Los Angeles lawyers Jeffrey N. Brown and Teresa A. MacDonald explain the statutory enforcement of settlement agreements

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Jeffrey N. Brown is a litigation partner at Morgan Lewis & Bockius LLP in Los Angeles, and Teresa A. MacDonald is an associate in the same firm. In “Staying Settled,” they identify the pitfalls in enforcing a settlement agreement under Code of Civil Procedure Section 664.6. Their article begins on page 22.

Cover photo: Tom Keller

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ROBERT D. COVIELLO
Mr. Coviello has been actively practicing in Orange County for over 22 years. He has personally tried over 50 jury trials and has been lead counsel in several hundred arbitrations and mediations in employment related matters. He is an Arbitrator on the Employment Panel of AAA and the most recent past Chair of the O.C. Bar’s Labor and Employment Law Section.

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- Will your carrier continue to insure “your type” of practice at your next renewal?
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Good-bye, again. My unplanned second year as chair of the Editorial Board of this extraordinary publication, Los Angeles Lawyer, ends this month. These two years provide proof of the scientific theorem that time flies when you are working with talented and special people, doing something important, making new friends, and having fun.

I have treasured this second year as chair as much as I did my first. As I wrote in what I thought would be my final From the Chair column in the June 2002 issue, “[A]s the curtain drops, I am the one left wanting more.” I was not sure how the audience felt, but I knew how I did. Unexpectedly, I had more. A chair of the Editorial Board first serves (for what seems like many years) as a member of the board and, if fortunate, is chosen to serve as articles coordinator for a year before becoming chair for a year. A chair then gracefully returns to the back benches, hopefully to remain as an active member of our House of Commons—although, at times, we may get a more sleepy candidate for the House of Lords.

As I leave this position, which I have enjoyed so thoroughly, my feelings are bittersweet. My second year was given to me by the sudden death of my intended successor, Abilio “Bil” Tavares Jr. Bil was a kind and gracious person and the most enthusiastic of members in the family of our magazine. The pleasure of my first year as chair was enhanced by Bil’s presence by my side as articles coordinator. He would have served his year as chair with distinction as well as boundless enthusiasm and happiness at having and doing this job. I opened each of our monthly board meetings with silent thoughts of Bil and the hope that we would honor him through our work.

This past editorial year has been distinguished by two special issues, one on the first anniversary of September 11 and another on the 125th anniversary of the Los Angeles County Bar Association. One hundred and twenty-five years is not too bad for almost any voluntary group. In the March 2003 issue, we featured in our pages some of the history and progressive changes of the Association and Los Angeles. Our September 2002 issue illuminated how we, as lawyers, have such an important role in the life of the United States, where so many national matters are often—one is tempted to write always—transmuted into legal matters.

I am starting to be asked about my favorite issue of the past two years. For breadth of writing, uniqueness, lasting value, and the joy of hard work with many brilliant colleagues, I have special fondness for the March 2002 issue celebrating the 25th anniversary of Los Angeles Lawyer. We published 18 articles on different areas of the law, asking our authors to write about the most important event or decision in their topic area in the past 25 years. What amusement my successor for the 50th anniversary or even the 125th may have looking back at our choices. I am also being asked about my favorite cover, and the answer is easy. Each of you who appeared on the cover looked just great.

It has been my continued good fortune to work with the professional staff and the Editorial Board of the magazine. I have written of them in past columns, and I thank them once again. I will miss the monthly opportunity to guide the meetings of this college of thoughtful people. I thank our talented authors, who are sometimes demanding, but that is the challenge of being an editor. I wish the best to the new chair, Jerry Abeles, with whom I have shared this year at the front of the room, and to Gary Raskin, the next articles coordinator, who moves forward from the part of the room to which I now return.

There are few second acts in life. I have just had a wonderful one. Good-bye, again.
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Letters

On Your Mark

As an East Coast IP lawyer who thinks about Southern California at this cold time of year and always thinks about wine, I was delighted to read Bill Seiter’s article (“On Your Mark,” LAL, February 2003) about trademark disputes and wineries. I had the following “musing” after reading Bill’s article during one of our February snowstorms.

Ode to “On Your Mark”

“On Your Mark” is a work truly splendiforous
Dealing with symbols on products viniferous
Gallo and Tyfield taste victory with crepes
To Kendall, Barcamera, and Consorzio it’s all sour grapes

“In Vino Veritas” is the message for the rest of us.

Bill has provided a real-world glimpse into how important trademarks and other IP regimes are to our most important industries. The members of your bar association are a little richer from Bill’s effort.

Jim McKeown

Thank you for a great issue of Los Angeles Lawyer (February 2003). President Miriam Krinsky’s and Executive Director Richard Walch’s response to Attorney Roberts’s letter regarding the BSA is clear, concise, and to the point: Endorsing bias or practicing discrimination by any member of the judiciary weakens the power of the bench to administer justice and enforce the rule of law.

L. Ernestine Fields

Attorney-Client Mediation

Anguish, according to my thesaurus, is “suffering, torment, agony, torture, pain, distress, or grief.” Any lawyer who has received a lawsuit from a former client can identify with these emotions, as did Adam Warshaw, when that process server stood before him (“The Right Business Decision,” Closing Argument, LAL, April 2003).

Being somewhat of an optimist, however, I suggest that there might have been a redeeming aspect to Warshaw’s experience. What was, in Warshaw’s words, “a smooth-flowing sales pitch” to convince a client to accept a reasonable settlement, now may translate into empathy that makes the reasons favoring settlement resonate with a client. This is not an undesirable outcome for future business—a lawyer who understands!

There may have been an even better option for Warshaw to explore. After all, his ex-client likewise faced risks in going to trial. A mediator may have been in a good position to discourse with Warshaw and with his ex-client and/or counsel about the downside of pursuing a claim against him.

The Attorney-Client Mediation and Arbitration Service (ACMAS), a project of the Los Angeles County Bar Association, would have been a great venue to turn to. Its mediators are skilled neutrals who volunteer up to three hours to assist in exactly the kind of dispute Warshaw encountered. The resolution rates are high, and the satisfaction rates are high as well.

A mediator familiar with fee disputes and related issues, typically revolving around inadequate communication or miscommunication, can work to rechannel any misunderstanding into a productive dialogue. This gives the attorney the opportunity to explain and to perhaps avoid the filing of a lawsuit and even collect the outstanding fee.

An attorney has a duty to serve a Notice of Client’s Right to Arbitrate when a fee dispute arises. (See Business and Professions Code Section 6200.) Now, parties have an option to mediate their fee dispute through ACMAS. ACMAS provides the additional opportunity to mediate any other kind of attorney-client dispute.

For an attorney litigant, a neutral’s observations, perceptions, point of view, and analysis of the law and facts can make a difference. The opportunity to listen and to be heard by the neutral is invaluable. Although settling usually is the right business decision, a skilled mediator can make the experience taste sweeter.

Lynne Bassis
Chair of the Mediation Subcommittee of ACMAS

Correction

Mr. Holtzman, thank you for letting us know you enjoyed our article (“Reverse Course,” LAL, February 2003). Thank you also for pointing out my mistake in endnote 30. You are correct that it was Governor Davis who signed AB 1676 into law, not Governor Wilson. The error is a factual oversight that occurred in the editing process and certainly was not intended as a political statement.

Benjamin Shatz
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Applying the Litigation Privilege before Trial

Various statutes serve to protect attorneys from retaliation for claims made for a client

The most effective and economical way for parties to resolve their disputes is to do so without resorting to the courts. Typically, before a complaint is filed plaintiff’s counsel sends a settlement demand letter to the potential defendant. This demand letter sets out the claims, allegations, and the type of recovery sought by the plaintiff. Subsequently, the parties discuss the contents of the plaintiff’s settlement demand letter, particularly the allegations by the plaintiff against the defendant. The communications can be provocative, as they usually include sensitive issues. At times, the allegations are not well taken, and settlement communications break down, with the result that the plaintiff files the complaint. When this happens, what can counsel for the plaintiff do when the defendant retaliates with a counterclaim alleging intentional torts and other claims arising from the prelitigation communications?

The plaintiff’s attorney may use Civil Code Section 47 as a shield to protect the privileged prelitigation communications, while swords are available in the form of a motion for sanctions pursuant to Code of Civil Procedure Section 128.7 and an anti-SLAPP motion for dismissal pursuant to Code of Civil Procedure Section 425.16.

It is well established that communications that have some connection or logical relation to a judicial proceeding, including prelitigation communications, are protected. Civil Code Section 47 states: “A privileged publication or broadcast is one made…[i]n any…judicial proceeding….” The California Supreme Court has held that the litigation privilege applies to any communication 1) made in, or in anticipation of, judicial or quasi-judicial proceedings, including arbitration, 2) by litigants or other participants authorized by law, 3) that have some connection or logical relation to the action, and 4) to achieve the objects of the litigation. The purpose of Civil Code Section 47 is to give litigants freedom of access to the courts and encourage counsel to represent their clients. In fact, most causes of action are protected by this privilege, with the exception of malicious prosecution.1

California’s litigation privilege is absolute as it applies to communications, irrespective of motive or malice. Absolute privilege affords immunity to counsel against tort liability arising out of communications that bear some relation to judicial proceedings, regardless of attempts by a defendant to plead around this absolute barrier and regardless of the particular label applied to the cause of action.2 Indeed, the “privilege should only be denied if the statement is so palpably irrelevant to the subject matter of the action that no reasonable person can doubt its irrelevancy.”3 Despite the California Supreme Court’s guidance, however, the state’s appellate courts continue to debate the issue of whether an attorney’s communicative act is a “publication or broadcast,” which is protected under Civil Code Section 47, or conduct, which is not protected under that section.4 For example, prelitigation settlement discussions via telephone are privileged, but the act of taping those telephone conversations is not.5 As a result, counsel should be cautious with respect to the manner of their prelitigation communications with the potential defendant and defense counsel.

Counsel for a plaintiff can also use the two swords against counterclaims. First, under Code of Civil Procedure Section 425.16, California’s anti-SLAPP statute, a claim against counsel arising from prelitigation communications may be subject to an anti-SLAPP motion to strike.6 The goal of the anti-SLAPP statute “is to eliminate meritless or retaliatory litigation at an early stage of the proceedings.”7 Counsel must file this motion within 60 days of service of the complaint or, in the court’s discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service. If counsel prevails, counsel shall be entitled to reasonable attorney’s fees and costs.

Second, Code of Civil Procedure Section 128.7 authorizes monetary sanctions against a party and the party’s attorney in cases in which a complaint is filed primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Counsel must serve the motion on the defendant but can only file it if the complaint is not withdrawn or appropriately corrected within 21 days after service. Absent exceptional circumstances, a law firm shall be held jointly responsible.

In an ideal world, aggrieved parties seek resolution of their differences, not revenge. In many cases, however, zealous representation takes a costly and wasteful turn away from settlement and toward use of the legal system for purposes of harassment. When counsel for a plaintiff faces these aggressive tactics from defense counsel, the shield of Civil Code Section 47 and the words of Code of Civil Procedure Sections 128.7 and 425.16 are available to return the focus of the dispute to more substantive issues.

By Wendy L. Wilcox

provisions or case law squarely addressing the issue, the admissibility of this evidence must be determined by reference to related code sections and case law. Closely analogous judicial decisions and the policy considerations underlying the relevant statutory provisions provide strong support for the admissibility of deposition testimony from a prior arbitration, so long as certain foundational prerequisites are satisfied.

In a trial de novo following an arbitration conducted pursuant to Code of Civil Procedure Sections 1141.10 et seq. and California Rules of Court 1600 et seq.—commonly referred to as judicial arbitration—evidence presented during the arbitration may not be admitted for impeachment or any other purpose in the subsequent trial. Because either party to a judicial arbitration can obtain a trial de novo as a matter of right, this type of arbitration does not necessarily lead to a final result. The issue of the admissibility of deposition testimony given in connection with a prior contractual arbitration is an open question under California law.

In the absence of statutory provisions addressing the issue, the admissibility of this evidence must be determined by reference to related code sections and case law. Closely analogous judicial decisions and the policy considerations underlying the relevant statutory provisions provide strong support for the admissibility of deposition testimony from a prior arbitration, so long as certain foundational prerequisites are satisfied.

Threshold Question

Given these clear standards, the threshold question is whether the deposition testimony at issue is considered former testimony. Courts have not ruled on whether deposition testimony given in connection with prior contractual arbitration proceedings qualifies as former testimony. The requirements under Section 1292, which applies when the party against whom the testimony will be offered was not a party to the prior proceeding, are similar. Under Section 1292, former testimony is admissible if the witness is unavailable to testify at trial and the party against whom the testimony was offered in the earlier case had an opportunity to cross-examine the witness with an interest and motive similar to that of the party against whom the testimony will be offered in the later case.

The Admissibility of Arbitration Depositions at Trial

Depositions from prior contractual arbitrations can be a source of valuable evidence

In commercial litigation or other types of civil actions, the parties may have been involved in prior litigation concerning subject matter similar to the current litigation. Deposition testimony from those earlier proceedings often will prove to be a valuable source of information and evidence. However, with the increasing use of private contractual arbitration instead of judicial litigation to resolve disputes, relevant deposition testimony, when it exists, is increasingly likely to have been generated in arbitral rather than judicial proceedings. The California Evidence Code does not explicitly address the admissibility of deposition testimony given in connection with a prior contractual arbitration. While the admission of a party is always exempt from the hearsay rule, whether other deposition testimony taken in a prior arbitration may be admitted under the Evidence Code provisions governing “former testimony” appears to be an open question under California law.

In the absence of statutory provisions or case law squarely addressing the issue, the admissibility of this evidence must be determined by reference to related code sections and case law. Closely analogous judicial decisions and the policy considerations underlying the relevant statutory provisions provide strong support for the admissibility of deposition testimony from a prior arbitration, so long as certain foundational prerequisites are satisfied.

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under Section 1290. While an overly narrow interpretation of the Evidence Code could be applied to exclude arbitration testimony, a better reading of the relevant law suggests the contrary.

"Former testimony" is defined in Evidence Code Section 1290 as sworn testimony given in:

(a) Another action or in a former hearing or trial of the same action;
(b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States;
(c) A deposition taken in compliance with law in another action; or
(d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.

The relevant provisions are the first clause of subsection (a), testimony given under oath in "another action"; subsection (c); and subsection (d).

The most compelling argument for admissibility is that deposition testimony given in an earlier arbitration proceeding constitutes former testimony given under oath in "an arbitration proceeding" under Section 1290(d). Assuming, as will usually be the case, that the deposition was given under oath and a verbatim transcript exists, the deposition testimony would appear to satisfy all the substantive requirements of the subsection. For that reason, its use clearly is consistent with the policy considerations underlying that subsection.2

There is, however, a narrow textual argument that the section should not apply. Section 1290 implicitly distinguishes between testimony given in "another action" and "a deposition taken in compliance with law in an arbitration proceeding." Given this semantic distinction, one could argue that the legislature consciously drew a distinction between testimony given in the substantive trial or hearing of an arbitration, not to depositions taken prior to that hearing. Under that reading, Section 1290(d) would apply only to testimony given at the actual evidentiary hearing of an arbitration, not to depositions taken prior to that hearing. According to the argument, if the legislature had intended to recognize as former testimony the testimony that is given in a deposition taken in connection with arbitration proceedings, it would have explicitly said so in a section paralleling Section 1290(c). In other words, the statute would explicitly include testimony given in "a deposition taken in compliance with law in an arbitration proceeding."

But if the policies and concerns underly-
ing the statutory text are considered, the proponent of admissibility should have the prevailing argument. A deposition taken in connection with a contractual arbitration proceeding has all of the indicia of reliability that exist for a deposition taken in connection with a prior judicial action. The absence of a specific subsection discussing depositions taken in connection with a prior arbitration proceeding can be attributed to 1) the fact that no depositions are permitted or taken in many arbitrations, and 2) the fact that the current iteration of the statute dates from 1967, prior to the great proliferation in arbitrations resulting from the relatively recent explosion in the use of alternative dispute resolution. Note, for example, that Code of Civil Procedure Section 1283, which authorizes the taking of depositions “for use as evidence and not for discovery” in arbitration proceedings, was not enacted until 1971.

Other Contexts

While no California case law directly addresses this question, there is case law supporting a relatively expansive reading of the term “former testimony” in other contexts. In Moore v. Conliffe, the California Supreme Court faced the question “whether a witness who testifies at a deposition held in connection with a private, contractual arbitration proceeding is subject to being sued in a tort action on the basis of statements made in the course of such testimony, or instead, like any witness in a court proceeding, is immunized from tort liability by virtue of the ‘litigation privilege’ embodied in [Code of Civil Procedure Section 47(b)].”

Analyzing prior decisions interpreting the litigation privilege and the policy considerations underlying Section 47(b), the Moore court held that the deposition testimony from a private contractual arbitration is protected by the privilege.

In Moore, the plaintiff had argued that the litigation privilege should not apply because the text of Section 47(b) limits its application to testimony given in “any…judicial proceeding,” and a contractual arbitration is not a “judicial proceeding.” The court rejected this argument, finding that the policies behind, and history of, Section 47(b) compelled a finding that the term “judicial proceeding” should be read broadly to include deposition testimony given in connection with a contractual arbitration proceeding. Although the court was interpreting slightly different language than that presented by Section 1290, much of the Moore court’s analysis is equally applicable to the issue of the admissibility of deposition testimony taken during the course of a prior contractual arbitration. For example, the court specifically approved holdings in

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prior cases that “an arbitration hearing falls within the scope of this privilege because of its analogy to a judicial proceeding.” Refusing to recognize a distinction between testimony given in connection with a judicial arbitration under Code of Civil Procedure Sections 1141 et seq. and a private contractual arbitration, the court held that “[f]rom the perspective of a witness who is called upon to testify in an arbitration proceeding, the two types of arbitration proceedings are virtually indistinguishable.”

Of course, establishing that the prior deposition testimony qualifies as former testimony under Evidence Code Section 1290 is not the end of the inquiry. For the testimony to be admissible, the proponent still must satisfy the requirements of either Section 1291 or 1292. One of the most important issues in applying either Section 1291 or 1292 is whether the motives for cross-examining the deponent are sufficiently similar in the prior and current proceedings.

Sections 1291 and 1292 are only two of several evidentiary gateways through which testimony given in prior proceedings may be introduced. If the proponent of the testimony establishes the requisite foundational elements, the testimony may be admissible as an admission under Evidence Code Sections 1220, 1221, and 1222. Alternatively, if the witness offers testimony in the present action that is at odds with the witness’s prior deposition, the prior testimony may be used for impeachment and may be substantively admissible as a prior inconsistent statement. Sections 1291 and 1292 offer the advantage, however, of additional bases for admissibility that do not depend upon the same foundational showings as Sections 1220, 1221, and 1222.

As with any evidence, counsel should consider all possible theories of admissibility for prior deposition testimony. For deposition testimony given in connection with prior arbitration proceedings, Evidence Code Sections 1291 and 1292 provide an additional potential means of introducing helpful evidence. In certain cases, these sections will allow an advocate to draw on powerful evidence that would not otherwise be admissible.

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2 See generally Horwich v. Superior Court, 21 Cal. 4th 272, 276 (1999) (The court should avoid a narrowly litigated interpretation of a statute if a broader interpretation would serve the statute’s underlying purpose.).
3 Compare EVID. CODE §§1290(a) and 1290(c).
4 Moore v. Conliffe, 7 Cal. 4th 634 (1994).
5 Id. at 638.
6 Id. at 637-38.
7 Id. at 641-51.
8 Id. at 647 (citation omitted).
9 Id. at 648 n.6.
10 EVID. CODE §§1291, 1292.
11 See generally EVID. CODE §§8240 (defining unavailability); 1291a(1) (Testimony may be offered against former proponent); 1291a(2) (Testimony may be offered against a party who had opportunity and motive to cross-examine the witness in a prior proceeding.). In many circumstances, discovery depositions taken in connection with prior litigation will not satisfy the “similar motive” requirement of §1291a(2) because the opposing party can argue that it had an interest in reserving its cross-examination for trial rather than showing its hand at the deposition. In contractual arbitration, however, depositions often serve as a substitute for live testimony at the final evidentiary hearing. See CODE CIV. PROC. §1283 (authorizing depositions in arbitration proceedings “for use at evidence and not for discovery”). In such circumstances, the testimony is more akin to trial testimony than to a traditional discovery deposition and thus is more likely to meet the similar motive requirement.
12 An admission for purposes of the hearsay exceptions is any out-of-court statement or assertive conduct by a party to the action that is inconsistent with a position the party is taking at the current proceeding. Colarossi v. Coty Us Inc., 97 Cal. App. 4th 1142, 1150 (2003). The statement or conduct need not contradict an essential element of the party’s prima facie case. It is enough that the out-of-court statement or conduct contradicts something the party is trying to prove or supports something the proponent of the evidence is trying to prove. Gates v. Pendleton, 71 Cal. App. 752, 756 (1925).
13 EVID. CODE §§780(h), 1235; People v. Zapien, 4 Cal. 4th 929, 951-52 (1993); People v. Manson, 71 Cal. App. 3d 1 (1977).
Structuring Workouts with Tenants Facing Bankruptcy

**practice tips**

By Anton N. Natsis, Peter J. Roth, and Michael S. Greger

Landlords need careful guidance on laws that affect the restructuring of leases

The destructive effects of the current economic decline have not been limited to the capital markets. Commercial real estate landlords have also suffered significantly, particularly landlords with a high concentration of tenants in the technology field. As the bear market has continued, landlords have been forced to shift their focus to restructuring existing leases rather than entering into new deals with tenants. Attorneys advising landlord clients should explore several prominent issues that may arise under California and federal bankruptcy law in connection with the restructuring of a commercial real property lease. Real estate practitioners can explore these issues with a hypothetical lease restructuring.

Notwithstanding a landlord’s best efforts to protectively structure leases and to secure adequate credit enhancement, leases frequently are consummated with inadequate credit enhancement or variants of credit enhancement that may not survive a tenant bankruptcy. Therefore, when approached by tenants seeking a modification (or workout) of their lease obligations, a landlord will concentrate upon the maximization of the amount of monetary and non-monetary consideration given to the landlord by the tenant, the security backing the payment of the consideration, and the protections available should the tenant enter into a bankruptcy proceeding after a workout is consummated.

To minimize the impact of a tenant’s bankruptcy on a landlord’s ability to receive and retain consideration and utilize security, at least three major bankruptcy-oriented obstacles should be considered:

- **The Bankruptcy Code and California law doctrines** that mandate that transactions that do not exchange “reasonably equivalent consideration” may be avoided if the transactions occur at certain times before a bankruptcy filing. These claims are called fraudulent conveyances.
- **The Bankruptcy Code provisions** that avoid transactions consummated during the 90-day time period immediately preceding a bankruptcy filing if a creditor receives a payment on account of a preexisting debt. This claim is known as a preference.
- **The Bankruptcy Code provisions** that caps a landlord’s maximum recovery in bankruptcy for lease damages at the greater of either one year of rent or 15 percent of the remaining rental stream under the lease. This cap obliges a landlord to structure the components of a workout to implement the best available strategies relating to the workout consideration and security.

These three general areas of concern need to be evaluated in connection with any consideration a tenant proposes to give a landlord in connection with a lease workout. The components of a workout for a landlord to evaluate commonly include:

- Allowing the landlord to keep the cash deposit that the tenant made when the lease began.
- A cash payment made by the tenant to the landlord.
- Allowing the landlord to draw on a letter of credit issued when the lease began.
- Allowing the landlord to keep undisbursed tenant improvement allowance funds.
- Transfer of stock in the tenant company.
- A promissory note issued to the landlord.
- Creation of a new letter of credit to secure that note.

Fundamental to an evaluation of the various forms of considerations available to a landlord in a workout is the method used to calculate damages. A landlord’s damages in connection with a lease termination are first calculated under California law without regard to any bankruptcy limitations. Of a landlord’s two alternative California law remedies — typically, California Civil Code Section 1951.2 will apply to a bankruptcy. Under this section, if a tenant rejects a lease in bankruptcy (or the lease is rejected by the bankruptcy court), the landlord will be entitled to assert a damage claim against the tenant equal to the net present value of future rents due under the lease during the remaining term (less the amount of rent that the tenant proves the landlord could recover by releasing the property to a third party) plus the costs incurred by the landlord to create such mitigation.

While this formula appears straightforward, courts have applied it inconsistently and unpredictably. Accordingly, in the event a breach occurs at the inception of a lease, there is a significant risk that a California court will not award a landlord the full amount mandated by statute. Furthermore, in bankruptcy, a landlord’s damages are capped at the lesser of the actual damages under California law or the amount of the bankruptcy cap under Bankruptcy Code Section 502(b)(6). With respect to the cap, Bankruptcy Code Section 502(b)(6)(A) sets a landlord’s rejection damages no higher than “the rent reserved by such lease, without acceleration, for the greater of one year, or fifteen percent...not to exceed three years, of the remaining term of such lease.” The significant majority view is that the 15 percent figure is calculated by multiplying 15 percent by the aggregate rent due from the bankruptcy filing through the natural lease expiration (i.e., the remaining rent x .15). The minority view is that the figure is calculated by multiplying 15 percent by the total months remaining on the lease from the bankruptcy filing through the natural lease term.
nation and then aggregating the rent due from the bankruptcy filing during the total number of months calculated. This may be expressed as: (remaining months x .15) x remaining rent.

The bankruptcy cap is only applicable to damages incurred by a landlord due to a tenant’s rejection of a lease during bankruptcy. In other words, any amount transferred to a landlord prior to a tenant’s bankruptcy will not be subject to the bankruptcy cap unless it is deemed a preference or fraudulent conveyance.

Another important factor in the calculation of the bankruptcy cap is the definition of which, for purposes of calculating the cap under Section 502(b)(6), is not entirely settled. Some courts conclude that the term only includes fixed and regular payments and excludes such charges as general maintenance or utilities, but within the fixed charges these courts include minimum rent, guaranteed parking charges, real estate taxes, and insurance. At least one court in the Ninth Circuit has adopted the following three-part test to determine what constitutes “rent reserved”:

- The charge must be designated as “rent” or “additional rent” in the lease, or be provided as the tenant’s obligation in the lease.
- The charge must be related to the value of the property or the lease thereon.
- The charge must be properly classifiable as rent because it is a fixed, regular, or periodic charge.

Under this definition, the term “rent reserved,” in the context of a triple-net or base-year lease, would presumably include minimum rent, parking charges, real estate taxes, insurance, and common area maintenance fees owed by a tenant. However, courts continue to apply these rules inconsistently, making the exact bankruptcy cap that is applied unpredictable and making the exposure that landlords face depend upon the jurisdiction in which a case is filed. It is important to note that all damages resulting from a termination or rejection of the lease are subject to the bankruptcy cap under Section 502(b)(6). In addition to unpaid rent, the bankruptcy cap also likely applies to any of the tenant’s obligations to restore or demolish the premises at the end of its lease term. The bankruptcy cap, however, does not cover a landlord’s damages that are not related to lease termination, such as those resulting from a tenant’s neglect of the premises.

There is little, if any, case law regarding whether the bankruptcy cap applies to payments made to a landlord prior to a bankruptcy filing. For example, assume that in a proceeding the applicable bankruptcy cap is $1 million and the state law damages exceed $2 million. Prior to filing bankruptcy, the tenant pays the landlord a $2 million fee to terminate the lease (which had, at the time, a remaining rental liability in excess of $2 million). If the tenant eventually files for bankruptcy, creditors will argue that the landlord has to return the amount of the tenant’s payment that exceeded the bankruptcy cap (in this case, $1 million). Their argument is without merit for several reasons. First, the bankruptcy cap only applies if and when a bankruptcy has been filed. Given that the payment was made at a time predating the bankruptcy, the bankruptcy cap should have no bearing on that payment. Second, the bankruptcy cap is merely a defense available to the bankruptcy estate to limit the amount of claim that the landlord can assert against the estate. It does not create any form of avoidance action that allows the tenant to recover payments previously made that may exceed the bankruptcy cap. Lastly, there is no reported bankruptcy case that supports this theory. Thus, a landlord should not have to repay the amount exceeding the bankruptcy cap.

Furthermore, courts have not yet answered the question of whether a pre-bankruptcy payment to a landlord that exceeds the bankruptcy cap constitutes a fraudulent conveyance if it is not supported by reasonably equivalent consideration. Because the equivalency and fairness of a transaction are measured relative to the date of the transfer (and not, assuming a bankruptcy is filed, some speculative future date), there should be no fraudulent transfer liability under the example, since the tenant paid $2 million in exchange for the release of in excess of $2 million in claims at the date of the transfer. In fact, a tenant should be willing to pay more to terminate a lease if it will avoid a bankruptcy filing and thus avoid the consequent negative effects on its business.

### Analysis Of Bankruptcy Impacts on Consideration and Security

<table>
<thead>
<tr>
<th>Type of Consideration or Security</th>
<th>Possible Impacts Based upon the Tenant’s Filing for Bankruptcy within 90 Days of the Workout</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FRAUDULENT CONVEYANCE</td>
</tr>
<tr>
<td>Use of Cash Security Deposit (received at lease inception)</td>
<td>NO</td>
</tr>
<tr>
<td>Cash Payment (paid before filing)</td>
<td>NO</td>
</tr>
<tr>
<td>Draw upon Letter of Credit (issued at lease inception and drawn before filing)</td>
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<tr>
<td>Extinguishment of Undisbursed TIA (applied before filing)</td>
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<tr>
<td>Note</td>
<td>NO</td>
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<tr>
<td>Creation of New Letter of Credit (securing the note and issued before filing)</td>
<td>NO</td>
</tr>
</tbody>
</table>

**Fraudulent Conveyances and Preferences**

Under Civil Code Section 3439 and federal Bankruptcy Code Section 548, a debtor can avoid any payment or transfer of property made while the debtor was insolvent, or that effectively rendered the debtor insolvent, when it is not supported by “reasonably equivalent consideration.” In the context of laws prohibiting fraudulent transfer or conveyance, the release of existing claims or antecedent debt owed by a debtor constitutes value. Additionally, the value of the consideration exchanged in the transaction is measured on the date of the transfer that is the subject of the challenge. Any action based on a fraudulent conveyance theory (and not based on an actual intent to defraud) must be brought by the claimant within four years under Civil Code Section 3439 or one year under...
Bankruptcy Code Section 548, whichever is greater. In the event a court determines that a fraudulent conveyance occurred, the court may order the creditor landlord to return the actual property transferred or to pay the value of the transfer. Although California law does not clearly resolve this issue, the Bankruptcy Code provides that a good faith transferee has a lien on or may retain any interest transferred to the extent of the actual value delivered by the transferee to the debtor. 10

Assuming that a tenant debtor is insolvent or rendered insolvent by a termination agreement and that the tenant pays the landlord total consideration that exceeds the landlord’s damages under California law, then that consideration may be avoided as a fraudulent transfer or conveyance, since the payment exceeds what was owed to the landlord. In the event that a bankruptcy court determines (while taking into account the total workout transaction consummated by the landlord and the tenant) that the termination agreement involves a fraudulent transfer or conveyance, the court can then void the portion of the consideration that exceeds the tenant’s liability to the landlord. For this reason, during lease and workout negotiations landlords should be cognizant of the total damages they would incur if the lease were terminated and compare these damages to the consideration proposed by the tenant for the restructure.

A related concern for landlords is Bankruptcy Code Section 547, which provides that a party that receives a payment from a debtor on account of an antecedent debt may be forced to disgorge that payment as a preferential transfer. The purpose of this section of the Bankruptcy Code is to prevent the debtor from favoring one creditor over other similarly situated creditors. This provision applies to any transfers occurring during the 90-day period immediately preceding a tenant’s bankruptcy filing that put the landlord in a better position than the tenant’s other creditors. 11

If a bankruptcy court determines that a transfer results in a preference, then the transfer may be voided and must be returned to the debtor. Instead of keeping the consideration, the creditor will be obliged, along with all the debtor’s other creditors, to submit its damage claim to the bankruptcy estate. Additionally, the claim is limited by the bankruptcy cap.

Under the preference theory, a bankruptcy court has very broad powers to void any transfers made by a debtor tenant, especially in cases in which no new value is created for the debtor (for example, when only an antecedent debt is extinguished). However, these powers are limited to transactions occurring during the 90-day period immediately preceding the date a tenant files for bankruptcy. 12 In contrast, under the fraudulent conveyance theory, the period is extended up to four years prior to the date a tenant files for bankruptcy protection. However, the bankruptcy court’s power to void transactions is limited to those that are not supportable by reasonably equivalent consideration. Landlords should keep this limitation in mind during workout negotiations with tenants.

Another portion of a workout that a landlord should consider in light of the complications of bankruptcy is a letter of credit. Generally, once a letter of credit is issued, the issuer (typically, the tenant’s bank) becomes statutorily obligated to honor drafts drawn by the beneficiary that comply with the terms of the credit. 13 Indeed, under longstanding commercial law, the obligation of the issuer to the beneficiary under the letter of credit is completely independent and distinct from the tenant’s obligation on the underlying contract to the beneficiary. 14 This principle has been recognized as the cornerstone of the law of letters of credit. 15 Put another way, the issuer must pay on a proper demand from the beneficiary even though the beneficiary may have breached the underlying contract with the tenant.

The preference statutes, however, raise several issues for landlords holding letters of credit to secure their leases. While a small minority of bankruptcy courts (not including the Ninth Circuit) find that landlords who draw on a letter of credit within the preference period have received preferential transfers, these rulings fail to consider that the letter of credit is not property of the debtor’s bankruptcy estate, and thus by definition cannot be considered part of a transfer of a debtor’s assets. Yet, one court held that a landlord may be sued for receiving preferential transfers from the debtor even though the landlord was fully secured under the terms of a letter of credit for the amounts of the payments received. 16 Based on this ruling, landlords may be required to return payments they have received during the preference period even though they had the right to draw on a letter of credit for the full amount of such payments during the preference period.

In order to obtain a letter of credit, a tenant is typically required to secure its obligation by granting the issuer a security interest in certain of the tenant’s assets. Under preference laws, a problem may arise when the tenant, during the preference period, either increases the amount of collateral securing the letter of credit, provides security to the issuer to secure an existing letter of credit, or provides collateral to secure a new letter of credit. Courts will deem that a grant of a security interest that is given after the inception of the lease to secure an existing letter of credit or the issuance of a new letter of credit constitutes a transfer of assets for purposes of preference laws. If the transfer grant of a security interest occurs during the preference period on account of the tenant’s existing obligation to reimburse the issuer under a letter of credit, the debtor may avoid the transfer against the issuer to further secure an existing letter of credit or to secure a new letter of credit. In addition, under Bankruptcy Code Section 550(a)(1), a debtor may sue and potentially recover from the landlord (as the beneficiary of the letter of credit) on the grounds that the landlord was “the entity for whose benefit such transfer was made.” Even though the beneficiary is holding a letter of credit that was issued outside of the preference period, the beneficiary may still face preference exposure based upon a transfer made to the issuer during the preference period. In such a case, the benefits and protections afforded the landlord from a letter of credit will be void.

A comprehensive workout can be examined in order to learn how state and federal law can be applied and how a landlord may structure the workout to maximize consideration and security. The following situation serves as an example of this process.

Applying the Law

The landlord is a traditional institutional property owner, and the tenant is a recently formed company that, while once flying high, has seen gross revenues plummet, its work force significantly cut back, and its stock price fall substantially. The tenant has 10 years remaining on its lease with the landlord. The leased premises are located in a 15-floor class A office building containing a total of 300,000 square feet. The tenant leases 50,000 square feet on two contiguous floors. The tenant’s base rent, at $5 per rentable square foot per month, is currently twice the fair market value of $2.50 per rentable square foot per month. Since March 2000, the tenant’s stock price has plummeted from $90 per share to $1.50 per share. Additionally, $1 million of the original tenant improvement allowance (TIA) under the lease remains undisbursed. Pursuant to the terms of the lease, the tenant provided the landlord with a cash security deposit equal to $250,000 (one month of base rent) and a letter of credit equal to $1.5 million (six months of base rent). After downsizing, the tenant’s remaining space needs could be satisfied with a 10,000-square-foot partial floor.

The tenant desires a termination agreement. As consideration for termination, the landlord would retain the existing letter of credit and apply the cash security deposit.
Additionally, the landlord would be released of any obligation to pay the undisbursed TIA, and the tenant would deliver to the landlord $50,000 shares (a value of $75,000) of its common stock, $750,000 cash (three months’ current base rent), and a promissory note in an amount of $750,000. The total consideration or termination fee thus equals $4,325,000.

As security for the note, the tenant is willing to deliver the landlord a new letter of credit for $750,000. An application of California and federal bankruptcy law to this situation allows an analysis of the correct manner in which to structure the workout.

The landlord’s California law damages (calculated pursuant to Civil Code Section 1951.2) would be large. Even assuming immediate mitigation for the entire leased premises at the fair market value of $2.50 per rentable square foot per month, and not including the payment by the landlord of any new brokerage commissions or TIAs, the landlord’s damages approximate $15 million (i.e., $125,000 per month for 120 months). Regarding the bankruptcy cap, since the lease has a remaining term of 10 years, the 15 percent analysis will apply, resulting in a bankruptcy cap in excess of $4.5 million (15 percent of the remaining $30 million base rent obligation plus amounts attributable to additional rent or rental escalation). Therefore, a bankruptcy cap of $4.5 million will be applicable.

Generally, if a security deposit has not been applied by the landlord prior to a bankruptcy filing, then the cash security deposit becomes an asset of the debtor’s bankruptcy estate, and the landlord must first obtain relief from the automatic stay before it can offset the security deposit against damages, even if the lease is ultimately rejected. Thus, while the landlord’s damage claim would likely be secured in an amount equal to the security deposit (to the extent the cash security deposit, along with other consideration paid postfiling, does not exceed the bankruptcy cap or the landlord’s state law damages), the landlord may nevertheless find itself enjoined for an extended period by the automatic stay from applying the security deposit. This creates serious cash flow issues for the landlord. In addition, to the extent a cash security deposit exceeds the cap, the landlord may be forced to disgorge a cash security deposit. This reasoning is based on the legislative history and case law behind Section 502(b)(6), which makes it clear that the amount of a cash security deposit that exceeds the bankruptcy cap must be returned to the bankruptcy estate.

If the ailing tech company tenant surrenders to the landlord the existing cash security deposit as a portion of the termination fee prior to filing for bankruptcy protection, the landlord will not likely face any issues concerning the bankruptcy cap. This is because the deposit was paid and applied prior to the bankruptcy filing, and even if the bankruptcy cap were deemed to apply to the prefiling transaction, the total amount of consideration is less than the bankruptcy cap of $4.5 million. Moreover, the application of the cash should not be considered a preference (since the cash security deposit was actually transferred to the landlord at the inception of the lease, long before the preference period). In addition, it is unlikely that the transfer would be deemed a fraudulent conveyance, because the tenant will receive reasonably equivalent consideration (specifically, the release of future lease obligations). Thus, the landlord should accept the tenant’s surrender of the security deposit as part of the restructure.

The cash that the tenant pays to the landlord as a portion of the termination fee prior to filing for bankruptcy should not be subject to the bankruptcy cap, again due to the fact that the bankruptcy cap is applicable only to payments made during bankruptcy. However, assuming the tenant files for bankruptcy within 90 days of the payment, the transfer may be challenged as a preference because the cash payment is made on account of antecedent obligations under the lease. As long as the total consideration ($4,325,000) paid under the termination agreement (including any cash) is deemed reasonably equivalent to or less than the tenant’s remaining liability under the lease ($30 million), it is unlikely that the transfer will be considered a fraudulent conveyance.

**Drawing on the Letter**

If the landlord draws on the existing letter of credit (as a portion of the termination fee) prior to the tenant’s filing for bankruptcy protection, that amount will not be subject to the bankruptcy cap, because the bankruptcy cap is only applicable to payments made during bankruptcy. The amount also will not be considered a preference, because the letter of credit is not an asset of the tenant’s bankruptcy estate and because the tenant had pledged the amount as security to the landlord outside the preference period. Assuming that the total consideration is less than or equal to the tenant’s existing liability under the lease under California law, it is furthermore unlikely that the transfer shall be deemed a fraudulent conveyance, since the tenant will receive reasonably equivalent consideration for the release of future lease obligations.

If the tenant provides the landlord with the new letter of credit as security for a portion of the termination fee, the new letter of credit should not be subject to the bankruptcy cap (again because the bankruptcy cap is only
applicable to payments made during bankruptcy). However, the new letter of credit is likely to be challenged as a preference. Finally, assuming that the total termination consideration is less than or equal to the tenant’s existing liability under the lease under California law, it is unlikely that such transfers shall be deemed a fraudulent conveyance.

In the scenario, the landlord is obligated to pay the tenant the undisbursed TIA, which amounts to $1 million. The landlord should not face any bankruptcy cap, preference, or fraudulent conveyance issues regarding what the tenant surrenders of the undisbursed TIA (as a portion of the termination fee) before filing for bankruptcy protection. First, since the application of the undisbursed TIA occurred prefiling, and the total consideration of the termination fee (including the undisbursed TIA) is less than the bankruptcy cap, the bankruptcy cap should have no application. Second, under Bankruptcy Code Section 553, the setoff of mutual obligations during the preference period is only actionable if the obligations owed by the debtor exceed the obligation owed by the nondebtor. The landlord is owed $30 million or more, so the tenant’s release of claims to the undisbursed TIA should not create issues of preference or fraudulent conveyance.

Provided the tenant does not declare bankruptcy, the value of a note to the landlord would be subject only to the tenant’s economic ability to pay. However, if the tenant declares bankruptcy, the note would be subject to the bankruptcy cap (but not preference or fraudulent conveyance rules) since the note is merely the reflection of a prior obligation already owed by the tenant (assuming the note is not in an amount exceeding the tenant’s existing obligations under the lease). The note provides the landlord with a secured claim (up to the amount of the bankruptcy cap, as the note would likely be disallowed to the extent it exceeds the bankruptcy cap). The security for the note (i.e., the new letter of credit) would be subject to preference if it is granted or perfected within 90 days of the tenant’s bankruptcy filing.

If the tenant grants the landlord stock, the value of the stock would be subject to preference and fraudulent conveyance rules, but the bankruptcy cap should not apply.

Landlords have recently been disappointed by the performance of some tenants in the technology industry. In evaluating lease restructuring transactions, landlords should use diligence when working out the consideration and security to be provided by the tenants. Otherwise, the landlord’s disappointment may be compounded.
Litigants often spend long hours negotiating settlements, employing the talents of judges and mediators to arrive at what appear to be final agreements, only to find that when the judge or mediator has gone they are back where they started—in disagreement. Judging from the number of appellate decisions on the topic, it is not uncommon for a party to renege on what an opposing party considers to be an agreement to end litigation. Until 1981, the party seeking to enforce that agreement had several cumbersome alternatives: file a motion for summary judgment, amend the answer or complaint to add a defense or claim based upon the “settlement contract,” or file a separate action alleging breach of contract or specific performance of the settlement agreement.

There was, in addition, a line of authority that recognized the inherent power of a trial court to enforce, by way of a nonstatutory motion for entry of judgment, a settlement agreement presented by the parties in the course of, or as a result of, judicially supervised settlement proceedings. In enacting Code of Civil Procedure Section 664.6 in 1981, the California Legislature not only endorsed this procedure “but expanded it beyond the context of judicially supervised settlement conferences.”

While the current text of Section 664.6 is slightly changed since its original enactment, its main thrust remains the same—to give trial courts a summary procedure to enforce settlement agreements:

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

Section 664.6 thus requires that the trial court enforce the settlement by entering a judgment setting forth the terms. It also provides that the judgment enforcing the settlement can include a provision that the trial court retains jurisdiction to make sure all the terms of the settlement have been completed.

In order to fashion enforceable settlements or to avoid the assertion of a final set-
tlement when that is not the intent, attorneys need a clear understanding of Section 664.6 and its implications. Although most litigators have some knowledge of Section 664.6, recent cases show that parties must pay careful attention to its requirements or face potential problems.

Section 664.6 is shrouded with the “strong policy favoring settlement of litigation.” Thus, parties opposing a motion to enforce a settlement under Section 664.6 often face an uphill battle. Yet, the very finality of settlement persuades courts, albeit reluctantly at times, to refuse to enforce settlements under Section 664.6 if the statute’s specific statutory requirements are not met. According to the California Supreme Court, “These requirements minimize the possibility of conflicting interpretations of the stipulation or its effect.”

Requirements of Section 664.6

To take advantage of the summary procedure of Section 664.6, the settlement must be reached during pending litigation. Courts have disallowed 664.6 motions brought before and after pending litigation. For example, in Kirby v. Southern California Edison Company, the plaintiff brought suit for wrongful death. The defendant filed a Section 664.6 motion to enforce a settlement that had been entered into before the filing of the lawsuit. Without addressing the plaintiff’s contentions that the purported settlement was obtained through fraud and coercion, the court focused on the procedural content of the motion and held that Section 664.6 was not available to the defendant because the alleged release was obtained prior to the filing of the lawsuit.

Similarly, in Viejo Bancorp, Inc. v. Wood, a bank and its officers were parties in four different lawsuits concerning the management of the bank, which were resolved by one written settlement agreement. After the case had been dismissed with prejudice, the bank filed suit and sought to use Section 664.6 to force the former chief executive officer to comply with the terms of the settlement agreement. The Viejo court held that because Section 664.6 requires that it be invoked only if litigation is pending, a party could not use its provisions to enforce a settlement that had been reached in a separate, prior action.

Yet, in In re Marriage of Armato, as in many family law cases, the court retained jurisdiction to enforce child support payments after dissolution was entered. Therefore, “pending litigation” existed when the wife moved under Section 664.6 to enforce an agreement between the parties for higher child support payments.

Another trap involves settlements not signed by the party itself. Section 664.6 provides alternative methods for establishing the parties’ agreement to settle and the terms of the settlement, either “in a writing signed by the parties outside the presence of the court or orally before the court.” A majority of the appellate decisions construing Section 664.6 focus on the meaning of “a writing signed by the parties.” The California Supreme Court, in Levy v. Superior Court, answered “whether the term ‘parties’ literally means the litigants personally or whether it also includes the litigants’ attorneys of record.”

The court analyzed the legislative history of Section 664.6 and reasoned that a “settlement is such a serious step that it requires the client’s knowledge and express consent.” Thus, the court then concluded that “the term ‘parties’ as used in Section 664.6…means the litigants themselves, and does not include their attorneys of record.” Thus, in construing the requirements of Section 664.6, the court declined to rely upon traditional laws of agency whereby an attorney may bind a party.

Various appellate courts subsequently fine-tuned the “signing” requirement of Section 664.6. In Harris v. Rudin, Richman & Appel, the Second Appellate District addressed the question of whether a party who had not signed the purported settlement agreement could enforce the settlement against its opponent who had. The court held that the statute’s requirement of a writing “signed by the parties” required “the signatures of the parties seeking to enforce the agreement under section 664.6 and against whom the agreement is sought to be enforced.”

In Williams v. Saunders, the Third Appellate District held that the fact that the appellant’s husband and her attorney had authorization to act on her behalf was not sufficient to invoke Section 664.6. Referring to the Levy decision, the Williams court reiterated that in enacting Section 664.6, the legislature “created a summary, expedited procedure to enforce settlement agreements when certain requirements that decrease the likelihood of misunderstandings are met.” Thus, the court declined to rely on traditional agency law for statutory enforcement of a settlement and disallowed spouses and attorneys to bind parties under Section 664.6.

More recently, in Gauss v. GAF Corporation, the First Appellate District held that “Section 664.6, as construed by the Supreme Court in Levy, simply does not permit the use of its summary, expedited procedures to enforce a settlement agreement signed only by a party’s agent.” GAF Corporation was a member of the CCR, a nonprofit corporation founded by manufacturers, distributors, and sellers of asbestos to handle all aspects of asbestos litigation. GAF gave “the CCR ‘exclusive authority’ to settle, pay or defend asbestos claims asserted against [it].” Over a number of years, the CCR settled several asbestos cases on behalf of GAF. A controversy erupted, however, between GAF and the CCR when GAF refused to pay its share of several settlements apportioned to it by the CCR. Several of the plaintiffs brought successful motions to enforce the settlements against GAF under Section 664.6. On appeal, the GAF court explained that the signature requirement applied equally to corporations and did not permit claim managers to bind a party without that party’s signature even though the party had given express consent for the claims manager to negotiate settlements using specific procedures. Thus, Section 664.6 could not be invoked to enforce settlements negotiated by the CCR because GAF, the actual defendant, did not sign the settlement agreements.

Despite policy concerns raised by litigants, most courts have strictly construed the signature requirement. In GAF, the plaintiff who was attempting to enforce the agreement argued that a court decision denying enforcement of the settlement would “jeopardize mass tort settlements, especially in the asbestos contexts where (plaintiffs assert) the parties often rely on claims managers…to ‘process[]’ settlements.” Despite these concerns, the court felt bound by the signature requirement of Section 664.6 and denied enforcement of the settlement.

In 1998, however, the legislature heeded these policy concerns—in part—and carved out a limited exception to the signature requirement by enacting Section 664.7, which allows counsel in a construction defect action to bind a party to a settlement that can be summarily enforced under that section. The legislature expressly stated that it intended to modify the holding in Levy, but only in the context of construction defect suits.

Consequently, attorneys may bind a party in construction defect cases to a settlement that may be summarily enforced under 664.7. But in other contexts, traditional agency law does not apply, and only the signature of the party itself will suffice to summarily enforce a settlement under Section 664.6.

The writing requirement means that lawyers must carefully draft agreements in view of the strict standards of Section 664.6. Attorneys should be mindful of situations in which individuals are signing on their own behalf and on behalf of a business entity or when attorneys or other agents oversee settlement negotiations for multiple parties. The better practice is to include separate
signature lines for all parties subject to the settlement agreement.

Oral Stipulation

Fewer appellate courts have addressed the second option presented by Section 664.6—that the parties may stipulate to settlement “orally before the court.” The question most often considered is: What does “before the court” mean? It is clear that “before the court” is not limited to the formal setting of a courtroom. In In re Marriage of Assemi, the California Supreme Court held:

It is undisputed that a stipulated settlement presented orally by the party litigants or their counsel to a judge, in the course of a settlement conference supervised by that judge, satisfies the “before the court” requirement of section 664.6. In contrast, an oral stipulation to settle made by the party litigants at a deposition, but not in the presence of a judge or any other person serving in an officially recognized judicial capacity, does not satisfy the “before the court” requirement, even if the stipulation is placed on the record before a certified reporter.

Whether the parties are “before the court” becomes ambiguous when judges or others such as retired judges and professional mediators take on the role of settlement officers, as they often do. It is helpful for all parties to have a clear understanding of the role the judicial officer is playing in settlement negotiations to ensure that the parties know whether any recorded agreements are “before the court,” or whether a signed, written settlement stipulation will be required.

According to the recent decision in Elyoudayan v. Hoffman, the writing and oral requirements are not mutually exclusive. In Elyoudayan, the appellate court addressed the question whether a party who agreed to settle in a signed writing could enforce that settlement under Section 664.6 against a party who agreed to the same settlement terms orally before the court. The court enforced the settlement agreement, holding that “[n]othing in the statutory language [of Section 664.6] suggests that, in a multi-party action, all parties must agree to the settlement in the same manner.” One party may agree orally before the court and the other party in a writing it signs, as long as the parties agree to the same material terms.

As with a written agreement signed by the parties, once the “before the court” requirement is met, the agreement is enforceable even if the parties contemplated a later, formal agreement but are unable to agree on its written terms. Thus, counsel should be mindful to include specific language on the record rather than relying on the parties’ opportunity to fine-tune the language later. In particular, parties should come to settlement negotiations armed with specific release language they hope to employ. Rather than relying on vague terms such as “the usual and customary” releases, parties should be prepared to state on the record exactly which parties they agree to release or wish to have released and the scope of those releases. Any other significant terms should be similarly set forth in detail when the agreement to settle is made.

Courts cannot enforce a settlement under Section 664.6 unless the parties have agreed upon the settlement’s material terms. In Richardson v. Richardson, the appellate court upheld the trial court’s enforcement of an oral settlement agreement “as to all material terms required for a binding contract, even though it was intended that the agreement be memorialized later by a formal writing.” In fact, it is well established that when the parties have agreed on the essential terms of a contract, the contract is binding even though other, nonessential terms have not been agreed upon and even though the parties contemplate entering into a more formal agreement containing additional terms in the future.

Whether a term is essential depends on the relative importance of the term to the parties and whether absence of the term would make enforcing the remainder of the contract unfair to either party. When parties later find they do not agree on the construction of the settlement terms, for example the scope of an agreed-upon release, the trial court may still hold that there is an enforceable settlement. Indeed, once an agreement is found, it then becomes the trial court’s role to interpret the parties’ agreement. “A trial court, when ruling on a

The Court’s Role as Interpreter

In determining whether the parties have indeed settled, the trial court will consider the intent of the parties, including whether the parties agreed upon the material terms of the settlement, whether all parties to the agreement understood the terms, and whether the parties expressly acknowledged their understanding. Courts may consider declarations alone or may hear oral testimony when determining whether the parties agreed to settle.

Courts may also consider a party’s silence when interpreting a settlement agreement. In Skulnick v. Roberts Express, Inc., the trial court—and appellate court—rejected the defendants’ contention that they had not waived their indemnification rights by signing the terms of the settlement agreement. In
interpreting the parties’ agreement made before the court on the record, both courts found the defendants’ silence on the indemnification issue paramount.

The appellate court held, “multiparty settlements will be presumed to be ‘global,’ i.e., a complete resolution of all claims, unless claims or rights of indemnification or contribution are expressly reserved by agreement.” Therefore, there was no reservation.

After the trial court finds that the parties entered into a settlement agreement, it has the authority to enforce the agreement according to the terms it has construed. For example, a court may require the parties to deliver releases or other documents.

If the trial court finds that the requirements of Section 664.6 are not met and its summary procedure thus is not available, the parties may seek enforcement of a settlement through traditional methods, including filing a motion for summary judgment, amending the pleadings to add a claim or defense of “settlement,” or bringing a separate action for specific performance.

The trial court’s factual findings during a Section 664.6 hearing, however, may drastically affect the enforcement options available to parties. While no available appellate decision addresses this specific issue, presumably, if the trial court refuses to summarily enforce a settlement because it finds that the parties did not agree to the material terms of a settlement, the party seeking to enforce the settlement will be hard-pressed to enforce the purported agreement by traditional methods.

Therefore, care must be given whether to pursue “close calls” through the use of Section 664.6 or instead bring the matter before the trier of fact on a more complete record.

Code of Civil Procedure Section 664.6 can be an effective tool to summarily end litigation. Conversely, the unwary lawyer may find his or her client bound by a settlement when this was not the intent. The best practice is to be very careful, either to make sure all the important details of an agreement are agreed upon or to reach a clear understanding that there has been no such agreement. Do not wait for a future opportunity to explain your client’s position. Otherwise, your client may be at the mercy of the trial court to determine if there is an agreement and, if so, what the agreement means.

1 When this article was prepared, there were over 175 California appellate decisions, published and unpublished, referencing Code of Civil Procedure §664.6.

2 In re Marriage of Assemi, 7 Cal. 4th 896, 904 (1994): California appellate decisions were in conflict as to the appropriate procedure for enforcement of an agreement to settle pending litigation. One line of authority suggested or held
[that] the proper procedures for enforcement of settlement agreements were limited to a motion under section 437c for summary judgment…; a separate suit in equity to enforce the agreement; or (if the defendant was attempting to enforce settlement) an amendment to the pleadings, asserting the settlement as an affirmative defense.

See also Jill Elizabeth Lusher, California Supreme Court Survey February 1994–December 1994, 22 PePP. L. REV. 1675, 1759-60 n.7 (1995).


2 Assemi, 7 Cal. 4th at 905.


4 See id. (“[T]he court, upon motion, may enter judgment pursuant to the terms of the settlement.”) See also Skulnick v. Roberts Express, Inc., 2 Cal. App. 4th 884, 889 (1992) (judgment following enforcement of settlement under §664.6); In re Marriage of Armato, 88 Cal. App. 4th 1120 (2001); Casa de Valle View Owner’s Ass’n v. Stevenson, 167 Cal. App. 3d 1182 (1985) (finding that there was only a partial dismissal of the case, so that the court retained jurisdiction to enforce the settlement under §664.6); Corkland v. Boscoe, 156 Cal. App. 3d 989, 995 (1984) (Where trial court signed a minute order granting a motion to compel enforcement of a settlement, appellate court “remanded the trial court with directions to enter a judgment pursuant to the terms of the settlement.”). If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.” Code Civ. Proc. §664.6.

5 See generally id. at 910.

6 See, e.g., Gauss v. GAF Corp., 103 Cal. App. 4th 1110, 1117 (2002) (“[S]ettlement ends the lawsuit and is thus ‘such a serious step that it requires the client’s knowledge and express consent’ and “the party-signature requirement of section 664.6 ‘protects parties from impairment of their substantial rights without their knowledge and consent’” (quoting Levy v. Superior Court, 10 Cal. 4th 578, 583, 585 (1995)). Courts also remind, in situations in which they refuse to embrace the alleged settlement under §664.6, that the party seeking to enforce the settlement can alternatively utilize one of the nonstatutory remedies, such as filling a new lawsuit. See, e.g., Harris v. Rudin, Richman, & Apple, 74 Cal. App. 4th 299 (1999).

7 Assemi, 7 Cal. 4th at 905.


9 Kirby, 78 Cal. App. 4th at 840.


11 Id. at 204.

12 Id.; see Code Civ. Proc. §664.6 (if requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.).

13 Viejo Bancorp, 217 Cal. App. 3d at 206.


15 Id. at 1035-38.

16 Id.


19 Id. at 581.

20 Id. (citing 1 Witkin, CALIFORNIA PROCEDURES, Attorneys, §194, at 221-22 (3d ed. 1983)).

21 Id. at 586.

22 See id. Again, the court held that “agency” could be used by a party in the context of a nonstatutory method of enforcement. Id. at 586 n.5.


25 Id. at 581.

26 Id. (citing 1 Witkin, CALIFORNIA PROCEDURES, Attorneys, §194, at 221-22 (3d ed. 1983)).

27 Id. at 586.

28 See id. again, the court held that “agency” could be used by a party in the context of a nonstatutory method of enforcement. Id. at 586 n.5.

29 See id. again, the court held that “agency” could be used by a party in the context of a nonstatutory method of enforcement. Id. at 586 n.5.
In what appears to be a minority position, the court in [citations omitted, emphasis deleted]. 

While most decisions concerning the "before the court" requirement have focused on whether the individual before whom the settlement was stipulated was a court official, recently, an appellate court addressed whether a nod of the head was sufficient to meet the oral requirement. The court held that it was not. In re Conservatorship of McElroy, 104 Cal. App. 4th 536 (2002). 

In re Marriage of Assemi, 7 Cal. 4th 896, 906 (1994). 


Id. at 1428 (emphasis in original). 


See, e.g., Levin v. Saroff, 54 Cal. App. 285, 290 (1921) ("Where the parties have agreed upon all essential facts there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later."). See also Gallo v. Getz, 205 Cal. App. 3d 329, 333-34 (1988) (settlement enforceable despite lack of signed "formal" settlement agreement). 


In re Marriage of Assemi, 7 Cal. 4th 896, 911-12 (1995). 


Skulnick, 3 Cal. App. 4th at 888, 891. 

Id. at 891. 

See Casa de Valley View Owner's Ass'n v. Stevenson, 167 Cal. App. 3d 1182, 1186 (1985) (Pursuant to §664.6, the court ordered a party to deliver a release in favor of the adversary.); Corkland, 156 Cal. App. 3d at 995 n.3 (if the parties require further guidance on the "documents to be executed and their terms and conditions...they may seek it from the trial court...").
Lawsuits against attorneys often contain a claim for breach of fiduciary duty. In litigating these claims, the parties invariably offer the testimony of ethics experts. While existing case law allows a wide scope of this type of testimony, there is nevertheless often considerable disagreement concerning the admissibility of some or all of the proposed testimony. A further complication is the fact that the decisions supporting the broad admissibility of expert testimony regarding the breach of fiduciary duty are not particularly well reasoned. Moreover, the courts are inconsistent when determining what issues are subject to expert opinion. Ultimately, an important aspect of the issue of the admissibility of expert testimony involves the role of the California Rules of Professional Conduct. A close look at the rules and the cases addressing the admissibility issue reveals that a change in the rules has rendered existing case law inapplicable in certain important circumstances.

The most common question concerning the admissibility of expert testimony in breach of fiduciary duty cases is whether the testimony invades the province of the trier of fact or the court and therefore should be excluded. Generally, experts are prohibited from offering legal opinions. Otherwise, an expert’s opinion is admissible if it relates to a subject that is sufficiently beyond common experience that the opinion of an expert would help the trier of fact. An expert opinion is admissible even if it embraces the ultimate issue to be decided by the trier of fact. These rules seem plain enough. However, in practice, the rules and the cases that apply them are difficult to reconcile.

Piscitelli v. Friedenberg, while not addressing the breach of fiduciary duty, is illustrative. A client sued an attorney for failing to opt the client out of a securities class action. Had the attorney done so, the client would have had to arbitrate his securities claim. In the malpractice action the client had to prove he would have prevailed in the arbitration. The court held that an attorney expert witness could not offer an opinion that the plaintiff would have prevailed in arbitration. This opinion on the “ultimate issue” was deemed to have invaded the jury’s function.

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By Jonathon Sher

Unwelcome

Are opinions on the application of law being improperly admitted in attorney breach of fiduciary duty cases?
The prohibition against admission of expert legal opinions is well established. Generally, application of law is the province of the court. As one court has stated: "[W]hile in many cases expert opinions that are genuinely needed may happen to embrace the ultimate issue of fact (e.g., a medical opinion whether a physician’s actions constitute professional negligence), the calling of lawyers as ‘expert witnesses’ to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts and results in no more than a modern day ‘trial by oath’ in which the side producing the greater number of lawyers able to opine in their favor wins." However, in cases involving claims of breach of fiduciary duty by attorneys, this restriction seems to be ignored.

For example, the court in Stanley v. Richard noted, “The scope of an attorney’s fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct, which together with statutes and general principles relating to other fiduciary relationships all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.” The court further stated that “expert testimony is not required but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge.”

Stanley presents an example of typical expert testimony in a case involving an attorney’s alleged breach of fiduciary duty. In Stanley, the plaintiff’s expert testified that the defendant, who was the plaintiff’s former attorney in a marital dissolution case, had a conflict of interest on a specific date. The expert identified the particular facts that created the conflict. He then testified that the conflict was not adequately disclosed by a letter attempting to do so. The expert also testified regarding what the defendant should have done to disclose the conflict and opined that the defendant was obliged to obtain the informed written consent of the client. He testified that the defendant attorney breached her duties to her client by forcing the client, contrary to the client’s wishes, to remove certain language from a declaration the client filed in support of a motion concerning a marital property settlement. By doing so, the extent of the attorney’s duty in the context of the facts of Stanley. These cases established to the court’s satisfaction that the expert was legally correct in his opinion.

Undoubtedly, the expert testimony was helpful to the trier of fact, thus satisfying the requirements of Evidence Code Section 801(a). However, all legal opinion testimony can be characterized in this way. Helpfulness does not change the legal nature of the opinion.

The court in Stanley did not examine the

**Discerning whether an expert opinion is a legal opinion can be difficult. In analyzing this issue, one should avoid the temptation to equate malpractice causes of action with breach of fiduciary causes of action.**

the expert said, the defendant violated the client’s right to control the litigation and constituted an effort by the attorney to protect her own interests over the client’s interests. The expert also testified that the attorney violated two of the Rules of Professional Conduct and had a further duty to withdraw since she did not have the client’s consent to withdraw.

Some of these opinions are clearly legal. For example, the first opinion regarding the existence of a conflict of interest seems to be a legal opinion. Unlike testimony regarding a conversation or a letter, or a statement on how attorneys conduct themselves that relates to the issue of standard of care, an opinion on conflict of interest is not an empirical observation. Rather, an expert’s opinion on conflict of interest derives from a knowledge of the law that identifies classes of circumstances that constitute conflicts of interest and then applies that awareness to the facts admitted as evidence in a particular case. Thus, the expert’s opinion on conflict of interest seems to be a legal opinion that should have been excluded. Other opinions of this expert seem to be equivalent to the one on conflict of interest and should have been excluded as well.

That the expert opinion in Stanley was legal in nature is evidenced by the discussion in Stanley after the court’s summary of the testimony. The court cited numerous cases that established the existence and the rationale for allowing the expert testimony. Rather, it cited a number of cases for authority to do so. Nevertheless, a change in the Rules of Professional Conduct removes the most significant rationale underpinning those decisions.

**Distinguishing between Two Attorney Torts**

Some of the expert’s opinions, however, seem not to be strictly legal because they apply to the breach of a duty rather than the duty itself. These include the adequacy of the disclosure letter and the act of forcing the client to remove particular language from a declaration. Discerning whether an expert opinion is a legal opinion can be difficult. In analyzing this issue, one should avoid the temptation to equate malpractice causes of action with breach of fiduciary causes of action. There are important distinctions between the two that can affect the analysis.

The misperception that a breach of fiduciary duty claim and a malpractice claim are alike may be a reason for the apparent inconsistency in allowing legal opinion testimony in fiduciary duty cases but not in other cases. A common comparison between the two actions occurs when courts state that an attorney’s behavior in a malpractice case should be measured by the “standard of care” and, in a fiduciary duty case, by the “standard of conduct.” The use of expert testimony follows in
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- Central
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- Santa Cruz
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- Sierra County Superior Court
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- Yuba County Superior Court

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- Eleventh Judicial Circuit
- Thirteenth Judicial Circuit (Tampa)
- Fifteenth Judicial Circuit (W. Palm Beach)
- Nineteenth Judicial Circuit

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INDIANA
- Marion County Superior Court
- (Indianapolis)

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both types of cases with experts identifying the “standard” in each case. However, the two claims are different, and so is the standard by which the attorney’s action should be gauged.

The elements of a cause of action for attorney malpractice, like other actions for professional negligence, generally are: “(1) The duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate cause of damage to plaintiff by reason of the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence.”

The existence of a duty is a question of law for the court. The breach of the duty is a question of fact. The fact of breach is proved by expert opinion as to whether the attorney followed the standard of skill prevailing in the profession.

Specifically, the attorney has “the duty to use the care and skill ordinarily exercised in like cases by reputable members of the profession practicing in the same or similar locality and under similar circumstances.” What attorneys do in “like cases” requires evidence from those who know how attorneys ordinarily handle such cases. Thus, the standard of care is based upon the practices of attorneys in specific situations. An opinion based upon the witness’s knowledge of what attorneys do in like cases is not based on legal principles but on observations of empirical fact.

The elements of the tort of breach of fiduciary duty are similar in form to those of malpractice: “(1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage caused by the breach.” As a result of cases—

existing case law indicates that the Rules of Professional Conduct play some role in the determination of whether an attorney breached a fiduciary duty to a client. However, a review of the cases shows either a lack of analysis as to the role, or a difference between a previous version of the Rules of Professional Conduct and the current version that renders the cases useless or inapplicable. For example, the court in Stanley was not called upon to determine the relevance of the Rules of Professional Conduct to its analysis. It simply relied upon an earlier case, Mirabito v. Liccardo.

In Mirabito, a fraud case by a client against an attorney, the court noted: “It is well established that an attorney’s duties to his client are governed by the [R]ules [of Professional Conduct].” The court then stated that the Rules of Professional Conduct, along with statutes and certain general principles, help define the duty component.

Mirabito relied on David Welch Company v. Erskine & Tulley, which in turn relied on Day v. Rosenthal for that proposition. Day held that “[t]he standards governing an attorney’s ethical duties are conclusively established by the Rules of Professional Conduct.” In Day, the attorney’s “numerous, blatant and egregious violations of attorney responsibility were not breaches of legal technicalities for which expert testimony is required. They were violations of professional standards, standards which the trial court was compelled to notice.” That is, the court had to take judicial notice of the Rules of Professional Conduct.

At the time Day was decided, the Rules of Professional Conduct did not contain the Rule 1-100 disclaimer as it currently reads. The current Rule 1-100 became operative May 27, 1989. Moreover, the court in the later cases—David Welch Company, Mirabito, and Stanley—all predated the effective date of the current Rules of Professional Conduct. To hold now that a court must take judicial notice of the Rules of Professional Conduct would contradict the disclaimer language contained in Rule 1-100. Ross, in passing, cites Stanley for the notion that the Rules of Professional Conduct may provide standards of conduct for attorneys but did not consider the issue of when the Rules of Professional Conduct can be relied upon in civil actions.

Unfortunately, cases from other jurisdictions that address the use of rules of professional conduct are not particularly helpful because the disclaimers found in those rules...
1. The elements that must be proved for attorney malpractice and attorney breach of fiduciary duty are similar in form.
   True. False.
2. Modifying the Rules of Professional Conduct is the only activity of the State Bar of California that does not require the approval of the California Supreme Court.
   True. False.
3. In what year did the current Rule 1-100 of the Rules of Professional Conduct become operative?
4. The current Rule 1-100 of the Rules of Professional Conduct expressly states that the rules are intended to create legal duties for attorneys.
   True. False.
5. The court in Ross v. Creel Printing & Publishing Company criticized what prior opinion?
6. Expert witness testimony is always admissible for the purpose of offering a legal opinion.
   True. False.
7. Whether a duty exists is a question of:
   A. Fact. B. Law. C. A and B.
8. Whether there was a breach of a duty is a question of:
   A. Fact. B. Law. C. A and B.
9. A conflict of authorities exists in California as to whether the Rules of Professional Conduct are the governing authority to determine whether an attorney breached a fiduciary duty to a client.
   True. False.
10. The court in Piscitelli v. Friedenberg held that the attorney expert witness could opine that the plaintiff in the action would have prevailed at arbitration but for the attorney defendant’s legal malpractice.
    True. False.
11. The standard of care for an attorney defendant in a legal malpractice action is based on the conduct of attorneys who practice in the same locale under similar circumstances.
    True. False.
12. The court in Ross v. Creel Printing & Publishing Company held that an independent cause of action for breach of a disciplinary rule does not exist.
    True. False.
13. Expert opinion is admissible if it relates to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact in rendering its decision.
    True. False.
14. At the time Day v. Rosenthal was decided, Rule 1-100 of the Rules of Professional Conduct contained the same disclaimer language that is included in the current version of the rule.
    True. False.
15. Which is not one of the elements of a cause of action for breach of fiduciary duty?
    A. The existence of a fiduciary duty. B. A breach of the fiduciary duty. C. The intent to breach the duty. D. Damage caused by the breach of the duty.
16. If an expert witness testifies contrary to the Rules of Professional Conduct, the expert’s testimony supersedes the rules.
    True. False.
17. Mirabito v. Liccardo relied on which case for the proposition that attorneys’ duties to their clients are governed by the Rules of Professional Conduct along with statutes and certain general principles?
18. An expert opinion is admissible even if it embraces the ultimate issue to be decided by the trier of fact.
    True. False.
19. There is a discrepancy among the 50 states whether rules of ethics are relevant to the determination of an attorney’s negligence and/or breach of fiduciary duty.
    True. False.
20. The dissenting opinion in Kinnaman v. Staitman & Snyder found that the Rules of Professional Conduct were intended to be used as a shield from an attorney’s unethical conduct rather than as a sword to recover monetary damages.
    True. False.
are not as broad as the one in Rule 1-100. Many states hold that an ethics rule may be relevant as evidence on the standard for determining negligence or fiduciary misconduct.\(^\text{32}\) However, some states do not allow specific reference to the state's rules either in instructions or in expert testimony.\(^\text{33}\)

In California, unlike other states, use of the Rules of Professional Conduct as evidence of the standard of care in a malpractice claim or standard of conduct in a breach of fiduciary duty claim should not be admissible. If a civil standard exists independent from the Rules of Professional Conduct, then the Rules of Professional Conduct cannot augment, diminish, or eliminate the civil standard. If a Rule of Professional Conduct is the same as a civil standard, reference to the rule is unnecessary and can only serve the purpose of suggesting to the jury that the attorney was "unethical." If no civil standard exists, both Rule 1-100 and \textit{Ross} would prevent courts from resorting to the Rules of Professional Conduct.

While the Rules of Professional Conduct do not seem to apply to attorney tort cases, they do apply in at least one circumstance. If conduct consistent with the Rules of Professional Conduct is mandatory, it would be unfair to allow an expert witness to offer an opinion that the standard of conduct or the standard of care requires conduct contrary to the rules. In fact, such an opinion is impermissible. As noted by the court in \textit{Day}, "The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct. They cannot be changed by expert testimony. If an expert testifies contrary to the Rules of Professional Conduct, the standards established by the rules govern and the expert testimony is disregarded."\(^\text{34}\) While the Rules of Professional Conduct may not be used to establish a breach of a civil duty, no coherent system of justice would allow an attorney to be civilly liable for adhering to the rules.

The admissibility of expert opinions in attorney breach of fiduciary duty cases needs to be reexamined to avoid the routine occurrence at trial of legal arguments disguised as expert opinion. Moreover, whatever the conclusion on admissibility, the use of the Rules of Professional Conduct in determining the nature and extent of the attorney's fiduciary duty should be prohibited. The cases that allow for the use of the Rules of Professional Conduct are distinguishable in that they refer to the rules as they existed prior to the change to Rule 1-100.

\(^{1}\) Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 865, 884 (1989) ("It is thoroughly established that experts may not give opinions on matters which are essentially within the province of the court to decide.").

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2 Evid. Code §801(a).
3 Evid. Code §805.
6 Downer, 152 Cal. App. 3d at 842.
9 Id. at 1083-84.
10 Id. at 1087-88.
13 Id.
15 BAJI 6.37 (9th ed.)
16 In some circumstances, expert testimony is not necessary; for example, when negligence is readily apparent from the facts of the case, a breach of duty exists as a matter of law. Goebel v. Lauderdale, 214 Cal. App. 3d 1502, 1508 (1989).
18 BUS. & PROF. CODE §§6076, 6076.5, 6077.
19 To the extent the standard of care is dictated by case law, the standard is not subject to expert opinion. It is a matter of law for the court. Cf. Day v. Rosenthal, 170 Cal. App. 3d 1125, 1147 (1985).
21 Id. at 746.
23 Id. at 901 (dissenting opinion of Hansen, J.).
25 Mirabito, 4 Cal. App. 4th 41.
26 Id. at 45 (citing Day, 170 Cal. App. 3d at 1147 (1985)).
29 Id.
30 Id.
31 Former Rule 1-100, effective Jan. 1, 1975, read in part, “[N]otwithstanding any provision of law relating to the duties and obligations of attorneys or the consequences of violation thereof.” This language was included in Rule 1 when the Rules of Professional Conduct were first approved by the California Supreme Court on May 28, 1928.
33 See, e.g., Hizey v. Carpenter, 119 Wash. 2d 251, 256, 830 P. 2d 646, 654 (1992) (The disclaimer in the Washington rules stated, “The rules make no attempt to prescribe either disciplinary procedures or penalties for violation of a rule, nor do they undertake to define standards for civil liability of lawyers for professional conduct.”).
In 1984, the Fourth District of the California Court of Appeal issued its opinion in San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc. Since that decision, much has been written—including numerous scholarly articles and judicial opinions in many states—about the conflicts of interest that sometimes develop when an insurer hires counsel to defend its policyholder in fulfillment of the insurer’s duty to defend under a liability policy. Among the states that have confronted this issue, only a handful have attempted to identify and resolve these types of conflicts of interest through legislation. California is one of the handful: It enacted legislation that has been codified as Civil Code Section 2860.

Despite the legislature’s attempt to bring clarity to a difficult question, confusion still exists in California as to when, and under what circumstances, a conflict of interest arises under Section 2860 that requires the insurer to pay for independent counsel. This is particularly true regarding whether an insurer’s reservation of rights based on the insured’s conduct creates a right to independent counsel under Section 2860.

For example, in one opinion issued before the enactment of Section 2860 and another issued soon afterward, courts held that a conduct-based reservation of rights automatically triggers independent counsel obligations. However, other appellate decisions that have found no insurer-insured conflict of interest appear to have been influenced by the fact that no evidence existed in those cases to support a finding that insurance defense counsel had actually defended the cases in a manner contrary to the interests of the insured. This second line of authorities suggests a general reluctance by California appellate courts to find a conflict of interest based upon the presumed malfeasance of insurance defense counsel. Resolving the potential inconsistency between these two lines of authorities requires a review of California law addressing the right to independent counsel in insurance defense situations.

Under most general liability policies, the insurer is contractually entitled to control the defense of its insured. The provisions of a liability insurance policy that typically grant the insurer this control are: 1) the provision stating that the insurer “has the right and duty to defend any suit” and 2) the provision stating that the insurer “may make such investigation and settlement of any claim as it deems necessary.”
The insurer's contractual right to appoint and control counsel to represent its insured is the foundation of the so-called tripartite relationship between insurer, policyholder, and insurance defense counsel.

Cumis was the first California appellate decision to extensively address the problem of conflicts of interest within the tripartite relationship. Cumis stands for the proposition that, irrespective of the language of the insurance policy, a policyholder has the right to select and control counsel when an insurer reserves its right to deny coverage and thereby creates a potential conflict of interest for insurance defense counsel. In response to Cumis, the legislature, in 1987, enacted Civil Code Section 2860, which requires an actual conflict of interest before an insured is entitled to independent counsel. Accordingly, Civil Code Section 2860 overruled Cumis, specifically on the issue of potential conflicts of interest, although counsel selected by insureds under Section 2860 are still referred to as Cumis counsel.

Under Section 2860, an actual conflict of interest does not arise simply because an insurer has reserved its rights. "The conflict must be significant, not merely theoretical, actual, not merely potential." A claim for punitive damages or a claim in excess of policy limits does not create a conflict of interest under Section 2860. Rather, a Section 2860 conflict of interest may arise when an insurer reserves its right regarding an insurance coverage issue for which the outcome can be controlled by defense counsel.

California case law has, with varying degrees of success, attempted to delineate when a conflict of interest arises under Section 2860. The decision in Blanchard v. State Farm Fire & Casualty Company is an example. In Blanchard, State Farm issued a liability policy to a general contractor, Blanchard, who was then sued by a homeowners’ association in a construction defect action. State Farm agreed to defend Blanchard through insurance defense counsel, subject to a reservation of rights. However, Blanchard demanded that State Farm also pay for independent counsel pursuant to Civil Code Section 2860. The trial court ruled that Blanchard was not entitled to independent counsel under the circumstances, and the court of appeal affirmed. The coverage issues raised in State Farm’s reservation of rights letter pertained only to whether certain construction-related damages were covered under the liability policy. The court of appeal concluded that a reservation of rights pertaining to damages does not create a conflict of interest because both insurer and insured have a common goal—to minimize all damages, whether they are covered or not. The court of appeal further noted that Blanchard had failed to submit any evidence showing how defense counsel could control the outcome of the damages issue or that defense counsel “had an incentive to do so.”

A more recent attempt by a California court of appeal to explain when an actual conflict of interest exists under Section 2860 is found in James 3 Corporation v. Truck Insurance Exchange. In James 3, Truck agreed to defend James 3 in an action brought by the Coca-Cola Company alleging trademark infringement, fraud, and related business torts. James 3 argued that it was entitled to independent counsel under Civil Code Section 2860 because Truck had reserved its rights regarding a variety of coverage issues, the outcome of which allegedly could be controlled by Truck’s appointed defense counsel. The court of appeal affirmed the ruling of the trial court that James 3 was not entitled to independent counsel. In doing so, the court noted that independent counsel is not required when the coverage issues are independent of those involved in the underlying case.

Conduct-Based Reservations of Rights

One unanswered question in Blanchard, James 3, and other decisions interpreting Section 2860 is whether, and under what circumstances, an insurer’s reservation of its right to deny coverage based upon the conduct of an insured (as opposed to damages) creates a right to independent counsel under Section 2860. Some authorities suggest that a Section 2860 conflict arises whenever an insurer reserves its right to deny coverage based upon the policyholder’s conduct. The corollary to that rule is that a reservation of rights regarding a claim of damages does not create a conflict of interest.

Under this analysis, no conflict arises when the reservation of rights is based upon a claim for damages because of the common interest of the insurer and insured to minimize the insured’s liability. Thus, an insurer’s reservation of its right to deny coverage for a claim for restitutory damages or punitive damages—neither of which is generally covered under a liability policy—does not give rise to a conflict of interest under Section 2860.

In contrast, a conflict of interest arguably arises when the reservation of rights is based upon the insurer’s conduct. The rationale is that insurance defense counsel has both the ability to manipulate facts pertaining to the insured’s conduct and an incentive to do so in order to assist the insurer in defeating coverage. Insurance defense counsel’s purported ability to manipulate facts pertaining to the policyholder’s conduct is based upon counsel’s control over certain decisions made during trial, such as the manner in which counsel “seek[s] or oppos[es] special verdicts, the answers to which may benefit the insureds by finding nonexcluded conduct.” Counsel’s presumed incentive to assist the insurer in defeating coverage is derived from the notion that insurance defense counsel typically desires to receive future business from the insurance company and, therefore, “will slant his efforts, perhaps unconsciously, in the interest of his real client the one who is paying his fee.” Following this logic, an insurer’s reservation of its right to deny coverage for a policyholder’s intentional conduct would create a Section 2860 conflict of interest.

While this analysis is attractive in its simplicity, its application to conduct-based reservations of rights sometimes conflicts with other California authorities. In many personal injury cases, for example, an insurer will reserve its right to deny coverage if it determines that the injury did not arise from an “occurrence”—that is, accidental conduct. Issuing this type of reservation of rights letter permits the insurer to immediately undertake the defense of the policyholder without waiving rights, even though the facts pertaining to the claim have not yet fully developed. Under the foregoing analysis, the reservation of rights would trigger a right to independent counsel because it relates to the conduct of the policyholder, and therefore insurance defense counsel arguably has both the ability and a motive to shade the facts in order to defeat or undermine coverage for the claim.

However, many California courts have been reluctant to find a Section 2860 conflict of interest without evidence of actual misconduct by insurance defense counsel. Furthermore, the notion that courts should automatically presume that insurance defense counsel will violate their ethical duties by defending a case in a manner detrimental to their primary client—the policyholder—suggests that insurance defense attorneys adhere to a less stringent code of ethics than do other attorneys. This is not, and should not, be the case.

Thus, there may be an inconsistency in the manner in which certain courts analyze whether an insurer-insured conflict of interest has arisen. On the one hand, there is some support in California for the proposition that a reservation of rights based upon the conduct of the insured automatically triggers a right to independent counsel because insurance defense counsel may be tempted to violate their ethical duties owed to the policyholder. On the other hand, certain authorities imply that a conflict of interest should not be based upon the potential future malfeasance of insurance defense counsel.

This inconsistency is further revealed upon consideration of Insurance Code Section 533, which precludes insurers from indemnifying policyholders in situations in which the policyholder’s conduct was willful. This implied exclusion is based upon public policy and,
Therefore, arguably applies irrespective of whether a reservation of rights is actually issued.\(^1\) If one presumes that insurance defense counsel will inappropriately manipulate facts pertaining to the insured’s conduct in order to defeat coverage, then a conflict of interest arises in connection with most insurance defense cases because insurance defense counsel could always theoretically present evidence in a way to suggest that the policyholder acted intentionally, not negligently. The result would be exclusion of coverage based upon Insurance Code Section 533.\(^2\) Accordingly, strict application of the rule that conduct-based reservations of rights trigger Section 2860 would mandate independent counsel in almost every insurance defense situation....This result is inconsistent with Section 2860 and its interpretive case law.\(^3\)

**Approaches for Identifying Conflicts**

No California court has addressed the potential inconsistency between 1) the cases suggesting that reservations of rights based upon an insured’s conduct may automatically create a conflict of interest, and 2) the cases in which courts of appeal resisted finding a conflict of interest based upon the presumed malfeasance of insurance defense counsel. Nevertheless, this inconsistency is capable of resolution by reference to the language of Section 2860. Section 2860(a) provides that a right to independent counsel exists when “a conflict of interest arises.” This language is significant for what it does not say. Unlike the decision in *Cumis* that held that a right to independent counsel arose based upon a potential conflict of interest,\(^4\) Section 2860 requires an actual conflict of interest.\(^5\) Just because an attorney has the theoretical ability to manipulate facts to defeat coverage does not necessarily mean that a conflict of interest, and therefore a right to independent counsel, has been triggered.\(^6\)

Section 2860(b) articulates the following test for identifying insurance conflicts of interest: “[W]hen an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer,... a conflict of interest may exist.” Use of the permissive *may* rather than the mandatory *shall* extends to courts the discretion to determine whether an actual conflict of interest exists. This language also makes clear that a Section 2860 conflict of interest does not arise in every situation in which insurance defense counsel can theoretically control the outcome of a coverage issue.

If a conflict of interest under Section 2860 does not arise every time insurance defense counsel can potentially control the outcome of a coverage issue, the question becomes, under what circumstances does a Section 2860 conflict arise? One response that harmonizes the potentially inconsistent California case authorities is that a Section 2860 conflict of interest arises in situations in which 1) an insurer has reserved its right with respect to the conduct of the policyholder, and 2) the purported conflict of interest between the policyholder and insurance defense counsel is not dependent upon a presumption that counsel will act in a manner that favors the insurer and harms the policyholder.

A scenario illustrates this approach. In an environmental pollution case involving property damage that allegedly took place over many years, the insurer reserves its right to deny coverage based upon the argument that there has been no occurrence. A potential defense to the environmental action is that the plaintiff complaining of the property damage was aware of the damage many years earlier but failed to file suit within the relevant limitations period. However, by proving that the plaintiff knew of the property damage years before—thereby triggering application of the statute of limitations—defense counsel may also indirectly prove that the policyholder was aware of the property damage prior to inception of the liability policy under which the insurer is providing a defense. Generating such proof may eliminate coverage for the claim because generally there is no coverage for property damage that the policyholder “expected or intended” to occur.\(^7\)

On the one hand, defense counsel may harm the policyholder if counsel does not pursue a valid liability defense—the statute of limitations. On the other hand, by pursuing this defense, defense counsel may eliminate coverage for the claim. Thus an actual conflict of interest exists for insurance defense counsel because whatever decision defense counsel makes may adversely affect the policyholder either in the defense of the action or regarding insurance coverage. Under such circumstances, the decision on how to proceed should be made by independent counsel in consultation with the policyholder, not by insurance defense counsel.

**Subsequent Actions of the Insurer or Insurance Defense Counsel**

This scenario is not the only type of situation in which independent counsel under Section 2860 may be appropriate. A conflict of interest that does not exist at the inception of a case may nonetheless develop as a result of the subsequent actions of the insurer or insurance defense counsel.\(^8\) For example, an insurer that directs defense counsel to make a motion for summary judgment eliminating a coverage-triggering negligence cause of action likely creates a conflict of interest as a result of that instruction. An insurer that does not permit defense counsel to move for summary adjudication regarding non-covered punitive damages also may create a conflict of interest as a result of its conduct.\(^9\) Similarly, insurance defense counsel that unjustifiably pursues a course of conduct detrimental to the policyholder’s coverage position may create a conflict of interest that requires appointment of independent counsel.\(^10\) Significantly, in each of these examples the determination that a conflict of interest has arisen is not dependent upon a presumption that insurance defense counsel will, in the future, act inappropriately. Instead, in each case an actual conflict of interest exists because the insurer, or insurance defense counsel, has affirmatively pursued a course of conduct that violates their respective obligations owed to the policyholder. In such instances, a
right to independent counsel arguably arises.

Executive Aviation Inc. v. National Insurance Underwriters," which was decided 16 years before the enactment of Civil Code Section 2860, offers an interesting example of action taken by an insurer that was found to create a conflict of interest requiring independent counsel. In Executive Aviation, a pilot was licensed to fly passengers in private carriage operations but not in common carriage for compensation. While the pilot was conducting a sales demonstration flight, the plane crashed and all on board perished. The insurer of the company that owned the aircraft determined that the defense of any claim that might arise as a result of the accident would be pursuant to a reservation of rights because 1) an endorsement to the relevant insurance policy provided that coverage was only available if the pilot of the aircraft was licensed “for the operation being performed,” and 2) the demonstration flight may have constituted a common carriage flight for which the pilot was not licensed. The insurer commenced a declaratory relief action to prove no coverage. Thereafter, the heirs of the passengers filed suit against the owner of the aircraft. The insurer determined that a conflict of interest existed because in the declaratory relief action the insurer was attempting to prove that the flight was a common carriage flight. However, by proving that the flight was a common carriage flight the insurer might jeopardize the defense of the insured in the action brought by the heirs. Accordingly, the insurer’s decision to file a declaratory relief action in which it sought to prove a fact adverse to its policyholder in the subsequent wrongful death action was conduct that created a conflict of interest between the insurer and the policyholder.

Regrettably, the holding of Executive Aviation has been misconstrued. Some California courts have suggested that the conflict of interest described in Executive Aviation arose between insurance defense counsel and the policyholder because “[w]hichever position the attorney took on the issue of the commercial nature of the flight he would be operating directly against the interests of the insurer or the insured.” However, the fact that insurance defense counsel theoretically could take a position that would adversely affect the policyholder with respect to coverage does not necessarily create an actual conflict of interest. While insurance defense counsel technically represents both the policyholder and the insurer, counsel’s primary obligation is to the policyholder. Also, the scope of insurance defense counsel’s representation of insurer and policyholder is singular: “the speedy and successful resolution of the claim and litigation.”

Insurance defense counsel does not represent the insurer with respect to coverage issues. The true conflict in Executive Aviation was therefore between the insurer, which instituted the declaratory relief action, and the policyholder. Nevertheless, under the facts described in Executive Aviation, the insurer was probably wise to relinquish control of the policyholder’s defense in order to avoid any appearance of propriety in a situation in which the interests of the insurer and the policyholder were in obvious conflict. Whether the insurer in Executive Aviation would have been required to appoint independent counsel under Section 2860 is another matter entirely and is subject to debate.

**General Rules**

When analyzing whether a right to independent counsel has been triggered, one overriding theme emerges: Identifying Section 2860 conflicts of interest is no easy task. This sentiment was expressed by the court of appeal in Dynamic Concepts, Inc. v. Truck Insurance Exchange, which noted, “The potential for conflict requires a careful analysis of the parties’ respective interests to determine whether they can be reconciled... or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured.”

Notwithstanding the significant confusion that surrounds the analysis of Section 2860, several general rules can be gleaned from this code section and its interpretive case law. First, the fact that an insurer reserves its right to deny coverage does not automatically create a right to independent counsel. Second, although certain cases suggest otherwise, Section 2860 and relevant authorities support the position that a reservation of rights based upon the policyholder’s conduct does not necessarily create an actual conflict of interest under Section 2860. Third, under appropriate circumstances, an actual conflict of interest may nevertheless arise from a conduct-based reservation of rights. However, such a conflict arguably should not depend upon a presumption that insurance defense counsel will violate counsel’s ethical obligations owed to the policyholder. Finally, a conflict of interest that does not exist at the inception of a case may develop as a result of the actions of either the insurer or insurance defense counsel.

The notion that a conduct-based reservation of rights always creates a right to independent counsel under Section 2860 is arguably inconsistent with the concept that courts should be circumspect in finding a conflict of interest based upon a presumption of malfeasance by defense counsel. When confronted with this inconsistency, counsel for both the insurer and the policyholder should resist the allure of simplistic, per se approaches. Instead, counsel should follow the court’s advice in Dynamic Concepts and conduct a careful analysis designed to accurately determine whether an actual conflict of interest under Section 2860 exists. This approach will not only ensure that the legislative intent of Section 2860 is respected but, in the long run, will allow policyholders continued access to the many fine attorneys who are regularly hired by insurers in insurance defense situations.

2 See, e.g., Kurt L. Schmalz, Deconstructing Cumis, LOS ANGELES LAWYER, Mar. 1999,

2 Compare ALASKA STAT. §21.89.100 and FLORIDA STAT. §627.426(2).


4 James 3 Corp. v. Truck Ins. Exch., 91 Cal. App. 4th 1053, 1109 (2001) ("[T]here is nothing in the record to suggest that defense counsel would violate his ethical duties to completely defend the insureds ‘as if [they] had retained [him] personally.’") (quoting Lysick v. Walcom, 258 Cal. App. 2d 136, 146 (1968)); Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 1008 (1998) ("There is no basis on the record to presume they [insurance defense counsel] would have violated their stringent ethical responsibilities to completely defend Dynamic for all allegations of the entire complaint, covered or uncovered."); Blanchard, 2 Cal. App. 4th at 350 (finding no conflict of interest when the policyholder "urged that there was an unspecified possibility of a conflict"); Native Sun Inv. Group v. Tiscor Title Ins. Co., 169 Cal. App. 3d 1265, 1277-78 (1987) ("At no time, the court finds, did [insurance defense counsel] prefer the [insurance company’s] interests to those of his client, Native Sun, nor did he allow the questions of coverage—though he was informed of them—to interfere with his litigation decisions regarding the third party claims.") Under these circumstances, where the retained attorney in fact was not subject to the conflicting forces which gave rise to Cumis, an extension of Cumis is not warranted.").

5 A 1999 Los Angeles Lawyer article analyzed §2860 and suggested that it may conflict with Rule 3-310 of the Rules of Professional Conduct. Schmalz, supra note 2, at 49-50. Inasmuch as §2860 focuses on the obligations of “insurers,” while Rule 3-310 discusses the obligations of “members” of the California State Bar, the assertion of a conflict between §2860 and Rule 3-310 may be overstated. Nevertheless, the issue described in the 1999 article is an interesting one that has yet to be squarely analyzed in any published California case authority. It is also beyond the scope of this article.


7 CALIFORNIA LIABILITY INSURANCE PRACTICE §12.9, at 410 (2001); see also American Cas. Co. v. Timmons, 352 F. 2d 563, 568 (6th Cir. 1965) (applying Ohio law).


9 But see Executive Aviation, Inc. v. National Ins. Underwriters, 16 Cal. App. 3d 799, 809 (1971) (generally discussing a policyholder’s right to independent counsel when the insurer is presented with a conflict of interest).


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pendent practitioners.


34 See Dynamic Concepts, 61 Cal. App. 4th at 1007-08; Native Sun, 189 Cal. App. 3d at 1277.


36 Shell Oil Co. v. Winterthur, 12 Cal. App. 4th 715, 741 (1993); but see Downey Venture v. LMI Ins. Co., 66 Cal. App. 4th 478, 559 (1998) (Insurance Code §533 does not preclude a duty to defend a malicious prosecution action if malicious prosecution is identified as an enumerated offense within the insurance policy's personal injury coverage.).

37 Dynamic Concepts, 61 Cal. App. 4th at 1006 ("[N]ot every reservation of rights entitles an insured to selectCumis counsel.").


40 Referring to a "potential conflict of interest" in connection with an analysis of Civil Code §2860 is unfortunate. Indeed, many assume that a potential conflict of interest arises whenever an insurer reserves its right to deny coverage. See, e.g., Mosier v. Southern Cal. Phys. Ins. Exch., 63 Cal. App. 4th 1022, 1038 (1998). However, a "potential conflict of interest" in California ethics parlance refers to a "reasonably foreseeable set of circumstances which could impair the attorney’s ability to fulfill his or her professional obligations to each client in the proposed representation." YAFNEK, ET AL., CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY §444 (2001). Thus, a potential conflict of interest is only a "potential" conflict of interest, an ethics context, does not necessarily arise every time an insurer reserves its rights. See also CAL. RULES OF PROF'L CONDUCT R. 5-310(c)(1).


42 Cf. Native Sun Ins. Group v. Ticor, 189 Cal. App. 3d 1265, 1277 (1987) (Insurance defense counsel may obviate any potential conflict of interest by "proceed[ing] diligently to litigate the matters that he was charged with on behalf of his client [the insured].").

43 These examples show an insurer placing its own interests above those of its policyholder, which may provide a basis for bad faith liability against the insurer. See Comumale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 659 (1958) (An insurer may breach the implied covenant of good faith and fair dealing if it fails to give the policyholder's interests at least as much consideration as its own.). Compare Schmalz, supra note 2, at 87.

44 Insurance defense counsel who pursues such a course of conduct likely has committed malpractice and may be held liable for tort damages. See, e.g., Shaffey v. Wilson, Elser, Moskowitz, Edelman & Dicker, 82 Cal. App. 4th 768, 770 (2000).


46 Id. at 804.

47 Id. at 805-04.

48 Id. at 804.

49 Id. at 804 n.1.

50 Id.; see also Golden Eagle Ins. Co. v. Foremost Ins. Co., 20 Cal. App. 4th 1372, 1395 (1993) (explaining that a finding that the aircraft in Executive Aviation was being used for commercial carriage would harm the defense of the insured because common carriers are held to a higher standard of care).


54 Id. at 592.

55 In a practical sense, hiring independent counsel did nothing to eliminate the conflict between the insurer and its insured in Executive Aviation. Under current California law, the proper way to eliminate the conflict between policyholder and insurer in Executive Aviation would have been to stay the declaratory relief action pending resolution of the underlying wrongful death action. See Haskel, Inc. v. Superior Court, 33 Cal. App. 4th 963, 980 (1995).

56 The insurer in Executive Aviation initially hired the same firm to represent its interests in the declaratory relief action and its insured's interests in the wrongful death action. The clear conflict of interest created by this dual retention was later apparently rectified when the insurer hired alternate counsel to represent the insured in the wrongful death action. Executive Aviation, 16 Cal. App. 3d 799, 809-10.


58 Id. at 1006.


61 See, e.g., Executive Aviation, 16 Cal. App. 3d at 805-04.

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Lawyers rely on everything from the Blackberry to document management tools

What cool tech tools are attorneys and their staff using these days? It depends on whom one asks. From solos to large law firms, the favorites run the gamut of available hardware and software. When we asked various lawyers to choose only their most important gadget or program, some were unable to limit themselves.

While all enthused over their favorites, Harold M. Goldner, a Philadelphia attorney (http://www.goldnerlaw.com), is so attached to his Palm Pilot that he says, “I’d be in therapy if anything happened to my Palm m515, and I’d be out of business without my HP 3100.” (The HP 3100 is a multifunction printer.) Alan Schroeder of the Wal-Mart Realty Group also touts the Palm as one of the favorites of the legal department, which has about 200 attorneys (including real estate, litigation, and employment law attorneys) and about as many support staff. Schroeder relates, “I use it all the time for note-taking during meetings, including strategy, personnel, and interviewing. I also calendar just about everything on it.” The Palm m515 costs $299 at Palm’s Web site (www.palm.com).

Goldner, who says he would be out of business without his HP 3100, may be sorry to hear that the 3100 has been replaced by the 3300mfp ($699). The 3100 (and the 3300mfp) are multifunction laserjet printers that allow users to scan, fax, copy, and print. Goldner explains, “In conjunction with Adobe Acrobat, I’m able to scan anything I want, OCR it, and then (with Time Matters) link it to my case files.” He also uses the 3100 with Stamps.com to print his own postage and bar-coded envelopes. The printer works with standard number 10 envelopes as well as the slightly smaller number 9 envelopes enclosed for clients to use for return mail.

Goldner admits that he has problems with the unit’s vertical paper feed, but he is willing to put up with it because “it is still cheaper than using the suite’s main copier, for which I pay 9 cents a copy.” He also prints his own checks on the 3100 using Versa-check and prints onto the checks by using Quickbooks. Noting that the 3100 will take basically “anything I throw at it,” he says, however, it will not accept an envelope in WordPerfect 9.

While Goldner would be in therapy without his Palm, Ross L. Kodner, a Wisconsin attorney and legal technology expert (www.microlaw.com), would never go back to a Palm after using a Kyocera 6035 Smartphone. The Kyocera serves as a Palm, a cell phone, and a Blackberry all in one. Kodner can look up a number in the unit’s address book, make a phone call, calendar a meeting, access the Internet (to surf the Web and send and receive e-mail), and compose a Word-compatible document. The phone also syncs with Time Matters. Ross finds the Kyocera to be an “incredibly sturdy device, with a great speakerphone to boot.” This all-in-one costs roughly $199 after rebates. Even though Kodner claims to “love it,” in the next breath he says he is ready to trade it in for the new Kyocera 7135 “as soon as I can get my hands on it.” This new model costs roughly $550 after rebates and features a folding keyboard, expansion slot, USB and serial connections (making it more like a portable computer), more memory (16 MB), and a color screen—all features that may be indispensable to your law practice.

Although an external modem is not as high-tech as the Kyocera phone, Joel Bennett (http://firms.findlaw.com/joelbennett.com), an attorney in Washington, D.C., turned his Nokia phone into an external modem to check e-mail and surf the Web while traveling. The $100 setup from Verizon included an upgrade on the cell phone, and a Blackberry all in one. Kodner can look up a number in the unit’s address book, make a phone call, calendar a meeting, access the Internet (to surf the Web and send and receive e-mail), and compose a Word-compatible document. The phone also syncs with Time Matters. Ross finds the Kyocera to be an “incredibly sturdy device, with a great speakerphone to boot.” This all-in-one costs roughly $199 after rebates. Even though Kodner claims to “love it,” in the next breath he says he is ready to trade it in for the new Kyocera 7135 “as soon as I can get my hands on it.” This new model costs roughly $550 after rebates and features a folding keyboard, expansion slot, USB and serial connections (making it more like a portable computer), more memory (16 MB), and a color screen—all features that may be indispensable to your law practice.

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Gadgets That Lawyers Cannot Live Without

By Carole Levitt and Mark Rosch

Carole Levitt and Mark Rosch are principals of Internet For Lawyers (info@netforlawyers.com), offering MCLE Internet research seminars.

Los Angeles Lawyer / June 2003
library services of Foley & Lardner’s Los Angeles office (www.foleylaw.com), certainly knows about the ability to convert docs into PDF and e-mail them."

Marks notes, “Court document retrieval services are also beginning to use this [method] to send copies of court docs. It’s quicker than Fed Ex and provides better quality than faxes.” Attorney Nancy N. Grekin of McCorriston Miller in Honolulu (www.m4law.com) has another alternative to old-fashioned faxing: “Hands down, my Visioneer StroberPro scanner running PaperPort [is my favorite tech tool]. I have practically eliminated faxing documents...by scanning and attaching as e-mail, and its OCR is great. I scanned my signature, converted it to a bitmap, and can insert it in desktop published letterhead that can be e-mailed, so I’ve eliminated postage with it too. It has a feature with forms that allows you to scan in a form, and it will recognize the lines and let you type on them. It is cool because it costs only $199 and is no bigger than a roll of aluminum foil.”

Electronic discovery is becoming increasingly important, and Jeff Brown, a member of Wright, Robinson, a firm with offices in Richmond, Virginia; Los Angeles; San Francisco; and Washington, D.C., says his favorite tool is software—namely, Daticon’s Virtual Partner (www.daticon.com). It allows for the management, review, and production of electronic documents. According to Russell Jackman (rjesq719@aol.com), an authorized reseller of Daticon products, Daticon’s Discovery OnDemand is even more exciting. It is a stand-alone system that indexes, sorts, and saves documents from up to 256 file formats.

Even small tech tools and free tech tools can help save time and money and increase efficiency and productivity. The USB solid state flash drive (commonly referred to as a thumb drive because of its size) provides a big solution. Cindy Chick, of the Information Services Department at Latham & Watkins, whipped out her USB drive when asked for her favorite tech tool. The drives, used for document storage, are about half the size of a highlighter but have up to 1 GB capacity. For attorneys who transport documents between the office and home PC, the USB drive offers extreme portability. For those who travel with a laptop and worry about having it stolen, loading documents onto the USB drive adds security, because the device can be placed in a pocket or hung around the neck with a lanyard (which is usually included with purchase). To use the USB drive, users simply plug it into most computers with a USB port; for newer operating systems, no drivers are required. The USB drive is a good replacement for the zip disk or files stored on CDs. Prices vary; we know of a 64 MB USB drive that cost $10 after rebates.

A free tech tool, the Google Toolbar (http://toolbar.google.com) is favored by Ben M. Schorr, director of information services at Damon Key in Honolulu (http://www.hawaiilawyer.com). “For folks who use Google frequently, it’s a fantastic add-on. It sits quietly on your toolbar, lets you quickly search Google from anywhere, gives you quick ways to search within the page or within the site, search Google Groups and its dictionary, and just about anything else you’d want to search. It’ll highlight the search terms you used…and you can even have it take you to the next hit or prior site in your results list.” Some of the attorneys at the 25-member firm probably do not even realize they are using this tool, because Schorr installs it by default on all new firm machines. Schorr notes, “About two-thirds of them have it, and quite a few are actually using it regularly. They rave about it, generally.”

Another of the latest cool high-tech interfaces is a data gatherer that understands spoken English: a human being. Attorneys who subscribe to the virtual reference service provided by LRSonline (www.lrsionline.net) can have immediate online access to an experienced law librarian for live reference assistance. Subscribers can pose questions to one of the service’s librarians by means of a chat feature. Browsing the Internet (including fee-based databases) with a librarian, an attorney simultaneously views the online resources that the librarian is using to locate the information the attorney seeks. The attorney and the librarian are thus literally on the same Web page. Within minutes of completing the request, a transcript with hyperlinks to all sites visited is sent to the attorney. E-mail reference is also available. A subscription to LRSonline is based on a rate of $50 per hour, according to Vice President Ray Jassin. His company, Law Library Management, has managed the libraries of hundreds of New York City law firms for more than 20 years. During those years, Jassin saw the need for experienced reference assistance at firms that either had no law librarian on staff or only a part-time librarian.

Lawyers at firms small and large are learning to rely on electronic gadgets to keep informed and make their jobs easier. No longer novelties, small devices have secured a niche in the legal technology marketplace, and software continues to develop new ways of managing the large amounts of data that lawyers must cope with. A lawyer with a particular problem may find that an electronic solution has recently appeared.
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Forming and Representing Nonprofit Corporations

ON TUESDAY, JUNE 10, the Business and Corporations Law Section will present an introduction to the legal issues involved in forming and representing nonprofit corporations. Speakers Shashi Hanuman and Louis E. Michelson will provide an overview of 1) how to form a nonprofit corporation, 2) how to obtain federal and state tax exemption, 3) the duties and liabilities of a nonprofit board of directors, and 4) general nonprofit corporate compliance issues. Attendees will also learn about opportunities for pro bono work with nonprofit corporations. This event—cosponsored by the Corporate Law Departments Section, the Taxation Section, the Barristers, and Public Counsel—will take place at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. Parking at the Figueroa Courtyard Garage will be available for $7 with LACBA validation. On-site registration and a meal will begin at 5:30 P.M., with the program continuing from 6 to 7:30. The registration code number is 808DF10. CLE+PLUS members may attend for free (meal not included). The prices below include meal.

$10—sponsoring section members, law students, and nonprofit legal service providers

$50—LACBA members

$60—all others, including all at-the-door registrants

1.5 CLE hours

Strategies for Employment Cases

ON SATURDAY, JUNE 21, the Labor and Employment Law Section will present a seminar for litigators interested in learning the latest strategies and tactics being used by leading members of the plaintiff and defense employment bars. The speakers—Judge James C. Chalfant, Linda C. Miller Savitt, and Steven J. Rottman, with moderator Andrew H. Friedman—will cover practical issues that include SLAPP, emerging discovery issues, and techniques and obscure procedural rules that both sides can use for advantage. The seminar will take place at Southwestern University School of Law, 675 South Westmoreland Avenue in Los Angeles. On-site registration and a light breakfast will begin at 8:30 A.M., with the program continuing from 9 A.M. to 12:30 P.M. The registration code number is 8174F21. CLE+PLUS members may attend for free ($20 meal not included). Prices below include meal.

$50—CLE+PLUS members

$100—Labor and Employment Law Section members

$135—LACBA members

$175—all others

3.25 CLE hours

How to Prepare Your Client for Deposition and Trial

ON THURSDAY, JUNE 12, the Litigation Section will present an interactive program focusing on preparing your client for deposition and trial. Please come prepared with questions for the esteemed panel of speakers: Judge William F. Highberger, Judge Joe W. Hilberman, Paul Kiesel, Katherine James, and Donna B. Siers. The program will take place at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. Parking at the Figueroa Courtyard Garage will be available for $7 with LACBA validation. On-site registration and a meal will begin at 5:30 P.M., with the program continuing from 6 to 7:30. The registration code number is 8174F21. CLE+PLUS members may attend for free (meal not included). Prices below include meal.

$10—Litigation Section members

$120—LACBA members

$140—all others

3 CLE hours
Let’s End Unneeded Court Appearances

**We can save time and money by conducting routine hearings and conferences by phone**

Most hearings are a waste of time and money. The submitted briefs address the issues that the parties think are material, and the judge and the clerks have days or even weeks to mull and ruminate, so the outcome is usually determined before the lawyers even park their cars. Oral argument itself is a pretense, an exercise in submitting on the tentative ruling or futilely repeating the arguments from the losing brief that the judge has already rejected. As with elections in Cuba, unexpected outcomes are rare.

The many species of mandated conferences are even more wasteful. Regardless of whether they are labeled as scheduling, trial-setting, postmediation, status, or case-management conferences, almost all entail little more than providing the court with rudimentary case information and selecting various dates for upcoming litigation events. Such bureaucratic tasks are not unimportant. On the contrary, effective calendar management is critical to the smooth functioning of the fast-track system. The Trial Court Delay Reduction Act has succeeded in erasing case backlogs and whittling the time from filing to trial from 5 years to 18 months or less. A major factor in that triumph has been the imposition of strict deadlines on litigants and the courts.

The problem with many hearings and conferences is the inherent inefficiency when lawyers, judges, court reporters, and other court personnel meet to complete tasks that could just as easily be handled by phone or mail. The tasks themselves need doing, but they should be done faster, cheaper, and smarter.

The waste of resources is obvious. Hundreds of lawyers slog through freeway gridlock to sit in courtrooms with agglomerations of other lawyers, all awaiting their opportunity to hear that the demurrer was denied or the motion to continue granted or to report that the mediation was a failure or that the case is near settlement.

The list of winners in this system is short: lawyers who are paid the hour (including myself) and owners of parking lots near courthouses.

The array of losers is much larger: lawyers who work for contingent fees, judges with too much to do and too little time to do it, taxpayers who foot the bill for overburdened court personnel and facilities, and litigants whose cases deserve more attention than they receive because judges are preoccupied with being litigation traffic cops.

But the biggest losers are clients who pay by the hour. Because Los Angeles County courthouses are so geographically dispersed and the freeways so fickle, round-trip drive times of four hours or more to court appearances are not uncommon. Litigants may get hit with a thousand-dollar tab for their counsel’s attendance at a one-minute hearing.

Small wonder that lawyers are reviled.

One solution to the problem lies in making hearings the exception rather than the rule. Imagine the savings if hearings were held only if judges specifically ordered them. Generally, the briefs would do all the talking. In effect, every noticed motion would be taken under submission. Judges who suspect that they would benefit from hearing from the parties could set hearings. Otherwise, the court would decide the matter based on the briefs. Judges could rule on the papers without listening to lawyers repeat the same arguments orally.

When the court’s minute order arrived in the mail or by e-mail, the parties would know how they fared. (Obviously, there are certain situations, such as when injunctive relief is sought, in which hearings would be mandatory.)

**Getting the Most out of Telephonic Hearings**

To further streamline the process, hearings should be conducted telephonically unless the court specifically orders otherwise. Arranging the telephonic hearing through Court Call or some similar agency would be the responsibility of the moving party. The speakerphone clumsiness that sometimes attends telephonic hearings would be outweighed by the convenience and savings entailed in skipping a drive to the courthouse.

Status conferences and similar logistical proceedings should undergo a similar transformation. The parties would file postmeditation status reports, case-management conference questionnaires, and the like, as they currently do. But instead of trudging to a hearing, they would receive a written order in the mail (or e-mail) outlining the schedule adopted by the court. This merely extends the court’s current practice of notifying parties by mail of the date of the initial status conference, a date that is unilaterally selected by the court without input from the litigants.

In fact, judges are already empowered to conduct telephonic hearings and case-management conferences under Rules of Court 212(b)(2) and 298. That power should be exercised by judges in all matters if they determine that a hearing is warranted. With budgets tight and getting tighter, neither government, insurers, nor private litigants should be asked to squander money on court appearances that exist more out of habit than need.
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