Class Wars

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Each year we dedicate many pages of Los Angeles Lawyer magazine to the business of the practice of law. This month, two articles address important issues that are related to this complicated and essential subject.

One of the hardest things for a lawyer to swallow is a claim that he or she committed malpractice because the result the lawyer obtained, although favorable to the client, was not good enough. That is exactly what happened last year in a class action lawsuit in which the plaintiffs’ counsel obtained a $90 million judgment for their clients. In this month’s cover story, Brad W. Seiling explores the California Court of Appeal’s decision in Janik v. Rudy, Axelrod & Zieff, in which the appellate court reversed the sustaining of a demurrer and held that a complaint properly states a cause of action for professional negligence when an attorney fails to consider and assert additional claims that could have increased the recovery in an underlying case.

Although in the Janik case the malpractice claim was asserted by parties who were not, but wanted to be, included as members of the class and therefore as clients of the attorneys who litigated the class action on behalf of the class, it is not difficult to apply the court of appeal’s rationale to many other factual scenarios. Indeed, by holding that nonclients may assert a claim for malpractice on the grounds that an attorney failed to consider or pursue claims that may have resulted in a benefit for the nonclients, arguably the appellate court has created an expanded duty for lawyers that is extremely broad in its scope. The question now is whether courts will limit the Janik decision to its specific facts or apply it expansively to other scenarios outside the realm of class actions. Whatever occurs in the future, one of the lessons that should be taken from the Janik case is that even a good result may not satisfy a lawyer’s professional obligations to his or her client.

Punitive damages awards have been under attack on many fronts. The clamor for “tort reform” usually includes a desire to restrict severely the availability of punitive damages for plaintiffs. In 2003, the U.S. Supreme Court held in State Farm Mutual Automobile Insurance Company v. Campbell that in most cases a punitive damages award that exceeds compensatory damages by more than 10 times is unconstitutional. In August 2004, the California Legislature enacted Civil Code Section 3294.5, which requires that 75 percent of all punitive damages awards be paid to the state of California. The state must hold 25 percent of its portion of an award to compensate the plaintiff’s attorney.

In their article, James J. Farrell and Jeremy G. Suiter analyze the application and ramifications of Section 3294.5. They explain that the statute explicitly applies only to judgments and not settlements. In addition, the statute is limited to cases that were filed after August 16, 2004, and that are finally adjudicated (including all appeals) before July 1, 2006. As a result of its short life span, the statute may not result in the receipt of any money by the state. However, the California Legislature may elect to extend the sunset provision of the statute. If that occurs, and Section 3294.5 is effective for several more years, its effect will be significant for lawyers and their clients.

At the very least, the statute does create interesting wrinkles for cases filed after August 16, 2004. Indeed, the statute affects the analysis a lawyer undertakes in making a business decision even to accept a case that includes a potential for the recovery of punitive damages.

What does not need to be analyzed is that the business of the practice of law continues to become more complex. In the future, we at the magazine will do our best to help explain the changes.

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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THE STATEMENT OF DISQUALIFICATION under Code of Civil Procedure Section 170.3(c) is used “when a judge who should disqualify himself or herself refuses or fails to do so.” Described as “outside the usual law and motion…rules,” the section is the basis for a unique procedure for disqualification. Every attorney in criminal or civil trial practice should have a basic understanding of judicial disqualification’s numerous grounds and unique procedure. Lawyers may inquire on the record in order to elicit facts that can generate a recusal or offer grounds for or against proceeding under the section. Disqualification issues arise whenever the facts that support them do. Disqualification is proper even after an adverse summary judgment has been granted.

Code of Civil Procedure Section 170.1 sets grounds for disqualification under eight subsections. Seven of these refer to objective criteria—for example, whether the judge has a financial interest in the case as defined by statute. However, Section 170.1(a)(6) includes more subjective language: “[A] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.”

Regardless of which subsection applies, the grounds for disqualification and their definitions require close reading—and sometimes a passion for genealogy. Different relationships matter for different grounds for disqualification. Under Section 170.1(a)(1), for example, a judge shall be deemed to have “personal knowledge of disputed evidentiary facts concerning the proceeding” and thus be disqualified if a material witness is the judge’s spouse, is related to the judge or the judge’s spouse within the third degree (e.g., a niece or nephew), or is married to a third-degree relative.

In contrast, Section 170.1(a)(5) does not automatically disqualify a judge if a lawyer in the case is the spouse of a third-degree relative. On the other hand, subsection (a)(5) automatically disqualifies a judge when a lawyer is in practice with a sibling-in-law of the judge. Furthermore, if none of these specifics correspond with the case at hand, the provisions of 170.1(a)(6) may apply.

Important facts often arise during an attorney’s initial research on a trial judge, so composing a checklist for issue spotting and fact gathering can be helpful. Newer judges are covered by more subsections of Section 170.1 than longtime bench officers, but the prior recusals of more experienced judges may be available online to savvy researchers.

Whatever subsection may apply, the grounds for disqualification and their definitions require close reading—and sometimes a passion for genealogy. Different relationships matter for different grounds for disqualification. The statement “shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.”6 If investigation and confirmation of preliminary facts take time, the statement should clearly show compliance with the timing requirement. Successive statements of disqualification are restricted to newly discovered grounds.

Service of the Statement
A copy of the statement of disqualification “shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers.”8 The server and the court clerk need to understand that the judge is being served, not merely receiving a courtesy copy. For this reason, the server should receive detailed instructions from the attorney on effecting the service and a number to call if any problems arise. For example, a temporary court clerk may refuse the statement or direct the server to the filing window. Calling the courtroom clerk in advance helps smooth the process, confirming the clerk’s understanding of the process and the judge’s presence for service. The server should confirm the judge’s presence and record the clerk’s name.

The judge who is served with a statement of disqualification has 10 days to act. The judge may 1) strike an untimely or legally insuf-
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ficient statement, 2) consent to or deny the statement by filing a written verified answer admitting or denying any or all of the allegations in the statement and setting forth additional facts, or 3) pass the case on to a judge agreed upon by the parties. Inaction is deemed consent to disqualification.9

If the judge and court counsel file a written verified answer, the issue must be decided by another judge. Generally, a Section 170.3 issue that arises in Los Angeles Superior Court is decided by an Orange County Superior Court judge. Attorneys should know that Section 170.4 limits the actions of a challenged judge and that the underlying action may be stayed.

The judge who is assigned a Section 170.3 issue may decide the disqualification on the statement, answer, “and such written arguments as the judge requests, or the judge may set the matter for hearing as promptly as practicable.”10 If the hearing is held, the parties and challenged judge may argue the issues and the court “shall...hear evidence on any disputed issue of fact.” No challenge is permitted against the assigned judge, although a recusal by the assigned judge is possible.

A polite call to court staff may reveal the assigned court’s policies, if any, on argument, evidence, and hearings. For example, it is the policy of one Orange County court that frequently hears disqualifications not to set hearings but to allow argument and evidence to be submitted without leave of court. This Orange County court also reserves the option of disregarding material it deems irrelevant. All filings on the disqualification are made in the courtroom in Orange County. The assigned court’s decision on disqualification may be reviewed only by writ of mandate within 10 days’ notice of the decision.11

At the beginning of a case and as it develops, an attorney’s due diligence may uncover a judge’s family or professional ties to a party involved in a case or simply create a reasonable doubt regarding whether the judge can be impartial. Therefore, an attorney may need to effect the filing of a statement of disqualification.

2 Id. at 421-22.
3 See Johnston v. Brown, 115 Cal. 694 (1897) and CODE CIV. PROC. §170.1(a)(6).
4 CODE CIV. PROC. §170.1(a)(2); Urias, 234 Cal. App. 3d 415.
6 CODE CIV. PROC. §170.3(c)(1).
7 CODE CIV. PROC. §170.4(c)(1).
8 CODE CIV. PROC. §170.3(c)(1).
9 CODE CIV. PROC. §170.4(b).
10 CODE CIV. PROC. §170.3(c)(5).
11 CODE CIV. PROC. §170.3(d).
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TAXATION WITHOUT REPRESENTATION led to a revolution in this country almost 230 years ago. But taxation by litigation in California has gone virtually unnoticed for the past several months. On August 16, 2004, with little public attention, the state enacted new Civil Code Section 3294.5, which mandates that 75 percent of punitive damages awards in California be paid into the state’s coffers.

At first glance, this revolutionary new law seems to be consistent with the growing belief that massive punitive damages awards—which inherently exceed actual damages—give plaintiffs an unwarranted windfall. But the plaintiffs’ bar supports Section 3294.5—no doubt because its members will receive a guaranteed share of punitive damages awards that nearly equals their clients’ share, in addition to their other fees. The new law may also result in larger punitive damage verdicts if juries learn that the state will receive most of the award. Conversely, because the 75 percent “tax” applies only to final judgments, Section 3294.5 gives defendants facing punitive damages substantially increased settlement leverage. By settling and eliminating the state’s payment, a defendant could pay the plaintiff his or her anticipated 25 percent portion, plus a portion of the 75 percent that would have otherwise gone to the state, and keep the remainder of the 75 percent.

These conflicting results are not surprising because Section 3294.5 was not intended to reform the court system. Rather, its sole objective is to generate revenue—as much as $450 million—for cash-starved California. Indeed, in the language of the statute, the legislature notes that “extraordinary and dire budgetary needs have forced the enactment of this extraordinary measure to allocate temporarily for the state’s Public Benefit Trust Fund a substantial portion of any punitive damages paid from a judgment during the limited time period specified in the statute.”

However, it is unclear whether California will ever collect a dime under the new law. Section 3294.5 applies only to cases filed after August 16, 2004, and “finally adjudicated”—including the resolution of all appeals—before July 1, 2006. Only a limited number of punitive damages cases may be resolved within that narrow 22-month window. Moreover, Section 3294.5 may generate more legal fees than state revenues, because it could be subject to several constitutional challenges. Plaintiffs will lose most of their punitive damages award under the new law, so they may argue that the statute constitutes an unlawful taking or violates equal protection. Defendants may face higher punitive damages verdicts as a result of the new law, so they may challenge the statute on due process grounds. But no matter how much revenue Section 3294.5 ultimately generates, every California litigator should understand this important new law and its strategic implications, which will affect every case seeking punitive damages filed in California this year.

Section 3294.5 provides a procedure for the allocation of all punitive damages that are awarded in a final judgment. The defendant pays the state’s 75 percent portion of the award to the director of the Department of Finance for deposit into the newly created Public Benefit Trust Fund. The state must hold 25 percent of the fund to compensate the plaintiff’s attorney, and the state may use the remainder of its portion for any purpose that is “consiste[nt] with the nature of the award.” The plaintiff’s attorney is entitled to receive the 25 percent of the state’s portion on July 1 of the next fiscal year.

This statutory contingency fee is deemed to be the plaintiff’s attorney’s income for state and local taxation purposes and does not preclude any other fees negotiated with the plaintiff. After paying the state’s 75 percent share, the defendant must notify the plaintiff’s counsel of the amount of that payment and pay the 25 percent remainder of the punitive damages award to the plaintiff through his or her counsel.

Section 3294.5 contains three procedural safeguards. First, to prevent the state from taking advantage of the law, California may not be a party in interest to, intervene in, or participate as amicus curiae in “any action in which [the state’s] sole interest is the potential recovery of a portion of a punitive damages award.” Second, to avoid judicial bias, the money deposited into the Public Benefit Trust Fund may not be appropriated to “the courts or judicial programs.” Third, to minimize juror misconduct, the jury may not be told that a portion of a punitive damages award would go to the state; however, a juror’s independent knowledge of this fact will not disqualify the juror.

Assessing the Impact of the New Law on Punitive Damages

James J. Farrell is a partner and Jeremy G. Suiter is an associate in the Los Angeles office of Latham & Watkins LLP, where they both specialize in securities and professional liability litigation.
that juror or otherwise provide a basis to set aside the jury’s punitive damages award.10 By its own terms, Section 3294.5 has a narrow window of applicability. The statute applies only to actions that are filed on or after August 16, 2004, and are “finally adjudicated” before July 1, 2006.11 The term “finally adjudicated” means truly final, and includes “the resolution of all mandatory or discretionary appeals, the resolution of any motion for attorney’s fees on appeal and any appeals therefrom, and the issue of final remittitur.”12 This short 22-month time period means that the new law may have little impact. Large punitive damages cases can take more than 22 months just to get to trial and can last even longer if the defendant exercises its right to bifurcate the liability and damages phases.13 The median time to conclude an appeal would be another 16 months.14 Thus, it is unlikely that a large case will be “finally adjudicated” before the July 1, 2006, sunset deadline. Even relatively smaller punitive damages cases may elude the statute’s grasp through continuances or other procedural delays.

Of course, the legislature may extend the limited life of Section 3294.5, bringing more cases within its scope. The legislature stated that this new law “shall not be construed to establish any policy, precedent, presumption, or inference in any case or any other setting, including future legislatures, regarding the award of punitive damages [or] its allocation.”15 Nevertheless, if Section 3294.5 successfully generates revenue, it could become a permanent addition to the Civil Code. California’s budget woes may make this potential revenue source too tempting to relinquish.

Settlements and Conflict of Interest

Because Section 3294.5 applies only to punitive damages that are “awarded pursuant to a final judgment,”16 parties may wish to enter into a settlement agreement prior to the entry of final judgment. This approach could benefit both sides, particularly in cases in which punitive damages have already been awarded in a verdict. The settlement could be structured so that the defendant would pay, and the plaintiff would receive, an amount that is greater than the 25 percent share that the plaintiff would receive under the statute but is less than the total amount of punitive damages that the defendant would have to pay under the judgment.

Consider, for example, a verdict for $1 million in punitive damages. As a purely economic matter, both the plaintiff and the defendant would prefer a settlement that requires the defendant to pay $300,000 (30 percent) to the plaintiff, rather than a judgment subject to the statute, under which the defendant would pay $300,000 (30 percent) of the plaintiff’s verdict. 

In Section 3294.5, the plaintiff’s attorney, on the other hand, has an incentive not to settle because the attorney’s recovery could be far greater if the statute, and its 25 percent statutory contingency fee, is applied. In the scenario of the $1 million punitive damages award, consider the consequences if the plaintiff’s attorney charged a contractual contingency fee of 40 percent. If Section 3294.5 is applied to that award, the attorney may be entitled to both 25 percent of the state’s portion and 40 percent of the plaintiff’s portion of the punitive damages award. This means that the attorney would receive $287,500,18 and the plaintiff would receive $150,000,19 while the state would receive $562,500.20 But if the parties settle the punitive damages component for $300,000, thereby eliminating California’s portion and the 25 percent statutory contingency fee, the attorney would receive just $120,000,21 and the plaintiff would receive $180,000.22 That settlement would increase the plaintiff’s recovery by $30,000 but cost his or her counsel $167,500. As a result, a leading legal institute has concluded that “allowing the plaintiff’s attorney some contingent share of the state’s award creates a potential conflict with the interests of the plaintiff.”23 These competing financial motivations of plaintiffs and their counsel may create a new ethical dilemma.

Legal Challenges

Similar punitive damages apportionment statutes in other states have been challenged on various legal grounds. One of the most common attacks by plaintiffs is that apportioning punitive damages to the state violates the takings clause of the U.S. Constitution or an equivalent provision of a state constitution. The takings clause prohibits the government from taking private property for public use without providing just compensation.24 Because property rights protected by the takings clause are created by state law,25 these challenges have generally been rejected on the ground that a plaintiff has no property right in a punitive damages award if a state statute assigns a portion of that award to the state.27 As the Indiana Supreme Court explained in a decision upholding an Indiana statute apportioning punitive damages to the state:

[...] any interest the plaintiff has in a punitive damages award if a state acquires an interest in the award. Further, the California Supreme Court has observed that the legislature lacks the authority “to take away rights which have been once vested by a judgment.”29 Nevertheless, the legislature could easily remedy any constitutional infirmity that exists in Section 3294.5 by amending the statute to clarify that the plaintiff does not acquire a property right in the state’s portion of the punitive damages award, or that the state has an interest in the punitive damages award upon entry of the verdict. Both provisions have passed constitutional muster in other cases.30

Plaintiffs have also challenged punitive damages apportionment statutes under the excessive fines clause of the U.S. Constitution.31 In Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., the U.S. Supreme Court observed that the excessive fines clause applies “primarily, and perhaps exclusively, to criminal prosecutions
and punishments.” Accordingly, the Court held that the clause “does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”

Seizing on this qualification in Bennett-Ferris, one federal district court has held that Georgia’s punitive damages apportionment statute violated the excessive fines clause because it required the plaintiff to deposit a portion of his punitive damages award into the state treasury. But other state and federal courts have rejected similar challenges, holding that the statutes in question did not violate the excessive fines clause because the state 1) could not intervene in private litigation and thus had no prosecutorial power, and 2) did not control the amount of punitive damages sought or awarded and thus had no interest in the award until it is made. Some courts also drew a distinction for those statutes directing that the award must be deposited into a state fund with a specified purpose, rather than the state’s all-purpose general treasury. Given that Section 3294.5 similarly prohibits California from intervening in private litigation seeking punitive damages and requires that the state’s portion of any punitive damages award be deposited into a specified fund, a constitutional challenge based on the excessive fines clause may be difficult.

A third challenge by plaintiffs is that punitive damages apportionment statutes violate equal protection requirements. The equal protection clause of the U.S. Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” This “provision creates no substantive rights,” but instead “embodies a general rule that States must treat like cases alike but may treat unlike cases accord-ingly.”

Many courts have rebuffed equal protection challenges to statutes similar to Section 3294.5. For example, the Missouri Supreme Court rejected the argument that Missouri’s apportionment statute, which applies only to final judgments, violated the equal protection clause because it discriminated against plaintiffs who do not settle. As the court explained, there were several possible “legitimate reasons for the legislature to distinguish between punitive damages awarded by court judgment and punitive damages recovered through settlement,” including the desire to encourage settlement, and the fact that it would be easier for the state to collect its portion of punitive damages that are awarded in a final judgment rather than in a settlement. Similarly, the Georgia Supreme Court rejected the argument that Georgia’s apportionment law violated equal protection principles because it applies only to punitive damages awarded in product liability actions. As the supreme court explained, “[T]he trial court was correct in its finding that the statute treats plaintiffs in various tort actions differently. However, all similarly situated plaintiffs and defendants, including those in product liability actions, are treated equally by the statute.” In light of these consistent judicial rejections of equal protection arguments offered by plaintiffs, it is unlikely that Section 3294.5 violates the equal protection clause.

But plaintiffs may not be the only parties who challenge Section 3294.5. Defendants also may challenge the statute on due process grounds. With respect to punitive damages, the due process clause of the U.S. Constitution prohibits the imposition of grossly excessive or arbitrary awards. In determining whether a punitive damages award is excessive or arbitrary under the due process clause, courts must consider three factors articulated in BMW of North America, Inc. v. Gore and reaffirmed in State Farm Mutual Automobile Insurance Company v. Campbell: 1) The reprehensibility of the defendant’s misconduct, 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and 3) the difference between the punitive damages award and the civil penalties authorized or imposed in similar cases.

If the jury was influenced by other arbitrary factors, such as prejudice or bias, then its punitive damages award violates due process.

Ostensibly to prevent an arbitrary award, Section 3294.5 prohibits a jury from being “informed that any portion of a punitive damages award will be paid to a government fund.” This prohibition is consistent with appellate court decisions from other jurisdictions holding that it is reversible error to inform a jury by way of jury instructions, verdict forms, or closing arguments that the state will receive part of any punitive damages award pursuant to an apportionment statute. As one of those courts explained, any knowledge of the potential apportionment can encourage the jury to 1) “award punitive damages for an improper reason—to enhance a state’s account,” and 2) “deliberate on the plaintiff’s share of punitive damages and add [an] additional amount to compensate for the portion distributed to [the state].” However, an exception contained in Section 3294.5 threatens to undermine its caution— and constitutional—approach. The exception provides that a juror’s independent knowledge that a portion of a punitive damages award goes to the state will not provide a basis to disqualify that juror or set aside the jury’s punitive damages award. Thus, the statute acknowledges the risk of improper influence created by the knowledge that the state will take 75 percent of a punitive damages award but prohibits the dismissal of a juror who has that knowledge— as long as it was gained before the trial. The possibility of independent knowledge will likely increase over time, particularly if the legislature extends the life of Section 3294.5, and the apportionment process is delineated and discussed in news reports about punitive damages verdicts in California. As a result, defendants who already face a median punitive damages verdict in California that is three to six times higher than the national average may soon see punitive damages verdicts increase if juries attempt to increase their awards to provide more money to the state or to offset the plaintiff’s share that is lost to the state.

Recent court decisions reflect a growing national trend to reduce the perceived windfall that plaintiffs receive from large punitive damages awards. Section 3294.5 may be the next step in that trend, although it was enacted simply to generate revenue for California. Regardless of how much revenue it generates, every practitioner should be familiar with this important new law because of its potential impact on litigating punitive damages cases, including settlement strategy, conflicts of interest, and the amount and frequency of punitive damages awards.

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2 CIV. CODE §3294.5(a).
3 CIV. CODE §3294.5(c)(1).
4 CIV. CODE §3294.5(b)(1). The statute does not explain what this quoted phrase means.
5 CIV. CODE §3294.5(d).
6 CIV. CODE §3294.5(f). The U.S. Supreme Court recently held that for federal taxation purposes, the portion of a verdict or settlement paid to the plaintiff’s attorney pursuant to a contingency fee agreement is the income of the plaintiff and not the attorney. Comm’r of Internal Revenue v. Banks, __ U.S. ___, 2005 WL 123825 (Jan. 24, 2005).
7 CIV. CODE §3294.5(c)(2), (c)(3).
8 CIV. CODE §3294.5(e).
9 CIV. CODE §3294.5(b)(1).
10 CIV. CODE §3294.5(g).
11 CIV. CODE §3294.5(b) & (i).
12 CIV. CODE §3294.5(b).
13 CIV. CODE §3294(d).
15 CIV. CODE §3294.5(a).
16 CIV. CODE §3294.5(b).
17 Rather than settle for a smaller portion, however, some plaintiffs may try to recover their entire punitive damages award by filing their action in federal court. If §3294.5 is “procedural” rather than “substantive”
for purposes of the *Erie* doctrine, then federal courts need not apply the statute, and California will have no right to share in the punitive damages award. See generally *Sneed v. Metropolitan Prop. & Cas. Ins. Co.*, 237 F. 3d 1080, 1090 (9th Cir. 2001). In fact, California is barred from appearing in any action for the sole purpose of collecting such an award. See 18 CIV. CODE §3294(e); see also *Finley v. Empreagas*, Inc. of Potosi, 28 F. 3d 782, 784 (8th Cir. 1994) (holding that similar language in Missouri Revised Statutes §537.675 prevented state of Missouri from appearing in federal diversity case to which it was not a party to request portion of plaintiff’s punitive damages award); while federal courts have not yet scrutinized §3294.5, they are likely to hold that §3294.5 is a substantive statute that applies to punitive damages awarded in federal diversity cases. *cf. Finley*, 28 F. 3d at 784 (describing district court’s application of Iowa’s punitive damages apportionment statute to punitive damages award in federal diversity action); *Simpson v. Burrows*, 90 F. Supp. 2d 1108, 1131 (D. Or. 2000) (applying Oregon’s punitive damages apportionment statute to punitive damages award in federal diversity action); *Simpson v. Burrows*, 90 F. Supp. 2d 1108, 1131 (D. Or. 2000) (applying Oregon’s punitive damages apportionment statute to punitive damages award in federal diversity action); *McCollough v. Virginia*, 172 U.S. 102, 123-24 (1897).

21 $120,000 = 40% of $300,000.
22 $180,000 = 60% of $300,000.

*See generally Santa Clara County Counsel Attorneys Ass’n v. Woodside*, 7 Cal. 4th 116, 125 (1982) (discussing CAL. RULES OF PROF’L CONDUCT R. 3-310(B)).


25 U.S. CONST. amend. V.

26 *See Fust v. Attorney Gen.*, 947 S.W. 2d 424, 431 (Mo. 1997).


28 Cheatham, 789 N.E. 2d at 473.


30 *Id. at 272* (quoting *COLO. REV. STAT.* §13-21-102(4)).

31 *Id.*

32 *Id.* (quoting *McCollough v. Virginia*, 172 U.S. 102, 123-24 (1898)).


35 *U.S. CONST.* amend VIII.


37 *Id. at 264.*


39 *Id.*


41 *U.S. CONST.* amend. XIV, §1.


43 *Id.*


45 *Id.*


48 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-75 (1996); State Farm, 538 U.S. at 418.

49 51 CIV. CODE §3294.5(g).

50 50 CIV. CODE §3294.5(g).


52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*
Filing Bankruptcy by Solvent Tenants to Cap Landlords’ Claims

**BANKRUPTCY CODE SECTION 502(b)(6)** provides a cap on claims of landlords for damages under long-term real property leases. Businesses such as retail chain stores often file reorganization cases under chapter 11 of the Bankruptcy Code in order to take advantage of this cap when closing unprofitable locations. These cases generally involve insolvent entities that are facing many difficult financial issues and challenges.

Courts recently have addressed whether a solvent entity may commence a chapter 11 reorganization solely to reject its one and only real estate lease and limit its landlord’s lease termination damages claim. While courts uniformly recognize that chapter 11 is available to solvent entities, in two recent decisions—*In re Integrated Telecom Express, Inc.* and *In re Liberate Technologies*—the use of chapter 11 by solvent entities solely to apply the Section 502(b)(6) cap was limited to situations in which the debtor was facing some level of financial distress.

The Section 502(b)(6) cap is designed to limit lease termination claims to prevent landlords from receiving a windfall at the expense of other creditors. Depending upon the length of a lease, the landlord’s claim for future rent could be enormous and dramatically diminish claims to prevent landlords from receiving a windfall at the expense of other unsecured creditors. Section 502(b)(6) limits the claim of a lessor for damages resulting from the termination of a lease of real property to:

- (A) The rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—
  - (i) the date of the filing of the petition; and
  - (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
- (B) Any unpaid rent due under such lease, without acceleration, on the earlier of such dates.

The Section 502(b)(6) cap should be a relatively simple calculation. First, the court calculates the total rent reserved under the lease from the earlier of the date of the tenant’s bankruptcy filing or the date on which the landlord repossessed or the lessee surrendered the lease property. Second, the court calculates 15 percent of the total due under the lease. Third, the court compares this 15 percent amount to the rent reserved under the lease for one year following the earlier of the bankruptcy filing or repossession or surrender of the leased property. The cap is the greater of the two, subject to the 15 percent amount not exceeding the amount of three years of rent. For example, in a scenario in which the debtor is current on all lease payments and has five years remaining, and the rent reserved under the lease is $100,000 per month, the total amount of future rent is $6 million, of which 15 percent is $900,000. The rent reserved for one year is $1.2 million, so the cap is $1.2 million. If instead of five years there are 10 years remaining under the same lease, the total amount of future rent is $12 million, and 15 percent of this amount is $1.8 million. Since the 15 percent amount is greater than the amount of rent reserved for one year and is less than rent for three years, the landlord’s claim would be capped at $1.8 million.

**Solvent Chapter 11 Filings**

There is no question that insolvent entities may file bankruptcy to take advantage of this cap. However, access to bankruptcy protection is not conditioned on insolvency. A debtor does not have to demonstrate insolvency under either a balance sheet test (liabilities in excess of assets) or under a liquidity test (unable to pay its debts as they come due). While the Bankruptcy Code does not limit chapter 11 relief to insolvent debtors or those who suffer any particular form of financial distress, courts have held that this “does not mean that all solvent firms should have unfettered access to Chapter 11.”

The lack of any bankruptcy solvency test is rooted in the reality that, at times, solvent entities suffer from financial distress. In fact, “[i]t is not uncommon for debtors to be solvent under the balance sheet test, and yet to have severe financial problems.” Congress rightfully believed that entities should be eligible for relief under chapter 11 before becoming insolvent under a balance sheet test: “The prospects for reorganizing a debtor in financial difficulty are much better when the debtor is still solvent than after it becomes insolvent.” Accordingly, the absence of an insolvency requirement allows entities to enter chapter 11 before facing a financially hopeless situation.

Nevertheless, to safeguard the integrity of the purpose of chapter 11, courts have created a good faith doctrine. If a chapter 11 bankruptcy petition is not filed in good faith, a bankruptcy court may dismiss the petition “for cause” or convert the chapter 11 case to a chapter 7 liquidation case pursuant to Bankruptcy Code Section 1112(b). The good faith determination is made on a case-by-case basis that focuses on the totality of the circumstances and involves a fact-intensive inquiry.

In examining the question of good faith, courts generally address two primary areas: 1) whether the bankruptcy petition serves a legitimate purpose of good faith is based on the totality of the circumstances.

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imate bankruptcy purpose, such as preserving a going concern (along with employees’ jobs) by avoiding the piecemeal liquidation of the enterprise or otherwise maximizing the value of the debtor’s estate, and 2) whether the petition was filed simply to create delay, harass or impose hardship on creditors, or otherwise obtain a tactical advantage in litigation. The Third Circuit Court of Appeals has explained the development of the judicially created good faith requirement:

It is easy to see why courts have required Chapter 11 petitioners to act within the scope of the bankruptcy laws to further a valid reorganization purpose. Chapter 11 vests petitioners with considerable power—the automatic stay, the exclusive right to propose a reorganization plan, the discharge of debts, etc.—that can impose significant hardship on particular creditors. When financially troubled petitioners seek a chance to remain in business, the exercise of those powers is justified. But this is not so when a petitioner’s aims lie outside those of the Bankruptcy Code.

The majority of chapter 11 debtors are insolvent and, in those cases, the good faith doctrine is generally not implicated. In contrast, when the debtor is solvent and files a chapter 11 petition in order to use Section 502(b)(6) to cap its sole landlord’s claim, thereby enhancing the recovery of the debtor’s shareholders (as opposed to its creditors), courts have struggled with the application of the good faith doctrine. In chapter 11 cases involving multiple leases, the issue is less likely to arise since these cases will involve more than just a two-party dispute, and there is a greater likelihood of more complicated financial issues and problems.

Recent Case Law

Prior to 2004, courts examining whether the commencement of a bankruptcy case for the purpose of using a particular provision in the Bankruptcy Code constituted bad faith found that, absent other factors, it did not. Against that backdrop, it is important to understand the reasoning of Integrated Telecom Express and Liberate Technologies, in which the Third Circuit Court of Appeals and a Northern District of California bankruptcy court, respectively, held that filing chapter 11 solely to use Section 502(b)(6) to cap a single landlord’s lease termination damage claim does not, by itself, establish good faith.

In Integrated Telecom Express, the Third Circuit addressed a situation in which “a Chapter 11 petition [was] filed by a financially healthy debtor, with no intention of reorganizing or liquidating as a going concern, with no reasonable expectation that Chapter 11 proceedings will maximize the value of the debtor’s estate for creditors, and solely to take advantage of a provision in the Bankruptcy Code that limits claims on long-term leases....” The debtor had $105.4 million in cash and $1.5 million in other assets at the time it filed its chapter 11 petition. The landlord asserted a claim of approximately $26 million. The debtor listed other miscellaneous liabilities of approximately $430,000 and had exposure in connection with a class action lawsuit of up to $5 million (any liability in excess of that amount was covered by insurance). Thus, the debtor was not suffering financial distress and was highly solvent and cash rich at the time it filed a chapter 11 petition. Applying the Section 502(b)(6) cap, the landlord’s claim would be reduced from $26 million to $4.3 million, and the shareholders of the debtor would enjoy the benefit of this reduction. In addition, the case involved a smoking gun—a board resolution and letter of counsel composed prior to the bankruptcy filing stating that, if the landlord was unwilling to settle, the debtor would file a chapter 11 petition and cap the landlord’s claim under Section 502(b)(6).

The Third Circuit found that the chapter 11 petition was not filed in good faith since the debtor was not in financial distress, and the filing would not preserve any value for the debtor’s creditors that would have been lost absent the filing. According to the appeals court:

To be filed in good faith, a petitioner must do more than merely invoke some distributional mechanism in the Bankruptcy Code. It must seek to create or preserve some value that would otherwise be lost—not merely distributed to a different stakeholder—outside of bankruptcy. This threshold inquiry is particularly sensitive where, as here, the petition seeks to distribute value directly from a creditor to a company’s shareholders.

The Third Circuit determined that the question of good faith was antecedent to the application of Section 502(b)(6), stating: “§502(b)(6) and the legislative policy underlying that provision assume the existence of a valid bankruptcy, which, in turn, assumes a debtor in financial distress.” Finding that the petition was not filed in good faith, the Third Circuit dismissed it.

The Third Circuit distinguished Integrated Telecom Express from its earlier decision in Solov v. PPI Enterprises (U.S.), Inc. (In re PPI Enterprises (U.S.), Inc.) and from the Ninth Circuit’s decision in Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.) on the grounds that the debtors in those cases were in financial distress and may actually have been insolvent. In PPI, the debtor claimed to have been insolvent, although this depended on whether claims of insiders were allowed. The Third Circuit in PPI held that a chapter 11 petition and liquidating chapter 11 plan filed for the primary purpose of capping a landlord’s lease termination damages claim did not contravene the good faith requirement. In its Integrated Telecom Express decision, the Third Circuit stated that “PPI stands for the proposition that an insolvent debtor can file chapter 11 in order to maximize the value of its sole asset to satisfy its creditors while at the same time availing itself of the landlord cap under §502(b)(6).”

Also, in Integrated Telecom Express the Third Circuit distinguished Sylmar Plaza as a case in which solvency was at issue and chapter 11 was used to maximize value for creditors. The appeals court stated that “although the debtors appear to have come out solvent in Sylmar Plaza, there is no indication that they would have come out solvent had the bank’s claim not been limited, or that solvency was a foregone conclusion when the petition was filed.”

Although Sylmar Plaza did not involve Section 502(b)(6), the Ninth Circuit in that case addressed a plan in which the sole purpose was to enable the debtors to “cure and reinstate” an obligation under Bankruptcy Code Section 1124(2). In so doing, the debtor avoided an approximately $1 million contractual liability for default interest owed to the debtor’s secured creditor bank. The Ninth Circuit rejected the bank’s argument that a chapter 11 plan lacked good faith when it left the debtors solvent while allowing them to reverse and avoid paying default interest to the bank, stating that “[g]iven the specific power to cure defaults, it makes no sense to treat a plan invoking that power as lacking good faith.”

The Northern District bankruptcy court’s finding in Liberate Technologies that filing bankruptcy solely to use Section 502(b)(6) did not constitute the requisite good faith emerged from a situation in which the debtor had ongoing business operations that were suffering significant losses and faced several pending lawsuits. However, the debtor had $212 million of unrestricted cash on hand and had total liabilities between approximately $59 million and $167 million, depending upon the outcome of the pending litigation. Accordingly, the debtor’s cash exceeded its liabilities by between $45 million and $153 million. Further, the debtor had received an offer from an entity willing to purchase the debtor’s business assets without a bankruptcy filing.

Facing a motion to dismiss the chapter 11 petition as a bad faith filing, the debtor asserted that it needed bankruptcy relief because of pending litigation, operational...
losses, its desire to cap its landlord’s lease termination damage claim, and problems in selling its assets. The bankruptcy court rejected each of these reasons. The court found that the pending litigation did not create a present need for bankruptcy relief because 1) it did not threaten the continuation of the debtor’s business, 2) the debtor might never incur significant liabilities from the lawsuits, and 3) the debtor could pay any judgments without liquidating business assets. The court further found that the debtor’s lack of profitability and the prospect of further losses did not show a present need for bankruptcy relief when the debtor had the present ability to pay all its debts without liquidating business assets. Moreover, the debtor’s own evidence showed that the debtor did not need chapter 11 protection to effect a sale of its assets as a going concern, according to the court. Also, the court noted that allowing the chapter 11 case to proceed would impose real hardship on the debtor’s landlord since the debtor sought to reduce the amount of the landlord’s claim from $45 million due under state law to the capped sum of $8 million allowed under Section 502(b)(6). In dismissing the chapter 11 case, the court found that the debtor’s proposed use of Section 502(b)(6) was simply a neutral factor that did not establish either good faith or bad faith.

**Chameleon Systems and Chapter 7**

By contrast, in *In re Chameleon Systems, Inc.*,[28] an earlier decision, another Northern District bankruptcy court held that a solvent debtor could use chapter 11 to cap lease damages. The debtor in that case filed its chapter 11 petition for the purpose of rejecting its sole real estate lease and then capping the landlord’s lease termination damage claim under Section 502(b)(6). The debtor had no ongoing operations, no income, and no employees other than a consultant it had hired to wind down its affairs, liquidate its assets, and settle various obligations owed to creditors. The debtor had in excess of $4 million in its bank accounts and, other than its $4 million-plus obligation to its landlord, the debtor’s total outstanding obligations amounted to approximately $25,000. Unlike Integrated Telecom Express and Liberate Technologies, the debtor would have been insolvent if the landlord’s claim was not capped. However, if the Section 502(b)(6) cap were to be applied, the debtor would have cash substantially in excess of the amount of its debt.

Prior to filing its chapter 11 petition, the debtor attempted to surrender possession of the premises to the landlord and to negotiate a termination of the lease, but the parties were not able to reach an agreement. There were approximately three years remaining before the lease would expire, and the debtor did not want to continue paying the landlord the monthly rent through the expiration date despite the fact that it had adequate funds to do so. In its decision, the bankruptcy court summarized applicable California landlord-tenant law:

Under California law...[the landlord] had the option of accepting the surrender of the property and then having the state court fix the damages for the breach of the lease. This would have adjudicated the total damages suffered by...[the landlord] as a result of the breach of the lease. Rather than pursue this course of action...[the landlord] elected its other option, to continue to consider...[the debtor] its tenant and to seek to collect rent on a monthly basis...[for approximately another three years].

After filing its chapter 11 petition, the debtor filed a motion seeking to reject the lease and cap the landlord’s claim at $1.816 million. The landlord responded by filing a motion requesting that the bankruptcy court dismiss the case as a bad faith filing. While recognizing that reorganization of an ongoing business or the liquidation of assets are valid purposes for filing chapter 11, the *Chameleon Systems* court noted that, in this case, there was no ongoing business, and the liquidation of assets had been completed prior to the filing of the chapter 11 petition. The court focused on whether the debtor’s filing was a legitimate use of the Bankruptcy Code or whether the debtor was attempting to unreasonably deter and harass creditors simply as a litigation tactic.[30] The court acknowledged that:

[The] resolution of this dispute involves a possible windfall no matter what the decision. If the court decides in favor of the debtor and allows the bankruptcy to continue the claim will be capped and it appears that additional funds will flow to shareholders of the debtor. On the other hand if the case proceeds under California law, the debtor is presented with a Hobson’s choice. Chameleon must stay in existence for another two or three years, or pay...[the landlord] now whatever it demands to terminate the lease regardless of what might happen in terms of mitigation later in 2004, 2005 or 2006. In the latter case, if the property is rented in the next 2 years for any amount the landlord will receive a windfall and the debtor will not be in existence to complain. Either way there is the possibility of a windfall.[31]

Ultimately, the court found that if the case had been filed under chapter 7 of the Bankruptcy Code, the landlord’s claim would be capped—because bad faith does not constitute cause to dismiss a chapter 7 case—and the fact that the debtor was solvent and filed under chapter 11 should not change that result.

*Chameleon Systems* suggests that, when a debtor is liquidating its assets, a potential means for completely avoiding the good faith issue would be for the debtor to file under chapter 7 instead of chapter 11. Section 502(b) is not tethered to chapter 11. It applies equally to chapter 7 cases. The problem, however, is that entities other than individuals do not receive a discharge in chapter 7 or liquidating chapter 11 cases.[32] Moreover, according to one bankruptcy court and echoed by others, “the Bankruptcy Code simply does not contemplate that equity security holders will share in the distribution of the estate in cases under Chapter 7—any surplus is to be distributed to the debtor.”[33]

In *Liberate Technologies*, the court explained that “Section 502(b)(6) limits distributions in the bankruptcy case; it does not preclude enforcement of the liability outside of bankruptcy where there is no discharge.”[34] As a result, in a case in which the debtor does not obtain a discharge, capping a landlord’s claim in the bankruptcy estate under Section 502(b)(6) may not prevent the landlord, after all creditors have been paid in full, from seeking its share of surplus funds returned to the debtor. This result might be avoided, even in a liquidating chapter 11 case, if the debtor sufficiently continues in business under its plan in order to obtain a discharge.[35]

Another problem with the chapter 7 approach is that, unlike chapter 11, an independent trustee is automatically appointed to marshal and distribute the debtor’s assets, and this may not appeal to the board of directors of a debtor of questionable solvency if millions of dollars of cash remain on hand. However, chapter 7 is an option that should influence the negotiations between the parties. A better understanding of the alternatives might even help the parties avoid any sort of excursion into bankruptcy jurisdiction.

The common thread that runs through the case law is that the question of good faith is based on the totality of the circumstances. This requires a fact-intensive inquiry on a case-by-case basis. In situations in which 1) a petition is filed solely as a litigation tactic in a two-party dispute or 2) the sole intent of a solvent debtor that is not suffering from financial distress is to avail itself of the Section 502(b)(6) cap, the recent decisions suggest that the court may find the requisite good faith lacking. Accordingly, counsel should advise debtors to find other bona fide reasons for filing a chapter 11 petition and to continue to
engage in business pursuant to a chapter 11 plan in order to obtain a discharge.

1 In re Integrated Telecom Express, Inc., 384 F. 3d 108 (3d Cir. 2004).
3 See Solow v. PPI Enters. (U.S.) Inc. (In re PPI Enters. (U.S.), Inc.), 324 F. 3d 197, 207 (3d Cir. 2003); In re Klein Sleep Prods., Inc., 78 F. 3d 18, 28 (2d Cir. 1996).
4 For a charge to constitute “rent reserved,” three requirements must be met. The charge must be 1) designated as “rent” or “additional rent” in the lease or provided as the tenant/lessee’s obligation in the lease, 2) related to the value of the property or the lease, and 3) must be properly classifiable as rent because it is fixed, regular, or periodic. In re McSheridan, 184 B.R. 91, 99-100 (Bankr. 9th Cir. 1995).
5 See Integrated Telecom Express, 384 F. 3d at 121 (citing In re SGL Carbon Corp., 200 F. 3d 1570, 1574-75 (9th Cir. 2002)); In re James Wilson Assocs., 965 F. 2d 160, 170 (7th Cir. 1992).
7 Integrated Telecom Express, 384 F. 3d at 121-22; see also Liberate Techs., 314 B.R. at 211 (citing SGL Carbon Corp., 200 F. 3d at 163).
8 See Integrated Telecom Express, 384 F. 3d at 122.
9 Marshall, 300 B.R. at 512.
10 Id. at 513.
11 See Liberate Techs., 314 B.R. at 211 (citing In re Marsch, 36 F. 3d 825, 828 (9th Cir. 1999)).
12 See Integrated Telecom Express, 384 F. 3d at 118 (citing SGL Carbon Corp., 200 F. 3d at 159-62; Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.), 324 F. 3d 197, 211 (3d Cir. 2003)).
13 See Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F. 3d 1070, 1074-75 (9th Cir. 2002); Integrated Telecom Express, 384 F. 3d at 118.
14 See Marsch, 36 F. 3d at 828.
15 SGL Carbon Corp., 200 F. 3d at 165-66.
16 Sylmar Plaza, 314 F. 3d at 1075; PPI, 324 F. 3d at 211-12; Integrated Telecom Express, 384 F. 3d at 128; In re Chameleon Sys., Inc., 306 B.R. 666, 669-71 (Bankr. N.D. Cal. 2004); Liberate Techs., 314 B.R. at 215.
17 Integrated Telecom Express, 384 F. 3d at 108.
18 Liberate Techs., 314 B.R. 206.
19 Integrated Telecom Express, 384 F. 3d at 112.
20 Id. at 129.
21 Id. at 128.
22 Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.), 324 F. 3d 197 (3d Cir. 2003).
23 Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F. 3d 1070 (9th Cir. 2002).
24 Integrated Telecom Express, 384 F. 3d at 123 (emphasis added).
25 Id. at 123.
26 Sylmar Plaza, 314 F. 3d at 1075.
29 Id. at 669.
30 Id. at 670-71.
31 Id. at 671.
CLASS
funny thing happened to a law firm on the way to collecting a $90 million judgment in favor of its clients. One of the clients—a member of a certified class of more than 2,000 insurance claims adjusters—sued the attorneys for malpractice. The California Court of Appeal has allowed the claim to proceed as a second putative class action. This recent appellate decision raises some obvious questions. Where could these attorneys possibly have gone wrong? When is a $90 million judgment not enough? The court of appeal’s answers to these questions have wide-ranging significance in class action litigation.

In *Janik v. Rudy, Axelrod & Zieff,* the court of appeal held that class counsel owed its clients (members of the class in the underlying litigation) a duty to consider and assert additional claims that could have increased the class’s recovery, even though those claims were not part of the trial court’s certification order. *Janik* appears to be the first reported California decision recognizing that class counsel can be liable in malpractice based on its successful representation of a certified class. The duties articulated in *Janik* extend beyond actions for legal malpractice and potentially raise a new obstacle to class settlements.

Class settlements are often criticized and challenged as collusive deals between greedy class counsel out to line their pockets and unscrupulous defendants trying to buy an inexpensive resolution of claims alleging serious injury to consumers. The sweeping rationale announced in *Janik* would apply equally to class counsel that settle class claims, even if they achieve substantial benefits for the class. Dissatisfied class members (and the counsel who represent them) now may attack class counsel for breaching duties to a settlement class by selling out the class’s claims too cheaply.

Before examining the conundrum that *Janik* poses for class action settlements, it is useful to understand how the court of appeal could conclude that seemingly successful class counsel potentially breached their duties to the class. The underlying litigation in *Janik* was one of the seminal cases in the area of wage and hour law in California. The case involved a class action against Farmers Insurance on behalf of more than 2,400 claims adjusters to recover nonpayment of overtime wages. The complaint, which was filed in 1996, asserted a single cause of action under the Labor Code. In 1998, the trial court certified a class of all claims adjusters who worked for Farmers from October 1, 1993 (three years prior to the filing of the complaint), to the date of trial.

After notice was sent and class members were given the opportunity to opt out of the

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To ward off objectors, class counsel may solicit the guidance of judges and mediators in the settlement process

by Brad W. Seiling

WARS

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class, class counsel successfully moved for summary adjudication on the ground that the members of the class were not exempt from overtime regulations. This favorable ruling was affirmed on appeal.  

A jury then awarded the class approximately $90 million in unpaid overtime wages, and that judgment was affirmed on appeal. Class counsel had won a substantial award for the class and in the process had made new law in the area of wage and hour class actions. These results would not seem to support a malpractice case, but that is exactly what happened next.

After the trial, a second putative class filed a malpractice suit alleging that class counsel breached their duties to the class by failing to assert a claim under California’s Unfair Competition Law, codified at Business and Professions Code Section 17200 et seq., which carries a four-year statute of limitations period—one year longer than the limitations period under the Labor Code. By not amending the complaint to assert a UCL claim, class counsel allegedly deprived the class of millions of dollars of additional unpaid wages. The court of appeal reversed, finding that the complaint failed to state a viable claim for unpaid overtime wages. The court, relying on its decision in Janik v. Purolator Air Filtration Products Company, 7 the California Supreme Court’s decision recognizing that unpaid wages could be recovered as an item of restitution under the UCL, was decided in 2000, after the trial court had certified the class in the underlying litigation. The court held that it was even possible to amend the complaint to assert a claim recognized by the court, and counsel certainly would not have wanted to risk reopening the issue of certification or to otherwise jeopardize their favorable rulings on the merits. 

Notwithstanding the “sound strategic reasons for not seeking to amend the complaint after the Supreme Court decided Janik,”8 the court held that whether such tactical decisions amount to a breach of a class counsel’s duties to the class presents a question of fact that could not be resolved on demurrer.

Sweeping New Duty

The court’s rationale confirms the central role that the UCL plays in consumer litigation. UCL claims are common in consumer class action cases, even if the comparatively limited remedies available under the UCL (particularly the limited monetary remedies in light of recent California Supreme Court rulings) mean that a UCL claim adds little to a class’s potential recovery. That a plaintiff can take advantage of the four-year statute of limitations under the UCL in itself would justify asserting a UCL claim in almost every consumer case. Indeed, in light of Janik, plaintiffs’ lawyers act at their peril if they do not allege a UCL claim in a class action lawsuit. Underscoring the importance of the UCL is nothing new.

What is new is the sweeping new duty that the court of appeal imposed on class counsel. The California Supreme Court previously had considered a malpractice case against class counsel in Ferguson v. Lief, Cabraser, Heiman & Bernstein LLP. However, the issue presented in Ferguson was whether a stipulated dismissal of punitive damages allegations as part of an $80 million class settlement constituted malpractice. The supreme court held that lost punitive damages were not recoverable as compensatory damages in a legal malpractice action, but the court did not analyze the scope of class counsel’s duty to members of the class. Janik expressly states what may have been implied in Ferguson—class counsel can be held liable for failing to pursue claims on behalf of a class.

In addition to recognizing new potential liability for class counsel, Janik also has potentially broad implications for class action settlements. Commentators and courts have expressed concerns that class action settlements offer an opportunity for attorneys to generate fees without any effective monitoring by class members, particularly when the settlement has been reached prior to class certification.

There also is concern that defendants may use the settlements to buy their way out of serious situations in a relatively nominal way or to structure settlements to achieve a “tremendous sales bonanza” for themselves while providing little relief to the settlement class. This criticism applies particularly to coupon settlements, which require class members to redeem coupons for the defendant’s products in order to realize the benefits of the settlement.

A new legal subspecialty has developed in recent years: lawyers who make a living representing class members who challenge the settlements of their class actions. These attorneys insist on modifications to settlement terms as well as fees for themselves in exchange for their clients’ decision to drop their objections to final approval of the settlement. Clearly, “objecting has become big business.”

Dealing with these objections can be extremely costly, particularly if the trial court permits discovery into the settlement process and the terms of the settlement. Litigating challenges to settlements delays finality for defendants and usually puts a hold on any award for attorney’s fees. For that reason, defense counsel and class counsel regard objectors and their lawyers as expensive nuisances who threaten to derail settlements that required countless hours to achieve.

In their defense, settlement objectors often achieve beneficial modifications to class settlements or derail settlements that courts ultimately concluded were not in the interests of the class. In these cases, the objectors raise issues that may not otherwise have been presented to or considered by the trial court in ruling on a stipulated application for settlement approval. Regardless of how one regards settlement objectors, they are here to stay.
Janik provides a new angle for attorneys seeking to challenge class action settlements. An argument that a proposed settlement is not fair and reasonable to the settlement class would support a malpractice claim against class counsel as well as a direct challenge to the settlement. There is no reason to think that future class members—and the counsel who represent them—will not use Janik’s rationale to challenge class settlements.

Protecting Class Settlements from Attack

There are many ways for counsel to protect class settlements from collateral attack. Of course, no single step—or even a combination of steps—will insulate a settlement from collateral attack or ensure its approval. Ultimately, whether a settlement survives and class counsel can avoid malpractice liability depends on the fairness of the settlement to the class. Class members will have no basis to complain if the settlement is fair and has not caused the relinquishment of any substantial legal rights without adequate justification. The following are effective ways to enhance the chances of defeating any attack on a class action settlement.

Use a mediator. Using a mediator to oversee settlement negotiations adds a layer of protection for the interests of class members and thus undercut a claim that the settlement was collusive. The trial judge may feel more comfortable approving a settlement that has been mediated before a neutral third party, particularly if the mediator is one whom the trial judge knows and respects. Courts have cited the parties’ use of a mediator as a factor in finding that a class settlement was fair, reasonable, and not collusive.

There are limits to how much mileage the parties can get from using a mediator. Declarations from the mediator describing the mediation process or opining on the fairness of the settlement may not be admissible in any subsequent proceedings. Indeed, the mediator may not even be willing to provide such a declaration. Even without a statement of support from the mediator, the mere fact that the parties submitted the matter to a respected independent mediator in itself is frequently cited as a factor in favor of approving class settlements.

Negotiate fees after substantive terms. Whether the parties negotiate the settlement between themselves or retain a mediator, the substantive terms of the settlement—class definition, form and content of class notice, consideration to the class members, procedures for redeeming consideration, and injunctive relief (for example, requiring changes in the defendant’s business practices)—should be the first order of business. The issue of attorney’s fees should not be placed on the table until after the substantive terms have been resolved.

Attorney’s fees often are one of the most controversial components of a class settlement, and a substantial stipulated fee award can provide a tempting target for settlement objectors or malpractice plaintiffs attacking the settlement as a sellout of the class by class counsel. The mediator’s presence can undercut these arguments and underscore the adversarial nature of the settlement process.

Waiting to negotiate class counsel’s fees until the substantive terms have been resolved is often very difficult for defendants. Clients want to know the bottom line, and in class action settlements, the plaintiffs’ attorney’s fees award forms one of the most significant components of the bottom line. Both sides may be reluctant to engage in protracted settlement discussions without addressing a material term. But rushing to deal with fees first or tying an agreement to substantive terms to a particular fee award may expose the settlement to challenge (or at a minimum, close scrutiny by the trial court).

Submitting the question of fees to the trial court eliminates any argument regarding collusion. While the taint of collusion evaporates, plaintiffs’ counsel and defense counsel often are unwilling to place this important issue entirely in the hands of a neutral third party. In a settlement, defendants can cap their exposure for fees, but they have no such assurances if they allow the trial court to decide the issue entirely. Conversely, class counsel may prefer the certainty of knowing that the defendant will not oppose its fee request to having to litigate its entitlement to fees.

There are ways to reduce the risks to both sides of submitting the fee issue to a third party for resolution. For example, a baseball-style arbitration procedure may be appropriate. In this procedure, each side presents one number for consideration, and the judge or arbitrator must select one of the two numbers. Alternatively, each side could propose a number that forms the range between which the fee award will fall. If the trial court is unwilling to resolve these issues, the matter could be referred to a third party for determination. Regardless of the procedure, placing the issue of fees into the hands of a third party makes it much more difficult for an objector or malpractice plaintiff to sell the argument that class counsel breached duties to the class in favor of their own fees.

Don’t skimp on class notice. Preparing a comprehensive class notice can also protect the settlement and class counsel from collat-
eral attack. Here is where defense counsel can be helpful. Many defendants try to cut corners on class notice to save potentially substantial costs.23 Other defendants hope to minimize the response rate and thus reduce the ultimate payout. These are short-sighted concerns that could threaten the settlement.

The notice is often the first and only time the class receives any information about the case or the settlement. Courts have adopted flexible standards for determining whether class notice is adequate. In general, notice must be given in a manner that has “a reasonable chance of reaching a substantial percentage of the class members.”24 The notice should be as broad as possible to avoid subsequent charges that the class did not receive adequate notice of the rights they were relinquishing. The notice should be sent in a way that is most likely to reach members of the settlement class.

Personal notice, if practicable, is always the best form of notice—both to satisfy due process concerns and to insulate the settlement from collateral attack. Posting the notice on a company’s Web site or publishing the notice in newspapers or magazines have been recognized as valid means of notice and may contribute to insulating a settlement from collateral attack.25

The contents of the notice are also important in avoiding subsequent challenges. “[N]otice given to class members must fairly apprise members of the terms of the proposed compromise and of the options open to dissenting class members.”26 All class notices briefly describe the nature of the action and the settlement terms. In light of Janik settlement notices also should describe any claims that are not being pursued or that the class could pursue but for the settlement. If possible, the notice should set forth the reasons why these claims are not being pursued.

Providing this detail will make any challenge to the settlement more difficult because class members will have been advised of the rights and claims that they relinquished under the settlement.

**Involve the trial court in the process.** Trial courts—particularly judges in the complex civil departments throughout the state—take an active role in class litigation to protect the rights of absent class members. Court oversight of settlements protects class members “whose rights may not have been given due regard by the negotiating parties.”27 This action by the court may provide an early line of defense to any collateral attack on a class settlement. In fact, the Janik court encouraged counsel to enlist the trial court to resolve questions about the scope of its duties to the class: “If class counsel has any question concerning the course that is required by the duty it owes to absent class members, the attorneys may seek guidance from the court.”28 There is absolutely no reason not to heed that advice.

**Parties should inform the trial court of their settlement negotiations and the parameters of the settlement terms they are considering.** This approach brings the trial court into the settlement process—even if the trial judge is not actually mediating the case—and may enhance the likelihood of approval. The judge may even spot issues that could present problems when the settlement is ready for approval.

Some trial judges may be reluctant to offer what might be regarded as advisory rulings on matters that are not properly before them on a noticed motion or other recognized procedure. The federal Manual for Complex Litigation suggests that on occasion “a judge might retain a special master or a magistrate judge to examine issues regarding the value of nonmonetary benefits to the class and their fairness, reasonableness and adequacy.”29 although such appointments are rare.30

**Trial courts are supposed to act as “fiduciaries” of absent class members.**31 Disclosing the reasons why counsel seeks guidance from the court and appealing to the court’s unique role as protector of the interests of absent class members may dispel some of the reluctance of courts to get involved. Citing Janik also may be compelling. Concerns about the trial court’s willingness to provide settlement guidance should not, however, dissuade counsel from making the inquiry. Counsel who refrain from asking for the trial judge’s help may never know what the judge is thinking until it is too late.

**Request detailed findings from the trial court.** Counsel should request specific findings from the trial court concerning the fairness of the settlement, the adequacy of class counsel’s representation, the lack of collusion in the settlement process, and the decision not to pursue certain claims or forms of relief in exchange for the settlement. These findings could be used in a subsequent action as collateral estoppel. Indeed, the Janik court suggested that such rulings could serve as a complete defense to a subsequent malpractice action: “If the issue on which the malpractice complaint is based has been considered and determined in the class action proceedings, the rulings of the class action court will be binding on the members of the class and preclude reconsideration of those matters in another forum.”32

Of course, asserting this defense assumes that the class action court made the requisite findings. Existing class action procedures—both at the certification stage and the settlement stage—require courts to examine the adequacy of class counsel’s representation of the class. More often than not, the trial court’s findings generally recite the requirements for settlement approval without delving into specific issues. That is perfectly understandable because most class settlement approval hearings proceed without opposition or objection. Those general findings may not, however, satisfy a subsequent court faced with a malpractice action against class counsel.

For that reason, class counsel should put themselves in the shoes of an objector or potential malpractice plaintiff and consider what aspects of the settlement might raise concerns in a subsequent collateral attack. Those issues should be presented to the trial court in the settlement approval papers and at the preliminary and final settlement approval hearings. Draft final approval orders also should include specific findings on these issues.

**Encourage objectors to speak now or forever hold their peace.** Potential objectors often contact counsel to raise their concerns with a proposed settlement before filing formal objections. It may be tempting for the proponents of a class settlement to ignore these objectors and hope they simply go away. The better course is to insist that any objector submit formal objections to the trial court and appear at the final approval hearing.

Res judicata and collateral estoppel principles apply to judgments in class action cases,33 including judgments that result from class actions settlements.34 Objectors who have appeared and had their concerns considered and addressed by the trial court in the underlying class action case will have a difficult time relitigating the same issues in a subsequent malpractice case.35 Indeed, the findings against them should serve as collateral estoppel and bar relitigation of those same objections in a subsequent action.36

**Malpractice and Other Concerns**

The appropriate response to a malpractice action filed before final approval of a class settlement is to seek an immediate stay or dismissal of that action on the basis of another action pending. While such a contemporaneously filed malpractice action likely is premature, the case will ripen once judgment is entered approving the settlement. The trial court in the malpractice action should be apprised that counsel appears to be engaged in forum shopping and should be forced to litigate the concerns in the context of settlement approval.

Most class settlements provide that the trial court will retain jurisdiction over enforcement of the settlement. In light of Janik, proponents of a class settlement should ask the trial court to retain jurisdiction over collateral challenges to matters related to the settlement. That would provide a basis to transfer any subsequent malpractice case to the same judge who approved the settlement in
the first place. The judge who found that class counsel adequately represented a settlement class and approved the settlement may be much less inclined to allow a malpractice action to proceed than a judge considering the matter for the first time.

Janik is not merely a problem for the plaintiffs’ bar. It is undoubtedly tempting for the defense bar to savor a case that exposes their adversaries to lawsuits by disgruntled clients. This may seem to be a welcome payback for all of the times defense counsel has had to deal with disgruntled clients complaining about the costs of class action litigation and settlements. Nonetheless, this view is shortsighted. Any vehicle that opens the door to challenges to class action settlements ultimately will affect defense counsel and the clients they represent in class action settlements.

Another unintended impact of Janik may be to increase class settlement demands. Plaintiffs’ counsel may seek to insulate themselves from subsequent attacks by demanding higher amounts in settlements and refusing to enter into settlements that do not provide relief to every class member. Coupon settlements, which many defendants like but which have been criticized by courts and commentators, may fall further out of favor because their low redemption rates may leave large numbers of class members with a reason to complain about the settlement.

Settling a class action lawsuit is never easy. Class counsel and defense counsel must first deal with each other in contentious negotiations that often follow protracted litigation. They must face the trial court twice, first at the preliminary approval hearing, then at the final approval hearing. During that process, they also may have to deal with objectors. Now, there is the possibility of contemporaneous or subsequent malpractice lawsuits.

Counsel negotiating class settlements owe a duty to each other to make sure that the settlement is not subject to collateral attack. Working together to structure a settlement and a settlement process may ensure approval of the settlement and insulate it from collateral attack. At the end of the day, no one wants to face the $90 million question.

4 Janik, 119 Cal. App. 4th at 936.
5 Id. at 941-42.
6 Id. at 945-46.
8 Janik, 119 Cal. App. 4th at 946-47.
9 Id. at 947.
10 Since November 2, 2004, no discussion of the UCL.
is complete without referring to Proposition 64—the voter initiative that changed the previously broad standing provisions under the UCL. With the passage of Proposition 64, plaintiffs must have suffered an injury in fact as well as a loss of money or property in order to sue a defendant for violation of the UCL. Proposition 64 also eliminated the ability of private parties to represent others unless the parties comply with class action procedures. Practitioners should note that Proposition 64 actually makes Janik even more important in UCL litigation. Since class action procedures will apply to any UCL suit prosecuted on behalf of others, the duties articulated in Janik potentially apply to all suits brought under the UCL.


12 See Mars Steel Corp. v. Continental Ill. Nat’l Bank & Trust Co., 834 F. 2d 677, 678 (7th Cir. 1987) (Judge Posner observed that class settlements, which are often presented to the class as a fait accompli, pose significant problems for abuse because “lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest....”).

13 In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F. 3d 768, 787 (3d Cir. 1995) (Third Circuit found that district court abused its discretion in approving the class settlement because, among other reasons, the coupon settlement did not provide adequate value to class members.).

14 See Weissman v. Quail Lodge Inc., 179 F. 3d 1194 (9th Cir. 1999). In Weissman, the Ninth Circuit reversed a district court order prohibiting an attorney from objecting to class action settlements. The district court characterized the attorney as “something of a class objector” who was objecting to class action settlements. The district court ordered the attorney to conduct discovery to show that settlement prejudiced the class (“something of a class action settlement gadfly.”). The Ninth Circuit reversed the restrictive order on the ground that trial courts do not have the power to sanction an attorney appearing on behalf of a client as a vexatious litigant. Id. at 1196. See also In re Mexico Money Transfer Litig., 164 F. Supp. 2d 1002 (N.D. Ill. 2001), aff’d, 267 F. 3d 743 (7th Cir. 2001) (Dissident attorney who objected to settlement solicited more than 90% of all opt outs.).

15 ALBA CONTE & HERBERT NEWBERG, 4 NEWBERG ON CLASS ACTIONS §11.57, at 168 (4th ed. 2002). (Dissident attorney who objected to settlement solicited more than 90% of all opt outs.).

16 CLASS ACTIONS §11.55, at 168 (4th ed. 2002). (Dissident attorney who objected to settlement solicited more than 90% of all opt outs.).

17 Janik, 119 Cal. App. 4th at 946. (Dissident attorney who objected to settlement solicited more than 90% of all opt outs.).

18 Officers for Justice v. Civil Serv. Comm’n, 688 F. 2d 615, 625 (9th Cir. 1982). In class action litigation, California courts routinely look to federal authority for guidance. Vasquez v. Superior Court, 4 Cal. 3d 800, 821 (1971).


20 See Foxgate Homeowners Ass’n, Inc. v. Bramaela Cal., Inc., 26 Cal. 4th 1 (2001) (holding that statements from a mediator regarding a party’s conduct during mediation proceeding were not admissible in connection with a motion for sanctions).


22 See, e.g., In re Lorazepam & Clorazapate Antitrust Litig., 205 F.R.D. 369 (D.D.C. 2002) (The court reported total notice costs of $8.250 million for a class that included more than 1.2 million members.).


24 Janik, 119 Cal. App. 4th at 251 (upholding class notice as adequate under circumstances in which defendant mailed or e-mailed notice to class members, published notice in USA Today and MacWorld, and posted notice for more than 30 days on its Internet Web site).


26 Officers for Justice v. Civil Serv. Comm’n, 688 F. 2d 615, 624 (9th Cir. 1982).

Matters that involve a combination of probate law and family law issues are common. Crossover issues can arise when clients require services regarding property ownership, estate planning, incapacity, family court proceedings (including marital dissolution, legal separation, and nullity), and death. The convergence of probate and family law issues can be confusing to the lawyer who practices in one area but not both. The Family Code contains the statutory law of marriage, dissolution, separation, and nullity, while the Probate Code addresses the capacity issues relating to those topics. In addition, the effect of marriage or divorce upon an existing estate plan is covered in the Probate Code, while the determination of permissible estate planning during a family court proceeding is set forth in the Family Code. Thus, practitioners must consult both codes for an understanding of many crossover issues.

A subsequent marriage, for example, generally has a dramatic effect on existing wills and trusts. The omitted spouse who married the decedent after execution of a “testamentary instrument” (defined to include the decedent’s will or revocable trust) will normally receive the equivalent of an intestate share of the “decedent’s estate” (defined to include a probate estate and all property held in a revocable trust that becomes irrevocable on the death of the settlor).1

However, certain conditions mandate that the omitted spouse will take no share of the estate. These conditions include: a showing that the the decedent’s failure to provide for the omitted spouse was intentional, so long as the intention appears on the face of the testamentary instrument;2 evidence that the decedent provided for the spouse in other ways;3 proof that the surviving spouse made a valid waiver of probate rights;4 or a showing that a valid premarital agreement contains a waiver of probate rights.5

Like subsequent marriages, judgments of marital dissolution and nullity and judgments of legal separation that terminate the marital property rights of a party may alter existing wills and nonprobate transfers, including living trusts. With regard to wills, unless a testator’s will expressly provides to the contrary, dispositions, powers, and nominations favoring the former spouse are revoked by such judgments.6 The revoked will, however, is subject to revival by the testator’s remarriage to the former spouse.7

For estate planning documents other than wills, a change in the spousal status of the beneficiary is

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Incapacity issues arise in estate planning when a person under conservatorship—the conservatee—wishes to make a will or trust, or when the conservatee’s conservator wishes to make a will or trust for the conservatee.

that designate a beneficiary), Payable-on-Death (P.O.D.) accounts, and like accounts described in Probate Code Section 5000, but not life insurance policies. The term “surviving spouse” has been defined as a spouse whose marriage has not been dissolved or annulled and whose marital property rights were not terminated by court order. A legal separation order not terminating property rights does not affect a will or nonprobate transfer.

Incapacity issues arise in estate planning when a person under conservatorship—the conservatee—wishes to make a will or trust, or when the conservatee’s conservator wishes to make a will or trust for the conservatee. The starting point for analysis is the law stating that nothing shall be construed to deny a person the right to make a will or trust, or when the conservatee’s conservator wishes to make a will or trust for the conservatee. The court may make a substituted judgment order only if the court determines two things: First, that the conservatee is not opposed to the proposed action; Second, that the conservatee has the capacity for the proposed action. Further, a court’s determination that a person is of unsound mind or lacks the capacity to make a decision to do a certain act, such as the execution of a will or trust, must be supported by evidence of a deficit in at least one of several specified mental functions—including alertness and attention, information processing, thought processes, and the ability to modulate mood and affect—and by evidence of a correlation between any deficits and the act in question.

When the conservatee lacks the capacity to make estate planning decisions, the Probate Code’s “substituted judgment” provisions come into play. These provisions enable the conservator or other interested person to petition the probate court for an order authorizing or requiring the conservator to take action on behalf of the conservatee for one or more of the following purposes: 1) the benefit of the conservatee or the estate, 2) the minimizing of prospective taxes or expenses of administration upon the conservatee’s death, or 3) the making of gifts that the conservatee would have been likely to make. In addition, the provisions include a nonexclusive list of 13 possible substituted judgment acts and activities. These involve several with real implications for the conservatee’s spouse and children, such as making gifts to the spouse and the children; conveying or releasing the conservatee’s contingent and expectant interests in property, including marital property rights; creating, revoking, or modifying trusts; and making a will.

The court may make a substituted judgment order only if the court determines two pairs of issues. First, the court must find that either the conservatee is not opposed to the proposed action or, if opposed to it, lacks legal capacity for the proposed action. Another issue involving incapacity arises when a conservatee wishes to marry. Like the right of a conservatee to make a will, the capacity to marry is unaffected by conservatorship, absent an order to the contrary. An unmarried adult not otherwise disqualified is capable of consenting to and consummating marriage. Thus, unless the order establishing the conservatorship disqualifies the conservatee from marrying, or there is a subsequent order to that effect, the conservatee retains the right to marry. Like the determination of a person’s lack of capacity to make a will, a judicial determination that a person lacks the capacity to marry must be supported by evidence of a mental function deficit, which by itself or in combination with other mental function deficits significantly impairs the person’s ability to understand and appreciate the consequences of his actions regarding the marriage, and there also must be evidence of a correlation between those deficits and the act of marriage. If, after marriage, the conservator seeks to establish the validity of the marriage, the conservator may initiate a family court proceeding for this purpose and to have the marriage declared valid.

Restraining Orders and Estate Planning Arguably the most frequently encountered crossover issue between family law and pro-
MCLE Test No. 136

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. An omitted spouse who married the decedent after the execution of the decedent’s living trust receives an intestate share unless there is an intentional failure to provide for the spouse—whether or not the intent appears on the face of the trust.
   True. False.
2. A judgment of marital dissolution revokes all powers and nominations favoring the former spouse in a will unless the will expressly provides to the contrary.
   True. False.
3. A nonprobate transfer to the transferor’s former spouse, in an instrument executed before or during the marriage, always fails if at the time of the transferor’s death, the former spouse is not the surviving spouse.
   True. False.
4. A paranoid schizophrenic may have the capacity to execute a will or trust.
   True. False.
5. The court’s determination of incapacity to make a will or trust must be supported by evidence of a mental function deficit.
   True. False.
6. The probate court may make a substituted judgment order only if the court determines that the proposed action will have no adverse effect on the conservatee’s estate.
   True. False.
7. A judicial determination of a person’s lack of capacity to marry need not be supported by evidence of a mental function deficit.
   True. False.
8. Standard (or Automatic) Temporary Restraining Orders—Family Law (ATROs) are binding on both parties to a family court proceeding upon the filing of the petition.
   True. False.
9. The preparation of a new will during the pendency of a family court proceeding is not a violation of the ATROs.
   True. False.
10. A party to a legal separation proceeding who serves his or her spouse with a notice of immediate revocation of the parties’ revocable living trust is not in violation of the ATROS.
    True. False.
11. If death of a party to a marital dissolution proceeding occurs after a bifurcated judgment terminating marital status, the family court retains jurisdiction over division of the community property.
    True. False.
12. A nullity proceeding does not survive the death of the petitioner.
    True. False.
13. Absent entry of a bifurcated judgment terminating marital status, upon the death of one of the parties, the title presumption of right of survivorship is applicable to the joint tenancy property of the parties.
    True. False.
14. The death of either party to a marital dissolution proceeding terminates an existing spousal support order unless the parties have otherwise agreed, whether orally or in writing.
    True. False.
15. The right of the obligee parent to collect child support from the estate of the deceased obligor parent continues as long as a valid child support order is in place.
    True. False.
16. An order for payment of child support is modifiable following the death of the obligor parent.
    True. False.
17. The conservator of a person’s estate may file a marital dissolution proceeding on behalf of the conservatee if the conservatee is capable of expressing a wish to dissolve the marriage on grounds of irreconcilable differences, whether or not the conservatee has expressed that wish.
    True. False.
18. If a conservator who is the conservatee’s spouse files a nullity proceeding, the conservator must file and serve a notice with the probate court within 30 days of filing the nullity.
    True. False.
19. A conservator has the power to manage and control the conservatee’s share of community property, and the conservatee’s spouse has the right to manage and control his or her own share of community property.
    True. False.
20. If an incapacitated spouse is under conservatorship and the well spouse refuses to comply with a probate court support order, the probate court has the authority to divide the community property.
    True. False.

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the $15 testing fee ($20 for non-LACBA members) to:
   Los Angeles Lawyer
   MCLE Test
   P.O. Box 55020
   Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.
4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
5. For future reference, please retain the MCLE test materials returned to you.

ANSWERS

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

1.  □ True □ False
2.  □ True □ False
3.  □ True □ False
4.  □ True □ False
5.  □ True □ False
6.  □ True □ False
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18. □ True □ False
19. □ True □ False
20. □ True □ False
bate is the effect of the filing of a family law proceeding on the right of a party to that proceeding to initiate estate planning or to revise existing estate planning documents. This is because of the Standard (or Automatic) Temporary Restraining Orders—Family Law (called ATROs) that appear on the back of the Judicial Council form Family Law Summons. The ATROs are binding upon the petitioner when an action for dissolution, legal separation, or nullity is filed and are binding upon the respondent upon service of the petition and summons.22 One ATRO precludes any transfers, encumbrance, or disposal of community or separate property without the written consent of the other party or an order of the court, except in the usual course of business or for necessities of life. It further requires the parties to give each other five business days’ prior notification of proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the ATROs are in effect. Another ATRO precludes cashing, borrowing against, canceling, transferring, or changing beneficiaries of any insurance policies. Thus, if certain estate planning activities occur after the effective date of the ATROs and without the consent of the spouse or court approval—such as, for example, creating and funding a living trust for the benefit of persons other than the spouse, or replacing the spouse with another beneficiary on a life insurance policy—the party performing those acts is in contempt of court.

Under Family Code Section 2040, some activities are expressly not restrained by the ATROs: 1) the creation, modification, or revocation of a will, 2) the revocation of a nonprobate transfer, including a revocable trust, pursuant to the instrument—provided that notice of the change is filed and served on the other party before the change takes effect, 3) the elimination of a right of survivorship to property—provided that notice of the change is filed and served on the other party before the change takes effect, 4) the creation of an unfunded revocable or irrevocable trust, and 5) the execution and filing of a disclaimer pursuant to Probate Code Sections 260 et seq.28

The ATROs, along with these unrestrained activities, suggest some estate planning strategies to consider when divorce is imminent or even after a dissolution petition has been filed. For lawyers representing a client who is about to be involved in a dissolution or is already a party to one, these strategies include:

- Preparing a new will that revokes the former will and designates a different executor and new beneficiaries.
- Revoking an existing living trust (after giving the requisite notice) and then returning the revoked trust’s assets to the parties.
- Severing any joint tenancies of the spouses (after giving the required notice), so that the former joint tenancy assets will be held by the parties as tenants in common, with each party having testamentary power over his or her one-half share.
- Terminating P.O.D. and similar accounts, so that the client’s spouse is not the beneficiary in the event of the client’s death during the dissolution proceedings, and the client has testamentary power over those assets.
- Withdrawing half of the contents of jointly held bank accounts, while leaving the other half to the control of the other spouse.
- Preparing a new unfunded revocable trust together with a pour-over will to add the client’s assets to the new trust at the client’s death. With the unfunded trust and pour-over will, no transfers will be made to the new trust during the family court proceedings, thus preserving the status quo. However, if the client dies during the proceedings, his or her will adds to the new trust all assets belonging to the client that were formerly in the revoked trust, together with the client’s share of the joint tenancy, P.O.D., and similar assets over which he or she acquired the right of testamentary disposition. While those assets would have to be administered in the deceased’s estate—that is, a probate estate—at least they would pass to the client’s desired beneficiaries and would be under the stewardship of the client’s desired fiduciaries. The family court will likely scrutinize any and all of these transactions for compliance with the interspousal fiduciary duties of Family Code Section 721. But they are permissible within the language of Family Code Section 2040 and, more critically, they do not affect the status quo of the marital assets during the pendancy of the family court proceedings.

Death and Family Court Proceedings

A marriage is dissolved by death as a matter of law. Moreover, if there is no entry of a bifurcated judgment terminating marital status before death, any pending action abates upon the death of a party, and the family court is divested of jurisdiction regarding status or anything else.29 Judgment, however, may be entered on any issues already decided by the family court.30 Except for those issues, no further order is possible regarding property rights, support, attorney’s fees, or costs.31

A wholly different result occurs if death follows entry of the judgment terminating marital status. Under this circumstance, the family court’s jurisdiction to decide any remaining issues, most importantly the division of community property, is unaffected.32 The deceased spouse’s estate will be substituted as a party to the dissolution proceeding.33 However, the status judgment does not divest the probate court of its jurisdiction over issues of succession, family allowance, probate homestead, and other purely probate matters.

The impact of the death of a party to a dissolution proceeding absent entry of a status judgment is not the same as the death of a party during a nullity proceeding. This proceeding involves a completely different issue: whether a valid marriage existed in the first place. Thus, the nullity proceeding survives the party’s death.34

An issue related to these jurisdictional considerations is the effect of the death of a party to a family court proceeding upon the characterization of marital property, particularly property held in joint tenancy by the spouses. Absent entry of a bifurcated status judgment of dissolution or a judgment of legal separation, the right of survivorship is applicable to joint tenancy property unless a party renews the title presumption or establishes some other form of ownership.35 By contrast, when death follows a judgment on status, the community property presumption continues to apply to property held in joint form.36 Further, the deceased spouse’s community property share passes through the probate estate to his or her devisees and heirs, and not to the surviving spouse, absent rebuttal of the community property presumption or establishment of a transmutation.37

The death of a party to a family court proceeding has varying effects upon existing orders for spousal support and child support. According to the Family Code, death of either the supporting or supported party terminates an existing spousal support order unless the parties have “otherwise agreed” in writing.38 Some court decisions, however, make it unclear what “otherwise agreed” really means. For example, a court held that the failure to list death or remarriage of the supported spouse as terminating events meant that the parties had “otherwise agreed” that death or remarriage should not be terminating events—although one might argue that the parties’ failure should not rise to the level of agreement.39 Similarly, a court held that the failure to list death as a terminating event along with a requirement in the lower court’s judgment that the supporting spouse maintain life insurance in the amount of the present value of the support obligation meant that death and the life insurance requirement were “otherwise agreed” to as nonterminating events.40

Practitioners should be aware that, even if spousal support terminates due to the death of the payor spouse, a family court order for the purchase of an annuity or life insurance policy or establishment of a trust to provide for the supported spouse remains enforceable.41 However, the obligation to pay medical insurance premiums to provide proper healthcare for a supported spouse has been
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The death of a party paying court-ordered child support usually has an opposite effect to the death of a spousal support payor. Unless otherwise provided in the support order, child support does not terminate at the death of either the supporting spouse or the supported spouse, since the order is based on the child’s support needs during minority.43 Child support is chargeable against the estate of the deceased obligor parent. The enforcement of this right following the death of the obligor parent requires that the party receiving the child support timely file a creditor’s claim in the decedent’s estate of the obligor.44 In addition, and perhaps counter intuitively, the child support payment is modifiable following the death of the payor spouse.45

Securing future child support payments after the death of the obligor parent may pose a challenge. Several potentially helpful Probate Code procedures can be used to secure the future payment of a debt that is not yet due, such as future child support payments. These include a court-approved agreement of the parties, the deposit of an amount in a financial institution, the distribution of an amount to a distributee subject to a bond conditioned on payment of the debt.46 The child support obligation is enforceable against the deceased obligor’s share of community property held with a subsequent spouse.47 Further, property that was put into a supporting parent’s living trust before his or her death is properly chargeable for that parent’s child support obligation.48

**Incapacity in Family Court Proceedings**

When an incompetent person or a person for whom a conservator has been appointed is a party to a family court proceeding, either a conservator of the estate or a guardian ad litem must appear in court on behalf of the person.49 Thus, if an incapacitated person is already a party to a family court proceeding, his or her attorney should either petition the probate court for the appointment of a conservator of the estate or make a motion to the family court for the appointment of a guardian ad litem.

The California Supreme Court held in the landmark case of *In re Marriage of Higgason*50 that a dissolution may be brought on behalf of a spouse under conservatorship by the spouse’s guardian ad litem, provided there is a showing that the spouse is capable of exercising a judgment and expressing a wish that the marriage be dissolved on account of irrec oncilable differences, and the spouse has already expressed that wish. In Higgason, Mrs. Higgason signed and verified the dissolution petition and the two order-to-show-cause declarations and gave her deposition expressing her desire to divorce. The court held that her actions met the test. Family lawyers may ponder, what else could constitute expressing a wish? For example, what if the impaired spouse left the other spouse for protracted periods, or consulted a family lawyer about commencing a dissolution, or set up a residence separate and apart from the other spouse, or unequivocally stated orally or in writing that he or she wanted a divorce but took no further steps?

Higgason is a marital dissolution opinion, but its reasoning should apply equally to legal separation proceedings. The Durable Power of Attorney Act provides a formal measure to nominate a conservator and thereby creates a rebuttable presumption in favor of the designated attorney in fact or conservator nominee for appointment as guardian ad litem.51 The conservator may commence a nullity of marriage proceeding for a party of unsound mind.52

Note that if the conservator is the conservatee’s spouse, and the conservator files a proceeding for marital dissolution, legal separation, or nullity, the conservator must file a notice with the probate court and serve it within 10 days of filing the action. The court may then issue an order to show cause why the spouse should not be removed and replaced as conservator.53

**Community Property**

The issue of the management and control of community property when one spouse retains legal capacity but the other spouse lacks legal capacity or is under conservatorship is of significant interest to the family court and the probate court. An analysis of this issue begins with the Probate Code’s provision that the spouse with capacity has the power to manage and control the community property, and the community property is not part of the conservatorship estate unless the spouse with capacity consents to its inclusion in the conservatorship estate.54 However, a tension exists between the well spouse’s management of the community property and the duty of a spouse to support his or her spouse.55 That statutory duty of support is nonwaivable and cannot be limited or rescinded by contract.56

Matters become complicated if the spouse with capacity fails or refuses to apply the community income, which he or she manages and controls, for the support of the incapacitated spouse. Under any circumstances, these matters can be handled in probate court, since conservatorships are a creature of the Probate Code.57 They may also be resolved in family court if the Higgason58 burden of proof can be met or if the matter is already before the family court.

The Probate Code provides a panoply of relief to the incapacitated spouse under conservatorship.59 Some of these forms of relief—and their Family Code analogs if the conservator files an action in family court—include:

- The probate court can issue an order that the well spouse who has management and control of the community property must apply that property to the other spouse’s support.60
- The probate court can issue an order that the well spouse must pay pendente lite support to the other spouse.61
- Income and expense declarations and property declarations must be filed by the well spouse when petitions under the appropriate Probate Code sections are filed.62
- The probate court has the power to determine the character of the property of the parties if that issue is raised63—a power comparable to that in Family Code Sections 2550 and 2551.
- The six circumstances for support and maintenance in conservatorship proceedings under the Probate Code64 are comparable to the 14 Family Code circumstances,65 since the sixth circumstance of the Probate Code is “any other relevant factors which [the court] considers just and equitable.”
- If the well spouse refuses to comply with any support order under an appropriate Probate Code section or in a separate support action, the probate court may divide the community property equally so that the conservatee’s community share can be administered in his or her conservatorship proceeding and not by the well spouse.66
- The probate court’s orders are enforceable by execution, contempt, and any other order deemed appropriate by the court.67

Assuming that issues involving the rights of the spouse with legal capacity and the incapacitated spouse can properly be before the family court, is the family court or the probate court the preferable forum for the determination of these matters? In *In re Marriage of Caballero*,68 the court of appeal, without discussing the provisions of Probate Code Sections 3000 et seq., held that a determination of the property and support rights of a person under conservatorship is more properly resolved under the Family Law Act than under conservatorship law. The court’s conclusion was based on the fact that 1) the incapacitated spouse may obtain immediate temporary spousal support consistent with the parties’ standard of living during marriage, and support orders may be effective as of the date of filing, and 2) support payments must first be paid from postseparation earnings (the supporting spouse’s separate property), then from community and quasi-community property, and only lastly from the supported spouse’s sep-
arate property. The Caballero court also reasoned that the supported spouse has the right to recover fees and costs incurred in seeking his or her family law rights. Also, the court noted that the family court may issue immediate ex parte restraining orders to preclude conduct contrary to the incapacitated spouse’s property rights—and in fact family law summonses contain ATROs regarding property transfers and related matters. Moreover, the family court has the authority to provide appropriate compensation for the well spouse’s exclusive possession and use of the family residence while the other spouse receives care elsewhere.

Finally, Caballero asserts that family court provides the only satisfactory forum to obtain an accounting of property and obligations—including full financial disclosure and cooperation with complete discovery within a short period of time—and the family court’s “power and experience in the determination of property rights after fully-developed adversarial proceedings” are of “substantial importance.” Still, parties should consider the extensive experience of probate court judges in protecting conservators, who are generally unable to protect themselves.

When family law issues collide with probate issues, the probate lawyer must look to the Probate Code, the Family Code, and case law, or must seek to associate counsel who are familiar with California family law. The prudent family lawyer must realize the possible effects of family court proceedings upon the client’s existing estate plan and should either consult with the client to modify that plan or refer the client to a qualified probate lawyer, with instructions about the possible effect of the ATROs. Of course, serious ethical considerations confront the probate lawyer who has represented both spouses in family estate planning and then is asked to represent either party against the other in family court proceedings.29

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1 PROB. CODE §§21600-21630.
2 PROB. CODE §21611(a).
3 PROB. CODE §21611(b).
4 PROB. CODE §21611(c). See PROB. CODE §§140-147 (waivers).
5 See the Uniform Premarital Agreement Act, Fam. Code §§1610-1617.
6 PROB. CODE §56122(a), (c).
7 PROB. CODE §56122(b).
8 PROB. CODE §56000(a).
9 PROB. CODE §56000(b)(2).
10 PROB. CODE §56000(b)(3).
11 PROB. CODE §56000(e).
12 PROB. CODE §78. See also Estate of Lahey, 76 Cal. App. 4th 1056 (2000).
13 PROB. CODE §§6122(d), 600(a).
14 PROB. CODE §18771(c).
15 PROB. CODE §810(b).
16 PROB. CODE §61000.5.
17 PROB. CODE §811.
18 PROB. CODE §§2580 et seq.
19 PROB. CODE §2580(a).
20 PROB. CODE §2580(b).
21 PROB. CODE §2582.
22 PROB. CODE §1900.
23 FAM. CODE §301.
24 PROB. CODE §1901.
25 PROB. CODE §§810(c), 811(a).
26 FAM. CODE §309.
27 FAM. CODE §§231 et seq., 2040.
28 FAM. CODE §2040.
30 CODE CIV. PROC. §669.
32 In re Marriage of Hille, 4 Cal. App. 4th 215 (1992); In re Marriage of Allen, 8 Cal. App. 4th 1225 (1992); Kinsler, 121 Cal. App. 3d 808; FAM. CODE §2337(c).
33 CODE CIV. PROC. §§375, 377.31, 377.41.
35 Swan v. Walden, 156 Cal. 195 (1909); Estate of Blair, 199 Cal. App. 3d 161 (1988); FAM. CODE §§850 et seq.
36 CODE CIV. §2581.
38 FAM. CODE §4337.
41 FAM. CODE §4360.
46 PROB. CODE §§11460 et seq.
47 PROB. CODE §§13530, 13531, 13535.
49 CODE CIV. PROC. §372.
50 In re Marriage of Higgason, 10 Cal. App. 3d 476 (1973).
52 FAM. CODE §§2210(c), 2211(c).
53 PROB. CODE §1813(b).
54 PROB. CODE §3081(b).
55 FAM. CODE §§720, 4300.
56 In re Marriage of Higgason, 10 Cal. App. 3d 476 (1973); In re Marriage of Pendleton & Fireman, 24 Cal. 4th 39 (2000).
57 PROB. CODE div. 4, §§1400 et seq.
58 Higgason, 10 Cal. App. 3d 476.
59 PROB. CODE §53000 et seq.
60 PROB. CODE §3080 (analogous to spousal support under Fam. Code §§4300 et seq.).
61 PROB. CODE §3083 (analogous to temporary spousal support under FAM. CODE §3600).
62 PROB. CODE §3084 (similar to family law requirement of Cal. R. of Ct. 1243 that both spouses file income and expense declarations in all proceedings involving financial issues).
63 PROB. CODE §3087.
64 PROB. CODE §3088(b).
65 FAM. CODE §4320.
66 PROB. CODE §3089 (comparable to Fam. Code §3550).
67 PROB. CODE §3090.
69 See, e.g., CAL. RULES OF PROF’L CONDUCT R. 3-310, Avoiding the Representation of Adverse Interests.
EIGHT YEARS AGO Congress decided that the existing means for awarding damages for trademark infringement were not deterring this illegal practice and decided to supplement these measures with statutory damages—a specific range that a court could award even in the absence of proof of a plaintiff’s losses or the defendant’s profits. Despite the fact that almost a decade has passed since Congress passed this statute, most courts that award trademark infringement damages continue to cite as their authority copyright law on statutory damages. While it is true that there is a much longer common law history for copyright statutory damages, the assumption of most courts, practitioners, and even trademark treatises, that there is little jurisprudence on trademark statutory damages is not correct. In fact, a solid body of trademark cases awarding statutory damages exists. At least 25 reported cases in which statutory damages were awarded for counterfeiting can be found.1

Before statutory damages provided an alternative, courts awarded damages based on a plaintiff’s actual damages or a defendant’s profits from the sales of counterfeit goods. Because the records of defendants were often poor or nonexistent, plaintiffs were forced to reveal important information about their businesses in order to recover damages. This put pressure on plaintiffs—particularly privately held companies—either to reveal confidential information about their sales practices and profits or forgo damages. Moreover, this information was to be revealed to the very persons who already had a track record of taking the plaintiff’s intellectual property. To plaintiffs, it seemed like they were being asked to give the key to the safe to the person who had just broken into their house. The choice between disclosing trade secrets or forgoing damages added insult to injury to a company that had already suffered a serious trademark infringement. Congress enacted statutory damages to provide an alternative:

The creation of this alternative to the more traditional remedies of recovery of the plaintiff’s damages or the defendant’s profits reflected a harsh reality—counterfeiters often do not keep or secrete records of their unlawful activities, thus making proof of the extent of the plaintiff’s injury or the counterfeiter’s profits impossible as a practical matter.2

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There are three prerequisites to an award of statutory damages in trademark cases. First, there must be a trademark registration. Second, the infringing mark must be nearly identical to the authentic mark. The third requirement is that the infringing product or service is listed in the federal trademark registration.

Courts have a wide range of discretion in setting statutory damages. A court may award $500 to $100,000 per counterfeit mark per type of goods or services. If the infringement is willful the range increases to $1 million. In practice, courts have employed the full range of statutory damages. In one case, a court awarded only $500 per mark, and several courts have made awards of the full $1 million per mark.

In most counterfeiting cases liability can be quickly established without trial. A plaintiff proves that it owns the trademark by offering its federal registration. A plaintiff offers samples of the products or services that the defendant offered that bore the mark and proves that this use was without authorization. Because counterfeiting cases involve only infringing uses in which the mark the infringer used is virtually identical to the registration, there is less room for litigation over issues such as similarity. Relatively simple counterfeiting cases thus lend themselves to resolution before trial.

In fact, in the vast majority of trademark statutory damage cases there were insufficient contested facts for a trial on the merits. Almost half involved default judgments. Another third of the statutory damage awards were made during or after a motion for summary judgment. To a defendant the message is that you may be at greatest risk for a statutory damage award in a case that can be quickly resolved. To a plaintiff, these quick cases look like the ideal setting in which to seek statutory damages.

Consistent with the summary stage in which most statutory damages are awarded—and with a defendant having insufficient contested issues to get to trial—the average award per mark is substantial: $219,739. This figure must be considered in view of not only the relatively uncontested state of most of the cases but also in view of the factors that the various courts considered, such as defendant’s profits or sales.

The amount of damages a plaintiff recovered on other claims, such as state punitive damages, may also be important. It seems that the greater the recovery on other counts, the less likely a court was to award large statutory damages. None of the courts said this explicitly, but because discretion is so wide, it is probably considered.

### Determining Statutory Damages

In almost all the decisions, the court considered the statutory factors of willfulness and the number of marks counterfeited. Because the statute requires a determination of damages “per mark,” many courts (more than 40 percent) reported that they first determined a damage amount and then multiplied it by the number of marks counterfeited. Although these decisions explicitly stated that the court followed the statute by first determining the damage amount and then multiplying by the number of trademarks counterfeited, one wonders if the real process was somewhat different. Did the courts tend to determine what a just total award was and work backwards by dividing it by the number of marks counterfeited? Or did courts determine the amount without regard to the number of marks?

Since the courts are under a statutory mandate to multiply the damages by the number of marks counterfeited, it is surprising that a number of courts admitted that they did the opposite, that they determined a reasonable total statutory damage award and then divided it by the number of marks to reach the award per mark. In other words if the “right” award were $5,000 and there was one mark, the damages were set at $5,000 per mark. If there were 10 marks, the award would be pegged at $500 per mark. One way to view this is that it converts the statutory mandate to multiply times the number of marks into a meaningless exercise. Another way to view it is as the determination of courts to award what they view as fair. This highlights a critical point about statutory awards: Because they are discretionary, the computation a court uses may not be the cause of the award as much as a reflection of what the court deems correct.

While the number of trademarks infringed—despite the statutory mandate—may not be important, there are a number of factors that did play an important role when courts have determined statutory damages. When a defendant’s profits could be determined, most courts considered that factor in awarding statutory damages. Some cases used a multiplier of defendant’s profits. In other cases the statutory award bore some relation to the defendant’s profits. Although lack of information about a defendant’s profits was a main reason that Congress authorized statutory damages, when courts could obtain this information they used it in determining statutory damages. This makes sense because it is the best indicator of the extent to which an infringer has profited from the infringement, and therefore makes a good basis upon which to calculate an award.

A factor that three courts considered in calculating statutory damages was whether infringing sales were made over the Internet. The rationale was that sales over the Internet increased the amount of an award because use of the Internet made the infringement widely available. These cases did not provide proof that the plaintiff’s Web
site sales of legitimate product were actually reduced. The logic of this approach is not strong. Without information about an infringer’s sales volume (or the reduction in the plaintiff’s Internet sales) the fact that the infringer marketed in a particular way does not make the infringement more or less harmful.

The Second Circuit provided the most rigorous analysis of statutory damages by analogizing to copyright law. Although many cases referred to precedent in copyright statutory damage cases, Judge Motley in New York most thoughtfully applied this analysis.17 Citing Second Circuit copyright cases, Judge Motley identified the factors a court should consider in determining an award of statutory damages. Her analysis was later refined into seven factors: 1) the profits made by the defendant, 2) the revenues lost by the plaintiff, 3) the value of the mark, 4) the deterrent effect on others, 5) whether the conduct was innocent or willful, 6) whether the defendant has cooperated in providing records, and 7) the deterrent effect on the defendant.18 These factors were used in three other cases in the Southern District of New York.19

The value of Motley’s reasoning is that it identifies the factors a court should consider in making the discretionary award. It increases the likelihood that a range of factors are considered and reduces the likelihood that a court reacts merely on the basis of a feeling about the case. This approach also encourages placing the case in a larger perspective—its deterrence effect on others.

If the same approach were used in the Ninth Circuit—closely following copyright precedent—the guiding case would probably be Los Angeles News Service v. Reuters TV International,20 which lists these factors:

The district court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima. The court is guided by what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like. Because awards of statutory damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant in order to sanction and vindicate the statutory policy of discouraging infringement.21

This description may be distilled into six criteria to be used when determining statutory damages: 1) what is just, 2) the nature of the trademark, 3) the circumstances of the infringement, 4) compensation to the plaintiff, 5) deterrence of the defendant, and 6) deterrence of other infringers. None of the three district court cases within the Ninth Circuit identified or used these factors.22

These factors are similar, but not identical, to those used in the Second Circuit. Both include the factors of deterrence of the defendant and deterrence of other infringers. The Ninth Circuit’s “nature of the trademark” and “compensation to plaintiff” are similar to the Second Circuit’s “the value of the mark” and “revenues lost by plaintiff.” The Ninth Circuit’s “circumstances of the infringement” using this approach read the statute to mean that there are two multipliers: the number of trademark registrations and the number of different goods counterfeited. For example, if bracelets, earrings, and rings (all in the description of goods in the registration) are counterfeited using different trademarks, the statutory damage amount is multiplied by three because there are three different types of goods, then by two because there are two trademarks. This analysis turns “type of goods or services” into key terms, which might be the subject of expert testimony (to determine whether particular goods are of one or more types) and must be considered by the court in its computation.

None of the courts that used the Nike analysis referred to the class of the trademark registrations. There is no indication in the statute or its legislative history that the phrase “type of goods or services” is meant to refer to the different classes on a registration. But there are a number of important advantages to using the class system as a multiplier on damage awards under the phrase “type of goods or services”—especially when compared to using “type of goods” as a multiplier without reference to class.

First, as the Nike analysis shows, this creates the separate issue of determining what are the “type of goods or service.” This results in another issue upon which courts must hear testimony, a process at odds with one feature of statutory damages: allowing courts to more readily award damages without extensive proof on a party’s income or losses. Thus, while the concept of statutory damages allows simplification of the awards process, determining the type of goods adds a complication. However, if the class system were used, courts would not have to make an independent finding; the answer would lie in the registration. This would better serve the purpose of a simplified damage calculation process.

Second, the Nike analysis hinges on the exact description chosen by the registrant. For example, if a registration specifies “boys’ underwear” and “girls’ underwear,” that registrant is in a much better position to argue that it has two types of goods (assuming the infringer sold boys’ and girls’ underwear) than a registrant with a description of “children’s underwear.” Under the analysis of Nike, another issue upon which courts must hear testimony, a process at odds with one feature of statutory damages: allowing courts to more readily award damages without extensive proof on a party’s income or losses. Thus, while the concept of statutory damages allows simplification of the awards process, determining the type of goods adds a complication. However, if the class system were used, courts would not have to make an independent finding; the answer would lie in the registration. This would better serve the purpose of a simplified damage calculation process.

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information that would be useful in deter-
mining damages and is depriving the court of
this information after representing in its ex-
parte motion that it needed the information.
If a Ninth Circuit district court were faced with
this situation and it chose to use the cri-
teria of Los Angeles News, it could consider
the plaintiff’s conduct under the “what is just”
prong of the analysis. However, in the Second
Circuit, the plaintiff’s conduct is not one of the
factors considered.
Statutory damage trademark cases have
already covered a fair amount of ground.
The Second Circuit decisions reflect the most
thorough analysis. Ninth Circuit cases have
did not have to respond to the defendant’s dis-
covery requests about its financial informa-
tion. Allowing a multiplier based on class
would make better public policy by encour-
gaging efficient registrations.
To reward multiple, single-class registra-
tions encourages inefficient trademark appli-
cations—numerous applications in individual
classes, instead of a single multiple class appli-
cation. Allowing a multiplier based on class
would make better public policy by encour-
gaging efficient registrations.
One issue not addressed by any of the courts
awarding statutory damages is how to deal with
the lazy plaintiff. For example, consider a plaintiff that seeks ex parte relief. In its application for ex parte relief it argues that it needs to seize the defendant’s records so that it will have information about the extent of counterfeiting. The application is granted and defendant’s records of its sales and profits are seized.
In litigation the plaintiff claims that it is not seeking its lost profits, so that it does not have to respond to the defendant’s dis-
covery requests about its financial informa-
tion. In another economizing move, theplaint-
tiff decides not to hire a damage expert. At
trial, the plaintiff simply asks the court to
award statutory damages.
While this is within the scope of the
statute, it was enacted for those situations in
which accurate information about the defen-
dant’s conduct is not available. In this case,
however, the plaintiff has that information in
the records it seized but does not want to be
bothered to analyze it and present it to the
court. The plaintiff is depriving the court of
information that would be useful in deter-
mining damages and is depriving the court of
this information after representing in its ex-
parte motion that it needed the information.
If a Ninth Circuit district court were faced with
this situation and it chose to use the cri-
teria of Los Angeles News, it could consider
the plaintiff’s conduct under the “what is just”
prong of the analysis. However, in the Second
Circuit, the plaintiff’s conduct is not one of the
factors considered.
Statutory damage trademark cases have
already covered a fair amount of ground.
The Second Circuit decisions reflect the most
thorough analysis. Ninth Circuit cases have
did not have to respond to the defendant’s dis-
covery requests about its financial informa-
tion. Allowing a multiplier based on class
would make better public policy by encour-
gaging efficient registrations.
To reward multiple, single-class registra-
tions encourages inefficient trademark appli-
cations—numerous applications in individual
classes, instead of a single multiple class appli-
cation. Allowing a multiplier based on class
would make better public policy by encour-
gaging efficient registrations.
One issue not addressed by any of the courts
awarding statutory damages is how to deal with
the lazy plaintiff. For example, consider a plaintiff that seeks ex parte relief. In its application for ex parte relief it argues that it needs to seize the defendant’s records so that it will have information about the extent of counterfeiting. The application is granted and defendant’s records of its sales and profits are seized.
In litigation the plaintiff claims that it is not seeking its lost profits, so that it does not have to respond to the defendant’s dis-
covery requests about its financial informa-
tion. In another economizing move, theplaint-
tiff decides not to hire a damage expert. At
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however, the plaintiff has that information in
the records it seized but does not want to be
bothered to analyze it and present it to the
court. The plaintiff is depriving the court of
information that would be useful in deter-
IN MANY RESPECTS, the cross-examination of an expert witness is the same as that of other witnesses. Some basics include: Be brief, do not quarrel with the witness, never ask a question to which you do not already know the answer, avoid asking one question too many, and so on. However, there are some important differences.

First, preparation is even more important when dealing with an expert witness. Your research should include:
- Has this witness written or testified previously with inconsistent conclusions to those being taken in your case?
- Does the expert always testify for the same side? An impartial expert can consistently apply his or her trade on behalf of plaintiffs and defendants.

Attacking the opposing expert’s theory or conclusions is much more difficult than attacking their qualifications. To prepare for the substance of the opinions, you should be schooled by your (equally competent) expert. Your expert can educate you as to weaknesses and flaws in the opposing position as well as the jargon necessary to understand what is being said. Your expert may also know information about your opposing expert that you would otherwise have difficulty learning.

Your cross-examination plan should emphasize quality over quantity. The more qualified and/or experienced the expert, the less likely that you will gain much from a more lengthy cross. The reason is that the expert has years of training and experience from which to draw in answering your questions. A wide-ranging cross is more likely to give the witness a new chance to demonstrate his expertise or explain his views. Particularly with complex subjects, focus on the big problems that you know you can demonstrate.

What Questions to Ask
Your deposition should have uncovered the assumptions upon which your opposing expert relies. These assumptions often control the result the expert reaches and will likely be the centerpiece of your examination. Your ultimate goal is to provide the jurors with the basis to argue against the expert’s conclusions by showing that they are based on assumptions that the jury independently rejects. The jury will generally find it much easier to critique the assumptions than to challenge the expert’s science or techniques.

All cross-examination is better when done with short and simple sentences. Add only one new fact or point with each question. This makes it difficult for the witness to disagree without appearing obstinate. Short questions provide less room for the witness to squirm away from your control or provide explanations that you would rather not hear.

The use of questions that do not contain extra details is particularly important when dealing with the complex subjects that experts address. Experts are usually careful and understand the importance of precision. Avoid questions containing absolute words (such as “always” or “never”) or unnecessary adjectives (such as “clearly” or “rapidly”). Otherwise, the expert may take advantage of your question’s exceptions or subtleties to avoid answering in the desired way.

Most questions should be leading, meaning the question can be answered with a yes or a no. This has the practical effect of having the attorney serve as a witness, with the real witness ratifying the attorney’s testimony. However, as long as you have a good deposition transcript to support you, some questions are better left open for the expert to complete. Some examples, all of which ask for specific objective data, include:
- How much money did you make last year testifying for other plaintiffs?
- Of the thousands of medical journals published around the world, how many of them have asked you to publish the opinions you are expressing in this case?
- When is the last time you treated a real patient?

Lawyers often try to impeach an expert with the fact that he or she has been paid for his work. This backfires as often as it works. For example, if the expert has put significant time and cost into the matter, does this indicate thoroughness rather than bias? If the expert has a high hourly rate, does this mean that he or she is a liar, or rather that he or she is eminently qualified and in high demand? The impeachment from fee-related questions is minor compared to the witness’s confidence and preparation on other matters and the effectiveness of the rest of your cross-examination.

Some experts attempt to demonstrate their superiority by using technical jargon. When dealing with a pompous expert, you must know the expert’s lingo. Get the expert to agree with your alternative explanation that uses everyday language. Doing this will demonstrate the expert’s arrogance and will raise your credibility with the jury.

The Order of Questions
You should generally begin and end your cross-examination with your strongest points. Otherwise, use the following sequence:
- Practically every opposing expert will have opinions that support your case. This corroborating testimony will have a stronger impact than the same testimony from your side. Therefore, start your examination with the areas or themes that will allow you to turn the opposing expert into your witness. At the beginning, your opposing expert will be less hostile.
- Next, dilute the opposing expert’s opinions by seeking agreement regarding possible alternative explanations that favor your theories. A jury will often give credit to a mere possibility, even if this possibility may not be probable.
- After the corroborative portion of the cross-examination, ask the more destructive and critical questions. However, do not be aggressive, as this might cause the jury to be sympathetic toward the expert. You should attack an expert only when you believe the jury will see the witness as being unfair, arrogant, or disrespectful of the truth. Even then, you must never cross the lines between tough and mean or confident and arrogant.

Experts often make a huge difference in the trial. Additional attention to the expert portion of your case is usually worth the effort.

David Nolte is a principal at Fulcrum Financial Inquiry LLP, with 30 years of experience performing forensic accounting, auditing, business appraisals, and related financial consulting. He regularly serves as an expert witness.
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CONTACT William C. Cotton, Shires and Associates, Inc.
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4910 Campus Drive, Newport Beach, CA 92660, (949) 724-1880, fax (949) 724-1889, e-mail: sagabriel@hayniecpa.com. Web site: www.hayniecpa.com. Contact Steven C. Gabrielson. After ego, consulting and expert witness testimony in a variety of practice areas: commercial damages, ownership disputes, economic analysis, business valuation, lost profits analysis, fraud/forensic investigations, taxation, personal injury, wrongful termination, professional liability, and expert cross examination. Extensive public speaking background assists in courtroom presentations.

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18881 Von Karman, Suite 1175, Irvine, CA 92612, (949) 263-8700, fax (949) 263-0770, e-mail: info@mcsassociates.com. Web site: www.mcsassociates.com. Contact Norman Norma, managing director. Nationally recognized banking, finance, insurance, and real estate consulting group (established 1973). Experienced litigation consultants/experts include senior bankers, lenders, consultants, economists, accountants, insurance underwriters/brokers. Specialties: lending customs, prac-
tices, policies, in all types of lending (real estate, business/commercial, consumer/credit card), banking operations/administration, trusts and investments, economic analysis and valuations/damages assessment, insurance claims, coverages and bad faith, real estate brokerage, appraisal, escrow, and construction defects/disputes, and title insurance.

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2182 Dupont Drive, Suite 202, Irvine, CA 92612, (949) 752-0270, fax (949) 752-9553, e-mail: jmberinger@beringerassociates.com. Contact John M. Beringer, Jr. LPCS, RPA. B&A assists with insurance litigation, including both bad faith and Code of Reg 2695; analysis of claims control systems and insurance carrier management and business claim management systems. B&A assists with the creation of risk management plans. B&A is a consultant to Creative Solutions, SPC, a Captive reinsurance carrier. He consults for IMMS, IRMA. Credentials include an LPCS and RPA. He is a member of SCLA, The National Association of Insurance Litigation Managers (NAILM) and published in Litigation Matters, the Property and Casualty Newsletter and Close-Up. Mr. Beringer’s carrier employment includes SRS (Hartford), Great American, ACSC and WIC, spanning approximately 30 years.

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550 South Hope Street, Suite 1050, Los Angeles, CA 90071, (213) 892-2568, fax (213) 892-2300, e-mail: robinsonl@capanalysis.com. Web site: www.capanalysis.com. Contact Laura Robinson, PhD. Specialties: economic, financial, accounting, and statistical analysis for complex litigation, arbitration, regulatory proceedings, and strategic corporate decision making. Assist attorneys with discovery, identification of relevant economic and financial issues, preparation of analytical models, critique of opposing experts, and expert testimony in federal and state courts, and before the FTC and DOJ. Areas of expertise include antitrust (including cutting-edge analyses of market definition, market power, coordinated interactions, and unilateral effects), economic damages, business valuation, investigative and forensic accounting and auditing, intellectual property (including patent, trademark, and copyright infringement, and valuation of intellectual property), insurance coverage, contract disputes and tort claims, mergers and acquisitions, and securities fraud. Degrees/licenses: CPAs, CFEs, CVAs, JDs, PhDs economics.

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502 Park Avenue, San Jose, CA 95110, (408) 279-1034, fax (408) 279-3582, e-mail: cemcom@aol.com. Contact Clint Miller. Insurance expert regarding claims, underwriting, agent and brokers errors and omissions, coverage disputes, customs and practices, and bad faith. See display ad on page 65.
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P.O. Box 4067, Oakland, CA 94606-4067, (510) 896-4747, fax (510) 896-0380, e-mail: john@grindon.com. Web site: www.grindon.com. Contact John R. Grindon, DSc. Dr. Grindon is a court-qualified expert witness and consultant with experience in patent litigation cases. Services offered include expert testimony, consulting research and patent analysis in the areas of electronics, electronic imaging, machine vision, signal processing, guidance and control, and related systems and software algorithms. He has extensive experience as a practicing engineer in these fields, and is skilled in communicating technical matters in clear language for expert reports and courtroom presentations. See display ad on page 64.

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435 North Roxbury Drive, Suite 311, Beverly Hills, CA 90210, (310) 274-7303, fax (775) 249-8082, e-mail: simon@lcshs.edu. Web site: www.simonmd.com. Pulmonary diseases, critical care, internal medicine. Twenty years’ experience—defense and plaintiff. Particular interests include asthma, pulmonary embolism, and deep venous thrombosis/pulmonary hypertension. Clinical professor, UCLA, former chief of staff, chief of pulmonary, chief of medicine—Cedars-Sinai.

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409 North Pacific Coast Highway, Suite 923, Redondo Beach, CA 90277, (310) 480-4770, fax (310) 943-3274, e-mail: mcnamara12749@mns.com. Contact Bernard T. McNamara, MD. Current practice, full time emergency medicine, and assistant clinical Professor of Medicine. Over 20 years experience in the practice of emergency medicine, infectious diseases, and HIV/AIDS. Experience in medical malpractice consultation and litigation (both plaintiff and defense). Board certified, emergency medicine since 1987; Board certified, infectious disease since 1984; Board certified, international medicine since 1980. Degrees/licenses: MD; Fellow, American College of Physicians; Fellow, American College of Emergency Medicine; Member, American Academy of Emergency Medicine; and member, Infectious Disease Society of America; LACMA & CMA; Lic: (CA, WA); CA-Lic-G66303 since 1978, WA Lic-MD0041205 since 2002.

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icine. He provides clinical evaluations and treatment, including electromyography, of individuals and populations with suspected neurological illness secondary to workplace injuries or chemical exposure. Services include medical record and utilization review and consulting to industrial, legal, government, pharmaceutical, and academic institutions on topics such as metals and solvents, mold illness, Baychol issues, Persian Gulf War syndrome, musicians’ injuries, and others. See display ad on page 77.

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ROBERT WAGMEISTER, MD, FACS
2001 Santa Monica Boulevard, #1170-W, Santa Monica, CA 90404, (310) 828-6626, fax (310) 828-2626, e-mail: rwagmd@aol.com. Contact April Johnson. Medical Board when requested by attorneys. Degrees/license: MD.

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Encino-Tarzana Regional Medicine Center Pathologist. (consulting emeritus status) 10155 Topeka Drive, Northridge, CA 91324, (818) 349-8568, fax (818) 993-9701. Contact Lester Winker, MD. Specializes: surgical and autopsy pathology, clinical pathology. Forty years of experience in reviewing medical records (hospital records, office records) with emphasis on pathology aspects, gross and microscopic, and relationships to general medical and hospital care. Experience with hospital bylaws, rules, and regulations, consent issues, medical staff privileges. Also experienced in hospital healthcare law, medical hospital and “outside” ethical medical issues. Helped establish concepts and chaired hospital ethics committees for more than 10 years. Represented physicians before California Medical Board when requested by attorneys. Degrees/licenses: MD. See display ad on page 72.

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969-G Edgewater Boulevard, Suite 807, Foster City, CA 94404-3760, (650) 577-8635, fax (650) 577-0191, e-mail: ExpertWitness@DrWapen.com. Web site: www.DrWapen.com. Contact Bruce Wapen, MD. Board-certified emergency physician and experienced public speaker offers consultation, chart review, and testimony as an expert witness for defense or plaintiff involving litigation arising from the emergency department. See display ad on this page.

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IN THE COMING MONTHS, lawyers can look to electronic technology not only to provide devices to improve office productivity but also to provide new arenas for the practice of law. Perhaps most influential will be handheld devices, which continue to improve the connections between traveling attorneys and their office computers. A related fact of life is the ever-growing ubiquity of computers and data. This development will continue to affect such legal issues as privacy, discovery, and intellectual property.

In the handheld world you are free to travel our land while being able to receive phone calls, e-mail, and music; synchronize with contacts and appointments on your desktop; take and send photos; organize your finances; and play video games on what used to be just a cell phone. Take a look at the Handspring Treo 650 (www.palmone.com). It can do it all. It uses the Palm OS, so there is a large number of applications already available. The Sony Ericsson P910a (www.sonyericsson.com/p910) is another great all-in-one, but it may be less suited for law firm applications, because it is designed for the Symbian operating system and several common time, billing, and case management programs may not be compatible. In the corporate environment, the Blackberry is more common as a result of the relative ease in which the e-mail client functions with the handheld unit.

Radio frequency identification tags, or RFIDs, can fit into a container about the size of a gelatin-capsule pill. They are no bigger than the antitheft tags that many retail products already have and that contain no data. RFID tags, on the other hand, can be encoded with data—for example, the type of product within a container (or, for that matter, your recent medical records, arrest record, or account and PIN numbers). RFID tags come in two varieties: active and passive. The passive type responds to the energy field produced by a reading device. Active RFID tags have a battery or other power source and can transmit their data over distances as great as 300 feet. RFID technology has been available since the 1970s, but the costs to produce the tags and scanners have now been brought down to a more affordable range.

Passive RFIDs and their readers have a range of a few inches to a few feet, and one of their functions is that of a more sophisticated bar code that contains much more information about the product. One clear advantage that they have over bar codes is that an item tagged with a passive RFID can be scanned from any angle and the tag does not depend on light to be read. Bar codes, on the other hand, can only be read from a very short distance, at or near a right angle and within line of sight of the reader. Some major retailers—for which inventory control is always a great concern—are already demanding that their suppliers use RFIDs.

The lack of uniform standards had impeded the implementation of RFID technology, but in December 2004, EPC Global, a standards-setting body for RFID, announced a second generation of specifications that, if implemented, will resolve a number of compatibility issues. A number of vendors have announced that they plan to offer tags that comply with these specifications. In short, RFID technology may be coming soon to a courtroom near you. In the near future, lawyers may be called upon to advise their employers on the legalities of RFIDs on employee ID cards and the placement of scanners around the office. Government and criminal defense attorneys may argue about RFIDs on driver’s licenses.

The privacy and security issues raised by RFID technology are not as up-to-date as the technology itself. Appropriately, the Internet is the best starting place for information on the conflict between privacy rights and the facility with which they can be compromised with the help of computers and other electronic devices, including RFIDs. Some Web sites that cover privacy, RFIDs, and the technical standards for RFIDs include www.epcglobal.org, www.epic.org, www.ala.org, www.rfidnas.com, www.aimglobal.org/standards/stndrdorgs.asp, and www.rfidjournal.com. On the Internet, some basic research on privacy laws can begin at www.privacy.ca.gov, www.epic.org, and www.eff.org. For a general overview of federal security initiatives, start with the Department of Homeland Security at www.dhs.gov and Customs and Border Protection at www.cbp.gov.

Electronic Discovery

Another issue involving privacy and the increasing use of computers and data-carrying devices is the burden of electronic discovery. Electronic discovery in judicial settings and for internal investigations will change the relationships among users, companies, and their computers. Attorneys in many practice areas may soon need to be better informed about how many copies of an e-mail message reside in the computer where it originated, each server along its path, and backup files, not to mention what information is automatically embedded in that message by the application that generated it.

RFIDs do not yet keep track of the movements of office workers, but they have dramatically advanced the amount of information that can ride along with a product from the manufacturer to the retailer. Similarly, as computers are ever more widely used and become steadily more capable of storing data, the field of electronic discovery has been dramatically affected. The flood of information that nearly any organization now harbors on its computers, servers, and telephone systems may become subject to a discovery request, and nothing more than compliance with the request can bring ruin.

In 2004 the federal courts issued proposed changes to the Federal Rules of Civil Procedure to address some of the concerns over the intrusiveness, costs, and use of electronic discovery. (See www.lawyers.com/rulemaking/civrules.) California has also addressed some of these issues in Code of Civil Procedure Sections 2017 et seq. In particular, Section 2017.730 provides that in certain cases the court must find, or the parties must stipulate, that electronic discovery will be cost-efficient. The court may appoint a third-party service provider to work on the discovery process in an efficient and cost-effective man-

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ner. In addition, corporate counsel, IT experts, and management have been and will be obliged to work together to create policies and procedures for coping with electronic discovery.

**Corporate Compliance**

The burdens of electronic discovery can weigh on anyone who relies on a computer, but they may be especially worrisome for corporate counsel, who can also add compliance issues to their list of technological challenges. Before the Sarbanes-Oxley Act, when the CEO of a public company stated that “the buck stops here,” he or she was usually assumed to be speaking figuratively. After the act’s passage, executives and board members must spend an unprecedented amount of time ensuring accountability for how the corporation’s decisions are made and how information is reported.

Sarbanes-Oxley is not the only recent legislation to focus on compliance issues. Companies involved in healthcare, banking, and the environment have recently faced increased regulation, resulting in more frequent review of their compliance practices, and attorneys in and out of house have had to adjust their roles accordingly. There are no signs that this will change soon.

Statutory certifications of compliance are frequently based on a review of the process by which a corporation makes decisions. This review often depends on checklists concerning how information is collected and how it is reviewed. The use of checklists, in turn, is facilitated by computer-based tracking systems that can include all personnel, from rank-and-file employees to the CEO. To offer effective advice, counsel will need to understand how these computerized checklists are created and used.


Lawyers may have mixed feelings about computers, which seem to create as much drudgery as they prevent. While every computer-created legal liability is also an employment opportunity, many lawyers may wonder whether the machine serves them or the other way around. In either case, thanks to handheld devices, attorneys can stay in touch with their office computers from almost anywhere at nearly any time.
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CLE Preview

Annual Environmental Law Super Symposium

ON THURSDAY, APRIL 7, the Environmental Law Section will present the 19th Annual Environmental Law Super Symposium. This program will emphasize creative solutions to the problem of diminishing resources in Southern California due to environmental contamination, population growth, and regulatory control. The symposium will take place at the Omni Los Angeles Hotel, 251 South Olive Street, Downtown. On-site registration will begin at 8 A.M., with the program continuing—with a lunch break—from 8:30 A.M. to 4:30 P.M. The registration code number is 008918. The prices below include the meal.

$150—CLE+Plus members
$275—Environmental Law Section members
$325—other LACBA members
$375—all others
$400—all at-the-door registrants
6.75 CLE hours

The 2005 Labor and Employment Law Section Annual Retreat

ON FRIDAY, APRIL 15, the Labor and Employment Law Section will sponsor its annual retreat in beautiful Ojai. Share in learning, laughter, and all-around good times while earning CLE credits at a very reasonable price. This retreat will take place at the Ojai Valley Inn and Spa (on Country Club Road in Ojai). On Saturday and Sunday mornings, CLE programs will run from 8 A.M. until 12:15 P.M. and will feature an ethics segment, an opportunity to hear from well-respected judges, a debate between two of the most outspoken members of the labor and employment bar, a commentary on identification of liars, an up-to-date presentation on creative uses of technology, and a program on using yoga to manage stress. The inn’s toll-free number is (800) 422-6524, and its URL is www.ojairesort.com. Participants must reserve rooms with the inn separately from the program registration. A spouse or guest may attend the reception on April 15, dinner on April 16, and breakfast on April 16 and 17 for $90. The retreat’s registration code number is 008944.

$120—CLE+Plus members
$240—Labor and Employment Law Section members
$285—other LACBA members
$335—all others
7 CLE hours

EXCEL AND WORD FOR ATTORNEYS

ON TUESDAY, APRIL 5, the Los Angeles County Bar Association will present a course on how to go beyond the basics of Microsoft Word and Excel. Speaker Russell Jackman will demonstrate techniques to use these programs to benefit any practice. The program is taught with hands-on techniques that novice users can follow but it is also designed so that veteran users can gain useful new skills. Techniques such as using a pleading wizard; creating templates; using autotext and callouts; formatting and effective use of text boxes, columns, and page layouts; and using a spreadsheet to create budgets, graphs, and charts will all be discussed in this informative seminar. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. On-site registration and the meal will begin at 5:30 P.M., with the program continuing from 6 to 9:15 P.M. The registration code number is 008837. The prices below include the meal.

$45—CLE+Plus members
$75—LACBA members
$100—all others
3.25 CLE hours

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/

For a full listing of this month’s Association programs, please consult the County Bar Update.
**A Washington Fable for Our Time**

**IMAGINE THAT** you are the chief executive officer of a growing public company. You learn that a government agency has begun an investigation of your industry, and your company is on the list of targeted companies. You call your company’s law firm, anxiously anticipating learning your lawyer’s plans to defend vigorously the company’s position and achieve its ultimate vindication.

Your lawyer arrives at your initial meeting exuding experience and confidence but then tells you that the company must immediately begin to cooperate in the agency’s investigation. “What about a defense?” you demand. With studied patience, your lawyer replies that any attempt to defend the company’s position would be futile—indeed, worse than futile. Because the government is investigating your industry, resistance would only paint a bull’s eye on your company and result in harsher penalties for failing to cooperate. You realize that if every company receives and follows this advice, the agency’s position will never be challenged effectively.

You ask what it means to cooperate. Your lawyer calmly explains that “cooperation” means “capitulation” but brings no formal assurance of leniency from the agency. Counsel advises that your company hire another, “independent” law firm to conduct a thorough internal investigation and report the results of the investigation to the agency. In other words, the agency wants your company to buy and bring the rope for its own hanging. Moreover, the agency may prosecute the investigating lawyer if that lawyer’s investigation exonerates your company and the agency does not agree. Thus, the investigating lawyer will have every reason to err in the direction of finding a violation.

Surely, you think, this investigation would be confidential and not available to other litigants. Your lawyer explains that when your company turns over the results of the investigation to the agency, the company will be waiving the attorney-client privilege and work-product protection—so that other civil and criminal enforcement agencies, or anyone who wants to sue the company, will have access to the work.

Not willing to give up, you protest that surely your lawyer could mount a spirited defense on behalf of the company. Your attorney responds, “We have handled scores of these types of investigations. We always recommend immediate cooperation and settlement. We would ruin our firm’s reputation with the agency if we did otherwise.” “Isn’t that a conflict of interest?” you ask incredulously. “Well, it would be, but the agency has decided that we are ‘gatekeepers’ and will ignore the professional obligations that lawyers once owed to clients.”

You end the meeting by observing, “Are you my company’s lawyer and I must assume that you are obligated to keep confidential the matters that we discussed today.” Without hesitation, your lawyer replies, “Once it was true that we lawyers had to maintain the confidentiality of our client’s secrets ‘at every peril,’ but that era is over. The agency has adopted formal rules that permit me to divulge your company’s secrets without its consent. According to the agency, the State Bar can-not even initiate disciplinary proceedings against me if I do.”

This story may seem a farfetched fable, but most of the details are already reality. In 2001, the Securities and Exchange Commission issued its “Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and SEC Statement on the Relationship of Cooperation to Agency Enforcement.” That report emphasizes the role of cooperation, including self-investigation and the disclosure of the results of any internal investigation, as a mitigating factor. In January 2003, the Department of Justice issued what is known as the Thompson Memorandum, which also emphasizes the waiver of the attorney-client privilege. Moreover, a California court has concluded that this disclosure constitutes a waiver of the attorney-client privilege and the attorney work-product doctrine.

The SEC has also made it clear that lawyers who conduct these investigations are potential targets. Last fall, the SEC’s director of enforcement stated, “One area of particular focus for us is the role of lawyers in internal investigations of their clients or companies.” Cooperation with the commission can also endanger a target vis à vis other enforcement agencies. For example, in United States v. DiStefano, a registered representative of a broker-dealer submitted to a nine-hour deposition by the SEC. Subsequently, the U.S. attorney indicted him for conspiracy to commit securities, mail and wire fraud, and securities fraud. Finally, the SEC’s recently adopted attorney conduct rules permit lawyers, in some circumstances, to disclose information without the consent of their clients to the commission and purport to immunize lawyers who take advantage of these rules.

As a former state securities regulator, I am deeply troubled by securities fraud and corporate malfeasance. However, I also fear the current regulatory assault upon the attorney-client relationship. In a free society, we must be free to seek the advice and counsel of private attorneys who are bound to maintain the trust and confidentiality of the attorney-client relationship. As a profession, we have in large measure stood by silently as our historic obligations to our clients have been eroded. We must speak up before it is too late.

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3 See 17 C.F.R. §§203 et seq.

Keith Paul Bishop is a shareholder of Buchalter, Nemer, Fields & Younger and former California commissioner of corporations.
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