “delay, defeat or hinder” a creditor, the transfer is not fraudulent.3 The most straightforward way to prove a lack of fraudulent intent, even if the transferee knew of the existence of claims against the transferor, is to demonstrate that the transfer was a bona fide purchase for market value.4

In addition, the inquiry into fraudulent conveyances often overlooks the fundamental question of just what the creditor’s remedy is, even if a transfer was fraudulent. Generally, the effect of the statute is to permit the creditor to ignore the transfer and proceed against the transferee to recover the transferred asset.5 The creditor cannot maintain an action alleging a fraudulent transfer against anyone who is not a transferee,6 and the transferee cannot be held liable for damages to the creditor or be required to turn over more than the value of the asset transferred.7 However, if the creditor cannot obtain jurisdiction over the transferee, the fact that the transfer may have been fraudulent becomes irrelevant—at least for the creditor and the debtor. That is the main benefit of a foreign trust.

For practitioners, however, the lack of jurisdiction may not settle the matter. It is true that a Central District court has found that professionals (generally CPAs and attorneys) cannot be held civilly or criminally liable for having “conspired” or “aided and abetted” a fraudulent conveyance.8 However, an attorney may still be held to be in violation of the Rules of Professional Conduct.

By Robert F. Klueger

Robert F. Klueger is a partner in the Woodland Hills law firm Boldra, Klueger & Stein, LLP, which specializes in asset protection and tax planning.
AN EMERGING ESTATE PLANNING TOOL . . .

Billions of dollars are currently available for individuals over age 65 that are considering canceling or surrendering a life insurance policy that is no longer needed. The policyowner (seller) can be an individual, corporation, or trust. The policy may now be disposable for any reason. The goal is to provide the seller a one-time cash settlement in excess of the surrender value.

COMMON REASONS FOR THE DISPOSAL OF LARGE LIFE INSURANCE POLICIES . . .

- Key executive retires
- Buy-sell arrangement dissolved
- Estate no longer needs insurance for liquidity
- Individual life policy is being replaced by survivorship insurance
- Policy has not performed as well as was originally expected
- More suitable products have become available
- Policy is no longer affordable

SAMPLE CASE SUMMARIES . . .

Male, Age 75
Life expectancy 5.5 years
Face amount of insurance $5,000,000
Cash surrender value $0
Amount offered to seller $1,225,000

Female, Age 85
Life expectancy 3.5 years
Face amount of insurance $550,000
Cash surrender value $165,000
Amount offered to seller $220,000

Female, Age 86
Life expectancy 4.5 years
Face amount of insurance $9,000,000
Cash surrender value $2,142,000
Amount offered to seller $2,803,000

Male, Age 79
Life expectancy 8.0 years
Face amount of insurance $5,000,000
Cash surrender value $0
Amount offered to seller $487,500

WHAT POLICIES QUALIFY?

Most types of life insurance policies qualify for a settlement. Term, Universal, Variable Life and Whole Life are the most common. In some circumstances, even group life insurance coverage can qualify.

SOME POPULAR USES OF THE SETTLEMENT PROCEEDS . . .

- Purchase long-term care insurance
- Purchase second-to-die insurance for estate tax liquidity
- Purchase securities or annuities
- Pay off an existing mortgage or other debt
- Provide current cash flow for living expenses
- Provide gifts or other charitable donations while you are alive
- Purchase a new business

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duct and face disciplinary action by the State Bar. Rule 3-210 provides that “a member shall not advise the violation of any law, rule or ruling of a tribunal....” The discussion following the rule states that it applies to specific legal services that a client may seek from an attorney.1 Thus, before advising any client on an asset protection technique that may be construed as a violation of Uniform Fraudulent Conveyances Act, a practitioner must carefully consider the applicable Rules of Professional Conduct.

The Core Questions

Once the fraudulent conveyance issue has been resolved, asset protection planning can consider the core questions that determine what strategy will work best for the client. First, determine who the debtor is. For example, if the impetus for asset protection planning is the threat of a lawsuit, the question becomes: Who is likely to be sued? Thus, if only one of two spouses executed a corporate guaranty, that spouse alone is the likely debtor, and a “transmutation agreement” may be an effective strategy. However, if both spouses signed the guaranty, a transmutation agreement will be useless.

Identifying the potential debtor is even more critical when an entity is involved. Assume, for example, that a client is a medical doctor who fears malpractice claims not covered by insurance, and that this doctor is also a member of a California limited liability company that owns an apartment building. Any lawsuit alleging professional malpractice will be brought against the doctor, not the LLC. However, if a judgment cannot be satisfied by the doctor’s assets, the creditor will seek to recover from the assets of the LLC. This effort is called “outside-in,” because the creditor will seek to get into the entity to satisfy its judgment. The creditor’s remedy against the LLC’s assets is generally limited to a “charging order,” which requires that the entity make its distributions and allocations to the creditor instead of the debtor.10 The charging order, however, specifically denies the creditor the right to foreclose upon the entity’s assets or to step into the member’s shoes in the management of the LLC and vote on various business decisions. It is, therefore, a particularly toothless remedy if persons friendly to the debtor-member control the distributions.

If, however, the claim arises from the operation of the apartment building (for example, a tort claim brought by a tenant), the debtor will likely be the LLC itself. If the claimant obtains a judgment it will be able to satisfy the judgment by seizing the LLC’s assets, and the charging order limitation becomes irrelevant. If the creditor cannot satisfy its judgment with the LLC’s assets, he or she will likely attempt to go outside the LLC (“outside-in”) by proceeding against its members. In this context, the creditor’s ability to proceed against the members is determined by the same piercing-the-corporate-veil analysis that is applied to corporations and their shareholders.11 If the LLC was undercapitalized, the proper formalities were not observed, or the entity was the alter ego of a member, then the creditor might be able to proceed against the members. Otherwise, the separate identities of the entity will be respected.

Second, it is usually helpful to know in advance the exact nature of the claim that may be brought against the client. For example, a creditor usually must first obtain a judgment against a debtor before being able to proceed against its assets. In many situations, this gives counsel time to effect a strategy. However, if the claim arises out of the conduct of the debtor’s business and the amount of the debt is readily ascertainable from the face of an instrument such as a contract or a note, the creditor may obtain an order attaching the debtor’s assets prior to judgment—indeed, the creditor may do so shortly after filing the complaint.12

If the creditor’s claim is dischargeable in bankruptcy, the debtor can plan accordingly. For example, most tort claims are dischargeable, but debts occasioned by fraud or breach of fiduciary duty are not.13 Federal and state income taxes are (under proper circumstances) dischargeable, but “trust fund” taxes, such as unpaid employment taxes, are not.14 Even if the debtor is unlikely to actually file a bankruptcy petition, the knowledge that the claim is dischargeable will affect the bargaining power of the debtor and the creditor.

Most debts incurred by an entity cannot be satisfied by proceeding against its owners unless the creditor can pierce the corporate veil. However, those owners deemed to be “responsible persons” may be liable for certain debts of the entity, such as unpaid wages15 or employment taxes.16

While it is important to know how ripe a claim is when considering whether a transfer of assets will be considered a fraudulent conveyance, it is also important to know how old the claim is. For example, the Internal Revenue Service has only 10 years (measured from the date the tax is first assessed) to collect a tax debt,17 but the California Franchise Tax Board suffers under no limitation, a fact that often determines which tax debt should be satisfied from available assets.

It also is important to know in advance who the creditor may be and how it is likely to proceed. Some creditors are content to do no more than file a lien against the debtor in

the county of the debtor’s residence, in the hope that it will attach to the debtor’s real estate. In this case, assuming that the lien cannot attach to a client’s assets is all the asset protection planning needed. On the other hand, certain government agencies, such as the Federal Trade Commission, possess enormous interlocutory powers to attach, freeze, and seize assets even before judgment, and they are not bashful about using these powers. Moreover, federal creditors, such as the IRS, are not subject to exemptions created by state law.

The final step in the analysis is to determine precisely which assets of the debtor need protection. A strategy that may work for some debtors may not work others, depending on the nature of their assets. For example, a foreign asset protection trust might work perfectly well to assure that creditors cannot attach liquid assets, but it will not be nearly as effective at shielding real estate.

Some assets are exempt from creditors altogether, the best example being the account of a participant in a pension or profit-sharing plan created under ERISA,18 the statute governing most corporate pension and 401(k) plans. Indeed, a plan will not qualify for the substantial tax deferral benefits afforded by the statute unless the plan includes an antialienation provision that prohibits the diversion of any plan assets to a participant’s creditors.19 However, even ERISA plans have an exception. The antialienation provision will not be effective for an otherwise qualified plan if the plan has no participants other than the business owner and/or his or her spouse.20

Even if the plan is not qualified under federal law, it may nevertheless qualify under a state law exemption. Code of Civil Procedure Section 704.115(b) fully exempts from the claims of creditors assets that are in a “private retirement plan,” whether or not the plan includes nonowner participants, provided that the plan is designed and used for retirement purposes. If the debtor creates his or her own plan, does not use the assets for nonretirement purposes, and has a third-party administrator (even if that third party is his or her own professional corporation), all of the plan assets will likely be exempt.21

An Individual Retirement Account is not an ERISA-qualified plan, but it enjoys its own, albeit limited, exemption. Code of Civil Procedure Section 704.115(a) (3) exempts IRAs to the extent the assets are necessary to provide support in retirement for the owner and the owner’s dependents. Thus, the availability of this statutory exemption will depend on the age of the debtor and the size of the retirement account at the time the debtor claims the exemption.

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One characteristic of all these plans is that if the assets are exempt, the exemption trumps any consideration of whether the transfer to the exempt plan or account was a fraudulent conveyance.

**Asset Protection Strategies**

**Transmutation agreements.** In asset protection planning between spouses, California law presents a problem and a solution. The problem is that all of a married couple’s community property is liable for any debt incurred by either spouse, even if the debt is incurred prior to the marriage. The solution is the transformation of the spouses’ assets from community property to their respective separate property by means of a transmutation agreement. The transmutation must be in writing, and in order for it to be effective for real estate transmutations, the notice must be recorded. Provided that the agreement is entered into before creditors come calling, a spouse’s future earnings may also be transmuted from community to separate property. Transmutation agreements are not exempt from the general principles regarding fraudulent transfers. But if consummated early enough, and if care is taken that each spouse receives a separate property interest in roughly half the assets transmuted, a creditor will have a difficult time demonstrating that the transmutation was a fraudulent conveyance.

Having decided that each spouse will receive a separate property interest in roughly half the marital assets, the trick is in determining which spouse gets which assets. Consider this example: A medical practice may enjoy a substantial fair market value if sold to a buyer or when valued for estate tax purposes. However, except for its accounts receivable and its tangible equipment, it has no value to a creditor. Thus when dividing marital assets between a neurosurgeon who has a high risk of incurring an adverse judgment and a low-risk homemaker spouse, the surgeon should get the medical practice and the homemaker the house.

Practitioners also need to factor in the tax consequences of transmutation agreements. Although no gift taxes are incurred with respect to interspousal gifts, the transmutation may result in increased income taxes if the spouses own appreciated property and die in an untimely order. The reason is that community property benefits from a stepped-up basis to fair market value when either spouse dies, eliminating the capital gain in the value of the property. However, if the spouse who owns separate property is the surviving spouse, there is no stepped-up basis when the nonowning spouse dies, and the capital gains tax will be due if the surviving spouse later sells the property.

A transmutation agreement is not a magic bullet. The high-risk spouse must receive some assets as his or her separate property, which may become available to creditors. In addition, if the marriage ends in divorce, the property that each spouse received through the transmutation agreement will be that individual’s to keep. But for a prospective creditor seeking to attack the assets of the entity is through the relatively weak charging order, even if the transfer to the entity is deemed a “fraudulent transfer.” If the debtor is the entity itself, the creditor will be able to reach the member’s (or partner’s) assets only by piercing the corporate veil.

The reach of the charging order limitation on LLCs and LPs has been challenged in at least two California cases. In both cases, the creditor was permitted to foreclose upon and sell the partner’s partnership interest but not the entity’s assets. The state legislature has now codified the result of these cases. As of January 1, 2003, a creditor will be able to foreclose upon a member’s or partner’s interest. However, at any time prior to the foreclosure, the other members may redeem the debtor-member’s interest ahead of the creditor, provided they do so with their own—and not the entity’s—assets.

Further, because the members have broad discretion in drafting the operating agreement, they may, in effect, incorporate the charging order protection as it existed prior to 2003 by use of a “poison pill” technique. An LLC operating agreement could provide that in the event any member’s interest becomes subject to a charging order, the other members may redeem the debtor-member’s interest for one dollar. There does not appear to be any way for a creditor to overcome this provision, because 1) the members were presumably dealing at arm’s length when they entered into the operating agreement, without foreknowledge of which member would benefit and which would be harmed by the provision, and 2) an assignee is subject to the provisions of the operating agreement. Moreover, the charging order or foreclosure is still the creditor’s only remedy.

Whether the IRS is subject to a state law restriction on a creditor’s ability to seize the assets of an entity depends on whether the restriction is deemed to be a state law exemption, to which the IRS is not subject, or whether the restriction delineates a property right, which the IRS must respect. In the case of the charging order, it appears that the latter is the case. Because a partner cannot assign his or her own rights in specific partnership property, an assignee of that partner’s rights, even if the assignee is the IRS, should not accede to property rights greater than the assignor.

Future case law will determine the extent to which the recent statutory revision helps or impedes creditors of members or part-
ners of LLCs and LPs. But one thing is certain: The one-member LLC, permitted in California since 2000, is of no use for asset protection planning purposes—at least in the outside-in context, in which the debtor is the one member.

In transferring assets to entities, practitioners must take care to avoid tax and non-tax pitfalls. If appreciated California real estate is transferred, the transfer may subject the property to reappraisal for property tax purposes. The reappraisal can be avoided by assuring that the participants in the LLC or LP own the entity in the same proportion that they owned the property immediately prior to its transfer.37

If property is encumbered by a mortgage, the transfer of the property is likely to trigger the due-on-sale clause. In this case, the client is well advised to seek the mortgagee’s permission (or at least notify the mortgagee) prior to effecting the transfer.

The transfer of a residence to an entity has its own tax trap. When a residence is sold, the first $250,000 of gain ($500,000 for a married couple) is exempt from tax, provided that the residence was owned and used by the taxpayer as the taxpayer’s principal residence for two of the five years prior to the sale.38 By transferring the residence to a different owner—the entity—the exemption is lost.

Foreign trusts. If a creditor obtains a judgment against a California debtor, and the debtor’s assets are located in a sister state, the creditor is not required to relitigate the case in the sister state. The Full Faith and Credit Clause of the U.S. Constitution39 requires the sister state to honor the judgment, so the creditor need only domesticate the judgment in the county in which the assets are located in order to file liens, garnishments, levies, etc. If the debtor’s assets are located in a foreign country with which the United States has signed an applicable treaty, the result will be the same.

But if the debtor’s assets are located in a country that has no treaty with the United States and that advertises the fact that it will not honor a foreign judgment, the results are very different. Not only will the creditor be unable to domesticate its judgment, but also it cannot relitigate the case even if it were willing to bring all the evidence and witnesses to the foreign country, because the defendant-debtor is not likely to be found in that foreign country.

The inability to domesticate a U.S. judgment is the heart and soul of the foreign trust. A foreign trust must always be irrerevable (if it were revocable, a court could simply order the settlor to revoke it) and formed in a jurisdiction that will not honor a foreign judgment. The trustee should be a trust com-

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pany that maintains no presence in the United States, because if the trustee is subject to the jurisdiction of a U.S. court, the trust is, in effect, a domestic trust. Foreign trusts are superior to foreign corporations or LLCs because 1) the debtor does not possess an attachable asset such as a stock certificate, and 2) someone in the offshore jurisdiction will both manage the assets and has a fiduciary duty to the beneficiaries.

Unlike California, offshore jurisdictions having favorable trust laws do permit self-settled trusts. The settlor may be a beneficiary without the spendthrift provisions of the trust. Most importantly, because the only action that the creditor will be able to maintain in the foreign jurisdiction is against the trustee as the transferee of a fraudulent conveyance, jurisdictions hostile to creditors have very short statutes of limitations for fraudulent conveyances. For example, if an action for a fraudulent conveyance is not brought in the Cook Islands within two years of the date of the transfer to the trust, the action is barred.

Foreign trusts are not appropriate for everyone. It is highly unlikely that a foreign trust will shield domestic real estate from creditors. A good rule of thumb is that foreign trusts work only for assets that are truly foreign. Securities held by a local broker will likely be subject to attachment and seizure if the creditor can effect service on the local broker, even if the securities are titled in the foreign trust. Moreover, the broker will be far less motivated than the owner of the account to resist an aggressive creditor.

The case of Federal Trade Commission v. Affordable Media is a template on how not to structure a foreign trust. In Affordable Media, the debtors, Denise and Michael Anderson, were sued by the FTC, alleging that they had engaged in a classic Ponzi scheme involving television infomercials. The Andersons earnings from the infomercials went to a Cook Islands trust, of which they were codtrustees with a Cook Islands trust company. The Andersons were also named in the trust as the trust’s “protectors,” with certain powers over the trustees.

The trial court ordered the Andersons to repatriate the trust corpus. The Andersons refused and fired the Andersons as the codtrustee. (The trust provided that if the Cook Islands trustee determined that any request for funds was the product of “duress,” the Cook Islands trustee could fire the Andersons as the co-trustee.)

When the order to repatriate the trust corpus was not complied with, the trial court ordered the Andersons jailed for contempt. The Andersons argued that compliance with the court’s order was impossible, because
should know in advance that at least the pos-
sibilities. Anyone who settles a foreign trust
cannot part with any of the control over their
assets. Foreign trusts are not for those who
consider. A prospective settlor (and some of their coun-
tels) that foreign trusts are mere paper shuf-
are aware of the Andersons’ foreign
upheld the trial court.
It is noteworthy that the trial court did not
ignore the language of the Andersons’ foreign
trustee, the settlor must resign as cotrustee
settlor feels that he or she must be a co-
not be his or her own protector. Second, if the
protectors, the trust instrument gave them
were still the protectors of the trust, and as
will refuse to comply.

2 The Uniform Fraudulent Conveyances Act (codified at
CIV. CODE §§3439 et seq.). Most states have similar statutes.
3 CIV. CODE §3439.08.
4 See, e.g., CyberMedia v. Synmatic Corp. 19 F. Supp. 2d 1070 (N.D. Cal. 1998).
5 CIV. CODE §3439.07.
6 Forum Ins. Co. v. Devore Ltd., 151 F. Supp. 2d 1145
(C.D. Cal. 2001).
7 Elliott v. Gibson, 390 F. 2d 514 (9th Cir. 1967).
9 For a full discussion of the ethical pitfalls when advising
clients on asset protection techniques, see Lisa
McArthur Blocher, Trust Worthy, LOS ANGELES LAWYER,
10 CODE CIV. PROC. §708.310; CORP. CODE §§15028 and
15025(c).
11 CORP. CODE §17101(b).
12 CODE CIV. PROC. §483.010.
15 LIT. CODE §216.
17 26 U.S.C. §6502(a); however, the statute of limitations
may be tolled under certain circumstances. See 26
19 26 U.S.C. §401(a)(13). See also Patterson v. Shumate,
112 S. Ct. 2242 (1992). The only exception is the ability
of a divorcing spouse to obtain a Qualified Domestic
Relations Order, authorizing the division of plan assets
in the context of the dissolution of a marriage.
20 See, e.g., In re Witwer, 148 B.R. 930 (C.D. Cal. 1992); Dodel
21 In re Lieberman, 245 F. 3d 1090 (9th Cir. 2001).
22 See FAM. CODE §910.
23 See FAM. CODE §850.
24 FAM. CODE §852.
25 State Board of Equalization v. Woo, 82 Cal. App. 4th
481; 98 Cal. Rptr. 2d 206 (2000).
26 FAM. CODE §852.
27 I.R.C. §2523.
28 See, e.g., ALASKA STAT. §34.40.110; DEL. CODE ANN. tit.
12, §§3570-3576.
29 FAM. CODE §15304(a).
30 FAM. CODE §15303(b).
31 I.R.C. §1014(b)(6).
32 See, e.g., ALASKA STAT. §34.40.110; DEL. CODE ANN. tit.
12, §§3570-3576.
33 PROM. CODE §15304(a).
34 I.R.C. §2503(b).
1, 255 Cal. Rptr 794 (1989); Hellman v. Anderson, 233
36 CORP. CODE §17302(b).
37 CORP. CODE §17302(c).
38 CORP. CODE §17302(d).
39 See REV. & TAX. CODE §622(2)(a).
40 I.R.C. §121.
41 U.S. CONST. art. IV, §1.
42 Cook Islands International Trusts Act of 1984, §13B.
43 Federal Trade Comm’n v. Affordable Media, 179 F. 3d 1228 (9th Cir. 1999).
The Sworn Examination under Oath in Insurance Investigations

A recent statute places procedural limits on EUOs for the first time in nearly 100 years

R
cent legislation dramati-
cally changed the land-
scape for attorneys prac-
ticing in the field of insurance
law, particularly those who rep-
resent insurance company clients
investigating a potentially fraud-
ulent property insurance claim.
When the California Legislature
passed SB 658 in 2001, some
observed that lawmakers were
attempting to level the playing
field by providing basic due
process rights for policyholders
who are subjected to a sworn
examination under oath (EUO),
while others deemed the new law
to be a misguided attempt to fit
the EUO into a deposition mold.

In seeking to protect insureds
against abuse, the
authors of SB 658
shone a particu-
larly bright spot-
light on the sworn
examination under oath by creating
a new statute, Insurance
Code Section 2071.1, dedicated
solely to that subject. The proc-
dural requirements of the statute
are, for the most part, limited to
residential property insurance
policies. For the first time, an
insured now has the right to
assert at the EUO “any objection
that can be made in a deposition
under state or federal law.” In
addition, the statute limits the
scope of the examination to secur-
ing information that is “relevant
and reasonably necessary to
process or investigate the claim.”

The EUO only may be taken
upon “reasonable notice” and for
a “reasonable length of time.”
Among its other provisions, the
statute expressly entitles insureds
to be represented by counsel at
the EUO; record the examination;
receive, free of charge, a
copy of the transcript from their
insurance company within 10
days of requesting it; and make
sworn corrections to the tran-
script.

An insurer is equipped with a
number of investigatory devices
to assist it in promptly and fairly
adjudicating insurance claims,
with the EUO being one of the
most important tools that it has at
its disposal. More than 100 years
ago, the U.S. Supreme Court
articulated the purpose of the
EUO: “To enable the [insurer] to
possess itself of all
knowledge, and all
information as to
other sources and
means of knowl-
dge, in regard to
the facts, material
to their rights, to
enable them to
decide upon their
obligations, and
to protect them
against false claims.”

Similarly, the California
Supreme Court has acknowl-
edged that the “facts with respect
to the amount and circumstances
of a loss are almost entirely within
the sole knowledge of the
insured.” For that reason, an
insurance company must “have
some means of cross-examining,
as it were, upon the written state-
ment and proofs of the insured,
for the purpose of getting at the
exact facts before paying the sum
claimed of it.”

There is a presumption that
the EUO is reasonable and that
the insured must submit thereto:
There may be logic in [the] plaintiff’s argument that [the insurer] was not
conducting the examination
under oath in good
faith, but the fact still
remains that [it] was act-
ing within the terms of an
expressed stipulation
found in the policy, which
gave it the right to demand
such an examination, and
it is not for the insured to
inquire into the motive
actuating the company in
exacting the examination,
but on his part to comply
therewith and to answer
all material questions,
notwithstanding he may
believe that the principal
object of the company is
to find some loophole
whereby it might evade
payment of the policy.

Further, the fact that an
insurer may have undertaken other
forms of investigation, such as
obtaining preliminary interviews
or written statements from the
insured, does not necessarily pre-
clude its right to conduct an EUO:
"[Suggesting that] insurance
companies are always required
to pay claims at their face value
on the basis of a preliminary
interview" is “patently illogical.”

Although some courts have
characterized the EUO as pri-
marily focused on the investiga-
tion of suspicious claims, noth-
ing in the governing statutes or
the language found in the typical
property insurance policy
restricts it in this manner. Indeed,
an examination of an insured may
be useful in resolving issues that
are entirely unrelated to fraud,
such as the valuation of damaged
or destroyed property or ascer-
tainment of coverage under the
policy.

Nevertheless, the EUO most
often is associated with the inves-
tigation of suspicious claims.
Thus, the requirements imposed
by Section 2071.1 will primarily
affect attorneys who either 1) rep-
resent insureds with property
insurance claims that are being
investigated for potential fraud
or 2) are retained by the insur-
ance carriers to conduct EUOs
and counsel the carriers con-
cerning their rights and obliga-
tions regarding payment of the
claims.

Historical Perspective

For more than 100 years, both
the U.S. and California Supreme
Courts have recognized an insur-
ance company’s right to take, and
an insured’s obligation to submit
to, a sworn examination under oath.
EUOs are most commonly
utilized by insurers that provide
property and automobile insur-
ance coverage; however, the
state legislature has not man-
dated an insured’s submission to
such an examination outside the
context of a property insurance
policy.

In 1909, the California Legis-
lature codified the procedure for
examinations under oath as part
of the mandatory standard form fire insurance policy.11 Violation of the statute was a misdemeanor. Although the 1909 statute underwent a number of significant changes, remarkably its provision governing EUOs remained virtually unchanged over the years.12 The provision stated simply that the insured shall submit to an examination under oath, as often as reasonably required, by any person designated by the insurance company, and shall subscribe to the testimony given during the examination.

From 1909 until 2001, the legislature remained silent regarding the proper scope of the sworn examination under oath. However, the courts occasionally acknowledged an implicit requirement that the EUO be taken upon reasonable notice and for a reasonable length of time.13

Insurers long have been subject to prohibitions against unfair claims practices, which apply to all aspects of an insurer’s investigations of claims. Insurance Code Section 790.03(h) enumerates 16 unfair claims practices, and there are numerous regulations promulgated by the California Department of Insurance addressing unfair claims settlement practices.14 Among other requirements, an insurer must timely commence any investigation of a claim and provide the claimant with necessary forms, instructions, and reasonable assistance, including how to submit a proof of claim. However, these requirements do not provide any specific instruction or limitation on the scope of the EUO or the manner in which it is conducted.

With the passage of SB 658, specific statutory limitations finally have been placed upon the EUO procedure. The changes resulted from a concern that the lack of procedural protections effectively gave insurers carte blanche to abuse the process. Indeed, the legislative history for SB 658 reflects that the law was designed to provide the public with additional safeguards against unfair claim settlement practices because existing legal protections proved to be inadequate following the Northridge earthquake. Among the accusations leveled at insurance companies is that they exploited the EUO procedure with the intent to persuade insureds to forfeit their claims or accept a lower amount to resolve a claim.15 This purportedly was accomplished by subjecting insureds to prolonged examinations on wide-ranging subjects and demanding that they produce voluminous amounts of documentation at their EUOs, including materials that implicate constitutionally protected privacy rights.

Soon after the introduction of SB 658, the insurance industry opposed several aspects of the bill as being unnecessary—“a solution in search of a problem.”16 These included the safeguards regarding EUOs that were enacted as part of Insurance Code Section 2071.1. However, the majority of the new provisions serve a laudatory purpose. These include educating insureds, particularly those not represented by counsel, about what to expect at the EUO. They further delimit the scope of the EUO by imposing some guidelines; for example, the insurer may only conduct an examination in order to obtain “relevant” information that is “reasonably necessary to process or investigate the claim,” and the examination can only last for a reasonable length of time. These requirements avoid what the California Supreme Court described, in a different context, as the insured being “unhappily surrounded by concentric circles of uncertainty.”17

Long-Held Practices

Installing these procedural parameters hopefully will curb the temptation of those insurers, however isolated in number they may be, to abuse the EUO mechanism and take advantage of the ignorance of insureds regarding their rights. Moreover, most of the recently enacted safeguards—including the limits on the scope of questions as well as the time frame of the examination—are hardly revolutionary concepts.

In truth, much of the statutory mandate merely adopts the long-held practices of many California insurers, who routinely 1) notify insureds of their right to have legal representation at the EUO,18 2) provide insureds with the opportunity to review and correct the EUO transcript, and 3) accommodate insureds regarding the scheduling of the EUO. Moreover, certain courts recognize, at least implicitly, the right of insureds to protest the “reasonableness of the time, place, or mode of examination.”19

In addition, there has always been a built-in incentive for insurance companies to limit the duration of EUOs to the reasonable length of time that is now mandated by statute, given the cost of not only retaining counsel to take the examination but also having the examination recorded and transcribed by a court reporter.

Naturally, the scope and duration of the examination will broaden in the face of a suspicious claim or a claim that provides specific challenges, such as one involving a large number of property items that are poorly documented. Indeed, if the circumstances surrounding the presentation of the insurance claim are “such as to indicate fraud… [the insurers are] entitled to conduct a searching examination.”20 However, a lengthy proceeding upon irrelevant topics is counterproductive to both insured and insurer alike. Indeed, the insurer runs the risk of having to defend against a bad faith lawsuit if it conducts an improper or biased investigation or misleads the insured in any way, including regarding the EUO process.21

The fact that insurers were in widespread voluntary compliance with many aspects of the statute prior to its enactment is not intended to suggest that Section 2071.1 is mere surplusage, nor does it obviate the

Other Provisions of SB 658

In 2001 SB 658 revised Insurance Code Section 2071, which sets forth the standard form fire insurance policy mandated in California and contains a provision for an examination under oath (EUO).1 Apart from the modifications to the EUO, SB 658 created new procedural protections for individuals faced with the investigation of their insurance claims. In a clever conceit, insurers must now educate their own insureds about practices on the part of insurers that are considered unfair and deceptive as a matter of law.2 In this manner, the insured is placed in a better position to police the insurance company’s compliance with applicable law.

Although prior versions of SB 658 flirted with the idea of making appraisal voluntary in nature or, alternatively, mandating appraisal only if requested by the insured, the bill as enacted retained the compulsory nature of appraisal when requested by either party, assuming the parties are unable to agree upon the amount of the loss. Insurance companies regularly invoke this statutory mandate to request a stay or dismissal of a “premature” lawsuit based on the insured’s failure to first submit the claim to appraisal.23

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necessity of protective legislation. An insured should not be relegated to relying upon an insurer’s voluntary provision of basic procedural protections in conjunction with the EUO.

Prior to SB 658’s passage, the insurance industry opposed, as unduly restrictive, the bill’s requirement that the EUO be limited to securing information that is “relevant and reasonably necessary to process or investigate the claim.” The contention advanced was that this standard “is even more restrictive than would be allowed under rules of discovery.”

Under California law, a party to a lawsuit may depose a witness not only as to “relevant” matters, but also matters that are “reasonably calculated to lead to the discovery of admissible evidence.” The definition of “relevant evidence” found in the Evidence Code is not easily transplanted to an insurance claim. “Relevant evidence” is defined in the Evidence Code as “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” For nonfraudulent claims, the disputed facts are clear. For example, the insured may value certain property at a different amount than the insurer. The investigation of suspicious claims, on the other hand, does not always lend itself to such clear categorization.

In reality, it is unlikely an insurer will be hampered in its investigation because of the “relevant and reasonably necessary” language. This is because, prior to the imposition of any formal statutory requirements, the courts repeatedly inferred a requirement that the EUO be conducted on subjects described by various courts as “proper,” “material,” “pertinent,” or “relevant.” Indeed, the U.S. Supreme Court has held that “every interrogatory that was relevant and pertinent in such an examination under oath was material, in the sense that a true answer to it was of the substance of the obligation of the assured.” Similarly, the California Supreme Court held it reasonable to require the insured to submit to an examination under oath touching all matters material to the adjustment of the loss. Other jurisdictions are in accord, finding that the insurer is “limited by a rule of reasonableness and specificity” and may not, for example, “roam at will through all of the insured’s financial records.”

The U.S. Supreme Court has also demonstrated its willingness to support an insured’s refusal to answer immaterial questions at the EUO. In one decision, the Court noted, “We are unable to perceive that the questions proposed had any legitimate bearing upon the inquiry, what was the actual loss sustained in consequence of the fire.”

In addition, Section 2071.1 contemplates both state and federal evidentiary considerations. Under federal law, “discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action.” Under this standard, the insurer should be entitled to explore any avenue of questioning that has a “possible bearing” upon the processing or investigation of the claim, including the credibility of the insured. This generally reflects the previous standards under which insurers operated; thus, there is nothing to suggest that insurers will be subject to a more rigorous standard under Section 2071.1.

Language excised from the draft of SB 658 was far more contentious than the final version of the statute. It required, for example, the insurer to pay the cost of the insured’s attorney at the EUO. It further limited the EUO to eight hours in duration, regardless of the complexity or size of the claim and issues at stake. Since the bill as enacted does not contain these elements, there should be little genuine dispute regarding the majority of Section 2071.1’s procedural requirements, particularly since they generally mirror the practices of insurers before the passage of SB 658. Still, one particular area of controversy exists.

Not a Deposition

Having acknowledged the need for some procedural protections for the insured who submits to the EUO, the question arises whether Section 2071.1 overreached its goal by allowing insureds to assert at an EUO any objection that could be posed at a deposition under either state or federal law. (The original draft of the statute went even further, stating that “the applicable provisions of the Evidence Code and the Code of Civil Procedure relating to depositions shall govern an examination under oath” and that “all evidentiary objections, except as to the form of a question, are preserved.”)

By failing to acknowledge the differences between EUOs and depositions, the statute threatens to engender needless litigation-type battles in a nonlitigation setting—the adjustment and investigation of an insurance claim. This result is surely not what the authors of SB 658 intended.

Is the California Legislature under the misimpression that the EUO is just a deposition by another name? If so, it is not the only branch of government that has difficulty keeping the two proceedings separate. One court referred to the EUO as a “deposition under oath.” In fact, a deposition and the EUO are distinct proceedings that do not necessarily serve the same purposes and should not be subject to the same procedural rules. This principle is recognized in other jurisdictions, with one court proclaiming that depositions and examinations under oath are “horse[s] of a different color” that serve “vastly different purposes.”

Although both proceedings involve the questioning—usually by an attorney—of an individual who has taken an oath to tell the truth, and both generally provide for the stenographic recording of the testimony, the differences are numerous:

1) Insureds have a contractual obligation to submit to the EUO. That obligation is part of the consideration given for the insurance contract; if breached, “the insurer would be deprived of a valuable right for which it had contracted.”

2) Typically an attorney representing the insurance company conducts the EUO. The insured may or may not be represented by counsel. If represented by counsel, there is no provision allowing cross-examination of insureds by their own attorney. In contrast, at a deposition, both parties are entitled to pose questions to a witness or a party.

This emphasizes one of the fundamental differences between the two proceedings: A deposition is a discovery tool available equally to the parties to the litigation. The EUO is not designed to provide discovery for both parties. It is solely the tool of the insurer and its agents, designed to aid in the investigation of a claim and to ferret out potentially fraudulent claims. Because the EUO is not a legal proceeding, the parties should not have all the same rights and obligations that they have as part of a lawsuit.

3) An insurer is entitled to examine insureds separately. This right has been deemed a “valuable truth-finding technique” that greatly enhances the insurer’s ability to discover the true facts and assess the veracity of the insureds’ claims—and may discourage or prevent fraud: “[S]equestration is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars.” In contrast, a party to a lawsuit has a right to attend all depositions.

4) Insurance policies may require the insured to volunteer information pertinent to the claim during the EUO. No such obligation is imposed upon a party in a deposition.

5) Discovery disputes, including those that address the propriety of objections lodged at a deposition, may be submitted to the court for resolution, in the form of a motion to compel or a motion for protective order. There is no immediate remedy available to the insurer that is faced with an insured’s assertion of improper objections at the EUO. Instead,
Section 2071.1 merely cautions, in general language, that “if as a result of asserting an objection an insured fails to provide an answer to a material question, and that failure prevents the insurer from being able to determine the extent of loss and validity of the claim, the rights of the insured may be affected.”

6) Parties to litigation have a wide array of discovery methods available to them, including the ability to subpoena third-party witnesses to testify at a deposition. The insurer investigating a claim is not so well equipped. This lack of a full complement of discovery tools, coupled with the fact that fraudulent claims may be extremely difficult to detect, suggests that insurers require greater latitude in examining their insureds at the EUO than what is afforded at a deposition.

7) The insurer is under state mandate to investigate and take appropriate measures to combat insurance fraud. The EUO is a means to comply with these obligations.

In light of these clear distinctions, why introduce into the EUO proceeding the insured’s right to assert “any objection that can be made in a deposition under state or federal law”? Presumably, insureds now will be within their rights to object when a question calls for a narration or lengthy explanation, or when it is stated in the conjunctive or disjunctive. These type of objections have no place in the EUO, which is a nonlitigation investigatory tool of the insurance company.

Further, allowing the insured to assert objections under both state and federal law at the EUO carries the potential for tremendous confusion. For example, in Feldman v. Allstate Insurance Company, an unpublished decision of the U.S. District Court for the Central District of California, a claims investigation disclosed that the insured misrepresented the value of property that was the subject of his claim. Among the evidence adduced to support that position was a tape recording made by the insured’s former spouse. The insured challenged the evidence on the basis that it was unlawfully recorded without his knowledge and invaded his right to privacy. However, state and federal laws differed on the legality of the tape recording; further, the Ninth Circuit permits the admission of recorded communications when such recordings were legally made under federal law, even though the recordings were illegal under state law. For that reason, the court considered the evidence.

The Feldman case was decided before the new procedural rules applicable to EUOs took effect. An insured now may raise objections at the EUO to questions concerning a matter that the insured believed was a confidential communication and that unknowingly and impermissibly was recorded. Would the legality of the recording, and the propriety in objecting to questions concerning it, be judged under state or federal law? Section 2071.1 does not answer that question, nor other concerns about fundamental differences between state and federal discovery that may confuse both the insurer and the insured alike when the two judicial systems are combined for the purpose of the EUO proceeding.

Ironically, forcing EUOs into a litigation mode appears to undermine the objective that insurance benefits be provided “without resort to unnecessary litigation.” Whether it also unwittingly hamstrings the insurance company’s ability to investigate and detect insurance fraud, as required by the Department of Insurance, remains uncertain. In the past, the legislature and the executive branch have been sensitive to the particular needs of insurance companies in investigating fraud.

For example, the California Standard Form Fire Insurance Policy imposes a one-year statute of limitations upon filing suit after inception of the loss. The legislature enacted a shortened limitations period to deter fraudulent claims. In addition, although an insurer that denies a first-party claim, in whole or in part, must provide the insured with a written statement listing all grounds for denial as well as their factual and legal bases, the Department of Insurance makes clear that this requirement does not compel the insurer to disclose information “that could reasonably be expected to alert a claimant to the fact that the subject claim is being investigated as a suspected fraudulent claim.”

Similarly, under the revised California Standard Form Fire Insurance Policy, an insurer must notify insureds of their right to demand copies of all “claim-related documents”; however, the insurer is not required to provide “documents that indicate fraud by the insured.”

Clearly, because of the many unique qualities of the EUO, the insurer should not be confined to the same restrictions that are placed upon depositions, let alone additional restrictions. In that regard, it is somewhat disturbing that the state Senate Committee on Insurance articulated one objective of SB 658 as preventing “insurer fishing expeditions.” The California Supreme Court determined over 40 years ago that an attorney may legitimately undertake such “fishing expeditions” during depositions under the liberal rules of discovery. It is unlikely that the legislature intended to restrict the scope of EUOs even further than depositions.

Although far from a panacea, Section 2071.1 serves a laudatory purpose. For the
first time in more than 100 years, an insurer is required to provide basic information to its insured regarding the nature and scope of the procedure for sworn examinations under oath. However, the legislature unfortunately capitulated to the suggestion that the EUO be treated as the equivalent of a deposition and be subjected to the same evidentiary objections. This decision apparently stemmed from a desire to curb the “unfettered freedom” of insurers in the conduct of such examinations. However, this goal requires one to ignore the plethora of authorities that imposed a reasonableness standard on the scope of the EUO as well as the many statutory prohibitions against unfair practices. The future will reveal whether the harm from this aspect of the statute outweighs its many benefits.

1 INS. CODE §700.031.

2 The statute does not impose any deadline for making these corrections, and it is uncertain whether the courts will enforce an insurer’s attempt to limit the time in which to make corrections. INS. CODE §3071.1.


5 Id. at 530 (citing Connecticut Fire Ins. Co. v. George, 32 Okla. 432 (1915)).

6 West v. State Farm, 888 F. 2d 348, 351 (9th Cir. 1989).

7 For example, if the insured submits a proof of loss that is unclear or contains numerous inaccuracies, or fails to provide adequate documentation, the EUO proceeding may assist in resolving outstanding questions. See Globe Indem. Co. v. Superior Court, 6 Cal. App. 4th 725, 731 (1992) (“the right to require the insured to submit to an examination under oath concerning all proper subjects of inquiry is reasonable as a matter of law.”).


10 Cf. INS. CODE §10350.10 (entitles insurer to conduct “physical” examinations as often as may reasonably be required).


13 Bergeron v. The Employers Fire Ins. Co., 115 Cal. 672 (1931), and cases cited therein.

14 10 CAL. CODE REGS. §§2695.1 et seq.


17 An insured is not always well served by having representation at the EUO. See West v. State Farm, 888 F. 2d 348 (9th Cir. 1989).

CMO should serve to streamline discovery and create a vehicle for defendants to challenge all the plaintiffs to actively participate in the litigation.
In California, as in most jurisdictions across the country, the plaintiffs’ tort bar continues to file mass toxic tort lawsuits with increasing frequency. In response, defense counsel have developed a variety of case management techniques to streamline toxic tort cases and challenge the complaints of plaintiffs, which are often lacking in substantive detail.

Many developments in California law assist defense counsel with these techniques. First, case management orders (CMOs) and Cottle hearings can streamline discovery and challenge each plaintiff to plead and prove a prima facie case early in the litigation. Second, new case law helps defense counsel utilize the defenses of proper product identification and lack of exposure. Third, California’s medical causation standards and options under federal and state law can be employed to take advantage of the frequent inability of plaintiffs to prove general or specific causation. Finally, defense counsel can gain from keeping current with the status of medical monitoring claims and class actions under California law.

Toxic tort cases often involve hundreds, if not thousands, of plaintiffs alleging a variety of personal injuries and property damages arising from claimed exposures to the products of multiple defendants. Overburdened courts generally welcome suggestions from the parties about management strategies for these cases. Defendants can gain sizeable advantages by proposing an

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ambitious CMO to streamline discovery and focus the court’s attention on the fundamental deficiencies of the claims of the plaintiffs.

The authority for courts to issue CMOs in complex cases is firmly established. The California Code of Civil Procedure empowers every court to amend and control its process and orders and to control its own docket. Additionally, the Judicial Council of California recently issued the Deskbook on the Management of Complex Civil Litigation, which advises trial courts about the importance of early case management and the adoption of CMOs. In fact, the exercise of a court’s managerial powers in complex cases has been described as a “critical necessity.”

A carefully drafted CMO should serve to streamline discovery and create a vehicle for defendants to challenge all the plaintiffs to actively participate in the litigation. Frequently, mass toxic tort cases involve many plaintiffs who hope to obtain quick windfalls without having to participate in discovery, submit to depositions, or otherwise become involved in prosecuting their claims. The CMO should establish discovery procedures requiring plaintiffs to timely respond or risk having their claims dismissed. Additionally, discovery under the CMO should require individualized responses from plaintiffs and should allow them to specify their exposures and their claimed injuries and damages. Plaintiffs should not be allowed to hide behind the generic allegations of the complaint.

The motion to implement a CMO should explain to the court that traditional discovery procedures are too tedious and inefficient for mass tort litigation and that an effective CMO will narrow the issues for trial and ensure that meritless claims are efficiently dismissed. A CMO will benefit all parties in a large case because both sides will be able to focus their attention and resources on those claims, if any, that are ultimately permitted to proceed to trial on their merits.

A proposed CMO may contain a variety of creative procedures for managing mass tort litigation, including:

- **Discovery questionnaires.** A proposed CMO should require each plaintiff to complete and verify a discovery questionnaire in lieu of interrogatories. The proposed questionnaire should contain questions regarding each plaintiff’s background, education, medical history, work history, lifetime exposures to chemicals or toxins, medical conditions and treating physicians, claimed damages, and so forth. Plaintiffs should be ordered to provide substantive responses, without objections, to the questionnaire within a specified time period, subject to dismissals for failure to comply.

- **Document production.** The CMO should require each plaintiff to produce all documents that relate to or are otherwise cited in his or her questionnaire responses.

- **Authorization for the release of documents.** The CMO should require each plaintiff to execute authorization forms so that defendants can obtain medical, employment, and military records from third parties without the need for subpoenas, to the extent that these documents are related to the plaintiffs’ claims.

- **Property inspections.** The CMO should allow the defense to conduct an inspection of each property for which damage is claimed without the need for a discovery request or subpoena.

- **Additional discovery.** The CMO should allow plaintiffs to propound a fixed number of discovery requests to the defendants and should allow defendants to propound a fixed number of follow-up discovery requests to the plaintiffs.

- **Depositions.** Depending upon the strategy for the particular case, the CMO should establish a deposition procedure. Under some circumstances, it may be beneficial to conduct “sprint depositions” in which the defense takes brief, one-hour depositions of each plaintiff for purposes of obtaining initial information regarding each plaintiff’s medical condition and statute of limitations issues. Such information can then be used to file summary judgment motions, begin retaining experts, and strategically divide the plaintiffs into groups for trial. If sprint deposition procedures are used, the CMO should also reserve the defendants’ right to take a more detailed deposition of each plaintiff whose case proceeds to trial.

- **Causation procedures.** The CMO should request an order that outlines a procedure whereby each plaintiff is required to make a prima facie showing of causation at the outset of the litigation, under the threat of dismissal for a plaintiff’s failure to do so. In California this is known as a Cottle order, and in other jurisdictions it is known as a Lone Pine order. Each plaintiff should be required to satisfy a threshold burden of causation before the parties and the judicial system expend time and resources in litigation.

- **Settlement conferences.** In many circumstances, it may be appropriate for the CMO to require that, following the causation hearings, the parties discuss settlement. By this time, plaintiffs who have failed to complete questionnaires, participate in depositions, or make a prima facie showing of causation will have been eliminated from the case, giving both sides a more realistic picture of the number of cases and types of claims that may proceed to trial.

- **Other provisions.** CMOs often contain additional provisions to streamline the litigation, including those establishing a joint defense privilege (so that defendants can work together without waiving applicable privileges), procedures for adding plaintiffs and defendants, provisions for handling the inadvertent production of documents, and provisions for requesting modifications to the CMO.

Defense counsel should be creative and thorough in drafting a CMO for the court’s consideration. By filing a motion to implement a CMO and offering the court a proposed CMO early in the litigation, counsel can often gain a tremendous head start in developing defenses and eliminating meritless claims.

**COTTLE ORDERS**

A proposed CMO should contain procedures to allow the defense to challenge evidence of causation. In toxic exposure cases, establishing a causal connection between a particular injury and an exposure to a certain chemical or product is perhaps the largest hurdle that plaintiffs face. Given the frequency with which plaintiffs are unable to prove causation, courts have routinely determined that plaintiffs in mass toxic tort cases should be required to make a prima facie showing of causation at the outset of the litigation, under the threat of dismissal.

In California, these causation orders are referred to as Cottle orders, after Cottle v. Superior Court. The trial court in this case issued a CMO requiring each plaintiff to submit a statement to the court establishing “a prima facie claim for personal injury and/or property damage.” To satisfy this requirement, the court ordered each personal injury plaintiff to state the chemical or toxic substance to which the plaintiff was exposed, the dates and place of exposure, the method of exposure, the nature of the plaintiff’s injury, and the identity of each medical expert supporting the plaintiff’s personal injury claim. The use of this order was affirmed on appeal, as was the trial court’s order excluding the personal injury claims of those plaintiffs who failed to make a prima facie showing of causation to a degree of reasonable medical probability through competent expert testimony—as required by the case management order and California law.

The CMO issued by the court in Cottle illustrates the “type of creativity courts are permitted to exercise in dealing with complex cases.” Consistent with Cottle, defendants in toxic tort cases should request that a CMO include provisions requiring each personal injury plaintiff to file a declaration identifying 1) the chemical or toxic substance to which that plaintiff was exposed, 2) the date and
duration of each exposure, 3) the location of the exposure, 4) the route and method of exposure, 5) the nature of the plaintiff’s alleged injury or injuries that are claimed to have been caused by each exposure, 6) all medical or scientific evidence in support of such a claim, and 7) the identity of each medical expert who will support the plaintiff’s personal injury claim. Following the filing of such declarations, the CMO should set procedures for briefing and a Cottle hearing regarding the sufficiency of the plaintiffs’ attempts to make prima facie showings.

**PRODUCT IDENTIFICATION DEFENSES**

One of the most common defenses to toxic tort cases focuses on a plaintiff’s inability to prove his or her exposure to a particular defendant’s product. The basic premise of the defense is that as a threshold to proving liability, a toxic tort plaintiff must first identify the product of a particular defendant and establish that he or she was exposed to that product. Recent California decisions confirm that plaintiffs cannot skirt these critical elements of their toxic tort claims with generic proof.

In *Bockrath v. Aldrich Chemical Company*, for example, the California Supreme Court held that a toxic tort plaintiff’s allegations that the products of multiple defendants cause cancer, that he was exposed to them, and that they migrated to his internal organs and caused his disease were insufficient. The court concluded that at least some specificity is required.

In defining the pleading requirements for a toxic tort case, the supreme court held in *Bockrath* that a plaintiff must 1) allege that he or she was exposed to each of the toxic materials claimed to have caused the specific illness—an allegation that he or she was exposed to “most and perhaps all” of the substances listed is inadequate; 2) identify each product that allegedly caused the injury—it is insufficient to generally allege that the toxins in the defendants’ products caused it; 3) allege that as a result of the exposure, the toxins entered his or her body; 4) allege that he or she suffers from a specific illness, and that each toxin that entered his or her body was a substantial factor in causing, prolonging, or aggravating that illness; and 5) allege that each toxin he or she absorbed was manufactured or supplied by a named defendant.

Although the court allowed the *Bockrath* plaintiff leave to amend his complaint, the court’s well-articulated pleading standard for toxic tort cases is extremely useful in attacking a poorly pled toxic tort complaint as soon as it is filed and served.

Once a toxic tort case is past the pleadings stage, some debate remains regarding the proper standard of proof on the critical element of exposure. In *Dumin v. Owens-Corning Fiberglas Corporation*, the California Court of Appeal explained that two different approaches have been taken by courts in determining the sort of evidence a plaintiff must adduce in order to establish that a defendant’s products are a legal cause of his or her injuries. The more stringent approach requires particularized proof that the plaintiff came into contact with the defendant’s product. Under the more lenient approach, on the other hand, it is sufficient that the plaintiff prove the defendant’s product was at his or her work site.

The *Dumin* court specifically declined to express favor for one approach over the other, holding that in the case at issue, the plaintiff could not prove his claims under either standard.

Taking the analysis one step further in a seminal toxic tort case, *Rutherford v. Owens-Illinois, Inc.* the California Supreme Court held that in establishing causation in an asbestos lawsuit, the plaintiff must first show some threshold exposure to a defendant’s defective product. That is, he or she must prove to a reasonable medical probability that a particular exposure or series of exposures was a substantial factor in causing the injury. The court held that the plaintiff bears the burden of proof on this issue. The court stated in a footnote, however, that it was declining to endorse any one particular standard for establishing the requisite exposure because the issue had not been raised or briefed.

Plaintiffs often urge courts to apply the more lenient of the two exposure standards articulated in *Dumin*. They argue that so long as they present evidence that a particular product is present at their work site, a jury can infer that they were actually exposed to that product. There is, however, a growing body of case law that demonstrates that California follows the more stringent exposure standard. In *Lineaweaver v. Plant Insulation Company*, the court of appeal held that a plaintiff must prove exposure to a particular defendant’s product and must establish to a reasonable medical probability that the exposure contributed to the plaintiff’s injury. Factors relevant to assessing the medical probability that an exposure contributed to the injury include the frequency, regularity, and proximity of the exposure. Depending on the circumstances of the case, relevant factors may also include the type of product to which the plaintiff was exposed, the type of injury suffered, and other possible sources of the plaintiff’s injury.

Further, in an unpublished decision, *O. C. Patterson v. E. I. DuPont De Nemours & Company, Inc.* the Second Appellate District expressed its view that California follows the more stringent exposure standard. The court explained that “[a] review of the decisional authority reveals that California courts have adopted the more stringent approach.” The *Patterson* court concluded that the mere presence of a product at a plaintiff’s work site was insufficient, and that the jury should have been given an instruction consistent with the more stringent *Dumin* exposure standard requiring that plaintiffs prove their exposure to the particular product of a particular defendant.

Most recently, in *McGonnell v. Kaiser Gypsum Company Inc.* the First Appellate District confirmed that proof of exposure requires more than mere evidence that a
defendant’s product was present at a plaintiff’s workplace. Instead, a plaintiff must present sufficient evidence to establish not only that a defendant’s product was present but also that he or she was exposed to that product.

In McGonnell, the plaintiffs filed a wrongful death action against Kaiser Gypsum Company and numerous other defendants alleging that the decedent, James McGonnell, died of asbestos-related lung cancer. The plaintiffs alleged that McGonnell had been exposed to products containing asbestos at various locations over many years during his employment as a plumber and pipe fitter at the California Pacific Medical Center.

Prior to his death, McGonnell testified in a deposition that he regularly cut through walls where he would encounter insulation and fireproofing materials, including those that contained asbestos. He could not identify, however, Kaiser Gypsum materials containing asbestos as those with which he came into contact. Neither could he offer other product identification evidence aside from general declarations that Kaiser products were used in construction at the medical center. Records indeed showed that Kaiser sold products that were used in the construction of the medical center, and there was a possibility that McGonnell could have encountered such materials.

The trial court held, however, that the possibility was insufficient and granted Kaiser’s summary judgment motion. The court of appeal affirmed that decision, holding that “all that exists in this case is speculation that at some time McGonnell might have cut into a wall that might have contained Kaiser joint compound that might have contained asbestos. The evidence creates a dwindling stream of probabilities that narrow into conjecture.”

In short, recent California case law suggests that in addition to expert-intensive medical causation challenges, a straightforward defense that questions product identification and exposure should not be overlooked.

**CAUSATION**

Many diseases do not manifest themselves until years after an exposure to a chemical. As a result, causation is often a critical defense in a toxic tort case. Under state and federal law, plaintiffs must demonstrate that the exposure to a specific chemical, supported by expert opinion to a reasonable medical probability, caused a certain disease. However, the California state and federal standards diverge when deciding whether to admit or exclude an expert opinion on this key issue. In California state court, the “general acceptance” test established in the case of Frye v. United States applies, while the federal courts are governed by the U.S. Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. Thus, whether a case is filed in state or federal court may greatly influence the resolution of the causation issue.

In a case originating from the Ninth Circuit, the U.S. Supreme Court established the federal standard governing the admissibility of expert testimony. In Daubert, the Supreme Court rejected Frye, instead relegating the Frye standard of whether an opinion is “generally accepted in the scientific community” to only one of several indicia of reliability. The Supreme Court interpreted Rule 702 of the Federal Rules of Evidence as requiring “a standard of evidentiary reliability.” To evaluate the reliability of proffered scientific testimony under Rule 702, the court identified the following factors as relevant: 1) the testability of the proffered scientific theory, 2) whether the scientific opinion has been published or subjected to peer review, 3) the error rate of the technique, and 4) whether the opinion is generally accepted in a relevant scientific community.

Federal courts have strictly interpreted Daubert to allow the trial judge, acting as a gatekeeper, to exclude speculative expert testimony and junk science. The court in General Electric Company v. Joiner clarified that,
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Despite Daubert’s focus on an expert’s methodology as opposed to his or her conclusions, “a court may conclude that there is simply too great an analytic gap between the data and the opinion proffered.” Daubert and Joiner are powerful authority for requesting an evidentiary hearing to exclude experts and their methodology.

Cases interpreting Daubert and Joiner in the context of toxic torts have focused on the admissibility of epidemiological evidence and whether plaintiffs can show through statistical association that a cause-and-effect relationship exists. Epidemiology is the study of disease in populations. It examines the relationship between the disease and a factor suspected of causing the disease, using statistical methods to determine the likelihood of causation. Many plaintiffs’ experts attempt to rely upon inadequate epidemiological studies to support their opinions on causation.

The Ninth Circuit recently evaluated the admissibility of epidemiological evidence in In re Hanford Nuclear Reservation Litigation, in which the district court granted summary judgment on the ground that the plaintiffs could not sufficiently establish the strength of the association between their radiation exposure and their claimed injuries. Further, the court held that the plaintiffs could not demonstrate that their alleged exposure to radiation doubled the risk of the injuries in question when compared to the risk experienced by the general population.

The Ninth Circuit reversed the trial court’s order granting summary judgment, holding that the “doubling of the risk” standard used by the district court was erroneous. The court, in reversing the summary judgment, reasoned that the district court had blurred general and specific causation and placed an unfair burden on the plaintiffs to demonstrate general causation. The Ninth Circuit emphasized that a plaintiff must show general causation—that radiation was capable of causing his or her disease—and specific causation, meaning that it, in fact, caused his or her disease. The admissibility of epidemiological evidence may be different depending upon whether general or specific causation is involved. The court concluded that epidemiological studies themselves are not the sole means of establishing general causation. The plaintiffs should have been permitted to establish by other scientific evidence that radiation was capable of causing the types of injuries they allegedly suffered.

One significant, limiting factor influencing the Ninth Circuit in this case was that it was undisputed that radiation is capable of causing a broad range of illnesses, even at the lowest doses. Notably, the Hanford court reaffirmed the doubling-of-the-risk standard in cases in which epidemiological studies are the sole basis of causation.

At first blush, Hanford appears to be adverse for the defense bar. However, a careful reading of that case reveals that the court was, in fact, only evaluating general causation when there is evidence other than epidemiological evidence to demonstrate that something has the capacity to cause a particular disease. The case does not apply to specific causation—that is, whether a particular exposure actually caused a specific disease in an individual plaintiff. Thus, Hanford is limited in application and still leaves open the possibility of Daubert challenges to specific causation and even general causation in cases in which the only evidence supporting the expert opinion is epidemiological studies.

California courts apply a more liberal standard for plaintiffs and are reluctant to exclude expert opinions on reliability grounds. In People v. Kelly, the California Supreme Court adopted the rule of “general acceptability” set forth in Frye. The rule provides that an expert’s opinion is deemed reliable so long as the methodology upon which it is based is generally accepted in the scientific commu-
After the U.S. Supreme Court ruled in Daubert, the California Supreme Court revisited the issue and concluded that in California the Kelly/Frye formulation had survived Daubert.32

The Kelly/Frye rule is that expert testimony that is based on novel scientific techniques is not admissible if the techniques themselves are not generally recognized as valid by the scientific community.33 In practice, this means that trial courts only exclude an expert opinion if it is based on novel scientific techniques.34

The net result is that California state courts will probably not scrutinize the admissibility of expert testimony, leaving the reliability of experts as an issue to be resolved by the trier of fact rather than by a pretrial motion. It is often said by California trial court judges that a challenge to expert testimony goes to the weight, not the admissibility, of the evidence. Since the Kelly/Frye rule controls in California, sophisticated plaintiffs' attorneys often prefer to litigate in state court, where it is less likely that a state trial judge will exclude their experts’ opinions.

**MEDICAL MONITORING CLAIMS**

Following the California Supreme Court’s decision in Potter v. Firestone Tire and Rubber Company35 that medical monitoring is a compensable item of damages, plaintiffs now routinely pursue claims for medical monitoring in toxic tort cases. A medical monitoring claim seeks to recover the anticipated costs of future, periodic medical examinations intended to detect latent diseases that could develop as a result of an exposure to toxic substances. Medical monitoring claims are unique in that they typically involve asymptomatic plaintiffs seeking costs for future medical monitoring despite the absence of any current manifestation of disease.

Prior to Potter, debate existed as to whether medical monitoring damages were permissible as a result of a defendant’s tortious conduct despite the absence of an actual present, physical injury. In Potter, the supreme court answered the debate, holding that medical monitoring damages absent physical manifestation of disease were available in certain circumstances. The court held that the “reasonably certain need for medical monitoring is an item of damage for which compensation should be allowed.”36

The court instructed that in determining the reasonableness and necessity of medical monitoring, the following factors should be considered: 1) the significance and extent of the plaintiff’s exposure to chemicals; 2) the toxicity of the chemicals; 3) the relative increase in the chance of onset of disease in
the exposed plaintiff as a result of the exposure, when compared to a) the plaintiff’s chances of developing the disease had he or she not been exposed, and b) the chances of the members of the public at large of developing the disease; 4) the seriousness of the disease for which the plaintiff is at risk; and 5) the clinical value of early detection and diagnoses. 37

The five factors were intended to provide “substantial evidentiary burdens” for toxic exposure plaintiffs. 38 Moreover, the five factors “do not allow medical monitoring damages based solely upon a showing of an increased but unquantified risk resulting from exposure to toxic chemicals.” 39 Toxic exposure plaintiffs may only recover medical monitoring damages if the evidence establishes the necessity, as a direct consequence of the exposure at issue, for specific monitoring that the individual should pursue as a matter of general good sense and foresight. Plaintiffs cannot recover for preventative medical care and checkups to which members of the public at large should prudently submit. 40

Based on Potter, mass toxic tort plaintiffs now almost always include claims for medical monitoring for asymptomatic plaintiffs. Notwithstanding the Potter court’s recognition of medical monitoring as a compensable item of damages, however, the scope of the remedy is limited to those cases in which plaintiffs can overcome their “substantial evidentiary burdens.” Defendants can defeat claims for medical monitoring by focusing on a plaintiff’s lack of evidence supporting the five factors espoused by the Potter court. Most significantly, a plaintiff’s proof is insufficient unless he or she can demonstrate through reliable medical expert testimony that the need for future monitoring is a reasonably certain consequence of his or her toxic exposure and that the recommended monitoring is itself reasonable. 41

Additionally, even if a plaintiff has demonstrated that the Potter factors weigh in favor of the recovery of medical monitoring damages, defendants may argue in many cases that a plaintiff’s preexisting medical condition precludes the recovery of medical monitoring damages. The requested medical monitoring due to an alleged toxic exposure must be in addition to, or different from, the type of monitoring a plaintiff may require due to a preexisting condition.

In Gutierrez v. Cassiar Mining Corporation, 42 the court reversed the jury’s award of medical monitoring damages on the ground that the trial court failed to properly instruct the jury that a defendant should not be liable for medical monitoring when monitoring is already required by a plaintiff’s preexisting medical condition. So, for example, even if a
defendant negligently exposes a smoker to toxins that significantly increase his or her risk of cancer, that defendant is not liable for reasonably certain future medical monitoring costs unless the recommended monitoring calls for tests or examinations that are in addition to or different from the type of monitoring the smoker should prudently undertake regardless of the toxic exposure.43 The plaintiff alone must bear any amount of the medical monitoring costs that his or her preexisting conditions would already require, and recoverable amounts must be new or different.

With the increase of medical monitoring claims following Potter, the issue has arisen whether a court can properly certify a class action for medical monitoring. The California Supreme Court recently addressed this issue in Lockheed Martin Corporation v. Superior Court.44

Lockheed involved a putative class action in which the plaintiffs alleged that various manufacturing defendants discharged chemicals that contaminated the city’s groundwater. The plaintiffs sought, among other damages, a court-supervised medical monitoring program funded by the defendants. The plaintiffs moved for class certification of a medical monitoring class, defined as “[p]eople who were exposed to water contaminated with any of the following chemicals...at levels at or in excess of the dose equivalent of the MCL (Maximum Contaminant Level), or in excess of the safe dose where there is no MCL...for some part of a day, for greater than 50 [percent] of a year, for one or more years from 1955 to the present” within specified geographical limits.45

The trial court certified the medical monitoring class, finding that the plaintiffs had met their burden of proof under California law.46 The court of appeal reversed, and in an opinion favorable to the defense, the California Supreme Court affirmed the reversal, holding that the trial court abused its discretion by certifying the class, because there was an insufficient community of interest among the class members.

The supreme court found that although significant common issues of fact existed among class members, the common issues would be overwhelmed by the numerous inquiries necessary to establish each individual’s claim for medical monitoring.47 Courts confronting medical monitoring claims may compare the increase in a plaintiff’s chances of onset of disease as a result of the exposure with that plaintiff’s chances had he or she not been exposed, and with the chances of members of the public developing the disease.48 The court stated that while a member of the public’s chances of developing a particular disease may be susceptible to com-
mon proof, each individual plaintiff’s chances of developing that particular disease, had he or she not been exposed as alleged, may not be. As a result, the court concluded that the common issues raised by the plaintiffs could not predominate, so the causation and damages issues raised by the numerous plaintiffs would have to be litigated individually.

Notably, the court found that no per se or categorical bar exists to a court’s finding that medical monitoring claims are appropriate for class treatment, since the individual issues the claims present are manageable.

A growing and evolving body of California case law in the field of toxic tort litigation now exists to help the defense bar combat poorly pled, generic complaints involving hundreds or thousands of plaintiffs. Defendants should look to California’s case law supporting the use of CMOs and Cottle orders to streamline discovery and requiring plaintiffs to prove a prima facie case of causation early in the litigation. Additionally, defendants should look to causation challenges, product identification and exposure defenses, and related case law establishing evidentiary prerequisites for plaintiffs to satisfy before proceeding to a jury with their claims.

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The federal Manual for Complex Litigation also endorses the use of CMOs. See Manual for Complex Litigation §33.2, 33.22 (5th ed. 1995).

Asbestos Claims Facility v. Berry & Berry, 219 Cal. App. 3d 9, 23 (1990). The court in Berry & Berry also noted that courts “face the hard necessity that, within proper limits, judges must be permitted to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants.” Id. at 24-25.


Cottle, 3 Cal. App. 4th 1367.

Id. at 1373.

Id.

Id. at 1387-88; see also Jones v. Ortho Pharm., Co., 163 Cal. App. 3d 396 (1985) (“In a personal injury action, causation must be proven within a reasonable medical probability based upon competent expert testimony.”).


Id. at 80-81.


Id. (citing In re Hawaii Federal Asbestos Cases, 960 F. 2d 806, 816-17 (9th Cir. 1992); Lockwood v. AC&S, Inc., 744 P. 2d 695 (1987)).


Id. at 982 n.12.


Id. at 1416-17.


Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).


In re Hanford Nuclear Reservation Litig., 292 F. 3d 1124 (2002).

Id. at 1136-37.

See Bonner v. ISP Tech., Inc., 259 F. 3d 924 (8th Cir. 2001) (To prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like those suffered by the plaintiff and persons subjected to the same level of exposure as the plaintiff and that the toxin was the cause, or among the causes, of the plaintiff’s injury.).

See Hanford Nuclear Reservation Litig., 292 F. 3d at 1137.

Id.

On Oct. 29, 2002, the Ninth Circuit unanimously denied a defense motion for reconsideration of Hanford.


Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).


Kelly, 17 Cal. 3d at 31.

See, e.g., Wilson v. Phillips, 73 Cal. App. 4th 250, 254 (1999) (applying Kelly/Frye rule and excluding psychiatric opinion based upon novel and unproven repressed memory technique because “the Kelly test is intended to forestall the jury’s uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate…..[I]n most other instances, the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them”); People v. Ward, 71 Cal. App. 4th 368, 373 (1999) (“California distinguishes between expert medical opinion and scientific evidence; the former is not subject to the special admissibility rule of Kelly/Frye….Kelly/Frye applies to cases involving novel devices or processes, not to expert medical testimony…..”).


Id. at 1006-07.

Id. at 1009.

Id.

Id.

Id.


Id. at 156.


Id. at 1102.

Id.

Id.

Id. at 1111.

Id. at 1110-11 (citing Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1109 (1993)).

Id.

Id. at 1111.

Id. at 1105-06.
By now, the graying of America is old news. Demographers have long noted the increasing percentage of senior citizens in the American population—a percentage that is currently higher than it has ever been, with all expectations that the trend will continue. One ramification of this trend that is of interest to lawyers is the effect that the aging population has on civil litigation. Sad to say, it is now more likely than ever that a party to a civil action will die before commencement of an action or during litigation. This situation creates new challenges for civil litigators who are unfamiliar with probate court.

Few civil litigators regularly appear in probate court; most use their best efforts to avoid the procedural quagmire of probate. However, if a defendant dies, either before suit is filed or during a pending lawsuit, some action before the probate court is almost always necessary in order for the litigation to proceed. Only in cases in which the decedent is a plaintiff and there is no probate estate can the litigator avoid probate court, but even then, avoidance of the procedures detailed in the Probate Code is not guaranteed. Every litigator must therefore understand that the death of a party will almost certainly demand strict observance to the statutory scheme and time constraints of both the Code of Civil Procedure and the Probate Code.

Unfortunately, the statutory scheme set forth in these two codes does not anticipate every possible scenario. As a result, civil practitioners sometimes face uncertainty in determining how to proceed after a party has died. The safest practice is to follow all the applicable procedures in both codes, even if it may appear at first that a particular procedure is unwarranted or duplicative. Doing this will safeguard the interests of clients, and avoid lengthy—and potentially dispositive—collateral litigation.

Analyzing how to proceed with an action when a party dies begins with determining if the claim survives death. Generally, most claims for or against a party survive the death of that party. In 1961 the California Legislature—departing from the ancient common law rule based on the maxim “Personal actions die with the person”—expanded the survival statute to include
actions for personal torts that do not result in physical injury. These torts include malicious prosecution, false imprisonment, invasion of privacy, and defamation. This increase in the type of claims that survive the death of a party remains the law in California today.

Still, there are claims that die with a decedent, and the most common of these are punitive damages claims against a decedent, and pain and suffering damages, including emotional distress damages, claimed by a decedent. There is a clear rationale for the death of these claims: Preventing future misconduct, or compensating for pain and suffering, cannot be achieved if the party is deceased.

Once a determination is made that a claim survives the death of the party, counsel must next ascertain the procedural steps required to initiate or continue the action, by whom or against whom the action can or must proceed, and the applicable statutes of limitations and other time deadlines that must be followed. The deadlines are strictly enforced in order to promote finality in legal affairs associated with death.

Continuing Lawsuits against Deceased Defendants

When litigation has already commenced and the defendant dies before the conclusion of the action, the plaintiff must follow a series of procedures to continue the litigation. Indeed, litigation against a deceased defendant is the most time-sensitive and procedurally burdensome of the actions involving parties who die before the resolution of a claim. In addition, these procedures and time limits change if the litigation is already being defended by the decedent’s insurer and the complaint only seeks recovery within the policy limits. Plaintiffs’ counsel therefore must be particularly familiar with proper procedure, lest they risk forfeiting a client’s cause of action.

In cases not involving a tendered claim to an insurer seeking payment within the policy limits, the first step is to substitute the decedent’s “representative” into the pending lawsuit after following the appropriate creditor’s claim procedures. The representative usually is the personal representative of the decedent’s estate but can be, under very limited circumstances, the successor in interest. The plaintiff must file a motion with the court in which the action is pending that requests the court to substitute the decedent’s representative into the action in place of the decedent.

At the time the motion for substitution is filed, the plaintiff must show the court that it has already complied with the creditor’s claim procedures set forth in the Probate Code. The compliance process is relatively easy: The plaintiff must file the requisite Judicial Council form in the probate proceeding. Merely informing the representative of the pending lawsuit is insufficient; a creditor’s claim must be filed. This process puts the personal representative and the probate court on notice of the plaintiff’s claim and ensures that the representative of the estate and the probate court are notified of all claims within a reasonable period. In this way, the estate can be expeditiously settled and distributed to legatees or heirs. The creditor’s claim procedures also allow the representative to quickly ascertain the obligations against the estate and the assets at issue.

There are certain situations that do not require the filing of a creditor’s claim prior to proceeding with an action against a decedent. Generally, however, if the plaintiff’s claim is a demand for payment for a liability based in “contract, tort, or otherwise,” a creditor’s claim is required. If there is any doubt as to whether the claim falls within an exception, it is wise to file a creditor’s claim, since there is no harm in doing so.

A creditor’s claim need not be filed when the creditor is continuing a lawsuit to establish the decedent’s liability if the decedent’s liability was protected by insurance, the insurance company is defending the action, and the creditor seeks recovery within the policy limits. In this circumstance the action can be continued without joining the personal representative or successor in interest as a party. However, any judgment is only enforceable against the insurer. If the creditor seeks damages outside of the policy limits, then the creditor must comply with all of the same procedures that would apply if the claim was not insured. Likewise, if an insurer seeks reimbursement for a deductible or any other amounts, the insurer must file a claim and comply with the procedures of suing a decedent’s estate.

Plaintiffs who must file a creditor’s claim are required to do so within either four months from the date that the letters of administration are first issued to a personal representative or 60 days after notice of administration is given to the creditor—whichever is later. After the creditor’s claim is filed and served on the representative, the representative must either accept it, accept it in part and reject it in part, or reject it completely. If the representative takes no action, the creditor has the option to deem the claim rejected on the 30th day after the date it was filed. Within three months of the date of rejection, the plaintiff must move the court in which the action is pending for an order substituting the personal representative in the action. If the plaintiff fails to comply with any of these procedures, recovery is barred against the decedent’s estate.

The plaintiff must also keep in mind that the statute of limitations changes when the defendant is a decedent. Code of Civil Procedure Section 366.2 sets forth a time limit of one year from the date of death for filing any type of claim, “whether arising in contract, tort or otherwise, whether accrued or not accrued” against a decedent, regardless of what the applicable statute would have been had the decedent survived. The creditor’s claim procedure tolls this one-year time bar, but most equitable principles do not. The exception is equitable estoppel, which acts as a bar to the assertion of the statute of limitations as a defense rather than a tolling device.

Thus, all creditor’s claims should be filed within one year of death to toll the statute. This is a harsh truth that bears repeating: A plaintiff who does not file a claim in probate court within one year of a decedent’s death cannot recover forever against the decedent’s estate.

The case of Bradley v. Brown is illustrative. In Bradley, the former wife of a convicted child molester was sued by the victim for “aiding and abetting” the molestation. The convicted child molester had died in prison prior to the suit, so the ex-wife filed a cross-complaint for indemnity against the decedent’s estate. One would think that, at the very least, justice would require the estate of the perpetrator to contribute to the victim’s recovery. But the ex-wife did not file a claim in the decedent’s probate estate within one year of death, and thus recovery was barred, despite the fact that she was not sued for many years after his death and did not even have a claim to assert within the one-year period.

When courts have applied the principle of equitable tolling, they have done so only in cases in which the party attempting to utilize the statute of limitations defense has unclean hands. For example, in the case of Battuello v. Battuello, the plaintiff’s father promised to leave the plaintiff the family vineyard after both the father and the plaintiff’s mother died. The plaintiff relied on this promise; for example, he went to college for the purpose of learning the formal aspects of running a business. After his father died, the plaintiff learned that his father had changed his trust, and the vineyard was not necessarily going to be left to the plaintiff. The plaintiff intended to object in the trust proceedings and properly proceed with an action on his claim. However, he and his mother entered into a settlement agreement in which his mother agreed to fulfill his father’s promise and give him the vineyard by the end of 1996.

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If the plaintiff seeks to recover against assets of the estate rather than against an insurance policy or seeks to recover amounts outside of the insurance policy limits, the plaintiff must first comply with the creditor's claim procedures prior to suing the personal representative.

plaintiff refrained from making an objection to the trust. The plaintiff’s mother then repudiated the settlement agreement, and the plaintiff filed suit to enforce his father’s promise. The plaintiff’s mother alleged that the claim was time-barred based on the one-year statute of limitations for bringing a claim against the father’s estate or its assets. The court found that the plaintiff’s mother was equitably estopped from asserting the statute of limitations because, had she not entered into the settlement agreement, the plaintiff would have filed his objections in a timely fashion. Obviously, the circumstances in this case are extreme, and the doctrine will likely be applied only on rare occasions.

The case law interpreting Code of Civil Procedure Section 366.2 is fact-specific and only focuses on whether the statute applies to those facts.3 One could argue that this statute also governs the time in which a plaintiff can substitute a decedent’s estate as the defendant in the stead of the decedent. Technically, an action against the decedent’s representative does not “commence” until the court grants the motion substituting the representative for the decedent. Therefore, to continue an action against a decedent, the best practice is to file a creditor’s claim in the decedent’s estate within one year of the decedent’s death. The California Legislature decided to set relatively short periods of time for taking action against a representative of the decedent’s estate to “protect[] a decedent’s heirs, legatees, or beneficiaries from stale and unknown claims”24 and thus “effectuate the strong public policy of expeditious and final estate administration.”25

Given the one-year time bar, a savvy probate lawyer for the decedent’s estate may deliberately prolong the opening of a probate. Therefore, if the one-year deadline from the date of death is approaching and no probate has been opened, the wise approach for the plaintiff is to open a probate proceeding as a creditor and file a timely creditor’s claim.30 It would be risky for the plaintiff to wait until a personal representative is appointed or until the decedent’s family takes action and opens a probate. The decedent’s family might be intentionally delaying the opening of a probate in order to trigger the one-year time bar and avoid all creditors, thereby increasing the family’s inheritance.31

Initiating Lawsuits against Decedents

The procedures and time deadlines required to initiate a lawsuit against a decedent are similar to those mandated for continuing an already-pending action. If a cause of action survives a decedent’s death and a lawsuit was not filed prior to death, it may be filed against the decedent’s personal representative (or, more rarely, a successor in interest) or against the decedent’s insurer if the claim is covered by the decedent’s insurance.32

If the claim is covered by insurance, the plaintiff may commence an action against the estate without the need to join in the personal representative, and the plaintiff need not file a creditor’s claim.33 However, the summons must be served either on a person designated in writing by the insurer or, if none, on the insurer itself.34 Therefore the plaintiff must have knowledge of the decedent’s insurer and of the policy prior to commencing the action if the plaintiff wishes to avoid serving a personal representative and filing a creditor’s claim. Also, the one-year time bar applicable to all other actions against decedents’ estates does not apply to this type of action. The action may be brought within one year after the expiration of the limitations period otherwise applicable had the defendant not died.35 However, if the plaintiff opts to take this route, the judgment is only enforceable against the insurer and is only enforceable for the amount of the policy. If the plaintiff seeks amounts above the policy limits, the plaintiff must comply with all procedures and time constraints that any other plaintiff must.36

If the plaintiff seeks to recover against assets of the estate rather than against an insurance policy or seeks to recover amounts outside of the insurance policy limits, the plaintiff must first comply with the creditor’s claim procedures prior to suing the personal representative.37 Once the creditor’s claim is rejected or deemed rejected, the plaintiff must file suit within three months of the rejection or the suit will be time barred.38 These are the same time requirements that apply to continuing an existing suit against a decedent.

Also applicable is the one-year statute of limitations in Code of Civil Procedure Section 366.2, which bars any action brought against a decedent after one year from the date of death, regardless of what the limitations period would have been had the defendant not died.39 Therefore, if no one else opens a probate, the proposed plaintiff must take the initiative and open a probate as a creditor, so that the plaintiff can ensure compliance with the creditor’s claim statutes as a prerequisite to bringing the lawsuit.40

Once the plaintiff meets the many procedural requirements and the representative rejects the creditor’s claim, the plaintiff may file suit in any county in which the action could have been commenced had the defendant not died or in the county in which the probate estate is being administered.41 Once suit is filed, the plaintiff must file a notice of pendency of the action in the probate proceeding along with a notice of service on the personal representative or personally serve a summons and complaint on the personal rep-
MCLE Test No. 117

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. Claims for punitive damages die with a defendant.
   True. False.
2. Claims for pain and suffering damages die with a plaintiff.
   True. False.
3. Emotional distress damages do not die with a plaintiff.
   True. False.
4. In order to continue a lawsuit against a decedent, the plaintiff must file a motion with the court in which the probate proceeding is pending to substitute in either the personal representative of the decedent’s estate or the successor in interest.
   True. False.
5. The filing of a creditor’s claim puts the personal representative of the decedent’s estate and the probate court on notice within a reasonable period of a plaintiff’s claim against the estate.
   True. False.
6. If a claim is based in contract or tort and does not involve a tendered claim to an insurer seeking payment within the policy limits, a plaintiff must comply with the creditor’s claim procedures prior to continuing with an action against a decedent.
   True. False.
7. If the personal representative does nothing to respond to a creditor’s claim, the creditor cannot deem the claim rejected until the 45th day after it was filed.
   True. False.
8. If a creditor files a creditor’s claim before initiating a lawsuit against the decedent’s estate, and the creditor’s claim is rejected, the creditor must file suit against the personal representative of the decedent’s estate within three months from the date of rejection.
   True. False.
9. An absolute one-year statute of limitations exists from the date of death for filing any type of claim against a decedent’s estate other than a tendered claim to an insurer seeking payment within the policy limits.
   True. False.
10. The one-year statute of limitations is tolled by the filing of a creditor’s claim.
    True. False.
11. The California Legislature set short time periods for filing claims against a decedent’s estate to “effectuate the strong policy of expeditious and final estate administration.”
    True. False.
12. A creditor is not an interested person authorized to commence a probate proceeding for the administration of a decedent’s estate.
    True. False.
13. A creditor is not required to comply with the creditor’s claim process prior to suing a decedent’s estate.
    True. False.
14. Once a plaintiff files suit against the personal representative of a decedent’s estate, the plaintiff must either file a notice of pendency of the action in the probate proceeding or personally serve a summons and complaint on the personal representative.
    True. False.
15. If a plaintiff who has sued the decedent’s estate through the personal representative fails to either personally serve the personal representative with the summons and complaint or fails to file a notice of pendency of the action in the probate proceeding, and funds are distributed from the estate, the plaintiff can seek recovery of those funds.
    True. False.
16. A beneficiary of the decedent’s estate is a successor in interest.
    True. False.
17. If a personal representative of a decedent’s estate has been appointed, only the personal representative has standing to pursue litigation on behalf of the decedent.
    True. False.
18. A personal representative never has longer than six months in which to commence an action on behalf of the decedent.
    True. False.
19. The legislature has developed a trust claim procedure similar to the procedure for decedents’ estates.
    True. False.
20. If a probate proceeding has been initiated, a trustee is prohibited from initiating the trust claim procedure.
    True. False.

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Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. □ True □ False
2. □ True □ False
3. □ True □ False
4. □ True □ False
5. □ True □ False
6. □ True □ False
7. □ True □ False
8. □ True □ False
9. □ True □ False
10. □ True □ False
11. □ True □ False
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15. □ True □ False
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17. □ True □ False
18. □ True □ False
19. □ True □ False
20. □ True □ False
representative. This requirement alerts the probate court and the personal representative that all action in the probate court must be taken in light of pending litigation that could affect the decedent’s estate and assets. Distributions from the estate, for example, must be examined in conjunction with the litigation and its potential impact on them.

Once again, time is of utmost importance when a party dies. Probate Code Section 9354 states: “Any property distributed under court order, or any payment properly made, before the notice is filed and given [to the probate court that an action is now pending against the estate in another court] is not subject to the claim or judgment. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment.”

This means that the creditor cannot seek recovery on monies already distributed by the estate. Therefore, the value of the estate could be significantly diminished if a plaintiff delays taking action. Distributions from the estate could be made prior to the commencement of litigation, and those assets cannot be part of the plaintiff’s recovery.

Continuing or Initiating Lawsuits on Behalf of Decedents

If a plaintiff dies during litigation, the action will most likely survive the decedent’s death, with the most common exception being a claim for damages for pain and suffering. In order to continue the litigation on the decedent’s behalf, certain procedures must be followed. Either the personal representative of the decedent’s estate or the decedent’s successor in interest (if there is no personal representative) may pursue the litigation on behalf of the decedent.

A successor in interest is defined as the “beneficiary of the decedent’s estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.” A successor in interest can act only if certain criteria are met. First, no proceeding for the administration of the decedent’s estate can be pending in California, and there cannot be a personal representative acting on behalf of the decedent. If a personal representative has already been appointed, only the personal representative has standing to pursue the action on behalf of the decedent.

Second, the successor in interest must execute and file with the court an affidavit or declaration certifying his or her interest and right to continue the proceeding and providing other specific information as required in the Probate Code.

In order for either a successor in interest or the personal representative to continue an action on behalf of a decedent, that individual must file a motion with the court in which the
action is proceeding, requesting that he or she be allowed to continue the matter in the decedent’s stead.\(^4\) In granting the motion, the court will allow the proceeding to continue, as long as the action survives death and all other prerequisites are met.\(^5\)

Of course, the personal representative or successor in interest has the option of choosing whomever he or she desires as counsel. The factors involved in determining whether the personal representative or successor in interest will retain the decedent’s former counsel will include counsel’s knowledge of and involvement in the case as well as the issue of continuity.

When a plaintiff dies in the middle of a lawsuit, the motion to allow the action to be continued by the decedent’s personal representative or, if none, by the decedent’s successor in interest is filed in the court in which the action was already proceeding. The litigator chosen to pursue the lawsuit can completely avoid the probate department if probate counsel has been retained to open a probate and administer the estate.

A personal representative or the decedent’s successor in interest may also commence an action on behalf of a decedent.\(^6\) A successor in interest is obligated to file a declaration or affidavit with the court similar to the one filed when a successor is continuing an action on behalf of a decedent. The successor in interest’s affidavit or declaration must certify that no personal representative has been appointed, that no proceeding for the administration of the decedent’s estate is pending in California, and that he or she has the interest and right to pursue the action, among other specific requirements.\(^7\)

So long as the action is one that survives death, the representative may commence the action on behalf of the decedent any time before the later of six months after the decedent’s death or within the limitations period that would have been applicable had the person not died.\(^8\) This affords the representative at least six months to sift through the decedent’s papers and discover, evaluate, and commence action on any claims the decedent might have had but did not initiate prior to death.

The story of the untimely demise of litigants or potential litigants has a clear moral. If a case has been litigated to death (or was about to be filed when one of the parties died), specific procedural actions must be taken quickly. Under these circumstances, the probate court does not provide litigants with the luxury of time.


\(^2\) For example, the statutory scheme governing litiga-
Barbara A. Ellis, chief counsel and chief compliance officer, US Bancorp, says the
changes are welcome. "It’s going to change the way people think about it, as
they will now have a better understanding of their options," she says.

Ellis says the changes are also going to help curb the rise in
fraudulent claims. "It’s going to make the system more transparent and
less susceptible to abuse," she says. "It’s going to make the system more
effective and efficient."
3) Actions to enforce a lien against the property that is subject to the lien, even if it is part of the decedent's estate, such as a mortgage—so long as the lien holder waives all other recourse against other property in the decedent’s estate.

4) Actions against a person to whom property was distributed from the estate without the estate first having followed the notice requirements to creditors. See Prob. Code §§9000-9392.

17 Prob. Code §§9552, 9390(b).
18 Prob. Code §§9100 et seq.

22 Bradley, 73 Cal. App. 4th 798, 805-06.
23 Battuello, 64 Cal. App. 4th 842.
24 See, e.g., Bradley, 73 Cal. App. 4th 798; Battuello, 64 Cal. App. 4th 842.
26 Bradley, 73 Cal. App. 4th at 865.
27 Prob. Code §8000 (allowing any interested person to commence probate proceedings for administration); Prob. Code §46 (including a creditor in the definition of "interested person"). If the plaintiff, as creditor, is appointed as the personal representative, the court must rule on the claim. If the court rejects the claim, and the creditor/personal representative files an action, the court must receive the summons and appoint an independent attorney to defend the action. Prob. Code §9025.
28 Prob. Code §9000 et seq.
29 Bradley, 73 Cal. App. 4th at 805.
30 It is permissible to name the successor in interest rather than a personal representative if a probate is not opened and the assets are transferred without administration. See Prob. Code §§13109 et seq., 13550 et seq., 18201. However, specific rules apply when initiating a lawsuit directly against a successor in interest, and the one-year time bar still applies.
33 Prob. Code §9552.
34 Prob. Code §9551.
40 Prob. Code §90534(a).
41 Id.
42 Prob. Code §9034(b).
43 It is always wise for the plaintiff to file a request for special notice in the probate, so that no action can be taken without proper notice to the plaintiff. Prob. Code §§1250-1252.
47 Code Civ. Proc. §377.32. This section sets forth the specific elements that must be included in the affidavit or declaration and other required documentation.
49 Id.
50 Id.
52 Prob. Code §377.32.
The United States Patent and Trademark Office defines a trademark as “a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of the goods of one party from those of others.” A service mark is defined as the same thing except that the mark is used to identify services rather than goods. Through continued use of a mark, a company or individual may retain exclusive rights to that particular mark in perpetuity. One of the keys is “continual use,” and it is here where savvy investigators can play a vital role in the clearance or protection of a company’s trademark rights.

Whether the decision to investigate is made in order to clear possible future use of a mark or to determine infringement on current rights, a good investigation will help clarify: whether someone is currently using the name on similar goods or services, when someone started using a particular name and where, the nature of the exact goods or services that are identified with the mark in question, the customers to whom the goods are being sold and how they are being distributed, and whether or not the goods or services have been identified by the mark in question since they were first sold.

Intellectual property investigators bring the same curiosity and relentlessness to their job as more traditional gumshoes while being able to focus on IP-specific issues. These issues can hinge on anything from the phonetic pronunciation of a company name to the type of lettering font, shape, or color scheme used in a logo.

Experienced IP investigators will look at a U.S. Patent and Trademark Office filing and understand that even though they are contacting a company with over 30,000 employees and have spoken with six longstanding employees who have never heard of the mark, someone or some department is going to know the history and current use of the product, because Section 8 and Section 15 affidavits were filed six months prior. Employees leave companies. Who are the right people to interview? Experienced IP investigators find the people who know.

Investigators should possess the technical skills and infrastructure to support various types of investigations and still maintain confidentiality. They will be up-to-date with technical methods and strategies for finding and identifying individuals who do not wish to be found.

Within a single day, IP investigators may need to discuss the inner workings of a resorbable polymer implant, a software program meant to track pharmaceutical prescriptions, a cheese-filled hot dog, or an industrial waste disposal tank. Their daily efforts finding, collecting, and reporting on salient details of various industries and products help them quickly and efficiently deliver information.

Typically the hourly rate of an investigative firm will be far less than that of an attorney, providing opportunities for both cost savings and billable hours spent poring over investigation findings. These services, however, should not be seen as competition to the attorney. The investigator’s role is to complement the lawyer. Also, using an outside source to gather evidence may limit liability in ways not possible when attorneys themselves attempt to investigate.

Increasingly, investigators find themselves at the center of many diverse transactions. Many provide acquisition services, purchasing domain names and trademark portfolios for their clients on an anonymous basis. They also may provide Internet content and domain-name-registration-watching services.

This speaks to the increasingly competitive landscape in which the IP investigator must maneuver to flourish. Gone are the fedora, trench coat, and stogie. Today’s IP investigators have traded those relics in for DNS trace-route, packet sniffers, and wi-fi.

Mark Doerr is vice president and William Shanks is senior lead investigator of Marksmen in Glendale. Marksmen helps brand owners protect their intellectual property by providing best-of-breed trademark use investigations, anonymous IP acquisitions, and Internet monitoring services.
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Evaluating the Use of Digital Voice Recorders for the Law Office

By Gordon Eng

For some attorneys, these devices will be indispensable—others may rely on more familiar tools.

A major part of the workday of many legal professionals is expended in the production of written documents. The evolution of faster, more efficient, and cost-effective methods to produce the written word continues with developments in handheld digital voice recorders (DVRs) and voice-to-text computer software. The current crop of DVRs may afford a step up in functionality and efficiency for those who use tape recorders for dictation, and the latest versions of the speech-to-text computer software may add some efficiencies to the document production process when used in conjunction with a DVR or when used directly for dictation transcription. Speech-to-text software, however, still requires an investment of time that may not be acceptable for some attorneys. These innovations, when implemented together or separately, will benefit some but not all practitioners.

DVRs capture sound—such as dictation—and convert it into digital computer files. (Tape recorders, on the other hand, use analog technology.) The recording of sound in digital form makes it possible to treat files created with a DVR in much the same way as other computer files. For example, digital audio files may be transmitted via e-mail. DVRs store dictation on a memory device, such as a smart media card or memory stick, rather than on tape. The latest crop of DVRs also provide more functionality than traditional tape recorders, a factor that may be compelling enough to convince people who currently use tape recorders to switch. However, the current cost of a DVR that is suitable for the office will likely be higher than that of a similar tape recorder. Additionally, when dictation is transcribed manually there are other costs to consider. The software provided with each DVR allows a typist to advance, stop, rewind, and search the audio file while transcribing. A person who performs a large amount of transcription will likely desire a foot pedal to navigate the audio file. The manufactures of DVRs offer foot pedal devices, but that is another cost to consider before implementing DVR dictation.

The four DVRs I reviewed are the Olympus DS-3000, the Phillips Pocket Memo LFH 9300, the Sony IC IDMSS15, and the Voice It VTR 3200. These DVRs store recordings in a proprietary format that compresses the sound file so that it uses less memory. This compression allows each unit to hold at least half an hour of recorded speech with the amount of memory that is provided at purchase. Unfortunately, the proprietary format requires the use of manufacturer-provided software to transfer the voice file from the handheld to a computer and to convert the proprietary format into a standard format. It is necessary to convert the file in order to share it with a person who does not have software that can read the proprietary format. Because of the lack of a standard interface, it is not yet possible to plug a DVR into any computer and download or open a voice file.

Good at the Basics

The DVRs all performed well, however, in delivering basic dictation functionality. In other words, these devices allow an attorney to dictate a file and edit it (by overwriting portions), add additional dictation at a particular place in the dictation without overwriting (a feat not possible with a tape recorder), erase segments, navigate through the file, identify the location of something in a file (for example, with a time counter), and adjust the volume and speed of the playback.

The recorders also offer a variety of more advanced file management and editing features. These include indexing; templates for assigning client, matter, and author to a file; assigning key words for certain file-creation functions; prioritizing files; and locking files. Also, each unit allows users to upload files from their computer to the handheld. Users can also adjust the recording quality of each unit. Higher quality sound produces larger files, which consume more memory. Lower quality recordings take less memory but can be more difficult to transcribe.

Whether basic or advanced, the functions of these DVRs depend on general ease of use. In evaluating this, I considered a number of factors, including the location and labeling of buttons and switches, access to the various functions and capabilities, size, download software, and ability to operate the unit without having to memorize the instruction manual.

The Voice It DVR is the most basic of the group. Its simplicity makes it generally easier to use. Most of its features are accessed through buttons on its face. It has a relatively small LCD display of basic information and status, and it is about the same size as the Olympus and Phillips models. The Sony, Olympus, and Phillips units all have a greater number of features, and some of them may be indispensable for some users. Of the units reviewed, the Voice It was the only one that requires a serial port connection to transfer files to the computer. The others use a USB connection.

The Sony is the smallest unit of the group. Many of the Sony’s features are accessed through a five-way switch and menu system. Many will find the switch to be a marvel of engineering; others will find it difficult or confusing to navigate the menu with the switch. This unit is not likely to be a good choice for a user with large hands. For example, I found it easy to accidentally divide one dictation into multiple files.

In a similar fashion, the Olympus DVR uses buttons and...
a menu. The buttons are somewhat larger than they are on the Sony unit, and there is more direct access to the various functions through the buttons rather than the menu. It is larger than the Sony, but the LCD screen is larger as well. The combination of the location of the buttons and the microphone on this unit may lead users to accidentally press buttons during recording and activate unexpected features.

The Phillips DVR also makes greater use of buttons than the Sony, and it is about the same size as the Olympus. Its LCD screen is large and, like the Sony and Olympus, provides a wealth of status information. The Phillips unit uses a sliding switch to record, play, stop, and rewind, which is similar to traditional tape recorders. Because the Phillips makes significant use of buttons to access features, rather than a menu, some may find this unit easier to operate.

Each DVR comes with software that allows for basic manual transcription, but there are differences among the advanced features. The Olympus and Sony units come with the most feature-rich software, while the Phillips and Voice It have more basic software. For example, the Olympus software allows the user to connect the DVR to the computer for use as a microphone. The Olympus and Sony software allows files to be converted to the common .wav format, which facilitates transfer of files by e-mail. With the Sony software, files can be divided, combined, and converted to a variety of formats, including MP3.

No attorney who advises clients to always read the contract will be so devil-may-care as to try to use one of these units without first reading the instruction manual. If, however, you attempt on behalf of a friend to operate a DVR while relying on nothing more than your familiarity with traditional tape recorders, you will probably have to glance at the instruction manual at least once in order to be able to operate even the basic features of these units. Once you have familiarity with the basic features of one unit, however, you have a good chance of being able to handle basic dictation tasks with any of the others. The advanced features, although useful, will likely require additional time and practice.

**Voice Dictation Software**

A possible compliment to DVRs is software (sold separately) that converts sounds to text. The challenge has been and continues to be accuracy. Along with the DVRs, I tested ScanSoft’s Dragon Naturally Speaking 6 and IBM’s ViaVoice 10, USB Edition. The software makers claim that accuracy above 95 percent can be obtained. Assuming that the user’s computer meets the specifications for operating the software, and depending on the qualities of the user’s voice and microphone, this level of accuracy is possible.

The challenge for the software is daunting. It has to determine how to spell a spoken word by comparing the sound to a library of sound files that the user creates. As a result, the software will probably have great difficulty differentiating among “to,” “too,” and “two,” for example. Also, the software attempts to spell all sounds, so a person who says “um” or “ah” between thoughts will see the software try to add these sounds to the document.

Any person contemplating using a speech-to-text program must be prepared to invest time in customizing the software. This is called training and initially entails reading selected text to the program, which takes about half an hour. But the improvement of accuracy is a continuous process. The claims that accuracy increases with use appear to be

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Base Memory</td>
<td>16 MB</td>
<td>8 MB</td>
<td>8 MB</td>
<td>4 MB</td>
</tr>
<tr>
<td>Base Mem. Rec. Time (SP high-quality mode) Minutes</td>
<td>2 hr 35 min</td>
<td>1 hr 4 min</td>
<td>1 hr 20 min</td>
<td>30 min</td>
</tr>
<tr>
<td>Base Mem. Rec. Time (LP lower quality mode) Minutes</td>
<td>5 hr 30 min</td>
<td>2 hr 51 min</td>
<td>1 hr 52 min</td>
<td>1 hr 14 min</td>
</tr>
<tr>
<td>Expandable Memory</td>
<td>Up to 128 MB</td>
<td>Up to 128 MB</td>
<td>Up to 8 MB</td>
<td>Up to 8 MB</td>
</tr>
<tr>
<td>Removable Media Type</td>
<td>Smart Media Card</td>
<td>Memory Stick</td>
<td>Smart Media Card</td>
<td>Smart Media Card</td>
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<tr>
<td>PC Connectivity</td>
<td>USB</td>
<td>USB</td>
<td>USB</td>
<td>Serial</td>
</tr>
<tr>
<td>Includes Voice Recognition Software</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Number of Folders</td>
<td>3</td>
<td>Up to 340</td>
<td>N/A</td>
<td>Up to 99</td>
</tr>
<tr>
<td>Overwrite Function: Insert Dictation to an Existing File, Partial File Erase</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Playback Speed and Volume Control</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Move Messages into Other Folders</td>
<td>Yes</td>
<td>Yes</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>Indexing: 1. Can add transcription comments automatically to the beginning of the file 2. Can add comments to index marks</td>
<td>Yes</td>
<td>Yes</td>
<td>1/No</td>
<td>2/Yes</td>
</tr>
<tr>
<td>Proprietary Native File Format</td>
<td>Yes/.ds</td>
<td>Yes/.mov</td>
<td>Yes</td>
<td>Yes/.sri</td>
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<tr>
<td>Time/Date Stamp on New Files</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>File Lock Capability</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Earphone and Microphone Jack</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Hi/Lo Microphone Sensitivity</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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</tr>
<tr>
<td>Voice Activated Recording</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Priority Function</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Erase One Message or Folder</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Alarms with Message</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Cable and File Transfer Software Included</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Battery Power Indicator</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Price</td>
<td>$395</td>
<td>$330 w/Dragon</td>
<td>$349</td>
<td>$185</td>
</tr>
<tr>
<td>Software Compatible</td>
<td>Win 95, 98, 2000, ME, NT</td>
<td>Win 95, 98SE, 2000, ME, NT 4.0, XP Home, XP Pro</td>
<td>Win 95SE, 2000, ME, NT 4.0, XP Home, XP Pro</td>
<td>Win 95, 98</td>
</tr>
<tr>
<td>Ease of Use without Reference to Manual (1 Being Easiest)</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Accuracy of Conversion of Speech File to Text Using Dragon Naturally Speaking (1 Being Easiest)</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>
true, provided that users correct misspellings and, in some cases, adjust their style of speech. The consistent pronunciation of words, avoidance of slurring words together, and use of complete sentences will all help to improve overall accuracy.

Each voice dictation program provides various commands for formatting a document and text. These commands allow for capitalization, new paragraphs, and punctuation. Moreover, the user can add commands and templates of documents to speed up document production. It also appears that advances in computing power have greatly benefitted speech-to-text software. The latest versions are able to keep pace with a normal speaking voice.

Another plus is that advances in hard drive capacity have made proofreading easier. On most office computers, hard drive space is abundant, and the current professional versions of both products take advantage of this by saving a voice file as well as a text file with each dictation. This allows the user to play back the voice file in order to resolve garbled portions of the text file. Often, the speech recognition software’s translation is so confusing that the author may find it difficult to recall the word or words that were intended. Playing the voice file back is a simple way of discovering what the software missed. Voice files are substantially larger than word processing files, so users need to have considerable hard drive space if they want to preserve their voice files for later use.

Even with the improvements in speech-to-text software, however, it is not likely to be beneficial for all users. The total time necessary to produce a document includes the time spent to input the document as well as edit and proofread it. Assuming a user has spent the time to train the software and learn the various formatting commands, then the inputting can be at the speed of average speech, which is roughly 70 words per minute. Users who correct as they go, however, lose speed. Moreover, the proofreading time may also be significant. A person who accurately types over 60 words per minute will probably not benefit from speech-to-text software. However, someone who types at around 30 words a minute or less could benefit—if the person is prepared to invest the time to work with the software.

Both speech-to-text products can be used to transcribe voice files that are generated by the DVRs. Combining a DVR with either speech-to-text program is probably beneficial if the user would gain from using speech-to-text software alone. On the other hand, using a DVR alone or as a replacement for a tape recorder may benefit any office in which dictation is used to create documents.
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Workers’ Compensation

ON FRIDAY, JULY 11, the Workers’ Compensation Section will present a program on Western Growers that will offer an overview of the case and explain how to argue for or against its application. 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. The registration code is 816LG11. CLE+PLUS members may attend for free ($27 meal not included). Prices below include meal.

$35—Workers’ Compensation Section members
$45—LACBA members
$50—all others

1 CLE hour

Section 17200 Litigation

ON TUESDAY, JULY 15, the Antitrust and Unfair Business Practices Section will present a program on Business and Professions Code Section 17200. The program will cover what every California litigator and business should know about this explosive area of law. This fast-paced, two-hour dinner program will take place at the Omni Los Angeles Hotel (formerly the Hotel Inter-Continental), 251 South Olive Street, Downtown. On-site registration will begin at 5 P.M. and dinner, cocktails, and reception at 5:45, with the program continuing from 6:30 to 8:30. The registration code number is 818DG15. CLE+PLUS members may attend for free ($30 meal not included). Prices below include meal.

$45—Antitrust and Unfair Business Practices Section members
$50—LACBA members
$60—all others

2 CLE hours

Managing Complex Toxic Tort Cases

ON THURSDAY, JULY 17, the Environmental Law Section will present a special luncheon program recommended for law students and newly admitted attorneys. Titled “Management of Complex Toxic Tort and Environmental Litigation: A Judge’s Perspective,” the program will feature Judge Carl J. West, a leading California jurist who oversees multiparty complex environmental litigation. Judge West will share his insights and experience on how he manages these challenging cases and will discuss the latest legal developments in environmental litigation. This program offers an opportunity to learn and to meet with other summer associates, interns, and newly admitted attorneys in the Los Angeles area. The 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. The registration code is 8223LG17. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. CLE+PLUS members may attend for free (meal not included).

$25—Environmental Law Section members
$15—law students ($10 lunch not included)
$25—government and public interest employees
$35—LACBA members
$45—all others, including all at-the-door registrants

1 CLE hour

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) 896-8560 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 County Bar Update.
Breakfast with Giants

Wise counsel from Warren Christopher and Seth and Shirley Hufstedler was on the menu

The series of Los Angeles County Bar Association programs last fall that was billed as “Breakfast with Giants” was a fine example of truth in advertising. I attended the session that featured Warren Christopher and Seth and Shirley Hufstedler. My hand could not write fast enough to keep pace with the wisdom the speakers imparted. Collectively they possess nearly 150 years of professional experience that includes running a federal cabinet-level department, serving on a federal appellate court, leading bar associations, writing books, guiding universities, and advising presidents. They have traversed the breadth and depth of the law in a manner that few achieve, bringing positive change to their communities and nation.

It was fascinating to hear these giants reminisce about the highlights of their careers. But the real pleasure came from observing their equanimity, humanity, and depth of professional devotion. It was well worth the price of admission to hear the principles that have guided them and the advice they now offer lawyers rising through the ranks.

Warren Christopher, a longtime O’Melveny & Myers partner and former U.S. secretary of education, described the elation he felt in 1981 when the 52 American hostages in Iran were freed. He had been waiting for the news in Algiers. Christopher is credited with skillfully negotiating the release of the hostages during his service as the deputy secretary of state. To him, integrity is the most important commodity lawyers have to offer; indeed, lawyers should possess the ability to give “faithful and honest advice.” Still, Christopher conceded that, even at our best, we are all imperfect. He quoted Los Angeles Dodgers great Duke Snider, who was once asked, “What would you have done differently in your life?” Snider said, “I would have stretched more.” Christopher also quoted Sigmund Freud who, to similar effect, said, “We all live the present immaturely.”

This veteran of Los Angeles legal circles and Washington politics urged lawyers “to stand back; put yourself in context; get happiness and satisfaction from what you’ve undertaken.” To young lawyers, Christopher counseled: “Preserve your idealism about the law and judges; you’ll find it rewarded. Maintain your professional network but be relatively unselfish about what you do.” He noted that the most precious gift of a legal career is “the relationships and friendships of people that grow out of what you do.”

Shirley Hufstedler, former Ninth Circuit judge, vividly recalled the late 1970s when, as the first U.S. secretary of education, she was assembling the new cabinet department’s office. “It was a killing job. There were innumerable constituencies that fought like cats and dogs. We succeeded because of the cooperation of extraordinary people who made it happen.” The effort taught her that the key to success in most positions is to find people who are willing to sacrifice for the greater good. Grateful for her friends “of extraordinary quality,” she warned that “you can’t be a chilly, remote person and get very far in life.” She reminded lawyers of first principles: Never cite a case you haven’t read; don’t cut corners with things that matter; there is no excuse for sloppy work; do the best with the law and facts at your disposal.

Hufstedler is nostalgic for the profession of yesteryear: “It was a profession of ‘gentlemen’: your word was good enough.” There was, as she put it, “an orthodontic pressure to obey the rules of good behavior.” She observed that “the bar has lost part of its cohesiveness; I’m not sure we can recapture it.” The fact that “hardball is played regardless of who gets hurt” is “appalling” to Hufstedler. For balance, she is a voracious reader, and urged younger colleagues to “keep your hands in the soil: feel the reality of the earth and watch things grow. That gives meaning to life and reminds you of your humanness.” She added, “You won’t be a good lawyer unless you’re pleased with yourself—unless you have a whole life.”

For decades Seth Hufstedler has enjoyed a highly successful trial and appellate practice while leading local, state, and national bar associations. He noted that one of his most memorable career moments came in 1977 when he represented the California Commission on Judicial Performance in its unprecedented investigation of an ailing 82-year-old California Supreme Court justice’s fitness to continue in office. Ultimately, the justice was forced into retirement by a specially convened tribunal.

Hufstedler—an inveterate hiker who has walked the 2,850 miles that separate Mexico from Canada, among many other journeys—counseled lawyers to try to avoid divisive tactics. He offered special advice to young lawyers: “Give more than you’re asked to give and the chips will fall where you want them to.” Like his wife, he regrets the decline in professional camaraderie and believes the legal profession has lost a great deal as a result of practitioners’ zealous pursuit of money. He noted that his colleague Leonard Janofsky was fond of beseeching lawyers, “Is there a dollar sign in Esquire?” Hufstedler urged lawyers to become active participants in the organized bar: “It’s good for your practice and you’ll feel better about the world—do it for selfish and public reasons.”

These legal luminaries have soared to great heights but still have their feet on the ground. We would all do well to borrow a page from their playbooks.
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