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Don Willenburg, an attorney with Carroll, Burdick & McDonough LLP in San Francisco and Los Angeles, specializes in appellate, litigation, and insurance coverage matters. In “Fixing the Damage,” he discusses how California appellate courts have determined punitive damages awards in the wake of State Farm v. Campbell. His article begins on page 22.

Cover photo: Tom Keller

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The U.S. Supreme Court has limited punitive damages awards to “single-digit multipliers,” but the results in state court have been unpredictable
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As I struggled with my first column for the magazine nearly one year ago, I wondered if this, my final one, would be easier to write. The answer is no. I still have several meaty topics that I wish I could address fully in this column. However, just as Carrie Bradshaw’s weekly chronicle about dating in New York reached its final installment, so too has my iteration of “Lex in the City.”

Had term limits not cut short my chairmanship, here are some of the subjects that perhaps would have graced this page:

**Financial crisis at the courthouse.** The impact of the state’s financial woes on the local courts has been well documented, with judicial personnel being laid off, court hours shortened, and filing fees increasing exponentially. Yet while Staples, Inc. is gladly forking over $100 million over 20 years for naming rights for Staples Center, the state has branded the Stanley Mosk Courthouse and the Clara Shortridge Foltz Criminal Justice Center without accepting a single dime from the namesakes. Between the egos and deep pockets of some of this city’s attorneys, the financial crisis could be solved within two months if naming rights for certain rooms in the courthouses could be offered to the highest bidder. Media interviews could take place in the Johnnie L. Cochran Press Center. Need to pick a mediator? Visit the Tony Piazza ADR office. Have a stomach flu? Run to the Mark J. Geragos Men’s Room. Grab a cup of coffee at the Thomas V. Girardi Cafeteria before meeting your client at the Marvin M. Mitchelson Palimony Assistance Center in the Gloria Allred Family Law Courthouse. And what client would not be impressed by the Jerry Abeles Clerk’s Office?

**Fill the frivolous lawsuit gap.** Ever since the Trevor Law Group was put out of business last year by the attorney general’s office, there has been a noted decline in the filing of frivolous lawsuits. True, the folks at Trevor were not responsible for every inane suit—indeed, they played no role in the recently settled lawsuit against Sony Pictures, which ran fake movie reviews to bolster mediocre films. Still, there is a hole that needs to be filled. I suggest that the attorney who elects to shoulder the frivolous lawsuit burden start with a representative action against every gas station in the state for overcharging customers by 1/10 of a cent per gallon.

**Social interactions with judges.** In the old days, the rules prohibiting parties from socializing with judges were fairly clear. Judges did not mingle with either party in a pending case, to prevent the appearance of impropriety. The rules changed, though, when U.S. Supreme Court Justice Antonin Scalia refused to recuse himself from hearing a case involving Vice President Dick Cheney, even though Scalia and Cheney had spent time together on a hunting trip after the Supreme Court had agreed to hear the case. Since the appearance of impropriety is no longer the guiding principle for conflicts, feel free to advise your clients to invite the judges who preside over their cases to backyard barbecues and Dodger games.

Granted, the gifted professional staff at *Los Angeles Lawyer* likely would not have allowed these columns to run. That is why they are professionals, and I merely volunteer.

Before my final sign-off, I must thank the professional staff. The publisher and editor and senior editor were particularly instrumental in ensuring that each From the Chair was coherent and did not exceed its allotted space, gently fending off my pleas for a full page. To fully appreciate the senior editor’s job, you should see, as they say in the movie *Alien*, what was left on the editing room floor.

I must also thank my wife, Debbie, who in addition to feigning interest in my cases, graciously read and constructively edited my columns. While partners, associates, secretaries, law firms, and even clients come and go, I know I can rely on Deb’s support.

I wish next year’s Editorial Board chair, Gary Raskin, the best of luck. I look forward to reading his columns.

It has been an honor and a pleasure serving the Association this year.
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Going beyond Traditional Pro Bono

Attorneys who lack, or think they lack, the time or training for pro bono have alternatives

By Rebecca A. Delfino

A recent informal survey of 50 lawyers from different practice areas in the public and private sectors on what they imagine as pro bono work revealed that nearly all respondents, including those with little or no pro bono experience, defined “pro bono” as providing legal services to the poor and disenfranchised for free. In general, this definition corresponds to those in legal dictionaries and relevant legal authorities. *Black's Law Dictionary* defines “pro bono” as “involving uncompensated legal services performed especially for the public good.” The California Business and Professions Code contains a similar definition.

It is therefore expected that the surveyed lawyers would define “pro bono” using similar language. What is surprising, however, was the limited type of activities that the large majority of respondents characterized as pro bono. When asked what kinds of activities constitute pro bono, most responses fell into one of two categories: 1) providing legal advice or counseling, for example, during a law day or at an HIV/AIDS immigration clinic, or 2) representing a client in a particular matter in court, such as assisting a victim of domestic violence to obtain a temporary restraining order.

Those lawyers surveyed who had not practiced pro bono held a narrow view of what qualifies as pro bono. Some lamented that while they were interested in participating in such activities, they had no training or experience to handle the work, or that the pressure of meeting billable hour requirements did not allow them the time to participate. A limited view of what activities qualify as pro bono and why time restraints and lack of training prevent pro bono work stands in contrast to the position of many law firms, law schools, judges, and organizations. Indeed, the ABA Model Rules of Professional Conduct suggest lawyers should “aspire” to provide at least 50 hours of pro bono legal service a year. These pressures leave many young lawyers in a quandary about how they can participate. Unfortunately, the survey revealed that the default decision is not to participate at all.

**A Better Alternative**

It may be time to offer a more flexible definition of pro bono. If lawyers are not participating in pro bono, maybe the traditional definitions and impressions of what qualifies as pro bono are too narrow and should be expanded. Perhaps pro bono could be thought of in broader terms that encompass using one’s resources and talents to help others without compensation.

There are many volunteer activities that require little or no training or experience beyond what every lawyer receives in law school.

Several organizations, including several within the Association, have volunteer opportunities to teach children and high school students about the law and operation of the legal system. The Barristers Kids Court program, for instance, allows volunteer lawyers to work with children who are witnesses in criminal trials to educate and comfort them prior to testifying. Lawyers can also assist high school students in participating in mock trial competitions. In addition, opportunities exist to mentor juvenile offenders through the Barristers Partners for Success Program, which matches volunteers with residents of a juvenile probation camp to provide guidance and to serve as positive role models.

Attorneys with legal experience or interest in pro bono activities other than representation and client counseling may also consider serving as a volunteer community mediator through an organization such as the Association’s Dispute Resolution Services. Attorneys may also serve as volunteer arbitrators or mediators through the Los Angeles County Superior Court’s ADR program.

Finally, for those who have the resources but no time to become involved in pro bono, there are a number of nonprofit organizations and legal service providers that accept monetary donations and contributions. The Los Angeles County Bar Foundation is but one example of several nonprofit entities that solicit and accept monetary contributions. With grants, the County Bar Foundation funds programs designed to improve the administration of justice and the delivery of legal services, enhance public confidence in the legal profession, increase understanding of and respect for the rule of law, and provide law-related assistance on a nondiscriminatory basis.

Within these broader descriptions of pro bono, nearly all lawyers should be able to find some service they can provide. Certainly all pro bono work is important and should be encouraged. However, in addition to traditional pro bono activities, attorneys searching for some way to use their legal talents and resources for the public good should also consider opportunities outside the norm.

Finally, expanding the definition of pro bono will produce other positive and important results. First, more lawyers could provide pro bono help. Second, a greater exposure and recognition of pro bono service would increase positive public perceptions of the important contributions lawyers make to the community at large. This awareness will specifically improve the public image of lawyers as well as promote greater confidence in the justice system in general. Such a result will ultimately reap rewards for all.
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The Ebb and Flow of Class Action Lawsuits

Despite their many controversies, class action lawsuits remain favored in California.

Three years ago, Justice Gary V. Hastings of the California Court of Appeal signaled a change in attitude in California toward class action litigation. After pointing out that “as a general proposition” class actions are favored under both California and federal law, he opined, “but, the tide has turned.” In support of his observation that “not all class actions are favored,” Justice Hastings cited federal legislation that more closely regulated class securities litigation.

One can, however, question whether this federal legislation is an appropriate barometer by which to measure the health of California class actions. Nearly 40 years after California expanded the use of class actions, they remain controversial, hotly contested, and continue to spawn appellate decision after appellate decision. But a trend remains elusive: Is the tide coming in or going out?

Before 1966, limited use of class actions was permitted in the federal courts under Rule 23 of the Federal Rules of Civil Procedure and, in California, under its general joinder statute. Then, in 1967, in Daar v. Yellow Cab, the California Supreme Court, following the lead of the federal courts, expanded the situations in which class actions could be maintained under the state’s joinder statute to include, among other suits, damage actions.

The Daar decision came one year after amendments to Rule 23 of the Federal Rules of Civil Procedure had expanded the use of class actions in federal courts. The amended rule set forth the elements for all class causes of action—numerosity, commonality, predominance, and adequacy—whether or not they sought damages or equitable relief. The requirements of federal Rule 23 were enacted into law in California in 1971 in the Consumers Legal Remedies Act which applied, however, only in limited situations and which contained requirements that further limited its use.

Four years later, in Vasquez v. Superior Court, the California Supreme Court did much more than express that class actions were favored “as a general proposition.” Justice Mosk, writing for a unanimous court, announced a broad, sweeping endorsement of class actions. The rationale and holding have never been criticized by an appellate opinion and stand yet today, still unimpaired as a statement of California public policy.

In making this sweeping change, the court reached back to a 30-year-old commentary, published after the stock market crash of 1929, that advocated the use of class actions to vindicate shareholder rights. The court’s comments still resonate:

What was noteworthy in the milieu three decades ago for stockholders is of far greater significance today for consumers.... Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.

In 1986, the California policy favoring class actions was challenged in State of California v. Levi Strauss & Co. A variation on the problem of identifying class members raised in Daar was how money judgments or monetary settlements could be distributed to unidentified or unidentifiable class members. The defendants argued that the inability to directly benefit class members rendered maintenance of a class action a futile exercise that did little more than consume the resources of the courts without providing any significant benefit to any significant number of the class-member plaintiffs. In class action terms, the action failed to meet the requirement of “manageability.” The countervailing argument was that, while compensation to the class members was a significant justification to allow class actions to proceed, equally compelling was the notion that such actions punished culpable defendants by requiring them to disgorge their ill-gotten gains. These two views were reconciled by the California Supreme Court through “the largely uncharted area of fluid recovery.”

In approving the use of the fluid recovery concept, the court outlined several particular applications of the doctrine that might be employed once payments to identified class members (by claims or otherwise) had been made: escheat, price rollbacks, additional payments to class members, and, as interveners had sought, a consumer trust fund. The court concluded:

[T]he sound approach of Vasquez continues to provide the proper framework. The trial courts...
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Representative Actions under the Unfair Competition Law

Even as Doar, Vasquez, and a host of other cases were settling and expanding California class action law, plaintiffs were increasingly exploring the use of California’s Unfair Competition Law (UCL) as a vehicle for redressing a wide variety of wrongs encompassed by the act’s broad description of condemned conduct—“any unlawful, unfair or fraudulent business act or practice.”10 In particular, plaintiffs were increasingly finding that an action under the act could be brought by a defendant to sue it—by providing “restitution” on behalf of a class, even if the defendant had not personally damaged the plaintiff by the conduct sought to be enjoined. Our research, too, has failed to disclose any such cases. However, we read the statute as expressly authorizing the institution of action by any person on behalf of the general public.14

The apparent limitation on the ability of a court to award damages under the act, which denominated the economic remedy available under it as “restitution,” was also largely swept away. The California Supreme Court held, in Cortez v. Purulator Air Filtration Products Company, “The concept of restitution or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person…. [R]estitutionary awards encompass quantifiable sums one person owes to another.”15

In a companion case decided the same day, Kraus v. Trinity Management Services Inc.,16 the California Supreme Court defined “restitution” with even more expansive language: “all money obtained through an unfair business practice” and “all profits earned as a result of an unfair business practice”—definitions that, if not synonymous with “damages,” are very close.18

But Kraus rejected the notion that the act allowed “any person” to seek disgorgement qua restitution on behalf of unrepresented third parties without alleging and satisfying the requirements of a class action (which would include that the named plaintiff have a typical claim—that is, standing) and explicitly held that fluid recovery, the means for disgorgement, was not a remedy available under the UCL, unless a class had been certified in the action.19

The court first hinted at such a holding in 1979 in Fletcher v. Security Pacific National Bank:

> Although an individual action may eliminate the potentially significant expense of pretrial certification and notice, and thus may frequently be a preferable procedure to a class action, the trial court may conclude that the adequacy of representation of all allegedly injured borrowers would best be assured if the case proceeded as a class action. Before exercising its discretion, the trial court must carefully weigh both the advantages and disadvantages of an individual action against the burdens and benefits of a class proceeding for the underlying suit.20

Respondents point out that no cases have been litigated under this section wherein the plaintiff, suing on his own behalf and as a public attorney general, was not personally damaged by the conduct sought to be enjoined. Our research, too, has failed to disclose any such cases. However, we read the statute as expressly authorizing the institution of action by any person on behalf of the general public.14

In sum, the Legislature has not expressly authorized monetary relief other than restitution in UCL actions, but has authorized disgorgement into a fluid recovery fund in class actions…. Therefore, we decline to read the grant of equitable power in section 17203 as encompassing the authority to fashion a fluid recovery remedy when the action has not been certified as a class action.21

This limitation on the use of fluid recovery in UCL actions did not, however, represent a turning of the tide in the development of class action litigation. Indeed, Kraus and Cortez actually extended the use of the broad UCL tort of “unlawful, unfair and fraudulent business practices.”

Ebb or Flow?

The introduction of the so-called Class Action Fairness Act in Congress in 2003 represented a clear attempt to turn the tide against class actions.22 The legislation was sponsored by business interests, including the tobacco industry, which perceived the federal courts as offering more favorable venues for class actions than state courts. The bill’s goal was to allow removal of class actions filed in state court to federal court by expanding the diversity jurisdiction of the federal courts.

The legislation provided that for class actions there need not be complete diversity between plaintiffs and defendants, and it sought to reverse early class action decisions holding that the monetary value of individual class members’ claims could not be aggregated to reach the minimum federal jurisdictional amount. In an effort to gain additional support, it tempered that restriction, somewhat, by providing that the aggregate value of the claims must be $5 million or more, an increase from the $2 million initially provided in the bill.23

In July 2003, the bill passed in the House by a vote of 253-170. However, despite an intense lobbying effort, proponents failed by one vote to get the necessary votes to invoke cloture and allow the bill to come to a vote in the Senate. While it can be assumed that the proposal’s supporters will attempt to pass the bill in this session of Congress, it will probably be difficult to do so in an election year.

In contrast to their failure to pass legislation last year, those who would turn the tide on class actions were more successful in 1995 and 1998 when securities litigation reform measures were passed and then amended,
providing the specific examples that Justice Hastings cited to support his observation that “the tide has turned.” The Private Securities Litigation Reform Act,24 passed in 1995, imposed stricter pleading requirements, limited precertification discovery, and limited the number of actions in which a person may be a lead plaintiff. Amendments adopted in 1998 prohibited class actions by private parties (with certain exceptions) based on state statutory or common law.25 This legislative activity may well suggest that the tide has ebbed in the limited area of federal securities class action litigation.

The tide may have ebbed as well in California in one other area: national class actions. The U.S. Supreme Court first approved national class actions in Phillips Petroleum Company v. Shutts,26 a case in which a Kansas trial court certified a national class and applied Kansas law to resolve all the claims. The Supreme Court first swept away constitutional and jurisdictional objections to the maintenance of a national class action in state court. It held that a forum state may “assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States” so long as the forum state affords due process—notice and the right to opt out.27 But the Supreme Court held that when there are conflicts between the law of the forum state and the laws of the states where the claims arose, the forum state must have a “significant contact or significant aggregation of contacts” to the claims asserted by each member of the plaintiff class, contacts creating state interests, before a state court may apply its own law. This is designed to ensure that the choice of the forum state’s law is “not arbitrary or unfair.”28 Thus national classes may be certified in state court and have been.

In Washington Mutual Bank v. Superior Court, the California Supreme Court affirmed that “if the relevant laws of each state are identical, there is no problem and the trial court may find California law applicable to class claims.”29 The rock upon which national class actions most often founder appears when the court must apply multiple, conflicting state laws to resolve all the claims. In this situation it is likely that individual legal issues, raised by the various applicable state laws, will predominate over common issues, and the class will not be certifiable.

Washington Mutual represents a careful attempt by the California Supreme Court to detail the analyses that a trial court must make to determine if there are conflicts of laws/commonality problems. The decision seems to indicate that the burden is first on the defendant to demonstrate that there are conflicts of law that prevent an across-the-board application of California law. Once the defendant does so, the burden shifts to the plaintiff to demonstrate that the class is still manageable, for example, by the use of subclasses.30

Washington Mutual also represents an effort by the supreme court to reconcile two earlier appellate court decisions, but the decision fails to do so fully. First, in 1988, in Osborne v. Subaru of America, Inc.,31 the Third District affirmed an order denying certification of a national class upon among other grounds “that California has [no] special obligation that would fairly call for this state to assume the burden of adjudicating this nationwide class action.”32 It appears that the Third District was not referring to the “contacts” test of Phillips Petroleum, but what it is referring to is not entirely clear. The opinion speaks of the burdens on the court of adjudicating a national class and appears to be saying that these burdens justify a refusal to certify a national class unless the state has some unspecified “special obligation.” Carried to its logical conclusion, no state would ever have a special obligation to adjudicate a national class action and, because class claims cannot be aggregated to meet the federal court jurisdictional dollar minimum, one could never maintain a national class action in any court. In Washington Mutual, the California Supreme Court noted Osborne’s “special obligation” requirement but neither adopted nor repudiated it.

Ten years later, in Canon U.S.A., Inc. v. Superior Court,33 the Second District had held that the propriety of national-class certification could be attacked at the pleading stage by a motion to strike (or, presumably, demurrer). While the California Supreme Court referred to the Canon holding in Washington Mutual, it neither explicitly affirmed nor disapproved it. But it did hold that the issues should be resolved at the class certification hearing.34 It would appear, therefore, that the certification of national class actions in California will be the subject of further clarifying opinions.

Looking Ahead

These recent court decisions show that the tide of class actions unleashed in 1966 by the amendments to Rule 23 and the warm embrace given them by the California courts commencing a year later has not turned. But that is not to say that, at some point, the class action critics will not have their way and will be able to, if not turn the tide, make it recede a bit.

Ever since the amendments to Rule 23 were debated, critics have argued that class actions hold the potential for great abuse and that the almost exclusive beneficiaries of an expanded use of these suits will be the attorneys who bring them. That argument was put forth vigorously in support of the Class Action Fairness Act of 2003, and it is not without merit. An obvious potential for abuse exists when class counsel simultaneously negotiates the substantive settlement on behalf of the class and the agreement with defendants to pay attorney’s fees. The danger is, of course, that trade-offs will be made that benefit counsel at the expense of his or her class clients. While the practice has not been condemned absolutely, it is a factor that the court must consider in evaluating the fairness of the settlement.35

However, two other areas equally subject to abuse have been the subject of little comment by the appellate courts. Given the potential of class actions for huge damage awards, large corporations (who are most often the defendants) initially reacted to them by resisting them at all costs. But, as time went on, sophisticated defendants came to appreciate the value of the full res judicata effect that class actions presented and began to devise ways that would provide that benefit while minimizing the payout. Two commonly used tactics emerged: claims-made settlements and prospective-relief settlements.

Under a claims-made settlement, the defendant agrees, often without limitation, to pay claims that are presented by class members pursuant to the notice that they are given. The reality is that only a very small percentage of class members make claims and the major payout, usually dwarfing the payout for damages, is for attorney’s fees. Thus, both goals justifying class actions—compensation to the numerous damaged persons and disgorgement—are defeated. If the goal of broad compensation cannot be, and often is not met because the class cannot be identified except through claims, the goal of disgorgement could be met by approving claims-made settlements only if the defendant agrees to a specific reasonable minimum payout with fluid recovery employed to utilize undistributed funds.

Under a prospective-relief settlement, the defendant agrees to pay attorney’s fees and to modify its practices in the future (in effect, a consent decree), thus conferring a benefit on its future customers, though not necessarily on the same customers it damaged in the past. The problem with prospective relief settlements is that once the matter is concluded, no one is left to monitor whether the defendant is living up to its promises, which were sometimes illusory in the first place. A reporting requirement as a condition of settlement approval could ensure that prospective relief is meaningful.

There is tremendous pressure on the
courts and parties to settle cases, and that pressure undoubtedly results in class action settlements that, but for attorney’s fees provisions, are more shadow than substance. It remains to be seen whether such class action settlements will receive greater scrutiny by the courts. If they do not, it may be that mounting criticism will result in a legislative turning of the tide.

2 CODE CIV. PROC. §378.
3 Daar v. Yellow Cab, 367 Cal. 2d 695 (1967).
Daar was brought on behalf of a class of overcharged taxicab patrons who could not be identified unless they individually stepped forward and identified (“ascertained”) themselves. Daar held that “ascertainability” does not turn on the question of whether individual members of the class can be identified but rather on whether there exists a “community of interest among the class members in the questions of law and fact involved” so that “the judgment…will be res judicata as to all persons to whom the common questions of law and fact pertain.” Id. at 706.
4 Consumers Legal Remedies Act (codified at CIV. CODE §1781).
5 Vasquez v. Superior Court, 4 Cal. 3d 800 (1971).
6 Id. at 807-08.
8 Id. at 479.
9 Id.
10 BUS. & PROF. CODE §§17200 et seq.
12 BUS. & PROF. CODE §17204.
13 BUS. & PROF. CODE §17203.
17 Id. at 127.
18 In Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1149 (2003), the supreme court pulled back a bit to restore somewhat the traditional notions of restitution when it redefined UCL restitution as “funds in which [plaintiff] has an ownership interest.” Id. at 127.
19 Kraus, 23 Cal. 4th at 137.
21 Kraus, 23 Cal. 4th at 132.
23 Id. at 663.
Avoiding the Bankruptcy Code’s Ratable Distribution Scheme

A purported creditor may be a beneficiary of an express, implied, or statutory trust

There are very limited circumstances in which a purported unsecured creditor of a debtor in bankruptcy can extract itself from the statutory scheme that gives priority first among unsecured creditors holding claims in the categories identified in 11 USC Section 507(a) and then to nonpriority unsecured creditors.1 In part, this is because of the strong policy in favor of ratable distribution among similarly situated creditors.2 Such circumstances exist, however, when the purported creditor establishes that it is not really a creditor at all but instead the beneficiary of an express, implied, or statutory trust relationship, under which alleged assets are collected in trust by the debtor for the benefit of the beneficiary and then paid to the beneficiary under applicable state or federal trust law.

Under 11 USC Section 541, the debtor’s estate consists of all of the “legal or equitable interests of the debtor in property as of the commencement of the case,” “wherever [such property is] located and by whomever held.”3 However, the legislative history of Section 541 clearly states that assets held by a debtor in trust for a third party are not part of the debtor’s bankruptcy estate.4 As one court observed, “Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition.”5

Understanding the applicability of these principles requires an awareness of what constitutes the types of trusts recognized by bankruptcy courts, which include statutory5 as well as express and implied trusts. An express trust, according to one court, is “a fiduciary relationship with respect to property, subjecting the person by whom the title to property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.”6 Another court noted, “An express trust may be created ‘without the use of technical words.”’7 Nevertheless, the everyday dealings between parties can establish a debtor-creditor relationship notwithstanding the existence of an express trust relationship between them.8

A trust that is implied may be a constructive trust or a resulting trust. One court wrote, “A constructive trust is an equitable remedy designed to prevent unjust enrichment, and restore legal title to one who, in equity, owns the res.”9 One species of a constructive trust occurs when a debtor has obtained property by fraud and that property is identifiable.10 However, as to alleged trust assets in the debtor’s possession on the petition date, the constructive trust remedy is typically useless, unless the constructive trust was imposed pre-petition by a court. Many courts have held that the remedy of a constructive trust will not be awarded postpetition because the remedy is “inchoate” as of the petition date and because the trustee’s strong arm powers under 11 USC Section 544(a) generally are superior to that remedy under the laws of most states.11 If a court has imposed a constructive trust against certain assets pre-petition or has issued an order for specific performance from which a constructive trust must be inferred, bankruptcy courts exclude the assets in question from the debtor’s estate,12 although there is limited authority to the contrary.

Resulting trusts also are implied trusts, but they differ from constructive trusts: “A resulting trust arises by operation of law to enforce the inferred intention of the parties to the transaction.”13 The parties’ intentions can be ascertained from the language of the parties, but intentions also can be determined from the parties’ conduct.14 The trust proponent need not show an actual intent to establish a resulting trust, but it “must prove the absence of an intent for the transferee to have a beneficial interest in the property.”15 Resulting trusts often arise in the “straw man” real estate transaction, in which one person takes title after consideration for the purchase is provided by another.16

There are various other circumstances, however, under which a resulting trust is created, including the failure of an express trust due to an invalidity, such as lack of a definite purpose or legality or if the trustee of an express trust has remaining property after a trust is fully performed.17 Once a resulting trust is implied by law to carry out the intention of the parties, the trustee’s only purpose is to hold or convey the trust assets to the beneficiary.18 The bankruptcy policy of ratable distribution has not been viewed as applicable to resulting trusts.19 However, even a determination that there is a resulting trust does not always eliminate a bankruptcy estate’s interest in the asset. The assets subject to a resulting trust will remain in the estate if applicable state law provides a lienholder or a bona fide purchaser with superior rights to the beneficiary of the resulting trust. For example, a trustee may use Section 544(a)(3) to avoid an unrecorded resulting trust interest in real property under Florida law.20

Finally, while equitable liens occasionally have been recognized by bankruptcy courts,21 they are conceptually different from trusts. Pursuant to 11 USC Section 541(d), the better-reasoned cases hold that “[i]f the debtors do not have an equitable interest” in the asset in question, then “the trustee takes only bare legal title subject to equitable encumbrances that can be proved.”22 Express, implied (resulting or constructive), and statutory trusts all form grounds for excluding property from a...
bankruptcy estate. The existence of an equitable lien, however, should not prevent the debtor’s bare legal interest from becoming an asset of the debtor’s estate. Instead, the equitable lien “is simply a charge upon the property, which charge subjects the property to the payment of the debt of the creditor in whose favor the charge exists.” That conceptual distinction may limit the rights of an equitable lienholder to being paid on its equitable lien from the proceeds of the sale of the asset rather than being able to prevent the sale.

### Tracing Alleged Trust Funds

If an alleged trust beneficiary has consented to a debtor commingling alleged trust funds with its general revenues rather than requiring the segregation of the alleged trust funds, courts are reluctant to determine that an implied trust exists, because consent to commingling typically creates a debtor-creditor relationship. This is even more true in the context of an express trust, when courts have found a beneficiary’s implied or express consent to commingling to be inconsistent with the existence of an express trust. In circumstances in which it would be unduly burdensome to segregate alleged trust funds, however, courts have found that the commingling of funds does not preclude the existence of an implied trust. Further, a long-term course of dealing between parties has been deemed to result in a trust relationship despite the commingling of funds.

If a trust relationship with a debtor is shown and the debtor has wrongfully commingled alleged trust funds without the trust beneficiary’s consent, the court usually will impose tracing requirements regarding the commingled funds. Indeed, wrote one court, “The remedies of constructive trust, sequestration, and the like cannot be applied, however, where the subject res cannot be traced or presently identified, and the interests of numerous other similarly-situated claimants are implicated.” This involves meeting the “lowest intermediate balance” test, described by a court as “[t]he normal procedure for tracing trust proceeds which have been commingled in a bank account.” When that test is applied to trust funds that have been commingled with other funds, the trust fund is treated as lost if all funds are withdrawn. However, if the amount on deposit is reduced below the amount of the trust fund but is not depleted, the trust fund claimant is entitled to the lowest intermediate balance in the account—based upon the fiction that non-trust fund monies have been withdrawn first.

The timing of the collection of alleged trust funds is a critical factor in tracing the funds and the trust beneficiary’s ability to recover. First, if the funds have been collected pre-petition by a debtor, commingled with the debtor’s general revenues, and spent pre-petition, the funds will be gone when the debtor files a bankruptcy petition, and the trust beneficiary will be left with a pre-petition unsecured claim arising from the wrongful diversion of trust funds.

Second, if the funds have been collected pre-petition and tracing proves that those funds are still held in the debtor’s account on the petition date, then the alleged trust remains and against which the trust may be imposed. If the collected trust funds remain in the debtor’s control as of the petition date and later are used for the debtor’s benefit, then the trust beneficiary may hold an administrative expense claim.

Third, if the funds have been collected post-petition, tracing will not be as important, because it is a virtual certainty that all such funds will be deposited in the debtor’s post-petition accounts. In these circumstances, the trust beneficiary should have an administrative expense claim under 11 USC Section 507(a)(1)(A) to the extent any such funds have been spent by the debtor.

### Recognition of Trusts

Bankruptcy courts agree that they are required to apply nonbankruptcy law to determine whether a trust relationship exists. That nonbankruptcy law typically is the law of the relevant state, but it may be federal law if there are significant federal interests involved.

In choosing whether to apply federal common law, courts have applied the generally accepted criteria of whether there is a “significant conflict between some federal policy or interest and the use of state law,” and whether a “unique federal interest exists” that would warrant the application of federal common law. The cases in which the Supreme Court has created and applied federal common law are few and restricted, and they are “limited to situations where there is a significant conflict between some federal policy or interest and the use of state law.” There are, however, cases in which bankruptcy courts have chosen to apply federal common law.

Bankruptcy courts have recognized statutory trusts under two federal laws—the Perishable Agricultural Commodities Act of 1930, and the Packers and Stockyards Act—as well as under state laws that protect subcontractors and suppliers. Bankruptcy courts also have enforced express trusts in various contexts, including joint deposit accounts, prepaid affordable college tuition contracts, funds held by a loan servicing agent, and properly funded escrow accounts.

Courts, however, have wrestled with finding implied trusts, especially constructive trusts. The biggest hurdle typically faced by the alleged beneficiary of a constructive trust is that the beneficiary is viewed as a mere creditor when the remedy of a constructive trust has not been imposed pre-petition against the debtor and the assets in question. Nevertheless, “[s]ome courts have concluded that pursuant to section 541(d), where the debtor holds property under conditions in which state law would impress a constructive trust, the property never becomes property of the estate and the trustee’s strong arm powers cannot defeat the creditor’s equitable interest.” On the other hand, “[o]ther courts have found that section 541(d) does not limit a trustee’s avoidance powers so that the trustee may avoid the previously undeclared equitable interest of a constructive trust claimant.” Applying Virginia law, however, one court has found that a trustee held title to real property subject to a constructive trust interest of a third party even though a pre-petition judgment had not been entered. Similarly, in a recent decision, a constructive trust was enforced under Illinois law against personal property in the debtor’s name, notwithstanding the lack of a pre-petition judgment. The court reached this decision because the constructive trust was deemed to arise at the time of the wrong rather than at the time of the judicial imposition of the remedy, and because the rights of a hypothetical lien creditor under Illinois law are not superior to the rights of the beneficiary of the constructive trust.

Constructive trusts also have been imposed for purposes of determining whether the property of the debtor was transferred pre-petition in the context of a voidable preference action, though courts may require the creditor to trace the funds that the debtor had wrongfully withheld. One court imposed a constructive trust postpetition against traceable funds in favor of a group of insurers, notwithstanding the fact that a constructive trust had not been judicially imposed before the bankruptcy filing. The funds had been received pre-petition by the debtor to reimburse it for damages covered by the insurers.

Similarly, one divided court of appeal recently found that the nondebtor spouse was entitled to the remedy of a constructive trust against community assets when the debtor spouse filed for bankruptcy, notwithstanding the fact that neither a pre-petition division of marital property nor a pre-petition state court order had occurred. The court, however, distinguished the case before it “from those cases in which the courts have concluded that the filing of a bankruptcy petition cut off the unrecorded equitable rights of a non-debtor spouse” on the grounds that
the trustee did not attempt to avoid the non-debtor spouse’s interest in the IRA that was at issue but instead supported the award.57 Thus, it would appear that a nondebtor spouse’s inchoate constructive trust claim against marital property that is the subject of a debtor spouse’s bankruptcy estate may not survive the trustee’s strong arm powers in the context of chapter 7 or chapter 11 cases, if those powers are available to the trustee and the trustee asserts them.

Resulting trusts, which give effect to the parties’ inferred intentions, have been imposed by bankruptcy courts in many contexts:

- A van paid for by the debtor, registered in the debtor’s name, and used exclusively by the debtor’s boyfriend.58
- A certificate of deposit that was titled a “Joint Account with Right of Survivorship” and that named the debtor as one of four individuals on the account.59
- Commingled utility payments collected by a chapter 11 debtor department store, though the utility company was required to trace those funds and they were subject to the “lowest intermediate balance” test.60
- Real property to which debtors held bare legal title because it was placed in their names to avoid acreage restrictions on an irrigation district, and the property was paid for by the parents of one of the debtors.61
- Bringing real and personal property into a bankruptcy estate after that property had been transferred by a debtor to a nondebtor spouse and a nondebtor family partnership.62

An analogous nonbankruptcy circumstance in which courts have found implied trusts occurs in SEC receivership actions, when investors’ monies have been collected under a Ponzi scheme operated by the debtor but certain investors’ monies have remained segregated and are traceable.63 However, “[c]ourts have favored pro rata distribution of assets where, as here, the funds of the defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders.”64

Any practitioner who has litigated the existence of a trust relationship in bankruptcy court undoubtedly has been met with comments about how the recognition of a trust relationship would have the effect of preferring the “trust creditor” over other creditors and would reduce the distribution to other creditors, especially in chapter 7 cases or liquidating chapter 11 cases. However, a similar effect occurs as a result of the recognition of secured debt, reimbursement rights, and setoff rights. If a trust relationship exists, the trust beneficiary can and should receive the appropriate recognition, rather than having its trust claim viewed with skepticism. After all, a
secured creditor and a creditor with reclamation or setoff rights are mere creditors, whereas a trust beneficiary is not even a creditor. Instead, a trust beneficiary simply asks that the court recognize that the debtor and the debtor’s estate should not be allowed to wrongfully convert the trust beneficiary’s assets to the benefit of the debtor and its creditors. Proper application of federal and state law should assist in the fair recognition of that right.

1 11 U.S.C. §§507(a); 726(a).
9 In re Morales Travel Agency, 667 F. 2d 1069, 1072 (1st Cir. 1981).
14 Markair, 172 B.R. at 641.
19 Bainbridge, 16 Cal. 2d at 428.
24 In re Surplus Furniture Liquidators, Inc. of High

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Helical Tiebacks
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Stabilized Home & Pool & Slope

Stabilized Slope, Building Pad, and Re-leveled Structure
Just over one year ago, the U.S. Supreme Court announced new limits on awards of punitive damages. In *State Farm Mutual Insurance Co. v. Campbell*, the Court acted to rein in “runaway” punitive awards by downplaying the roles of the defendant’s wealth and of harm to anyone other than the plaintiffs in a particular suit. In California and elsewhere, however, considerable latitude remains. California courts responded to *Campbell* in a variety of ways: by applying the limits; by extending them to new areas; and by apparently ignoring, while pretending to apply, the new limits. *Campbell* reversed a punitive damages award that was 145 times the compensatory award. The Court recommended punitive damages in an amount “at or near” the compensatory damages in the case, and no more than a “single-digit multiple” generally.2 *Campbell* and its progeny are now required reading for plaintiff and defense counsel.

*Campbell* began as a car insurance claim. The Campbells caused an accident that left one person dead and another paralyzed. Their insurer assumed their defense but, against the advice of its investigator, refused to settle within the $50,000 policy limits. A much larger judgment was entered, and the insurer refused to pay the excess for 18 months. The Campbells sued the insurer for bad faith. The trial court found that the treatment the family had received was part of a nationwide, decades-long policy by State Farm to defraud insureds and courts by not paying legitimate claims. The insurer targeted this scam at those most vulnerable, such as the poor, the elderly, and the sick. The jury awarded, and the Utah Supreme Court approved, $1 million in compensatory damages and $145 million in punitive damages. The U.S. Supreme Court reversed and remanded to determine a “reasonable and proportionate” award pursuant to three “guideposts”: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”3

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California courts are struggling to apply reasonable limits on punitive damage awards in light of *State Farm v. Campbell*
The first guidepost is reprehensibility. In particular, according to Campbell, when determining an award a court should consider only the reprehensible conduct that is closely related to the plaintiff’s particular harm. A defendant may only be punished for its actions toward the the plaintiffs in a particular case, not the defendant’s actions toward other people. Although the Court agreed that this insurer’s conduct “merits no praise,” the Court objected to using the case “as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country,” which “bore no reasonable relation” to the Campbells’ harm. “A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.” The Court also noted: “A defendant should be punished for the conduct that harmed the plaintiff, not for being…unsavory…..” This clear language should limit the applicability and the amount of punitive damages.

The Court also discounted the relevance of acts outside the state in which the action was brought. The “conduct [justifying punitive] must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed…that it may not use evidence of out-of-state conduct to punish a defendant for conduct that was lawful in the jurisdiction where it occurred.”

This may mean that in-state conspiracies can be fully vetted and punished, but decisions made in a remote corporate office that affect multiple states may not. Nevertheless, the Court did allow the use of evidence of nationwide acts to establish “deliberateness and culpability” of the in-state acts. It is not specified how, as a practical matter, courts are to distinguish between these uses of such evidence.

The second guidepost is proportionality between punitive damages and the compensatory award. The Campbell Court declined to “impose a bright-line ratio which a punitive award cannot exceed,” but held that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”

The Court surveyed prior decisions, including Pacific Mutual Life Insurance Company v. Haslip, which allowed punitive damages four times greater than compensatory damages, and observed: “Single-digit multipliers are more likely to comport with due process, while still achieving the state’s goals of deterrence and retribution, than awards with ratios in the range of 500 to 1…or, in this case, of 145 to 1.” The Court did not fix the proper amount but remanded with a recommendation of “a punitive damages award at or near the amount of compensatory damages…In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio.”

The Court announced a general principle that “courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” “Reasonable and proportionate,” or variants thereof, is a phrase repeated throughout the decision. “Reasonable” lends little guidance, however, considering that the Utah Supreme Court considered the award reasonable. The Court therefore recognizes the primacy of the “proportionality” prong of the test: “In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio.”

The context in Campbell included several significant factors. The compensatory award in this case was substantial: The Campbells were awarded $1 million for a year and a half of emotional distress. The harm arose from an economic problem, not from physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them.

The Court indicated that the “compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award,” such as “distress,” “outrage,” and “humiliation.” The Court did not find that punitive elements were actually present but held that because such elements as humiliation may be considered in a compensatory award, punitive elements were “likely” present. The Court justified its holding on the basis of this likelihood rather than any specific evidence as to whether in fact punitive damages in this case were counting for something already awarded in compensatory damages. Defendants in future cases may similarly seek to rely on this likelihood for justifying lower punitive awards.

This presumption puts plaintiffs in a box. If they win only a small compensatory award, then regardless of the reprehensibility or widespread nature of the defendant’s acts, the punitive award must be small as well to satisfy the Court’s concern about proportionality. If plaintiffs win a large award, then the Court says that it is likely that the award includes punitive elements, so the punitive award should be limited to avoid duplication.

The Supreme Court may have complicated the “proportionality” analysis when it held that the “wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award.” This pronouncement has been widely quoted, but it is of uncertain effect. On the one hand, the Court held that the reference to State Farm’s assets “had little to do with the actual harm sustained by the Campbells.” This will almost always be true, so this seems to say that wealth should not be considered. But the Court also recognized that deterrence and retribution are permissible purposes of punitive damage awards, and wealth is relevant to both. Wealth is not, however, relevant to a proportionality analysis, which simply compares the size of the compensatory and punitive damage awards.

The third guidepost in Campbell looks to the relation between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The Court found that the “most relevant sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine…an amount dwarfed by the $145 million punitive damages award.” The Court discounted the Utah Supreme Court’s consideration of other possible penalties, such as the loss of business license, disgorgement of profits, and imprisonment, as speculation.

Campbell should be comforting to some potential targets of punitive damage actions. For example, most conduct will be, or can be made to appear, far less reprehensible than the decades-long, nationwide scheme that was proven in the Campbell trial. So defendants can always argue that the awards in their cases should not exceed the ratio of punitive to compensatory damages that the Court recommended, which in the case of Campbell was “at or near” one to one. But the Court’s language leaves plaintiffs to argue that each state can decide whether wealth is relevant in deciding punitive damages.

**California Cases**

California punitive damages law has already felt the effect of Campbell. Several pending cases were remanded or otherwise rebrieved specifically to address Campbell. The first decisions to apply Campbell show a wide range of results.

In Diamond Woodworks, Inc. v. Argonaut Insurance Company, the first California appellate court to interpret Campbell held that it limited punitive awards to no more than four times compensatory damages. The court reduced a punitive award from 13 to 3.8 times compensatory damages.

In Diamond Woodworks, a worker cut off four fingers on his first day on the job. Argonaut insured BSC, which leased employees to Diamond under an agreement that BSC’s insurance would cover worker-related claims. When this worker was injured, BSC said that his paperwork had not been completed and contested his employment status. Argonaut agreed, refused to defend Diamond, and denied...
coverage to the worker for 18 months, even in the face of a contrary court decision in virtually identical circumstances, plus a substantial likelihood of damages in excess of the policy limits. The court found that this insurer bad faith justified “significant punitive damages,” but that in light of Campbell the jury’s award of punitives of 13 times compensatories was unconstitutional. Because the court found the insurer’s conduct particularly reprehensible, it awarded punitives of about 3.8 times compensatories, near Hastip’s upper limit of 4 times compensatories.

In Romo v. Ford Motor Company, a wrongful death and physical injury case, the U.S. Supreme Court vacated judgment and remanded for determination in light of Campbell. On remand, the California Court of Appeal reduced a $290 million punitive award from 59 times compensatories to “approximately five times.”

Romo applied the Campbell limits to a case that (unlike Campbell) involved physical injury, and in the process overruled longstanding California punitive damages law. Romo arose from an accident in which a sport utility vehicle rolled over. The roof could not support the weight of the car, and three of four family members inside (who were wearing seat belts) were killed. The passengers who escaped death were thrown from the car and seriously injured. The court of appeal had no problem finding reprehensibility:

> [T]he design and production of the car was the despicable conduct: we think it obvious that putting on the market a motor vehicle with a known propensity to roll over and, while giving the vehicle the appearance of sturdiness, consciously deciding not to provide adequate crush protection to properly belted passengers (in the words of a corporate memo introduced in evidence, ‘penalizing’ passengers for wearing a seatbelt) constitutes despicable conduct.

In addition, the court observed:

> [D]efendant ignored its own internal safety standards while leaving the Bronco with the appearance of incorporating a roll bar into the vehicle’s roof structure. Defendant declined to test the strength of the Bronco’s roof before placing the vehicle in production, and when it did test the roof strength [years later], defendant concluded the roof in fact failed to meet its own standards. Ford modified later models but did not recall or warn purchasers of earlier, weak-roofed models.

Even with this evidence of reprehensibility, and the tremendous losses to the plaintiffs, Romo stayed within Campbell’s “single-digit multiplier” limit on punitive damages. In part this was because Romo interpreted Campbell to overrule longstanding California law as set forth in Grimshaw v. Ford Motor Company, and Rufo v. Simpson. Grimshaw, and traditional California punitive damages law, held that the amount of an award should be enough to deter the same conduct against consumers other than the plaintiffs. But Romo found that Campbell “disapproved of this broad view” and required that courts focus primarily on what the defendant did to the present plaintiff, rather than the wealth of the defendant or the defendant’s general incorrigibility. The same focus also effectively overruled traditional California punitive damages law, as stated in Rufo, that the defendant’s wealth is one of the “three main factors” in determining the proper amount of punitive damages.

Romo did not, however, follow Campbell’s lead in presuming that a large compensatory award must include punitive elements: “[T]he extreme reprehensibility of defendant’s actions and the undercompensation of plaintiffs’ individual losses [addressed in a separate portion of the opinion] outweigh the punitive element already contained to some extent in the individual compensatory awards.” Romo holds that “the deathly harmful component of the punitive award in the present case is [not] strictly constrained by the single-digit multiplier” set forth in Campbell. But Romo nevertheless reduced the award to within that range—“about five times” the compensatory damages.

A third case, Henley v. Philip Morris, raises the issue of extreme reprehensibility as a justification of a 6-to-1 ratio of punitive to compensatory damages. The California Supreme Court remanded Henley with express directions to reconsider the punitive damages award in light of Campbell. The court of appeal reduced the pre-Campbell punitive award but stretched the limits used by the California decisions in Diamond Woodworks and Romo.

Henley was brought by a smoker for tobacco-related injuries. Henley reduced a punitive damages award from 17 times compensatory damages to 6 times compensatories. (The compensatory damages were $1.5 million. Henley reversed subject to remittitur, reducing the punitive award from $25 million to $9 million.) Henley’s reduction of the punitive award is noteworthy in several respects.

First, Henley applied the Campbell single-digit limits in a case involving physical injury, not just economic injury (as in Campbell). Second, Henley went beyond the 4-to-1 ratio that Campbell held would be the normal limit for punitive awards but stayed within the single-digit ratio beyond which Campbell found awards particularly sus-
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sured against compensatory damages or against all the harm that a plaintiff may suffer, even if not legally compensable. The court may also address whether a merely economic injury, as in *Simon*, should merit any multiple of compensatory damages rather than an award “at or near” compensatory damages as suggested by *Campbell*. The court may also address whether *Simon*’s insistence that punitive damages be large enough that “they cannot simply be written off as a cost of doing business” can be squared with *Campbell*’s holding that “wealth...cannot justify an otherwise unconstitutional punitive damages award.” Thus, the California Supreme Court’s review of *Simon* has the potential to clarify a broad range of issues under California law after *Campbell*.

In the fifth and most recent reported California decision interpreting *Campbell*, *People ex rel. Lockyer v. R. J. Reynolds Tobacco Company*, the State of California won sanctions against a tobacco company for violating a consent decree by targeting advertising to minors. The court of appeal reversed a $20 million sanctions award because it was “improperly based [upon] (1) Reynolds’s national advertising spending rather than on Reynolds’s advertising spending in California and (2) Reynolds’s wealth.” In *Lockyer*, the people argued that the punitive award was reasonable because that amount represented “about 10 percent” of what “Reynolds spent on magazine advertising during the relevant...period, and...less than one percent of Reynolds's cash on hand.”

The court of appeal, citing *Campbell* and other federal decisions, held that punitive damage awards based on conduct in one state cannot be based on “nationwide financial figures without violating...due process rights.” Because “a 'State cannot punish a defendant for conduct that may have been lawful where it occurred','” and because states may not impose “punitive damages...for unlawful acts committed outside of the State’s jurisdiction,” using national advertising spending as a guideline was impermissible.

*Lockyer* assumes, without discussing or citing authority, that “the principles applicable to punitive damage awards are applicable to the sanctions imposed in this case.” *Campbell* and the other federal cases that *Lockyer* cites involved torts, with both compensatory and punitive damages awarded. *Lockyer*, on the other hand, involved violation of a contractual duty, for which sanctions were the only award. Because there were no compensatory damages to which the sanction award could be compared, the limits that *Campbell* imposes on punitive awards seem inapplicable. Further, enforcing a voluntarily assumed contractual duty does not implicate due process concerns at the same level as a state court making punishable what is otherwise, and in other states, lawful. There was no evidence that Reynolds’s youth-targeted advertising was lawful or unlawful anywhere else or that the consent decree obligations stopped at the state line.

One could argue that *Lockyer*’s $20 million sanctions award was not based on either nationwide spending or the defendant’s wealth but that it was reasonable in light of such factors. A true evaluation of the harm, even restricted to one state, would likely result in a far higher figure than the sanctions that were originally awarded, perhaps even higher than the company’s national advertising expenses. Comparing the $20 million requested to the national figures was a matter of advocacy by counsel, not a finding of causation by the trial court. Perhaps it is true that neither sanctions nor punitive awards should be based solely on wealth, and that the mention by counsel of wealth in assessing whether an award is reasonable should not be by itself a basis for reversal.

*Lockyer* did not decide the ultimate question of what would be an appropriate amount
for sanctions. To do so, it might have been forced to confront the poor analogy between punitive damages and sanctions. The California Court of Appeal remanded Lockyer on damages without specifying how that amount should be determined and without suggesting or setting a maximum.

**OUTSIDE CALIFORNIA**

California courts are not alone in stretching Campbell's limits. Although Campbell holds that punitives “at or near” compensatories are appropriate in the ordinary case (with Campbell itself belonging to that category),

state courts have not followed this prescription. Other states are awarding significant punitive damages even after Campbell, although most of these awards use a single-digit multiplier. In fact, since Campbell, no reported appellate decision from any state has limited a punitive award to “at or near” the compensatories, even when it otherwise reduces an award in light of Campbell.

Campbell and subsequent California decisions provide fodder for both sides in an argument over the size of punitive awards in any particular case. Defendants seeking to limit the size of awards may consider how the following points may apply to their cases. First, is the conduct in the present case as reprehensible as it was in Campbell? In that case, a mammoth insurer could have settled a claim against its insured arising out of a horrific accident for a relative pittance within policy limits, ignored the advice of its own advisers and chose not to settle, and exposed its older, ill, and impecunious insureds to a judgment of over $1 million and the threatened loss of their home. Most plaintiffs are not as vulnerable, and most defendants are not so heavy-handed or unreasonable.

Second, the compensatory award already includes some punitive elements, so the punitive award should be lower to avoid what the U.S. Supreme Court called “double counting.” This argument will most likely succeed in cases in which tangible damages are slight and “soft” damages, such as emotional distress or damage to reputation, are high.

Third, evidence of acts against parties other than the plaintiffs, acts outside the jurisdiction, and the defendant’s wealth should not be considered in making an award. If evidence relating to these matters is presented at trial, a good ground for appeal may exist. A comparatively impecunious defendant may want to introduce financial condition evidence, however, to limit the punitive award to a reasonable percentage of net worth.

Fourth, the U.S. Supreme Court held that a 1-to-1 ratio was proper in Campbell and that the ratio should generally be no higher than 4 to 1 and almost never more than 9 to 1. The Campbell ruling effectively declares that the days of super-sized punitive damage awards are constitutionally over.

On the other hand, plaintiffs arguing for a large punitive award after Campbell are not bereft of points to emphasize. First, it may be that a defendant’s conduct was more reprehensible than it was in Campbell, e.g., because it lasted longer or involved physical harm. Campbell involved purely economic harm, and only 18 months of uncertainty before State Farm paid the entire underlying judgment owed by its insured. Second, despite the U.S. Supreme Court’s pronouncements, the trend in post-Campbell decisions among lower courts is to award punitive damages significantly more than “at or near” compensatories, and in fact at multiples of four or greater.

Third, plaintiffs may also argue that their actual harm exceeds the limited amount that is recoverable as damages. Under Simon, the higher amount may be used to compute an acceptable punitive award.

Fourth, plaintiffs may argue that the amount of any punitive award should be enough to serve the twin purposes of deterrence and retribution. Evidence of wealth is necessary to determine what amount of damages might be sufficient to deter and punish. While a defendant’s wealth may not jus-
tify an award of 100 times compensatory damages or more, wealth may still mean the difference between awarding punitive damages at, for example, 2 or 9 times compensatories.

Fifth, if the compensatory damages are small or pro forma, the *Campbell* limits should simply not apply. If they do, however, it is more likely that the award does not include any punitive elements, so a higher multiple of compensatories may therefore be appropriate.69

The U.S. Supreme Court has announced significant new limits on punitive damage awards. The post-*Campbell* decisions have explored ways to apply, or perhaps evade, these limits. *Campbell* may have ended punitive damage awards dozens or hundreds of times greater than the actual damages suffered by plaintiffs. But recent decisions suggest that “reasonable and proportionate” punitive awards may still be a significant multiple of compensatory damages.

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2 Id. at 1524.
3 Id. at 1520 (citing BMW of North Am., Inc. v. Gore, 517 U.S. 560, 575 (1996) (reversing $2 million punitive award accompanying a $4,000 compensatory verdict)).
4 Id. at 1524.
5 Id. at 1521-24.
6 Id. at 1522.
7 Id. at 1524.
9 Campbell, 123 S. Ct. at 1524.
10 Id.
11 Id.
12 Id.
13 Id. at 1524-25.
14 Id. at 1525 (citing RESTATEMENT (SECOND) OF TORTS §908 cmt. c.).
15 Id. at 1525.
16 Id. at 1519.
17 Id. at 1526.
18 Id.
20 Id. at 1024.
21 Nonparties unsuccessfully petitioned the California Supreme Court to depublish this opinion. Their lack of success indicates that the court does not find the result outrageous, but neither does it indicate that the court supports the decision.
25 Id. at 1141.
26 Id. at 1148.
The court of appeal followed the California Supreme Court's directions on remand, whereupon the California Supreme Court granted review and the opinion was depublished. See Henley v. Philip Morris, 81 P.3d 223 (2003). The court required only a technical correction, however, and did not revisit the substance of the court of appeal's opinion. The court of appeal corrected the matter and "reiterated[d] our previous decision." Henley, 114 Cal. App. 4th at 1457.

Henley, 114 Cal. App. 4th at 1480.

Id. at 1477-81.


Smith, Generous Punitive Awards Are Trumiped, CALIFORNIA LAWYER, Apr. 2003, at 37, 39 [hereinafter Smith].


Smith, supra note 40, at 39.

Campbell, 123 S. Ct. at 1519.


Campbell, 123 S. Ct. at 1524-25.

Id. at 1522-24.


IN OCTOBER 2003, a Durham, North Carolina jury convicted novelist Michael Peterson of killing his wife. Peterson, author of *A Time of War*, told authorities that his wife had fallen down a flight of stairs in their home after drinking alcohol and claimed that the fall killed her. His conclusion did not persuade prosecutors, who had uncovered remarkable evidence that 18 years earlier, Peterson’s next-door neighbor in Germany, a woman unrelated to Peterson, had died alone in her home after a fall down a flight of stairs. This coincidence had a sinister twist, even though Peterson was neither charged with nor convicted of any crime involving the neighbor’s death, and German officials deemed the neighbor’s death accidental. The North Carolina court allowed Peterson’s jury to hear the evidence about the neighbor in Germany after an autopsy on the neighbor’s exhumed body conducted just before Peterson’s trial revealed that repeated strikes to the head, and not the fall, had killed her. Supplementing the autopsy was testimony from an eyewitness who had seen Peterson running from the house on the night the neighbor died. Under the trial court’s instructions, the North Carolina jury could consider the evidence from Germany relevant to show 1) Peterson’s mental state, including his intent and knowledge, and 2) that his wife had not died by accident. The jury convicted Peterson of first degree murder. Afterward, Peterson’s attorney, David Rudolf, called the evidence from Germany “very, very damaging.”

Like the court in North Carolina, California courts also would have admitted the evidence from Germany.

**Second ACTS**

The expansive reach of Evidence Code Section 1101(b) provides a basis for effective strategies before and during trial.
evidence from Germany under Evidence Code Section 1101(b) had Peterson committed the crime in California. That section permits a party to present evidence of a person’s behavior if the evidence is relevant to prove a fact “such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident....” The power of Section 1101(b) is perhaps unparalleled in the Evidence Code. The obvious impact of the evidence the section regulates should invite attorneys to use that section whenever possible. Inventive strategies using Section 1101(b) may lead to the introduction of otherwise prohibited evidence.

Practitioners can utilize Section 1101(b) in ways that expand its reach and enhance its influence before and during trial. The statute lists permissible uses—for instance, to prove motive, identity, and intent—that are not exclusive. Moreover, courts have developed different tests for the admissibility of evidence under Section 1101(b). Understanding these various judicial interpretations of Section 1101(b) is essential to devising creative uses of the statute.

Section 1101(b) packs a wealth of possibilities in a brief paragraph:

Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

Lawyers often incorrectly refer to Section 1101(b) as the statute that permits the introduction of evidence of “prior bad acts.” That shorthand reference, perhaps as much as anything, perpetuates the misunderstanding—and limited use—of the statute. In reality, the section does not restrict the admissible evidence to “prior” acts or to “bad” ones. It permits a party to introduce behavior that occurred before or after the alleged acts of the case on which civil or criminal liability is premised. It allows evidence of good and bad conduct—though prior conduct and bad conduct, by their timing and character, are more likely to draw attention under Section 1101(b). Not surprisingly, most of the cases analyzing Section 1101(b) emerge from criminal prosecutions. Still, the statute applies equally to civil cases.8

The last clause of Section 1101(b), following immediately after a recital of permissible evidence, delineates the impermissibility of any proof of a person’s “disposition to commit” a crime, civil wrong, or other act. Evidence of criminal propensity is excluded “not because it has no appreciable value, but because it has too much.” Character evidence is not admissible under Section 1101(b).

Character evidence may be admissible under a very few exceptions under statutory and case law, but never under Section 1101(b).10 According to the Reporters’ Notes to Section 1100, while character evidence carries a “slight probative” value, it may be unfairly “prejudicial,” distracts from the “main question of what actually happened,” and may reward or punish people based not on their actions but on their character. In contrast, the evidence that is admissible under Section 1101(b) is evidence of behavior and can carry exceptional weight with a jury.

In theory, a court will admit only relevant evidence.11 Traditionally, any evidence that tends to prove a fact is relevant.12 That standard, however, is too abstract and vague to offer practical direction. Another way to look at relevancy is to answer three questions:

1) Did the alleged act occur?
2) Who did it?
3) What was the person’s state of mind when doing it?

Answering each question determines an ultimate fact in the case: the act, the actor’s identity, and the actor’s mental state. Evidence presented under Section 1101(b) is relevant if it answers any one of the three questions.

Accordingly, courts have devised three tests for the admissibility of most evidence under Section 1101(b). Each test corresponds to one of the three questions of relevancy. No generally agreed name applies to each test. However, each test lends itself to a descriptive appellation. To determine whether evidence of the act at the heart of a civil lawsuit or a criminal prosecution is admissible—or, did the alleged act occur?—courts apply what can be called the common features test, which is a moderately difficult test to meet. To determine whether evidence of identity is admissible—or, who did the act?—courts use what can be deemed the distinctive acts test, which is a stringent test. Finally, to determine whether evidence of mental state is admissible—or, what was the person’s state of mind when doing the act?—courts employ what can be termed the sufficient similarity test, which is a more relaxed test. Opportunities for creative uses of the statute exist under each test.

The Common Features Test

To prove the acts charged under a civil or criminal complaint, Section 1101(b) evidence must pass the common features test. This test analyzes prior or subsequent acts to determine whether they have a sufficient number of common features and “a high degree of similarity”13 with the alleged acts. Evidence of uncharged misconduct, for instance, used to show a common plan or scheme, “must demonstrate not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.”14 Nothing unusual or distinctive is required, just a high degree of similarity between the alleged acts and the prior or subsequent acts.15 As a practical matter, similarity exists if the court believes it does. The test is grounded less in objectivity and more in an advocate’s powers of persuasion.

Evidence of other crimes that a person committed in an identifiable style may support the conclusion that the person committed the crime charged. Consider, for example, a dentist who molests sedated patients over a period of years. Assume that the dentist’s most recent patient regains consciousness during the molestation and reports it. The dentist denies the act, claiming that the patient imagined it as a side effect of the anesthesia. Evidence of separate acts that are highly similar is sufficient to establish a logical relevance between the two. Evidence that the dentist had molested other sedated patients is enough to establish that the alleged act is part of a general plan. Molesting other women before or after the act charged is strong evidence of a general plan—and is admissible to prove the general plan.16 This is a recognized use of Section 1101(b) evidence.

A nonstandard but equally legal use occurs when the evidence is offered to show a person’s ability to commit an act. In a criminal case,17 a defendant was charged with violating Vehicle Code Section 23152(b), driving with a blood-alcohol concentration of .08 or greater. The defendant’s percentage was remarkably high—.48. Typically, .40 is associated with a stupor, and .50 is associated with a coma.18 The defense claimed that the test yielding a .48 result was flawed because no one could achieve that high level and still drive a car. The prosecution presented evidence that the defendant had a prior DUI conviction with an even higher blood-alcohol concentration—.54. In both instances, the defendant drove into a parked car.

The “ability” to do an action is not listed as one of the categories in Section 1101(b). Nevertheless, ability is a fact relevant to establish that the act occurred. In this case, pursuant to the common features test, the evidence that the defendant drove with a blood-alcohol concentration of .54 was evidence of his ability to drive with a level of .48...
and was relevant to prove that the act had occurred.

The Distinctive Acts Test

The most stringent test for admissibility of evidence under Section 1101(b) is the distinctive acts test for evidence offered to prove identity. The test is strict because evidence admitted to show identity is particularly powerful and prejudicial. Evidence of prior or subsequent acts used to prove identity must be so similar to the alleged conduct that it "share[s] common features that are sufficiently distinctive [to] support the inference that the same person committed both acts." What features qualify as distinctive? According to the California Supreme Court, they should be "like a signature."21

Ordinarily, parties to a lawsuit use Section 1101(b) to present evidence against a defendant or a victim of a crime. However, parties can use the statute to present evidence of behavior by anyone. For example, a criminal defendant may introduce Section 1101(b) evidence to prove that someone else did the crime.22

Still, the section is an effective tool for prosecutors, as illustrated by People v. Lawrence.23 In that case, the police arrested the defendant after they caught him in an apartment in which an informant had purchased $500 worth of amphetamines. The police found the drugs—white, double-scored mini-Bennies—in plastic bags that each contained either 100 mini-Bennies or 1,000. Some of the plastic bags were stored in a brown paper bag. At trial, the defendant, who did not live in the apartment, testified that he did not know the drugs were there and that they did not belong to him. To prove that the defendant was the person who had tried to sell the drugs to the informant, the prosecution presented evidence that the defendant had tried to sell two plastic bags, each filled with 1,000 double-scored mini-Bennies and stuffed into a brown paper bag, to an undercover police officer just months before his arrest. The trial court and the court of appeal found that the earlier evidence sufficiently distinctive to warrant its admission at trial to prove identity of the person who sold the drugs to the informant.24

The distinctive acts test to prove identity is so stringent that it may exclude some important evidence. Yet not all evidence that points to identity is admitted directly to prove it. Other categories of proof that carry a lower evidentiary burden can substitute for proof of identity.

Motive is one of those categories. Facts denoting motive can link a party to the alleged acts. These facts, when used to prove motive, can lead to inferences that prove act, identity, or mental state. Motive is an intermediate fact, not an ultimate fact. As such, motive may be a vehicle for determining the essential elements of a case. The test for evidence of motive is different—and more liberal—than the three other tests for relevancy.

In contrast, "the intermediate fact of motive" may be established by evidence of prior dissimilar crimes. Similarity of offenses [is] not necessary to establish this theory of relevance for the evident reason that the existence of a motive requires a nexus between the prior crime and the current one, but such linkage is not dependent on comparison and weighing of the similar and dissimilar characteristics of the past and present crimes.25

Evidence presented to show that the defendant had the motive to commit the act can have little or no similarity between the prior (or subsequent) conduct and the acts in the present lawsuit or prosecution. The prior or subsequent acts and the alleged acts can be entirely dissimilar.26

Moreover, motive "may be material" when evidence of the "criminal’s identity is circumstantial."27 Even in that situation, courts permit considerable latitude in presenting evidence.28 For instance, in People v. Gonzales,29 a prosecution for murder, the district attor-
test. This evidence need only consist of prior or subsequent acts sufficiently similar to the alleged acts to allow the inference that the defendant probably had the same mental state during the prior or subsequent acts and the alleged acts.35 A court wrote, “The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.”36 This applies to proof of other states of mind,34 such as knowledge35 and motive.36

The case of Nelson v. Gaunt is illustrative. In May 1968, a physician assured a patient that he could enhance her breasts by a series of injections of an inert, harmless substance called silicone. At his trial for fraud, he testified that he had not given any silicone injections after 1967. The plaintiff, however, presented evidence that the physician had been arrested and convicted of supplying illegal silicone injections three months before she met him in February 1968. The trial court and the court of appeal determined that the evidence was admissible to prove fraud. The prior conviction proved that the physician knew silicone was unsafe, and his representation to the contrary was false.37

The evidence had the additional impact of impeaching the physician. Thus, Section 1101(b) can be used with devastating consequences to establish direct evidence of knowledge and to impeach a witness who claims lack of knowledge.38

The most flexible use of Section 1101(b) occurs when applying the sufficient similarity test to prove a party’s mental state. If warranted, alternatives exist to the categories listed in the statute. For example, the need to prove malice or oppression arises in civil actions that seek punitive damages.39 Section 1101(b) can help to prove those elements.

In Weeks v. Baker & McKenzie, a high-profile sexual harassment case, a plaintiff sued a key partner in a large law firm who repeatedly groped female secretaries and made salacious comments. The firm had learned of the partner’s behavior but did nothing to protect its female employees from it. One of the secretaries filed a sexual harassment action against the partner and his law firm. At trial, the secretary presented evidence of the partner’s sexually harassing behavior directed at other women. The trial court properly admitted that evidence to show malice, one of the elements of punitive damages liability. The evidence was not, however, admitted to prove that the partner had sexually harassed the secretary: “Evidence of [the partner’s] past conduct, and that he had been warned or reprimanded as a result of that conduct, tended to prove that he was fully aware that similar conduct would cause injury, and acted either with the intent to cause injury or with a willful and conscious disregard of [the secretary’s] rights.”40

Similarly, malice is an ultimate fact that is necessary to prove guilt in some criminal cases. For instance, to prove the crime of intimidation of a witness, the prosecution must establish that the defendant “knowingly and maliciously” prevented or attempted to prevent the witness from testifying.42 Section 1101(b) can help to establish malice in criminal cases by permitting a prosecutor to present evidence of prior or subsequent acts relevant to that fact.43

Rethinking Approaches

Sometimes, creative approaches to using Section 1101(b) can complicate the analysis and prompt counsel to overlook an easier strategy. Attorneys must scrutinize the elements of their case and the supporting evidence to determine which of Section 1101(b)’s categories they can stretch to cover the case and which already apply. For instance, in a prosecution for possession of stolen property, the jury must consider whether the defendant had possession of the property and an opportunity to commit the crime. While possession is not a category enumerated in Section 1101(b), other elements of the crime are. Possession occurs when a person knowingly exercises direct or indirect physical control over something.44 Thus, the key issue of proof for possession is knowledge, one of the existing Section 1101(b) categories.

Merely the prospect of a judge admitting Section 1101(b) evidence can change the course of a case, even prompting a settlement. Consider a scenario in which the plaintiff receives health insurance through his employment. He becomes angry at the insurance company’s bureaucracy, so he calls the insurance company more than 400 times during a one-year period to complain about coverage, berate employees, and threaten criminal charges against them. The insurance company terminates his policy for failing to cooperate, which is a violation of the policy. The insured sues for bad faith. The company asserts an unclean hands defense.

In preparing its defense, the insurance company uncovers evidence that the insured has repeatedly visited doctors’ offices and written to and called state administrative agencies to “raise hell” about the insurance company. In some of those visits and telephone calls, the plaintiff has used foul language and threatened criminal and administrative action against the physicians and their employees.

But this case has an interesting wrinkle. The unclean hands defense is equitable, which means that the judge can require a separate trial for that defense. If the judge does so, the jury will not learn about the

**MCLE Test No. 127**

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

1. Evidence under Evidence Code Section 1101(b) consists only of prior bad acts, such as felony and misdemeanor convictions.
   - True.
   - False.

2. Only evidence of acts that occurred before the crime charged in a criminal case or before the conduct alleged in a civil action is admissible under Section 1101(b).
   - True.
   - False.

3. Evidence may be admitted under Section 1101(b) to prove only those facts: “[M]otive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented.”
   - True.
   - False.

4. If evidence under Section 1101(b) is presented to show a party’s disposition to commit the act at issue, courts will conduct a thorough analysis under Evidence Code Section 352 before admitting it into evidence.
   - True.
   - False.

5. Courts have devised three general tests to determine whether evidence is relevant under Section 1101(b), and each test corresponds to one of three questions: 1) Did the act alleged occur? 2) Who did it? and 3) what was the person’s state of mind when doing it?
   - True.
   - False.

6. Which test is used to determine whether the evidence presented under Section 1101(b) is admissible to prove that the act alleged has occurred?
   - A. The distinctive acts test.
   - B. The sufficient similarity test.
   - C. The common features test.
   - True.
   - False.

7. Which test is used to determine whether the evidence presented under Section 1101(b) is admissible to prove identity?
   - A. The common features test.
   - B. The distinctive acts test.
   - C. The sufficient similarity test.
   - True.
   - False.
8. Which test is used to determine whether the evidence presented under Section 1101(b) is admissible to prove mental state?
   A. The common features test.
   B. The distinctive acts test.
   C. The sufficient similarity test.
9. Evidence admitted under the common features test must:
   A. Have a sufficient number of common features and “a high degree of similarity” with the alleged acts and “must demonstrate not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.”
   B. Must be so similar to the alleged conduct that it “share[s] common features that are sufficiently distinctive to support the inference that the same person committed both acts.” The features must be so distinctive that they are “like a signature.”
   C. Be sufficiently similar to the alleged acts to allow the inference that the defendant probably had the same mental state in both instances.
10. Evidence admitted under the distinctive acts test must:
    A. Be sufficiently similar to the alleged acts to allow the inference that the defendant probably had the same mental state in both instances.
    B. Have a sufficient number of common features and “a high degree of similarity” with the alleged acts and “must demonstrate not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.”
    C. Must be so similar to the alleged conduct that it “share[s] common features that are sufficiently distinctive to support the inference that the same person committed both acts.” The features must be so distinctive that they are “like a signature.”
11. Evidence admitted under the sufficient similarity test must:
    A. Be sufficiently similar to the alleged conduct that it “share[s] common features that are sufficiently distinctive to support the inference that the same person committed both acts.” The features must be so distinctive that they are “like a signature.”
    B. Be sufficiently similar to the alleged acts to allow the inference that the defendant probably had the same mental state in both instances.
    C. Have a sufficient number of common features and “a high degree of similarity” with the alleged acts and “must demonstrate not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.”
12. A court must admit evidence under Section 1101(b) once the evidence satisfies one of the three tests for admissibility.
    True.
    False.
13. One reason a court may refuse to admit evidence under Section 1101(b) is that the evidence may prompt a trial within a trial on the weight of the evidence presented.
    True.
    False.
14. Once a court permits a prosecutor to admit evidence of the defendant’s behavior under Section 1101(b), the prosecutor should argue which of the following during closing argument?
    A. The evidence reflects the defendant’s propensity to commit the crime.
    B. The evidence powerfully links the defendant to the crime because personalities act in signature ways.
    C. The evidence proves an ultimate fact in the case, such as the identity of the perpetrator, his or her motive, or his or her mental state.
15. After balancing the probative value of Section 1101(b) evidence with its potential prejudicial effect, a court must state on the record its detailed analysis as well as its conclusion.
    True.
    False.
16. When filing a motion to admit Section 1101(b) evidence, counsel should insist on presenting as many witnesses as possible.
    True.
    False.
17. Section 1101(b) is designed for the admission of character evidence under certain circumstances.
    True.
    False.
18. To convince a court to admit evidence under Section 1101(b), an advocate should prepare a limiting instruction for the jury about the use of the evidence, or invite the court to use one.
    True.
    False.
19. Proof of motive, while typically not the element of a crime or a civil action, is an intermediate fact that can lead to proof of an ultimate fact in a case, such as identity and intent.
    True.
    False.
20. Section 1101(b) evidence of acts more serious than the alleged acts may be inadmissible as unfairly prejudicial.
    True.
    False.
insured’s disruptive behavior. Clearly the power of Section 1101(b) lies even in the possibility that a jury may hear highly prejudicial evidence.

Evidence under Section 1101(b) can be so prejudicial that the law requires “extremely careful analysis” before admitting it.46 Once a court has determined that evidence is relevant under Section 1101(b), it must then determine whether the evidence contravenes “other policies limiting admission, such as those contained in Evidence Code section 352.”47

Section 352 permits a court the discretion to exclude evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” Evidence under Section 1101(b) may invite evidence rife with suggestion of bad character and propensity to commit the alleged acts. Such evidence, of course, is inadmissible under Section 1101(b), but it is impossible to strip all suggestion of character and propensity from evidence of conduct. Section 352, therefore, is an important bulwark against the unintended but sometimes predictable result that evidence presented under Section 1101(b) may be unfairly prejudicial or could invite a trial within a trial.48

The protection Section 352 affords is so important to a fair trial that a court must do more than state its decision regarding admissibility on the record. Proof that the court analyzed the evidence must also appear on the record, though the record need not reflect the actual analysis.49

Basic strategies can ensure that Section 1101(b) evidence survives Section 352. First, counsel should limit the number of instances of conduct that are offered as evidence. Correctly or incorrectly, courts often link prejudice under Section 352 with the number of specific instances of conduct offered under Section 1101(b). Also, limiting the number of witnesses offered to prove the Section 1101(b) evidence may lead a court to determine that the amount of time spent on the evidence is reasonable.

Next, comparing the seriousness of the Section 1101(b) evidence with the seriousness of the alleged conduct helps to give perspective to the importance of the prior or subsequent act. Evidence under Section 1101(b) is more likely to survive scrutiny under Section 352 when the alleged acts are more serious than the Section 1101(b) evidence. In that event, unfair prejudice is difficult to argue.50

Third, the evidence presented under Section 1101(b) should be as similar as possible to the alleged acts. The greater the dis-
similarity, the more likely a court is to perceive the Section 1101(b) evidence as inadmissible character evidence.51

Fourth, requesting that the court instruct the jury at the time the Section 1101(b) evidence is admitted about the limited use of the evidence may dampen arguments that the evidence generated unfair prejudice. Although it is not necessarily error to wait until the end of the case to instruct the jury, a court’s decision to admit the evidence is more likely to withstand scrutiny on appeal if the instruction occurs both when the evidence is admitted and at the end of the case during jury instructions.52

Finally, closing arguments must not overstate the use for which the court admits the evidence. Arguing Section 1101(b) evidence for another purpose could lead to objections that trial counsel violated the court’s pretrial orders, used improper character evidence, or both—and either can cause a mistrial.53 During closing argument, trial counsel should not overstate and transform Section 1101(b) evidence from facts regarding behavior to facts denoting character. The evidence is powerful enough when used correctly.

Using Section 1101(b) evidence correctly is critical, but learning to use it at all is paramount. With so few cases going to trial, litigators sometimes overlook the leverage that Section 1101(b) can yield in pretrial maneuvering. Still, perhaps the most powerful component of evidence at trial lies in the strategic use of the intricacies of Section 1101(b).

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7 Evid. Code §1101(b) (“crime, civil wrong or other act”); People v. Balcom, 7 Cal. 4th 414, 425 (1994).
9 People v. Ruiz, 44 Cal. 3d 589, 626 (1988).
10 See Evid. Code §1101. Character evidence generally is inadmissible in civil actions, unless character itself is at issue in the case. Character may be an element in parental custody proceedings (In re Dorothy L., 162 Cal. App. 3d 1154, 1159 (1984)) and employment proceedings involving an employee’s fitness or ability to hold positions of leadership (Pugh v. See’s Candies, Inc., 203 Cal. App. 3d 743, 756 (1988)). Character can be at issue in the penalty phase of a death penalty case if the defense asserts that the defendant is normally a peaceful and benevolent person.
[14] Id. at 402.
[15] Id. at 403.
[16] See, e.g., People v. Ing, 65 Cal. 2d 603 (1967). While Ing was overruled by People v. Tassell, Tassell was overruled by Ewoldt. People v. Tassell, 36 Cal. 3d 77, 84 (1984), overruled by Ewoldt, 7 Cal. 4 at 403.
[17] The case was settled prior to trial and no documentary record is readily available.
[20] Ewoldt, 7 Cal. 4th at 403.
[22] See People v. Davis, 10 Cal. 4th 463 (1995) (The defendant introduced §1101(b) evidence to prove someone else committed the alleged rape and murder.).
[24] Id.
[25] People v. Scheer, 68 Cal. App. 4th 1009, 1018-20 (1998) (internal quotations and citations omitted). Nevertheless, the greater the similarity, the more likely the court will admit the evidence. “Striking similarities” make the best cases. Ewoldt, 7 Cal. 4th at 396; see also People v. Ing, 65 Cal. 2d 603, 612 n.18 (1967).
[28] Id. at 877.
[29] Id. at 867.
[30] Id. at 873.
[31] Id. at 877-78; see also People v. Simon, 184 Cal. App. 3d 125, 131 n.4 (1986).
[34] People v. Durham, 70 Cal. 2d 171, 186-87 (1969).
[38] Id. at 639-40.
[39] CIV. CODE §3294(c)(1) & (2).
[40] CIV. CODE §3294(c) & (2). Malice is defined as 1) conduct intended “to cause injury to the plaintiff,” or 2) “despicable conduct . . . carried on by the defendant with a willful and conscious disregard of the rights or safety of others.”
[47] Id.
[48] See People v. Cain, 10 Cal. 4th 1, 64 (1999).
[50] Id.
New Devices That Combine the Cell Phone and PDA

Attorneys may now find phones that also store contact, billing, and calendaring data.

The marriage of the cell phone and personal digital assistant into a single device has long been a dream of many. A PDA—for example a Palm Pilot or Pocket PC—carries extensive contact and calendar information, copies of documents and e-mail, and myriad other information. On the other hand, the data-handling capabilities of cell phones are somewhat limited. Until recently, for example, cell phone users had to make do with only 25 to 100 telephone numbers in their phone’s memory, without complete contact information. As a result, users carried a PDA and a cell phone because neither device provided the complete solution. Now, however, there are better choices.

I tested offerings from Audiovox, Blackberry, Handspring, Kyocera, Nokia, Samsung, and Sony Ericsson. They all have color screens, software to synchronize with PC contact and calendaring programs such as Microsoft Outlook or Lotus Notes, a plug for a hands-free headset, e-mail and Web browsing capability, and SMS (short text messaging) support. These devices also can carry and display spreadsheet and text documents. The major cell phone carriers are not equipped to interact with all these phones, so some shopping is required to match the phone and features you want with your carrier.

Matters are somewhat more settled, however, in the area of operating software. Most of the devices use either the Palm OS or the Microsoft Pocket PC system. Symbian, a Linux compatible OS, is also making some headway.

Beginning with the Palm OS devices, the Handspring Treo 600 is one of the phones that uses the Palm OS, and it is one of the easiest to use of the devices that I tested. A user can navigate through its PDA and phone features with a five-way rocker switch or by means of the touch screen and the familiar Palm stylus. Data may be entered via a small QWERTY keyboard or Palm’s writing method. The keys are small but shaped so that they are surprisingly easy to use.

A user may dial the phone with the touch screen or the keypad that is part of the keyboard. The keypad is helpful when using the phone in bright sunlight. The Treo 600 has a speaker phone as well but lacks built-in voice-activated dialing. The device’s size and its five-way rocker switch allow for one-handed phone and PDA operation. The user can use the phone and PDA concurrently, reviewing contacts or calendar information while speaking on the phone. Hot keys conveniently open the calendar, telephone, or e-mail features. Airline travelers will be pleased that they can turn off the phone but still use the PDA. Moreover, a software development community exists online for the Palm OS. Additional features include an MP3 player, an expansion memory card slot, infrared connectivity, and a camera.

The Kyocera 7135 also uses the Palm OS and thus has PDA features like those of the Treo 600, but unlike the Treo, the Kyocera has a clamshell design. This has always appealed to me because the keypad and screen are protected when the phone is closed. The Kyocera uses Palm’s data entry system and has touch screen navigation and an expansion memory slot. This unit has a more traditional cell phone keypad and a speaker phone. Users may find it hard to use the phone and PDA functions concurrently with one hand, because the device lacks the five-way rocker switch found on the Treo. You need one hand to hold the stylus and the other hand for dialing.

With the speaker phone, however, a user can continue a telephone conversation while using the PDA. Added features include an MP3 player and infrared connectivity port. The Kyocera has no camera.

Another Palm-based device is the Samsung G1000, which also sports a clamshell design and uses the Palm data entry system. Like the Kyocera, the Samsung is likely to require both hands to use the phone and PDA simultaneously. The Samsung lacks a speaker phone and memory expansion slot. Like the Kyocera, the Samsung has no camera, which may be an advantage for many attorneys, and the Samsung is a smaller and sleeker package than the Kyocera.

The Samsung is packaged with an extra battery and stylus, has a voice dialing feature, and can be used as a PDA with the phone turned off.

Microsoft and Other Devices

First in alphabetical order among the the Microsoft OS devices is the Audiovox Thera. Data entry is accomplished through the touch screen via either handwriting recognition or a soft keyboard. Users can only dial the Thera’s telephone on the touch screen, which will be a problem in bright sunlight. The unit has a speaker phone, and additional features include expansion memory capability. Like the Palm OS devices, the Thera user can benefit from a community of software developers. The Hitachi G1000 is another Microsoft OS PDA and phone, but I was unable to obtain one for a review.

Microsoft may be putting more effort into putting its Pocket PC software into so-called smart phones such as the Samsung i600 or the Motorola MPX200. They can synchronize with a PC as a PDA does, but their screens are much smaller. If your PDA activity is passive (e.g., only use your PDA to find a name or date), then a smart phone may suffice. Those who want to view docu
ments and add and change information on their PDAs, however, will continue to value the larger screen of PDA phones.

The Symbian OS PDA phones include the Nokia 3650. It has been on the market for a time, so buyers may be able to find discounts. The Nokia does not have a touch screen, but navigation is eased with a five-way switch. Data entry and editing, frankly, is a challenge. A user must use the telephone keypad, which means cycling through the alphabet and symbol choices on each key for every character entry. This device supports expansion cards, but unfortunately a user cannot use the PDA when the phone is turned off.

The dial pad consists of buttons placed in a circle. At first I felt I was about to drop the phone every time I tried to dial a number. For those who cannot adjust to this design, the Nokia feature list includes voice dialing capability and a speaker phone. In addition, the phone can include features such as a camera with video ability, Bluetooth or infrared connectivity, and an MP3 and video player. The Nokia has great features, but data entry and dialing challenges make it somewhat difficult to use.

Users who desire a Symbian-based phone, however, have another choice: the Sony Ericsson P900. This device is the most feature-rich of the group. The PDA uses the Symbian OS and has one of the largest screens of the group I tested. A keyboard can be opened on the touch screen to input and edit information, and there is a built-in character recognition program. Users can view data on the screen lengthwise, which is great for spreadsheets and Web pages. The Sony has an expansion memory slot, and the PDA features can be used while the phone is turned off. Users can navigate through the numerous features using a jog dial or touch screen. The document viewer works not only with MS Word and Excel but also Adobe Acrobat files. The telephone has a traditional keypad, which covers a part of the touch screen when in use, and a speaker phone, voice dialing, and speed dial. Additional features include a camera, MP3 player, video player, and Bluetooth and infrared connectivity.

Rounding out the review is the Blackberry 7230. This new Blackberry represents an evolutionary advance for the successful portable e-mail client. The unit has cell phone and PDA capabilities (older models only handle e-mail). For firms that already use the Blackberry e-mail client, the new version may be an easy step forward. The Blackberry PDA runs under Java-based programming. Navigation is straightforward using the thumb dial and back buttons. The new Blackberry does not have a touch screen, so data input takes place only through the QWERTY keypad. Third-party software development may not be as abundant as it is for the Palm OS, but for lawyers and law firms, software from Timetag can export calendar entries and phone time to popular time-and-billing programs, which may be all that is needed.

The Blackberry 7230 is slightly wider than the other cell phone PDAs I examined, which may make one-handed dialing difficult for some. This Blackberry has no speaker phone, but other versions of the device—for example, those that are configured to operate with a Nextel account—may have this feature. The Blackberry lacks such additional features as a camera, MP3 or video player, infrared or Bluetooth connectivity, or memory expansion card slot, which may or may not be of much importance to an individual user.

This new generation of cell phone PDA combinations offer an opportunity to improve productivity and cut down on the bulk of what lawyers may need to carry when away from the office. These devices have enough usable features to merit use in a law firm. As always with technological developments, the choice of whether to buy one of these devices or to wait for the next generation depends on many factors, but this group of devices do represent the long-awaited marriage of the cell phone and PDA.
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Food, Animals, and the Law

ON THURSDAY, JUNE 24, the Animal Issues Committee will present a screening of the recently released film, Peaceable Kingdom, a sensitive, graphic, and eye-opening documentary about the animals we eat. The screening will be followed by a panel discussion on legal issues relating to farm animals. The panel members—David J. Wolfson, Gene Bauston, Sheldon Eisenberg, and Bruce Wagman—all have extensive experience in legal advocacy for farm animals and animal law, including contributions to the book Animal Rights: Current Debates and New Directions and litigation of a false advertising challenge to the California Milk Advisory Board’s “happy cows” campaign that is currently pending in the court of appeal. The program will take place at the LACBA/Lexis Publishing Conference Center, 281 South Figueroa Street, Downtown. On-site registration and meal will begin at 5:30 P.M., with the program continuing from 6 to 9. The registration code number is 008581. CLE+PLUS members can attend for free (meal not included).

$15—law students and nonattorneys
$25—LACBA members
$30—all others
3 CLE hours

Nonprofit Corporations

ON TUESDAY, JUNE 8, the Business and Corporations Law Section will provide an introduction to the legal issues involved with forming and representing nonprofit corporations. Those who attend will gain an overview of how to form a nonprofit corporation, how to obtain federal and state tax exemptions, the duties and liabilities of a nonprofit board of directors, and general nonprofit corporate compliance issues. Panelists will also discuss opportunities for pro bono work with nonprofit corporations. The program will take place at the LACBA/Lexis Publishing Conference Center, 281 South Figueroa Street, Downtown. 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 8311. CLE+PLUS members can attend for free ($15 meal not included). The prices below include the meal.

$20—Business and Corporations Law Section members
$25—LACBA members
$30—all others
1.5 CLE hours

California Loan Documents

ON WEDNESDAY, JUNE 16, the Real Estate Finance Subsection of the Real Property Section will present a basic overview of the loan document provisions that are unique to loans secured by California property, including a discussion surrounding the legal basis for these provisions, whether they are critical to the enforceability of lenders’ remedies, just good practice, or merely redundant “belt and suspenders” rhetoric. The speakers are Trudi J. Lesser, Clarice F. Silva, Sarah V. J. Spyksma, and Stephanie Tydlaska. The program will take place at the LACBA/Lexis Publishing Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 005016. CLE+PLUS members can attend for free ($15 meal not included). The prices below include the meal.

$45—Real Property Section members
$55—LACBA members
$65—all others, including at-the-door payments
1 CLE hour
A Firsthand View of the Middle East

By Jeffrey I. Abrams

The lessons of mediation provide insight into the obstacles to peace in the region

At the end of last year, I visited Kuwait, Israel, the West Bank, and Jordan as part of a 50-person U.S. delegation to the Middle East led by former Ambassador Dennis Ross. Over a period of 10 days, our delegation met with a king, three prime ministers, and a host of high-ranking government and military officials to discuss the major topics of the day, including Israeli-Palestinian relations. (Photos are available at www.jeffreyabrams.com.) As we met with leaders such as King Abdullah of Jordan, Prime Minister Ariel Sharon of Israel, and Prime Minister Abu Ala of the Palestinian Authority, I was struck by how much my experience as a professional mediator affected my perspective about the seemingly irresolvable dispute between Israelis and Palestinians.

One of the principal challenges in resolving a litigated case is to overcome a spiralling process of creating myths that the parties, and often their counsel, engage in toward the opposition: “He hates women.” “They are terrible people.” “The lawyer will never settle while she is getting paid.” Eventually, these myths can grow into perceived realities that make settlement harder, if not impossible.

This same process is an impediment to peace in the Middle East. In his cabinet room, Prime Minister Sharon repeatedly spoke of Jerusalem as “the eternal, undivided capital of the Jewish people,” refused to disputed land as the “birthright” of the Jewish people, and stated that the immigration of one million Jews was the solution to Israel’s demographic problems. On the Arab side, this mythmaking process takes the form of a consistent focus on Israeli “occupation.” In the West Bank village of Abu Dis, Palestinian Prime Minister Abu Ala spoke of Israel’s “racist, apartheid wall.” At a dinner party in Amman, Jordan, a Palestinian Christian investment banker, whose family once lived in Haifa, spoke passionately of his grandfather’s home being occupied in 1947 by one million European Jews. Reinforced by the public statements of their leaders, this mythmaking process continues to grow over time and serves as a true obstacle to peace.

The choice of language also can be critical in both framing and resolving a dispute. Consider a private company in which the principals are separating. One views a financial settlement as a “redemption of stock,” reflecting his role as a partner. The other views it as a “discretionary bonus,” considering the other guy as just an employee. Each party places certain values behind each term, and a mediator (as well as parties and counsel) need to be conscious of the impact of using the wrong term, at the wrong time, with the wrong party.

In Israel today, there is enormous debate not only about whether to construct a separation barrier, but what it should be called. The Israelis call it a “fence,” while the Palestinians call it a “wall.” By calling it a fence, the Israelis hope to conjure up images of an open structure, easily opened through gates, and easily moved, or even ultimately removed. By calling it a wall, the Palestinians seek to convey the image of a solid, permanent, prisonlike structure. The placing of such deep meaning in each side’s choice of language not only makes peace between the two parties more difficult but increases the risk that the dispute will be further inflamed by third parties intentionally or unintentionally using these value-laden terms.

As every trial lawyer knows, presentation matters. This is equally true in a mediation, where clear and effective briefs and visual aids can not only have an impact on the opposition but on the mediator as well. In Israel, we saw this truth dramatized by the opposing presentations discussing the Israeli-built barrier. The Palestinians used a PowerPoint presentation delivered by an articulate Palestinian American graduate of the University of Texas School of Law. In contrast, the presentation of General Eival Giladi, chief of strategic planning for the Israel Defense Forces, included little more than displaying a foldout map taped to an easel and distributing a printout with handwritten corrections.

Cautious optimism is the greatest tool of any mediator. Even if it appears that there is no hope that a resolution can be reached, an effective mediator keeps the parties talking. The ultimate settlement may not look as the parties envisioned it or occur as quickly as the parties might have liked, but a settlement will come only if the parties continue to strive for a solution.

This was the clear message that the drafters of the Geneva Accords hoped to convey. Amram Mitnza, the former leader of the Israeli Labor Party, proudly pointed to the accords as a demonstration that people on both sides can work together to reach a detailed agreement. Even for those who oppose its specific details (or absence of details), Mitnza expressed the hope that it would provoke discussion, which as a process will lead to peace. This view was shared by a Palestinian member of the team addressing the issue of Jerusalem in the Geneva Accords, who expressed the need for both sides to simply keep talking.

My view of the Middle East peace process and my approach to mediating litigated cases will forever be changed by these meetings, as I have seen first hand that with every dispute, whether it is over a business or an international border, there are certain common factors that can either enhance or destroy the chance of resolution.
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