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n this election year, one of the major issues is the selection of judges. Although the federal judicial appointment process garners most of the press coverage, the system of choosing state court judges merits equal attention. Unlike federal judges, state court judges are elected.

As lawyers, we receive information regarding upcoming judicial elections from various sources, including evaluations provided by the Los Angeles County Bar Association. Many lawyers, however, have a superficial knowledge of the election process for county judges. Admittedly, I am not an expert in this area. In conducting research for this column, I spoke to judges and political consultants who have lived through many judicial elections, and the insight they provided is interesting.

There are approximately 1,500 active judges in California and close to 500 in Los Angeles County. Upon election, a judge serves a six-year term and must stand for reelection for each subsequent six-year term. However, more than half of the judges initially were appointed by the governor. Judicial seats become available as judges are appointed to another court, retire, or leave the bench for other reasons during a term.

When a judge is appointed by the governor, the judge must run for election during the next California general election (which occurs every two years). As a result of the six-year judicial terms and recurring gubernatorial appointments, in Los Angeles County about 170 judges, on average, are candidates in each general election.

Most judges, however, are not forced to face the election process. Prior to the general election, each judge who is subject to reelection is randomly assigned a seat number. Once the numbers are released to the public, challengers have a designated time period within which they can file applications to become judicial candidates for the seat of their choice. If one or no files to become a candidate in a particular seat, the judge to whom that seat number is assigned is deemed elected, and the judge’s name will not appear on the ballot. For this reason, many judges view the assignment of seat numbers as a form of lottery.

Many challengers have little hope of winning a judicial election, and statistics show that significantly more challenges are filed for seats bearing the lowest numbers. Even if a judge does not face a strong contender, the mere filing of a challenge forces the judge to participate in the election. Judges may be right in their lottery theory. A judicial election political consultant told me that in one judicial election the challenger chose to run against the consultant’s client because the assigned seat number was the challenger’s lucky number. Apparently, it wasn’t lucky enough to win the election.

The election process can be very expensive and exhausting. It also can become politicized, which seems incongruent with what is supposed to be a nonpartisan position. The general consensus is that a challenger has little chance to defeat an incumbent judge in an election unless the challenger’s campaign budget is at least $250,000. For open seats—the seats that the presiding governor did not fill prior to the election—campaign costs for any serious candidate will be in the $100,000 range. Moreover, the filing fee, which must be paid by the judge and any challenger, is 1 percent of the salary for the seat—and that is not small change. For Los Angeles County Superior Court judge seats, the fee is approximately $1,370.

Although judges are appointed to a particular courthouse, judicial elections are conducted countywide. Thus, voters from one community have the power to determine the judges who will sit in another community—although the presiding judge has the authority to reassign judges to different courthouses.

No matter the side of the bench, justice is neither free nor flawless.

Gary S. Raskin is a principal of Garfield Tepper & Raskin, where his primary area of practice is entertainment litigation. He is the chair of the 2004-05 Los Angeles Lawyer Editorial Board.
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Preparing for Court-Ordered Mediation

**COURT-ORDERED MEDIATION** is occurring with increasing frequency throughout Los Angeles County in all civil and probate matters. As a result, mediation is often a new lawyer’s first hands-on experience in the litigation process. The following tips can make you a more effective advocate at a court-ordered mediation.

First, counsel your clients about the opportunity of mediation. Few clients understand the differences among mediation, arbitration, and settlement conferences. Be sure clients know what will happen during the mediation. Prepare them to think creatively and to discuss new perspectives rather than just rehash old issues. In short, prepare them to resolve the case. The most challenging clients are those who know it all, have attended dozens of mediations, and have strong opinions. Each mediation, like the facts of every case, is different, and the dynamics between the mediator and the participants present opportunities for outstanding results. Later, when the mediator is meeting with the other participants, help your clients refrain from indulging in flights of paranoia. You simply do not know what is being discussed, so there is no point in worrying about it. Instead, use the time to work with your clients on creative solutions.

Second, prepare a mediation brief, not a trial brief. Understanding the difference can cause a difficult case to resolve. An ideal mediation brief contains:

- A simple statement of the facts. Get to the point in a sentence or two. Use descriptive words (for example, landlord-tenant, seller-buyer, builder-owner) instead of personal names.
- A list of discussion points. The mediator is looking for points to discuss with the participants. You may have several factual and legal controversies in the case. Summarize them in your brief and have the details available to discuss at the mediation.
- Suggested solutions. Focus on solutions that may not be available from a trial court.
- A notice to the mediator if your brief is confidential.

Third, develop alternative solutions. Creativity is king. A good mediator will instinctively find creative solutions. Since you, as the lawyer, have been dealing with the controversy, you are best able to prime the pump. You can read the case law and predict what the court will or will not do, but in a mediation all the boundaries for resolution are swept aside. The slate is clean and open to fresh solutions.

Consider the tactics for presenting your solutions. Mediation involves a process, and time may need to be spent in the process before the matter is ripe for resolution. Solutions can be:

- Suggested in your mediation brief.
- Presented “spontaneously.”
- Presented at the 11th hour, or when at an impasse.

Enter the mediation determined not to let the last, best, and final offer pass if it is a good result for your client.

Fifth, evaluate whether the mediation is premature. If critical facts or participants are missing, the answer is yes. However, not all facts or participants are critical. At the mediation it is possible to proceed without all the details that you need for trial. If you do not have some of the material facts, determine how to work around them. Most mediators will quickly gain a sense of whether the mediation is premature. If so, they should stop the mediation, assign homework, and set a new date to reconvene. These assignments sometimes lead to a resolution of the controversy.

Sixth, use the mediation to help your client’s case. Not all cases resolve at mediation. According to Julie Bronson, the ADR administrator for the Los Angeles Superior Court, 60 percent of the matters sent to mediation in 2003 resolved with either a full or partial agreement of the participants. Be prepared to reevaluate your perception of your client’s case. A good neutral will give you the benefit of an unbiased opinion about the strengths and weaknesses of your case and can help you assess the opposition’s case. Make sure you understand what the neutral has told you rather than let your own arguments blind you.

Before the mediation begins, you should assure yourself and your client about the mediator’s qualifications. Check the mediator’s credentials by visiting www.lasuperiorcourt.org/adr/. Mediators are requested to keep the information on this page up-to-date. For each mediator, the site lists a short resume and a table of the types of matters the mediator has handled.

Utilizing these tips will yield better mediation results. When asked what she would suggest to new lawyers to prepare for mediation, Bronson said, “Educate your client to the process, know your case, show up, and be prepared to discuss settlement in good faith.”

Edward M. Phelps is a mediator with offices in Pasadena.
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Using a Letter of Credit as a Substitute for an Undertaking

WITH AN APPROPRIATE AGREEMENT IN PLACE, parties to civil proceedings may be able to substitute a letter of credit, on mutually advantageous terms, for a statutory undertaking. For example, in one case, the parties to an attachment proceeding entered into an agreement that surmounted the hurdles that are posed in substituting a letter of credit for an undertaking. In that case, one party realized substantial cost savings. Additionally, the successfully negotiated agreement may be used as a model in other civil proceedings.

Various provisions of the Code of Civil Procedure require or permit a party to civil litigation to file an undertaking with the court in connection with obtaining or avoiding the enforcement of judicial remedies. For example, a plaintiff generally must file an undertaking in order to obtain a prejudgment writ of attachment, a prejudgment writ of possession, or a preliminary injunction.1 A defendant may file an undertaking in order to avoid levy under a prejudgment writ of attachment or under a prejudgment writ of possession or to obtain the release of property levied upon pursuant to a prejudgment writ of attachment or prejudgment writ of possession.2 A judgment debtor may file an undertaking to stay the enforcement of a monetary judgment pending appeal.3

Under the Bond and Undertaking Law,4 whenever a statute provides for an undertaking, generally the party that must file the undertaking may file a surety bond instead.5 Typically, a party to civil litigation that is required or permitted to file an undertaking will file a surety bond given by an admitted surety insurer (a bonding company). Under the surety bond, the bonding company obligates itself to meet the statutory obligations for which the undertaking is required.6 If the bond is filed in an action or proceeding, the bond is enforceable by motion in the court without the necessity of an independent action.7

In order to obtain a bond issued by a bonding company, a party generally must pay the bonding company an annual premium of at least 1 percent of the face amount of the bond, along with a minimum fee.8 If the bond is extremely large or risky, the bonding company may require a cash deposit in the full amount of the bond or other collateral to secure the party’s obligation to reimburse the bonding company in the event the bonding company makes payment under the bond.9 In some cases, the bonding company will require the party requesting issuance of the bond to provide the bonding company with a letter of credit to support the party’s reimbursement obligation.

In order to obtain a letter of credit, a party generally must pay the issuer a fee for the issuance of the letter of credit and must pay the issuer additional fees, based on the face amount of the letter of credit, on a quarterly or annual basis. Faced with having to pay premiums to a bonding company for issuing a surety bond and fees to a bank for issuing a letter of credit in favor of the bonding company, a party required or permitted to file an undertaking in a civil proceeding might propose to cut out the middleman and simply use a letter of credit as a substitute for the undertaking. In a civil action filed by Western Digital Corporation against Cirrus Logic, Inc., in Orange County Superior Court, that is exactly what occurred.

Western Digital Corporation commenced a civil action against Cirrus Logic, Inc., for breach of contract, and Cirrus Logic filed a counterclaim against Western Digital, also for breach of contract. Cirrus Logic obtained a right to attach order and an order for the issuance of a writ of attachment against Western Digital. The amount to be secured by the attachment exceeded $25 million. Western Digital could have prevented a levy under the writ by posting a surety bond or other undertaking in the same amount.10 Western Digital, however, proposed to substitute a letter of credit for the undertaking. Assuming that Western Digital otherwise would have filed a surety bond, that Western Digital would have had to obtain a letter of credit in order to obtain the surety bond, and that Western Digital would have had to pay the bonding company annual premiums of not less than 1 percent of the face amount of the bond, using a letter of credit as a substitute for the undertaking instead of as credit support for the surety bond could save Western Digital in excess of $250,000 per year.

The Code of Civil Procedure does not permit the use of a letter of credit as a substitute for an undertaking, so Cirrus Logic simply could have rejected Western Digital’s proposal. But the substitution of a letter of credit for an undertaking also promised benefits to Cirrus Logic. All Cirrus Logic would have to do to obtain payment under the letter of credit would be to timely present the issuer with the documents required to effect a drawing. Cirrus Logic would not have to go back to court as it would to enforce a surety bond or other undertaking. Cirrus Logic therefore found the proposal worth pursuing.

The parties, however, faced several difficulties in designing an appropriate letter of credit arrangement—difficulties that would be faced by any set of parties attempting to substitute a letter of credit for a statutory undertaking.

First, a letter of credit is an obligation of the issuer independent of the rights and obligations between the party requesting the issuance of the letter of credit (the account party or customer) and the party that is the beneficiary of the letter of credit (the beneficiary).11 The issuer’s obligation to pay under a letter of credit arises upon the beneficiary’s presentation of documents that conform to the requirements of the letter of credit.12 An issuer examines the documents submitted in connection with a drawing but does not determine the legal rights of the beneficiary or the enforceability or legal effect of any documents submitted. Accordingly, the parties in Western Digital v. Cirrus Logic had to avoid conditioning Cirrus Logic’s right to payment under the letter of credit upon the presentation of “a judgment in favor of Cirrus Logic that has not been stayed pending appeal,” or any similar document.

Second, the decision whether, when, and for what amount to draw under a letter of credit rests solely with the beneficiary. If the letter of credit designated Cirrus Logic as the beneficiary, then Western

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Digital would bear the risk that Cirrus Logic might draw under the letter of credit in advance of Cirrus Logic's obtaining judgment against Western Digital in the underlying civil action or might draw for an amount in excess of Western Digital's liability on the judgment. On the other hand, if the letter of credit named some third party, such as an escrow agent, as the beneficiary, then Cirrus Logic would bear the risk that the third party might fail or refuse to timely draw under the letter of credit when Cirrus Logic was entitled to recover.

Third, letters of credit have expiration dates. If the letter of credit expired before Cirrus Logic became entitled to draw under the letter of credit, then Cirrus Logic would lose the benefit of the letter of credit. But if Cirrus Logic could become entitled to draw under the letter of credit as a result of the forthcoming expiration of the letter of credit, then Cirrus Logic could draw under the letter of credit in advance of establishing its right to recover from Western Digital in the underlying civil action.

Fourth, because the letter of credit transactions would be independent of the claims and defenses asserted in the underlying civil action, the court exercising jurisdiction over the action might refuse to exercise jurisdiction over any dispute about the letter of credit unless the parties commenced a new action or proceeding. The commencement of any new litigation would impose additional expenses on the parties.

Notwithstanding the foregoing obstacles, the parties were able to use a letter of credit as an effective substitute for an undertaking by entering into an agreement governing the rights and duties of the parties with respect to the letter of credit.

The Agreement

Pursuant to the agreement, Western Digital agreed to procure the issuance of a letter of credit in favor of Cirrus Logic, in the amount of the required undertaking and in an agreed-upon form. The letter of credit would have an initial expiration date of one year from the date of issuance, but the letter of credit would contain an evergreen clause, which would provide that the expiration date of the letter of credit would be automatically extended for additional periods of one year unless the issuer gave written notice to Cirrus Logic and Western Digital not less than 60 days before expiration that the issuer elected not to renew the letter of credit. In order to obtain payment under the letter of credit, Cirrus Logic would have to present a draft accompanied by Cirrus Logic's statement executed by an authorized officer of Cirrus Logic certifying under penalty of perjury that Cirrus Logic was entitled to make a drawing under the letter of credit in accordance with the terms of the agreement. Payment under the letter of credit was to be made by the issuance of a cashier's check payable to the Orange County Sheriff and delivered to the sheriff by registered mail, return receipt requested, or by overnight courier.

The agreement required Cirrus Logic to obtain a writ of attachment and to deliver the writ to the sheriff with instructions to hold any proceeds of the letter of credit as funds received under the writ. The parties agreed that proceeds held by the sheriff would be subject to an attachment lien as if the sheriff had levied upon such funds pursuant to the writ.

In addition, the agreement provided that Cirrus Logic could draw under the letter of credit only in two circumstances. First, Cirrus Logic could draw if the court entered judgment in favor of Cirrus Logic against Western Digital in the underlying civil action, if 10 days had elapsed from the entry of judgment, if enforcement of the judgment was not stayed, and if the amount owing under the judgment was equal to or greater than the amount of the drawing. Second, Cirrus Logic could draw if the issuer had provided notice to Cirrus Logic that the letter of credit would not be renewed.

Cirrus Logic agreed that it would surrender the letter of credit to Western Digital on the expiration of the time provided under Code of Civil Procedure Section 488.510 for an attachment under the writ of attachment or in the event the writ was discharged pursuant to court order. Cirrus Logic further agreed that, at the request of Western Digital, it would consent to the surrender or reduction of the letter of credit to the extent that, at the time of the request, the amount of the letter of credit exceeded the amount for which Cirrus Logic was entitled to an attachment against Western Digital or exceeded the amount of a judgment in favor of Cirrus Logic.

So long as the letter of credit remained in full force and effect, and as long as the amount of the letter of credit equaled or exceeded the amount for which Cirrus Logic was entitled to an attachment, Cirrus Logic agreed that it would not seek to attach any property of Western Digital except by drawing under the letter of credit. Cirrus Logic agreed that, for all applicable purposes, including Code of Civil Procedure Section 490.010, the issuance of the letter of credit would be deemed the equivalent of the sheriff's having levied upon assets of Western Digital pursuant to the writ of attachment.

The parties agreed that any dispute regarding the parties' rights or obligations under the agreement or the disposition of the proceeds of the letter of credit would be determined by...
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Mr. Gleitman has practiced sophisticated estate planning for 25 years, specializing for more than 13 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.

The court in the pending civil action.

The parties’ agreement solved or mitigated the four problems listed above. First, by omitting any requirement of the presentation of a judgment as a condition to a drawing under the letter of credit, the parties avoided imposing on the issuer any duty to interpret the effect or enforceability of the judgment. Moreover, the parties gained settlement flexibility. If the parties later chose to settle the matter and to include a drawing under the letter of credit as a means of effecting payment under the settlement agreement, they could amend the agreement to permit Cirrus Logic to draw under the letter of credit for that purpose and would not be hamstring by a requirement in the letter of credit that Cirrus Logic present a judgment.

Second, the parties mitigated the risk to Western Digital of a premature or improper drawing by Cirrus Logic by requiring that the proceeds of the letter of credit be paid to the sheriff, to be held pursuant to the writ of attachment. In the event of an allegedly improper drawing, Western Digital could petition the court for appropriate relief. During the pendency of the dispute, the sheriff, a neutral third party, would hold the proceeds. For its part, Cirrus Logic retained control over the power to draw.

Third, the parties addressed the expiration date issue by providing for an evergreen letter of credit. If the issuer of the letter of credit gave notice of nonrenewal, then Cirrus Logic could draw under the letter of credit, but the sheriff would hold the proceeds pending the outcome of the civil action.

Fourth, the parties mitigated the risk of additional litigation expenses by agreeing that the court in which the underlying civil action was pending would determine any dispute regarding the agreement or the disposition of the proceeds of any drawing under the letter of credit. If a dispute arose from Cirrus Logic’s refusal to surrender the letter of credit, possibly the court would refuse to exercise jurisdiction over the controversy without the filing of a new civil action or at least a supplemental complaint. The risk of Western Digital’s requiring judicial relief solely by reason of Cirrus Logic’s wrongful refusal to surrender the letter of credit was lessened by the fact that Western Digital could instruct the issuer to give notice of nonrenewal and thereby cause the expiration of the letter of credit to occur. If a dispute arose out of an alleged wrongful drawing by Cirrus Logic under the letter of credit, then the dispute would effectively be a dispute over the proper disposition of funds held by the sheriff pursuant to a writ issued in the pending civil action, a controversy over which the court would not seem to need any additional basis for jurisdiction.

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More than a year after the dispute began, Western Digital and Cirrus Logic settled. Cirrus Logic surrendered the letter of credit prior to making any drawings. By effectively substituting the letter of credit for an undertaking, Western Digital saved hundreds of thousands of dollars.

In summary, the parties were able to effectively substitute a letter of credit for an undertaking in an attachment proceeding, to their mutual advantage, by entering into an agreement governing the rights and duties of the parties with respect to the letter of credit. The key elements of the agreement were provision for 1) the issuance of an evergreen letter of credit in favor of the party entitled to the benefit of the undertaking, 2) the proceeds of the letter of credit to be payable directly to a neutral third party under the control of the court, 3) the terms and conditions under which the beneficiary could draw upon, or would become obligated to surrender or reduce, the letter of credit, and 4) the resolution in the pending civil action of any disputes arising from the agreement or the disposition of the proceeds of the letter of credit.

Parties to civil actions may be able to use a similar agreement to permit the substitution of a letter of credit for a statutory undertaking. Where there is no writ or similar process that would require funds to be seized or held by a sheriff or marshal in the absence of the filing of the undertaking, the parties might designate the clerk of the court as the neutral third party under the control of the court to whom payments under the letter of credit would be made and by whom they would be held pending resolution of the relevant issues in the civil action.

9. See id.
14. See Code Civ. Proc. §488.510. An attachment ceases to be of any force or effect, and the property levied upon must be released from the attachment, at the expiration of three years from the date of issuance of the writ of attachment under which the levy was made, unless the expiration date of the writ has been extended on motion of the plaintiff.
15. Code Civ. Proc. §490.010 (providing that the levy of a writ of attachment in an action in which attachment is not authorized generally constitutes a wrongful attachment). In *Western Digital v. Cirrus Logic*, Western Digital intended to appeal from the right-to-attach order on the ground that the attachment was not authorized in the action.

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CALIFORNIA'S DEPARTMENT OF HEALTH SERVICES devotes significant effort to preventing and punishing fraud and abuse in the Medi-Cal system. The California Attorney General's Office estimates that the annual cost of Medi-Cal fraud and abuse may reach billions of dollars, and the DHS reports the development of criminal charges against more than 500 individuals, leading to 323 convictions between July 2000 and February 2002. Health care providers suspected of fraud or abuse of Medi-Cal—such as billing for procedures that are unnecessary or not performed—are subject to temporary action by the DHS. The department may suspend their Medi-Cal privileges and deactivate their provider numbers (a physician may have multiple provider numbers) or withhold payments for services rendered.

The suspension of a provider number practically bars a doctor from treating patients eligible for Medi-Cal. The withholding of reimbursements affects the cash flow—and in many cases the viability—of a medical practice. Medi-Cal is often the source of a substantial portion of the revenue for a medical practice, especially in the case of providers who serve poor communities. The due process rights of affected medical practices are limited, and the scope of administrative review is narrow. Additionally, the DHS does not always resolve cases of suspected fraud or abuse with alacrity. To the dismay of many doctors, “temporary” actions taken by the DHS can last for years. These doctors may seek legal counsel.

The readily apparent way that counsel may challenge a DHS deactivation or suspension is through a petition for mandamus. Published case law in the area is lacking, although some unpublished opinions are available through online research services. The dearth of published opinions and the regular appearance of the California Attorney General’s Office as counsel for DHS allows, essentially, for the DHS to amass much more institutional knowledge of unwritten decisional law than an individual practitioner.

The complicated backdrop of Medi-Cal funding offers some insight as to how physicians can find themselves in need of counsel who can help resolve temporary deactivations and suspensions. The federal Medicaid program allows for states to establish and administer state Medicaid programs. In California, that program is called Medi-Cal. Although Medi-Cal and other state Medicaid programs are subject to state statutes and regulations, federal regulations are paramount. These regulations provide for temporary withholding of payment under a state Medicaid program and for notice to the providers. The purpose of this rule is to allow state agencies to protect the investigation pending its outcome. Temporary withholding can commence when reliable evidence of fraud or willful misrepresentation is uncovered and should end when it is determined that the evidence is insufficient, but there are no clear limits on how long a temporary withholding or suspension should last.

Welfare and Institutions Code Section 14107.11 tracks the requirements of the federal regulation that provides for temporary withholding. The decision to withhold is made by the DHS, although the job of prosecution is left to the California Department of Justice’s Bureau of Medi-Cal Fraud and Elder Abuse. Investigations may be initiated by the DHS, by the bureau, or by some other state or federal body. On receipt of reliable evidence of fraud or willful misrepresentation by a provider, the DHS may withhold payment “for any goods, services, supplies, or merchandise, or any portion thereof.” The statute neither requires that there be any dispute or question concerning withheld payments nor limits the amount withheld. When a provider is providing Medi-Cal services at numerous locations under numerous provider numbers, the DHS may withhold payments due under all provider numbers, even if allegations of fraud or willful misrepresentation concern only one provider number. There are no established standards by which to determine whether all payments, or just some, will be withheld.

Federal regulations and state law require notice to the provider within five days of any withholding. The notice must state that payments are being withheld temporarily in accordance with Section 14107.11(a) and withholding will not continue after it is determined that the evidence is insufficient or when related legal proceedings are complete. In addition, the notice must specify the types of claims for which payment is being withheld and inform the provider of the right to submit written evidence for consideration by the DHS.

Temporary suspension is authorized under Welfare and Institutions Code Section 14043.36(a), which provides in part:

If it is discovered that a provider is under investigation by the

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Further, the DHS takes the position that what misrepresentation cannot be challenged. A ruling on the appeal is required within 90 days of its submission.17 Regarding what happens after an appeal is filed, the statute provides: “The decision of the director or the director’s designee shall be final. Any further appeal shall be required to be filed in accordance with Section 1085 of the Code of Civil Procedure.”18

**Due Process Challenges**

Providers subject to temporary withholding and suspension have raised constitutional challenges to the process. Earlier cases involved challenges to the delegation of authority by the DHS to the California State Controller’s Office, based on federal rules that limit authority to a single state agency. This issue has been resolved and is not of current concern. Providers have alleged that temporary withholding deprived them of a property interest (in payments already approved) without due process of law, and that temporary suspension deprived them of a property or liberty interest in Medi-Cal privileges without due process. Courts have held that while withholding does implicate a property interest,20 suspension does not implicate a liberty or property interest.21 Further, if the DHS has followed the procedures set forth in federal regulations and state statutes, the provision of notice of withholding and postdeprivation hearing have been held to satisfy due process requirements.22

The leading case in this area is *Bergeron v. Department of Health Services.*23 In Bergeron, investigation of the plaintiff provider Bergeron led to a November 1996 request to the DHS seeking temporary withholding. Finding reliable evidence of fraud or misrepresentation, the DHS temporarily withheld all payments due in February 1997. The amount was $89,000. On May 30, 1997, the DHS lifted the withhold on $39,000 and retained $50,000. Criminal proceedings for Medi-Cal fraud were commenced in June. Bergeron unsuccessfully sought a writ of mandate, and the court of appeal affirmed, holding: 1) providers have a property interest in withheld payments for services rendered that may not be taken absent due process, 2) providers do not have a protectable property interest in continued participation in the Medi-Cal program, and 3) due process does not require a hearing but is satisfied by the notice requirements of 42 CFR Section 455.23.24 The opinion does not discuss the appeal procedure set forth in Welfare and Institutions Code Section 14043.65 and does not indicate that Bergeron used the appeal process.

The *Bergeron* court relied on the underlying purpose of granting the DHS’s power to withhold and suspend payments. The court noted: “The regulatory scheme is obviously designed to parallel a criminal investigation by the agency or a state fraud prosecuting unit. It is temporary in nature in order to hold the status quo and protect the government’s monetary interests until the criminal investigation ends in either abandonment or a judicial proceeding....The clear intent of the regulatory scheme is that the adjudication of the allegations is to occur at a criminal proceeding, unless the matter is voluntarily dropped by the prosecuting authority for lack of evidence.”25

*Bergeron* was followed in 2002 by an unpublished opinion, *Goubran v. Director of the State Department of Health Services.*26 In *Goubran,* the appellant’s main due process challenge appeared to be a claim that the DHS notice to him did not provide enough specific information about the charges made. The appellant had made use of the appeal procedure of Welfare and Institutions Code Section 14043.65. The court relied on *Bergeron* regarding the adequacy of the notice and of the requirements of Welfare and Institutions Code Section 14107.11 and 42 CFR Section 455.23. The *Goubran* court did not address the issue of whether there was a property or liberty interest sufficient to require due process.

A year later, the same division of the Second District issued another unpublished opinion in *Marshall v. California Department of Health Services.*27 In this case, the provider had used the statutory appeal procedure without avail. However, he had succeeded in his challenge to the ongoing withholding at the trial level. The trial court ordered release of the withheld funds on constitutional grounds. It reasoned that permanent withholding without notice and hearing would be unconstitutional, and since the withholding in question was not temporary, it was unconstitutional.28

On appeal, the court expressly held that temporary suspension did not infringe on a liberty interest that required due process. The appellate court followed *Bergeron* by holding that temporary withholding did implicate a property interest, but that the notice of withholding was not due process. Thus it reversed the order directing return of withheld funds. The *Marshall* court did not address the issue of whether the actions at issue were truly temporary but stated that the provider had possessed the option of petitioning for a writ claiming that the investigation into his conduct had been abandoned.29
on a provider that lasts for years. Providers have challenged enduring temporary actions by claiming that they were no longer temporary. Only one published opinion—Azer v. Connell—considers the issue of how long is too long for a temporary suspension or withholding under California law. Unfortunately, the case does so by reference to an unpublished opinion. Azer involves federal claims under 42 USC Section 1983 that were brought by the same plaintiffs who were involved in Doctor’s Medical Laboratory, Inc. v. Connell (Doctor’s I). In discussing the state court litigation, the Ninth Circuit mentioned a second writ proceeding and appeal considered by the court of appeal: Doctor’s Medical Laboratory, Inc. v. Connell (Doctor’s II). Referring to an unpublished order in Doctor’s II, the Ninth Circuit states: “The Court of Appeal concluded that because the payments had been withheld for more than two and a half years, the withholding could not be termed ‘temporary’ pursuant to the relevant regulation.”

This language may superficially establish a two-and-a-half-year limit on temporary withholding, but its foundation in the underlying opinion is uncertain. The unpublished opinion in Doctor’s II states in part:

In the present case, DHS appears prepared to withhold Doctor’s payments if not indefinitely then at least longer than reasonably can be labeled “temporary.” At the present time these payments have been withheld for approximately two and a half years. The statute of limitations on filing a fraudulent Medi-Cal claim is three years from discovery of the offense. If we assume DHS first received reliable evidence of the alleged fraud in May 1999, the same time it notified the Controller’s office of this evidence, then under its current policy DHS could continue to withhold Doctor’s payments until May 2002—a total withholding period of approximately four and a half years. We seriously doubt this is what federal regulators had in mind when they wrote of a “temporary” withholding. It is not clear whether the court means that two and a half years was too long to be temporary, or that four and a half years was, or that the willingness to withhold the money indefinitely was. Although the court’s use of the phrase “under its current policy” hints that the DHS took the position that the key date was the expiration of the statute of limitations, the appellate record does not support that conclusion.

How Long Is Temporary?

Unpublished opinions may also be reviewed for indications of the reasonable limits on a
temporary withholding. Marshall offers little in this regard: The trial court analyzed the duration of withholding in a due process framework, and the court of appeal did not address the issue of how long temporary actions could legally persist. In Goubran, the petitioner physician argued that the department's temporary actions had become permanent. (The temporary actions commenced in March 2000, and Goubran filed his writ petition in September 2001.) In that case the court of appeal noted that there was an ongoing investigation by the DHS and an ongoing criminal investigation by the Bureau of Medical Fraud, stating: “We conclude that because the investigations are ongoing, the withholds have not violated the federal regulations or state statutes.”

Despite the paucity of authority in California law, other sources provide some context for examining how long temporary actions may properly persist. After publishing a notice of proposed rule making in the Federal Register, the U.S. Department of Health and Human Services (DHHS) collected comments and set forth responses when it promulgated its final regulations. The DHHS expounded on its intent in making the regulation and its expectation of how states would apply it, including the purpose of the regulation:

The DHHS also discussed the length of temporary actions:

Several commenters raised the issue of the need to set specific time frames for conducting investigations, taking withholding actions and notifying providers. The proposed regulations stated that any withholding action is “temporary....”

In response to these concerns, we will be advising all State Medicaid and investigative agencies of our expectation that they act expeditiously both in addressing any case in which a withholding action has been undertaken and in notifying the provider when the investigation has been terminated. Under normal circumstances, it is
anticipated that a withholding action will not exceed one year and will be periodically reviewed so as to determine whether the circumstances that gave rise to the withholding action still exist. We do not believe, however, that we can mandate a specific time limit in which a criminal investigation can be conducted, as suggested, without disadvantaging such investigation.39

Thus, while the DHHS apparently expected that temporary withholding actions would take less than a year “under normal circumstances,” it was not willing to include that limit as a rule in its regulation.

In Doctor’s II, the court of appeal cited two out-of-state cases: Pressley Ridge Schools, Inc. v. Stottlemeyer40 and Medicon Diagnostic Laboratory v. Perales.41 In Pressley, a West Virginia court held that the withholding of Medicaid payments may not be indefinite, while Medicon upheld a New York statute that puts a 90-day limit on temporary withholdings unless the state agency takes further action, which triggers a right to a hearing.42 Additionally, in Midwest Family Care Clinic, Inc. v. Shalala,43 a Michigan court upheld cognate regulations under Medicare that allow temporary withholding for up to 180 days, noting that the regulations did not allow for indefinite withholding.44

To date, challenges regarding the duration of temporary actions have focused on withholding. No court has yet faced the question of how long is too long regarding the temporary suspension of Medi-Cal privileges. For the providers involved, however, the suspension of their ability to provide Medi-Cal covered services can have greater economic and reputational consequences than the withholding of payments.

There is little reason to apply one set of rules to temporary withholdings and another to suspensions. The statutes involved are in pari materia; temporary suspensions and withholdings commonly start at the same time, and the evidence needed to start a withholding is greater than that needed to start a suspension. The DHS reads the suspension statute45 to mean that the agency may continue a temporary suspension so long as there is an ongoing investigation. A better reading of the statute, however, seems to be that by providing that temporary suspension shall commence “if it is discovered” that there is an investigation, the legislature was expressing conditions sufficient to trigger temporary withholding, rather than conditions sufficient to justify an ongoing suspension in perpetuity.

Since no groundswell of public support for people accused of Medi-Cal fraud is likely to prompt legislative action, courts will probably have to impose some limits on temporary withholding and suspension in ordinary and exceptional cases. The DHS has not adopted any self-imposed limits and apparently takes the position that so long as the DHS has an ongoing investigation, withholding and suspension may continue. The applicable state statute of limitations ought to be adopted as the outside limit on temporary withholding and suspension.46 At the federal and state level the purpose of withholding has been seen as a way to protect the status quo pending resolution of a state’s criminal investigation. Consequently, once prosecution becomes time-barred, any ongoing criminal investigation becomes moribund, and there is no further legitimate interest in protecting it. The withholding regulations and statutes require termination upon the completion of legal proceedings or the abandonment of criminal investigation. Expiration of the statute of limitations is an equivalent event. In California the applicable statute of limitations is three years from discovery of the offense.47 This is longer than the two-and-a-half-year rule that the Azer court arguably drew from Doctor’s II, but there is no logical reason to set the general limit at two and a half years.

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Beyond an outside limit based on the statute of limitations, it makes sense to apply the one-year period envisioned by the Department of Health and Human Services in its rule making as creating a rebuttable presumption that a temporary action has persisted for too long. Such a presumption might be rebutted by a showing by the DHS that the case is unusually complicated, there is an ongoing dispute over whether withheld funds were properly billed, criminal charges have been filed, or an active criminal investigation is underway.

1 See http://caag.state.ca.us/bmfea/medical.htm (visited June 6, 2004).
3 According to the DHS Web site, over 600 providers were placed on temporary suspension and over 580 were subject to temporary withholding of over $60 million between July 2000 and February 2002. See http://stopmedi-calfraud.dhs.ca.gov/sanctions.htm (visited June 6, 2004).
4 CODE CIV. PROC. §1085.
5 Azer v. Connell, 306 F. 3d 930, 933 (9th Cir. 2002).
6 42 C.F.R. §455.23.
8 42 C.F.R. §455.23(c).
9 WELF. & INST. CODE §14107.11(a).
10 42 C.F.R. §455.23(b); WELF. & INST. CODE §14107.11(a)(2).
11 WELF. & INST. CODE §14107.11(a)(2).
12 Fifteen days’ notice is required. WELF. & INST. CODE §14043.36(b).
13 Evidence on this point is anecdotal, arising from a particular case in which a DHS senior investigator requested the imposition of temporary suspension and withholding by someone higher in the DHS’s chain of command.
14 See WELF. & INST. CODE §§14107.11, 14043.36.
15 WELF. & INST. CODE §14043.65. See also the Administrative Procedure Act (codified in scattered sections of the Government Code).
16 See, e.g., WELF. & INST. CODE §14100.2; EVID. CODE §§1040, 1041.
17 WELF. & INST. CODE §14043.65.
18 CODE CIV. PROC. §1085(a) provides:
A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.
20 Bergeron v. Department of Health Servs., 71 Cal. App. 4th 17, 23 (1999) (citing G & G Fire Sprinklers, Inc. v. Bradshaw, 156 F. 3d 898 (9th Cir. 1998)).
22 Id. at *5-5; Bergeron, 71 Cal. App. 4th at 24-27.
24 Id. at 24-25.
25 Id.
28 Id. at *2.
29 Id. at *5-6, *7.
30 Azer v. Connell, 306 F. 3d 930 (9th Cir. 2002).
33 Azer, 306 F. 3d at 935.
38 Id.
39 Id. at 48816.
44 Id. at 770-71.
45 WELF. & INST. CODE §14043.36.
46 Rather than the federal statute, 18 U.S.C. §3282.
47 PENAL CODE §§801, 803; WELF. & INST. CODE §14107.

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An Alternative to California’s Prohibition on Noncompete Clauses

CALIFORNIA’S STRICT BAN ON NONCOMPETITION CLAUSES is well known. The prohibition is frustrating for employers seeking an effective way to protect their legitimate economic interests, particularly in the current business environment characterized by an increasingly mobile workforce. However, despite the state’s policy, employers under certain circumstances may be able to accomplish the goal of noncompetition clauses.

An often overlooked strategy for limiting competition by former employees is to include a noncompetition forfeiture provision in employee pension plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). Under this approach, a plan typically would provide that if participants join a competitor within a specified period after their employment is terminated, they forfeit their accrued benefits from employer contributions under the plan. Courts consistently have held that ERISA preempts state law and that noncompetition forfeiture provisions are enforceable so long as they do not affect any interests that cannot be forfeited.

Noncompetition forfeiture provisions are permissible in all types of ERISA-covered pension plans that provide employer contributions. However, the 2001 amendments to ERISA, which accelerated vesting of employer contributions, limit the practical impact of these provisions in most pension plans. Nevertheless, noncompetition forfeiture provisions may be particularly effective in what are commonly called top hat plans, which are maintained for high-level executives and are exempt from ERISA’s vesting standards. Although a noncompetition forfeiture provision cannot actually prohibit former employees from competing, it can provide a powerful financial incentive for them to refrain from doing so.

The statute prohibiting noncompetition clauses under California law is Business and Professions Code Section 16600, which states: “Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” Section 16600 reflects a strong public policy of the state. Courts have strictly enforced Section 16600 in the employment context, invalidating agreements that restrain an employee from working for a competitor following the completion of his or her employment.

Moreover, in Muggill v. The Reuben H. Donnelly Corporation, a case that preceded ERISA by nine years, the California Supreme Court held that a noncompete clause in a pension plan violated Section 16600. The plaintiff in Muggill terminated his employment after his benefits had fully vested and went to work for a competitor. Shortly thereafter, the employer’s retirement committee sent the plaintiff a letter terminating the former employee’s retirement benefits pursuant to a noncompete provision in the retirement plan. Construing Section 16600, the court stated, “This section invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so.” Reasoning that the pension plan was part of the employment contract, the court concluded that the noncompete clause in the pension plan likewise was invalid.

In Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., which also predated ERISA, the court invalidated a noncompete forfeiture provision in a profit-sharing plan. The plan contained a provision that an employee who terminated his or her employment and went to work for a competitor forfeited his or her benefits under the plan. Citing Muggill, the court held that the provision violated Section 16600.

In 1974, Congress enacted ERISA to set minimum standards for employee benefit plans that are voluntarily established by employers in private industry. ERISA distinguishes between two types of benefit plans. The first type is a pension plan, which provides retirement income for employees or defers income for periods extending to termination of employment or beyond. The second type is a welfare plan, which provides participants or their beneficiaries with medical, disability, life insurance, or other specified benefits.

Not every program designed to provide employee benefits is governed by ERISA. For ERISA to apply, the plan must have an ongoing administrative scheme. Determining whether a particular benefit plan is governed by ERISA often is a fact-intensive analysis and involves evaluating a number of factors, the most important of which is the extent to which the plan administrator is required to make discretionary decisions in administering the plan.

Among other requirements, ERISA imposes minimum vesting standards for employee benefits and defines permissible forfeitures. An employee’s right to his or her normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. In addition, an employee’s rights in accrued benefits derived from the employee’s voluntary contributions are nonforfeitable. Further, the plan must satisfy one of two minimum vesting schedules for employer contributions. The first schedule alternative provides for “cliff vesting,” whereby an employee with at least five years of service must have “a nonforfeitable right to 100% of his accrued benefit derived from employer contributions.” There is no requirement for vesting of any lesser percentage of benefits before the required five years of service. The second alternative provides a graduated schedule, with the...

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employee becoming fully vested by the seventh year of service.18

ERISA Preemption
The enforceability of noncompetition forfeiture provisions in pension plans is based on ERISA’s preemption of state law. Section 514(a) of ERISA provides that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.”19 Although courts sometimes have struggled to apply ERISA’s preemption language to particular facts, the U.S. Supreme Court repeatedly has recognized that the act’s preemption language is “clearly expansive” and should be broadly construed to preempt any state law that has a “connection with” or “reference to” an ERISA plan.20

The Ninth Circuit first addressed the validity of noncompete forfeiture provisions under ERISA in Hummell v. S. E. Rykoff & Company.21 The employer in Hummell established a profit-sharing plan that provided that participants with less than 15 years of service with the company who went to work for a competitor forfeited a portion of their benefits under the plan. After reviewing ERISA’s legislative history and vesting requirements, the court held that “ERISA does not prohibit forfeiture of benefits in excess of the minimum vesting requirements in §1053.”22

The court found that the forfeiture provision at issue was invalid, however, because it applied to employees with less than 15 years of service and therefore did not comply with the minimum vesting standards. Reasoning that “we should construe the plan to make it legal,” the court altered the plan to limit its forfeiture provision to employees with less than 10 years of service.23 Three years later, in Lojek v. Thomas,24 the Ninth Circuit held that ERISA preempted state law regarding noncompete forfeiture provisions in employee benefit plans. In Lojek, a law firm established a profit-sharing plan in which 100 percent of retirement benefits would vest and be nonforfeitable after 10 years of employment with the firm. If an attorney voluntarily left the firm before completing 10 years of employment and engaged in competition within a five-county area less than two years after leaving, the attorney forfeited all retirement benefits attributable to employer contributions. The plaintiff left the firm after approximately two years and shortly thereafter began practicing within one of the five counties prohibited by the plan.

Noting that “Congress explicitly provided that ERISA’s provisions preempt state laws,” the court found that ERISA preempted Idaho’s common law prohibiting noncompete provisions and that “federal law governs the validity of the plan.”25 The court further stated that “ERISA does not prohibit forfeiture of benefits in excess of ERISA’s minimum vesting requirements.”26 Finding that the plan’s noncompete clause did not affect any nonforfeitable interests, the court concluded that the clause was valid.27

Another Ninth Circuit decision upholding a noncompete forfeiture provision under ERISA is Clark v. Lauren Young TireCenter Profit Sharing Trust.28 The plan in Clark provided that benefits were fully accrued after six years, but if a participant accepted employment with a competitor before completing 10 years of service, the “entire account shall be forfeited.” The plaintiff worked for nine years and eight months for the company before he was laid off. Two months later, he went to work for a competitor. Shortly thereafter, the company sent the plaintiff a letter warning that he risked forfeiture of his profit-sharing account if he did not resign from the new job. He nonetheless continued working for the competitor and brought suit under ERISA, urging the court “to incorporate into ERISA Oregon law with regard to non-competition clauses.” The plaintiff contended that Oregon law prohibited noncompetition forfeiture provisions. The court questioned the plaintiff’s interpretation of Oregon law but found that the point was irrelevant because “ERISA preempts state law with regard to non-competition forfeiture clauses” and “state law plays no part in assessing the validity of such a clause in an ERISA plan.”29

As for federal law, the court noted that “a non-competition forfeiture clause is valid so long as the plan provides that benefits accrued after ten years of service cannot be forfeited.”30 The court reasoned, “If such a plan vests employees with pension benefits before their tenth year and is thus ‘more liberal’ than ERISA demands, the employer may condition his liberality with a non-competition requirement.”31 Rejecting the plaintiff’s argument that the noncompetition clause was too broad, the court noted that “a non-competition forfeiture clause in a pension plan is not like a non-competition agreement in an employment contract, which may unreasonably restrain trade or endanger the employee’s livelihood.”32 Therefore, the court concluded, “[T]he considerations that have led courts at common law to strike down overbroad non-competition agreements on their face do not apply to non-competition forfeiture clauses.”33

The decisions by the Ninth Circuit upholding noncompete forfeiture clauses under ERISA are consistent with the holdings of courts in other jurisdictions.34 However, Hummell, Lojek, and Clark were decided
prior to the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). Among other changes, EGTRRA accelerated the vesting standards for employer contributions in ERISA-covered pension plans. As a practical matter, the accelerated vesting significantly reduces the impact of noncompetition forfeiture clauses for most pension plans. In a typical plan, for example, a noncompetition forfeiture provision can only apply to employees with less than five years of service if the plan requires cliff vesting. For plans that provide graduated vesting, the forfeiture provision can affect only the nonvested portion of employer contributions—an amount that decreases with each year of service until the employee becomes fully vested after seven years of service. For top hat plans, however, noncompetition forfeiture clauses may still be particularly effective.

Top Hat Plans
ERISA defines top hat plans as “unfunded” and “maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.” Although ERISA does not define the term “unfunded,” a plan usually is deemed to satisfy this requirement if benefits are paid solely from the general assets of the employer. The term “select group” also is not defined in ERISA, but courts have held that employees are part of a select group if they are “a small percentage of the employer’s entire work force” and “by virtue of their position or compensation level have the ability to affect or substantially influence...the design and operation of the plan.”

Top hat plans are exempt from ERISA’s fiduciary provisions as well as its participation, vesting, and funding requirements. However, they are not exempt from ERISA’s reporting, disclosure, administration, or enforcement provisions. Despite the fact that top hat plans are exempted from most of ERISA’s substantive regulations, courts uniformly have held that ERISA preempts state law regarding these plans.

For example, in Bigda v. Fischbach Corporation, the Second Circuit Court of Appeals held that state law was preempted by ERISA regarding a top hat plan that contained a noncompetition forfeiture clause. The plaintiff in Bigda signed an employment agreement in which he would forfeit his benefits under the plan if, prior to reaching age 65, he accepted employment that the company’s board of directors deemed to be competitive. The court analyzed ERISA’s language and found that, despite the plan’s exemption from many of ERISA’s requirements, it was still governed by ERISA. Reasoning that “the goals underlying ERISA’s

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preemption of state laws indicate that all plans covered by ERISA should be protected by preemption,” the court concluded that, for top hat plans, state law was preempted. The court thus found that the plan’s forfeiture provision was valid, reasoning that “since ERISA intentionally omits top hat plans from its non-forfeitability protection, federal common law may not be used to create non-forfeitability protection under ERISA.”

Forfeiture provisions in top hat plans can be a particularly useful method for protecting an employer’s business interests, because the exemption from ERISA’s vesting standards allows employers to provide maximum financial incentives for employees to refrain from engaging in postemployment competition. For example, an employer can require an employee to forfeit all accrued benefits under a top hat plan if the employee goes to work for a competitor, without regard to the number of years the employee worked for the employer. In addition, it is often high-ranking employees—the participants in top hat plans—who are able to do the most damage to an employer’s business by competing after their departure.

Despite California’s ban on covenants not to compete, employers may lawfully include noncompetition forfeiture clauses in pension plans covered by ERISA. These provisions should be drafted carefully to comply with all applicable ERISA and EGTRRA requirements, including minimum vesting standards. Specifically, the forfeiture provision must not affect any nonforfeitable plan benefits—but if the forfeiture provision is part of a top hat plan, the forfeiture can apply to all benefits that have accrued under the plan. Plan participants should be given notice of the forfeiture provision in accordance with ERISA’s notice requirements.

The Ninth Circuit’s decision in Clark suggests that courts will not scrutinize the breadth of noncompetition covenants under ERISA. Nevertheless, employers would be well advised to ensure that the noncompetition forfeiture provisions in their employees’ pension plans are no more broad in scope or duration than is reasonably necessary to protect the employers’ legitimate business interests. Employers should follow this course at least until the law on this issue is further clarified.

1 29 U.S.C. §§1001 et seq.
5 Id. at 242.
Id. at 242-43.
7 Frame, 20 Cal. App. 3d 668.
8 Id. at 673.
12 See, e.g., Bogue v. Ampex Corp., 976 F. 2d 1319 (9th Cir. 1992), cert. denied, 507 U.S. 1031 (1993) (finding that a program entitling terminated employees to severance benefits if they were unable to find “substantially equivalent” employment required “particularized, administrative, discretionary analysis” and was covered by ERISA). Compare Velarde v. Pace Membership Warehouse, Inc., 105 F. 3d 1313 (9th Cir. 1997) (holding that an agreement to provide “stay bonus” and severance benefits to selected employees unless such employees were terminated for “cause” required insufficient level of discretion to constitute an ERISA plan).
21 Hummell v. S.E. Rykoff & Co., 634 F. 2d 446 (9th Cir. 1980).
22 Id. at 450.
23 Id. at 452.
24 Lojek v. Thomas, 716 F. 2d 675 (9th Cir. 1983).
25 Id. at 678.
26 Id. at 679.
27 Id. at 680.
28 Clark v. Lauren Young TireCenter Profit Sharing Trust, 816 F. 2d 480 (9th Cir. 1987).
29 Id. at 481.
30 Id.
31 Id. at 482-82.
32 Id. at 482 n.1.
33 Id.
38 Duggan v. Hobbs, 99 F. 3d 307, 312-13 (9th Cir. 1996). See also Demery, 216 F. 3d at 289 (noting that 15.54% of the employer’s work force “is probably at or near the upper limit of the acceptable size for a ‘select group’”).
43 Id. at 1013-16.
44 Id. at 1016.
Critical evidence CAN OFTEN BEST BE UNCOVERED through the appropriate use of informal discovery

Most lawyers are familiar with a rule of ethics that prohibits contact with an adverse party who is represented by counsel. The rule appears straightforward when the adverse party is an individual litigant.

Frequently, however, a practitioner’s client is adverse to a corporation, limited liability company, or other business organization that employs tens, hundreds, or even thousands of people. Even before the commencement of litigation, the entity may already have engaged counsel or may employ counsel on a full-time basis. Also, the practitioner may have a strong incentive to contact one or more employees of the adverse organization prior to filing suit to gather evidence in support of the client’s position.

Many attorneys, however, will forego the process of “informal discovery” and refrain from contacting the entity’s employees for fear of transgressing an ethical constraint that has been ill defined for these circumstances. While this concern may have been well founded for most of the last quarter century, recent decisions allow attorneys to gauge with reasonable certainty what contacts with employees of an adverse organization are permissible and what contacts constitute an ethical violation. Now that clear rules exist, practitioners can and should garner for their clients the full advantages of informal discovery.

Discovery, as the term is most commonly used in litigation, is the legally mandated disclosure of information by parties and nonparties through procedures such as depositions, document production requests, and interrogatories. Informal discovery is the development of information independent of the legal process, frequently without the knowledge or cooperation of the adverse party. Unlike formal discovery, informal discovery often can be accomplished rapidly and with minimal expense—such as reviewing public records or interviewing witnesses. It can be commenced before the initiation of legal proceedings. Moreover, informal discovery has the potentially enormous benefit of permitting an attorney to develop support for a cause of action or defense without simultaneously disclosing the existence of this evidence to an adversary. In many instances, evidence can be obtained through informal discovery that would never be obtained through formal discovery techniques.

Informal discovery has its drawbacks. Witness interviews, unlike deposition testimony, may not be admissible as evidence and may not be as useful for purposes of impeachment. For instance, statements made during witness interviews are hearsay and thus inadmissible under California law, unless an exception to the hearsay rule applies. Further, attorneys who conduct interviews (as opposed to using an investigator) may become witnesses in the case, thereby compromising their position as an advocate. In addition, careless interviewing of witnesses creates the potential for claims of slander by an adverse party.

Practitioners should note that two exceptions to the hearsay rule...
frequently apply to statements made during witness interviews: 1) admission of a party, and 2) prior inconsistent statements. Also, while prelawsuit communications to opposing parties, counsel, represented persons, or witnesses may give rise to tort claims, including slander, the litigation privilege, which protects statements made in the course of judicial proceedings or “in any other proceeding authorized by law,” may not be limited to statements made at trial. In fact, the privilege may extend to communications that are made before the commencement of any lawsuit.

For example, in *Lerette v. Dean Witter Organization, Inc.*, the court held that an attorney’s prelitigation letter to a bank chairman threatening suit based on an allegedly false credit reference was absolutely privileged under California Civil Code Section 47. Other prelitigation communications, such as statements made in the course of interviewing witnesses, should likewise be protected so long as the communication is relevant to a potential judicial proceeding. However, this is a rapidly evolving area of the law, with the risk of litigation always present.

Ethical constraints on an attorney’s contacts with witnesses who are or have been associated with an adverse party still exist. But it is precisely those witnesses who often hold the key to a successful prosecution or defense. Now that the law has been clarified regarding who may be contacted without fear of an ethical violation, attorneys no longer need to avoid appropriate and valuable informal discovery.

Charitably described, the evolution of the law concerning informal discovery has been marked by the adoption of ambiguous rules, which were then construed in unanticipated ways and later supplanted by new rules of equally uncertain meaning. The reluctance of practitioners to test the limits of ambiguous rules is understandable, given the severe sanctions that may ensue from a perceived violation: disqualification, loss of fees, and ethical censure.

In the realm of informal discovery, ethical issues may arise because of questionable means used to obtain information, such as misrepresentations regarding the status or capacity of the party seeking information. The use of informal discovery also may implicate privacy rights. Still, the most frequently litigated ethical issues in informal discovery involve contacts with persons who may be deemed represented by counsel in a matter or controversy.

Fortunately, the series of recent decisions that has substantially reduced the uncertainty regarding the scope of permissible informal discovery of an adverse party’s past and present employees will give practitioners a margin of comfort. They also reveal certain persistent mine fields.

**Impact of Former Rule 7-103**

The codified prohibition on attorney contacts with a party represented by counsel had its genesis in California in 1975 with the adoption of former Rule 7-103 of the Rules of Professional Conduct. This rule, replaced by current Rule 2-100, provided in pertinent part: “A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel.”

On its face, former Rule 7-103 left open the question of which employees of an adverse corporate party would be deemed encompassed by the prohibition. The resolution of this question was materially affected by *Upjohn Company v. United States*, in which the U.S. Supreme Court held that the attorney-client privilege for a corporation extends beyond the “control group” to middle- or even low-level corporate employees who “can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties.” (The Court defined “control group” as “officers and agents… responsible for directing [the company’s] actions in response to legal advice.”) Insofar as the attorney-client privilege might extend to virtually any employee of the corporation, former Rule 7-103 was construed by the Los Angeles County Bar Association Committee on Professional Responsibility as prohibiting contact with any employee of a represented corporation concerning a subject of controversy.

In *Bobele v. Superior Court*, the California Court of Appeal ratified this analysis, finding that the rule proscribed all contacts with employees of a represented corporation as to matters in controversy. The *Bobele* court further held that former Rule 7-103 applied both to current noncontrol-group employees and to former employees who continued as members of the control group, such as by serving as a director of the corporation. The effect of the broad construction of former Rule 7-103 by the *Bobele* court was to render virtually all post-controversy contact with corporate employees potentially sanctionable. For certain types of litigation, such as employment discrimination claims, this restraint on informal discovery seriously impaired meaningful prelitigation investigations as well as the effective conduct of litigation itself. Due to the excessive burden imposed by former Rule 7-103, the rule was repealed and replaced on May 27, 1989, by Rule 2-100, which provides in pertinent part:

(A) While representing a client, a member of the State Bar shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a “party” includes:

1. An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

2. An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organi-
zation....

(C) This rule shall not prohibit:
   (1) Communications with a public officer, board, committee, or body;
   (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party’s choice; or
   (3) Communications otherwise authorized by law.

Notably, the intent of the drafters of Rule 2-100 to materially liberalize opportunities for informal discovery is not apparent from the language of the rule. While the rule implicitly permits contact with nonmanagerial employees unless they are responsible for an “act or omission...in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability,” the rule omits a definition of “managing agent.” The only indication of an intention to expand informal discovery beyond that permitted under Bobele appears in the Drafters’ Notes accompanying Rule 2-100. Those notes implicitly reject the holding of Bobele as applied to formerly employed members of the control group: “Paragraph (B) is intended to apply only to persons employed at the time of the communication.” The more general intent of the drafters to limit operation of the rule to members of a corporate control group is obscure. Thus, it is understandable that trial courts construing the new rule frequently treated it as only a slight variant of former Rule 7-103. However, a series of subsequent appellate decisions have made clear the error of this approach, and have thus radically altered the playing field for those inclined to pursue informal discovery by interviewing past or present employees.

**Clarifying the Scope of Current Rule 2-100**

The first decision to address the radical difference between former Rule 7-103 and current Rule 2-100 was Triple A Machine Shop, Inc. v. California. In Triple A, the court of appeal reviewed a trial court’s preliminary injunction enjoining state and local authorities from contacting any present employees and certain former employees of a machine shop under investigation for criminal violation of environmental laws. The trial court found that government contacts with a currently employed assistant facilities manager and with certain former managers violated Rule 7-103. In reversing the trial court’s order, the court of appeal rejected reliance on Bobele, commenting that “any question whether current ‘noncontrol group’ corporate employees lie within the scope of such protection is resolved by new rule 2-100....”. The Triple A court further held that “rule 2-100 permits opposing counsel to initiate ex parte contacts with...present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee’s act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability.” The court commented that the attorney-client privilege “does not protect disclosure of the underlying facts which were communicated [to counsel] and it does not extend to independent witnesses.”

The court of appeal in Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corporation addressed whether it was proper for an attorney to communicate ex parte with a former member of a corporate adversary’s control group. In Nalian, the attorney spoke with a former general manager, who was also a minority shareholder. Since the former manager was neither a current employee nor a member of the control group at the time of the communications, the court held that Rule 2-100 did not prohibit the attorney from engaging in ex parte communications with the former general manager.

The trial court in Continental Insurance Company v. Superior Court also tested the scope of Rule 2-100. This case involved an office building fire, about which certain janitorial employees had relevant knowledge. By the time the matter was actually litigated, two of the witnesses were no longer employed by the defendant building management company. Counsel for an insurance carrier interviewed the witnesses without the knowledge of the management company’s counsel. The trial court found that one witness may have been misled by the interviewing attorney and that other interviewing attorneys had clearly violated Rule 2-100 by contacting a witness whose acts or omissions were in controversy. While the trial court denied a motion to disqualify, it issued an order precluding use of any testimony or statements by the interviewed witnesses. The court of appeal reversed the trial court’s order excluding evidence obtained from the interviewees, noting that Rule 2-100 did not apply to former employees, whether or not the acts and omissions of the former employees were at issue in the litigation.

The trial court in Jorgenson v. Taco Bell confronted the issue of whether Rule 2-100 applied to prelitigation informal discovery. In Jorgenson, an attorney investigating an employment discrimination claim had an investigator interview several noncontrol-group employees of a major fast food chain. Although the attorney presumably was aware that the prospective defendant employed in-house counsel, no attempt was made to obtain the consent of corporate counsel to the con-
contacts. The trial court found that because no litigation was pending at the time of the interviews, the employees could not be deemed represented parties. Therefore, Rule 2-100 had not been violated. The court of appeal concurred in this analysis and further held that the mere existence of corporate counsel does not cause the application of Rule 2-100 to a noncontrol-group employee.25 Indeed, the Jorgenson court noted that the corporation’s counsel had not given opposing counsel notice of his intent to represent the contacted employees, nor was there other evidence of actual knowledge.26

Managing Agent

While substantially clarifying the scope of Rule 2-100, the holdings in Triple A, Nalian, Continental, and Jorgenson left open the definition of “managing agent.” This omission was significant, because it is the adverse party’s managerial employees who will most frequently have knowledge that is critical for proving or defending claims. Fortunately, the court in Snider v. Superior Court defined “managing agent” and thereby resolved prior uncertainty in favor of the availability of informal discovery in certain circumstances.27

Snider arose out of an unfair competition suit brought by Quantum Productions Inc. against former employee David Snider for alleged misappropriation of trade secrets. Snider was represented in the case by attorney Dale Larabee. Between the filing of a trial readiness statement by Quantum’s counsel and the date for trial, Larabee contacted two employees of Quantum listed in the statement. One of the employees was a sales manager and the other a production manager. Larabee interviewed the sales manager at length concerning material issues in the case. The trial court found that these contacts violated Rule 2-100 and granted a motion to disqualify Larabee. The court of appeal reversed, however, finding that the employees contacted were not “managerial employees,” were not responsible for acts or omissions that formed the basis for liability, and could not be deemed to bind the corporation by their statements.28

In considering whether the employees were managing agents within the meaning of Rule 2-100(B)(1), the Snider court found support for a limited interpretation of the term “managing agent” in White v. Ultramar, a wrongful termination case.29 White holds that misconduct by a supervisor will be deemed to permit an award of punitive damages only if the supervisor is “high level management.”30 In accord with White, the Snider court held that unless a supervisory employee has discretion and authority to set corporate policy, the employee is not a managing agent for purposes of Rule 2-100(B)(1).31
Furthermore, in discussing the meaning of Rule 2-100(B)(2), the Snider court noted that paragraph (B)(2) of Rule 2-100 has been interpreted in California as applying only to high-ranking organizational agents who have actual authority to speak on behalf of the organization.\textsuperscript{32} Thus, although the language of paragraph (B)(2) seems broader than paragraph (B)(1), it only applies to those who have authority to speak on behalf of the corporation. This interpretation is consistent with the drafters’ rejection of the no-contact rule under former Rule 7-103.\textsuperscript{33}

Nonetheless, the decision in Snider should not be deemed a license for unfettered contact with all ostensibly nonmanagerial employees of a corporate adversary. The appropriate approach, as articulated by the court, requires caution even when dealing with lower echelon employees:

To avoid potential violations of the attorney client privilege, an attorney contacting an employee of a represented organization should question the employee at the beginning of the conversation, before discussing substantive matters, about the employee’s status at that organization, whether the employee is represented by counsel, and whether the employee has spoken to the organization’s counsel concerning the matter at issue. If a question arises concerning whether the employee would be covered by rule 2-100 or is in possession of privileged information, the communication should be terminated.\textsuperscript{34}

The court likewise offers cautionary advice to corporations and their counsel:

Once a dispute arises that could lead to litigation, it is also incumbent upon an organization and its counsel to take proactive measures to protect against disclosure of privileged information by informing employees and/or opposing counsel of their position concerning communications between employees and opposing counsel.\textsuperscript{35}

Unresolved Issues

While Snider clarifies the application of Rule 2-100 to managerial employees, certain comments of the court raise questions that are unresolved by the opinion. The text addressing prophylactic measures for counsel performing informal discovery suggests that any prior contact between an interviewee and corporate counsel should raise a red flag against further inquiry. However, in Snider both witnesses had had prior contact with corporate counsel, yet the court found no violation of Rule 2-100. This was arguably because the employees’ relationship to corporate counsel was that of witness rather than that of one who receives and acts upon advice. Moreover, there was no indication that attorney Larabee made inquiries concerning communications between the employee and corporate counsel. However, because the Snider court, in dicta, has suggested that any confidential communication between corporate counsel and an employee raises ethical issues for inquiring counsel, doubts remain concerning the permissibility of such contacts.

It would have been better had the court explicitly held that contact with noncontrol-group managers is ethical, notwithstanding their prior communications with corporate counsel, so long as no attempt is made to secure disclosure of communications with corporate counsel. This result would appear consistent with the discussion in Triple A concerning the distinction between a represented party and an independent witness. A contrary result would allow corporate counsel to significantly impede discovery and even preliminary fact-gathering contacts with nonmanagerial employees.

Equally troublesome is the Snider court’s suggestion that corporate counsel should proactively advise employees and adverse counsel concerning corporate counsel’s posi-
tion regarding employee contact with adverse counsel. If the court contemplated corporate counsel advising adverse counsel as to the identity of legitimate control group members, the court’s suggestion is arguable constructive. However, in the age of instantaneous e-mail communication, it is easy to foresee corporate counsel notifying tens if not hundreds of potential witness-employees of every rank to refrain from contact with opposing counsel. Corporate counsel could then argue that this pro forma communication creates a privileged relationship between corporate counsel and the witness—or at least a fiduciary duty on the part of the employee not to communicate with adverse counsel. To indulge this result would be a mistake. The ethics and availability of informal discovery should not depend upon such legal gamesmanship but on whether the informal discovery threatens to invade a substantive attorney-client relationship. Indeed, numerous courts have prohibited such attempts to frustrate informal discovery.\textsuperscript{36}

Last, there is a disturbing aspect of Rule 2-100’s blanket stipulation that an employee whose act or omission is being litigated is to be deemed represented by corporate counsel. While this rule may work admirably when the interests of the employee and the corporation are aligned (such as when both deny liability and the corporation has agreed to provide a full defense and indemnity), this will not always be the case. An employee may be clearly at odds with an employer, and corporate counsel could not, because of a conflict of interest, undertake representation of the employee. Under these circumstances, it would seem to be improper for corporate counsel to assert the application of Rule 2-100 to the employee in question—and it would be an error to sanction adverse counsel for communicating with the employee who has disavowed corporate protection.\textsuperscript{35} Indeed, contact with the employee could be deemed a communication “otherwise authorized by law” within the meaning of Rule 2-100 (C)(3). To deny the employee the opportunity to communicate directly with opposing counsel would infringe on the employee’s right to conduct his or her own affairs and in effect treat the employee as chattel subject to unjustified corporate control.

With the availability of informal discovery, litigators may need to think more like Sherlock, rather than Oliver Wendell, Holmes. In many instances, the effective representation of clients will require counsel to engage in informal discovery rather than formal discovery because of cost considerations and the need for the unfiltered flow of information. Given the current state of California law, before the commencement of litigation, each side of a dispute should at a minimum consider the opportunities for appropriate informal discovery. The outcome of many cases will turn on the extent of this inquiry.\textsuperscript{37}

\textsuperscript{1} See, e.g., Code Civ. Proc. §2035. On occasion, an attorney may want to take a deposition prior to filing a lawsuit to preserve evidence that may become unavailable. In these cases, the court may order a deposition or other discovery based on a showing of “good cause.”

\textsuperscript{2} Evid. Code §1200.

\textsuperscript{3} See Cal. Rules of Prof. Conduct R. 5-210. A lawyer “shall not act as an advocate” before a jury that will hear the attorney’s testimony unless the client gives informed written consent. Id. The discussion following Rule 5-210 states that the rule applies whenever the attorney knows or should know that he or she “ought to be called” as a witness in a jury trial.

\textsuperscript{4} Evid. Code §§1220, 1235.

\textsuperscript{5} See Civ. Code §47.


\textsuperscript{7} Former Rule 7-103 is similar to ABA Model Rule of Professional Conduct 4.2, which states: “In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by the law to do so.” The primary purpose of both former Rule 7-103 and Model Rule 4.2 was to “protect the integrity of the attorney-client relationship” by insulating the parties from opposing counsel. Felicia Ruth Reed, Ethical Limitations...


10 Id. at 391.


13 Id. at 714.

14 Snider v. Superior Court, 113 Cal. App. 4th 1187, 1200 (2003). The drafters of Rule 2-100 said that the new rule was “intended to clarify the troubling issue of which employees of an entity may be approached without consent of the attorney for the entity when the entity is the opponent.” See Office of Professional Standards, State Bar of California, Request That Supreme Court Approves Amendments to the Rules of Professional Conduct (Dec. 1987).


16 Id.


18 Id. at 139-40.

19 Id. at 140.

20 Id. at 143 (citations omitted).


22 Id. at 120-21.

23 Id. at 140-02.

24 Id. at 1403.


26 Id. at 1209-11.

27 White v. Ultramar, 21 Cal. 4th 563, 573 (1999).

28 Id.


30 Id. at 1400-02.

31 Id. at 1403.

32 Id.

33 Snider, 113 Cal. App. 4th at 1208.


35 Snider, 113 Cal. App. 4th at 1210.

36 Id. at 1213.


38 The California Court of Appeal recently reached a similar result, holding that counsel for minority shareholders seeking dissolution of a corporation may contact dissenting directors of the corporation with the consent of the directors’ personal counsel, notwithstanding the objection of counsel for the corporation. La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court, 2004 WL 1813854 (Cal. App. Dist. 4, Aug. 16, 2004). See United States v. Talao, 222 F. 3d 1133, 1140, 1141 (9th Cir. 2000) (U.S. attorney did not violate Rule 2-100 by communicating with corporate bookkeeper who expressly disavowed representation by corporate counsel and pursued role of whistle blower.).
In joint defense agreements (JDAs) defendants or individuals under investigation typically agree to share information on a confidential basis among themselves. The parties to this agreement are collectively known as the joint defense group (JDG). JDAs facilitate the flow of information by allowing the subjects of the investigation and/or their counsel to share information without waiving a privilege that might otherwise apply. From the defense lawyer’s perspective, the principal purpose of the JDA is to allow the lawyer to gather information not just from his or her client (as the lawyer would be able to do confidentially under the attorney-client privilege) but from all of the client’s codefendants and their counsel. This puts the lawyer in the best possible position to advise the client during the course of the governmental investigation or lawsuit.

A casual review of the literature—or conversation with a prosecutor—might suggest to the uninitiated that JDAs are a blight on the otherwise pristine tableau of legal ethics that is tantamount to judicially authorized obstruction of justice. Yet, notwithstanding the consternation they cause prosecutors, JDAs are an invaluable tool to parties accused of violating the law.

JDAs help to overcome the informational advantage that is typically wielded by prosecutors through use of the grand jury process. Consider the well-known “prisoner’s dilemma”: Two individuals are arrested, put in separate rooms, and questioned. The prosecutor, without enough evidence to convict either, offers leniency to the first one to confess and cooperate. While both prisoners would together be better off telling the prosecutor nothing, each has a strong incentive to cooperate. The incentive remains identical even if each prisoner is provided counsel. The success of this information-gathering technique is entirely dependent on the prisoners (and their counsel) not being able to communicate with each other. If they could communicate, the information vacuum within which each is otherwise forced to make a decision would no longer exist, and each could make a more informed decision.

In terms of its incentives, a grand jury investigation—during which prosecutors can communicate in secret with each accused, threaten indictment, and incentivize each of them to incriminate others—creates a situation no different from the prisoner’s dilemma. JDAs, however, empower subjects of investigations to communicate in confidence. By utilizing this information conduit, each accused and his or her counsel can determine what evidence the prosecution has been able to marshal against him or her and make an informed decision about the best defense. Similarly, at trial, inconsistent defenses presented by individual defendants—the result of a lack of opportunity for confidential pretrial communication—weakens all the defendants’ cases. JDAs, by contrast, allow confidential pretrial communication. Thus, JDAs provide some means of leveling the legal playing field.

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Some prosecutors believe that, if permitted, the accused would all agree on a story to explain away any incriminating evidence or collectively agree not to testify.6 JDAs, prosecutors argue, allow the accused to get their stories straight before trial while simultaneously protecting the substance of those conversations from third-party ears. In this way, they believe that JDAs facilitate obstructionist conduct by the accused.

In addition, prosecutors eliciting testimony may find a witness refusing to answer a question or produce a document on the grounds that it is protected by the joint defense privilege (JDP). Prosecutors view this use of a JDA as a tactic to prevent the government from getting an answer to its legitimate concerns.

Furthermore, JDAs typically require any party withdrawing from the JDA to notify the JDG, which gives a clear signal to the JDG when one of its members has cut a deal with the prosecutor and is now likely to be a witness for the government at trial. It is therefore no surprise that many prosecutors decry JDAs.

In defining who can participate, one thing is clear—the term “joint defense agreement” is a misnomer, since courts have allowed coplaintiffs to participate8 and have even allowed a plaintiff and a defendant to participate in the same JDA.10 More accurately, such agreements should be called “common interest agreements,”11 because the participants need only have a realistic basis for believing that they may have a common interest in a litigation.12 One matter that is clear is that the parties’ interests with respect to the investigation, and as a result, prosecutors weighing the extent and value of a corporation’s cooperation—may count as a factor against a corporation whether it appears “to be protecting its culpable employees by...providing information to the employees about the government’s investigation pursuant to a [JDA].”8

While in theory it may be desirable for a group of individuals to be able to share information on a confidential basis in order to defend themselves, prosecutorial concerns persist that if the individuals are allowed to meet confidentially, they may: 1) shape or suppress testimony, 2) improperly invoke the joint defense privilege, 3) manufacture conflicts that will provide a strong argument on appeal for any defendant who is convicted, or 4) take advantage of prosecutorial fears that information the prosecutor provides to one witness will be provided to the targets of the investigation, and as a result, prosecutors may lose the benefits of key witness testimony. The solution is to control the terms of JDAs so that they achieve legitimate defense purposes while allaying prosecutorial concerns.

**Nuts and Bolts**

In order to draft a proper JDA, it is necessary to review some of the basics. Who can participate? When can JDAs be entered into? What are some of their essential terms?

In defining who can participate, one thing matters of common interest cannot be antagonistic.13

A question that arises in criminal cases is whether a target and witness in the same grand jury investigation can be in the same JDG. While there is no case law on point, it would seem that as long as the parties to the investigation have a realistic basis for believing they may ultimately be codefendants, even if one has been identified as a mere witness, they may participate in a JDG.14 On the other hand, if the target is obviously more powerful than the witness (such as a corporate CEO and his or her former secretary), and the witness has no realistic expectation of being a defendant, prosecutors may consider the arrangement objectionable. Of course, if one party is granted immunity, it would be difficult, though not impossible, for that party to maintain a realistic basis for believing that he or she may become a codefendant.

Similarly, the timing of a JDA is quite flexible. Courts have recognized JDAs formed whenever the participants had a realistic basis for believing they could become parties with a common interest in a criminal or civil lawsuit. There is little doubt that targets can enter into a JDA before the government has decided to indict;15 however, to be safe, parties should not execute a written JDA until a
governmental investigation is underway. Similarly, a California court has recently approved a JDA formed during a business transaction by contracting counterparties to the transaction because they reasonably believed that the transaction would give rise to a lawsuit from a common adversary.16

JDAs are typically written agreements signed by all parties and their counsel. While there is no requirement that a JDA be in writing,17 a written contract is important in establishing the existence of the JDA and its terms should it ever be questioned.18 In addition, a JDA signed by all parties ensures that all parties at a joint defense meeting are in fact members of the JDG, as opposed to government cooperators, and that all parties have an expectation that their conversations will be confidential. Indeed, at least one court has concluded that no JDP attached when codefendants thought they were engaged in confidential strategy discussions in which one did not wish to share his confidential information with the JDG, one attorney could not cross-examine his "second client and, accordingly, was required to withdraw as trial counsel.21 Since the Henke court did not hold that all JDAs necessarily create attorney-client relationships among members and other members' counsel, the easiest way to avoid this problem is to make clear in the JDA that, by virtue of sharing confidential information with the JDG, one attorney does not become the attorney for the client who shared the confidential information. If the client personally signs the JDA and waives any right to assert that all other JDG counsel are barred from cross-examining him or her at trial, this provision should protect the JDG counsel from being disqualified at trial.24

The agreement should also specify withdrawal provisions—generally that if a member decides to cooperate with the government, he or she must withdraw from the JDG and return all JDG materials.25 This provides notice to the group that one member has decided to testify for the government and ensures that the cooperating member will not participate in any future JDG meetings and act as a spy for the government.26 The withdrawal provision should also explicitly state that the withdrawing member waives any right to prevent the use against him or her of information he or she supplied to the JDG. This is necessary so that counsel for the remaining JDG members can freely cross-examine a withdrawing member without running afoul of any implied or actual duty of loyalty or confidentiality.27

In addition, the agreement should explain what uses can be made of JDP information at trial between the remaining members of the JDG. Typically, this information remains privileged. However, an attorney should be free to use JDP information to the extent it tends to exculpate his or her client. The best way to ensure this is to draft withdrawal provisions stating that, to the extent an individual testifies in a manner adverse to the “common interest,” that individual is automatically ejected from the JDG, and the remaining members are free to cross-examine him or her by making use of information supplied to the JDG.

This approach strikes a middle ground between the withdrawal provision proposed by the Eleventh Circuit (that a JDG member who testifies for the government waives his right to be free from cross-examination based on information he supplied to the JDG) and the approach proposed by the American Bar Association (that whenever a JDG member testifies at trial, regardless of who calls the member as a witness, the member waives the right to prevent the use against him or her of information he or she supplied to the JDG). The ABAs approach eschews the JDP at trial and accordingly vitiates any incentive JDG members have to share information in the first place. The Eleventh Circuits approach does not go far enough because a codefendant may testify at trial as a defense witness and nonetheless inculpate another defendant. A defendants lawyer should be free to cross-examine the codefendant with any JDP material the witness supplied that may be inconsistent with the trial testimony, even though the codefendant

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was not called to testify by the government. Another way for JDG counsel to make use of JDP information at trial is to approach the source of the information and ask the source to submit to an interview outside the JDP in which he or she would confirm the same information.

Addressing Prosecutorial Concerns

If a prosecutor is faced with a witness invoking the JDP and is concerned that the material is not covered by the JDP because, for example, it was shared with the JDG merely so that the JDP would artificially attach, the appropriate and available remedy to the prosecutor is to lay the groundwork for a successful motion to compel by fully exploring the basis for the witness’s invocation of the JDP.

Typically the presence of a third party waives the attorney-client privilege or the attorney work-product doctrine, but if the third party is a member of a JDG, the communication is protected by the JDP. Accordingly, to be JDP-protected:

1) The communication must be between an attorney and client for the purpose of seeking or providing legal advice or be a document prepared in anticipation of litigation by or for a party.

2) The third parties present for the communication must be part of a legitimate joint defense effort concerning actual or threatened litigation.

3) The communication must be designed to further the joint defense effort.

4) The communication must have been made in confidence among JDG members.

5) The communicator must have reasonably understood it to be confidential among JDG members.

6) The privilege must not have been waived by the presence of a non-JDG member.

The burden of establishing each of the elements of the privilege rests with the party asserting it.

It is well settled that clients cannot simply provide documents to their lawyers and thereby make them attorney-client privileged. For the same reasons, a client cannot provide documents to the JDG and thereby make them privileged. One cannot make information that predates the formation of the JDG retroactively privileged by giving it to the JDG. Accordingly, the prosecutor should elicit information from the witness regarding the foundation for the invocation of the JDP and examine whether in fact the JDP applies. A court reviewing the invocation will only allow a witness to withhold information that is properly joint defense privileged.

Prosecutors are also wary about the line between appropriate JDG communications and communications that may constitute

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obstruction of justice. Whether pursuant to a JDA or not, efforts by individuals or their counsel to convince a witness (a fellow JDG member or a third party) to testify falsely or in a misleading fashion, or not to testify, may constitute the crime of obstruction of justice. Thus, the prosecutorial concern that JDAs will be used to facilitate obstruction of justice must be analyzed in light of the fact that the offending conduct—shaping or suppressing testimony—is already criminal. (By contrast, individuals are free to communicate how they or their clients will testify and how they understand third parties will testify.)

Prosecutors are concerned that, because of the JDA, they are denied the ability to investigate whether the crime of obstruction of justice took place. This is so because prosecutors may be denied the ability to question those present at the JDG meeting in which the alleged criminal behavior took place. However, the JDP operates no differently than the attorney-client privilege, which permits an individual lawyer and client not to be compelled to testify about attorney-client communications. To overcome this hurdle, the law recognizes the “crime/fraud exception” to the attorney-client privilege. By analogy, a prosecutor could argue that the JDP is also subject to a crime/fraud exception. After all, to be covered by the JDP, the information must have been covered by a privilege ab initio. A prosecutor who believes that individuals in a JDG are obstructing justice may present the basis for this belief to a court, which would have the authority to vitiate the JDP on a sufficient showing. At that point, members of the JDG could be compelled to testify regarding their JDG communications. Indeed, the mere existence of this exception to the JDP would likely deter JDG members from engaging in obstructionist conduct.

Some prosecutors are also concerned that information provided to one member of the JDG will be provided by that member to all other parties to the JDA. This concern reflects a fundamental misunderstanding of the JDA—ordinarily there is no provision within the JDA requiring a JDG member or his counsel to share all relevant information with the JDG. If such a provision were to exist, it would surely violate each attorney’s duty of confidentiality owed to his own client. Rather, the typical JDA provision on the duty to share material with the JDG is permissive. Each attorney must decide with his or her own client what, if anything, is in the best interest of the client to share with the JDG. Accordingly, prosecutors need not be concerned that a JDG member’s counsel will be compelled to share with the entire JDG information the prosecutor revealed to that counsel on a confidential basis. The better practice
is for the prosecutor and that counsel to agree that information they share will remain confidential between them. This is not inconsistent with counsel's obligations to the JDG. In that case, the prosecutor is free to share information with counsel without fear that it will be passed on to the remaining members of the JDG, and counsel for JDG members are free to share with the prosecutor any information they have obtained other than JDP information.

JDAs also must be concerned with possible conflicts of interest. Courts and prosecutors have interests in ensuring that targets/defendants are competently represented. It is in everyone's interest to ensure, as early as possible, that counsel does not suffer from a disqualifying conflict, requiring the retroactive unwinding of proceedings. Accordingly, in the event a prosecutor is concerned that defense counsel is suffering from a disqualifying conflict, notwithstanding counsel's protestations to the contrary, the best practice is for prosecutors to raise the issue with defense counsel, and, if unsatisfied with the response, raise the issue with the court as a motion to inquire into conflicts.

The Justice Department has indicated that this matter should be raised as a motion to inquire into potential conflicts rather than a motion to disqualify a potential adversary because of its belief that motions seeking court inquiry into possible conflicts are more neutral and consistent with the role of government counsel. In *United States v. Stepney*, the court, before trial, citing its authority under the court's inherent supervisory powers, required defense counsel to commit all JDAs to writing and submit each JDA for in camera review so that the court could independently verify that each accused's Sixth Amendment rights to conflict-free counsel was honored. The *Stepney* court reviewed the JDAs and provided guidance as to appropriate terms, thereby ensuring prior to the trial that no defense counsel was laboring under a disqualifying conflict. Thus, there are mechanisms available to prosecutors to ensure prior to trial that their hard-fought convictions will not be overturned on appeal because of a JDA.

All told, the JDP allows defendants to communicate with one another to further their legitimate interest in defending against allegations of misconduct. It is important to understand that JDAs are not contracts that create whatever rights the signatories choose but rather represent written notice of defendants' invocation of the JDP. Accordingly, JDAs "cannot extend greater protections than the legal protections upon which they rest." Since JDA provisions that go beyond mere memorialization of the invocation of the JDP may not be enforceable, a properly
constructed JDA ensures that the legal playing field is rendered more level without providing defendants carte blanche to abuse the privilege.

1 See, e.g., Craig S. Lerner, Conspirators’ Privilege and Innocents’ Refuge: A New Approach to Joint Defense Agreements, 77 NOTRE DAME L. REV. 1449, 1543 (2002); MARVIN PICKHOLZ, 21 SEC. CRIMES §3:20.

2 See, e.g., Lerner, supra note 1, at 1543 (applying prisoner’s dilemma to joint defense agreements).

3 Deborah Stavile Bartel, Reconceptualizing the Joint Defense Privilege, 65 FORDHAM L. REV. 871, 873 (1996) (observing that a trial becomes a “lopsided contest” when multiple codefendants are discouraged from coordinating their defense); United States v. Stepney, 246 F. Supp. 2d 1069, 1086 (N.D. Cal. 2003).

4 Bartel, supra note 3, at 873.


8 Schwimmer, 892 F. 2d at 244.


10 Schwimmer, 892 F. 2d at 237.

11 See, e.g., United States v. Melvin, 630 F. 2d 641 (5th Cir. 1981) (noting cooperation had not explicitly joined JDA).

12 Hunydee v. United States, 335 F. 2d 183, 184-85 (9th Cir. 1965); 3 WHARTON’S CRIMINAL EVIDENCE §11:21 n.45 (listing cases in all federal circuits recognizing the privilege).
disclosing the information to a party outside the privileges. If a claim of privilege, and second, demonstrate that the information would otherwise be protected from disclosure.

JDP must first establish that the communicated information was made during the course of the joint defense effort. Matter of Blevil, Bresler & Schulman Asset Mgmt. Corp., 305 F. 2d 120, 125 (3d Cir. 1966).

35 The JDP only protects communications made during the course of the joint defense effort. Matter of Blevil, Bresler & Schulman Asset Mgmt. Corp., 305 F. 2d 120, 125 (3d Cir. 1966).

36 Oxy Resources Calif. v. Superior Court, 115 Cal. App. 4th 874, 893 n.15 (2004). "If otherwise adverse parties...are engaged in a common enterprise to commit a crime or fraud, they cannot rely on the [JDP] to shield their communications...because there is no underlying privilege if the services of a lawyer are sought to aid someone in planning or committing a crime or fraud."

37 The JDP only protects communications made during the course of the joint defense effort. Matter of Blevil, Bresler & Schulman Asset Mgmt. Corp., 305 F. 2d 120, 125 (3d Cir. 1966).

38 Encouraging others to give false testimony related to a judicial proceeding may constitute obstruction of justice or witness tampering. 18 U.S.C. §§1503, 1512. Agreeing with others to give false testimony may also be charged independently as conspiracy to obstruct justice.


40 See, e.g., United States v. Cintolo, 818 F. 2d 980 (1st Cir. 1987) (attorney improperly advising client to invoke the Fifth Amendment); Cole v. United States, 329 F. 2d 437 (9th Cir. 1964) (obstruction by nonattorney for advising witness not to testify).


42 See United States v. United Shoe Mach. Corp., 805 F. 2d 120, 125 (3d Cir. 1986) (holding provision in JDA requiring [JDP] to shield their communications...because there is no underlying privilege if the services of a lawyer are sought to aid someone in planning or committing a crime or fraud.).
Each year, state and local governments make thousands of decisions that fundamentally affect the liberty and property rights of individuals and businesses. For an example, one need only look to the impact of state and local regulatory permit and licensing schemes in California. Permits and licenses govern such diverse business activities as construction, law, medicine, massage parlors, nightclubs, and liquor sales. An agency decision to revoke a license or permit will terminate the right to do business in California.

Before a government agency can take an action that deprives an individual of a liberty or property interest protected by the Fourteenth Amendment, due process requires that the agency provide the individual with an opportunity to present evidence and argument at an administrative adjudication. Consequently, the growth in the volume and importance of government actions affecting individuals and businesses has brought about a commensurate increase in administrative adjudications between government and those asserting a loss of their rights.

While due process requires a hearing, courts have noted that “[t]he question remains, what process is due at the hearing?” It seems apparent that due process requires a fair and impartial adjudicator and procedural safeguards appropriate to the nature of the action taken by the government. Further, the wide range in the type and impact of actions taken by state and local governments dictates that flexibility should be the hallmark of administrative procedural safeguards. Recognizing the need for flexibility, the U.S. Supreme Court, in the seminal case of Matthews v. Eldridge, adopted a “balancing test” to determine the appropriate level of administrative due process required by a particular type of government action.

The balancing test considers five factors: 1) the private interests that will be affected by the action, 2) the risk of erroneous deprivation of private interests through the procedures used, 3) the probable value of alternative or

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substituted procedural safeguards, 4) the government interest, including the function involved, and 5) the fiscal and administrative burdens that additional or substitute procedural requirements would entail.7

The balancing test, however, has no role in addressing the most fundamental, and perhaps most challenging, requirement of administrative due process: the right to a fair and impartial adjudicator. The California Supreme Court, in Haas v. County of San Bernardino—the court’s most recent examination of administrative due process—rejected the use of the balancing test to analyze bias, explaining, “The unfairness that results from biased decision-makers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from insufficient procedures. In Justice Holmes’ famous phrase, ‘even a dog distinguishes between being stumbled over and being kicked.’”8 The Haas court concluded that while “[t]he requirements of due process are flexible, especially when administrative procedure is concerned...they are strict in condemning the risk of bias....”9

California has adopted a statutory scheme that provides specific procedural safeguards to ensure due process in administrative adjudications. The California Administrative Procedure Act10 applies to state agencies—and local agencies may choose to be governed by the act.11

In addition to differentiating between local and state agencies, the APA also distinguishes between formal and informal APA proceedings.12 Whether a state agency will be governed by the formal APA requirements is determined by the statutes and regulations pertaining to the particular agency.13 A formal proceeding under the APA is conducted by an administrative law judge of the Office of Administrative Hearing.14 Informal proceedings are conducted by a presiding officer, who may be an agency head, a member of an agency, an administrative law judge, or a hearing officer.15

Administrative due process has proven a fertile ground for judicial review. Since Haas was decided on May 6, 2002, in addition to the 19 California appellate cases that have cited the decision, California appellate courts have issued no less than 30 decisions addressing administrative due process.16 Notwithstanding the factual variety of these decisions, they provide, in concert with the APA, clear guidelines to the minimum procedural safeguards required in administrative adjudications.

**A Fair and Impartial Adjudicator**

Courts have found two distinct types of bias that impair the fairness and impartiality of adjudicators: the personal bias of individual adjudicators and institutional bias that implicates the structure of the government and taints the independence of the adjudicative body. A distinct standard of review exists for each type of bias.17 The Haas case focused on personal bias, and another recent case, Southern California Underground Contractors, Inc. (SoCal) v. City of San Diego, addressed institutional bias.18

Haas involved a massage clinic in San Bernardino County operated by the plaintiff, Haas, under a license issued by the county. After a deputy sheriff reported that a massage technician at the clinic had exposed herself and proposed a sexual act to a client, the county board of supervisors revoked Haas’s license. Haas appealed, and the board set the matter for hearing before a hearing officer hired by the county. On an ad hoc basis, the county unilaterally selected, retained, and paid the hearing officer as an independent contractor for the one case.

After voir dire, Haas, arguing that the hearing officer had a financial interest in the outcome of the case, asked the hearing officer to recuse herself. Despite Haas’s objection, the hearing went forward with the same hearing officer and resulted in a decision affirming the license revocation.

Haas petitioned for a writ of administrative mandamus, asserting that the hearing officer was biased because the financial arrangement involving the hearing officer created a direct pecuniary interest in the ultimate resolution of the case. Haas claimed that he was denied administrative due process because of the hearing officer’s personal bias.

The supreme court agreed with Haas, finding that bias “arises when an adjudicator’s future income” will likely depend on an outcome of the case that is favorable to the hiring party.19 The court found that an allegation of a pecuniary interest was a unique type of personal bias justifying a presumption that the bias was sufficient to deprive an individual of due process. The court stated, “While adjudicators challenged for reasons other than financial interest, have, in effect, been afforded a presumption of impartiality, adjudicators challenged for financial interest have not. Indeed, the law is emphatically to the contrary.”20 The court ruled that a hearing officer cannot be hired on a case-by-case basis unless procedures are in place to eliminate the risk of bias, such as limiting future assignments for a period of time.21

Avoiding personal bias, whether financial or otherwise, requires that the administrative agency provide a procedure to test the impartiality of its adjudicators.22 The traditional method to guarantee that adjudicators are fair and impartial and free of personal bias is voir dire, which was the procedure used in Haas.23 Once a request for voir dire is made, an individual adjudicator must submit to an examination or be excused from participating in the adjudication.24

Consistent with the flexibility afforded by the balancing test, an agency has some latitude in the procedure used to test the impartiality of the adjudicator. For example, an agency certainly could require voir dire at a deposition prior to the date set for the hearing.

Also, due process does not require that adjudicators be disqualified solely because of a perception or an appearance of bias. Concrete facts must demonstrate circumstances offering “possible temptation to the average person as an adjudicator.”25

Although there are many factual scenarios that might establish bias, certain common situations, in addition to pecuniary interest, have been found by courts to constitute constitutionally impermissible bias, requiring the disqualification of an adjudicator. Principal among these are involvement by the adjudicator in matters directly concerning the entity or individual whose rights are being determined at the hearing, or prejudice on the part of the adjudicator due to his or her prior involvement as an accuser, investigator, fact finder, or additional decision maker in matters involving the individual or entity seeking adjudication.26

The court found that an **allegation of a pecuniary interest was a unique type of personal bias justifying a presumption that the bias was sufficient to deprive an individual of due process.**
MCLE Test No. 130

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

1. The balancing test adopted by the U.S. Supreme Court in _Matthews v. Eldridge_ for determining the appropriate level of administrative due process required by a government action is composed of five factors that address private interests and governmental interests.
   - True.
   - False.

2. Compliance with the California Administrative Procedure Act (APA) is mandatory for state and local administrative agencies.
   - True.
   - False.

3. There are two types of bias that impair the fairness and impartiality of adjudicators: personal and institutional.
   - True.
   - False.

4. In _Haas v. County of San Bernardino_, the allegations of bias involved the hearing officer having a pecuniary interest in the ultimate resolution of the case.
   - True.
   - False.

5. The traditional method of guaranteeing a fair and impartial adjudicator is voir dire.
   - True.
   - False.

6. Due process requires that adjudicators be disqualified solely because of an appearance of bias.
   - True.
   - False.

7. Common situations in which courts have found constitutionally impermissible bias requiring disqualification of an adjudicator include:
   A. Pecuniary interest.
   B. Involvement of an adjudicator in matters directly concerning the entity or individual whose rights are being determined at the hearing.
   C. Prejudice on the part of the adjudicator due to his or her prior involvement as an accuser, investigator, or fact finder.
   D. All of the above.
   - True.
   - False.

8. The court in _Southern California Underground Contractors, Inc. (SoCal) v. City of San Diego_ addressed the issue of the adjudicator’s personal bias.
   - True.
   - False.

9. If the government agency conducting the hearing has overlapping investigative, prosecutorial, and adjudicative functions, courts will always find that the agency did not conduct a fair hearing.
   - True.
   - False.

10. Absent actual bias, the rule of necessity precludes a claim of bias based on a structure of government that includes a combination of functions.
    - True.
    - False.

11. The APA does not permit a combination of the investigative, prosecutorial, and adjudicative functions of the hearing agency.
    - True.
    - False.

12. The only permissible method for seeking disqualification of an adjudicator in a formal hearing under the APA is an affidavit alleging with particularity the grounds for disqualification.
    - True.
    - False.

13. The APA’s Administrative Adjudication Bill of Rights contains detailed specifications on the contents of the notice for an administrative hearing.
    - True.
    - False.

14. The SoCal court found that SoCal was not given sufficient time to prepare for the hearing and provided SoCal with an additional 60 days to prepare for a second hearing so it could:
    A. Notice necessary parties.
    B. Present live testimony.
    C. Conduct depositions.
    D. All of the above.
    - True.
    - False.

15. Presenting live witnesses at an administrative adjudication is a fundamental due process right.
    - True.
    - False.

16. State agencies are expressly granted subpoena power for both formal and informal hearings.
    - True.
    - False.

17. There is a constitutional right to prehearing discovery, and each agency can establish the extent and scope of the discovery applicable to its proceedings.
    - True.
    - False.

18. An adjudicator must provide a written decision to the parties that includes:
    A. The reasoning behind the decision.
    B. The evidence relied upon by the adjudicator.
    C. Sufficient information describing the mode of analysis used by the adjudicator.
    D. All of the above.
    - True.
    - False.

19. A petition for a writ of administrative mandamus is the only available method to challenge a decision resulting from an administrative adjudication.
    - True.
    - False.

20. A writ of mandamus can be pursued at any time during the administrative adjudication process, including prior to a final decision from the agency conducting the adjudication hearing.
    - True.
    - False.
In SoCal, the court addressed institutional bias caused by the structure of the government body conducting the adjudication.\textsuperscript{27} The contractor, known as SoCal, argued that bias existed as the result of ongoing litigation between the contractor and the city of San Diego and by the city’s combining investigative, prosecutorial, and adjudicative functions in one agency.

After the San Diego city council’s initial decision to debar SoCal from future city contracts, SoCal petitioned for a writ of administrative mandamus challenging the merits of the debarment and the procedures. While the petition was pending, SoCal filed a multimillion dollar lawsuit against the city. The superior court issued a writ, finding

that the procedure used by the city council did not provide SoCal with sufficient time to prepare its defense and thus denied SoCal administrative due process. The trial court ordered this problem to be rectified and sent the case back to the city council for a rehearing.\textsuperscript{28}

After a second hearing by the city council, SoCal was once again debarred from city contracts. SoCal filed a second petition for writ of administrative mandamus. In one of many arguments, SoCal asserted that the debarment proceedings before the city did not provide a fair and impartial tribunal because the city was the investigator, prosecutor, and adjudicator and was the defendant in SoCal’s lawsuit.

The court of appeal also rejected SoCal’s assertion that both the city and individual council members had a pecuniary conflict of interest that denied SoCal due process. The court’s reasoning blended the well-established “rule of necessity” precludes a claim of bias resulting from the structure of government.\textsuperscript{33}

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The court of appeal was not persuaded by this argument. It found that overlapping investigative, prosecutorial, and adjudicative functions are commonplace in government and do not necessarily deny a fair hearing.\textsuperscript{29} In fact, the structure of state and local governments often provides no reasonable means to avoid a combination of functions.\textsuperscript{30} Indeed, by itself, a combination of functions amounts to only the mere suggestion or appearance of bias.\textsuperscript{31} According to the court, without more concrete facts, a party claiming institutional bias based on overlapping functions has failed to demonstrate actual bias and a denial of due process.\textsuperscript{32} Absent demonstrated actual bias, the well-established “rule of necessity” precludes a claim of bias resulting from the structure of government.\textsuperscript{33}

The court of appeal also rejected SoCal’s assertion that both the city and individual council members had a pecuniary conflict of interest that denied SoCal due process. The court’s reasoning blended evidentiary findings with the rule of necessity. In explaining its rationale, the court stated:

Although the probability of bias can arise from “the pecuniary interest of Board members” (citation omitted), the individual City Council members are not named as defendants in SoCal’s lawsuit, and thus have no personal pecuniary interest in the outcome of that case. Further, any financial impact of the lawsuit against the City is remote, contingent and uncertain, and is thus insufficient to constitute the type of pecuniary interest necessary to disqualify City from participating in debarment proceedings....

Where, as here, an administrative body has a duty to act, and is the only entity capable of acting, the fact that the body may have an interest in the result does not disqualify it from acting. The rule of necessity precludes a claim of bias from the structure of the process. (Citation omitted.)\textsuperscript{34}

Unlike the rule of necessity, however, the APA does not permit a combination of functions. The act specifically provides that the adjudicative function must be separate from the investigatory, prosecutorial, and advocacy functions of the government body.\textsuperscript{35}

Another form of bias specifically addressed by the APA arises from the adjudicator engaging in ex parte communications. The restriction on ex parte communications prevents communications regarding any issue of the adjudication, whether direct or indirect, between the adjudicator and a representative or employee of an agency that is a party to the adjudication. An adjudicator also must not communicate about the proceedings with any interested third parties.\textsuperscript{36} This pro-

Due process only requires the opportunity to conduct depositions of both favorable and adverse witnesses and present the transcripts at the hearing.

The Administrative Hearing

Fundamental due process requirements for the administrative hearing begin with the notification of the administrative action. The governmental agency that has decided to take action against an individual or entity must provide a written notice to the affected party that specifies, with particularity, the action that the agency is contemplating against that party and the information regarding the action that is known by the agency.\textsuperscript{37} The written notice should advise the party regarding the right to an administrative hearing on the action.

According to Government Code Section 11425.10(a)(1), a part of the codification of the APA’s Administrative Adjudication Bill of Rights,\textsuperscript{39} “The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present rebuttal evidence.” The APA Bill of Rights does not specify the contents of the notice,\textsuperscript{40} but Government Code Section 11509, which governs notice for formal hearings, provides greater detail regarding what the notice is required to contain.\textsuperscript{41}

The notice of the hearing date must provide the affected party sufficient time to adequately prepare its response to the agency’s action. Determining what constitutes sufficient time to satisfy due process requirements is a fact-specific process and also depends on whether the party requests additional time.\textsuperscript{42} In SoCal, the court found that three weeks was not sufficient time for the affected party to prepare for the hearing.\textsuperscript{43} SoCal was provided an additional 60 days to prepare for a second hearing, in large part to permit SoCal to conduct depositions of city employees.\textsuperscript{44}

At the hearing, the party affected by the agency’s action is entitled to be represented by counsel and present oral argument, briefs, and other support for its position.\textsuperscript{45} The party also may present the testimony of witnesses.\textsuperscript{46} However, the right to present testimonial
evidence does not include the right to present live testimony at the hearing. Due process only requires the opportunity to conduct depositions of both favorable and adverse witnesses and present the transcripts at the hearing.42

The fundamental right to testimonial evidence also includes the right to cross-examine adverse witnesses.43 This right, however, does not mean that the cross-examination must occur live at the administrative hearing. Due process is satisfied by the opportunity to conduct depositions of adversarial witnesses and submit the deposition transcripts to the administrative entity.43 Thus, the hearing date must be set to allow sufficient time to depose witnesses.

Consistent with the dictates of constitutional due process, the APA identifies the right to present and rebut evidence. It does not provide for the right to present live witnesses, either on direct examination or cross-examination.50

Due process does not require that a party be able to subpoena witnesses in either formal or informal hearings: “[A party’s] inability to subpoena witnesses is not a per se violation of his right to procedural due process.”51 Although due process does not require the availability of subpoenas, state agencies and some local agencies do have subpoena power. Under Chapter 4.5 of the APA, state agencies are expressly granted subpoena power for formal hearings and have the option to avail themselves of that power for informal hearings if they so desire.52 Local agencies, however, only have subpoena power for a hearing if the appropriate city charter or an ordinance grants them that power.53 If a local agency does not have subpoena power, however, there is no per se violation of procedural due process.54

In administrative proceedings, there is no absolute constitutional right to prehearing discovery.55 Each agency will establish the extent and scope of discovery applicable to its proceedings.56 However, discovery rights must be granted if refusing to do so denies parties their due process rights.57 Consistent with due process standards, agencies rely on the balancing test in determining whether parties should be allowed to conduct prehearing discovery and, if so, what methods are available.

Agencies that are governed by APA formal hearing procedures are subject to specific methods of discovery.58 Discovery is available only upon written request from the parties and generally applies to writings regarding the basis and subject matter of the proceedings and witness statements.59

Depositions should not be used for prehearing discovery. Instead, depositions may be taken in lieu of testimony at the hearing if witnesses are unavailable or if live testimony will not be heard at all at the hearing.60 The decision to allow depositions rests with the administrative law judge in formal APA hearings or with the agency in local or informal hearings.61

The adjudicator must provide a written decision to the parties. The decision should state the reasoning behind it and present the evidence relied upon by the adjudicator.62 The decision must be sufficiently detailed so that it informs the parties and reviewing courts of the basis for the decision and the mode of analysis used by the adjudicator63 and allows the affected party to determine whether to seek review by administrative mandamus—and if review is sought, on what grounds.64

**Petitioning for a Writ of Administrative Mandamus**

A party seeking to challenge the decision arising from an administrative adjudication may only do so through a petition for a writ of administrative mandamus under Code of Civil Procedure Section 1094.5.65 The failure to petition for a writ will render the decision of the adjudicator final and binding.66

Before seeking judicial review, however, all administrative remedies must be exhausted to allow the administrative agency a chance to correct its errors.67 Even if the claim is one of denial of due process, a writ cannot be pursued until there has been a final decision from the agency.68

A petition for a writ must be filed within 90 days of the date that the adjudicator’s decision becomes final. The time may be extended by a request for a record within 10 days of the final decision. The writ decision of the adjudicator must notify the affected party of the time period within which to file a writ.69

The reviewing court will apply an independent judgment test to determine whether the administrative process provided the procedural safeguards required by constitutional due process and, if applicable, the APA.70 The decision of the reviewing court must be based on the administrative record along with judicial evidence admitted under Code of Civil Procedure Section 1094.5.

As exemplified in SoCal, the reviewing court’s independent judgment will be grounded upon a consideration of the flexibility permitted by the due process balancing test. The SoCal court succintly set forth its analysis and conclusions:

Having analyzed the private and governmental interest at stake and the nature of the debarment procedures, we conclude that SoCal was afforded due process. [Citation omitted.]

Although the private interest in this case was of considerable importance, it does not command the highest degree of protection. The debarment proceedings are characterized—indeed, the very nature of the proceedings enacts at issue in this case.
case was considerable because of the severe economic impact of debarment...[the City’s interest in dealing with irresponsible contractors and administering its duties with efficiency is substantial. In view of the fiscal and administrative burdens additional procedural safeguards would impose, such safeguards are not warranted...Under the tests set forth in Matthews, SoCal received a fair hearing.]

Even in the face of a significant private interest, agencies have a substantial degree of discretion and flexibility in determining what procedural safeguards are necessary for an administrative adjudication.


7 Id. at 333-35; Brown, 102 Cal. App. 4th at 175; Golden Day Schools, 83 Cal. App. 4th at 708-09; Haas v. County of San Bernardino, 27 Cal. 4th 1017, 1035-36 (2002); SoCal, 108 Cal. App. 4th at 543.

8 Haas, 27 Cal. 4th at 1036 (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 3 (1881)).

9 Haas, 27 Cal. 4th at 1037.

10 GOV’T CODE §§11400-11429.


12 Chapter 4.5 of the APA (Government Code §§11400-11470.5) provides general rules that control administrative adjudications. These rules apply to formal and informal hearings. Chapter 5 (Government Code §§11500-11529) provides detailed hearing procedures that govern formal hearings conducted by the Office.
of Administrative Hearing for certain state agencies.


15 Gov’t Code § 11405.80.


19 Haas, 27 Cal. 4th 1037.

20 Id. at 1025.

21 Id. at 1037 n.22.


23 Haas, 27 Cal. 4th 1017.

24 Id.

25 Id. at 1014.


28 Id.

29 Id. at 549; see Howitt v. Superior Court, 3 Cal. App. 4th 1575 (1995); Applebaum, 104 Cal. App. 3d 648.


36 Gov’t Code § 11430.10.

37 Gov’t Code § 11512; Cooper v. Board of Med. Exam’ts, 49 Cal. App. 3d 931, 945-46 (1975) (no right of voir dire of committee members since §11512 specifically calls for affidavit).

39 GOV’T CODE §§11425.10-11425.60.
40 GOV’T CODE §11425.10(a)(1).
41 GOV’T CODE §11509.
43 SoCal, 108 Cal. App. 4th at 539-42.
44 Id.
46 Stacy & Witbeck, 36 Cal. App. 4th at 539-42.
47 Id.
48 Id. at 546; Burrell, 209 Cal. App. 3d at 577; Brown, 102 Cal. App. 4th at 175; Golden Day Schools, 83 Cal. App. 4th at 706.
49 Stacy & Witbeck, 36 Cal. App. 4th at 1089.
52 GOV’T CODE §§11450 et seq.
53 See, e.g., L.A. ADMIN. CODE, div. 19, ch. 3.1, §19.33 (authorizing subpoena power for all boards created by the Los Angeles City Charter).
55 Id. at 302; Cimarusti v. Superior Court, 79 Cal. App. 4th 799, 808-09 (2000).
56 Mohilef, 51 Cal. App. 4th at 302; Cimarusti, 79 Cal. App. 4th at 808-09.
57 Mohilef, 51 Cal. App. 4th at 302.
58 GOV’T CODE §§11507.5, 11507.6.
59 GOV’T CODE §11507.6.
61 GOV’T CODE §11511.
64 Saleebey, 39 Cal. 3d at 567-68; Topanga Ass’n for a Scenic Cnty. v. County of Los Angeles, 11 Cal. 3d 506, 514-17 (1974); Burrell, 209 Cal. App. 3d at 577.
65 Note that for local agencies, judicial review is available pursuant to Code of Civil Procedure Section 1094.5, provided the writ of mandamus is filed within the time specified in Section 1094.6.
66 CODE CIV. PROC. §§1094.5, 1094.6.
67 Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 301-02 (1941); Sierra Club v. San Joaquin Local Agency Formation Comm’n, 21 Cal. 4th 489, 496 (1999).
69 CODE CIV. PROC. §1094.6(b), (d), & (f).
70 See Haas v. County of San Bernardino, 27 Cal. 4th 1017 (2002); CODE CIV. PROC. §1094.5(c).
Law Firm War Rooms

WITHOUT TECHNOLOGY, a law firm’s war room is just a room. The technologies that support war rooms are electronic data discovery, relational databases, and optical character recognition (OCR). Combining electronic discovery with relational database technologies can provide a legal team with access to facts that the other side does not know about or thinks are buried or destroyed. In a war room arms race, the side with better information can focus on the right areas and ultimately have the better legal arguments.

Imagine a sexual harassment case in which hundreds of thousands of pages of documentation are produced for discovery. Without a database in which the data has been properly entered and structured, it is extremely unlikely that a legal team will be able to find all the references to a party in that documentation. For example, what if a party’s name is Robert, and all the documents the legal team finds show Robert as a good guy, but the plaintiff’s counsel uses a relational database search engine to connect the word “Bob” written by hand on a memo and a dinner date on the same date as that of the memo, and that connection leads researchers toward the information that Bob—despite his testimony to the contrary—saw the plaintiff after hours? The counsel for the plaintiff can begin planning legal arguments around this discrepancy while defense counsel remain ignorant of its existence.

The heart of a war room is its database, and it is not enough merely to store all the information about a case in a database. Firms sometimes make the mistake of using spreadsheet programs to construct databases. Spreadsheet databases, however, do not allow for interrelationships among tables to be explored.

The relationship among different fields (for example, the parts of a record—first name, date, and the like) is the key to a worthwhile database. A relational database is made of tables that look like spreadsheets. An unlimited number of tables is possible. A database can classify documents by standard office terms, such as correspondence, e-mail, fax, date, to, from, and re. It also can classify documents by department, medium, access by cocounsel, or access by opposing counsel. In short, one simple memo can generate a large number of fields to help classify the document in various ways.

What a Database Can Do

In litigation, for example, fields in various tables may be used for cross-referencing time, names of deponents, names of companies, and names of products. A table can be created to classify documents by plaintiff, defendant, date, author, recipient, type, and various other categories. The field classifying the document’s type can link the table to another that tracks whether each document is correspondence, e-mail, or some other category.

Deposition transcripts can be added to the war room depository and cross-referenced by fact, witness, time, legal issue, and so on. Each legal issue can be included as a field in a table so that issues can be cross-referenced to dates, names, and other categories. Exhibits too are placed into another table and the relational links (i.e., the cross-referencing) created to tie exhibits to every other part of the database.

The power of a well-made relational database is amazing. It allows the attorney to ponder any combination of information in a case. Simple queries can provide links to information so deeply buried that it could not be found otherwise. With the right database, times, dates, names, departments, types of documents, and legal issues can all be interconnected and interrelated. When an attorney asks a database to show every mention of Bob’s name between 1999 and 2000, excluding mentions of Barbara, the information is retrieved instantly. These searches provide hints that can expand or narrow a line of inquiry. Once an exhibit, statement, or fact is found that conflicts, supports, or suggests anything else in the database, a whole new legal argument can become apparent. This argument would not be so apparent, however, if the database did not exist or were not properly configured.

War Room Personnel

To take advantage of database technology, lawyers will need the help of computer specialists. A law firm’s network administrator, for example, keeps the network running, data backed up, and security tight. Data discovery, however, is something that most network administrators know about only in theory rather than through experience.
Experience, so a programmer or technician with law firm experience may play a vital role in a well-functioning war room.

Similarly, with few exceptions, lawyers should refrain from managing the technology in a war room. They will make technical mistakes that will negate their good intentions. One area in which the technicians and attorneys may best work together, however, is electronic discovery. Today, nearly all documents and records pertinent to a suit are found on hard drives, in e-mail, and in other types of electronic storage, and it can take investigative as well as technical sophistication to recover and organize this data. Firms that do not properly subpoena electronic media or do not have the ability to discover or sort through electronic data should not expect opposing counsel to face the same predicament.

Despite the prevalence of electronic media, some documents are still made or edited by hand or typewritten. Although OCR is not a perfect technology, scanning handwritten documents or pictures and indexing them into the relational database creates digital images of the items and makes them available for searches. Indexing is accomplished by entering information about a scanned item—for example, by filling out fields such as to, from, date, and re.

Another advantage to creating a war room database is that it can improve with age. Search requests, legal research, and the documents produced for court can all be recorded and become part of the firm’s knowledge base. This is overwhelmingly valuable for younger attorneys who become involved in similar litigation.

The computers and software used in a war room are typically variants of technology that is already deployed at a law firm. Still, a war room represents a significant investment. But no matter what return-on-investment equation is used to justify the expense of a war room, the fact that a war room can win a major case is enough to justify the investment.

All forms of law office technology intersect in the war room. The combination of technologies (or, in other terms, the conservation of resources) is the key to establishing and maintaining the knowledge a firm gathers. As such, it is difficult to recommend which hardware and software is best for a war room, since a recommendation depends on the overall technology focus of the firm and the current systems being used. However, no war room can exist without the right technology for sorting electronically discovered data and placing this data into a searchable relational database. A war room is a must for a big case, and the lack of one can be the cause of a defeat.
Classifieds

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Los Angeles, California — "At the Attorney Website Bootcamp, we teach attorneys how to make their websites efficient, cost-effective machines that literally reach out to clients and the press," says legal marketing and web communications expert Suuzen Ty Anderson, Esq. "My co-presenter and I cover everything attorneys need to know to make their website an internet powerhouse: how to organize, write, and select design for maximum effect. How to put the website at the top of the search engines without paying per click. How to increase their site's impact by adding audio recorded on the telephone. Plus legal website ethics, privacy, and other essential laws.”

And that’s only to start, says Anderson, who has been creating, promoting, and managing successful attorney websites since the early days of the web. "We cover low-cost, easily accomplished techniques that are a mystery to most attorneys - how to set up and run a discussion forum for client categories or referral sources; how to sell your legal forms from an online shopping cart; how to create and run an easy e-mail newsletter. The seminar includes an 80-page manual stuffed with my personal forms, guides, and checklists for attorney websites."

The Attorney Website Bootcamp will be taught in Los Angeles on January 15, 2005; the cost is $399 for the entire day. An application for 6 hours of MCLE is pending. Information and reservations can be obtained online at www.LawMarkets.com or by calling, toll free, (888) 700-8800.

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CLE Preview

37th Annual Securities Regulation Seminar

ON FRIDAY, OCTOBER 15, the Business and Corporations Law Section will present its 37th Annual Securities Regulation Seminar, covering recent developments in securities laws, including federal and state securities laws, NASD corporate governance, and other initiatives. Speakers representing a broad range of experience and expertise will lead general and breakout discussion sessions covering such topics as: representing public companies, criminal aspects of securities fraud investigations, mergers and acquisitions, trends in equity and debt financing, securities litigation update, corporate governance, enforcement developments, and ethics and the securities lawyer. The seminar will take place at the Biltmore Hotel, 506 South Grand Avenue, Downtown. On-site registration will begin at 8 A.M., with opening remarks scheduled for 9, and the program will continue (with breaks) until 5 P.M. The registration code number is 008680.

$225—CLE+Plus members
$275—Business and Corporations Law Section members
$325—LACBA members
$375—all others
$395—all at-the-door registrants
6.75 CLE hours, including 1 ethics hour

IDENTITY THEFT

ON WEDNESDAY, OCTOBER 20, the Commercial Law Section will present a program covering what every lawyer should know about identity theft, including prevention and dealing with an actual theft. Speakers Douglas M. Haigh and Sandy Klein will provide up-to-date information in this evolving area, including the prospects for criminal prosecution. A fascinating recent criminal case will be discussed. Attend this program for your clients and for yourself. The program will take place at the LACBA/Lexis Publishing Conference Center, 281 South Figueroa Street, Downtown. On-site registration, along with the meal and reception, will begin at 11:45 A.M., with the program continuing from 12:30 to 1:30 P.M. The registration code number is 008646. CLE+Plus members may attend for free (meal not included). The prices below include the meal.

$55—Commercial Law Section members
$65—LACBA members
$80—all others
1 CLE hour

Ethics and Persuasion

ON WEDNESDAY, OCTOBER 13, the Business and Corporations Law Section will present a program titled “Ethics and Persuasion: Why Ethics Is Essential to Persuasion.” In this program, speaker Sidney K. Kanazawa will discuss why lawyers have become fodder for jokes, the impact of this change on lawyer effectiveness, and how ethical principles can improve a lawyer’s persuasiveness and ability to resolve conflicts. The program will take place at the LACBA/Lexis Publishing Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 008712. CLE+Plus members can attend for free ($15 meal not included). The prices below include the meal.

$25—Business and Corporations Law Section and Barristers Section members
$30—LACBA members
$40—all others, including at-the-door payments
1 CLE ethics hour

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org. For a full listing of this month’s Association programs, please consult the County Bar Update.
Blakely’s Promise for Federal Sentencing Reform

The U.S. Supreme Court’s ruling in Blakely will likely result in the return of significant sentencing discretion to federal district judges.

The U.S. Supreme Court left the federal criminal justice system in disarray following its decision at the end of the 2003-04 term in Blakely v. Washington. A positive development, however, may emerge from the chaos. Congress finally may be forced to remedy the most objectionable feature of the U.S. Sentencing Guidelines, which are used to sentence nearly 75,000 federal criminal defendants every year.

The legal principle the Court relied on in Blakely to strike down aspects of the state of Washington’s sentencing guidelines sounds simple enough: The Sixth Amendment guarantees criminal defendants the right to have a jury determine every contested fact used as a basis for increasing the maximum sentence that may be imposed. That principle was not in any sense new—indeed, the Court had announced it four years earlier—but the context in which the Court applied it in Blakely certainly was. For the first time, the Court held that the maximum sentence is not just the statutory maximum for the crime in question but also the maximum permitted under sentencing guidelines, if those guidelines are actually binding on the court.

The Court’s logic is hard to deny. If additional facts necessary to increase the statutory maximum must be found by a jury, why should the rule be any different with respect to facts necessary to increase the applicable range under sentencing guidelines when that range acts as an effective cap on punishment in an individual case? In jurisdictions operating under sentencing-guidelines regimes in which the prescribed sentencing range may not be exceeded except on pain of reversal, the guidelines are masquerading as de facto statutory maximums that dictate the maximum sentence that may be imposed on a particular defendant. In that sense, the guidelines carry the force of law no less than the statutory maximums established for specific crimes. The Court quite reasonably concluded that if sentencing guidelines bind judges in this fashion, the guidelines should be subject to the same constitutional rule as the statutory maximums.

It is precisely this aspect of the U.S. Sentencing Guidelines—the fact that they are guidelines in name only and in reality dictate the permissible sentences that may be imposed—that has long generated the most heated criticism from federal district judges and others. From the time the federal guidelines were first implemented in 1987, critics of the guidelines have complained that they strip district judges of one of their most important functions: exercising independent judgment regarding the appropriate punishment to impose based on the unique set of facts and circumstances before them. Under the federal guidelines, particularly as the nature of the sentencing calculations they require has grown increasingly complex, district judges have been better served at sentencing by wielding a calculator than by a nuanced understanding of the appropriate balance between deterrence and retribution called for by the facts of a case.

Ironically, although Blakely is fundamentally about vindicating a defendant’s right to trial by jury, the Court’s ruling will likely result in the return of significant sentencing discretion to federal district judges. If the Supreme Court holds this fall that Blakely applies to the U.S. Sentencing Guidelines, as is widely expected, Congress will be left with few attractive options other than abolishing the very feature of the guidelines that made them so objectionable in the first place.

Simply leaving the current federal sentencing-guidelines regime intact will not be a workable solution, given the sheer number of additional factors that must be found at sentencing under the guidelines in order to calculate the appropriate sentence. Under Blakely, each of those factors would have to be charged in the indictment and found by a jury beyond a reasonable doubt through the use of special interrogatories, often in the context of a bifurcated sentencing proceeding. Whether intelligible jury instructions could ever be drafted for most of the existing enhancements is an open question. Many of the guidelines are so convoluted that they are difficult enough for lawyers and judges to apply. Requiring juries to make the requisite findings would prove unworkable in practice.

Instead, the most sensible course Congress can take is to make the guidelines voluntary, providing judges with useful benchmarks to guide their discretion rather than rigid formulas that amount to a judicial straitjacket. The Court suggested this course in Blakely and made clear that there is nothing constitutionally suspect about sentencing regimes in which judges are given wide discretion to impose sentences within a range of potential penalties, even if the sentences imposed are based on facts found only by the judge rather than by a jury. The Sixth Amendment’s right to a trial by jury is implicated, the Court declared, only when a judge is required to impose a higher sentence through additional factual findings that go beyond those found in the jury’s verdict or the defendant’s guilty plea.

So long as the judge has the authority to impose a higher sentence without being compelled to make any particular factual finding, the Blakely jury-trial requirement for fact-finding in sentencing decisions never comes into play. Thus, by eliminating the binding nature of the federal guidelines, Congress can avoid the problems posed by Blakely and at the same time restore to district judges some of the sentencing authority they should rightfully possess.

Paul J. Watford is a partner at Munger, Tolles & Olson LLP, where he specializes in appellate litigation. From 1995 to 1996, he served as a law clerk to U.S. Supreme Court Justice Ruth Bader Ginsburg.
Dean Neil H. Cogan and the Faculty Are Pleased to Announce the Following Appointments:

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**Kenneth D. Agran**

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- J.D., Harvard Law School, *magna cum laude*
- Board of Editors, *Harvard Law Review*
- Lecturer in Political Science, University of California, Irvine
- Attorney at Law, Private Practice


**Visiting Assistant Professor of Law**

**Matthew J. Parlow**

- B.A., Loyola Marymount University, *magna cum laude*
- J.D., Yale Law School
- Law Clerk, Honorable Pamela Ann Rymer, United States Court of Appeals, 9th Circuit
- Associate, Manatt, Phelps & Phillips, LLP, Los Angeles


**Assistant Professor of Law**

**Radha A. Pathak**

- B.A., University of California, Berkeley, *with honors*
- J.D., New York University School of Law, *cum laude*
- Notes Development Editor, *New York University Law Review*
- Law Clerk, Honorable Raymond C. Fisher, United States Court of Appeals, 9th Circuit
- Associate, Quinn Emanuel Urquhart Oliver & Hedges, LLP
- Associate and Of Counsel, Willenken Wilson Loh & Stris, LLP

**Director, Center for Intellectual Property Law and Assistant Professor of Law**

**Elizabeth I. Winston**

- S.B., Massachusetts Institute of Technology
- J.D., University of Virginia
- Managing Editor, *The Journal of Law and Politics*
- Law Clerk, Honorable James T. Turner, United States Court of Federal Claims
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