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Marcellus A. McRae is a partner, and Joanie L. Roeschlein is an associate, in the Los Angeles office of Gibson, Dunn & Crutcher LLP. In “Proof and Pretext,” they sort through the burden-shifting framework for adjudicating employment discrimination litigation. Their article begins on page 22.

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In the past few years, some judges have attracted the spotlight, but for all the wrong reasons. Two local examples are noteworthy. In 1997, a judge “retired” from his bench in Pomona when it was revealed that he had a sexual relationship with a criminal defendant who had pled guilty in his court.

Another Los Angeles Superior Court judge resigned his position in 2001 when, while on an extended disability leave from the court, it was discovered that he was attending medical school in the Caribbean.

It is in the context of such ethical lapses by judicial officers that this year I joined the Los Angeles County Bar Association’s Judicial Elections Evaluation Committee. The JEEC consists of some 50 volunteer attorneys who rate the candidates for each open and contested seat on the Los Angeles Superior Court. The committee’s members include federal and state prosecutors, public and private defense counsel, civil litigators and transactional attorneys, and one former judge. The JEEC serves one of the Association’s more public functions, with voters often having no information about judicial candidates other than the committee’s widely reported ratings.

The JEEC evaluated 36 candidates vying for nine contested positions in the election held early this month. The majority of the candidates this year were deputy district attorneys or other public service lawyers; only a few came from private practice. Four sitting judges were challenged, including two who were involved in the controversial decision last May to close the downtown arraignment court one busy afternoon before all criminal defendants could be arraigned. The court released 26 defendants and ordered them to return the next morning. Several did not, including one who was later charged with a murder that occurred after his release. The Association of Deputy District Attorneys supported candidates challenging those judges.

The JEEC’s evaluation process was impressively thorough. Each candidate was asked to complete and sign under oath a 20-page questionnaire that included detailed questions about the person’s educational and employment background, trial experience, involvement as a party in civil and criminal proceedings, and medical issues. Candidates also had to supply a list of 75 references, to whom questionnaires were mailed for opinions about the candidate’s judicial temperament, work ethic, bias, and other factors. As committee members, we contacted each candidate’s references and others who had worked with or appeared opposite the candidates. Each candidate was evaluated on his or her own merits, not against the qualifications of any other contender or incumbent.

Nearly every candidate was interviewed by one of the JEEC’s four subcommittees. (A few elected not to appear for interviews, but we rated them nonetheless.) Before and after the interviews, members of a subcommittee engaged in lengthy and sometimes heated discussions before voting on a preliminary rating. Votes were sometimes deferred while members sought additional information. Each subcommittee then presented the candidates to the full committee, where there was further debate before a tentative rating was reached. Most candidates were rated Qualified; a 60 percent vote was required for either a Well Qualified or Not Qualified rating. Dissatisfied candidates could appeal the tentative decision. Appeals consisted of interviews by the full committee, after which we voted on a final rating.

The evaluation process was more complex than it may seem. While confidentiality rules preclude disclosure of specific concerns we considered, the information that we gathered ran the gamut from medical issues and legal experience to courtroom demeanor and the veracity of information provided to the committee.

By my estimate, the members of the JEEC spent approximately 1,500 hours gathering and evaluating information, interviewing candidates, debating the ratings, and considering appeals. The process was provocative and enormously rewarding.

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

**Proper choice of law analysis can be the key to finding a winning strategy**

When considering a new case, many lawyers skip right over what should be their first step, one taken even before drafting a complaint, preparing a demurrer, or writing a contract. When you first receive a new file and begin to become acquainted with the facts and consider possible legal strategies, ask yourself: What law applies to this dispute (or in contract negotiations, what law should apply to any dispute that arises)? Even though the case may be filed in a California court, there is a good chance that some of the parties and claims are connected to other states. If you overlook the choice of law issues at the outset, you may miss the opportunity to bring or defeat a crucial demurrer or leave out a winning cause of action.

There are two situations in which a case may involve the law of some state (or country) other than California. First, the client may be party to a contract with a choice of law clause—a specific provision that calls for the application of foreign law. Second, California’s choice of law rules may require the application of another state’s laws to your dispute. Of course, if you are litigating outside California, you will need to examine the choice of law rules of the forum state.

In contractual disputes, California employs a strong policy favoring the enforcement of choice of law provisions.1 It is important to distinguish between two kinds of clauses that are frequently included in contracts between persons or firms from different states and that give rise to choice of law questions.

A typical example of the first type—what may be called a choice of law clause proper—may read, “Any dispute arising under this contract shall be governed by the laws of the State of Minnesota.” Although choice of law clauses are generally enforceable, they can be defeated in two ways. First, the party opposing enforcement can show 1) the chosen state lacks a substantial relationship to the parties or their transaction, and 2) there is no other reasonable basis for the parties’ choice of law. If these showings cannot be made, the provision may still be set aside if it can be demonstrated that the chosen law is contrary to a fundamental public policy of California.2

The second type of clause is called a forum selection clause. A typical forum selection clause may read, “Any dispute arising under this contract shall be heard in the Superior Court of Broward County, Florida.” A forum selection clause does not necessarily indicate what law will be applied to the dispute. Thus, even if a client’s contract specifies that disputes will be litigated in California, a forum selection clause alone will not prevent California courts from applying the law of a different state.

If all the events took place outside California, then it is possible that the law of some other state will govern the dispute.

### Choice of Law Analysis

A preliminary choice of law analysis can begin with some simple questions. What was the location of the event or transaction giving rise to the dispute? What law would the parties have expected to govern their relationship or conduct? Remember that California will give extraterritorial reach to its laws when the alleged conduct originated in this state.3 If one of the parties is a corporation, determine where the company makes decisions related to the conduct at issue. For example, preparation of materials in California, although disseminated from points outside of California, may be enough of a connection to apply the laws of this state.4

If the laws of another state might be applied to the dispute, both federal constitutional questions and California choice of law principles are implicated. The analysis of the constitutional issues turns on whether there are significant contacts between the claims in the litigation and the forum state. If the contacts are sufficient to give the forum state an interest in the dispute, then the application of the forum state’s laws is constitutionally permitted. But if the contacts are nonexistent or so slight that the forum state has no interest in the dispute, applying the forum state’s laws to the dispute violates due process guarantees.5

In many cases more than one state has significant contacts with the dispute. In that case, if the litigation is in California, California’s choice of law methodology must be applied. Under the approach of the California Supreme Court, the threshold task is to analyze the potential conflict of laws. A false conflict obtains if the states involved have identical or nearly identical laws, or if analysis of their interests reveals that both states would apply the same law. In that case, no further analysis is required,6 because the question of which law to apply is moot.

If, however, there is a true conflict of laws, California requires a three-step analysis.7 First, the court must identify the foreign state laws that may apply based on the facts alleged in the complaint.8 Second, the court must determine what interest each state has in having its law applied to the case. Third, if
the court finds the foreign state laws to be materially different and that each state has an interest in having its own law applied, it must determine which state’s interests would be “more impaired” if its law were not applied.

In resolving a true conflict, the California Supreme Court has articulated a complicated-sounding test called the “comparative impairment” test, which proceeds in three steps. Step one asks: How much would California’s interests be impaired if the law of the foreign state were applied? Step two asks: How much would the foreign state’s interests be impaired if California law were applied? Step three requires a comparison of the impairments and the application of the law of the state that would suffer the greater impairment if its law were not applied. The essence of the comparative impairment test is thus: When there is a true conflict and the interest of one or more states will unavoidably be impaired, apply the law of the state that will do the least damage to the interests of other states.

Applying the comparative impairment test requires an analysis of the policies and interests served by the laws of California and the other state. If the case is analogous to one already analyzed by California appellate courts, there may be a clear answer to the question of comparative impairment. If there is no appellate court case to guide the analysis—and that is more often than not the case—you are on your own in convincing the court to adopt your client’s position.

Although choice of law questions can be intimidating, the proper analysis may be critical to your case or transactional analysis. Pleading your claims requires that you know what law may govern them. Resolving a demurrer—or the federal equivalent, a 12(b)(6) motion—requires you to know what law applies. Likewise, you cannot argue for or against summary judgment unless you know which state’s law you should cite. Analyzing the choice of law issue may guarantee a late night, but if you sense a conflict of laws, you need to tackle the problem right away. Waiting even a few weeks after receiving a complaint could mean forfeiting a winning demurrer or summary judgment motion.

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2 Id. at 466.
8 Bernhard v. Harrah’s Club, 16 Cal. 3d 313 (1976).
The definition of public use may hinge on a parcel-specific finding of blight

For 50 years federal and California courts have authorized public entities to take private property by eminent domain for urban redevelopment purposes. Under the rubric of redevelopment, public entities have regularly expanded the concept of public use to include transfers of property from one private entity to another private entity to accomplish the “development” portion of “redevelopment.” Recent federal cases suggest that there may be limitations to taking property for redevelopment purposes and transferring it to private entities.

These federal cases—each admitted based on an extreme factual situation—appear to impose new parcel-specific determinations of blight for each state law eminent domain filing, conclusive presumptions notwithstanding. In addition, the federal cases postulate a definition of “public use” that is significantly at variance with that of state law. These cases, in sum, pose a significant threat to California redevelopment agencies that presume to exercise condemnation powers.

The Fifth Amendment to the U.S. Constitution proscribes the “taking” of private property “for public use without just compensation.” The public use requirement is an explicit limitation on the power of government to take private property because, as the U.S. Supreme Court has long recognized, a taking—even if for just compensation—must serve a legitimate public purpose. A taking for purely private use is unconstitutional, no matter what the amount of just compensation: “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”

To satisfy the public use clause, a taking need only be “rationally related to a conceivable public purpose.” Moreover, “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.” Under the “reasonable relationship” standard articulated by the U.S. Supreme Court in Berman v. Parker and in Hawaii Housing Authority v. Midkiff, a court must accept the avowed public purpose of the condemnor’s condemnation efforts unless the public use findings are “palpably without reasonable foundation.” Indeed, ever since the Supreme Court’s decision in Berman in 1954, the redevelopment of urban areas has been authorized by federal courts as a public use under the Fifth Amendment.

Even under such a deferential standard, however, public use is not established as a matter of law whenever a legislative body acts to define it. While the scope of judicial scrutiny is narrow, “there is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use.” No judicial deference is required, for instance, “where the ostensibly public uses are demonstrably pretextual.” According to the Ninth Circuit in Armendariz v. Penman:

If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a “public use,” and if those officials could later justify their decisions in court merely by positing “a conceivable public purpose” to which the taking is rationally related, the “public use” provision of...
could be blighted under state law and not blighted under federal law for the purpose of establishing a constitutionally permissible public use:

Lancaster must present a valid public use within the meaning of the Takings Clause supporting its decision to condemn 99 Cents property interest. Lancaster’s failure to show that 99 Cents’ leased property was blighted at the time of its attempted condemnation is determinative of 99 Cents’ federal takings claim only. Its significance under California law is an issue the Court need not resolve.43

Leading to the unusual circumstances of the case is the fact that in a 1997 Plan Amendment renewing the Redevelopment Agency’s eminent domain authority, Lancaster did not make a new determination of blight regarding the project area but instead relied only on its 1983 finding of blight. Thus Lancaster contended before the court that the “loss of Costco” would cause what it described as “future blight.” According to the court, however, prevention of future blight was an inadequate public use within the meaning of the taking clause.44 The court noted that “[t]he concept of future blight” has long been rejected by California courts.45

The 99 Cents Only Stores court was the first federal court to set a boundary on the motives allowed by the lenient reasonable relationship standard for public use established in Berman and Midkiff. On appeal, the Ninth Circuit, in an unpublished decision, returned the matter to the district court for consideration of the injunction in view of Lancaster’s decision to sell Costco a less encumbered property.

Cottonwood Christian Center v. Cypress Redevelopment Agency, issued in 2001, is another Central District decision. Cottonwood Christian Center owned an 18-acre parcel at a commercially significant intersection in the city of Cypress. Cottonwood was pursuing a conditional use permit (CUP) to build a church facility, including a 4,700-seat auditorium. Cottonwood’s property was located in the Los Alamitos Race Track and Golf Course Redevelopment Project. In the 12-year period between the adoption of the redevelopment plan and the filing of the lawsuit, Cypress had proposed at least four different designs for the area surrounding the property. None of these designs evolved beyond the concept stage.

Ultimately, Cypress rejected Cottonwood’s CUP application, choosing instead to allow Costco to place one of its stores on Cottonwood’s property. In response to the denial of its CUP, Cottonwood filed an action in federal court, alleging violations of the U.S. and California Constitutions, along with various state statutes. The redevelopment agency, in turn, initiated a condemnation action after the adoption of a resolution of necessity, seeking to condemn the Cottonwood property for “redevelopment purposes.” Cottonwood sought a preliminary injunction from the district court to halt the condemnation proceedings.

The district court, in assessing the viability of an injunction, applied a strict scrutiny standard (unlike the court in 99 Cents Only Stores) in light of the recently enacted Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).46 Cypress asserted two interests for refusing to grant Cottonwood’s CUP and condemning its property: “blight and generating revenue for the City.”47 The district court held that “[n]either interest is sufficiently compelling to justify burdening Cottonwood’s religious exercise.”48

Examining the viability of Cypress’s blight defense, the district court was not impressed: Moreover, it is evident that the refusal to grant Cottonwood’s application for CUP was not at all premised on blight. The construction of a church on the Cottonwood Property would eliminate the blight.49

Cypress asserted the conclusive presumption of blight that is afforded to redevelopment agencies under the Community Redevelopment Law.50 In response, the court held that “examination of local laws under the strict scrutiny analysis requires not only that the government’s stated purpose is [a] compelling interest, but it is also a genuinely-held purpose.”51 Cypress’s finding of blight was even more suspect because “it did not compel the City to take action until after Cottonwood purchased the Cottonwood Property.”52

In assessing Cottonwood’s likelihood of success on the merits, the district court again used the strict scrutiny standard while adopting the approach of the district court in 99 Cents Only Stores:

Defendants’ planning efforts here appear to consist of finding a potential landowner for property that they did not own, and then designing a development plan around that new user....Although that conclusion is not clear from the record in this case, there is strong evidence that Costco could locate on property adjacent to Cottonwood Property, perhaps even on their remaining 18 to 28 acres that were initially part of the Town Center project. If Defendants’ taking decision was made in order to “appease Costco,” the exercise of eminent domain is not for a “public use.”53
Cypress had once again asserted the conclusive presumption of blight afforded California redevelopment agencies in its response to Cottonwood’s likelihood of success on the merits. The district court again drew on the opinion in 99 Cents Only Stores, which differentiated findings of blight under the Fifth Amendment of the U.S. Constitution from those made under California law. With that, the court issued the injunction.

A third federal case, Aaron v. Target Corporation, is proof that these types of parcel-specific decisions are not unique to Costco and/or the Central District of California. Target operated a retail store in South St. Louis, Missouri, pursuant to a long-term lease in which the plaintiff was the lessor. Target wanted to tear down its 30-year-old store and build a new one. In the course of negotiating a new lease with the plaintiff, Target could not agree on the terms. Without the plaintiff’s knowledge, Target and the city of St. Louis entered into an agreement in which the city would find the property to be blighted and in need of redevelopment and would condemn the property, and Target would be a redeveloper of the property. Target and St. Louis jointly funded and participated in the blight analysis, after which the city found that the plaintiff’s property was blighted and adopted a redevelopment plan around it. The city authorized Target to serve as the redeveloper and authorized condemnation of the plaintiff’s property. Prior to the city’s filing of a condemnation complaint, the plaintiff filed a suit in federal court seeking to enjoin state court condemnation proceedings on federal constitutional grounds.

The district court first rebuffed the city’s Younger abstention claims by finding the city’s conduct to be “one of the rare cases” in which possible “bad faith, harassment, or other extraordinary circumstances makes abstention inappropriate.” In assessing the challenge to public use, the district court invoked passages from both 99 Cents Only Stores and Cottonwood. The court noted that in order to satisfy the public use clause, a taking need only be “rationally related to a conceivable public purpose.” However, like the district court in 99 Cents Only Stores, the Target district court noted that “courts must look beyond the government’s purported public use to determine whether that is a genuine reason or if it is merely pretext.”

The district court concluded by adopting a recent holding of the Illinois Supreme Court, in which a taking of a recycling facility’s property to convey to a race track for the purpose of expanding the race track’s parking lot was found unconstitutional as a public use:

Nonetheless, the City may not use its
power of eminent domain in the manner of a “default broker of land” [citation omitted], to allow tenants to wrest property from their landlords merely to enable the tenant to maximize its profits. As plaintiffs suggest, this “will magnify the financial risk of investing in core City neighborhoods, and thereby strongly discourage private investments in those areas.”

St. Louis and Target immediately sought an expedited appeal of the injunction issued by the district court. On February 3, 2004, the Eighth Circuit Court of Appeals reversed the district court, principally on Younger abstention grounds, and dissolved the injunction.

The Future of the Public Use Doctrine

Based on 99 Cents Only Stores, Cottonwood, and Target, it appears that some federal courts no longer accept redevelopment as a public use without further scrutiny. Indeed, a state finding of public use is no longer conclusively presumed in the absence of an examination of the factual context in which the power of eminent domain is being exercised.

The effect of federal courts’ applying this new standard of public use in state court condemnation actions poses enormous consequences for redevelopment agencies. If redevelopment agencies must face federal actions challenging the constitutionality of their condemnation actions every time the agencies move to condemn property for a proposed development, redevelopment will be jeopardized. Developers and lenders will be leery of advancing funds in such an uncertain climate. Also, the real danger lies in the possibility of redevelopment condemnees filing reflexive federal actions based on factual circumstances that, unlike the factual settings in the three federal cases, are not extraordinary.

On the other hand, three federal district court opinions do not a trend make. It is clear, however, that federal and state courts differ over the meaning of the standards of public use. Certain legislative presumptions concerning blight and public use that exist in state court may not exist in federal court. When the “ostensible public use is demonstrably pretextual,” state court condemnation proceedings are going to be closely scrutinized by a federal court no matter what standard of review is involved.

In the most egregious factual situations regarding redevelopment, federal notions of ripeness, abstention, mootness, and equity will be ignored to preserve the federal constitutional rights of property owners. Finally, the exercise of the power of eminent domain based on findings of blight that have no rea-
sonable current viability will be questioned in federal court irrespective of state law pre-


3 See Health & Safety Code §33367.

4 See 99 Cents Only Stores, 237 F. Supp. 2d at 1130 n.2; Cottonwood, 218 F. Supp. 2d 1229-30.


6 See HEALTH & SAFETY CODE §33000 et seq.

7 See HEALTH & SAFETY CODE §33368.


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14 See Tepper, supra note 23, at 36.

15 See Health & Safety Code §33030.


17 See AB 1290, the Community Redevelopment Reform Act of 1990. See, e.g., HEALTH & SAFETY CODE §33030-33031.
31 See, e.g., Sweetwater Valley Civic Ass’n v. City of Nat’l City, 18 Cal. 3d 270 (1976); Friends of Mammoth v. Town of Mammoth Lake, 82 Cal. 4th 511 (2000); Beach-Courchevres v. City of Diamond Bar, 80 Cal. App. 4th 388 (2000).


36 See Decl. of John W. Barr, supra note 33, at 13.

37 In the face of the federal lawsuit, Lancaster rescinded its resolution of necessity—the statutory step prefatory to filing an eminent domain case. The district court held that Lancaster’s refusal to enter into a stipulation “agreeing not to condemn” 99 Cents’ Leasehold interest at Costco’s behalf” weighed “heavily against the finding of mootness.” 99 Cents Only Stores, 237 F. Supp. 2d at 1128.

38 The U.S. Supreme Court clearly disfavors federal injunctive relief against state action based on what is informally called “[o]ur federalism.” Younger v. Harris, 401 U.S. 37, 41 (1970). See also San Remo Hotel v. San Francisco, 145 F. 3d 1095, 1101 (9th Cir. 1998). However, because Lancaster had not yet initiated a condemnation action, Younger abstention was not directly applicable.

39 See Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 192 (1985) (Governmental action must in fact either cause or threaten actual, concrete injury in order for the matter to be ripe.). Because Lancaster had not filed a condemnation case, the city contended the federal action was not ripe for adjudication.

40 The court telegraphed its holding when it stated that no “judicial deference is required, for instance, where the ostensible public use is demonstrably pretextual.” 99 Cents Only Stores, 237 F. Supp. 2d at 1129.

41 Id. at 1128.

42 Id. at 1130 n.2.

43 Id. at 1130.

44 Id.


46 RLUIPA, 42 U.S.C. §2000 cc-2. RLUIPA prohibits any governmental agency from imposing or implementing:

A land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly, or institution—(A) is in furtherance of the compelling governmental interest; and (B) is the least restricted means of furthering that compelling governmental interest.

The district court also held that the strict scrutiny standard was applicable under the free exercise clause of the First Amendment. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002).

47 Cottonwood, 218 F. Supp. 2d at 1227.

48 Id. at 1228.

49 Id.

50 See HEALTH & SAFETY CODE §§33350/1, 33388.

51 Cottonwood, 218 F. Supp. 2d at 1228 (citing Lincoln Club of Orange County v. City of Irvine, 274 F. 3d 1262, 1269 (9th Cir. 2001), opinion amended and superseded, 292 F. 3d 934 (9th Cir. 2002)).

52 Id.

53 Id. at 1229-30.

54 HEALTH & SAFETY CODE §33368.


56 See Mo. REV. STAT. §99.320 (2000). Ironically, the indicia of blight found by the city included matters uniquely within the control of Target, such as the exterior condition of the property and the condition of the utility systems.

57 Target, 269 F. Supp. 2d at 1172 (citing Middlesex County Ethics Comm’n v. Garden State Bar Ass’n, 457 U.S. 423, 437 (1982)).

58 Id. at 1176 (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984)).


61 Target, 269 F. Supp. 2d at 1177-78.


63 Target, 269 F. Supp. 2d at 1162, reversed, slip op. (8th Cir. Feb. 3, 2004).

Recent changes in Mexican law have improved the climate for secured lending

Secured financing in Mexico has recently taken a turn for the better, and there is little reason to doubt that recent amendments and additions to Mexican law will enhance the rights of secured creditors and thereby encourage the extension of credit in Mexico. Lenders that were reluctant to extend secured financing to Mexican borrowers in the past may now want to reconsider their practices.

In 2000 and 2003, new federal legislation took effect, altering Mexico’s Law of Negotiable Instruments and Credit Transactions (Credit Transactions Law) as well as the Commerce Code. This legislation enhances the rights of creditors and, from the lender’s standpoint, makes secured lending significantly more attractive. In particular, as a result of this legislation, loans that support real estate development in Mexico can be made more secure, because the new law clearly sets forth the provisions for nonjudicial foreclosure.

The new provisions have tremendously enhanced two instruments of Mexican law: the pledge without transfer of possession (prenda sin transmisión de posesión) and the guaranty trust (fideicomiso en garantía). These instruments are sure to be the preferred choice for secured lending in Mexico for the foreseeable future. The statutory changes have augmented, substantively and procedurally, the rights of creditors.

For years, a pledge (prenda) of personal property to secure a debt under the Commerce Code required a transfer of possession of the collateral to the creditor. Under the law, this means actual rather than constructive possession. The only exception to this rule of the creditor taking possession in order to have a valid pledge was available when the collateral could be held under lock and key by an independent third party warehouse owner. Therefore, if it was not feasible for the borrower to surrender possession of the property offered as collateral, a security interest in the form of a pledge could not be employed.

For this reason, one of the most important parts of the new legislation is the amendment to Article 346 of the Credit Transactions Law, which holds that a pledge of personal property to secure a debt without transfer of possession of the collateral to the pledgee-creditor creates a chattel mortgage and gives the pledgee-creditor a right of first preference against the collateral as long as the debt that is secured by the collateral remains unpaid. Further, the amendment to Article 353 of the Credit Transactions Law provides that all kinds of personal property (and rights thereto) may be pledged without the transfer of possession of the collateral to the pledgee-creditor.

The new legislation also amended certain articles of the Credit Transactions Law, specifically addressing the use of trusts as a vehicle for any legal purpose. Trust agreements (fideicomisos) have been used in Mexico for many years for different purposes. Since the enactment of the Foreign Investment Law of 1973, trusts have been used as a vehicle to allow non-Mexican persons to have the use and benefit of real property in the border and coastal areas. Trusts have also been used by developers of real property to divide a large parcel of real property into smaller units in the form of lots, single family homes, or condominiums that are later sold to different buyers. Trusts have also been used in past years as a vehicle for secured purchase money financing and other types of lending by creating security interests in real property and personal property. However, the statutory law of Mexico on the use of trusts for secured lending transactions was not adequate in many respects, and this created some doubts about the use of trusts for the purpose of securing debt. There were many unanswered questions regarding foreclosure on the collateral in the event of default by the debtor.

The new legislation includes articles of the Credit Transactions Law that specifically address the use of a trust agreement to guarantee a debt. Thus, for the first time, the law of Mexico includes express statutory authority for the use of trust agreements to create security interests in real property and personal property. Prior to these new articles, only Mexican banks were statutorily authorized to act as trustees on trust agreements. Article 395 of this law stipulates that other institutions are authorized to act as trustees for trusts created for the purpose of guaranteeing the payment of a debt to the creditor named as beneficiary of the trusts. These other institutions include insurance and bonding companies, stock brokerages, limited object financial organizations, and general warehousing for deposit. This change will generate competition for Mexican banks in the business of providing trust services. The added competition should cause trustee services to be more efficient and less expensive, especially if foreclosure becomes necessary due to a default in the obligations of the trustor.

The amendments also require that financial institutions serving as trustees keep a separate accounting for each trust and indemnify the trustor-debtor for any loss caused by the trustee acting in bad faith or in excess of the trustor’s authority as prescribed by law and the terms of the trust agreement. Under the new law, trustees have the legal capacity to transfer legal title to property held in trust and act as the judicial and administrative authority on behalf of the trustor.

Other new articles of the Credit Transactions Law set forth provisions that can be included in

pract i ce tips

By Frederick W. Hill

Creditors’ Rights in Secured Transactions Enhanced in Mexico

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Even if the creditor is forced to commence a judicial proceeding against the debtor, it should be remembered that a complaint (demanda) that is based on public documents and/or a promissory note initiates what is known as an “executive action.” This expedites judicial proceedings, limits the defenses that can be raised by the debtor, and permits a prejudgment attachment on all assets owned by the debtor by operation of law ex parte. Moreover, if the promissory note is assigned by a third party, this constitutes an aval (a guarantee of repayment), and the cosigner (or avalista) becomes a primary obligor on the note and is subject to the executive action independent of the debtor on the note. The creditor holding the note is free to proceed against the avalista to collect the debt regardless of the action against the debtor.

Judicial enforcement of legal obligations in Mexico has been open to question. However, in recent years the integrity of the judiciary in Mexico has improved. One recent example is the action taken by supervisory officials of the federal court system in Mexico City. A case involving Grupo Transportación Marítima Mexicana, S.A. (TMM) arose wherein creditors, regulators, and tax authorities were pursuing their rights against TMM. Upon application by TMM attorneys, a Mexico City judge issued an injunction staying the ability of the creditors to enforce their rights. Immediately, court supervisory officials removed the judge from office and announced that he had been transferred to another jurisdiction and was currently being investigated on suspicion of granting an illegal injunction.4

The successful passage of the recent federal secured transaction legislation is an exception to the reforms that President Vicente Fox strived to make a part of his administration’s accomplishments. Despite the efforts of the Fox administration, the Mexican Congress did not approve the administration’s most coveted legislative reforms in the areas of energy, labor law, and taxation. Although the Congress did not grant Fox these crown jewels of reform, the jewel of increased protection for secured lenders was approved with the cooperation of the two major political parties.

Business transactions under this new legislation have not been tested in Mexican courts. Some legal scholars and lawyers in Mexico will undoubtedly question aspects of the legislation. However, many of the leaders in the federal government, the judiciary, and the business community in Mexico recognize the need to modernize laws and regulations affecting business. Moreover, the role of the judiciary in the business community of Mexico is not as broad as it is in the United States. For these reasons, it is believed that this legislation will be followed when careful documentation is created for secured lending transactions in Mexico.

1 The Mexican Commercial Code (Código de Comercio) and the Credit Transactions Law (Ley de Títulos y Operaciones de Crédito) are federal laws, applicable in all states of Mexico.
2 The Public Registry of Property (Registro Público de la Propiedad) in Mexico is similar to a county recorder in the United States. However, as with registrations in the Public Registry of Commerce (Registro Público de Comercio), the state of Mexico where the property is located has jurisdiction. All transfers of real property must be recorded in the Public Registry of Property in order to be valid. The registry is also where title searches must be performed in order to determine who has title to real property in Mexico. Fees for recording in the Public Registry of Property are based upon the value of the transaction, and as a result are much higher than the recording fees charged by county recorders in the United States.
3 The federal Penal Code (Código Penal) applies when a depositary commits an abuse of confidence. Articles 382 through 385 of this code specify a range of jail time and fines that are imposed on persons who violate their obligations as a depositary or trustee. In general, prosecution is a summary proceeding compared to its equivalent in the United States. For this reason, creditors have added protection in Mexico.
4 See Michael Allen & Joel Millman, A Test of Mexican Bankruptcy Law?, WALL STREET JOURNAL, May 30, 2003, at A15. The action taken by the federal court surprised many observers and indicated that the federal government of Mexico fully supported the action.
It has been almost four years since the U.S. Supreme Court held that an employee’s discrimination claim may reach a jury if the employee can offer proof undermining the company’s stated reasons for an adverse employment action—even without additional evidence of discrimination. Yet, the decision in Reeves v. Sanderson Plumbing Products, Inc. has left courts struggling to discern the precise factual formulas required for a plaintiff to survive summary judgment. Lawyers representing employers should pay particular attention to how Reeves clarifies the burden a plaintiff must meet to get a claim before a jury.

Reeves actually marked the end of a long and arduous journey that began in 1973 with the Supreme Court’s decision in McDonnell Douglas Corp. v. Green, which established the burden-shifting analytical framework to be used by trial courts in adjudicating individual disparate treatment cases. According to McDonnell Douglas, once a plaintiff has provided evidence of a prima facie case of discrimination, the defendant bears the burden to “set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of [the] employment action…. Under the Supreme Court’s holding in McDonnell Douglas, once the defendant meets this burden of production, the plaintiff bears the burden of demonstrating that the reasons proffered by the defendant are pretextual; that they are “in fact a coverup for a racially discriminatory reason.” If the plaintiff shows that the defendant employer’s proffered legitimate nondiscriminatory reasons are pretextual, the court must deny summary judgment. If, however, the plaintiff cannot establish pretext, the defendant must prevail.

Subsequent Supreme Court opinions attempted to clarify the McDonnell Douglas burden-shifting framework. First, in 1981, in Texas Department of Community Affairs v. Burdine, the Court revisited the issue of how to allocate burdens in disparate treatment cases. In Burdine, the trial court ruled that the burden on the defendant-employer to set forth a legitimate nondiscriminatory reason for its action was one of persuasion. To avoid liability for discrimination, the defendant had to introduce evidence “which, in the absence of any evidence of pretext, would persuade the trier of fact that the employment action was lawful.” The Court rejected the trial court’s interpretation

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of McDonnell Douglas, holding instead that an employer’s burden was merely one of production. The employer “need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.” The Court clarified that the plaintiff at times bears the burden of persuasion.

After the Supreme Court’s pronouncement in Burdine, some federal circuit courts concluded that a plaintiff must prevail merely upon showing that the defendant’s articulated reasons were pretextual. In contrast, other circuit courts found that the plaintiff’s burden of persuasion could not be satisfied merely by discrediting the defendant’s proffered reason for the adverse employment action, but, instead, also required proof of the defendant employer’s discriminatory intent based on the plaintiff’s protected status. As a consequence, the circuits split three ways on the impact of proving pretext. Some federal circuits applied what became known as the “pretext only” approach, while other circuits followed a “permissive pretext” approach, and still others followed a third approach—“pretext plus.”

Under the pretext-only approach, a plaintiff necessarily prevailed if he or she proved that the defendant’s proffered “legitimate nondiscriminatory” reasons for the adverse employment action were pretextual. Under the permissive-pretext approach, the trier of fact could infer discrimination once a plaintiff established that the defendant’s proffered reasons were pretextual and could find for the plaintiff, but this was not mandatory. Finally, under the pretext-plus approach, a plaintiff could not prevail unless he or she demonstrated that the defendant’s proffered reasons were pretextual and added additional evidence—beyond the plaintiff’s prima facie case—that the adverse employment action was motivated by discrimination.

In 1992, two decades after its McDonnell Douglas opinion, the Supreme Court, in St. Mary’s Honor Center v. Hicks, was called upon to finally resolve the circuit split over the allocation of burdens in individual disparate treatment claims. The Court held that when the plaintiff alleges intentional discrimination, the fact finder’s disbelief of the defendant-employer’s proffered reasons for its adverse treatment of the plaintiff-employee does not compel judgment for the plaintiff as a matter of law. Rather, the fact finder’s disbelief of the defendant’s proffered reasons, coupled with the evidence of discrimination from the plaintiff’s prima facie case, may lead it to conclude that the adverse employment action was the result of intentional discrimination. In other cases, however, despite having discredited the employer’s proffered reasons, the plaintiff will need to provide additional proof at the pretext phase that discrimination motivated the employer.

The Court’s decision was widely viewed as confusing. Indeed, the uncertainties arising from Hicks bore heavily on the question of whether judgment in a particular case could be granted for the defendant as a matter of law, and the federal circuits proceeded to address those uncertainties in that context. A leading question was whether Hicks required the employer to go to trial whenever the plaintiff called into question the employer’s stated reasons for its actions.

Circuit court decisions after Hicks indicated agreement on the McDonnell Douglas framework in which 1) the plaintiff is required to show at least a prima facie case that creates a presumption of discrimination, 2) the defendant is required to rebut this presumption by producing a legitimate, nondiscriminatory reason for the employment action in question, and 3) the plaintiff must show that the reason given by the defendant was a pretext for intentional employment discrimination. However, Hicks did not clarify the allocation of burdens in disparate treatment cases. Instead, Hicks perpetuated the existing conflict among the circuits that struggled to measure the quality and quantity of pretext evidence that a plaintiff now had to present to survive summary judgment.

The circuit courts imposed different levels of proof for a plaintiff to survive summary judgment, which in turn fostered the inconsistent evidentiary standards applied post-Burdine. These standards could be categorized as either “pretext only” (similar to the permissive-pretext-only approach adopted in many circuits after Burdine) or “pretext plus.” Under the pretext-only approach, once a plaintiff established a prima facie case of discrimination and introduced sufficient evidence discrediting an employer’s “legitimate non-discriminatory reasons,” the fact finder was permitted to infer discrimination. On the other hand, those courts following pretext-plus required plaintiffs to introduce additional evidence of intentional employment discrimination beyond that produced as part of plaintiff’s prima facie case.

Reeves v. Sanderson Plumbing

On June 12, 2000, in Reeves v. Sanderson Plumbing Products, Inc., the Supreme Court once again sorted through the divergent circuit views on how to prove pretext. Reeves involved allegations of age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA). The plaintiff, Roger Reeves, who worked as a supervisor for Sanderson Plumbing, was fired from his position after an internal audit revealed numerous timekeeping errors in the attendance sheets of employees within his department. Reeves claimed that his age was the true reason for the adverse employment decision and on that basis brought suit under the ADEA in federal district court. At trial, Sanderson Plumbing offered the numerous timekeeping errors Reeves had made as its legitimate nondiscriminatory reason for terminating his employment. Reeves challenged this justification as pretextual through testimony that the employer was incorrect about the record-keeping errors that were used to justify his termination and by introducing evidence of critical age-based remarks made by his much younger supervisor.

This presentation of evidence resulted in the trial court twice rejecting Sanderson Plumbing’s motions for summary judgment. In effect, the trial court allowed Reeves to survive summary judgment simply by showing that Sanderson Plumbing’s proffered nondiscriminatory reason for the plaintiff’s termination was pretextual. Ultimately, the jury entered judgment in favor of Reeves on the issue of age discrimination.

The Fifth Circuit reversed, holding that Reeves “had not introduced sufficient evidence to sustain the jury’s finding of unlawful discrimination.” According to the Fifth Circuit, the plaintiff “very well may have offered sufficient evidence for a reasonable jury to have found that respondent’s explanation for its employment decision was pretextual,” but proof of pretext alone was “not dispositive of the ultimate issue—namely, whether Reeves presented sufficient evidence that his age motivated respondent’s employment decision.” The Fifth Circuit, Reeves’s proof of pretext was insufficient as a matter of law to support the jury’s verdict.

The Supreme Court granted certiorari “to resolve a conflict among the Court of Appeals as to whether a plaintiff’s prima facie case of discrimination…combined with sufficient evidence for a reasonable fact finder to reject the employer’s nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability” on the part of a defendant for intentional discrimination. The Court found that the Fifth Circuit erred in holding that a plaintiff was obligated to produce evidence beyond proof of pretext to prevail in an individual disparate treatment case. The Court held that sometimes, but not always, a finding of discriminatory animus could be inferred from proof of pretext.

Thus, an employee plaintiff is not always required to produce proof of pretext plus additional evidence proving intent to discriminate to survive summary judgment in a
discrimination case. Indeed, “[b]ecause a prima facie case and sufficient evidence to reject the employer’s explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.”

The question at issue is whether the court and trier of fact could reasonably infer that a proffered false reason for an employer’s action camouflages intentional employment discrimination. The Supreme Court explained:

In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party’s dishonesty about a material fact as “affirmative evidence of guilt.” Moreover, once the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Nevertheless, the Court noted that “there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational fact finder could conclude that the action was discriminatory.” Thus, summary judgment for the employer may still be appropriate even when the plaintiff sets forth a prima facie case and sufficient evidence to reject the defendant’s explanation.

The Supreme Court’s decision in Reeves, by washing away the standards created by the circuits after Hicks, mandates a case-by-case approach to summary judgment in disparate treatment claims. In the aftermath of Hicks, some circuits mandated judgment for the defendant, even at the summary judgment stage, unless the plaintiff offered some direct evidence of discrimination. Other circuits did not require plaintiffs to demonstrate both that the employer’s legitimate, nondiscriminatory reason was pretextual and that the real reason for the challenged employment decision was discrimination in order to survive a motion for summary judgment. Reeves attempts to resolve this inconsistency among the circuit courts by requiring that courts examine the entire record to determine whether the plaintiff has produced sufficient evidence to ultimately satisfy his or her burden of persuading the trier of fact that the defendant intentionally discriminated.

The Ninth Circuit after Reeves

Reeves has generated wide discussion and further uncertainties, but it is difficult to discern its impact. Within the Ninth Circuit, courts have ruled in both directions. However, a careful reading of the cases indicates which factors are key to these courts’ determination of when summary judgment is appropriate.

In several post-Reeves decisions, the Ninth Circuit has affirmed a defendant employer’s motion for summary judgment. For example in Nichols v. Mineta, the plaintiff, an African American, alleged that he was denied a promotion because of his race and age. Nichols argued that he should have been promoted based on his “superior engineering experience and the number of his equipment certifications.” The employer’s stated reason for not promoting the plaintiff was his writing ability.

The appellate court affirmed the district court’s grant of summary judgment in favor of the employer, finding that the plaintiff did not meet his burden of showing that the employer’s stated reason was a pretext based on race or age discrimination. The court reasoned that Nichols needed to show that his qualifications and experience should have been the “decisive criteria in the hiring decision.” Indeed, the plaintiff “failed to present ‘specific’ and ‘substantial’ circumstantial evidence of pretext sufficient to raise a genuine issue of material fact.” The fact that a technical background was one of several criteria was not sufficient to demonstrate pretext. Nichols provided performance evaluations to “refute the proposition that he was a poor writer,” and he obtained an admission from one of the successful candidates that she “had her own writing difficulties.” In rejecting the plaintiff’s evidence of supposed pretext, the court reasoned that the candidates who filled the positions were all qualified as well, so there was no evidence of discrimination. That the plaintiff was also qualified was irrelevant without evidence that he was discriminated against based on his race and age.

Similarly, in Adams v. Kmart Corporation the district court granted summary judgment in favor of the employer. In Adams, the plaintiff sued Kmart for wrongful termination based on retaliation. Adams had several discrepancies in his timesheets, and there were several instances when the defendant claimed that the plaintiff was not at work at his scheduled time. He was issued a written reprimand documenting an instance in which he did not show up for work. This reprimand also stated that “any future disregard for company policy will result in your termination.” Thereafter, the plaintiff either showed up late or did not show up at all on several occasions. Kmart terminated Adams and offered as its stated nondiscriminatory reason that the plaintiff had three straight days of unwarranted partial absences. Adams claimed that this proffered reason was pretextual and that the defendant terminated his employment in retaliation for his reporting that his supervisors were padding their inventories and changing expiration dates on meats.
In granting summary judgment in favor of the employer, the court noted that Reeves would not be controlling in this case because Reeves involved discrimination rather than retaliation. Although the court noted that the reasons given by the employer were “subject to doubt,” the court stated that “it would be impossible for a reasonable trier of fact to disregard the affirmative evidence that the decision-maker was in no way motivated by plaintiff reporting a public-policy violation.”

In another case in which a district court granted summary judgment, Wroge v. Henderson, the plaintiff brought a disability discrimination action against his employer, the U.S. postmaster general. Wroge contended that his employer wrongfully suspended him because he occasionally needed time off from work for health reasons. The plaintiff had previously been reprimanded for improperly completing a form on several occasions and had also refused a customer’s request for assistance, all of which was was documented in his file. The defendant then issued the plaintiff a 14-day suspension on the basis of these documented problems with his performance. Wroge alleged that this proffered reason was pretextual and that he was instead fired due to his medical condition.

As evidence of pretext, Wroge offered “copies of military evaluations, a copy of his honorable discharge certificate, letters from customers on his route and fellow postal carriers which attest to his integrity, an account of his weekly expenses (with receipts),... and photographs of his parents and himself as a boy.” Since he presented no evidence to show that his alleged disability was a factor in his termination, the district court granted summary judgment to the defendant.

In contrast to this line of post-Reeves cases, the Ninth Circuit has also frequently reversed a district court’s granting of an employer’s motion for summary judgment. For example, in Raad v. Fairbanks North Star Borough School District, the plaintiff, a substitute teacher of Lebanese descent and Muslim faith, filed suit against her former employer, a school district, for disparate treatment under Title VII. Raad claimed that the school district refused to hire her full time because of her accent. She had impeccable credentials and was “awarded the highest possible rating by the team of principals who interviewed her.” Despite her high academic achievements and glowing recommendations, the principal noted that the plaintiff’s “accent and soft spokeness may be a detractor to some instructional effectiveness.” She applied and was rejected for several positions for which she was qualified. For one full-time position, the school district argued that it legitimately denied her the teaching position because of her language and communication skills and her temperament. For another position, the school district claimed that the plaintiff was not hired because it was looking for a teacher to double as a ski coach.

The district court granted summary judgment in favor of the employer, and the Ninth Circuit reversed. As evidence of pretext, the plaintiff provided evidence that there were already two ski coaches employed by the school. Significantly, during the course of the litigation, the school district had changed its stated reason for not hiring the plaintiff from her accent, to lack of credentials, and finally to her temperament. The court held that, based on the facts of the case, it was error for the trial court not to draw all reasonable inferences in favor of the plaintiff. The court reasoned that the fact that several of the defendant’s witnesses made note of plaintiff’s accent, that the plaintiff was substantially more qualified than applicants who were hired instead of her, and that she had been told that she would receive a position, clearly demonstrated that there was a question of fact for the jury to decide. Indeed, the court noted that plaintiff’s superior qualifications alone would support a finding of pretext. The court reiterated that it has never held that qualifications “must be so apparent as to jump off the page and slap us on the face to support a finding of pretext.”

A similar result obtained from the appeal in Lyons v. England. In Lyons, the plaintiffs, African American males, brought disparate treatment claims against their employer under Title VII for denying them job promotions and giving them unfavorable work assignments. The plaintiffs claimed that they reached a ceiling in promotions and were given “non-career enhancing jobs.” They claimed that they were not assigned details that would provide them with an opportunity to advance and gain experience that would be beneficial for higher-ranking positions. They presented evidence that a white male employee was placed in a supervisory position for two years even though he did not have the proper level of qualification. The employer’s stated reason for denying the promotions was the low rank of the plaintiffs.

The appellate court reversed the district court’s grant of summary judgment in favor of the employer, finding that the plaintiffs established a prima facie case of pretext. The court noted that if the employer did not “publish the qualifications for positions that were awarded without a competitive application process, it would be unreasonable to require a plaintiff to present direct evidence of the actual job qualifications as part of his prima facie case.” Further, the court found that the employer failed to explain how rank-
ing was relevant to its granting of promotions. Additionally, the court noted that the plaintiffs produced a substantial amount of background evidence to show that the employer “maintained a discriminatory system of detail assignments that disadvantaged black employees by denying them work experience that would have facilitated their promotion” to higher levels. Consequently, the court reversed the lower court’s decision granting the employer’s motion for summary judgment, finding that a reasonable trier of fact could determine that there was discriminatory intent.

Another example of a district court’s denial of summary judgment to an employer can be found in Mulugeta v. Regents of the University of California. In Mulugeta, an Ethiopian male brought a claim for disparate treatment under Title VII. Mulugeta worked in the transportation department at the defendant university, where he was given the opportunity to take classes at the Building Owners and Managers Institute. His supervisor gave him a check for tuition, and he deposited this check into his personal account and later withdrew cash funds to pay for his tuition. The plaintiff was terminated for misuse of employer resources. He alleged that he was discriminated against because he was not treated the same as two white men in his department who had committed similar violations.

The court reasoned that different treatment of similarly situated individuals was prima facie evidence of discrimination. A white employee who had committed a more egregious misuse of resources was only suspended for 10 days rather than terminated. Another white employee who misused resources far greater than the amount misused by plaintiff received significantly lighter disciplinary action. The court held that these facts constituted prima facie evidence of discrimination toward the plaintiff. Even though there was a legitimate reason for firing the plaintiff, the court held that the lenient treatment of the white employees compared to that of the plaintiff was prima facie evidence of discrimination and that plaintiff was entitled to proceed to a jury. Accordingly, the court denied the defendant’s motion for summary judgment.

**Practical Considerations**

The factors identified and the issues discussed in these cases by no means represent the breadth of factors relevant to a court’s inquiry into whether it will grant or deny summary judgment. The relevant decisional law reveals the tremendous extent to which summary judgment rulings in this area are driven by the specific facts of a given case and the eyes of the beholder. However, several factors do seem to be of special importance in light of Reeves.

Reeves confirms that the plaintiff’s deposition is a critical event in an employment discrimination case for purposes of summary judgment. As the Reeves Court noted, “The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.” Accordingly, crucial to the employer’s motion for summary judgment or summary adjudication is a carefully prepared and thorough deposition of the plaintiff that establishes the record of the plaintiff’s testimony on the essential elements of the challenged causes of action.

Second, post-Reeves decisions beyond the Ninth Circuit indicate that employer-defendants should not rely solely on the memories and testimony of their decision makers to defeat discrimination claims. In Zimmermann v. Associates First Capital Corporation, for
example, the Second Circuit affirmed judgment for the plaintiff, stating that “a notable aspect of this case is that [the defendant] failed to offer a single item of documentary evidence to support its assertion that it fired [plaintiff] for inferior performance.” Thus, an employer’s ability to defend itself is enhanced by its ability to produce contemporaneous, documentary evidence of the nondiscriminatory reasons for its employment actions. Courts have held that contemporaneous documentation may be credible evidence of an employer’s asserted nondiscriminatory reasons for the challenged action in an employment discrimination case.

Post-Reeves decisions also make it clear that vague explanations for adverse employment actions may make the employer vulnerable to claims that the explanation is pretextual. An employer’s explanation of its legitimate nondiscriminatory reasons should be clear and specific. This consideration has been emphasized in several circuits. For instance, in the Second Circuit’s decision in Mandell v. County of Suffolk, the employer’s explanation for its adverse employment actions was couched in vague and general terms. Specifically, the employer stated that the plaintiff “did not project the image...of someone who has a positive grasp of some unspecified ‘areas’ of interest to the defendant.” In reversing the summary judgment ruling in favor of the employer, the Second Circuit concluded that the employer had failed to show legitimate nondiscriminatory reasons for its actions.

Finally, inconsistent explanations for the adverse employment action may be sufficient to cause a case to proceed to a jury trial. Courts from numerous circuits have held that inconsistent reasons offered for an adverse employment action can support a claim of actionable pretext in disparate treatment cases. The clear lesson is that it is not enough for an employer simply to practice non-discrimination in employment practices in order to prevail at the summary judgment stage; it is also necessary to prove the existence of these practices with reliable and credible evidence.

References:
5. Id. at 807.
7. Id. at 257.
time of discharge, and 4) either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of age. See id.
16 Reeves, 530 U.S. at 151.
17 Id. (quoting Reeves v. Sanderson Plumbing Prods., Inc., 193 F. 3d 988, 994 (5th Cir. 1999)).
18 Id. at 140.
19 Id. at 147-48.
20 Id. (internal citations omitted).
21 See, e.g., Rodriguez-Cyervos v. Wal-Mart Stores, Inc., 181 F. 3d 15, 22 n.5 (1st Cir. 1999) (“[In Hicks, the Court made it clear that in order to survive summary judgment, a Title VII plaintiff must present sufficient evidence not only that the employer’s proffered reason is false but also that the real reason is discrimination.” (internal citation omitted)).
22 See, e.g., AKA v. Washington Hosp. Cir., 156 F. 3d 1284, 1290 (D.C. Cir. 1998) (en banc) (rejecting “any reading of Hicks under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer’s stated explanation in order to avoid summary judgment”).
23 Nichols v. Mineta, No. 00-56851, 2002 WL 74445 (9th Cir. 2002).
24 See id. at *2.
25 Id.
27 Id. at *17.
29 Id. at *17.
30 Raad v. Fairbanks North Star Borough Sch. Dist., 323 F. 3d 1185 (9th Cir. 2003).
31 See id. at 1191.
32 See id. at 1194.
33 Lyons v. England, 307 F. 3d 1092 (9th Cir. 2002).
34 See id. at 1110.
35 See id. at 1114.
36 Id.
39 See id. at 1153 (2000).
40 Id.
41 See, e.g., Zimmermann v. Associates First Capital Corp., 251 F. 3d 376 (2d Cir. 2001).
42 Id. at 379.
43 See, e.g., Mayer v. Nextel West Corp., 318 F. 3d 803, 810 (8th Cir. 2003) (finding that a review of the plaintiff’s performance evaluations and “corrective action plan” drafted by the defendant-employer dispelled any reasonable inference that age was a determinative factor in the plaintiff’s termination); Massey v. Blue Cross-Blue Shield of Ill., 226 F. 3d 922, 926 (7th Cir. 2000) (“[A] plaintiff’s subjective, self-serving testimony is not sufficient to contradict a well-documented history of poor job performance.”).
44 Mandell v. County of Suffolk, 316 F. 3d 368 (2d Cir. 2003).
45 See id. at 380.
46 See, e.g., Rodriguez-Cyervos v. Wal-Mart Stores, Inc., 181 F. 3d 15, 22 n.5 (1st Cir. 1999) (“[In Hicks, the Court made it clear that in order to survive summary judgment, a Title VII plaintiff must present sufficient evidence not only that the employer’s proffered reason is false but also that the real reason is discrimination.” (internal citation omitted)).
47 Id. (quoting Reeves v. Sanderson Plumbing Prods., Inc., 193 F. 3d 988, 994 (5th Cir. 1999)).
48 Id. at 140.
49 Id. at 147-48.
50 Id. (internal citations omitted).
51 Id.
Last year, California's rigorous system of attorney ethics was faced with continued pressure by forces within and outside the state, reflecting public unease about the role of lawyers in recent corporate scandals and the government's war against terrorism. Lawyers were pressured to abandon undivided loyalty to their clients and to become whistle-blowers in the service of a perceived greater public good. The California Legislature passed the first substantive amendment to the state's statutory duty of confidentiality in 131 years, and the American Bar Association and the Securities and Exchange Commission both published rules that, by inviting lawyers to reveal confidential information without their clients' consent, conflict with California law. California lawyers may face a showdown between the traditional state regulation of attorneys and federal preemption in 2004.

The Duty of Confidentiality
A core value of the legal profession for centuries, and codified in California since 1872, the lawyer's duty of confidentiality received its first substantive change in 2003. The fiduciary duty of confidentiality is not merely aspirational; it is a legal obligation set forth in Business and Professions Code Sections 6000 et seq. and the Rules of Professional Conduct. Breach of this duty may result in liability and professional discipline. Business and Professions Code Section 6068, titled "Duties of Attorney," states: "It is the duty of an attorney... (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Under an amendment to Section 6068(e), which will

By John W. Amberg and Jon L. Rewinski

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go into effect on July 1, 2004, California lawyers will be permitted to reveal “confidential information relating to the representation of a client” if the lawyer reasonably believes that disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death...or substantial bodily harm...”

The sponsors of the amendment justified it on the grounds that 1) it would harmonize Section 6068(e) with Evidence Code Section 956.5, which contains a similar exception to the attorney-client privilege, and 2) it would “bring California in line with every other state in the nation and the ABA Model Rules of Professional Conduct.” However, the duty of confidentiality is broader than the attorney-client privilege and protects all secrets, not just privileged communications. Also, exceptions to the privilege presume notice to the client, a hearing, and a court order before disclosure.

The American Bar Association also rewrote its Model Rules of Professional Conduct in response to criticism that lawyers were complicit in recent corporate scandals by failing to blow the whistle at Enron, Worldcom, Tyco, and other companies. Although the ABA Model Rules are not binding in California, they may provide guidance. As amended, ABA Model Rule 1.6 would permit a lawyer to reveal confidential information if the lawyer reasonably believes disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death...or substantial bodily harm...”

The new SEC Rules conflict with California law governing the fiduciary duties of attorneys. Neither Section 6068(e) nor the Rules of Professional Conduct recognize an exception to the duty of confidentiality for alleged violations of the securities laws or harm to investors. Under Rule 3-600(A) of the Rules of Professional Conduct, the corporate lawyer’s duty of confidentiality is owed to the corporation, not to its directors, officers, or shareholders. When the lawyer knows that an agent of the company is acting in a manner that violates the law or violating the law by refusing to act, Rule 3-600(B) states that the lawyer may take those actions that appear to be “in the best lawful interests of the organization,” including urging reconsideration of the matter or referring the matter to higher authority within the organization. Whatever actions are taken, however, Rule 3-600 cautions that the lawyer “shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068, subdivision (e)...” If the company’s highest authority persists in illegal conduct that is likely to result in substantial injury to the organization, a member of the California bar may not blow the whistle on the client. Under Rule 3-600(C), the lawyer’s response “is limited to the member’s right, and where appropriate, duty to resign...”

In a public letter to the SEC in August 2003, the Corporations Committee of the State Bar’s Business Law Section warned that any California lawyer who discloses client confidences in reliance on the new SEC Rules would violate California law and expose themselves and their clients to substantial risks. The SEC did not respond but took the position in a public comment to the Washington State Bar Association that state law is preempted by the SEC Rules.

The Duty of Loyalty

Another core value of the legal profession is the duty of undivided loyalty to the client. As the California Supreme Court stated a decade ago, a client is entitled to a lawyer’s undivided loyalty as the client’s advocate and champion throughout the engagement. This past year, the Fourth District Court of Appeal reaffirmed the duty of undivided loyalty in a new context.

In Hernandez v. Paicius, the plaintiff sued his doctor for medical malpractice. The law firm defending the doctor also represented the plaintiff’s medical expert in an ongoing disciplinary proceeding and previously had represented the expert in several malpractice disciplinary proceedings and previously had represented the expert in several malpractice disciplinary proceedings.

The challenge to traditional notions of loyalty and confidentiality continued unhaltingly in 2003

were complicit in recent corporate scandals by failing to blow the whistle at Enron, Worldcom, Tyco, and other companies. Although the ABA Model Rules are not binding in California, they may provide guidance. As amended, ABA Model Rule 1.6 would permit a lawyer to reveal confidential information if the lawyer reasonably believes disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death...or substantial bodily harm...”

broadly. SEC Rule 205.3(d) (2) would permit a lawyer for a corporate issuer to reveal the SEC, without the client’s consent, confidential information under three circumstances in which the attorney reasonably believes disclosure is necessary: 1) to prevent the company from committing a material violation of the securities laws likely to cause substantial injury to the company’s financial interest or property of the company or its investors, 2) to prevent the company from committing perjury, suborning perjury, or perpetrating fraud on the SEC, or 3) to rectify a material violation of the securities laws likely to cause substantial injury to the company’s financial interest or property of the company or its investors, and in furtherance of this violation the lawyer’s services were used. In an attempt to preempt state regulation, SEC Rule 205.6 permits to shield a lawyer who complies in good faith with the new SEC Rules from liability or discipline by any state.

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San Luis Obispo County Superior Court  
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Santa Barbara Superior Court  
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1. The duty of confidentiality, a core value of the legal profession, has been codified in California since 1872.
   True. False.
2. Under California law, a lawyer must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."
   True. False.
3. The amendment to Code of Civil Procedure Section 6068(e) will require a lawyer to reveal confidential client information if the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm.
   True. False.
4. The duty of loyalty prohibits lawyers from attacking their clients during cross-examination at trial, even if the examination is based on public information.
   True. False.
5. The duty of loyalty is codified in a California statute.
   True. False.
6. Ordinarily, a lawyer owes no professional duties to nonclients.
   True. False.
7. A communication between a lawyer and a non-client may give rise to a duty of confidentiality even if no attorney-client relationship is formed.
   True. False.
8. An attorney for an insurance carrier may not misrepresent the nature of the coverage of the carrier’s insured to opposing parties.
   True. False.
actions. During cross-examination at trial, the defendant’s lawyer attacked the expert’s competence, integrity, and reputation. In her closing argument, the defendant’s lawyer described the plaintiff’s expert as a “ liar” who “had the guts to come in here and lie to you [the jury].”

The Fourth District Court of Appeal reversed judgment for the defendant. In a strongly worded opinion, the court of appeal concluded that the defendant’s lawyer had “demonstrated a dulled sensitivity to professional ethics and engaged in an egregious and shocking breach of her duty of loyalty to [her firm’s client, the plaintiff’s expert].”16 The court reached this result even though much, if not all, of the lawyer’s cross-examination was based on publicly available information. Nevertheless, the court declared that “[t]he spectacle of an attorney skewering her own client on the witness stand in the interest of defending another client demeaned the integrity of the legal profession and undermines confidence in the attorney-client relationship.”17

A lawyer facing this dilemma should find a remedy before trial—perhaps a written waiver by both clients, or the retention of separate counsel (with appropriate screening mechanisms in place to ensure the absence of any conflict) to examine the witness’s own client on the witness stand in the interest of defending another client.18 If the dilemma is not resolved by the absence of any conflict) to examine the witness’s own client on the witness stand in the interest of defending another client, the lawyer had failed to evaluate their father’s testamentary capacity.

The First District Court of Appeal affirmed judgment on demurrer for the lawyer, holding that a lawyer preparing a will for the testator owes no duty to beneficiaries to ascertain and document the testamentary capacity of the client.20 The court noted that the crux of the dispute was the testamentary capacity of the client rather than the draftsmanship of the amended estate plan itself.21 The court expressed its reluctance to impose on the lawyer an obligation to evaluate his client’s capacity, because that obligation would be inconsistent with the lawyer’s existing duty of undivided loyalty to the client and would impose “an intolerable burden” on lawyers.

The Second District Court of Appeal considered whether a lawyer representing one spouse owed a duty to advise the other spouse of his rights arising from a wrongful death action involving the couple’s child. In Hall v. Superior Court,25 the couple’s two-year-old daughter drowned in a swimming pool at the home of her paternal grandmother. The little girl’s father was present at the time of the drowning, but the mother was not. The couple separated, and the mother sued her estranged husband’s mother for wrongful death. The father demanded that his wife drop the lawsuit and threatened to file for divorce if his estranged wife continued with this “evil thing.” The wife ultimately settled the wrongful death claim for $210,000, and the judgment was paid by the grandmother’s homeowner’s insurance carrier.

When the estranged husband learned the insurer would pay the settlement, he sued his wife and her lawyer to get a portion of the settlement for himself. He contended that his wife’s lawyer had a duty to advise him that the claim would likely be covered by his mother’s homeowner’s insurance and, as an heir, he would be entitled to a portion of any proceeds. The trial court denied the attorney’s motion for summary judgment, but the Second District Court of Appeal reversed, concluding that under the circumstances of this case—the wife’s lawyer never consulted with the husband, and the husband never contacted the wife’s lawyer—the lawyer owed no duty to the husband to discuss the husband’s legal rights.26

When representing an organization, a lawyer must communicate with the organization’s employees. Whether the lawyer also represents the employees was addressed by the Fourth District Court of Appeal in Koo v. Rubio’s Restaurants, Inc.27 The plaintiffs in Koo filed a putative class action for overtime wages against Rubio’s Restaurants on behalf of Rubio’s salaried assistant and general managers. The plaintiffs’ counsel sought to intervene, view the managers, and defense counsel filed declarations stating that he represented both the restaurant and its managers. Based on the declarations, the plaintiffs’ counsel successfully moved to disqualify the defense attorney for pursuing to represent both the plaintiffs and the defendant in the same litigation. The court of appeal reversed, holding that the defense attorney’s unilateral declaration regarding representation could not, by itself, create an attorney-client relationship when none otherwise existed.28 There was no evidence suggesting that any of the managers agreed to be represented by defense counsel in their individual capacities, and there is a distinction between communicating with corporate managers in their representative capacities and in their individual capacities.29

In Formal Opinion 2003-161, COPRAC considered whether a lawyer owes professional duties to nonclients who ask legal questions in casual settings. The committee opined that even if a formal attorney-client relationship is not formed, the lawyer will be obligated to treat a communication as confidential if 1) the speaker was seeking representation or legal advice and, under the totality of the circumstances, the speaker had a reasonable belief that the attorney was willing to be consulted in his or her professional capacity, and 2) the speaker provided information to the attorney in confidence. Of critical importance in assessing the speaker’s reasonable belief are the statements and conduct of the attorney. If the attorney explicitly tells the speaker, before the speaker discloses any private information, that the attorney will not represent the speaker, the duty of confidentiality should not attach, even if the speaker thereafter discloses confidential information. But if the attorney listens to the speaker’s story without protest and the client discloses private information, the duty to maintain the information in confidence probably will attach.

**Duties to Potential Clients and Nonclients**

Under what circumstances does a lawyer’s conduct create a duty of competence, loyalty, or confidentiality to nonclients? During 2003, three courts of appeal and the State Bar’s Committee on Professional Responsibility and Conduct (COPRAC) analyzed these issues.

Generally, a lawyer has no professional obligation to nonclients for the consequences of the lawyer’s professional negligence, although this rule is subject to certain limited exceptions when a nonclient was the intended beneficiary of the lawyer’s services.31 In Moore v. Anderson Zeigler Disharow Gallagher & Gray,32 a lawyer prepared an amended estate plan that dramatically altered the distribution of the client’s property among the client’s nine children. The client executed the amended plan two days before his death. After expensive litigation among themselves, some of the children sued their deceased father’s lawyer for legal malpractice, claiming that the lawyer had failed to evaluate their
judgment for the accounting firm.

The Fourth District Court of Appeal affirmed. The rules on recovery after a separation between client and lawyer in a contingency case depend on who wanted to terminate the relationship and why. If the lawyer withdraws from the engagement without the client’s consent, recovery depends on whether the lawyer had “justifiable cause” for withdrawal. Under the circumstances, the court of appeal concluded that the lawyers had no reasonable justification for withdrawing and so were precluded from withdrawing and retaining a quantum meruit claim on any contingent recovery.31

Similarly, a lawyer disqualified due to a conflict of interest in violation of the Rules of Professional Conduct may not recover for services rendered. In In re Credit Corporation, Inc. v. Aguilera & Sebastianelli, the First District Court of Appeal held that when a lawyer does not appeal his or her disqualification, the order is collateral estoppel on the issue of ethical breach.32

In Fletcher v. Davis,33 a lawyer sued his former client, a corporation, and others to recover legal fees and expenses the lawyer incurred in representing the client in litigation with its landlord. To secure payment of the lawyer’s fees and costs, the former client, through its president, had orally agreed to provide the lawyer with a lien on any judgment. There was no written retainer agreement. The client discharged the lawyer and retained new counsel, who ultimately obtained a $500,000 judgment, which was distributed to the former client’s new lawyer and other judgment creditors. The lawyer sued his former client, the new lawyer, and others who received proceeds from the judgment, alleging that all defendants were on notice of his lien. The trial court dismissed the action on demurrer, ruling that the plaintiff could not plead facts showing perfection of his lien or that the third parties had knowledge of the lien.

In an opinion that was subsequently depublished, the Second District Court of Appeal affirmed. The court of appeal held that the trial court had erred in ruling that the lawyer’s lien had to be in writing. The California Supreme Court has granted review on this issue of first impression, which is, according to the court of appeal, “admittedly a close one [in which] reasonable justices, lawyers and scholars could, and do, arrive at different conclusions.”34

When a lawyer enters into a business transaction with a client, he or she must comply with Rule 3-300 of the Rules of Professional Conduct.35 In BGJ Associates, LLC v. Wilson,36 an individual retained a lawyer to file a declaratory relief action for a prescriptive easement over a parcel of property owned by a railroad. The railroad offered to settle by selling the parcel at issue as well as another parcel. The lawyer and a friend were interested in participating in this investment and, together with the client, the three formed an oral joint venture to acquire the property.

The client retained new counsel to evaluate his rights and ultimately purchased the property with different partners. His first lawyer sued the former client for breach of oral contract and other contractual and tort claims. The court concluded that the lawyer had violated Rule 3-300 and, therefore, the alleged joint venture was voidable at the election of the client.

The Second District Court of Appeal affirmed, holding that the lawyer had failed to disclose in writing all of the proposed transaction’s terms (Rule 3-300(A)) and to obtain the client’s informed written consent (Rule 3-300(C)). Furthermore, the oral joint venture was unfair to the client. The court rejected the lawyer’s contention that Rule 3-300 should not be applied once the client retains independent counsel.

Conflicts of Interest

In Visa U.S.A., Inc. v. First Data Corporation,37 the federal district court in San Francisco approved the use of both a prospective conflict waiver and an ethical screen by a law firm that concurrently represented the plaintiff in the lawsuit and the defendant in a separate matter. First Data moved to disqualify its lawyers from representing its adversary, Visa, under Rule 3-310(C) of the Rules of Professional Conduct, but the district court denied the motion because First Data had signed an advance waiver of all future conflicts of interest between the parties. Interestingly, the case involved Heller Ehrman White & McAuliffe LLP, the same law firm whose prospective waiver was approved in a seminal 1995 case, Zador Corporation v. Kwan.38

In 2001, First Data sought to retain Heller Ehrman’s Silicon Valley office to represent it in a patent infringement action. Heller Ehrman informed First Data that it had a longstanding relationship with Visa, and as a condition of the engagement, First Data agreed to permit Heller Ehrman to represent Visa in any future litigation between First Data and Visa. The firm promised it would not represent Visa if it possessed confidential information of First Data relating to the dispute and would use screening mechanisms to prevent its lawyers representing Visa from communicating with firm lawyers working with First Data about the separate engagements. In 2002, Visa retained Heller Ehrman’s San Francisco office to sue First Data for trademark infringement and breach of contract.

In support of its motion to disqualify Heller Ehrman, First Data argued that it did not knowingly consent to the waiver, but the court held that advance waivers are permitted under California law even if the waiver does not state the exact nature of the future conflict. First Data’s claimed ignorance was not credible because it was a sophisticated user of legal services and had contemplated the possibility of litigation with Visa when it engaged Heller Ehrman. The language in the firm’s advance waiver was more explicit than blanket waivers upheld in other cases, the court noted, and having received a valid prospective conflict waiver, the firm did not breach its duty of loyalty. The court also held that Heller Ehrman had rebutted the presumption that knowledge of First Data’s confidential information is imputed to all lawyers in the firm by showing that screening procedures had been timely implemented.39

The duty to avoid conflicts of interest in successive engagements was the subject of Jessen v. Hartford Casualty Insurance Company.40 Rule 3-310(E) provides that, absent informed written consent by both clients, a lawyer may not accept employment adverse to a former client if the lawyer obtained confidential information in the prior engagement that is material to the new engagement. Jessen sued his insurer, Hartford Casualty Insurance Company, for bad faith denial of coverage, and Hartford moved to disqualify Jessen’s lawyer on the ground the lawyer had represented Hartford in coverage matters at the lawyer’s previous law firm. The trial court denied the motion, ruling it was barred by collateral estoppel because Hartford had unsuccessfully tried to disqualify the same lawyer in two prior cases. The Fifth District Court of Appeal reversed, noting that the lawyer had worked on 17 coverage opinions or lawsuits for Hartford at the former firm, and remanded the case for rehearing under the substantial relationship test.41

Citing H. F. Ahmanson & Company v. Salomon Brothers, Inc.,42 the Jessen court noted that the attorney’s possession of confidential information will be presumed when a substantial relationship is shown to exist between the former and the present representatives, and when the relationship of the lawyer to the former client is such that confidential information material to the current dispute normally would have been imparted to the attorney. Unfortunately, the court’s definition of “substantial relationship” is cumbersome: “[S]uccessive representations will be ‘substantially related’ when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accom-
FRAUD AGAINST THIRD PARTIES

During 2003, courts also considered a number of cases involving alleged fraud against third parties. These cases often arise when a lawyer represents an insurance company in a insurance coverage dispute and subsequently represents another party involved in the same matter. In two such cases, the plaintiff alleged that the lawyer had misstated the facts, thereby depriving the opposing party of a full and fair settlement.

In Pour Le Bebe, Inc. v. Guess, Inc.45 the Second District Court of Appeal refused to vacate an arbitration award, even though the lawyer who represented the insurance company in the coverage dispute had made a misleading statement to the opposing party. The court held that the lawyer's statement was not sufficient to show a conflict of interest, and that the opposing party had failed to show that the statement caused it to enter into an agreement that it would not have entered into had it been fully informed.

In another case, in which the lawyer represented an insurance company in a coverage dispute and subsequently represented the plaintiff in a related tort lawsuit, the court held that the lawyer's representation of the insurer in the coverage dispute did not constitute fraud. The court noted that the lawyer had not made any false statements, and that the opposing party had no knowledge of the lawyer's representation of the insurer.

As the court observed, "It is not enough for a lawyer to have represented a party in a related matter to show that the lawyer's representation constituted an act of fraud. The lawyer's representation must have been made with the intent to deprive the opposing party of a full and fair settlement."46

The court also noted that the lawyer's representation of the insurance company in the coverage dispute did not prejudice the opposing party's ability to litigate the tort lawsuit. The court observed that the lawyer had not made any false statements, and that the opposing party had no knowledge of the lawyer's representation of the insurer.

The court concluded that the lawyer's representation of the insurance company in the coverage dispute did not constitute fraud. The court noted that the lawyer had not made any false statements, and that the opposing party had no knowledge of the lawyer's representation of the insurer. The court also noted that the lawyer's representation of the insurance company in the coverage dispute did not prejudice the opposing party's ability to litigate the tort lawsuit.

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100 because they were not officers, directors, or managing agents of the organization. Also, the subject matter of the communications did not consist of acts or omissions that could be binding on the company. Moreover, the persons contacted were not employees whose statements might constitute admissions by their employer. Finally, there was no evidence the employees had any privileged information.

Advice by Lawyers to Commit a Violation of Law

In *Hetos Investments, Ltd. v. Kurtin,* the plaintiff borrowed money from the defendant to fund a real estate project. The parties negotiated the terms of the promissory note directly, without the involvement of their counsel. At the defendant’s request, and after the parties completed their negotiation, the plaintiff’s lawyers prepared a promissory note memorializing the terms of the loan. When the project failed, the plaintiff asserted a claim against the defendant for usury, based on the promissory note prepared by the plaintiff’s counsel. The defendant moved to disqualify the plaintiff’s lawyers, arguing that if the allegations were true, the lawyers had advised the plaintiff to commit a violation of law—specifically, the law against usury—in violation of Rule 3-210 of the Rules of Professional Conduct, which provides: "A member shall not advise the violation of any law…unless the member believes in good faith that such law…is invalid." The trial court denied the disqualification motion, and the Fourth District Court of Appeal affirmed.

The court reasoned that if there was a violation of the law in this case, the defendant, not the plaintiff, was the violator by charging interest at a usurious rate. The defendant conceded that the plaintiff’s lawyers had not advised him in connection with the preparation of the note and, therefore, the court held, they did not violate Rule 3-210. The court’s reasoning assumes that Rule 3-210 is limited to advice rendered to clients, although the rule does not use the word "client."

Preemption of Ethical Standards

Last year, both state and federal district courts held that California’s Ethics Standards for Neutral Arbitrators in Contractual Arbitration were preempted. The standards that 1) require appointed arbitrators to disclose potential conflicts of interest and 2) set forth procedures for disqualification were challenged by NASD and the New York Stock Exchange—two “self-regulatory organizations” (SRO) that conduct securities arbitrations. In *Mayo v. Dean Witter Reynolds, Inc.* and *Wilmot v. McNabb,* the federal district courts held that the California standards are

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preempted by the Securities and Exchange Act of 1934 and the Federal Arbitration Act. In Jevne v. Superior Court, the Second District Court of Appeal held that the California standards are preempted by SRO arbitration rules and procedures to the extent they were approved by the SEC.58

During 2004, many of these 2003 ethics developments are likely to be reflected in the work of the State Bar’s Commission for the Revision of the Rules of Professional Conduct. The commission is continuing its multyear task of reviewing and, where necessary, rewriting California’s ethics rules.59

1 The duty was originally codified in 1872 as Code of Civil Procedure §282(5). It is currently codified as Business and Professions Code §6068(e), and this section was modified by AB 1101, which was signed by Governor Gray Davis on October 10, 2003.

2 BUS. & PROF. CODE §6068(e)(2) (effective July 1, 2004).

3 Assembly Committee on Judiciary, Synopsis of Proposed Consent (AB 1101).


5 MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2), (3).

6 MODEL RULES OF PROF’L CONDUCT R. 1.13(c)(1), (2).

7 17 C.F.R. §205.2(a).

8 17 C.F.R. §§205.3(d)(2)(i), (ii), (iii).

9 17 C.F.R. §205.6(c).


13 The duty of loyalty is codified in the phrase “[t]o maintain inviolate the confidence…of his or her client” in Business and Professions Code §6068(e).


16 Id. at 466.

17 Id. at 467.

18 The court of appeal stated that disqualification is not always the appropriate remedy. Id. at 468.

19 Id. at 468.


21 See, e.g., Lucas v. Hann, 56 Cal. 2d 583 (1961) (holding that intended beneficiaries of a will whose bequests were denied because of negligent drafting could assert a claim for malpractice against the drafting lawyer) and Heyer v. Flaig, 70 Cal. 2d 223 (1969) (holding that the daughters of the decedent, whose bequests were denied because of the lawyer’s negligence in drafting the will, could assert a claim for malpractice against the lawyer).


23 Id. at 1296.

24 Id. at 1299. The court also examined several Biakanja factors, including 1) the extent to which the transaction was intended to affect the nonclient, 2) the foreseeability of harm to the nonclient, 3) the degree of certainty that the nonclient suffered injury, 4) the closeness of the connection between the lawyer’s conduct and the injury suffered, 5) the moral blame attached to the lawyer’s conduct, and 6) the policy of preventing future
Finding Facts on the Internet on Nonlegal Topics

The practice of law involves the interplay of legal issues and facts, and for lawyers factual research can be as important as or more important than legal research. While some facts can be obtained through client interviews and discovery, other facts must be obtained through research. For a personal injury attorney, the subject could be anatomy. For a products liability attorney, the subject could be how a product was designed and manufactured. The Internet is extremely well suited to fact-finding in these areas.

For medical research, for example, the best place to begin is the Gateway site of the National Library of Medicine (NLM). The site (http://gateway.nlm.nih.gov/gw/Cmd) allows visitors to search and retrieve abstracts and citations from over 12 million medical journals, articles, books, and conference notes, going back to the mid-1950s. As the site’s name—Gateway—implies, the information is derived from multiple sources, including MedLine/PubMed, OLDMedline, ClinicalTrials.gov, and consumer health publications. For a cursory review of a medical topic, it is often enough to read abstracts for free, but for more in-depth learning, one needs to read complete articles. To obtain them, a visit to PubMed Central (at www.pubmedcentral.nih.gov) may prove fruitful, because the site lists 120 medical journals that can be accessed for free. If the desired articles are not available at PubMed, researchers can return to Gateway and place an order.

Sometimes finding the right official at a regulatory agency is what is needed. Facts about every legislative, judicial, and executive agency of the federal government—from a description of what the agency does to the names and contact information for officials and staff—can be found in the U.S. Government Manual. The official handbook of the federal government is online at http://www.gpoaccess.gov/gmanual//www.gpoaccess.gov/gmanual.html.

When a science-related matter is part of a case, a consumer publication or educational resource can be a good way for an attorney to obtain a rudimentary understanding of a scientific matter, and introductory resources can be found to help attorneys explain scientific concepts to jurors. The MadSci Library (at www.madsci.org/libs/libs.html) is one of the better resources for introductory information in biochemistry, clinical microbiology, immunology, chemistry, and physics, among other areas. The site is part of the Young Scientists program of the Washington University School of Medicine and is aimed at improving science literacy among school-aged children. No researcher should dismiss this site because it is geared toward students. In addition, one can pose a question via e-mail by clicking the Ask-A-Scientist link.

Statistics

An attorney can always make use of a statistic to prove or disprove an argument or to illustrate a point. From the Census Bureau to the FBI, the most insatiable gatherer of statistical information is probably the U.S. government. Fed Stats is a useful site for federal statistical information (www.fedstats.gov). Searching can be undertaken by topic, key word, or agency name, and searches can be limited to regions. The choice of topics range from agriculture to weekly wages. If a researcher is helping with a wrongful death case involving a worker on a fishing boat, Fed Stats can provide data for a report about the number of fishing industry workers who die at sea and the types of accidents that claim their lives. The report can impress a jury with how dangerous it is to fish for a living.

Transportation research is another source of valuable information for attorneys, from those dealing with cases involving an automobile, aircraft, or railway crash to those trying to find the opposing party’s assets (especially very large assets, such as an aircraft). The U.S. Department of Transportation’s TranStats-Intermodal Transportation Database (www.transtats.bts.gov) contains ample information on all modes of transportation—even bicycles and pipelines. To discover if an opposing party owns an aircraft, researchers can search the FAA Aircraft Registry Database (http://162.58.35.241/acdatabase) by an owner’s name. If there are no results, a search by an aircraft’s registration number (if known) can provide the name and address of the last owner in the United States, which may be helpful information if the opposition is suspected of transferring assets.

Sometimes the facts needed to make or break a case appear in the least expected place: the opposition’s Web site. In one case, an attorney was consulted by the parents of a child who had been injured on playground equipment. The attorney wondered if the equipment was designed defectively, and a quick look at the defendant’s site provided him with the specifications of the equipment. Another search on the Internet for competing playground equipment manufacturers provided the attorney with those manufacturers’ equipment specifications. It was immediately obvious to the attorney that the defendant’s design was very different from those of the others, helping him to decide that the case had merit without even spending the money and time to locate and consult with an expert.

Most attorneys do not have Erin Brockovich to dig up local records regarding environmental hazards, but any attorney can access the vast resources of environmental information on the Internet. The Environmental Protection Agency (EPA) site,
Envirofacts (www.epa.gov/enviro), provides access to several EPA databases, some of which are updated nightly. The information focuses on activities that affect air, water, and soil quality in the United States. The site’s Quick Start feature allows one to search by zip code as well as city or county and state to find information on facilities that are regulated by the EPA. For a nongovernmental survey of the environment, the Natural Resources Defense Council site (www.nrdc.org) offers brief and in-depth discussions of environmental topics and provides links to other Web sites for more information. The site also includes a glossary of environmental terms.

### International Information

With the continuing rise of economic globalization, even attorneys who do not practice international law may need to know how to gather information about foreign countries and markets. For example, an attorney may need to research which countries have the most stable governments or best infrastructure or who may be an appropriate counsel for a client who needs representation in a foreign country. One of the best resources about other countries is the CIA Factbook, and an online version is now available for free at www.cia.gov/cia/publications/factbook/index.html. Detailed information in 9 categories is presented for each of the 200 countries profiled. The categories range from the country’s geography, people, government, economy, and communications to its transportation systems.

To search for foreign attorneys by practice areas, one can use Martindale-Hubbell online (www.martindale.com). By clicking the Location/Area of Practice tab, one can create a search as specific as one for law firms in Copenhagen with a business law practice and with 100 or more members, at least one of whom speaks English. To know the appropriate time to contact a Danish law firm, go to the World Clock Web site (www.timeanddate.com/worldclock), where one can discover the current time in over 500 foreign cities. This site can also be used to convert the date and time of a local event into those of a foreign city.

Attorneys either know the law on a given legal subject or know where to find it, but they also have to know about topics outside the law. This usually involves gathering factual information about topics one knows next to nothing about. With all the factual information one can gather from the Internet, it is possible to learn enough quickly to assess the merits of a case or to find the right statistic to make a point with a jury. The Internet affords attorneys the ability to conveniently access these facts day or night, often for free.
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**Meet the Regulators**

ON THURSDAY, MARCH 11, the Business and Corporations Law Section will present a program, cosponsored by the Corporate Law Departments Section and the Barristers, that will provide those who attend with an opportunity to meet local representatives from the regulatory agencies in an informal setting. The program will include an update from each attending agency concerning current regulatory and enforcement initiatives and local activities. This event will be held at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. Parking at the Figueroa Courtyard Garage will be available for $7 with LACBA validation. On-site registration and lunch will begin at 11:30 A.M., with the program continuing from noon to 1:30 P.M. The registration code number is 8307. Preregistered CLE+PLUS members may attend for free ($15 meal not included). The prices below include the meal.

- $20—members of the Business and Corporations Law, Corporate Law Departments, and Barristers Sections
- $25—LACBA members
- $30—all others
- 1.5 CLE hours

**Seller Beware**

ON TUESDAY, MARCH 16, the Taxation Section will present a program on sales tax audits. Speakers Steven Blanc, James Belna, and Chang Noh will discuss the critical ramifications of failing to pay sales tax and present a complete procedural analysis of the tax audit and the criminal sentencing processes. Those who attend will obtain valuable insight regarding the Board of Equalization’s Investigation Division and the elements that cause a civil audit to become a criminal one, what steps are taken during the criminal investigation, what steps of due process are available to clients, and the aftermath of a criminal prosecution. This is a unique opportunity to hear views and tips from experts in the trenches on how to prevent a sales tax audit from turning criminal or, in the alternative, how to provide the best defense to individuals charged with sales or excise tax crimes. This event will be held at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. Parking at the Figueroa Courtyard Garage will be available for $7 with LACBA validation. On-site registration and lunch will begin at noon, with the program continuing from 12:30 to 2 P.M. The registration code number is 008517. Preregistered CLE+PLUS members may attend for free ($30 meal not included). The prices below include the meal.

- $65—Taxation Section members
- $85—LACBA members
- $95—all at-the-door registrants
- 1.5 CLE hours

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://forums.lacba.org/calendar.cfm. For a full listing of this month’s Association programs, please consult the March County Bar Update.
How to Calculate an Opening Offer

Identifying the right offer can make the difference in settlement negotiations

One of the most common questions about negotiation and mediation is whether there is a secret to making initial offers or demands. The issue of making an opening offer, although seemingly simple, is fraught with complexities that depend on the circumstances of the case. As such, it is impossible to make a definitive statement or apply only one formula for making an opening offer. Instead, the opening offer depends on a balanced judgment of numerous factors.

First, an attorney must consider what type of relationship is involved in the case. The evaluation of this relationship is critical because making the wrong initial move could hamper or inhibit further discussions. It is important for an attorney to ask the client whether the dispute involves a one-time transaction (as in personal injury litigation) or a relationship that must continue in the future, such as a business or family relationship. The opening offer can vary based upon the value of the relationship. For example, if the parties in an employment case want to continue their relationship, both sides may be inclined toward a moderate or cooperative initial stance to try to preserve the relationship. Studies have shown that when parties are more familiar with each other, they are more inclined to start with moderate demands or offers and make greater concessions. On the other hand, if the case involves, for example, an employment relationship that has definitely ended, the parties may be inclined to make a more aggressive or competitive opening move.

After determining the value of the continuing relationship, if any, it is important to develop sufficient information about your position, the other side’s position, and the motivations of the parties. A British study evaluated how much time effective negotiators spent evaluating the common interests and concerns of the other side. The study revealed that effective negotiators spend four times more time than average negotiators evaluating the motivations and interests of the other side. They do so in order to ascertain shared concerns and interests. The study also showed that better negotiators spent twice as much time as the average obtaining information, testing for understan-ding of the positions, and clarifying issues. With this in mind, before making an opening offer, prepare yourself with enough information to arrive at the optimum amount.

After you have determined the value of the relationship and obtained sufficient information to make an informed judgment of the potential value of the case, it is important to shoot for the stars. Regardless of other factors, it is always good strategy to have strong expectations of success. By asking for the impossible, you may obtain the best possible deal. This principle is confirmed in several studies that demonstrate that, in negotiating and in less formal social encounters, the higher a person’s expectations are, the better are the results that person will obtain. One study of this phenomenon involved two sets of negotiators, with the one difference between their initial conditions being what was considered a satisfactory result. The negotiators that were given the higher expectation consistently outperformed the others.

How Optimism Works

This does not mean that you can make an outrageously high or low offer. The optimistic offer must at least be supportable by some presentable evidence or argument. It is not necessary to be able to support your initial position with your best argument, but it is necessary to support your offer with some argument or evidence. The difference between an outrageous and an optimistic offer is that the former cannot be supported and the latter is supported by an optimistic evaluation of the facts. For example, in an employment case for sexual harassment, the defendant may open with an offer in the range of four or five figures. This position may be supported by the fact that many employment cases are settled or won outright by the defense for similar sums.

The principle of optimism in offers or demands is also supported by additional sociological and psychological research. For example, researchers have shown that all people are affected by the concept of anchoring. When given a set of numbers, people will adjust their expectations based upon the first numbers they hear. One study demonstrated that when people were presented with a string of numbers and asked to guess their sum, people estimated that the sum was higher when the group of numbers was presented in highest-to-lowest order rather than lowest-to-highest. When the demand and the offer in a case are realistic, they may anchor the expectations of both sides to a more moderate number.

Knowing when to compete and when to cooperate is very important in determining the outcome of negotiations, and opening offers and demands are an extremely important part of this balance of forces. Moreover, getting as much information as possible and setting optimistic goals can mark the difference between a successful negotiation and a highly successful negotiation. Thus, the secret to making an opening offer is to make a good judgment of the circumstances and act accordingly.

Steven G. Mehta is an attorney and mediator of complex disputes with offices in Valencia and Century City.
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