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LMIC invites you to celebrate the fun things in life!
n this month’s MCLE self-study article, Ronald R. St. John analyzes the use of ethical screens to avoid conflicts of interest. As St. John explains, the law is uncertain whether the implementation of an ethical screen is sufficient to avoid the vicarious disqualification of a law firm due to a conflict of interest arising from a firm attorney’s former representation of an adverse private sector client.

In theory, it seems obvious that ethical screens do not avoid conflicts of interest. If we accept the principle that all the attorneys in a law firm have access to all the confidential information that the firm receives, then we have to acknowledge that ethical screens are a fiction. In addition, the effectiveness of ethical screens is questionable. There are no standards for the implementation or safeguarding of ethical screens, nor are there any methods, uniform or otherwise, for policing the practice.

Ethical screens also contradict one of the functions of California’s Rules of Professional Conduct, which is to avoid the appearance of conflicts of interest. It is difficult to explain to a client how the law firm representing the client’s opponent avoided a conflict of interest simply by making assurances that firm attorneys working on the matter will not communicate with other attorneys in the firm. In a culture in which jokes about lawyer dishonesty are common, the use of ethical screens does not improve the perceptions of clients regarding the ethics of attorneys.

Of course, none of us lives in the theoretical world. Attorneys may practice with several different firms during the course of their careers. Moreover, at large law firms in particular, lawyers in one office of the firm representing a client may never communicate about the representation with lawyers in another firm office. As a practical matter, it seems excessively technical for a client to be deprived of its selection of counsel simply because a lawyer at the firm formerly worked at another law firm that represented the adverse party on a similar matter. The ethical line, however, is blurry and requires further consideration and clarification.

Many people are interested in the settlements that are reached and the awards issued in divorce and child support cases of the rich. Perhaps it is the surreal amounts that are bandied around that create this interest. Does Kirk Kerkorian really pay $50,000 per month in child support? Maybe we believe that one day each of us may face the same problem. How much of my $10 million yearly income will I have to pay in support?

The merely curious as well as the deeply concerned should know that relief may exist for the wealthy. Dennis M. Wasser and Bruce E. Cooperman explain that “extraordinarily high income” parents—apparently, those with annual incomes of $1.4 million or more—may seek child support payments that are below the Statewide Uniform Child Support Guideline. Wasser and Cooperman analyze the law and strategy that counsel should consider in pursuing nonguideline child support orders. They supply information that is valuable not only for practitioners contemplating their next high-income child support case but also for those of us swapping insights at cocktail parties.

As Wasser and Cooperman note, the trial court may ignore the child support guideline in extraordinarily high-income cases if it determines that the guideline amount would exceed the needs of the children. The supporting parent who meets the standard of an extraordinarily high-income earner must first prove that the guideline amount is excessive and then present evidence showing a lower amount will meet the reasonable needs of the children. As a result, seeking a nonguideline support order will likely increase the cost of litigation and require a trial. A parent seeking a nonguideline award may find that the pursuit is expensive and unrewarding.

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.
DEBBIE ZIMMERMAN PAYS ATTENTION

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Letters

Changing Sides

Regarding the Closing Argument column titled “The Case for Switching Teams” (October 2003): Whatever the merits may be for prosecutors and public defenders to switch sides, there is a practical aspect that must be taken into account and undoubtedly was one of the bases upon which district attorneys rejected such a proposal during the time that I was a prosecutor.

If a prosecutor wanted to change sides, he or she would have to resign. Any effort to make such a switch by taking a leave of absence would be unlawful (Government Code Section 25640; 66 Opinions of the Attorney General 31). Thus if a prosecutor made such a switch and then decided to return in two or three years to the prosecutor’s office (as suggested in the column), he or she would lose seniority and, depending upon the applicable hiring policies of the particular district attorney’s office, probably any promotions previously achieved in the prosecutor’s office.

Harry B. Sondheim

Praise for LAL

Regarding the October 2003 issue of Los Angeles Lawyer: I just want to say that I thought this issue was power-packed with interesting and useful information by practicing lawyers who really know their stuff. I am so impressed.

Maria Stratton

Hobson’s Choice

The article titled “Marital Duty” (February 2004) was timely and well done; however, it uses the term “Hobson’s choice” as a euphemism for “two equally bad choices.” In fact, the term “Hobson’s choice” means “no choice.” It derives from Hobson’s livery stable, where morning rentals were lined up in a narrow alley for the customers. Each customer had to take either the next horse in line or no horse at all. See, for example, http://www.wordorigins.org.

Scott Clarkson

Blaming Blogs

Your article about keeping current with blogs (Computer Counselor, December 2004) was most irritating. Technology has made the practice of law into the business of law, to the detriment of all lawyers. Everyone wants everything faster and faster—there is no time to breathe, no time to analyze, to digest the barrage of information. We are caught up with process instead of substance. And, with every wondrous new “tool,” the standard of care goes up—exposing all lawyers to malpractice claims from an already suit-happy clientele.

Be careful what you wish for.

Stephany Yablow

A Plaintiff’s Perspective

I just read “Bad Compromises,” by Judith Ilene Bloom (November 2004). Frankly, the article will be of much greater usefulness to a Defense Bar Association PAC than it will to the Los Angeles County Bar Association as a whole.

Bloom writes about virtually every complaint the defense bar has had about CCP Section 998, equating her wish list for how it should be interpreted and/or changed with “public policy.” She offers the defense bar’s view of how Section 998 should be “interpreted and applied” by the courts and the legislature. Although she makes some valid points about how that section can at times be cruel to defendants who have to defend against trivial claims, she does not even mention how it also can severely hurt plaintiffs who have completely valid claims, sometimes in perhaps unexpected ways. Two examples: Take, for instance, a recently filed, serious injury accident case in which liability is not disputed. The injured plaintiff, although still being treated, appears to be improving. The defense has virtually nothing to lose by making an early statutory offer for the damages that would be reasonable if the plaintiff does fully recover. Then, if the plaintiff does make a good recovery but has refused the offer due to uncertainty at that time as to the final medical result, the defense may be awarded postoffer costs. On the other hand, if the plaintiff’s condition takes a turn for the worse, the defense wins again if the plaintiff was cowed into accepting the early offer. At least now, the courts look into whether the plaintiff was reasonable in refusing an early offer where the final medical result is not certain. Bloom asserts flat out that “public policy” does not permit such an analysis.

I have often seen Section 998 offers used by manufacturers’ lawyers in so-called lemon law cases in which liability is a slam dunk. The manufacturer will make an early statutory offer for 100 percent of actual damages. That leaves plaintiffs who may have had a reasonable chance at trial of obtaining not only actual damages but also a civil penalty with an unpleasant choice. They either must accept the offer (and give up their chance for a penalty) or reject it and go to trial. Penalties are discretionary, so there is no effective way to judge whether one’s jury will make a penalty award even in a particularly egregious situation. The economic disparity between most consumers and automobile manufacturers makes it extremely difficult for a plaintiff to hang in there solely for the

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The Value of Simplifying Case Presentation

IN TIMES OF TIGHT BUDGETS and crowded court calendars, it is well worth remembering a basic rule that we lawyers all too often forget: Keep it simple. Simplicity involves more than developing a theory for a case and sticking to it. Simplicity involves investigation, research, and difficult choices. The task of simple, effective case presentation begins the moment an attorney meets a client or receives a case. It does not end until the case or conflict resolves.

The benefits of simple and effective case presentation are clear. Juries, already overloaded with information and questions, like lawyers they can understand. Judges have limited time to review papers or hear arguments. Both benefit from an attorney’s clear communication of the law, the facts necessary to give the law meaning, and the party’s purpose. A straightforward presentation enables a judge and jury to understand what the attorney wants. They cannot offer relief if they do not understand what the attorney seeks and, more important, why.

Regardless of the audience, an attorney often sounds more confident and credible when making a presentation that is simple and stripped of tangents. The attorney will appear more credible as well if he or she is not saddled with unworkable theories or strong advocacy of a bad position. More than one judge has noted that legally unsupportable claims consume valuable court resources and distract from claims that have merit or are at least arguable. In short, a simple argument cuts through the verbiage.

Simple, however, does not have to equal boring. An attorney can present a compelling and complete picture within the context of a case’s theme. Causes of action and the facts required to meet or defend against them can be made part of a simple story. A concise argument leaves little room for quibbling. Either the case is strong, or it is not. But at least the discourse is on the merits and not on a minor, essentially irrelevant, point.

This proposition seems basic enough, but too often, we stray from the message. Having done our research and learned our facts, sometimes we cannot resist the urge to embellish the case’s story with all that we have learned, as if to prove how much we know. Sometimes this embellishment is calculated; an attorney may use additional facts to allow the audience to infer an important point. A digression may draw an analogy to a different area of law. All strategies have a place and time. Without vigilance, however, embellishment, digression, and multiple themes easily leave audiences unable to see the forest for the trees. An audience may lose sight of the larger goal.

There may even be a place and time to create confusion. An attorney may need to distract from a missing element, fact, or unfavorable law. This strategy, too, has its purpose, but it is usually obvious—in fact, that a lack of simplicity weakens a strong case by inviting the audience to assume that the only means an attorney has to prevail is to sow confusion. If the case is good, why not just say so?

Even when a case concerns complex law or facts, multiple parties, or tremendous amounts of evidence, it still can be made simple with homework. Managing a case means more than reaching milestones of law and motion and hearings. From the start, an attorney should act as an investigator. Certainly, a lawyer may rely on a client’s original documents and version of the events. Often, however, this version is not complete. Clients may recall events incorrectly. Additional witnesses or documents may provide a fuller picture that might change a case’s nature. Thus, from the beginning, an attorney should explore as many avenues as possible to complete the factual picture.

Once a case’s factual underpinnings appear set, the next step is to make sure of each element of each cause of action or defense. Determine whether the law has changed in any way that affects the case. Read the relevant cases again. Another tip is to discuss the case with someone unfamiliar with it. This exercise tests whether the attorney can effectively state his or her argument. Getting caught on words, adding unnecessary statements, or needing a few attempts to get the point across are hallmarks of a need to simplify. Once the need is identified, the attorney can determine the most effective manner to convey the point. The sounding board may be an attorney, client, expert, or lay person. It does not need to be someone familiar with the specific legal field or the facts of this case. By talking through the case, an attorney minimizes the opportunities to lose an audience.

Most important is the understanding that the homework never ends. An attorney should keep revisiting the basic causes of action in light of the law and facts. This is the process that will determine if certain theories are unworkable or if new ones should be asserted. Some theories will stand out as stronger than others, and by this process an attorney should map out a plan for the case. Attorneys may also simplify by eliminating claims or defenses through law and motion, dismissal, or settlement and by proceeding with a more streamlined case. As another example, a bifurcated trial may be a more efficient use of resources.

Strategies for simplifying a case often do not present themselves. They arrive from an attorney’s determination to keep a final goal in sight and willingness to formulate the best plan to get there. A case that cannot be communicated effectively loses strength. So to keep your audience attentive, responsive, and convinced, keep your case presentation simple.

Jennifer F. Novak is vice president of the Barristers.
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CALIFORNIA IS AMONG THE FOREFRONT of states in guaranteeing certain rights to domestic partners, provided they register with the California Secretary of State. However, many of these couples are unsure about the legal consequences of their registration, especially in the area of estate planning. This uncertainty is magnified because many estate planning devices are influenced by their federal tax consequences, and federal law does not recognize domestic partnerships. Thus, practitioners advising domestic partners face special challenges.

California law defines “domestic partners” as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.” California domestic partners must register with the secretary of state, have a common residence, and share certain financial responsibilities. Both partners must have legal capacity and not be married or in another domestic partnership. The relationship cannot be incestuous. Domestic partners must be of the same gender unless at least one partner is age 62 or older, in which case they may be of opposite sexes.

On July 1, 2003, domestic partners received many rights equivalent to those granted surviving spouses under the Probate Code. For example, the surviving domestic partner inherits from the deceased partner by intestate succession. Like a surviving spouse, the domestic partner has priority for nomination of, or appointment as, administrator of the deceased partner’s estate and holds identical rights of participation in the estate administration process. Similarly, a domestic partner can make health care decisions for an incapacitated partner. A partner has priority for nomination of, or appointment as, conservator. If a domestic partner is hospitalized, the other partner and his or her family, including parents and children, have hospital visitation rights.

The legislature further attempted to equalize the rights and obligations of domestic partners with those of spouses by passing the California Domestic Partner Rights and Obligations Act (generally referred to as AB 205), which became effective on January 1, 2005. The act grants domestic partners “the same rights, protections, and benefits...and the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, governmental policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”

The validity of AB 205 was attacked in the courts in a suit, which was brought by now-deceased State Senator William J. Knight, claiming that AB 205 violated Family Code Section 308.5 (otherwise known as Proposition 22), which provides that “[o]nly marriage between a man and a woman is valid or recognized in California.” In September 2004, the Sacramento Superior Court granted summary judgment for the defendants, stating that AB 205 was valid.

Although AB 205 seeks to make the legal position of domestic partners equal to that of spouses, the federal Internal Revenue Code does not grant partners equivalent rights. For example, domestic partners cannot make unlimited tax-free transfers of assets to each other during their lifetimes or at death, because they cannot take advantage of the marital deduction that the IRC restricts to transfers between spouses. Domestic partners do not have the ability to “split” gifts, which permits spouses to double the amount of their annual gift tax exclusion. Under both California and federal law, partners cannot file joint income tax returns or treat their income as community property for tax reporting purposes.

Therefore, domestic partners need to have an estate plan in order to provide for orderly management and distribution of their assets upon incapacity or death and, if necessary, decrease transfer tax liability.

Basic Estate Planning

Representation of domestic partners in estate planning is similar to representation of spouses in that a potential conflict of interest exists when representing both partners. California Rules of Professional Conduct Section 3-310 requires that the attorney obtain informed consent of each client if the interests of clients actually or potentially conflict. A disclosure letter should be provided to both clients represented by the same attorney in estate planning, describing potential conflicts, which are similar to those that might occur between spouses. For example, during their lifetimes or at death, because they cannot take advantage of the marital deduction that the IRC restricts to transfers between spouses. Domestic partners do not have the ability to “split” gifts, which permits spouses to double the amount of their annual gift tax exclusion. Under both California and federal law, partners cannot file joint income tax returns or treat their income as community property for tax reporting purposes.

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Therefore, domestic partners need to have an estate plan in order to provide for orderly management and distribution of their assets upon incapacity or death and, if necessary, decrease transfer tax liability.

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ple, the partners may wish to benefit different beneficiaries at the death of the surviving partner, or they may disagree on which of their property is community and which is separate. The disclosure letter should also advise that matters that one partner might discuss with the attorney would not be protected by the attorney-client privilege from disclosure to the other, and that information provided by either partner cannot be withheld from the other. The attorney should obtain written acknowledgments from both partners of receipt of the disclosure letter and written waivers of potential conflicts of interest.

As with other estate planning clients, domestic partners have to consider several questions before an appropriate estate plan can be prepared for them:

1) Is one partner wealthier than the other?
2) Will either partner have a taxable estate (that is, one exceeding $1.5 million in 2005) at death?
3) Does either partner have children or other persons whom he or she intends to benefit in addition to the other partner?
4) Does either partner wish to benefit particular charities?

The answers to these questions will shape more sophisticated estate planning vehicles for the partners with substantial wealth or complicated family situations.

Even if a complex estate plan is unnecessary, both partners should have at least four basic estate planning documents: 1) a will, 2) durable power of attorney for asset management, 3) advance health care directive and durable power of attorney for health care, and 4) nomination of conservator. Each partner’s beneficiary designations on life insurance, IRAs, pension plans, annuities, and other contractual assets must be reviewed for appropriateness as part of the basic estate plan.

Notwithstanding their statutory rights under the intestacy laws, partners need wills to ensure that their property passes at death to intended beneficiaries. The intestacy laws give the surviving domestic partner the entire separate property intestate estate if the decedent is not survived by issue, parent, brother, sister, or issue of deceased brother or sister. However, few individuals are so lacking in family. The surviving partner receives only half of the separate property intestate estate, if the decedent is survived by 1) only one child or 2) issue of one deceased child or 3) no issue of the decedent’s, but one or more parents or 4) no issue of the decedent and no parent, but the issue of parents or the issue of either parent of the decedent. The surviving partner inherits only one-third of the separate property, if the decedent leaves 1) more than one child or 2) one child and the issue of one or more deceased children or 3) issue of two or more children. Therefore, the intestacy laws are not sufficiently protective of domestic partners, especially if the decedent is survived by children.

The expansion of community property rights to domestic partners after January 1, 2005, should result in a surviving domestic partner receiving the entire community property intestate estate. However, in strained family situations, intestacy could result in prolonged litigation concerning the character of property held by domestic partners. Is it separate property acquired prior to creation of the partnership, by gift or by inheritance? Or, is it community property acquired during the partnership? Was the property legally transmitted from separate to community property by written agreement entered into by the partners during partnership? These problems, and many others, can be avoided if each partner executes a will.

Similarly, if either partner should become incapacitated, a dispute could arise between that partner’s family and the other partner about who has the authority to make health care decisions or manage finances. Although Probate Code Section 4716 grants a domestic partner the same authority as a spouse to make health care decisions, designation of a partner as an agent under an advance health care directive and a durable power of attorney for health care avoids the delay and confusion that could arise from a medical provider’s lack of familiarity with this relatively new statute. (It also does not help that the Probate Code contains two different sections designated as 4716.)

Execution of an advance health care directive, stating the incapacitated partner’s intention concerning prolongation of life by modern medical technology, also avoids disputes over end-of-life procedures carried out under instruction from the other partner as attorney in fact under the durable power of attorney for health care.

Inability of one domestic partner to handle his or her own finances could result in a similar disagreement between relatives and the other partner, one which can be avoided by execution of a durable power of attorney for asset management by both partners, each appointing the other as attorney in fact. A Uniform Statutory Form Power of Attorney can be found in Probate Code Section 4401, or an individualized document can be drafted.

If an individualized power of attorney is prepared, the document should include specific language if any of the following powers are granted: 1) to make gifts on behalf of the principal, either to third parties or to the attorney in fact, 2) to create, revoke, or amend a trust created by the principal, 3) to transfer the principal’s assets to a revocable living trust created by the principal or by a third party, 4) to enter the principal’s safe deposit box and remove its contents, 5) to change beneficiary designations on behalf of the principal, or 6) to instruct the trustee of a trust regarding distributions to the principal, or 7) to make a loan to the attorney in fact. The durable power of attorney can also include designation of a conservator of the estate and person, in case a court proceeding becomes necessary. In the alternative, a conservator can be nominated in a separate written document.

Many domestic partners hold a large portion of their wealth in retirement plans, IRAs, annuities and other contractual relationships that pass at death by beneficiary designation. Because federal law preempts California domestic partnership statutes, the nonparticipant partner will have no interest in a ERISA-qualified plan, either at dissolution of the relationship or at the death of the other partner. A domestic partner does not qualify as a spouse under ERISA rules, which require that qualified plans provide mandatory annuities for surviving spouses, unless properly waived by the spouse. The participant partner can designate any beneficiary, without obtaining a waiver from the nonparticipant.

However, California law recognizes a community interest of each spouse in IRAs. Therefore, the nonowner domestic partner should consent in writing if a third party is designated as the beneficiary on a community property IRA owned by the other partner.

If either partner fails to designate a beneficiary on his or her retirement or annuity accounts, the proceeds will be payable under the terms of the plan or contract either to the decedent’s estate or next of kin, but not to the surviving partner. Therefore, both domestic partners must review all beneficiary designations to ensure that the intended beneficiary will receive the benefits at death.

**Title to Property**

If domestic partners want to avoid the expense and delay of probate, they may hold title to property in joint tenancy. Under joint tenancy, each partner owns an undivided one-half interest in the property. At the death of one partner, the surviving joint tenant receives title under an automatic right of survivorship, without probate court administration. The surviving joint tenant takes title free of creditors’ claims, if the transfer into joint tenancy was not designed to defraud creditors.

Attractive as it may appear, however, joint tenancy title has some substantial disadvantages to the partners if one partner contributes most or all of the money to acquire the asset. For example, the joint tenancy in their residence can be severed unilaterally by one partner, terminating the right of survivorship in the other partner without
If one partner contributes more than one-half the value of the property, a taxable gift is made when the partners take title to their residence in joint tenancy. If this gift exceeds the amount of the annual gift tax exclusion (currently $11,000), the transfer is a taxable gift that reduces the amount that the donor partner can pass free of transfer tax.44

Joint tenancy property has another unfavorable estate tax consequence. Under the IRC, 100 percent of joint tenancy property is included in the taxable estate of the first partner to die, unless the estate can prove that the surviving joint tenant originally owned the property or acquired his or her interest in it for full and adequate consideration.35 Any portion of the property that the survivor acquired by gift from the deceased joint tenant is brought back into the decedent's taxable estate, because it was not acquired by the survivor for full and adequate consideration.46 Because the burden of proof under these circumstances is on the taxpayer, if domestic partners take title to their residence in joint tenancy, they need to keep detailed records showing the contributions made by each of them to the purchase.

Partners face fewer tax problems if they hold securities or bank accounts in joint tenancy. For these assets, no gift transpires until one joint owner withdraws more than he or she contributed.38 However, the same estate tax inclusion rule applies to jointly owned securities or bank accounts, making the entire value of the account taxable in the estate of the first domestic partner to die.39

AB 205 also permits domestic partners to hold title to their residence and other assets as community property or community property with right of survivorship.40 However, it is unclear whether community property under AB 205 applies only to property acquired by domestic partners after the effective date of the legislation or whether it applies to all property acquired during a domestic partnership that was created prior to that date. In either case, if property is brought into the relationship by one partner and transmuted into community property by written agreement, a gift results under the IRC amounting to one-half of that property if there was not full and adequate consideration for the transmutation.41

As an alternative to joint tenancy, the partners could hold title to their own assets in their names alone, using a “pay on death” (POD) account, “transfer on death” (TOD) account, Totten Trust (ITF) account, or other statutory transfer device to transfer title to the other partner as beneficiary at death, without probate.42 Each partner could give the other a power of attorney or trading authorization over bank or brokerage accounts, ensuring that both could participate in the financial affairs of the partnership. Although there is no gift upon the designation of a beneficiary to these assets, the entire value of each account still would be included in the taxable estate of the partner who holds title.

**Trusts for Domestic Partners**

If domestic partners have sufficient assets, trusts can be used to transfer assets during lifetime and at death, avoiding probate and saving gift and estate tax. The most commonly used trust is the revocable living trust. In most instances, partners would not save estate tax by using this trust, but they would avoid probate.

When considering trusts, partners first must decide whether they want to create two separate trusts, each funded with the property of that partner, or a single trust containing the property of both. Unless the single trust holds community property, which has been created under AB 205, creation of a single trust with equal rights in both partners results in a taxable gift—just as creation of a joint tenancy in real property does. Therefore, in most cases, each partner should create his or her own revocable living trust. Each trust can be distributable to the surviving partner at death, and each partner's estate would be taxable at death.43

In a slightly more complex estate plan, each partner's trust could continue for the lifetime of the surviving partner, providing for a life estate for the survivor, with the trust remainder distributed to third persons at the second partner's death. Because the life estate would not be taxable in the estate of the surviving partner, this trust would decrease estate tax payable upon the second death.44 The surviving partner could act as trustee, receive net income and invade principal for his or her own benefit, as long as the trust instrument limits the invasion of principal by an ascertainable standard of “health, education, support or maintenance.”45 The surviving partner could also have a limited power of appointment, permitting the survivor to designate which family members or charities would receive the remainder upon termination of the trust.46

Charitable goals of a domestic partner can be achieved with a charitable remainder trust (CRT), which can provide for the surviving partner and save on estate taxes. The CRT would provide an income stream for the survivor's lifetime and distribute the remainder to charitable organizations at the survivor's death. A CRT can be created during lifetime, under a will, or under a revocable living trust to become effective at the death of the settlor. The settlor of an inter vivos CRT can avoid gift tax liability by reserving the right to eliminate the surviving partner's interest. The CRT can be funded with appreciated property, deferring or avoiding capital gain. At the settlor's death, the value of the charitable remainder interest will not be subject to estate tax, decreasing the decedent's taxable estate.47 The charitable remainder beneficiary can be the settlor's private foundation, created to fund specific charitable activities.

A domestic partner with substantial wealth can also use more specialized trusts to save gift or estate tax. Because domestic partners are not “family members” under IRC Chapter 14, a partner can reduce gift tax liability significantly by creating a common law grantor retained income trust (GRIT).48 The GRIT is an irrevocable trust created during lifetime that divides property into two interests: The settlor retains an income interest for a period of years, and at the end of this period, the remainder interest passes to the settlor's partner. Use of the GRIT decreases the settlor's gift tax liability, because the actuarial value of the retained income interest is subtracted from the value of the gifted property transferred into the GRIT. If the GRIT is funded with appreciating property that produces little income, significant value can be transferred to the remainder beneficiary with only a limited gift tax liability.

If one partner holds title to a home in his or her own name, rather than in joint tenancy, that partner can use a qualified personal residence trust (QPRT) to transfer title to the other partner at a lower gift tax. The QPRT is an irrevocable trust created during an individual's lifetime that lowers gift tax liability by use of the same device as the GRIT. Under the QPRT, the settlor retains an interest in his or her home for a period of years, at which time title to the residence passes to the other partner as remainder beneficiary.49 However, when the settlor's retained interest in the QPRT terminates, the settlor will have no further ownership interest in the house. If the settlor wishes to continue living in the residence, he or she must pay reasonable rent to the other partner as the new owner. If a remainder beneficiary sells the house after the termination of the trust, the cost basis will be the same as the settlor's, but the beneficiary can use the $250,000 exclusion from income for sale of a principal residence if that partner satisfies the statutory requirements.50

**Life Insurance for Domestic Partners**

Life insurance is a useful estate planning tool not only to provide financial support for a surviving partner but also to fund estate tax liability. Under California law, registered domestic partners will likely have insurable interests in each other's lives.51 Life insurance income is generally not taxable to the recipient.52 However, insurance proceeds are subject to estate tax, unless the deceased insured does...
not hold certain “incidents of ownership” in the policy, including the power 1) to change beneficiaries, 2) to assign the policy, 3) to revoke an assignment, 4) to pledge or borrow on the policy, or 5) to surrender or cancel the policy.53

Because incidents of ownership generally arise from the right of the insured or the insured’s estate to obtain economic benefits from the policy, estate taxation of insurance proceeds can be avoided by eliminating the insured partner’s control over the policy.54 Partners can purchase insurance on each other’s lives, holding the policies in cross-ownership. Alternatively, each domestic partner can create an irrevocable life insurance trust with Crummey withdrawal provisions, which would purchase a policy on the settlor’s life. The settlor could contribute the annual premium to the trust, taking advantage of the annual gift tax exclusion.55 At the death of the insured, the insurance proceeds could be distributed by the trust to the surviving partner, retained in trust for the survivor’s benefit, or loaned to the decedent’s estate to pay any estate tax.

The estate planning vehicles available to domestic partners are limited only by the creativity of the attorney representing the couple in applying standard planning techniques to the newly created relationship of domestic partnership. Complex estate plans designed to save transfer taxes for domestic partners can be intellectually stimulating for practitioners to investigate and utilize. However, domestic partners whose financial means do not require esoteric tax-saving devices should still have the basic estate planning documents that include a will, durable power of attorney for asset management, advance health care directive and durable power of attorney for health care, nomination of conservator, and appropriate beneficiary designations on life insurance policies, IRAs, pension plans, and annuities.

1 FAM. CODE §297(a).
2 FAM. CODE §297.
3 PROB. CODE §6401.
4 PROB. CODE §§8461-8462, 8465.
5 PROB. CODE §1206.
6 PROB. CODE §4716.
7 PROB. CODE §§1811-1812, 1813.1.
8 HEALTH & SAFETY CODE §1261.
9 FAM. CODE §297.5(a).
11 I.R.C. §§2056 and 2523.
12 I.R.C. §§2503(b) and 2513. In 2005, this provision allows married spouses to double the exclusion from $11,000 to $22,000.
13 I.R.C. §7703 basically defines a “married” person as a person who has a spouse. I.R.C. §6013 permits “a husband and wife” to file jointly. Family Code §§297.5(g) and 297.5(k) specifically prohibit domestic partners from filing joint California income tax returns.
14 Effective January 1, 2005, each domestic partner will hold as separate property assets acquired 1) prior to registration as domestic partners, 2) by gift at any time, or 3) by inheritance at any time. Fam. Code §§297.5(a), 770. All other assets are presumed to be the community property of the domestic partners, with each one owning an undivided half interest. Fam. Code §760. It is unclear whether assets acquired by registered domestic partners prior to January 1, 2005, will be community or separate property.

15 The amount exempt from federal estate tax is $1.5 million in 2004-05, $2 million in 2006-08, and $3.5 million in 2009. In 2010, there is no estate tax, but in 2011, the estate tax returns with an exempt amount of $1 million. I.R.C. §2010(c).

16 Prob. Code §6401(c).

17 Prob. Code §6401(a).

18 Fam. Code §850.

19 The statutory scheme for the advance health care directive and durable power of attorney for health care is contained in Probate Code §§4650-4701. The advance health care directive form is found in Probate Code §4701, or it can be obtained from the California Medical Association. Because the durable power of attorney for health care is not effective until the principal is incapable of making his or her own health care decisions, HIPAA medical information privacy rules may prevent medical providers from conferring with the agent in making the determination of incapacity. This problem can be avoided by having the principal also execute a separate document, naming the agent as “personal representative” who is authorized to receive protected health information from medical providers under HIPAA.

20 Prob. Code §4264(c). Authorizing the attorney in fact to make gifts to himself or herself could give that individual a general power of appointment under I.R.C. §2041, unless the power is properly limited.

21 Prob. Code §§15401(c), 2646(a).

22 Prob. Code §4264(b).


24 Prob. Code §4264(g).


27 I.R.C. §401.

28 See generally Estate of MacDonald, 51 Cal. 3d 262 (1990). For the requirements under California law for such written consent, see id. at 272.

29 See 45 C.F.R. §164.502(g), generally referred to as HIPAA. This problem can be avoided by having the principal also execute a separate document, naming the agent as “personal representative” who is authorized to receive protected health information from medical providers under HIPAA.

30 Prob. Code §4264(b).


32 Prob. Code §4264(g).

33 Prob. Code §4264(h).

34 Prob. Code §4264(i).


36 Treas. Reg. §20.2040-1(a)(2). This is another disadvantage of domestic partners compared to married couples, for whom half of all joint tenancy property is automatically excluded from the decedent’s taxable estate under I.R.C. §§2040(b)(2) and 2056(a).


39 I.R.C. §2040(a).

40 Fam. Code §297.5.

41 Treas. Reg. §20.2512-8. If the domestic partners enter into an agreement whereby one partner maintains the home and performs other nonmeretricious services in exchange for receiving an interest in the home, the consideration requirement might be met. See Marvin v. Marvin, 18 Cal. 3d 660 (1976).


43 If one partner is 37% or more years younger than the other, generation skipping transfer tax liability will result from any lifetime or testamentary transfer from the older to the younger partner. I.R.C. §2651(d). Each partner has an exemption from generation skipping transfer tax of $1.5 million in 2004-05, $2 million in 2006-08, and $3 million in 2009.

44 I.R.C. §2031.

45 I.R.C. §2041(b)(1)(A).

46 I.R.C. §2041(b)(1).

47 I.R.C. §664.

48 I.R.C. Chapter 14 contains special valuation rules for various estate freeze techniques, including GRITs. Under I.R.C. §2703, the income interest in a GRIT is valued at zero, unless the retained interest is either an annuity or a unitrust amount. This limitation does not apply if the beneficiary of the GRIT is not a family member of the settlor.

49 A QPRT must meet all seven requirements listed in Treas. Reg. §25.2702-5. Because domestic partners may not be “family members” under the Internal Revenue Code, all these requirement may not have to be met.

50 I.R.C. §121.

51 California law grants an insurable interest to any person who is under legal obligation for support. Ins. Code §10110.

52 I.R.C. §101(a).

53 I.R.C. §2042(2); Treas. Reg. §20.2042-1(c)(1).

54 Treas. Reg. §20.2042-1(c)(2).

55 In D. Clifford Crummy v. Comm., 397 F. 2d 82 (9th Cir. 1968), the court of appeals held that a gift in trust that granted the beneficiary the immediate right of withdrawal was a gift of a present interest for purposes of the annual gift tax exclusion.
The Risks of Recruiting At-Will Employees

The California Supreme Court recently provided additional guidance on this question: Is it a tort to hire away a competitor’s at-will employees? In Reeves v. Hanlon, the court ruled that “a plaintiff may recover damages for intentional interference with an at-will employment relation under the same California standard applicable to claims for intentional interference with prospective economic advantage.” In other words, interfering with an at-will employment relationship is actionable when the interference involves an independently wrongful act. In establishing this law, the court disapproved GAB Business Services, Inc. v. Lindsey & Newsome Claim Services, Inc., insofar as that case holds that an employer cannot be liable for interference with at-will employment contracts. In addition, Reeves breaks new ground in upholding an at-will employment interference claim that was brought by an employer rather than by an employee.

Reeves offers new guidance to employers, but recruiting a competitor’s employees remains a legal risk. To compete successfully, however, businesses must recruit and retain valuable employees. Disagreements about what constitutes fair play in this arena often reach the litigation stage, and courts have struggled to define the limits of permissible conduct. One issue in many decisions is at-will employment, which implies the absence of a full-fledged contractual relationship deserving of protection. Another issue is the distinction, which has not always been clear, between the torts of interference with contract and interference with prospective economic advantage. A third issue is the tension between two important California public policies, one being the protection of businesses from unfair competition and the other being the protection of employee freedom to change employers. California’s appellate courts have reached varied conclusions in attempting to address these issues.

On the first issue—at-will employment—California courts have long held that commercial contracts terminable at will are contracts nonetheless and deserve protection from third-party interference. By the same reasoning, some courts have found at-will employment agreements deserving of the same protection. In a 1970 decision, Kozlowski v. Westminster National Bank, a discharged bank president sued the bank for breach of contract and a director of the bank for interference with his employment contract. In affirming judgment in favor of the bank but reversing judgment in favor of the director, the court of appeal stated that “the fact that the Bank was privileged to discharge plaintiff at any time does not necessarily privilege a third party unjustifiably to induce the termination.” In reaching this conclusion, the court did not distinguish between the torts of interference with contract and interference with advantageous relationships. Indeed, at the time and for many more years it was by no means clear from the case law that there was any meaningful difference in these causes of action.

The substantial confusion between the torts of interference with contract and interference with prospective economic advantage was addressed by the California Supreme Court in 1995 in its landmark ruling, Della Penna v. Toyota Motor Sales USA. In Della Penna, the court explained that courts should “firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that exist in a zone where the rewards and risks of competition are dominant.” The court declared that to prevail for wrongful interference with prospective economic advantage, a plaintiff must plead and prove the defendant’s conduct was “wrongful by some legal measure other than the fact of interference itself.” In Quelimane Company v. Stewart Title Guaranty Company, the supreme court clarified its ruling in Della Penna to make it clear that the requirement of independent wrongfulness does not also apply to the tort of interference with contract. It would still be a number of years before the analyses of these cases would be brought to bear on at-will employment relationships.

Opposing Goals

Judicial decisions involving interference with employment relationships also struggled to reconcile conflicting public policies. One of the earliest cases involving the tension between ensuring fair competition and permitting employee mobility is the California Supreme Court’s decision in Buxbom v. Smith. In Buxbom, the plaintiff entered into a contract with the defendant to distribute the defendant’s newspaper. After the plaintiff had employed and organized distribution crews to perform the contract, the defendant repudiated the contract and hired the plaintiff’s distribution crews directly. The court recognized that “it is not ordinarily a tort to hire the employees of another for use in the hirer’s business,” but noted that “[t]his immunity against liability is not retained, however, if unfair methods are used in interfering in such advantageous relations.” The court then applied this exception because the defendant’s breach of contract prevented the “plaintiff from competing effectively for the retention of those employees” and thus constituted “an unfair method of interference with advantageous relations.” Buxbom, then, can be read as establishing a qualified immunity for interference with employment relationships.

More recently, the concept of immunity for interfering with employment relationships was taken another step. In GAB, for reasons based in public policy, the court of appeal rejected an employer’s claim against a competitor for tortious interference with its at-will employees. GAB had sued its former employee, Neal, and his new employer, Lindsey, a GAB competitor, after they had caused 17 key GAB employees to resign from GAB to join Lindsey. The GAB court acknowledged that courts “have applied tortious interference claims in the specific context of at-will employment relationships,” but concluded that “no case has yet allowed an

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employer to bring such an interference claim.”16 Concerned with the prospect of innumerable lawsuits, California’s strong public policy in favor of employee mobility, and “something inherently suspect about a tort that, at bottom, concerns an employee’s voluntary departure from employment,”17 the court found “no compelling reason to expand the tort, and plenty of reason not to.”18 The GAB court also concluded that the tort of unfair competition was adequate to address the problem of unfair or unlawful conduct among employers.

The stage was set for supreme court review when the second district decided Reeves,19 and in so doing declined to follow GAB. In Reeves, the plaintiff law firm sued two former lawyer-employees for tortious interference with the firm’s at-will relationships with other employees. Reviewing the supreme court’s opinions in Buxbom and Quelimane, the court of appeal in Reeves found that “[n]othing in this authority or any authority cited in GAB supports the contrary view, namely, that a person who hires the at-will employee of another employer enjoys a special immunity from liability for tortious interference, notwithstanding the person’s use of unjustifiable or unfair methods to lure these employees.”20 The court affirmed the judgment in favor of the employer on the grounds that the defendants engaged in unfair conduct in the course of hiring away the plaintiff’s employees by destroying computer records, misusing confidential information, and cultivating employee discontent.

Hiring a Partner

The law regarding tortious interference with employment relations became even more complex when the fourth district decided Powers v. The Rug Barn.21 Powers involved a written partnership agreement for the operation of a textiles and home furnishings business. The plaintiff alleged that the defendants were liable for interference with contract because they had taken intentional steps to disrupt the partnership agreement by hiring away a key partner.

The Powers court acknowledged that the tort of interference with contract does not require a showing of independent wrongfulness but concluded that a “different rule has been applied, however, in cases in which the disruptive conduct consisted of the defendant’s hiring of the plaintiff’s employees in order to compete with the plaintiff.”22 The law generally recognizes that the defendant in such a case has “the right to conduct a business in competition with that of plaintiff,” as long as the means of competition involve “no more than recognized trade practices”…hiring a competitor’s employees is a recognized trade practice.”23

The court in Powers held that absent independently wrongful conduct, “the hiring of a competitor’s employee—including one occupying a partnership position—cannot support liability for interference with contract.”24 The Powers court relied, in part, on what it described as the “Buxbom-GAB rule of non-liability”25 and explained that it “is the lack of independently actionable conduct, not the at-will nature of the partnership agreement, that creates the impediment to plaintiff’s interference claim.”26 Powers may thus be read to immunize interference with any employment contract as long as the interference does not involve other wrongful conduct. The supreme court granted review of Powers but later dismissed in light of its decision in Reeves.

Factual Background

Against the backdrop of these cases, the supreme court’s decision in Reeves provides considerable analytical clarity. In Reeves, two attorneys resigned from a law firm and, on the evening of their resignations, solicited the plaintiff law firm’s key employees, who were at-will. Six of the employees left the plaintiff firm to join the defendants’ new firm. Citing GAB, the defendants argued that California does not recognize a cause of action by one employer against another for interference with an at-will employment contract.

The court noted established case law holding that the tort of interference with contract may be predicated on interference with an at-will employment relationship, as well as the considerable body of case law recognizing California’s competing policies of preventing unfair competition and promoting employee mobility. The key to the court’s analysis is its observation that “the economic relationship between parties to contracts that are terminable at will is distinguishable from the relationship between parties to other legally binding contracts.”27 In both cases there is a contractual relationship, but in the case of an at-will contract “an interference with it that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of [a contracting party] there is no breach of it.”28

The holding in Reeves is this: Because an interference with an at-will employee “is primarily an interference with the future relation between the plaintiff and the at-will employee, we hold that inducing the termination of an at-will employment relation may be actionable under the standard applicable to claims for intentional interference with prospective economic advantage.”29 This means that to prevail, “a plaintiff must plead and prove that the defendant engaged in an independently wrongful act…that induced the at-will employee to leave the plaintiff.”29

Adopting this standard, argued the court, reconciles the competing public policies responsible for much of the confusion in the employment case law: “Not only will it guard against unlawful methods of competition in the job market, but it will promote the public policies supporting the right of at-will employees to pursue opportunities for economic betterment and the right of employers to compete for talented workers.”30

Reeves clarifies the often-litigated interface of employee recruitment and business competition; yet for employers it is a mixed blessing. Employers no longer enjoy blanket immunity on competitive grounds when they hire away a competitor’s at-will employees, but employers may now recruit these at-will employees with some assurance that simply interfering in their at-will employment relationships is not actionable. Employers nevertheless must proceed with caution, because there are risks of incurring liability through other independently wrongful conduct.

Other Employees

If the recruited employee is under a contract for a specified term, the recruiting employer may still be liable for inducing breach of contract.31 If the recruited employee is an officer, director, or senior manager of his or her current employer, the employee may owe that employer a fiduciary duty. The recruiting employer may be liable for conspiracy to breach a fiduciary duty and unfair competition if the recruited employee assists the recruiting employer in any way, for example by providing competitively sensitive information or recruiting other employees before terminating the employment relationship.32 If the recruited employee has access to trade secrets or other confidential information of his or her current employer, the recruiting employer may be liable for misappropriation of trade secrets and unfair competition if the employee brings any of this information to the new employer.33 If the recruiting employer makes defamatory statements regarding the employee’s current employer or uses false information to recruit the employee, the recruiting employer may be liable for defamation and unfair competition.34 In all of these cases, the recruiting employer may also be liable for interference with economic relations based on this other, independently wrongful conduct.

According to the supreme court reasoning in Reeves, a recruiting employer is not liable merely for interfering with a recruited employee’s former at-will employment relationship, but the employer may be liable if the inter-
ference involves any independently wrongful conduct. This rule resolves uncertainty regarding the tort of interference with contract in the context of at-will employment and resolves the competing public policies of preventing businesses from competing unfairly and promoting employee mobility.

Employers must still exercise care in recruiting the at-will employees of their competitors. Employers may still be liable for interference with economic relations when recruiting at-will employees if the recruiting involves breaches of fiduciary duty, misappropriation of trade secrets, defamation, or any conduct constituting unfair competition. As reported cases demonstrate, this independently wrongful conduct is often present when employees leave their employer to work for a competitor.

2 Id. at 1152.
7 Della Penna v. Toyota Motor Sales USA, 11 Cal. 4th 376 (1995).
8 Id. at 392.
9 Id. at 393.
11 Id. at 55-57.
13 Id. at 547.
14 Id. at 548.
16 Id. at 427 (emphasis in original).
17 Id. at 428.
18 Id. at 427.
20 Id.
22 Id. at 1020.
23 Id. at 1024.
24 Id.
25 Id. at 1025 n.3.
27 Id. at 1151-52 (quoting RESTATEMENT (SECOND) OF TORTS §768, cmt. i).
28 Id. at 1144.
29 Id. at 1145.
30 Id.
31 Powers may be read to create an exception for such liability in the employment context. Such a rule would be a fairly significant departure from existing case law.
33 See Reeves, 33 Cal. 4th at 1151.
As professionals, attorneys act as advisers to the whole client. People turn to legal counsel not merely for representation in litigation or in a transaction but also for advice about more general objectives. Meeting this challenge is essential for practitioners and broadens their scope of expertise.

Advising the Islamic client in business matters is an example of how clients may be represented as people rather than cases.

The Muslim faith guides an adherent’s daily affairs. Principles governing the levying of interest, assumption of risk, and the nature in which returns are reaped date to the birth of the Islamic faith in the seventh century. These same principles survive to this day, largely unmodified and important as ever for Muslim clients who wish to conduct business in harmony with their faith. It is incumbent upon counsel to understand the fundamental principles that motivate the client and harmonize those principles with the objectives of the business transaction. If properly advised, the Muslim client can participate in mainstream business transactions, protected by the usual assurances pursuant to law, while remaining in accordance with Islamic economic principles.

While Western and Islamic methods of financing are intended to meet the same objectives—the productive use of goods, services, and property for profit—a pivotal distinction between the two systems arises from different ideological standpoints. Three main points should be kept in mind. First, under Islamic law (or shari’a) all property is within the ownership of God. Human beings are merely the trustees of property. Money lacks intrinsic value and is neither appreciable nor depreciable. Second, because money has no intrinsic value, concepts of inflation and time value have no legitimacy under an Islamic system. Accordingly, interest (riba) is prohibited. Third, excessive risk taking in business is considered gambling (gharar) and is prohibited. Modern interpretations of this prohibition are somewhat accommodating of the speculative nature of business, but, under the shari’a, limitations on risk are far greater than they are under Western economic principles.

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and then payment at a predetermined price or asset price plus a premium. This form of financing, known as a swap, has been used especially in the context of real estate. Payments in these transactions are more flexible than those in conventional mortgages, allowing borrowers to make payments according to the property's rental income or other sources of income.

A debt structure is a financial agreement between a lender and a borrower, which includes the terms and conditions of the loan. It specifies the amount borrowed, the interest rate, the repayment schedule, and other terms. The debt structure is a critical component of any financial transaction and plays a significant role in determining the financial risk and return for both the lender and the borrower.

The profit element in a debt structure is often referred to as the interest. Aside from the principal, which is the amount borrowed, the interest is the amount paid by the borrower to the lender for the use of the borrowed funds. The interest rate is determined by factors such as the prevailing interest rate, the risk associated with the loan, and the expected return on investment for the lender.

A third type of Islamic transaction is theJam’ah, which involves the pooling of resources to finance a common objective. In a Jam’ah, the parties agree to contribute a portion of their wealth to a pool, which is then used to finance a project or business. The profit and losses are then shared among the participants based on their contributions.
Islamic terms dominate this structure and, hence, it is widely employed. In a bay‘mu‘ajjal, the parties determine the price, and then payment is delayed. The agreed-upon cost represents the asset price plus an amount representing the cost of delayed payment. This form of credit sale is the most analogous to conventional interest-based financing. The price can be determined using mainstream indicators, such as the prime rate. However, a drawback to this structure is that late payments are not permitted, because an arrangement to allow for them is viewed as speculative. Payments in recompense for proven lost opportunities, however, are more permissible. It therefore falls to negotiations between lender and borrower to decide on the terms for late payment. As long as these terms are based on something tangible involving the property or the asset, the transaction will be valid.

It is helpful to illustrate these concepts with an example. An investor wishes to lease a parcel of real estate with an office building built on it, with an option to purchase the land and building at the end of the lease. The estimated value of the purchase is $1 million. Using a Western leveraged lease, the investor contributes 20 percent of the asset cost. A debt provider furnishes the remaining 80 percent at a rate of 5 percent over a five-year term, or $40,000 per year. In comparison, a shari‘a-compliant transaction would be structured so that the equity investor contributes 20 percent of the property cost and a financial intermediary funds the remaining 80 percent of the property with a mortgage, taking title and leasing the property to the investor for $1.2 million, payable in installments over a five-year period, with the capability to transfer title to the investor at the end of the lease. The result of both transactions is identical. The profit for the intermediary under the conventional model is tied to the time value of the funds lent. Under the shari‘a-compliant model the intermediary’s profit is characterized as compensation for risks taken over the term of the lease. The terms of the purchase option are set at a negotiated rate for the land and fair market value of the building (with depreciation taken into account). The result is a mutually beneficial lease-with-purchase deal that adheres to the shari‘a and has all the protective benefits that typically protect parties that have made conventional agreements.

From an ideological perspective, shari‘a-compliant finance structures follow the basic concept of using assets productively. The ability to employ an Islamic lease structure in a real estate deal allows a Muslim investor to enjoy the benefits of the transaction while remaining faithful to ideological principles that would otherwise bar participation.

As a practical matter, establishing a shari‘a-compliant lease is the final piece of the transaction. Clearly, finance and credit arrangements must be made beforehand in order to gauge terms and tailor the profit components of a shari‘a-compliant lease. An additional consideration is that the potential exists for combining a shari‘a-compliant lease with other sources of capital funding, including multijurisdictional finance arrangements. In fact, this practice has seen great success in the leasing of larger assets—for example, aircraft and tankers.1

**Avoiding Usury**

The absence of interest in a transaction that complies with the shari‘a does not eliminate consideration whether usury laws apply. Counsel should thus prepare transactions that, should litigation ensue, will pass a factual examination for usury. In litigation, the structure of a transaction constitutes evidence of the parties’ intentions to reap interest or its equivalent, and the terms of the transaction form the basis of judicial presumptions of intent.2

Under California law, a loan is usurious if the total interest exceeds the maximum rate per annum for the full period of the loan.3 The standard test for usury has two parts: 1) there was a clear intent to evade the law, and 2) that intent may be inferred from the circumstances and consultations involving the loan.4 If the interest

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1. The practical benefit of leasing is the ability to finance real assets, which are generally seen as investments.
2. Courts typically examine the factual circumstances and interactions between the parties to determine if usury has occurred.
3. Interest rates are typically calculated based on the prime rate plus a margin.
4. The intent to evade usury laws can be inferred from the arrangements made, even in the absence of explicit usury.

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agreement is not in writing, usury may be presumed, and if either of the two parts of the test are present in the transaction or the facts surrounding the transaction, a stipulation concerning the payment of interest may not prevent the loan from being considered usurious. California courts are given wide discretion in determining whether damages should be awarded. Typically, if usury is found the procedure is to permit recovery of the principal, but the interest amount deemed usurious is disgorged. In a California court, shari’a compliance offers no protection against a factual inquiry into a transaction and possibly a finding of usury, but the ideological foundation of shari’a compliance supports transactions that are not usurious.

In the context of the two most commonly utilized forms of shari’a-compliant transactions (ijara leases and bay’mu’ajaal credit sales), the parties to the transaction may agree with the prevailing view that the seller of a property may charge a higher price if payment is delayed or delivered in installments. Legitimate credit sales are not actionable under usury law under the theory that there are no loans or forbearance in a sales transaction, and thus no interest. Transactions with the extension of payments over time, with an additional price for extensions, are also not considered usurious. Similarly, if a transaction is a valid credit sale, modifications or extensions of the agreement that the parties agree to later, in lieu of foreclosure, are also exempt. Late charges imposed in the event of a purchaser's failure to pay in a timely manner are not usurious if payment is delayed or delivered in installments. Legitimate credit sales that involve revolving and nonreolving transactions are similarly exempt from usury prohibitions if the underlying structure of the sale is substantively based upon a time-price differential rather than an interest structure.

When scheduled rates or charges are applied to a base price, however, the additions are considered interest, and the transaction will be considered a loan, unless the transaction qualifies as a bona fide credit sale. This sale depends on the presentation of two prices to the purchaser: a cash price and a price adjusted for payment over time. The difference between the prices is not usurious even if the amount of the difference is more than would be permissible if it were charged as interest on a loan.

Counsel also need to evaluate the risk of judicial recharacterization of transaction structures that the parties call leases. If the purchase or repurchase terms of a contract provide for a purchase or repurchase amount that exceeds the total amount to be paid under the agreement, a court may find that the transaction is usurious. The Uniform Commercial Code has been interpreted to hold purchases involving prices amounting to less than 10 percent of the original worth as strong evidence that the item being leased is the subject of a loan rather than a bona fide lease. In addition, a real estate leaseback transaction that is subject to a mandatory repurchase agreement or buyout and in which the rental amounts exceed the legal amount of interest chargeable on the principal advanced has been treated as usurious.

On the other hand, structures that have been treated as nonusurious include pure leases in which the thing leased is furnished through a third party and the lessor is acting as a financial intermediary and not a seller in disguise. These transactions have characteristics such as the absence of a purchase option at the end of the lease, the retention of the object leased by the lessor at the end of the lease, and no discussion of options to purchase until the transaction is well into being consummated.

Whether or not a transaction may be usurious under California law or under the shari’a, attorneys will need to examine the likely scope of available remedies for clients should their deals disintegrate and lead to litigation. For example, taking a security interest in real property owned by the buyer is inconsistent with a bona fide credit sale in situations in which the property that is the subject of the sale is to be affixed and made part of the real property that is given as security for payment. Similarly, assignment of contracts from construction parties to a mortgage company, in the context of financed sales by builders to landowners, does not convert bona fide credit sales into loans that are subject to usury laws. Hence, in the event of default, recourse takes the form of mortgage foreclosure. These available remedies should offer clients some reassurance if they are leery of the unconventional features of a shari’a-compliant transaction.

Gaining Acceptance

Attorneys seeking to foster acceptance of Islamic finance techniques should first gain a solid understanding of the theoretical differences between shari’a-compliant and conventional interest-based transactions and how such differences may be harmonized. Counsel also will need to create an environment of trust and assurance among the parties. Apprehension toward Islamic finance may be placated with assurances that lending relationships will be secure and that adequate
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Conventional financing takes the time value of money for granted, so restructuring a deal to eliminate this feature requires foresight. Time value is tied to inflation, which is a concept at odds with Islamic economic theory, so reconciling a party’s understanding of inflation with the structure of shari’a-compliant financing may be achieved through the inclusion of a profit element in which a portion is dedicated to outpacing projected inflation. This solution acknowledges the use of monetary systems that are incongruous with Islamic techniques but observes the tenets forbidding interest.

The finance terms of a contract are largely unaltered by shari’a-compliance modifications. Commercial lenders that are parties will have access to the remedial implements that are customary in conventional finance transactions. This relationship allows the lender more conventional forms of recourse while making shari’a-compliant methods available to a party who wants them. This should be a source of great assurance regarding the reliability of the transaction.

Structuring a transaction to comply with the shari’a may be unconventional. Such terms are not broadly employed in the United States, so counsel has the burden of showing non-Muslim parties that a shari’a-compliant transaction is not only valid and enforceable but also accomplishes the same objectives as one that is more conventional. Governing law provisions need not be altered; choice of law provisions remain valid. While little appellate guidance exists on the shari’a, federal courts have deemed that the Islamic law of foreign jurisdictions will be respected when determining the rights and obligations of the parties to a contract.

As a practical solution to conflict of law concerns, the successful utilization of shari’a techniques lies in the acknowledgment of their role within the general transaction structure. Transactions may be completed in stages in order to secure the positions of Muslim and non-Muslim finance sources. A traditional finance lease can be negotiated and coupled with any relevant credit agreement before integrating an Islamic lease by reference. In this way, the conventional choice of law provision governs the operating lease, while the shari’a governs the Islamic lease. If fashioned in this manner, the choice of law provision may govern only the operating lease and consequently will not precipitate conflict with the shari’a-compliant lease that is attached to furnish the investment capital, nor will the choice of law provision governing the operational elements of the transaction be preempted by Islamic law.

Although shari’a-compliant transaction structuring is a relatively new phenomenon in the United States, Islamic finance techniques have been utilized with great success in the last few years in large-scale cross-border transactions involving the sale and lease of ships and commercial aircraft. Recently, a number of investment funds managed by banks with significant Islamic finance divisions have undertaken real estate investments involving ijarah leases in the United Kingdom. These techniques present great promise for international and domestic transactions involving the sale and lease of goods, assets, and real estate. Drawbacks and benefits exist in the growth of Islamic finance opportunities in conjunction with major financial institutions. However, these drawbacks are more logistical than fundamental in nature, and practitioners can find ways to offset them.

In initial preparation for a business transaction, resources available to a practitioner are developing, notably in London, Dubai, Singapore, and Hong Kong. Expertise in the United States is embryonic at present, but a fair amount of academic resources are available for reference on the principles of Islamic law and their applicability to business transactions.

In negotiating a shari’a-compliant transaction, the primary task for counsel is to assure all parties of the integrity of the transaction despite its unconventional terms. Assurance of adequate recourse to legal remedies and a view of the objectives of the transaction as being identical to more conventional agreements are points that counsel can emphasize.

Islamic finance methods as they apply to real estate show great promise. Furthermore, Islamic finance principles are guided by a desire to control excessive risk, a consideration that is fully consistent with any prudent business practice. These methods, as applied to conventional business transactions, represent an innovation that reflects the needs of an economically formidable investor demography and are indicative of flexibility in financing that does credit to those who are pursuing ways to harmonize secular practices with nonsecular belief. The goal for the practitioner is to facilitate a transaction that is viable and mutually beneficial regardless of the unique vestments that Islamic law requires. Shari’a-compliant structures are intended to be viable under Islamic law and a secular legal system, and this double compliance avails parties of a panoply of rights and remedies.

If properly advised, clients will greatly appreciate the sensitivity of counsel to their spiritual needs and will work with counsel to reach a successful business transaction. For this reason, advising the Muslim client on business transactions may be a challenge,
but it is a challenge worth meeting.

3 The California Constitution sets the maximum interest rate at (1) 10 percent for money, goods, or things used for primarily personal, family, or household purposes, or (2) the higher of 10 percent or 5 percent plus the Federal Reserve Bank of San Francisco’s discount rate on the 25th day of the month preceding the earlier of the date the loan is contracted for or executed. CAL. CONST. art. XV, §1.
5 DEERING’S ANN. UNCOD. MEASURES 1919–1 §2.
6 Id.
12 Southwest Concrete Prods., 51 Cal. 3d 701.
13 Fox, 94 Cal. App. 3d at 876 (time-price doctrine applied to oil company’s sale of product to independent dealers even though some sales included revolving charge accounts).
14 Blackmore Inv. Co. v. Johnson, 32 F. 2d 433 (9th Cir. 1929); Southwest Concrete Prods., 51 Cal. 3d 701 (debtor cannot by default cause a nonusurious transaction to become usurious). See also Berger v. Lodge, 265 P. 515 (1st App. Dist. 1928) and Whitaker v. Speigel Inc., 95 Wash. 2d 408, 623 P. 2d 1147 (1981), amended 95 Wash. 2d 661, 637 P. 2d 235 (1981).
15 See, e.g., Peco, Inc. v. Hartbauer Tool & Die Co., 262 Or. 573, 300 P. 2d 708 (1972) (evidence that the object leased was in fact security for a loan).
16 See Golden State Lanes v. Fox, 232 Cal. App. 2d 135, 42 Cal. Rptr. 568 (2d App. Dist. 1965) (An agreement requiring repurchase of the lease at the end of the term was a loan and not a lease.).
An attorney leaves one firm to join another. The firm now employing the attorney represents a party adverse to one of the attorney’s former clients in a case involving the subject matter of the attorney’s past representation. In these circumstances, the attorney’s current firm is subject to disqualification because of the attorney’s conflict of interest. Firms may attempt to avoid this type of disqualification by isolating the recently arrived attorney from any involvement in the case at issue and assuring the opposing party that whatever confidential information was previously provided to the attorney will be kept inviolate and will not be disclosed to the firm counsel who are working on the case. This technique has been referred to in the past as a Chinese wall and is now commonly called an ethical screen.

Parties who seek to disqualify law firms that employ a former public sector attorney with a conflict will not succeed when appropriate ethical screens are in place.1 The law is different, however, when an attorney with a conflict moves from one private sector firm to another. Under those circumstances, appellate courts in California have held that no form of ethical screen will ever suffice to prevent the imputation of knowledge from a firm’s new attorney to his or her partners and associates, and thus disqualification is required if the new representation involves the same subject matter as the attorney’s prior representation.2 The validity of this holding has been questioned in federal court,3 but cases decided by state courts subsequent to the ruling in the federal case have nevertheless cited the prior state law decisions as authoritative.4 The use of ethical screens to avoid disqualification in cases involving private sector attorneys may be desirable and a worthy public policy goal, but courts remain uncertain about the validity of the procedure in nongovernmental settings.

The California Supreme Court has spoken twice on the issue of ethical screens. In the 1994 case of Flatt v. Superior Court,5 the court in dicta endorsed a “clear cut” rule that “[i]f an attorney is disqualified because he formerly represented and therefore possesses confidential information regarding the adverse party in the current litigation, vicarious disqualification of the entire firm is compelled as a matter of law.” In 1999, however, in People ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc.,6 the supreme court, whether by intent or inadvertence, indicated some equivocation.

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knowledge and disqualification emerged as a forefront issue in
The importance of ethical screens as an antidote to imputed
had defected from the Department of Transportation. The Shasta
prosecuting the case professed complete ignorance of the defendant's
related the new prosecutor from involvement with the prosecution of
not to apply the doctrine of imputed knowledge to the district attor-
insulated the new prosecutor from involvement with the prosecution of
the court stated:
Even though INA and Hughes applied a more lenient approach
effects to be rebuttable by a showing that the attorney at issue was
“effectively screened.” In distinguishing these cases, the court stated:

Even though INA and Hughes applied a more lenient approach
to conflicts disqualification than prevails in California (see, e.g.,
Henriksen v. Great American Savings & Loan...), neither
case suggests that a rebuttable presumption of shared confi-
dences ought to apply in the circumstances present here. In any
event, we need not consider whether an attorney can rebut a
presumption of shared confidences, and avoid disqualifica-
tion, by establishing that the firm imposed effective screening
procedures. The declarations the Shapiro firm submitted fail
to demonstrate that any formal screening procedure prevented
attorneys working on respondents' behalf from being exposed
to Mobil’s confidences.

The language of the court in SpeeDee Oil has created an ambi-
guity, leaving later appellate decisions to speculate about the possible
use of ethical screens in situations not involving former govern-
ment attorneys. Prior California authorities had established an
absolute rule, which made it irrelevant that the Shapiro firm had not
established effective screens. Nevertheless, the mere fact that the
supreme court was willing to consider the efficacy of the screens implies
that there might not be an absolute rule.

Legal Landscape before SpeeDee Oil
California authority on this subject began germinating as early as 1976
in the case of In re Charles L. In that case, a criminal defendant’s
public defender joined the district attorney’s office, and the defendant
tried to disqualify the entire district attorney’s office from prosecut-
ing him. The court only had out-of-state authority for the proposition
that one attorney’s knowledge of confidential information requiring
disqualification would extend to the entire firm, and the court decided
not to apply the doctrine of imputed knowledge to the district attor-
ney’s office. There was no discussion of the measures, if any, that insu-
lated the new prosecutor from involvement with the prosecution of
his former client, but the court noted that the district attorney
prosecuting the case professed complete ignorance of the defendant’s
former attorney.

The 1980 case of Chadwick v. Superior Court also involved a pub-
court of Appeal issued a writ forcing reinstatement of the firm, treating
the issue of the vicarious disqualification of a former gov-
ernment employee’s current law firm as a matter of first impression
in California. The

The Chambers court cited numerous federal cases, as well as disci-
plinary rules and formal opinions from the ABA. The long shadow
of the ABA in this controversy is curious given that California has not
adopted the ABA Model Rules, but the ABA’s pronouncements in the
area were so prolific that they filled the vacuum left by the absence
of California authority. The Chambers court examined ABA Formal
Opinion No. 342 to find policy considerations regarding a party's right
to its chosen counsel, the employment prospects of the disqualified
attorney, and the potential harm to the ability of government to
attract talented young attorneys. The court’s discussion of the need
to allow ethical screens to avoid vicarious disqualification was arguably
dicta, given the court’s conclusion that there was no evidence that the
former DOT attorney had any responsibility over matters related to
the new action, or that he acquired confidential information regard-
ing the action. But the court proceeded to rule that “moreover” the
new firm had “undertaken sufficient protective measures to screen [the
attorney] from any participation in the subject action.” This latter
finding was the primary thrust of the rest of the court’s opinion.

The use of ethical screens to avoid disqualification of law firms that
hire former government attorneys has gone unquestioned in later
cases. This is the one area in which ethical screens can be used with
confidence.

Raising Questions about Klein and Henriksen
When the California Supreme Court in its 1994 Flatt decision stated in dicta that vicarious disqualification is required “as a mat-
ter of law,” it was taking language from a 1992 First District Court of
appeal case, Henriksen v. Great American Savings & Loan. The
requiring disqualification. In the
not have been necessary to discuss the other aspects of the case
an “absolute rule” of disqualification in private sector cases, it would
is not imposed as strictly as it is in other instances”—but if there were
carious disqualification of a former government employee’s law firm
mandate.

opposed to successive representation.25 Perhaps ethical screens are
guished as one involving concurrent representation problems as
the partner’s involvement with the bank. The case can be distin-
Cary, with the court also citing the problem of the ongoing nature of
court, and the court issued a writ requiring disqualification of Gray,
the procedures had been sufficient. They were not, according to the
court had ordered the individual attorney disqualified and “decreed
estate while that partner was affiliated with a different firm. The trial
had represented one of the defendants in matters relating to the
impossible in the context of concurrent representation, but they may
posed were inadequate, and the case can only be reasonably read as
announcing an absolute rule of vicarious disqualification:

Clearly, the California precedent has not rushed to accept the
concept of disqualifying the attorney but not the firm, nor has it enthusiastically embarked upon erecting Chinese walls. Aside from two limited exceptions—the former government attorney (Chambers) and the punitive disqualification, not for conflict of interest but for improper communication (Chronometrics and Mills)—no California case appears to have permitted disqualification of the individual attorney for a conflict without disqualifying his law firm.... It is our opinion that in this case, unless we were prepared to reverse the trial court decision to disqualify Glickman, we could not, consistent with the precedent, permit the Fenwick firm to continue to represent Plaintiffs.... Accordingly, because Glickman has been disqualified, the Fenwick firm in which he is a partner must similarly be disqualified from further representing Plaintiffs.... The Klein court required vicarious disqualification without dis-
cussing any reasons why the proposed ethical screening devices pro-
posed were inadequate, and the case can only be reasonably read as
announcing an absolute rule.

Nevertheless, the Klein court’s claim that disqualification could not be denied “consistent with precedent” was not true. Every California case decided before Klein was consistent with the rule that vicarious disqualification could be avoided if the affected attorneys could demonstrate that client confidences could be preserved by an effective ethical screen. The federal decisions and the ABA authorities all assumed the possibility of ethical screens as well.

In the Chambers decision, there were other rationales for the use of ethical screens to avoid disqualification aside from the status of the attorneys as former government attorneys. These included the impact on the client of a separation from the client’s counsel of choice, and the fact that disqualification motions are often interposed for tactical reasons.23 These factors apply with equal force in private sector cases. In the handful of reported decisions in California in which the issue of vicarious disqualification of an attorney’s new firm was squarely addressed, the fact that none had endorsed ethical screening yet is not any logical authority for the proposition that none ever would.

In 1991, the Fifth District did not discuss Klein and gave ethical screens a boost in its decision in Higdon v. Superior Court.34 The case involved a former court commissioner who had sat as a judicial offi-
cer on a divorce case and was later an associate of a firm represent-
ing one of the parties in the divorce action. The Higdon court cited Chambers, Raley, and the ABA authorities as support for remand-
ing the matter for a hearing on whether ethical screens could be suf-
cient to avoid vicarious disqualification. Still, the Higdon ruling did not in any way slow down the Klein momentum. For one thing, the former court commissioner had not been privy to any confidential information.

Thus, notwithstanding Higdon, Klein’s absolute rule of disqual-

Henriksen court for its part found authority for what it described as
a “clear cut” rule from an earlier Sixth District case, Klein v. Superior Court.22 An examination of the earlier authority, however, raises ques-
tions about the basis of the Klein and Henriksen decisions.

Shortly after Chambers was decided in 1981, the Fourth District Court of Appeal considered a conflict case involving the private sector,
William H. Raley v. Superior Court. In Raley,23 the El Centro office
of San Diego firm Gray, Cary, Ames & Frye represented a tenant suing a
gavel pit owner in a lease dispute. The defendants discerned that one of Gray, Cary’s downtown partners was a board member and a
trust investment committee member for the bank that owned, as
trustee, all the stock in one of the defendants.

Raley differs from the other vicarious disqualification/ethical
screen cases in several respects. The screened partner was not, in a
technical sense, involved in the case as a result of a legal representa-
tion, and the partner’s alleged conflict was ongoing rather than in the past. Nevertheless, the conflict of interest analysis was very similar
to the other cases, and the issue of ethical screens was squarely pre-

In 1984, the Third District Court of Appeal decided Dill v.
Superior Court, in which it distinguished its decision in Chambers.26
The attorney in Dill moved from the plaintiff’s firm to the defendant’s
firm in the middle of a case after making appearances for the plain-
tiff’s side and taking two depositions. This situation was viewed as
one for which ethical screens would not suffice in avoiding vicarious
disqualification. The Dill court distinguished Chambers on two
grounds: Chambers addresses disqualification for a public sector attorney, and Chambers does not involve prior representation in the
same case.27 In discussing Chambers, the Dill court noted that “vi-
carious disqualification of a former government employee’s law firm
is not imposed as strictly as it is in other instances”—but if there were
an “absolute rule” of disqualification in private sector cases, it would
not have been necessary to discuss the other aspects of the case
requiring disqualification. In the Dill court’s holding, it emphasized
that “the compelling reason for disqualification” was the attorney’s
“personal involvement in the identical action.”28

Just a few years after the Chambers, Raley, and Dill decisions, the
Sixth District in Klein asserted an absolute rule of vicarious dis-
quotation in private sector cases.29 Klein involved a multiparty dis-
pute over the handling of an estate. A partner at the plaintiff’s firm
had represented one of the defendants in matters relating to the
estate while that partner was affiliated with a different firm. The trial
court had ordered the individual attorney disqualified and “decreed
a Chinese wall, forbidding [him] from taking any part in this action
or communicating any information about his prior dealings with [the
defendant] to the Plaintiffs.”30 This result was reversed by a writ of
mandate.

The Klein court devoted five pages to discussing the authority on
vicarious disqualification and ethical screens. Klein distinguishes
Chambers on the ground that it is applicable only to former gov-
ernment attorneys. The dicta in Raley requiring consideration of an
ethical screen to avoid disqualification is acknowledged but rejected.
In order to reject the Raley dicta, the Klein court analyzed the three
California cases cited by Raley as authority. The Klein court credited
the Raley dicta by distinguishing each of those cases. One of the three
cases cited by Raley was Chambers, which Klein notes was limited to
former government attorneys. According to Klein, the other two cases
do not constitute conflict of interest cases. Instead, they involve
punitive disqualification for improper communications with a party
represented by counsel.31 The Klein court took the absence of any
reported California decision in which ethical screens were endorsed
in a private sector case and bootstrapped that fact into an absolute
rule of vicarious disqualification:

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ification was followed in 1992 when the First District Court of Appeal decided Henriksen. The case involved a construction loan dispute, in which an associate from the defendant’s firm switched sides and began working for the plaintiff’s firm during the pendency of the litigation. Henriksen is essentially a reiteration of Dill, with a twist. The Dill court held that no ethical screen was sufficient. The Henriksen court went further, citing Klein’s exposition of the law with approval and announcing its “clear cut” rule in California—picked up and repeated by Flatt—that “vicarious disqualification of the entire firm is compelled as a matter of law.” Henriksen does not limit its statement of the rule to concurrent representation cases. Moreover, Henriksen’s statement gained considerable weight when it was endorsed in dicta by the California Supreme Court in Flatt.

The next court to join the fray was the Second District in Cho v. Superior Court, which involved a former judge who joined a law firm after conducting a settlement conference involving the matter at issue. The case was Higdon revisited, except the judicial officer in Cho received confidential information in the course of the settlement conference. The case could be distinguished as involving special concerns about the judicial process. But in rejecting the possibility of any ethical screen, Justice Epstein used language that has been frequently quoted in subsequent cases:

No amount of assurances or screening procedures, no “cone of silence,” could ever convince the opposing party that the confidences would not be used to its disadvantage. When a litigant has bared its soul in confidential settlement conferences with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm—which is now pressing or defending the lawsuit against that litigant. [Footnote omitted.] No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties’ consent.

When the California Supreme Court decided SpeeDee Oil in 1999, in the wake of Klein and Henriksen, its ambiguity regarding the absolute rule of vicarious disqualification in California was as puzzling as its language. The supreme court cited Henriksen’s unequivocal decision in favor of an absolute rule of vicarious disqualification as the only representation of California law. Moreover, with California law governing the case, the discussion about whether the law firm in SpeeDee Oil had any effective screening procedures seems to be entirely superfluous. So why was it included? Justice Mosk anticipated how the discussion might be interpreted and filed a concurring opinion in which he emphasized that the case involved a “straightforward question of law, not of fact,” and that regardless of any “ethical screen,” disqualification was “automatic.”

**Post-SpeeDee Oil Issues**

Just a year after SpeeDee Oil, in 2000, the Ninth Circuit applied California law to a disqualification motion in In re County of Los Angeles, a police brutality case in which the plaintiff’s lawyer had a partner who was a former magistrate. The magistrate had participated in a settlement conference in an unrelated but similar case involving one of the same police officers. The Ninth Circuit took up the question of whether, under California law, “a law firm can rebut the presumption of shared confidences by taking prophylactic measures, such as building an ethical wall, to prevent the passing of information from the tainted lawyer to other members of the firm.” The opinion acknowledges that the California courts of appeal have developed a general rule that the presumption is not rebuttable, citing Henriksen and Klein. But the Ninth Circuit also looked at the language from the SpeeDee Oil majority regarding the necessity of considering “effective screening procedures” and read the case as “saying a signal that the California Supreme Court may well adopt a more flexible approach to vicarious disqualification.”

It is really not possible to reconcile County of Los Angeles with Cho, Henriksen, and Klein. To cite any of the three latter cases as authority for an absolute rule of vicarious disqualification is to disagree with the assessment of California law in County of Los Angeles.

In 2001, the crack in California’s resolve to maintain an absolute rule of vicarious disqualification grew a little wider in the Third District’s decision in Adams v. Aerojet-General Corporation. This case involved an attorney formerly associated with a firm that, if it had been a participant in the case, would have been in conflict with the attorney’s current representation. However, the attorney had never worked on the subject matter of the representation at his prior firm. The court refused to impute the knowledge of the old firm to the attorney, despite the fact that if the attorney had garnered actual knowledge from his service at the old firm, it would have been imputed to his current firm. The court cited the modern-day realities of job changes and large firm practice, among other things, as creating a policy that militated against the imputation of firm knowledge to the attorney when the attorney had no actual knowledge of the prior representation.

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**MCLE Test No. 134**

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

1. A law firm hiring an attorney formerly employed by a government agency may not represent a party suing the agency that employed the firm’s new associate.
   - A. True in all cases.
   - B. True, but only if the new attorney has confidential information from the agency.
   - C. False in all cases.
   - D. False, but the new attorney should be screened from involvement in the case.

2. The policy reasons for permitting a law firm to represent interests adverse to the former government employer of one of the firm’s attorneys include:
   - A. The right of private parties to the counsel of their choice.
   - B. The encouragement of employment prospects for former government attorneys.
   - C. The goal of ensuring that government agencies attract good attorneys.
   - D. All of the above.

3. If a new partner has ongoing responsibilities to an old client, the entire firm is disqualified from representing interests adverse to the old client.
   - A. True in all cases.
   - B. True, unless there is an ethical screen in place.
   - C. False.

4. If a firm’s new associate made appearances at his or her old firm for a party in a case that is still pending, the entire firm presently employing the associate is disqualified from representing any adverse interest in the pending case.
   - A. True in all cases.
   - B. True, unless there is an ethical screen in place.
   - C. False.

5. If any attorney in a private law firm has a conflict of interest based on a past representation of a former client, the entire firm is disqualified, regardless of any ethical screening.
   - A. True.
   - B. There is authority for this statement, but the authority has been questioned.
   - C. False.
6. Former judges or court commissioners have a conflict of interest preventing the representation of interests adverse to parties who appeared before them while they held their judicial offices.
   A. True, if a bench officer was privy to confidential information.
   B. True in all cases.
   C. False.

7. If a former judge has a conflict, his or her entire new firm shares the same conflict, regardless of any ethical screens.
   A. The case law makes clear that this is true.
   B. The case law makes clear that this is false.
   C. There is conflicting authority on this question.

8. The primary policy consideration in requiring disqualification based on past representation is:
   A. Protecting the integrity of client confidences.
   B. Distributing employment fairly among attorneys.
   C. Assuring that judgments are based on the truth.

9. An attorney who changes firms is deemed to have all the knowledge of all the attorneys with whom he or she was formerly associated.
   A. True.
   B. False.

10. Policy considerations against disqualification of an entire firm based on the past representation of one of the attorneys in the firm include:
    A. The modern-day realities of large firm practice.
    B. A recognition of the tactical use of disqualification motions.
    C. The right of parties to counsel of their choice.
    D. All of the above.

11. A government agency is automatically disqualified from any matter in which the head of the agency would have a conflict, regardless of any ethical screens.
    A. True.
    B. False.
    C. The issue is currently pending before the California Supreme Court.

12. A government agency can avoid a conflict of interest based on a past representation by an agency attorney who is not head of the agency, if the attorney with the conflict is screened from involvement in the case.
    A. True.
    B. False.

13. An attorney who is of counsel is treated the same as a partner or associate for purposes of vicarious disqualification of the firm based on past representation.
    A. True.
    B. False.

14. Public defenders can never join a district attorney’s office, because their former clients could never be prosecuted.
    A. True.
    B. False.

15. ABA Formal Opinions on vicarious disqualification issues:
    A. Have been cited as influential in California cases.
    B. Mean nothing in California because California has not adopted the ABA Model Rules.

16. Trial courts have such wide discretion in approving the efficacy of ethical screens that no trial court decision in this area has ever been overturned by a writ.
    A. True.
    B. False.

17. The issue of vicarious disqualification is most often raised by a motion to disqualify opposing counsel.
    A. True.
    B. False.

18. The issue of vicarious disqualification first arose in California in a case involving a public defender joining a district attorney’s office.
    A. True.
    B. False.

19. Ethical screens will never pass muster if a firm’s new attorney has a conflict based on representing both sides in the same case.
    A. True.
    B. False.

20. A case questioning the distinction between the public sector and the private sector in vicarious disqualification cases is pending before the California Supreme Court.
    A. True.
    B. False.
In its general statement of the law regarding vicarious disqualification, the Adams court cited Henriksen (and the citation to Henriksen in Flatt) to support the general rule that disqualification extends to the entire firm. However, it did so while adding the caveat “at least where an effective ethical screen has not been established” and citing the SpeeDee Oil language quoted by the Ninth Circuit.46 Without citing County of Los Angeles, the Third District quietly acknowledged the resurrection of ethical screens.

The temptation is to draw on practical policy considerations—such as the nature of modern law practice, the right of innocent clients to the counsel of their choosing, and the reality of the tactical use of disqualification motions as a means to create delay and increase costs—to justify an embrace of the federal courts’ liberal policy of allowing ethical screens to avoid disqualification. Yet the California Supreme Court is only on the record with two endorsements of the absolute rule from Henriksen and a superfluous observation in dicta prefaced with the words “in any event we need not consider.” Three separate cases that have not yet earned red flags in the citing services stand firmly behind an absolute rule, and even SpeeDee Oil can be quoted convincingly as supporting the absolute rule. But SpeeDee Oil’s discussion of the possibility of an ethical screen still creates an ambiguity as to the continued authority of an absolute rule.

In the 2004 case City and County of San Francisco v. Cobra Solutions, Inc.,47 the First District suggested that ethical screens should be available in any type of case, and with the next sentence the court criticized Chambers in a way that implies that ethical screens are insufficient in any type of case.

In Justice Simmons’s dissenting opinion in Cobra Solutions, he cited SpeeDee Oil, County of Los Angeles, and Adams for the “more flexible approach to disqualification”—that is, one that would always consider the possibility of ethical screens to avoid vicarious disqualification. “After SpeeDee Oil,” he concluded, “we should reassess the rigid vicarious disqualification rule in successive representation cases and eliminate the conclusive presumption that the disqualified attorney will share confidences with the current members of his or her firm.”52

The California Supreme Court has granted review to the Cobra Solutions case, so there will soon be further clarification of whether the “rigid” disqualification rule will be reassessed. Many policy considerations supporting the availability of ethical screens are not limited to public sector issues. Attorneys should have freedom of movement, and clients should have the freedom to choose their counsel in the private sector. If client confidences from a prior representation can be protected by screening the attorney who would, as an individual, have a conflict, vicarious disqualification of the private law firm should be avoided.

The division of opinion in Cobra Solutions illustrates that reasonable minds can differ regarding the state of the law in California governing the viability of ethical screens as a means of avoiding vicarious disqualification in cases involving successive representation. The better reasoned view from a policy perspective is to permit ethical screens in any case in which they would be effective in protecting the client’s expectations with respect to client confidences. However, there is still plausible California authority for the proposition that, except for former public sector attorneys, vicarious disqualification of the disqualified attorney’s entire firm is required, regardless of the presence of ethical screens.

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Ironically, the case did not involve the issue of vicarious disqualification.

20 Id. at 283.


23 Vivitar Corp. v. Broady, 143 Cal. App. 3d 878 (1983);


28 Id. at 117.


31 Id. at 125.


33 Id. at 1157 (Mosk, J., concurring).


35 Id. at 995.


37 Id. at 1336.


39 Id. at 313.

40 Id. at 314-15.


42 Cobra Solutions, 119 Cal. App. 4th at 314 n.7.

43 Id. at 324 (Simmons, J., dissenting).
WHEN CALIFORNIA enacted the Statewide Uniform Child Support Guideline,1 the primary goal of this new statutory scheme was to ensure that children actually receive “fair, timely and sufficient support reflecting the state’s high standard of living and high costs of raising children compared to other states.”2 The guideline also was intended to promote statewide uniformity in child support awards in cases involving similar factual and financial circumstances. By doing so, the legislature hoped the guideline would encourage settlement of child support issues and minimize the need for litigation.3

However, the guideline has not reduced litigation in cases involving a parent with a very high income. While most states have enacted child support guidelines that place a cap on guideline levels in anticipation of high-income cases,4 California follows its traditional approach of giving discretion to trial courts in these cases. This approach, codified in Family Code Section 4057(b)(3), authorizes the trial court to make a nonguideline child support order if it determines by a preponderance of the evidence that the supporting parent “has an extraordinarily high income and the amount determined under the [guideline] formula would exceed the needs of the children.”5

Thus, at least when dealing with a very high-income earner, the trial court has “the ability to exercise discretion to achieve fairness and equity.”6 Consequently, counsel involved in high-income cases must do much more than determine the correct numbers to be entered into the computer program used

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to calculate guideline child support.

Nowhere in the guideline does the legislature define what constitutes an “extraordinarily high income” under Family Code Section 4057(b)(3). Instead, it chose to leave that issue for subsequent judicial determination. Thus far, no California case has specified the minimum annual income level that qualifies as extraordinarily high income under the statute. However, a review of all the relevant reported cases appears to establish clearly that an annual income in the range of $1.4 million brings the payor parent squarely within the purview of Section 4057(b)(3). Of course, an annual income of $1.4 million might not necessarily be the floor for the application of the extraordinarily high-income exception, but none of the reported cases addresses whether an annual income of less than $1.4 million qualifies as being extraordinarily high.

Nevertheless, for a payor whose annual income is $1 million, a guideline child support award for one child will be approximately $6,300 per month. At least in Los Angeles County, absent highly unusual circumstances, it is extremely unlikely that a nonguideline award will be materially lower than that amount. Therefore, at that income level, counsel for the high-income parent should carefully assess whether the potential financial savings from a nonguideline award would be sufficient to justify the increased costs of litigation normally incident to cases in which the Section 4057(b)(3) exception is asserted.

Benefits of Nonguideline Child Support Orders

The most obvious benefit to the payor seeking a nonguideline child support order under Section 4057(b)(3) is the possibility of obtaining a child support order that might be significantly lower than the guideline amount. The extent to which a nonguideline order might vary from the guideline amount will depend on the circumstances of the particular case.

The percentage by which a nonguideline award varies from the guideline amount is not, and should not be, a factor in determining whether the award constitutes an abuse of discretion. Normally, as the payor’s income level increases, the percentage of that income needed to fulfill all the reasonable needs of the minor children will decrease. An empirical correlation exists between levels of income and the percentage of income spent on minor children. When available income reaches a certain level, the percentage spent on children not only declines but also ultimately reaches a ceiling for most categories of expenses. Thereafter, the percentage no longer increases regardless of the level of income.

To make a nonguideline award under Section 4057(b)(3), the trial court must find that the lower amount in the order “is consistent with the best interests of the children.” Counsel for the payee spouse will likely argue that no amount lower than a guideline award could possibly be in the minor children’s best interests. But Section 4057(b)(3) clearly reflects the legislature’s recognition that guideline support and best interests are not always synonymous. Indeed, every reported case involving a high-income earner has concluded that a child support order that meets a child’s real needs is sufficient and, therefore, is in the child’s best interests.

Another significant advantage for extraordinarily high-income clients seeking a nonguideline child support award is available if spousal support is not an issue. The court more often than not can be more lenient in setting the amount of child support. The court has the ability to curtail discovery substantially. A body of case law has established very narrow limitations on the payee’s right to obtain detailed financial and lifestyle information in child support cases involving extremely high-income earners.

The rationale underlying these limitations was first enunciated in White v. Marciano. In White, the trial court issued a protective order that precluded the mother from conducting discovery regarding the father’s net worth or lifestyle. At trial, the court barred any evidence of the father’s net worth because the court determined that any such evidence was likely to be more prejudicial than probative.
the mother from presenting any evidence on these two factors. The court of appeal affirmed the rulings, explaining that the standard of living to which a child is entitled should be measured in terms of the standard of living that is attainable by the income available to the parents rather than by evidence of the manner in which a parent's income is expended and the parent's resulting lifestyle. Although White is a preguideline case, its rule has been reaffirmed by a number of cases decided after the enactment of the guideline.

In general, discovery in child support cases involving extremely high-income earners is limited to determining the payor's actual income available for child support if that amount is disputed. Since Section 4057 expressly requires the trial court to make a finding regarding the amount of guideline support in order to comply with federal law, the courts have reasoned that discovery necessary to calculate the guideline amount is appropriate. Since the guideline calculation requires the trial court to determine the payor's annual gross income, discovery needed to determine that figure clearly is acceptable. However, the case law uniformly reaffirms the restrictions on most other discovery in high-income cases.

In most cases, the factual information necessary to apply the guideline formula can be obtained from the payor's income tax returns. In Marriage of Loh, the court of appeal noted that the information presented in income tax returns is presumptively correct. Therefore, the trial court should only allow broader discovery if the payee can show that the income declared on the payor's tax returns is inaccurate.

When representing either party in a high-income earner case, counsel must recognize that the mere fact that one party qualifies as an extraordinarily high-income earner does not automatically mean that the court will reject the guideline formula for a child support order. To the contrary, as the statutory scheme expressly provides, the guideline amount “is intended to be presumptively correct in all cases.” Thus, counsel for the high-income parent must effectively rebut the presumption that the guideline amount is correct. Counsel can do this by offering “admissible evidence showing that application of the [guideline] formula would be unjust or inappropriate in the particular case” because the guideline amount would exceed the needs of the children.

While counsel for the high-income earner bears the burden of establishing that the guideline amount would exceed the children's reasonable needs, counsel for the supported party also has an important decision to make regarding how to present that party's case. Instead, the children's needs must be determined from the ground up. This means that the trial court must create a budget for the minor children on an item-by-item basis. Therefore, counsel for each party should provide the trial court with a persuasive, detailed budget setting forth the children's reasonable needs. This requires familiarity with the role of historical expenses, which are expenses for the children that were incurred in the past. Counsel also must grasp the distinction between child support that helps children and child support that, by primarily assisting the custodial parent, acts as disguised spousal support.

It is a likely scenario that the parties' marital lifestyle will have fully reflected the wealthier parent's available income. In these circumstances, the parties' historical expenses will play a valuable role in properly analyzing the children's postseparation needs. In fact, in many cases the historical expenses are likely to be the most probative evidence of the children's postseparation needs. Thus, if historical expenses are relevant, they should be substantiated and properly documented. This can be best accomplished with schedules that are prepared by a forensic accountant based upon the custodial parents' canceled checks, check registers, invoices, and other relevant documents.

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However, there are situations in which the historical expenses will not have a significant role to play in calculating children's reasonable needs. In *Marriage of Cheriton*, the court of appeal concluded that the significant flaw in the trial court's calculation of child support was its reliance on the parties' historical expenditures and its assumption that those expenditures defined the children's reasonable needs. In that case, the husband was a professor of computer science at Stanford University who also served as a consultant to Cisco Systems, Inc. By the time of trial, he had received stock options valued at more than $45 million as a result of his consulting work. He also had sold certain previously vested stock options for $9.75 million. Nevertheless, the parties' marital lifestyle had not reflected the significant wealth attained by the husband, in part because a major portion of that wealth had been created after separation. Relying on those facts, the court of appeal properly determined that a child support order based upon historical expenditures would not enable the minor children to share in a lifestyle reasonably attainable from their father's greatly enhanced wealth.

Whenever historical expenses are not utilized, counsel for the custodial parent proposing that new or increased expenses will be incurred on behalf of the minor children must substantiate them. The manner in which these proposed expenses can properly be documented will vary depending upon their nature. Some may be best established by expert testimony; others may be best substantiated through the custodial parent's declaration.

As a practical matter, whenever a material discrepancy exists between the incomes of the payor and the custodial parent, any child support payment will to some extent “produce a benefit for the custodial parent.” Thus, large child support orders have been affirmed even though they “undoubtedly will allow [the custodial parent] to substantially improve her own economic status.” The legislature expressly codified that doctrine in Family Code Section 4053(f), which provides, in relevant part, that “[c]hild support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children.”

Although child support will necessarily improve the custodial parent's standard of living to some degree, trial courts should guard against requests for items of child support that would primarily benefit the custodial parent instead of the child. The determination of whether a particular claimed expense provides only an “incidental benefit” to the custodial parent or actually is primarily for that parent’s benefit often is a difficult and intensely fact-driven task. Obviously, some
expense categories lend themselves to ready allocation between the custodial parent and the minor children. Private school tuition and fees, for example, are expenses that are 100 percent attributable to the children. Clothing expenses for children generally can be readily determined.

Other expenditures, such as housing-related expenses, do not lend themselves to a simple allocation. Instead, the appropriate allocation of this type of expenses must be determined on a case-by-case basis. If the custodial parent relies primarily upon child support, the percentage of a housing-related expense allocated to the children may well be higher than it is in cases in which the custodial parent has other sources of income. Custodial parents should be required to make a meaningful contribution toward housing-related expenses if they are able to do so.32 Certain other categories of expenditures, such as food and transportation, also have child-related and parent-related components and therefore must be allocated between the parent and the children.33

It is not uncommon for the party seeking child support to include in the budget of child-related expenses certain items that may be primarily (or even entirely) for the benefit of the parent rather than the children. For example, if the custodial parent is not employed, the cost of child care would be an expense primarily for that parent’s benefit.34 The determination of whether a specific expense falls into the category of being for the parent’s benefit is necessarily fact-driven as well. Therefore, each expense category must be closely scrutinized in order to ascertain whether it primarily benefits the children or is merely disguised spousal support. Occasionally, the list of purportedly child-related expenses submitted by a custodial parent will constitute nothing more than a wish list created in large part for that parent’s benefit. Items intended to benefit the parent should be vigorously disputed by counsel for the payor parent.

While both the statutory scheme and case law recognize that children of a wealthy parent are entitled to share to some extent in the lifestyle available to the wealthier parent, there is no authority for the proposition that the custodial parent can utilize child support to replicate the wealthier parent’s lifestyle. For example, in Marriage of Catalano, the court of appeal recognized that “to some degree” child support in high-income cases must reflect “the more opulent lifestyle” of the wealthier parent.35 A number of other cases similarly refer to the children’s right to “share” in the lifestyle available as a result of the payor’s wealth.36 Also, Section 4053(f) expressly provides that children “should share in the standard of living of both parents.” However, there is a veritable chasm between the concept of enabling children to share in the wealthier parent’s lifestyle and the idea that the custodial parent is entitled to recreate every aspect of that lifestyle, especially since child support is supposed to primarily benefit the children and provide only incidental benefits to the custodial parent.37 It is a simple fact of life that many of the luxuries available to the wealthier parent do not benefit the minor children. For example, child support that enables the supported parent to rent a vacation villa on the French Riviera probably would be inappropriate when the young children likely would be happier with a vacation at Disney World.38

Forensic accountants generally play an important role in the preparation of both parties’ evidence in Section 4057(b)(3) high-earner cases. Not only can they prepare an analysis of historical expenditures, they also can prepare pro forma expense schedules based on a combination of historical and projected expenses to the extent each type is applicable. Naturally, this evidence must meet the requirements of Evidence Code Section 801(b), which requires an expert’s testimony to be:

Based on matter (including the spe-
cial knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Other experts also may be invaluable. Economists can empirically demonstrate the correlation between levels of income and the percentage of that income spent on minor children. Travel agents can prepare itineraries for age-appropriate vacations for the children and the custodial parent. Real estate experts can estimate the monthly expense of appropriate housing for the custodial parent and the children if the housing they presently occupy is not suitable. Professional shoppers can estimate the average monthly cost of appropriate clothing for the minor children. Psychologists or other behavioral experts can address the general needs, perceptions, and experiences of children of like ages to the children in the case when these factors are relevant to the appropriateness of the expenditures proposed for the children.

Whenever a payor is asserting that he or she is an “extraordinarily high income earner” under Section 4057(b)(3), a claim also should be made under Family Code Section 4057(b)(5), which provides, in relevant part, that “[a]pplication of the formula would be unjust or inappropriate due to special circumstances in the particular case.” Ironically, Section 4057(b)(5) is equally available to the payee parent as a means to seek a higher than guideline child support award in appropriate cases.

**Section 4057(b)(5)’s Double-Edged Sword**

_Marriage of deGuigne_ is illustrative. In that case, the husband had been born into wealth and social prominence but never worked during the marriage. While his annual income, generated from investments and family trusts, was approximately $240,000, the parties maintained an extraordinarily opulent lifestyle that far exceeded this income. The husband funded this lifestyle by liquidating inherited assets.

Although a guideline child support order would have been $4,844 per month, the trial court ordered spousal and child support totaling $27,000 per month—a figure that exceeded the husband’s gross monthly income. The child support component was $15,000 per month—more than three times the guideline amount. The court found that even with support payments of that magnitude, there would be a substantial reduction in the children’s lifestyle.

The trial court’s order was partially based upon the husband’s earning capacity, and his earnings were imputed to his nonproductive, inherited assets. However, even after imputing this income, a guideline support award would have been substantially less than $15,000. The primary basis for the trial court’s order was Section 4057(b)(5). Indeed, the court determined that the guideline amount would be “unjust or inappropriate due to the special circumstances of the particular case” because it would “subvert the overriding principle behind the support guideline.”

The court of appeal affirmed, holding that substantial evidence supported the trial court’s ruling. The appellate court explained that the overriding purpose of all the exceptions to the mandatory guideline is to ensure that trial courts retain their traditional discretionary authority to adjust child support orders according to the circumstances of each case. Therefore, it concluded that it was within the trial court’s discretion to reason that it was inappropriate for a parent’s support obligation to be based on investment income alone, particularly when the parent...
schooled and benefited from substantial assets that produced no income. Thus, a trial court may consider all assets of a parent in determining that parent’s earning capacity. Moreover, Marriage of DeGuigne provides precedent for a court to use Section 4057(b)(5) as a basis for devising a child support order that requires a wealthy parent to utilize capital in order to maintain the lifestyle to which the children have become accustomed.

In the overwhelming majority of child support cases, once each party’s “cash available for support” has been calculated, the child support amount is relatively easy to resolve. The major exception to this general experience is cases involving extraordinarily high-income payors. In these cases, calculating guideline support is only the beginning of the analysis. From there, the task of counsel is to ensure that the trial court fashions a child support award that meets all the reasonable needs of the supported children but does not constitute disguised spousal support. That task definitely represents a unique challenge for family law practitioners.

1 Fam. Code §§4050 et seq.
2 Fam. Code §4053(i).
3 Fam. Code §§4053(j), (k).
5 According to Family Code §4057(b), the presumption that the guideline formula amount is the correct amount of child support to be ordered “is a rebuttable presumption affecting the burden of proof and may be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles of Section 4053, because one or more of the following factors is found to be applicable by a preponderance of the evidence: (3) the parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children.”
8 See, e.g., Marriage of Chandler, 60 Cal. App. 4th 124 (1997) (Payor father had a gross income of $117,000 per month, or $1,404,000 annually); McGinley v. Herman, 50 Cal. App. 4th 936 (1996) (Payor’s income was “just under $1.4 million a year.”); Estvez v. Superior Court, 22 Cal. App. 4th 423 (1994) (The parties stipulated that the father, whose gross annual income was “not less than $1.4 million per year,” was an extraordinarily high earner.).
10 Fam. Code §4056(a)(3). Whenever the trial court makes a nonguideline order under Family Code §4057, it is required to state in writing or on the record all the information required in §4056(a), including its finding that a nonguideline award is consistent with the best interests of the minor children.
13 This type of protective order is expressly authorized by Code of Civil Procedure §2017(c).
14 White, 190 Cal. App. 3d at 1032.
16 See, e.g., Hubner II, 94 Cal. App. 4th 175.
17 See, e.g., id.; Johnson, 66 Cal. App. 4th 68.
19 A payor’s tax returns are discoverable pursuant to Family Code §3552.
21 Fam. Code §4053(k).
23 Fam. Code §4057(b).
27 Marriage of Cherriton, 92 Cal. App. 4th 269.
28 Id. at 280-81, 89.
29 Notwithstanding his wealth, the husband also continued to live “very modestly, maintaining a standard of living far below his means.” Id. at 292 n.13. However, as the court properly noted, child support is to be determined based upon the lifestyle that is attainable from the high-income parent’s wealth and is not predicated upon whether the wealthy parent “lives in a manner consistent with extravagance or with frugality.” Id. (citing Johnson v. Superior Court, 66 Cal. App. 4th 68, 76 (1998)).
30 Id. at 292-93.
31 Marriage of Catalano, 204 Cal. App. 3d at 532.
33 Marriage of Cherriton, 92 Cal. App. 4th 269.
34 Id. at 280-81, 89.
35 Marriage of Catalano, 204 Cal. App. 3d at 532.
36 See, e.g., Marriage of Hubner (Hubner I), 205 Cal. App. 3d 667-69; Marriage of Catalano, 204 Cal. App. 3d at 531-32.
37 See, e.g., Hubner I, 205 Cal. App. 3d at 667.
38 Marriage of Catalano, 204 Cal. App. 3d at 532.
40 Marriage of Catalano, 204 Cal. App. 3d at 531-52; Hubner I, 205 Cal. App. 3d at 668-69.
43 Id. at 1359. Despite the couple’s opulent marital lifestyle, the husband clearly did not qualify as an extremely high-income earner under Family Code §4057(b)(3). Guideline child support is based on income, not assets, and income does not include the proceeds received from liquidating assets. See Fam. Code §4058.
44 Marriage of deGuigne, 97 Cal. App. 4th at 1360.
45 Id. at 1366. However, the court of appeal reversed the portions of the order requiring the father to pay 100% of the children’s educational expenses and make a $10,000 “lump sum” child support payment to be used toward any rental housing security deposit. Id. at 1367-68.
46 Id. at 1362.

Letters
Continued from page 10

chance of obtaining a penalty. To do so, they have to risk not only losing their postoffer costs and attorney’s fees (because under the Song-Beverly Act, they are part of statutory costs), but also that they will be responsible for the defendant’s postoffer costs, should they “win” as expected but not also receive a civil penalty.

I feel that some sort of follow-up article is due here.

Alan R. Golden

California’s Coastline

Philip J. Hess’s article, “A Line in the Sand” (January 2005) does both property owners and the public a grave disservice by encouraging beachfront property owners to challenge previously recorded irrevocable offers to dedicate public access. As Hess acknowledges, such challenges are expensive to the property owner. Wendy McCaw paid $460,000 in penalties in addition to her attorney’s fees and the actual cost of her unsuccessful litigation. More importantly, such challenges are unsuccessful. The court of appeal recently reiterated in Serra Canyon Company v. California Coastal Commission, 120 Cal. App. 4th 663, 665 (2004), that all challenges to conditions placed on a development permit had to be asserted at the time the final permit decision was made, including all collateral attacks. A property owner’s failure to timely challenge a commission-imposed public access condition forever waives any challenge to that condition, by the owner and by subsequent purchasers, regardless of how the challenge is dismissed. This includes any challenge that the commission violated the California Environmental Quality Act or any of the due process rights of the property owner.

The people of the state of California enacted Proposition 20, the Coastal Initiative, in 1972 precisely to protect their constitutional rights to access the publicly owned tidelands of this state. The legislature extended this coastal protection in enacting the Coastal Act of 1976. One of the many goals of that act is to protect and maximize public access to the public’s beaches. Property owners recorded irrevocable offers to dedicate public access in exchange for permission to build along our coast. They obtained the benefits of their permits and should now shirk the obligations they agreed to many years ago. Expensive, unsuccessful litigation may delay but will not avoid their obligations.

Ralph Faust
Chief Counsel for the California Coastal Commission

Alan R. Golden
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The Promise of Extranets for Law Firms

Most law firms have embraced law office technology, but this has come at a significant cost in time and resources. Law office technology has become a major problem for law firms not only in administrative costs but also in financial investment. Furthermore, the technology boom in legal practice is exacerbated by the growing need to integrate law firm technology with cocounsel and client networks. The solution to this problem is an extranet.

An extranet can provide a focal point of investment and service the firm’s needs for applications, data, and communication. A properly constructed extranet also can integrate cocounsel and client technologies, regardless of equipment or software differences. Further, an extranet can provide a firm with a single centralized location for all its data. With this centralized data storage, costs are reduced and, concurrently, data can be more secure because it is less scattered—so long as proper security and data backup procedures are implemented. With an extranet, the firm can enhance its ability to perform its work and regain control not only of its data but also the data it shares with cocounsel or clients. With properly designed profiles, extranet users can log on to the firm’s applications and information whether the users are in the office or at remote locations. The work that attorneys and staff are doing at the office can be saved on the extranet and then accessed and completed from a home or any other remote location.

Like Internet sites, extranets are housed on servers. Extranets, however, are the gated communities of the Internet. They can only be accessed by people who have registered user names and passwords. Each extranet user is granted specific, limited access rights. Like a Web site, an extranet can be accessed by any computer on the Internet (as well as any computer in the firm). Unlike a Web site, an extranet cannot be accessed unless a user has an established profile, including a name and password or passwords.

Law firm extranets have advantages that justify their cost. For example, extranets can allow a firm to exploit the interrelationships among different areas of its data, such as marketing, accounting, or document depositories. Discovery advantages. Just as a videotaped seminar can be saved in digital form, so too can videotaped discovery. An extranet can greatly facilitate the creation and use of off-site video depositions. With a capable extranet, a firm does not, for example, have to fly six attorneys to Chicago when a video teleconference or remote deposition can accomplish the same goal with only a single attorney off site. Some court reporters are already armed with the technology that provides firms with video depositions, but firms without properly configured extranets cannot use this technology effectively. With an extranet connection to a deposition on video, one attorney can be present to conduct the deposition while an unlimited number of others (including cocounsel, experts, and clients) can log in from various locations and take notes or ask questions via the attorney who is present at the deposition. With an extranet, a team can take part in the deposition without the expense of travel.

Increased Efficiency

On an extranet, however, the firm’s data and applications are centralized. When someone corrects client information, the correction is automatically propagated throughout the firm, and redundant effort is eliminated. Labor is usually the greatest expenditure for law firms. Information should no longer be entered twice by different departments because with an extranet it is not required.

Similarly, various departments can integrate their efforts. For example, the marketing department can videotape a seminar, convert it to streaming video, place it on the firm’s Web site, and add a link to the video to an e-mail newsletter that informs everyone on any number of contact lists that the video is available for viewing. In the litigation department, discovery data—including videotaped discovery—can be loaded into a document depository and shared via the extranet for anyone in the firm to conduct searches, track time lines, and so on. In turn, these research efforts can be saved, shared, and improved upon by the same means.

Discovery Advantages

Just as a videotaped seminar can be saved in digital form, so too can videotaped discovery. An extranet can greatly facilitate the creation and use of off-site video depositions. With a capable extranet, a firm does not, for example, have to fly six attorneys to Chicago when a video teleconference or remote deposition can accomplish the same goal with only a single attorney off site. Some court reporters are already armed with the technology that provides firms with video depositions, but firms without properly configured extranets cannot use this technology effectively. With an extranet connection to a deposition on video, one attorney can be present to conduct the deposition while an unlimited number of others (including cocounsel, experts, and clients) can log in from various locations and take notes or ask questions via the attorney who is present at the deposition. With an extranet, a team can take part in the deposition without the expense of travel.

Benjamin Sotelo is president of Legal Friendly Technologies and can be reached at Benjamin@LegalFriendly.com. Greg Brenner practices criminal defense in Beverly Hills.
Another way that an extranet can save a firm money is through the licensing of applications. For example, instead of buying a copy of Microsoft Word for every computer on a firm’s network (and performing maintenance on each computer separately), an extranet can utilize one copy of the program and offer remote use of the copy by the entire firm. This form of licensing is significantly less expensive than buying multiple single-user copies of a program.

Security Issues

The cost of this increased efficiency is extranet technology and its highly important server security and training issues. An extranet commits more of the firm’s valuable knowledge to networked, accessible hard drives. As a result, two specific concerns are server security and training. Cultural resistance to vigilant security (in the form, for example, of practitioners who are annoyed at having to deal with increased security protocols or temps who forget to log off before going to lunch) can be overcome through education and policy enforcement. Most recent graduates from law school are technically aware, however, and this should help lower resistance to the changes that an extranet will bring to the daily practice of law at a firm.

Properly designed user names and passwords and good fire wall devices provide enough basic security to protect an extranet. Higher levels of security can be provided by having separate servers perform different data functions. For instance, the server that hosts the firm’s Web site should be separated from the server that houses the firm’s knowledge depository. If the Web server is compromised, the damage should be limited to the firm’s Web pages, and the hacker would have to perform more work before he or she could pass from the compromised server to another server. Layers of security can be added until the firm and clients feel secure with the extranet.

When proper security measures are implemented, the risk that a direct attack by a random hacker will compromise the firm’s servers will be low. Rather, security is more likely to be compromised by disgruntled employees or by unsecured computers or networks in the homes of employees.

When the new Microsoft dot-net standard, which greatly facilitates the interconnection and compilation of data from different sources, and the return on investment that comes from increased efficiency, law firms are very likely to embrace extranet technology. Dot-net allows access of all data on all office computers and integrates data and software. As a result, extranet technology should be the focus of law firm investment in technology for the near term.
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**CLE Preview**

**Litigation and Trial Tools**

ON WEDNESDAY, FEBRUARY 16, the Association will present a program for litigators who are using or are considering using automated litigation support tools. Presenters Russell Jackman and Alex Lubarsky will also discuss case calendar and case pleading management. The presenters will demonstrate the basic features of the leading litigation support tools on the market: Introspect, Summation, Concordance, and Case Map. This is a must for the solo litigator or the large firm litigation support manager who wishes to leverage technology in litigation. The program will take place at the LACBA/Lexis Publishing Conference Center, 281 South Figueroa Street, Downtown. On-site registration and a dinner will begin at 5:30 P.M., with the program continuing until 9:15 P.M. The registration code number is 008773.

- **$65**—CLE+PLUS members
- **$90**—LACBA members
- **$115**—all others
- **3.25 CLE hours**

**STOCK INCENTIVE PLANS**

ON THURSDAY, FEBRUARY 10, the Business and Corporations Law Section will present speakers Michael D. Fernhoff, Lee R. Petillon, and Seth Rosen in a presentation on the basics of setting up a stock incentive plan for key executives. These panelists will discuss what kinds of stock incentives to grant, the tax considerations of various stock incentives, and the applicable accounting and securities law issues. Finally, the panelists will review the new IRS deferred compensation guidance and the new FASB rule requiring expensing of stock options. The program will take place at the LACBA/Lexis Publishing Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 8313. CLE+PLUS members may attend for free ($15 meal not included). The prices below include the meal.

- **$60**—Business and Corporations, Barristers, and Corporate Law Section members
- **$70**—other LACBA members
- **$80**—all others
- **1.5 CLE hours**

**Advising Clients about Domestic Partnerships**

ON TUESDAY, FEBRUARY 15, the Real Property Section will present a discussion about the title insurance implications of domestic partnership legislation. Speakers John C. Hoag and Marshal A. Oldman will provide insight on how to advise clients regarding the provisions of the act. This discussion will take place at the Olympic Collection, 11301 Olympic Boulevard, Suite 204, in Los Angeles. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 008741. CLE+PLUS members may attend for free ($30 meal not included). The prices below include the meal.

- **$65**—Real Property Section members
- **$75**—other LACBA members
- **$85**—all others
- **1 CLE hour**

**Construction Law Update and Robert Flaig Award Presentation**

ON TUESDAY, FEBRUARY 22, the Real Property Section will host a review of California decisional and statutory law issued in 2004 relevant to the practice of construction law. Speakers Aimee Gross, Harold Hammersmith, and Candace L. Matson will also be on hand to present the 2005 Robert Flaig Award for excellence in the practice of construction law. The program will take place at the LACBA/Lexis Publishing Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 8313. CLE+PLUS members may attend for free ($15 meal not included). The prices below include the meal.

- **$60**—Real Property Section members
- **$70**—other LACBA members
- **$80**—all others
- **1 CLE hour**

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

AS THE PRESIDENT OF the John M. Langston Bar Association, I have often reflected on a deceptively simple question: What is the purpose of our organization? For most of the last 100 years, this question was much easier to answer.

When the Blackstone Club, the Langston Bar’s predecessor, was founded in the 1920s, black lawyers were excluded from most of the social and professional associations in Los Angeles—and indeed in the United States. The local bar associations and influential downtown social clubs did not admit black members, and the American Bar Association would not allow black attorneys to join until 1943. In the legal, social, and political environment in the United States for most of the twentieth century, a black bar association had a clear mission: to give black lawyers what they were not able to receive and experience from a white bar association.

During this time in the United States before the advent of laws prohibiting racial discrimination, black attorneys most often practiced alone or in a small firm because corporate law departments, major law firms, and government agencies would not hire them. The typical black attorney was a he because few women of any race had the opportunity to attend law school. He had a black clientele because white clients preferred to hire white lawyers—and he would find that blacks often preferred to hire white lawyers as well. The typical black lawyer lived in the same community as his clients because racial covenants prevented him from buying a home in a white neighborhood. Because of his education and relative economic independence, he was a leader in his community and active in organizations such as the National Association for the Advancement of Colored People (NAACP).

Today, there is no typical black lawyer because blacks have walked through doors long closed to them. Black men and women may be found in the largest and most influential law firms in the United States. They also work for the largest and most powerful U.S. corporations and serve as judges throughout the state and federal courts.

In addition, black lawyers may freely join their white colleagues in all the prominent professional and social organizations. In 2003, Dennis Archer became the American Bar Association’s first black president. Robert Grey succeeded him in 2004 and became the ABA’s second black president. Here in Los Angeles, Roland Coleman became the second black president of the Los Angeles County Bar Association in 2001. (The first was Samuel Williams, who was president of the Association in 1978.)

The racial dynamic in the country also has changed dramatically in the last few decades, as immigration has woven many more colors into the nation’s tapestry. Asians outnumber blacks in California. Latinos are, or soon will be, America’s largest minority. Many Latinos consider themselves to be black, and millions of Americans are identifying themselves as multiracial.

What then for the black bar association? Is it a historical relic, no more relevant to today’s society than a union for bowling pin setters? Or worse, is it somehow harmful, an embodiment of outdated racial thinking?

My answer to these questions is that the black bar association is more relevant today than it has ever been. The Langston Bar Association is relevant not because the United States is the same as it was 100 years ago but precisely because the United States is so different than it was 100 years ago.

In the United States of today, black lawyers can join any organization, work in any firm, and serve on any court—but these inspiring possibilities don’t always translate into equally inspiring realities. According to the 2000 census figures, blacks represent less than 4 percent of the lawyers in the United States, even though blacks are more than 12 percent of the total population. Even more troubling, and after decades of steady increases, the number of blacks receiving law degrees peaked in 1998 and has actually declined slightly since.

For those blacks who become lawyers, they may join a prominent law firm, but they are unlikely to stay. So-called attrition rates for minority lawyers at law firms are substantially higher than the rates for their white counterparts, and the number of black partners at major law firms remains minuscule.

Fifty years after Brown v. Board of Education and 40 years after the passage of the Civil Rights Act, these statistics should be a national scandal. Yet, other than the recent efforts to eliminate affirmative action, the condition of black America is rarely the subject of national discourse. This state of affairs will not change unless organizations like the Langston Bar Association remain active.

I am pleased by the positive developments, including changes in laws and attitudes, that occurred in the latter part of the last century, but I am hardly satisfied. As important as it is to look back, it is equally important to look forward. I do not know what the twenty-first century will bring, but I do know that progress must be earned. Only our hard work, and an unwavering commitment to more opportunities and justice for all, will build a brighter future for our children and grandchildren.

Christopher E. Prince is president of the John M. Langston Bar Association. He is an associate in the Los Angeles office of Sonnenschein Nath & Rosenthal LLP, where he focuses on bankruptcy/restructuring matters and commercial litigation.
A Major Gift from The “1939” Club was received to fund The “1939” Club Law Scholar in Holocaust and Human Rights Studies.

Based in Los Angeles, The “1939” Club is one of the largest and most active Holocaust survivors organization in the world. It takes its name from the year 1939, when Hitler invaded Poland and changed the lives of its members forever. The “1939” Club is dedicated to Holocaust education, documentation, justice and the memory of the six million Jews who perished, the millions of other victims who lost their lives, and the righteous persons who stood up for human rights — so that it will never happen again!

The “1939” Club’s association with Whittier Law School dates back to 1998, when the Club co-sponsored the Law School’s conference on Holocaust restitution, the first such legal conference in the United States.

Professor Michael J. Bazyler became the first “1939” Club Holocaust and Human Rights Law Scholar on November 1, 2004. Born in the former Soviet Union, he is a child of Holocaust survivors, receiving his primary education in Poland and emigrating with his family to the United States at age eleven. He earned his B.A., from the University of California, Los Angeles, graduating summa cum laude, and his J.D. from University of Southern California. Prof. Bazyler has taught at Whittier Law School since 1982, currently teaching Holocaust, Genocide and the Law; Comparative Legal Systems; International Criminal Justice; International Business Litigation; International Business Transactions; and Torts.

Prof. Bazyler is a specialist in international human rights law. He is the author of over fifty legal articles, most focusing on genocide and other massive human rights abuses. He is a leading authority on the use of American courts to redress genocidal wrongs, and recently authored HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS (NYU Press, 2003), a comprehensive study of the Holocaust restitution litigation in the United States. Prof. Bazyler has been a visiting scholar and law professor at many institutions around the world. This past summer of 2004 he directed the Whittier Law School Summer Abroad Program at Bar-Ilan University School of Law, in Ramat Gan, Israel and he will be directing the program in 2005.
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