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The Catalyst Theory in California
page 28

A New Leader
Edith R. Matthai is the Association’s 2005-06 president page 14

PLUS

Collateral Estoppel and Arbitration page 20
Police Administrative Discipline page 24
Reality TV and Copyright Law page 34
Insurer Reservation of Rights page 40
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FEATURES

28 Catalyst for Change  BY DONNA M. DEAN
The California Supreme Court has clarified the definition of “successful party” entitled to private attorney general fees under the catalyst theory

34 Reality Check  BY DANIEL A. FIORE AND SAMUEL E. ROGOWAY
In determining whether an unscripted television show enjoys full copyright protection, the analysis must center on the expression of its concept

40 With Reservations  BY ANDREW S. WILLIAMS AND VIVIAN I. ORLANDO
Can an insurer’s reservation of rights result in a bad faith cause of action?

70 Los Angeles Lawyer’s Annual Index to Articles
A complete guide to authors and articles published in Volume 27, March 2004-February 2005

46 Special Section
2005 Guide to Investigative Services

DEPARTMENTS

14 President’s Page
Defending and improving our judicial system
BY EDITH R. MATTHAI

18 Barristers Tips
The Barristers Section continues its years of service
BY KIM TUNG

20 Practice Tips
Using collateral estoppel after arbitration
BY MICHAELBRENT COLLINGS

26 Practice Tips
The harm to public service standard in police misconduct cases
BY RAY JURADO

68 Computer Counselor
Encryption technology for keeping computer data safe
BY GORDON ENG

76 Closing Argument
A new paradigm for mentoring
BY MATTHEW C. FRAGNER

10 Letters to the Editor

74 Classifieds

75 Index to Advertisers
Judgments Enforced

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he managing partner of a law firm stands before hundreds of attorneys at a law firm retreat and remembers when the entire firm was defined by a few names on a wall. A newly appointed deputy city attorney looks over a list of assistant city attorneys and realizes that the Los Angeles City Attorney’s Office is one of the largest “law firms” in Los Angeles. The lead plaintiff’s counsel in a public interest lawsuit meets with the lead plaintiff, the experts, and the witnesses and wonders how to meld all the moving human parts into a cohesive and persuasive presentation of the case. Each of these lawyers is confronting the mysterious and elusive challenge of effective leadership.

More law school graduates will be called upon to assume the mantle of leadership than will be called upon to argue issues of civil procedure or advocate for real property rights or get comfortable with the blood-streaked labyrinth of criminal procedure. And yet leadership training is not required by the American Bar Association for ABA accreditation of a law school curriculum.

What is leadership, anyway? Is it merely the responsibility for the conduct and achievements of personnel under an identified command structure? Is it taking responsibility for desired outcomes? Conversely stated, is leadership simply the process of ascribing blame when things go badly and garnering acclaim when things go well? These are tragically limited views of leadership.

According to Michael W. Morrison, a Toyota executive and expert on leadership training, “The most important role of the leader is to be a shaper of meaning.” Imagine taking on that responsibility. You are responsible for shaping the meaning of being a lawyer at your law firm, the meaning of being a city attorney, the meaning of being involved in a particular case. You must differentiate the concept of meaning from your goals, tactics, and self-interest.

The goal of legal counsel is to realize outcomes in the client’s best interest, but legal practice is not meaningless when a client loses. Tactics, which require skill and training, comprise the plans and research necessary to achieve the goal. Self-interest is winning, getting paid, and building one’s reputation, whether in private practice or, perhaps more nobly, in the public interest and civil service arenas. Meaning provides the purpose that transforms human action into a creative force. Leaders manage personnel—and themselves—to ensure that each action taken is in alignment with the meaning of the organization.

Too abstract? Take this example. The manager of a practice group in a California law firm of approximately 250 attorneys described what it means to be a lawyer in his practice group. The meaning of his practice is to add value to every client’s matter by first understanding how the client makes money and then implementing legal strategies and services with the intention of improving the client’s bottom line—even if that involves challenging the client’s assumptions. This concept of the meaning of the practice group is explained to each of its attorneys and is included in all training materials and performance evaluations. All practice group attorneys are expected to justify their hours, their conclusions, and their work products on the basis of the group’s meaning.

So ask yourself: What is the meaning of my legal practice? How can I convey this meaning to my colleagues and subordinates and clients, and will they have any clue that what we do together is guided by this meaning?

Or perhaps you think leadership is something different than shaping meaning. Fine. Identify for yourself your own leadership challenge. We lawyers are leaders, however leadership is defined, and the task of leadership demands our full attention.

R. J. Comer is a partner at Allen Matkins Leck Gamble & Mallory LLP, where he specializes in land use law and municipal advocacy. He is the chair of the 2005-06 Los Angeles Lawyer Editorial Board.
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Letters

Praise

Please pass my thanks to David S. Kupetz for his article (“Filing Bankruptcy by Solvent Tenants to Cap Landlords’ Claims,” April 2005). I found it interesting and importantly educational on the subject and some underlying issues with leases I was aware of but not clear on. Well written, it was some of the footnotes that “switched the light on.”

I will be a little better lawyer as a result. May we all have that effect on our brothers from time to time.

D. J. Hartsough

Opposing Shari’a

I was more than disappointed when I looked at the February 2005 issue of Los Angeles Lawyer. The United States is a civil country. To suggest that any credence should be given to shari’a in the U.S. legal system is appalling. Blind adherence to shari’a has caused the deaths of thousands of innocent people, the maiming of even more and brought misery to millions. What an insult to all of these poor people (including those killed on 9/11) that you have the nerve to publish “Keeping the Faith.” I know what my answer would be if ever asked to draft a contract that is “shari’a compliant”—NO. If you like I would be pleased to write a feature article for your next issue about the proper role of beheading, stoning to death for adultery, and cutting off of hands for thievery. You owe your readers an apology.

Robert Goldsmith

Remembering Johnnie Cochran

In the dark days of law school, a light came on for me during the O. J. Simpson trial. A sharp dressed, articulate African American lawyer stepped forth at a moment when the world was watching, hanging on his every word. As a second year law student in the midst of the grind that is law school, I tuned in along with my classmates at the Southern University Law Center to watch the O. J. Simpson trial.

We watched with great anticipation every moment of the trial. We hung on every phrase of the prosecution and defense. We were captivated. Like minor league baseball players observing their first World Series, we scrutinized every decision, every sidebar, every ruling each and every day.

As the trial wore on, it was clear that ever so slightly, bit by bit Johnnie Cochran was imposing his will on the proceedings. For me as an African American male, to see another strong African American male command respect in the practice of his craft was truly inspiring. For me as a lifelong resident of Shreveport, Louisiana, watching another Shreveport native rise to prominence was impressive on a level so personal as to be impossible to quantify. It was an understatement that Johnnie Cochran’s mastery of the proceedings caused my chest to swell with pride.

When Johnnie Cochran prevailed in the courtroom, I prevailed in the courtroom along with an entire generation of young African American lawyers. For me, Johnnie Cochran is my Thurgood Marshall. He is that model of an attorney and consummate legal professional that I strive to emulate.

Johnnie Cochran said that his greatest pleasure as a lawyer came not from the Simpson case or other multimillion-dollar cases in which he prevailed. He made it clear that securing the freedom of Geronimo Pratt after over 25 years of imprisonment provided him his greatest reward. This reminds us as lawyers that success is not measured in dollars won, it is measured in the lives restored and the clients helped. In the case of Johnnie Cochran, his success can also be measured in the lives that he touched and the lawyers he inspires even today.

Johnnie Cochran touched many lives, including mine. I am fortunate that I had the opportunity to meet him, even if ever so briefly, to tell him that I appreciated him for providing a positive example for me as a young lawyer. As always he was gracious, even though I had interrupted his lunch with some friends and family during his visit back to Shreveport.

Now as I walk the steps to the courthouse, pass the bar into the courtroom, I have Thurgood Marshall at one side and...
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Johnnie Cochran at the other. My words are sharper, my mind is more focused, and my commitment that much deeper. For me and many others, our path is made that much clearer because Johnnie Cochran passed this way. His dedication to the practice of law and to the proposition that we as African American attorneys have a particular duty to fight to secure justice for those who have no voice is a legacy that will last forever.

Calvin Ben Lester Jr.
(Editors note: Mr. Lester is a member of the Shreveport city council.)

Clarification from Michael Warren
This letter attempts to dispel any misconceptions about the actor L. Michael Warren and other defendants, including the producer Stephen Bochco, sued for copyright infringement by Jerome and Laurie Metcalf that might have arisen, particularly for nonlitigators, who read the article titled “Access Hollywood” by Andrew J. Thomas published by Los Angeles Lawyer in its May 2005 issue. In 2000, the Metcalfs sued Warren and others alleging that about nine years earlier, the Metcalfs had written a treatment and two screenplays for a motion picture involving a hospital. The Metcalfs claimed that the short-lived television drama City of Angels infringed their treatment. Norminton & Wiita, the law firm where I practice, represented Warren, who had a role on City of Angels, in the Metcalf litigation.

The article, which confined itself to a discussion of the 2002 Ninth Circuit decision in the Metcalf litigation, quoted the allegations of the Metcalfs regarding purported wrongdoing by the defendants. However, the article did not reflect that 1) Warren denied at all times having provided the Metcalfs’ treatment to Bochco, 2) the other defendants also denied that they had access to any of the Metcalfs’ alleged works but merely conceded access solely for the purpose of one summary judgment motion granted by the district court and later reversed by the Ninth Circuit, 3) the contributory copyright infringement claim by the Metcalfs against Warren was proven to be completely baseless, 4) Warren in fact obtained summary judgment in his favor in the action subsequent to the 2002 Ninth Circuit decision, 5) Warren was awarded attorney’s fees and costs against the Metcalfs, and 6) a jury found in favor of the remaining defendants after trial, concluding that the defendants had not copied the Metcalfs’ works.

In sum, the Metcalfs’ allegations about Warren and the other defendants were disproved, and Warren and the other defendants were completely exonerated of any wrongdoing in the matter.

Kathleen Dority Fuster
(Editor’s clarification: The article in question discusses the legal issues raised by the 2002 Ninth Circuit decision Metcalf v. Bochco, 294 F. 3d 1069 (9th Cir. 2002). The facts of the case as recited in the article were drawn from that decision. However, the article should have indicated that the court noted, “Because we review a summary judgment against plaintiffs, we recite the facts as alleged by them.” Id. at n.1. The editors regret any misconception this omission may have caused.)

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Defending and Improving Our Judicial System

"THE CONSTITUTION PROTECTS judicial independence not to benefit judges but to promote the rule of law. Judges are expected to administer the law fairly, without regard to public reaction." That statement by Chief Justice William Rehnquist may have been inspired by the recent spate of unfortunate and personalized political attacks on judges who have made highly publicized decisions. Criticism of the courts inspired by political opposition to particular rulings is neither new nor unexpected. Unfortunately, the current rhetoric not only is shrill but is directed at individual judges, with the suggestion that they should be "held accountable" for their decisions.

It is inevitable that courts will decide issues that touch deeply held beliefs. In the climate of the current "culture wars," inflamed by special interest groups and the media, decisions on abortion, same-sex marriage, and the role of religion in public life are guaranteed to generate highly emotional responses. As lawyers, we are obliged, no matter how strong our own beliefs on the issues, to refrain from disparagement of the system and to respond to threats of retribution directed toward judges who have made unpopular decisions. Reasoned and even sharp criticism of the legal basis for a decision is appropriate. Suggestions that the bench officer who made the decision should be "held accountable" are wholly inappropriate. As Ted Olson eloquently stated in a recent Wall Street Journal editorial: "We expect dignity, wisdom, decency, civility, integrity and restraint from our judges. It is time to exercise those same characteristics in our dealings with and commentary on those same judges."

Although the executive and legislative branches are required to respond to current events and controversies, each has far greater freedom to select which issues to address, and, unrestrained by stare decisis, each has far greater freedom to choose a position on those issues they do address. Those who speak scornfully of "activist judges" should recall that the courts do not solicit their business. It is the litigants that determine what issues will be brought to the court.

The current round of judicial criticism should be viewed with some historical perspective. The constitutional system of checks and balances all but guarantees that there will be tension among the branches of government—it is intended to do so. Politically inspired disparagement of the judiciary has periodically erupted throughout our history. Criticism has emanated from all sides of the political spectrum depending on who holds the greater sway in each branch of government. From the brief research for this column, it was interesting to note that the most heated rhetoric has flared when the executive and legislative branches were controlled by the same party, and the court was viewed as the "check" that maintained unwanted "balance."

After the Democratic-Republican party swept both houses of Congress in 1800, with Democratic-Republican Thomas Jefferson in the White House, the power struggle with the "Federalist judiciary" resulted not only in Marbury v. Madison but also in the attempt to impeach Justice Samuel Chase. While Chase was not a model of judicial temperament or conduct, the impeachment effort failed, largely because of the admissions by those seeking his ouster that their motivation was his "dangerous opinions" and that the effort was intended to open the office for a Democratic-Republican loyalist.

When Democratic president Franklin Roosevelt, with the support of an overwhelmingly Democratic Congress, found the Supreme Court a roadblock to the progressive reforms he supported, he launched his infamous court-packing plan as a way to provide "a con-

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ordered desegregation for local schools, far too many called for defiance and direct action against the judge and the courts.

The California Supreme Court held in 1948 that “If the right to marry is a fundamental right then it must be conceded that an infringement of that right by means of a racial restriction is an unlawful infringement of one’s liberty.” Justice Traynor wrote, “The caprice of the politicians cannot be substituted for the mind of the individual in what is man’s most personal and intimate decision.” In 1967 the U.S. Supreme Court agreed, invalidating antimiscegenation laws throughout the country. Decisions on the right to marry were met with assertions that the court was interfering with “God’s plan.” Some called for impeachment, some called for stripping the courts of jurisdiction over such matters, and some called for violent action against both the justices and those who would take advantage of the decisions.

The judiciary cannot easily rise to its own defense. Attempts to do so risk dragging the courts into heated political discourse inappropriate for judicial officers. The Canons of Ethics require judges to “avoid political activity that may create the appearance of political bias or impropriety.” Instead the bar has a responsibility to ensure that “an independent, fair, and competent judiciary will apply the laws that govern us.” When personal threat is directed to a bench officer, we have the obligation, individually and collectively, to step forward to educate those who fail to recognize that the role of the judiciary is central to the American concept of justice. We must also remember to temper our own rhetoric when we disagree with a decision. Assertion that the legal reasoning is in error is legitimate; a diatribe directed toward the bench officer is not.

When a political attack is directed toward the system as a whole, we must also step forward. The recent attacks on the jury system, many of which are based on wildly inaccurate information, seek to eliminate the critical protections provided by that system. Many bar organizations have programs that convey the importance of the jury system to the public. Even small efforts contribute; think twice before responding to the inevitable groans from your friends who have received a jury summons with a recommendation on how to avoid service. Try instead a brief endorsement of the one-day-one-trial system that has eliminated the endless days of jury room ennui. Be sure you have all the facts before disparaging a jury’s decision in a high-profile case, especially since media reports may not accurately reflect what was actually presented to the jury.

Support for the courts and the judiciary does not mean that legitimate criticism can-
not be made or that legitimate channels cannot be used to seek improvements in the system and in the judiciary. As long as the efforts are not inspired by personal animus or politically driven motive, the bar has the responsibility to work to make the system the best it can be. A court with the highest quality judicial officers making the most well-grounded and reasoned decisions will be the least subject to criticism and the easiest to defend from unfair attacks.

The Los Angeles Superior Court, with over 500 bench officers, is the largest court in the nation. The Association has joined with the court to establish a multitude of programs to assist in ensuring that it is also the finest. Association officers, committee members, and other representatives serve on multiple bench/bar committees designed to address problems encountered by both bench and the bar. Our members are asked by the court to assist in judicial training. The officers meet regularly with the court leadership to review responses to the Association’s Judge Your Judge program. The court is committed to addressing legitimate concerns raised in these responses. Subsequent discussions, between court leadership and judges who were unaware of the problems created by their courtroom practices, have solved some problems. Over time we have had success, working with other bar organizations, in securing the court’s commitment to elimination of local-local rules, in securing random reassignment following 170.6 challenges, and in addressing unreasonable time standards imposed in some venues. We have participated as amicus in cases directly affecting the ability of our members to practice, including Oliveros, which confirmed that decisions on continuances “must be made in an atmosphere of substantial justice.”

In 2000, the Association released the report of its Blue Ribbon Commission, which examined issues of concern raised by superior court constituents, including parties, lawyers, jurors, staff, security personnel, and attorney services. With the cooperation of the court, the commission’s recommendations helped to solve many problems. Yet, the thorniest issue remained. To address that problem, our immediate past president, John Collins, who chaired the original Blue Ribbon Commission, appointed the “New Blues” to seek answers to the extraordinarily difficult challenge of preserving judicial independence while providing appropriate means of addressing those few but consequential situations in which a bench officer is abusive, incompetent, or perpetually unprepared. I look forward to working with John, the distinguished members of the bar who comprise the New Blues, and the leadership of the superior court to make this project a success.
The Barristers Section Continues Its Years of Service

THE BARRISTERS SECTION of the Los Angeles County Bar Association has been active for more than 75 years and is excited to continue its service to new and young lawyers and the community. You are automatically a member of the Barristers, without any additional fee, if you are a member of the Association and are either 36 years of age or younger or have been admitted to practice for 10 years or less.

The mission of the Barristers is to provide opportunities for new and young lawyers to develop their legal skills, professional reputation, and network beyond their firm or agency and to promote public service projects. The Barristers activities also provide a forum for new and young lawyers to develop leadership skills and to interact with judges, more experienced attorneys, and peers.

To enhance trial practice, our Bench and Bar Committee will organize, as it has in the past, judicial round table programs to introduce new and young lawyers and law students to federal and state judges and the judicial system. We have and will continue to cosponsor the Los Angeles Superior Court Walk-Through program, which provides new and young lawyers with vital knowledge of the inner workings of the Los Angeles Superior Court.

Our Continuing Legal Education Committee will continue to provide programs that will improve the legal skills of our membership. These programs include our well-attended Nuts and Bolts Basic Litigation Skills Program, which is a three-day course designed to help a lawyer to be an effective litigator. The programs features some of the top lawyers and judges in our community. We will also strive to provide continuing legal education to satisfy the requirements for ethics, elimination of bias, and prevention of substance abuse.

Public Service
The Barristers also will continue to provide public service projects. Last year, the Barristers made a difference in the lives of foster children by promoting the Court Appointed Special Advocates (CASA) program. Each month in Los Angeles County, several hundred hurt, frightened, and confused children enter the dependency court system. These foster children have been removed from the custody of their parents because of abuse, neglect, or abandonment. Judges in the dependency court rely on CASAs to make key decisions that affect the lives of these children and their families. In collaboration with the Alliance for Children’s Rights, the Barristers trained attorneys to represent foster children pro bono for National Adoption Day. The Barristers will continue to provide support for foster children.

In partnership with the Screen Actors Guild Foundation, the Lawyers for Literacy Committee went to schools in Los Angeles to promote the importance of literacy to children and to teach them to read. This past year, the committee had great success in inviting celebrity and attorney volunteers to read to children in Los Angeles, and the Barristers hope to continue such success in the coming year.

The Barristers also will participate in National Law Day by assisting the community and LACBA affiliates in providing support and volunteers at Law Day free legal advice locations. In conjunction with Public Counsel, the Barristers has promoted the Community Development Project to provide legal assistance to nonprofit community organizations and the Debtor Assistance Project to assist lower-income debtors confronting bankruptcy. The Barristers will also continue its relationship with Public Counsel.

The Barristers is a proud sponsor of the National Moot Court Competition Western Regional Finals, and this year, the Barristers will sponsor the fifty-sixth moot court competition. As it has in years past, the Barristers will invite members of the judiciary and the legal community to act as volunteer judges and to grade appellate briefs.

The Barristers Section is not all work and no play. Through our Networking Committee, the Barristers host networking mixers across Los Angeles. The networking mixers have been held at varieties of destinations, including wine tasting stores, bars on top of hotels, and local restaurants. The Networking Committee will continue to provide fun and interesting venues for its mixers.

New Programs
The legal community is dynamic, and in furtherance of its mission, the Barristers is constantly creating new programs to fit the needs of the legal community. Although we will continue many of the Barristers programs and public service projects, we are currently engaged in researching programs that will help the growing segment of sole and small firm practitioners and will promote bar association involvement and leadership. We are proud that the Barristers Section leaders and members reflect the changing demographics and practice areas of the Los Angeles legal community; we applaud Luci-Ellen Chun as the first Asian American LACBA Barristers president.

We invite you to get involved and take advantage of your membership in the Barristers. Of course, non-Barristers are also welcomed. When you come to a Barristers event, we encourage you to meet and talk with the Barristers Officers and Executive Committee. For the 2005-06 year, these are Luci-Ellen Chun (immediate past president), Gavin Hachiya Wasserman (president-elect), Cheryl Johnson-Hartwell (vice president), Cindy Macho (trustee), Chris Pham (assistant vice president), Richard Lee (treasurer), Vivian Lee (secretary), Kenneth Chiu, Stephanie S. Choi, Alexander Gareeb, Amos Hartston, Christine Hayashi, Rose Hickman, Valerie Ho, Princeton Kim, Domini Pham, Thomas F. Quilling, Rita Soto, Sharon Wagner Wells, and Samuel J. Woo.

More information about our committees and activities may be found on the Barristers Web page at www.lacba.org/barristers. Also, keep an eye out for the Barristers monthly e-newsletters about upcoming events. You may also contact me at ktung@DGDK.com. Feel free to tell me or any member of the Barristers leadership how the Barristers can be more responsive to new and young lawyers. We hope to see you at the next event.

Kim Tung, an associate at Danning, Gill, Diamond, & Kollitz, LLP, is president of the Barristers for 2005-06.
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Collateral estoppel occurs when a judgment in one court action serves as a bar in a later action to the relitigation of issues that were actually litigated and conclusively adjudicated in the first action. Collateral estoppel can be a useful weapon in a litigator’s armory, potentially saving huge amounts of money in trial time and preparation.

However, when a party seeks to assert collateral estoppel based on the outcome not of a court action but of an arbitration, some questions emerge. May a third party who was not a party of the arbitration assert collateral estoppel against an arbitrating party in a subsequent lawsuit against the arbitrating party? Conversely, can a party to the arbitration assert collateral estoppel against a party in a subsequent litigation who was not a party to the arbitration? With arbitration increasingly viewed as the favored method of dispute resolution, these questions are important and will become even more so as the number of arbitrations continues to climb.

Generally, the answer to both questions is no. But lawyers who wish to assert—or avoid—collateral estoppel should be aware that there are exceptions to this general rule. These exceptions hinge on the relationship between the party to a lawsuit who was not a party to the previous arbitration and the party in the lawsuit who was a party to the previous arbitration.

In *Vandenberg v. Superior Court*, Eugene and Kathryn Boyd operated an auto dealership on property that they owned. The land was leased to Vandenberg for 30 years, at which time possession reverted to the Boyds. The Boyds discovered the land had been contaminated and sued Vandenberg, who had numerous insurers. Some of the insurers’ policies excluded coverage for contamination unless it was the result of a “sudden and accidental” discharge. Vandenberg tendered the defense of the action to the insurers, and the majority of the claims were settled.

However, the Boyds and Vandenberg (and only those parties) agreed to submit the remaining breach-of-lease issues to binding arbitration. USF&G, one of Vandenberg’s insurers, agreed to defend the Boyds, but the ultimate issues regarding USF&G’s obligations were reserved for future resolution.

The arbitration took place, and the arbitrator made an award to the Boyds. The arbitrator also found that the contamination was not caused by sudden and accidental discharge. Vandenberg requested indemnity from the insurers, but the request was rejected.

During litigation, the insurers filed a motion for summary judgment on the grounds that the issue of whether the discharge was sudden and accidental could not be relitigated. Vandenberg had reached a decision on that issue, so collateral estoppel precluded a subsequent trial in which the issue would be litigated again. The trial court agreed and granted summary judgment.

But the appellate court disagreed, and the California Supreme Court ultimately affirmed, holding that:

> Absent a contractual agreement by the arbitral parties, a party to private arbitration is not barred from relitigating issues decided by the arbitrator when those issues arise in a different case involving a different adversary and different causes of action. It would not be fair to give a private arbitration decision nonmutual collateral estoppel effect without the arbitral parties’ consent, the Court of Appeal reasoned, because private arbitration lacks significant safeguards of court litigation, particularly the right to full judicial review.

The California Supreme Court’s review included a consideration of “the circumstances, if any, in which private contractual arbitration decisions may have collateral estoppel effect in favor of nonparties.” After a discussion of the binding nature of arbitration and the limited judicial review available to parties to arbitration, the court ruled that collateral estoppel could not be used by a third party against a party to an arbitration unless the parties specifically agreed in the arbitration agreement that collateral estoppel could be invoked by nonparties to the arbitration in a subsequent litigation.

The court first observed that:

> Every different considerations affect the issue whether private arbitration awards should have nonmutual collateral estoppel effect. California’s statutory scheme nowhere specifies that, despite the arbitral parties’ failure so to agree, a private arbitration award may be binding in favor of nonparties in litiga-
Weiland, Golden, Smiley, Wang Ekvall & Strok, LLP, formerly Albert, Weiland & Golden, LLP, congratulates its founding partner, Theodor C. Albert, on his pending appointment as United States Bankruptcy Judge, Central District of California, Los Angeles Division.

The firm will continue to concentrate its practice in the areas of:

- Bankruptcy and Insolvency including Chapter 11 Reorganizations
- Business Workouts
- Creditors’ Rights
- Trustee Representation
- Business and Commercial Litigation
- Appellate Advocacy
- Corporate and Real Property Matters
tion involving different causes of action. Moreover, in our view, such a consequence is not an inherent or expected feature of private arbitration that is implicitly accepted by the arbitral parties.5

Because of arbitration’s informal nature and for a number of public policy reasons, the supreme court stated that it was “compelled to conclude that a private arbitration award, even if judicially confirmed, can have no collateral estoppel effect in favor of third persons unless the arbitral parties agreed, in the particular case, that such a consequence should apply.”6 The court noted that “fairness and public policy thus counsel against application of nonmutual collateral estoppel in this setting, unless the parties specifically agree thereto.”7

Analyzing the Exceptions

While the court’s ruling does not seem to provide for exceptions, they exist nonetheless. There are times when a third party in a subsequent lawsuit will be able to assert collateral estoppel against one of the arbitral parties. These occur only when the third party seeking to assert estoppel is the same party in whose favor the arbitration issue was decided or is sufficiently close to a party to the arbitration as measured by interests and relationship.

For instance, in Sartor v. Superior Court,8 the plaintiff homeowners filed a lawsuit alleging fraud and other causes of action against the company they engaged as their architects. During contractually mandated arbitration, the arbitrator found that the company was not guilty of the fraud claim. Subsequently, the homeowners brought an action for fraud against several individual defendants who were employees and/or agents of the architectural company. The court noted that a company can only act through its agents and employees, so if the company is not guilty of a cause of action, then the individuals who acted as the company cannot be guilty either. Therefore, collateral estoppel would act to bar any lawsuit against the company’s individual employees and agents by the party to the earlier arbitration for the same cause of action that was determined by the arbitrator to have no merit.

These cases demonstrate the viability of a third party in a subsequent lawsuit asserting collateral estoppel against a party to the previous arbitration, but they do not address whether a party to the arbitration can raise collateral estoppel to bar claims by a third party in a subsequent lawsuit. A resolution of this issue will depend on several facts, most particularly the relationship between the third party and a party in the previous arbitration.

In Kelly v. Vons Companies, Inc.,9 a union, Local 381, brought an action against Vons under a collective bargaining agreement. The union claimed that the closure of a Vons facility was in violation of the agreement. The dispute was submitted to binding arbitration, and the arbitrator found that Vons had acted for economic reasons and not in response to the outcome of a previous arbitration involving a different union, Local 63.

Later, several individuals sued Vons, claiming they had left their secure employment and turned down other job opportunities, only to lose their Vons jobs (or have them detrimentally altered) after Vons closed its facility. They claimed that Vons had failed to notify them of the earlier arbitration involving Local 63 and thus was liable for fraud and negligent representation. Vons moved for summary judgment, claiming that the Local 381 arbitration had led to a finding that the facility closure was for economic reasons, and this result had nothing to do with the Local 63 arbitration. Therefore, Vons argued, collateral estoppel barred the employees’ claims.

The court of appeal agreed with Vons. It first noted that the Local 381 arbitration proceedings “had the elements of an adjudicatory procedure.”10 For collateral estoppel to be applicable, the first requirement is that the arbitration must be found to have been “formal,” with discovery, motions, briefings, and similar procedures. Indeed, the court stated that other indicia of formality included:

[T]he opportunity for a hearing before an impartial and qualified officer, at which [the parties] may give formal recorded testimony under oath, cross-examine and compel the testimony of witnesses, and obtain a written statement of decision. When an arbitration has these attributes, it is not unjust to bind the parties to determinations made during the proceeding.11

This conclusion is in line with numerous statements in Vandenbergs, in which the court noted that lax arbitrations created circumstances for which estoppel should not apply. The more informal the arbitration proceedings, the less likely a court will be willing to allow the assertion of collateral estoppel based on decisions from the arbitration.

Turning to the nature of the parties’ relationships, the Kelly court held that:

[F]indings made during a labor arbitration will only be binding in a subsequent employee lawsuit if the employee was a party to the arbitration or in privity with the union during that proceeding. Privity requires identity of interests, or a relationship which is sufficiently close to justify application of the doctrine.12

Thus, the court allowed the previously arbitrating party (Vons) to assert collateral estoppel against a third party in a later lawsuit (the employees), specifically because the third parties were sufficiently close in interests and relationship to a party to the arbitration to justify the court’s application of the doctrine.

The court proceeded to summarize the basic elements necessary for collateral estoppel: A prior determination by a tribunal [including an arbitrator when the arbitration has the “elements of an adjudicatory procedure”] will be given collateral estoppel effect when (1) the issue is identical to that decided in a former proceeding; (2) the issue was actually litigated and (3) necessarily decided; (4) the doctrine is asserted against a party to the former action or one who was in privity with such a party; and (5) the former decision is final and was made on the merits.13

Another case illustrates these points in a circumstance in which a bond surety principal is found liable in an arbitration. In T&K Painting Construction, Inc. v. St. Paul Fire and Marine Insurance Company,14 a property owner entered into a contract with a general contractor, Capitol. Capitol subcontracted with T&K, and that subcontract had a clause entitling the prevailing party in a lawsuit between them to receive attorney’s fees. T&K completed part of its work, and Capitol terminated T&K for defective work. The dispute went to arbitration. The arbitrator ruled that the termination was unsupported and awarded T&K the value of its work, plus attorney’s fees and costs.

Capitol filed for bankruptcy, but T&K petitioned for confirmation of the arbitration award against Capitol, and judgment was entered. T&K proceeded to file suit against St. Paul, Capitol’s payment bond surety, for a limited determination of “whether St. Paul was liable for the attorney fees T&K incurred in prosecuting its claims, including arbitration, against Capitol.”15 There was no attorney’s fees clause in the payment bond.

St. Paul prevailed at trial, contending that T&K’s action against it was barred by the doctrine of res judicata or the “one final judgment” rule. The appellate court disagreed, stating that the one final judgment rule did not operate to bar T&K’s action. Though Capitol and St. Paul had a “unity of interest,” they were not the same party. Res judicata operates to bar the same claim against the same parties. However, the arbitrator had not reached the question of St. Paul’s liability, so T&K was entitled to pursue that claim in its lawsuit. Relying on Civil Code Section 2808, the court ruled that, since the liability
of the surety was commensurate with that of
its principal, and Capitol’s liability included
payment of fees under the subcontract, St.
Paul should be liable in that same amount.

The court seemed to implicitly recognize
the collateral effect of the arbitration ruling
against the surety’s principal in binding the
surety for the same sum. However, the ques-
tion of whether T&R was entitled to assert
collateral estoppel against St. Paul was never
explicitly reached. Further, the court relied on
a statute that defines liability for bond sureties
making its determination. Therefore, prac-
titioners should exercise care in relying on
T&R Painting for determining the applica-
bility of collateral estoppel in situations that
fall outside that case’s limited fact pattern.

Strong Argument

Nonetheless, based on the T&R Painting
decision together with the holding in Kelly,
a strong argument can be made for any arbi-
tral party to assert collateral estoppel against
a third party in a later lawsuit if the follow-
ing conditions exist:

1) The arbitration “had the elements of an
adjudicatory procedure,” including a hearing
before an impartial and qualified officer, at
which the parties gave formal recorded tes-
timony under oath, cross-examined and com-
pelled the testimony of witnesses, and
obtained a written statement of decision.

2) The issue to be decided in the subse-
quent lawsuit is identical to the issue decided in
the arbitration.

3) The issue was actually litigated and “nec-
essarily” decided in the arbitration.16

4) Collateral estoppel is asserted against a
party to the former arbitration or one who
was in privity or had a “unity of interests”
with a party to the former arbitration.

5) The arbitral decision is final and was made
on the merits. The cases demonstrate that
finality in an arbitration occurs when the ar-
bitration award is confirmed by the court. ■

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1 Todhunter v. Smith, 219 Cal. 690, 695 (1934).
2 Vandenberg v. Superior Court, 21 Cal. 4th 815
(1999).
3 Id. at 827.
4 Id. at 828.
5 Id. at 831 (emphasis in original).
6 Id. at 834.
7 Id. at 835.
8 Sartor v. Superior Court, 136 Cal. App. 3d 322 (1st
Dist. 1982).
9 Kelly v. Vons Cos., Inc., 67 Cal. App. 4th 1325 (2d
Dist. 1998).
10 Id. at 1336.
11 Id. at 1336-37.
12 Id. at 1338.
13 Id. at 1339; explanatory phrase regarding what
constitutes a tribunal, id. at 1336.
14 T&R Painting Constr., Inc. v. St. Paul Fire & Marine
15 Id. at 742.
16 Kelly, 67 Cal. App. 4th at 1339.
IN THE WEEKS FOLLOWING A CONTROVERSIAL police incident, the media may play a videotape over and over, but they rarely focus on issues related to the administrative investigation of the officers involved. Typically, there is no examination of the applicable law or administrative standard for disciplining officers if a subsequent investigation confirms that misconduct occurred. In California, police and sheriff’s departments may terminate an officer’s employment for misconduct determined to cause harm to the public service. Although the doctrine of harm to the public service has existed in California law for decades, police departments do not consistently apply the doctrine when imposing discipline for serious misconduct.

Harm to the public service is defined as misconduct committed by a public servant that is likely “to have a deleterious effect upon public service,” or that is likely to cause “impairment or disruption of public service.”1 In 1975, in one of the first cases to address this issue, the California Supreme Court declared that when disciplining a public employee’s on- or off-duty misconduct, the employing agency’s “overriding consideration…is the extent to which the employee’s conduct resulted in, or if repeated is likely to result in, [h]arm to the public service.”2 Other factors considered are the circumstances surrounding the misconduct and the likelihood of its reoccurrence.3

It remains unclear why police departments do not consistently apply the doctrine when imposing discipline in serious misconduct cases. Perhaps those who determine discipline—police captains and other high-ranking personnel—do not have the relevant legal background conducive to the application of a legal doctrine that, while established, lacks a bright-line test. Analysis of the cases that have applied the doctrine, however, reveal remarkably consistent holdings. Where the misconduct is serious—involving dishonesty, false statements, violence, threats, or sexual misconduct—courts have consistently found that the officer no longer deserves the public and department’s trust and that termination is the appropriate discipline.

When firing of a police officer has been challenged, California courts have repeatedly upheld the firing in cases of harm to the public service. The near-uniform affirmation of severe discipline suggests that police departments should at least consider termination in such serious cases. However, some departments’ disciplinary guidelines—internal guidelines that set forth low to high ranges of discipline—do not allow for termination as a possibility even when the conduct involves dishonesty, false statements, violence or threats of violence, or sexual misconduct.

Dishonesty and False Statements

When police officers are found to have lied to their superiors during investigations, courts have held that such misconduct harms the public service and discharge is the appropriate discipline. For example, Talmo v. Civil Service Commission of Los Angeles County concerned a Los Angeles County Sheriff’s deputy who was discharged for several different acts of serious on-duty misconduct.4 Specifically, the deputy batted an inmate by tipping over the bed the inmate was sleeping in, causing the inmate to fall onto the floor, which resulted in a bloody nose. The deputy then wrote a false report claiming that the inmate tipped over the bed himself. In another incident, the deputy placed a dead gopher in an inmate’s pocket and lied about it when he was questioned by his supervisor. The deputy also made a threatening telephone call to a coworker, calling him a “fucking snitch” and the n-word, and then denied doing it.5

The court rejected the deputy’s claims that a lesser discipline should have been imposed and that discharge was out of proportion to the misconduct. The court reasoned “we know of no rule of law holding every deputy sheriff is entitled to commit one battery on a prisoner before he or she can be discharged.” The court also rejected the deputy’s assertion that the department had not fired other deputies alleged to have committed similar misconduct. Noting that even if the deputy had proved this, which the court found he did not, the court held “there is no requirement that charges similar in nature must result in identical penalties.” In upholding the deputy’s discharge, the court opined that “when an officer of the law violates the very law he was hired to enforce and lies about it to his superiors he forfeits the trust of his department and the public.” Further, the court emphasized that a “deputy sheriff’s job is a position of trust and the public has a right to the highest standard of behavior from those invested with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer’s duties.” By mistreating inmates and subsequently lying about it to his supervisors, the deputy caused harm to the public service.6

When a police officer engages in relatively minor misconduct, including falsely calling in sick, but lies about the misconduct in a subsequent investigation, courts have held officers to a higher standard and upheld their firing. In one case, Paulino v. Civil Service Commission of San Diego County, a deputy sheriff was dismissed for various causes.7 The deputy had called in sick on eight days in one month. On at least two of those days the deputy was involved in recreational activities with friends, although he told his supervisor that he was ill. In addition, in order to avoid a shift change, the deputy lied to his supervisor regarding a doctor’s orders. After being asked to file a report detailing his sick leave, the deputy convinced a fellow deputy to lie about his engagement in recreational activities during his sick leave. In upholding the deputy’s termination, the court distinguished two cases involving public officials who were not peace officers.8 In one case, the court of appeal reversed dismissal of a labor commissioner who pointed a gun at a fellow employee while off duty.9 In another, the California Supreme Court reversed dismissal of a state Department of Healthcare doctor who took lunch breaks a few minutes longer than permitted and left the office without permission for several hours.10

In Paulino, the court noted that, unlike the civilians in the other

Ray Jurado is a former federal prosecutor who currently oversees police misconduct internal investigations in the Los Angeles County Sheriff’s Department.
two cases, the deputy was a peace officer who was intentionally dishonest. The court reasoned that “dishonesty is not an isolated act; it is more a continuing trait of character.” The court also concluded that a “deputy sheriff is held to the highest standards of behavior,” honesty and credibility were “crucial to proper performance of his duties,” and “[d]ishonesty in matters of public trust is intolerable.” Finally, the court held that “[u]nder the county’s progressive discipline guidelines, dismissal was within the range of punishment for the first offense of dishonesty.”

The decision is not the only one to hold that officers are held to a higher standard. When an officer steals or misappropriates public property and is dishonest during the investigation of the theft, courts have found harm to the public service. In Ackerman v. State Personnel Board, a state motorcycle officer was discharged for misappropriating state-owned motorcycle parts and installing them on his privately owned motorcycle. When questioned about where he obtained the parts, the officer lied to the investigator handling the case. Had the officer been a civilian, the court noted, punishment less than dismissal would probably have been sufficient. The court ruled, however, that the officer’s discharge was proper because police officers “must be held to higher standard than other employees.” “The credibility and honesty of an officer are the essence of the function.” Consequently, the court reasoned that “[a]ny breach of trust must therefore be looked upon with deep concern.” Although the officer admitted that his lie constituted “bad judgment,” the court held that his theft of the parts and his initial failure to be forthcoming during the investigation affected the public’s respect and trust of the California Highway Patrol, caused harm to the public service, and justified his discharge.

In a similar case, a correctional officer was discharged for insubordination, dishonesty, and misuse of state property. After going off duty, the officer attempted to remove a box of recording equipment clearly marked as state property from his work place. When questioned about his activity by a security officer, the officer claimed to own the property. Several months later, the officer was suspected of being under the influence of drugs or alcohol while on duty and refused to submit to any urine or sobriety tests. During his hearing before the State Personnel Board, the officer claimed that an unknown person had told him that a box would be delivered for him and that he should pick it up. He did not know the identity of the person or why the recording equipment was delivered to him. He also denied he was under the influence of narcotics or alcohol and denied he refused to take a urine or sobriety test. The court rejected the officer’s claim of insufficiency of evidence and found the evidence sufficient to sustain findings of insubordination, dishonesty, and misuse of state property. It held that “an officer’s actions must be above reproach,” and found that the officer’s course of conduct was “anything but commendable.” In assessing whether or not the officer’s conduct amounted to harm to the public service, including the circumstances of the misconduct and the likelihood of its reoccurrence, the court held that the discharge was not excessive, despite his otherwise good work record.

When an officer fails to perform his duties, including inadequately investigating crimes, and lies during the subsequent investigation, his dismissal will most likely be upheld on appeal. A Los Angeles police officer failed to conduct an adequate felony investigation, failed to prepare reports of the crime, lied to an investigator about this conduct, failed to write another report involving a different felony, and knowingly submitted a false daily field activities report. The officer also had a history of similar misconduct. On two prior occasions he had neglected his duties and failed to take proper law enforcement action when victims reported serious crimes to him. His supervisors had concluded that as a result of these two prior incidents, he showed “a lack of concern for providing professional or acceptable level of service to the public.” Under these circumstances, the court found that dismissal was not an abuse of discretion.

An officer’s dereliction of duty may also amount to harm to the public service, especially where the misconduct is worsened by falsification of records or dishonesty. In Haney v. City of Los Angeles, a Los Angeles police officer was discharged from his position for dereliction of duty. On Memorial Day, the officer planned a barbecue for himself and three other officers. The barbecue occurred while the officers were on duty and should have been performing foot patrol assignments in the San Pedro area. The officer then knowingly falsified his patrol log to indicate that he was on foot patrol while he was in fact attending the barbecue. In a subsequent separate allegation, it was determined that he failed to adhere to the LAPD’s reporting requirements during a 14-month period of sick leave, by failing to maintain contact with his supervisors, and that on several occasions he lied about calling the station’s desk when he had been told to call his supervisors. He also failed to submit a doctor’s letter supporting his sickness claim until the end of the 14-month period. At his Board of Rights hearing, which he did not attend, his supervisors testified. They considered him disloyal to the LAPD, none wanted him under their command in the future, and if forced to retain him would assign him only to in-station duty or place him on patrol under very strict supervision. In upholding termination, the court ruled that the officer’s actions caused harm to the public service in that he “deprived the public of police protection by his absence.” Even though the officer admitted he did not have permission to stage the barbecue and admitted he falsified his patrol log to cover for this time, the court found he “demonstrated both disloyalty to the LAPD and a serious lack of integrity.” Further, the court went on to say that “[p]olice officer integrity is vital to effective law enforcement. Public trust and confidence in the [LAPD] as an institution and in individual officers do not exist otherwise.”

**Violence and Threats**

Off-duty police misconduct involving violence or threats may constitute harm to the public service because the potential that such conduct may also occur on-duty places the public and the government at risk. In one case an off-duty Long Beach police officer swerved out of the way of another car and became involved in an argument with the other motorist. Believing the motorist might be arming himself, the officer pointed his gun at him, and held his finger on the trigger. Even though the motorist began to drive away from the officer, and the incident appeared to be over, the officer still kept his gun pointed at the motorist. The officer claimed that his gun accidentally discharged when his car lurched forward. The motorist was shot in the chest and the bullet lodged within an inch of his heart. The police department’s shooting review board found that the officer had violated procedures and training by cocking the hammer, which increased the likelihood of accidental discharge, and pointing the gun at the motorist. The officer was terminated but was eventually reinstated by the Civil Service Commission. In a rare reversal of a decision of the commission, the court of appeal ruled that the decision manifested “an indifference to public safety and welfare.” The court reversed the commission’s reinstatement and ordered the officer fired. The court found that the officer acted unreasonably when he pointed a loaded, cocked gun with a light trigger at the motorist. In support of its decision to fire the officer, the court reasoned that “[t]he public is entitled to protection from unprofessional employees whose conduct places people at risk of injury and the government at risk of incurring liability.” The court further stated that because police officers are in a position of significant public trust, mandating that a police department retain “an officer who is unable to handle competently either his emotions or his gun
poses too great a threat of harm to the public service to be countenanced.”23

In another case, Gray v. State Personnel Board, a state correctional officer saw a male stranger leaving his former girlfriend’s house.24 Becoming jealous, the correctional officer pushed the stranger and threatened to shoot him. The correctional officer’s gun was in his car, but he simulated a weapon by placing his hand in his pocket. Once the stranger left, the correctional officer retrieved his gun from his car and broke through the door of the house. The police soon arrived, and the correctional officer was arrested for assault. He later pleaded guilty to battery and was placed on probation. Because of the incident, the Department of Corrections discharged the correctional officer. In upholding the discharge, the court stated that “the ability to remain calm under stressful circumstances at work.” This constituted harm to the public service because “the ability to make calm and reasoned judgments under pressure was required of correctional officers and that [his] demonstration of lack of self-control and misuse of a weapon indicated that he could lose control in the life or death atmosphere of the prison.”25

In cases of off-duty threats or violence courts have also upheld discharge by reasoning that officers should be held to a higher standard than other employees. In Thompson v. State Personnel Board, a state correctional officer was discharged for discourteous treatment of the public and poor off-duty behavior discrediting his agency.26 Specifically, bar patrons reported the officer as being rude and obnoxious throughout an evening he spent at a bar. At one point, the officer became involved in an argument with two men whom he knew. Because the argument was getting heated, one of the men took his girlfriend home and returned to the bar. He put his arm on the officer’s shoulder and said, “Let’s go home.”

The officer pulled his gun, which was loaded and the safety off, pointed it two inches from the man’s head, and said, “Don’t do that again.” Upset, the man struggled with the officer, who was subsequently arrested for assault with a deadly weapon. In weighing whether his conduct amounted to harm to the public service, the court distinguished cases involving non-law enforcement personnel. The court held that the nature of the officer’s employment was a controlling factor. Peace officers are held to a higher standard. In upholding the dismissal, the court found that “a correctional officer must be able to maintain self-control, particularly when armed with a deadly weapon.”27

Off-Duty Sexual Misconduct

Courts have found that an officer’s sexual misconduct causes discredit to the officer’s police department, harms the public service, and may justify discharge. A California Highway Patrol officer was terminated for repeated off-duty public nudity.28 The officer had appeared nude numerous times in front of neighborhood adults and children, even after being warned by the department that the conduct was unacceptable and that more discipline was required of him. The court stated “unquestionably, the actions of a law enforcement officer must be above reproach, lest they bring discredit to the officer’s employer.” The court sided with the officer’s supervisor, who testified that the officer had undermined his credibility with other agencies and attenuated his effectiveness with his peers and subordinates. The court noted that law enforcement imposes on officers “certain responsibilities and limitations on freedom of action which do not exist in other callings.”

In upholding the officer’s termination, the court held that the evidence clearly showed his public nudity actually offended neighborhood women and children. In addition, the court found that the officer’s behavior discredited and embarrassed the department.29 When an officer commits sexual misconduct that may be criminal, courts have also found harm to the public service. A highway patrol officer was dismissed based on immoral conduct and failure of good behavior while off-duty causing discredit to the agency.30 The officer had inappropriate and unwanted sexual contact with two teenage girls on two separate occasions and later refused to answer his supervising officer’s questions regarding that behavior. In upholding the officer’s termination, the court held that the officer’s conduct constituted child molestation. In addition, the court found that the misconduct was not the type that might be corrected with a lesser form of discipline, such as suspension or demotion. There was a likelihood of recurrences because it had already happened on more than one occasion with more than one girl, and the officer would probably come into contact with teenage girls while on duty. The court reasoned that “a law enforcement agency cannot permit its officers to engage in off-duty conduct which entangles the officer with lawbreakers and gives tacit approval to their activities. Such off-duty activity casts discredit upon the officer, the agency and law enforcement in general.”31

Even if off-duty sexual misconduct is consensual, the misconduct may support discharge, especially if the officer is associated with lawbreakers and the conduct is likely to reoccur. A highway patrol officer was terminated for failure of good behavior causing discredit to the agency and dishonesty.32 During a San Jose City Police Department raid, the patrolman was engaged in oral sex at a commercially sponsored transvestite party at which prostitution was practiced.33 Subsequently, the officer made false statements to the arresting officers and his supervisor concerning his misconduct. The court upheld the patrolman’s termination because the “harm to the public service is evident.” It concluded that the inappropriate behavior would negatively affect the patrolman’s ability to work effectively within his own department and with other law enforcement agencies. In addition, the officer’s conduct reflected adversely on him and his department and hindered the investigatory process regarding the incident. Further, since the officer had a long relationship with the party organizers, the conduct was likely to reoccur.34

Recently, the U.S. Supreme Court reviewed the issue of sexually related misconduct. A San Diego police officer was found to have sold sexually explicit videos on eBay, including one of him acting out a scene where he issues a traffic citation but revokes it after undoing his uniform and masturbating. The Court rejected the officer’s claim that the sexually explicit videos constituted protected First Amendment speech. In language similar to California’s harm to the public service doctrine, the Court upheld the officer’s discharge and found that the misconduct was “detrimental to the mission of the employer.”35

A Useful Standard

“Harm to the public service” distinguishes between officers and civilians and establishes a higher standard for police officers. It affirms that because integrity is indispensable to the position of police officer, one whose misconduct undermines that integrity no longer deserves the public’s trust. Further, when an officer’s misconduct places the public at risk of future malfeasance, public safety and risk of liability weigh in favor of termination. Because of this higher standard, the doctrine supports dismissal of officers who commit serious misconduct, such as false statements, violence or threats, or sexual misconduct, and it provides a useful discipline barometer to police departments.

The ranges of discipline considered in police misconduct cases in some police departments are set forth in disciplinary guidelines. These guidelines operate somewhat like sentencing guidelines in criminal law. For different types of misconduct, the guidelines set forth a range of discipline, from low to high. For example, for relatively minor policy violations, such as preventable low-impact traf-
fic accidents, the prescribed discipline may range from a written reprimand to a few days of suspension without pay. More egregious violations, such as insubordination, may range from a few to 15 days of suspension.

Disciplinary guidelines also allow for consideration of mitigating and aggravating factors, as well as an officer’s past disciplinary history. Usually the indicated ranges of discipline are not mandatory but operate as a discretionary guide and can vary depending on the circumstances in aggravation or mitigation and the officer’s disciplinary past.

When officers are alleged to have committed conduct that may amount to harm to the public service, disciplinary guidelines should allow for consideration of termination at the high end of the disciplinary range. California courts usually have upheld termination in such cases. Departments should at least be able to consider whether the evidence of the misconduct is strong enough to sustain the allegations, and if so, whether termination is the most appropriate discipline. If disciplinary guidelines do not list termination as the ceiling of potential discipline in these cases, police departments should not unnecessarily limit the range of discipline they are allowed to consider under the law. Accordingly, departments should modify their disciplinary guidelines so that termination is within the range of discipline permitted in cases involving harm to the public service.

Police and sheriff’s departments should use the doctrine of harm to the public service as a guide in drafting their disciplinary guidelines. By allowing termination to be within the permissible range of discipline in serious misconduct cases found to constitute harm to the public—dishonesty, false statements, violence or threats of violence, or sexual misconduct—departments would bring their disciplinary guidelines in line with this established legal standard.

5 Id. at 214-15.
6 Id. at 229-31.
8 Id. at 965-72.
Since 1977, the private attorney general doctrine has allowed public interest lawyers as well as lawyers in private practice to obtain attorney’s fees awards for performing legal services to successfully enforce important rights and public policies that benefit a large class of people. Courts have applied the doctrine to a wide variety of cases, including those involving the environment and zoning ordinances, the criminal justice system, abortion rights, First Amendment rights, the civil rights of employees and students, equal protection rights, the electoral process, and challenges to business practices.

In order to obtain an attorney’s fees award under Code of Civil Procedure Section 1021.5, the private attorney general fee statute, parties must meet several requirements: 1) they were the “successful party,” 2) the action resulted in the enforcement of “an important right affecting the public interest,” 3) the action conferred a “significant benefit” on the general public or “a large class of persons,” 4) the necessity and financial burden of private enforcement made an award appropriate, and 5) the fees, in the interest of justice, will not be paid out of the recovery.

Last year, in its decision in Graham v. DaimlerChrysler Corporation, the California Supreme Court clarified the definition of a “successful party” entitled to recover private attorney general fees pursuant to Section 1021.5. To appreciate the supreme court’s clarification of “successful party,” a review of the term’s application in prior California case law is necessary.

In general, decisions of the California Court of Appeal have given the same treatment to the terms “successful party” under Section 1021.5 and “prevailing party” under other fee-shifting statutes. However, one significant departure from this general rule can be found in the “catalyst” theory, which was first recognized by the California Supreme Court in 1983 in Westside Community for Independent Living, Inc. v. Obledo. In Westside, the supreme court, citing federal precedent, announced the rule that “an award of attorney fees may be appropriate where ‘plaintiffs’ lawsuit was a catalyst motivating defendants to provide the primary relief sought.…’” The court explained that “an attorney fee award may be justified even where a plaintiff’s legal action does not lead to a favorable final judgment.”

In Westside, the plaintiffs sought a writ of mandate compelling the secretary of the Health and Welfare Agency to issue final regulations pursuant to Government Code Section 1021.5.
Section 11135, which prohibits unlawful discrimination in any program or activity funded by the state. But the Westside court held that there was no causal connection between the plaintiff’s action and the relief obtained because the draft regulations had been submitted before the lawsuit was filed and, during the pendency of the lawsuit, were subject to public comment—a cause of action that resulted in the adoption of the final regulations. Accordingly, the court reversed the award of attorney’s fees to the plaintiffs on the grounds that they were not the successful parties.

An earlier California Supreme Court case had enunciated a similar rule without explicitly adopting the catalyst theory from the federal cases. In Folsom v. Butte County Association of Governments, the court affirmed an award of attorney’s fees pursuant to Section 1021.5 following a settlement agreement between the parties. The Folsom court stated:

While California authority on the subject is sparse, common sense dictates that the determination of success under section 1021.5 must depend on more than mere appearance. As we said in Woodland Hills, the trial court must “realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right.”

The Folsom court also determined that “[t]he critical fact is the impact of the action, not the manner of its resolution.” The court cited with approval the reasoning by Congress in enacting the Civil Rights Attorney’s Fees Awards Act and the rule set forth in a federal case that calls for a comparison of “the situation immediately prior to the commencement of the suit” and “the situation today,” and “the role, if any, played by the litigation in effecting any changes between the two.”

The rules set forth in Folsom and Westside laid the foundation for litigation regarding the meaning of “successful party” under Section 1021.5 as well as whether a particular party met the definition of a “catalyst” under the catalyst theory. Two subsequent California Supreme Court cases ruled that attorney’s fees could be awarded under circumstances in which there is no final judgment in the plaintiff’s favor but the plaintiff obtained the relief sought. In Press v. Lucky Stores, Inc., the plaintiffs’ action became moot, but the state supreme court affirmed that they were entitled to private attorney general fees after they had achieved their litigation goals through a preliminary injunction. Similarly, in Maria P. v. Riles, the plaintiffs ultimately were awarded attorney’s fees under Section 1021.5 after they obtained an injunction declaring that a section of the Education Code was unconstitutional—even though the lawsuit was later dismissed as moot because of a legislative amendment deleting the unconstitutional portions of the section. Following the rules set forth in Westside and Folsom, the supreme court held that the plaintiffs “clearly obtained the relief they sought” with the issuance of the trial court’s injunction.

Rare Awards

These California Supreme Court decisions set the stage for a number of opinions by the California Court of Appeal interpreting the catalyst theory. In most of those cases, the court of appeal determined that the party seeking fees was not a catalyst and therefore was not a successful party entitled to Section 1021.5 attorney’s fees. In many instances, the court determined that there was no causal link between the lawsuit and the change in the behavior of the defendant. For example, in Boccato v. City of Hermosa Beach, the plaintiff successfully enjoined the defendant city from enforcing a new resolution related to parking pending Coastal Commission approval and urged the Coastal Commission to send a letter to the city stating that a permit was required for the new resolution. But the court held that the defendant city’s conduct was not caused by the lawsuit but was the result of the Coastal Commission’s letter.

Likewise, in Crawford v. Board of Education, the court held that the parties seeking attorney’s fees—intervenors in a desegregation lawsuit against the Los Angeles Unified School District—were not the successful parties because the results of the desegregation lawsuit were due to the passage of a ballot measure and not the participation of the interveners in the lawsuit. The fact that one of the intervenors was instrumental in the passage of the ballot measure did not qualify that party as a successful party because, as the court stated, “[T]he [private attorney general] doctrine simply does not, nor should it, encompass successful lobbying efforts by those who seek to influence the Legislature or the electorate on any particular issue.”

The court noted that:

At bottom, the inquiry is an intensely factual, pragmatic one that frequently requires courts to go outside the merits of the precise underlying dispute and focus on the condition the fee claimant sought to change. [Citation omitted.] With that condition as a benchmark the inquiry becomes “whether as a practical matter the outcome, in whatever form realized, is one to which the plaintiff fee claimant’s efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.”

Using the same reasoning, the court in Leiserson v. City of San Diego held that if the plaintiff could not present evidence of the motivation for the city’s change in its behavior two years after he filed his lawsuit, the mere inference that the change was motivated by the lawsuit was not sufficient to make the plaintiff a successful party under the private attorney general fee statute. However, in Californians for Responsible Toxics Management v. Kizer, the court followed federal precedent and stated the following rule: “When action is taken by the defendant after plaintiff’s lawsuit is filed, the chronology of events may permit the inference that the two events are causally related….”

This inference shifts the burden to the defendant to offer a rebuttal. No other cases have applied this analysis to determine whether a party meets the causation requirement under the catalyst theory.

There are only two cases in which the court of appeal has confirmed trial court awards of private attorney general fees under the catalyst theory. In the first, Wallace v. Consumers Cooperative of Berkeley, Inc., the trial court awarded private attorney general fees to the plaintiff organization that successfully challenged the validity of mandatory minimum retail milk prices. After submitting several unsuccessful petitions to the director of the Department of Food and Agriculture requesting that he suspend the retail milk price regulations, the plaintiff decided to challenge the legality of the regulation through litigation. Although the DFA director obtained a temporary restraining order and preliminary injunction against the plaintiff, the court stated that the plaintiff had “made a colorable showing that it will prevail at trial on the merits….” Parties entered into settlement negotiations and ultimately settled the case by having the director agree to hold public hearings on the issue of the suspension of the minimum milk retail prices in exchange for the plaintiff dropping its challenge to the statutory and administrative procedures as moot. After this settlement was reached, the director issued orders suspending the minimum retail milk prices. The trial court awarded private attorney general fees to the plaintiff, and the court of appeal upheld the award, on the grounds that “the litigation set in motion the process which eventually resulted in the suspension.”

In the second case, California Common Cause v. Duffy, the plaintiffs sought to stop the sheriff of San Diego County from distributing postcards calling for the removal of Chief Justice Rose Bird because the sheriff’s action involved the illegal expenditure of public monies and public personnel in politi-
Appelants later granted summary judgment to the plain-
tiffs on their declaratory relief claim, finding that the sheriff’s activities were indeed an illegal expenditure of public monies and per-
sonnel on political campaigning. Nevertheless,
the trial court denied injunctive relief because of the sheriff’s agreement to cease distribut-
ing the postcards. The trial court awarded pri-
vate attorney general fees to the plaintiffs, and
the court of appeal upheld the award, on the
grounds that the plaintiffs had obtained the


de novo Standard of Review

An important issue currently under review by the California Supreme Court is under what circumstances an appellate court may apply a de novo standard of review in determining whether an action was sufficient to justify an award of attorney’s fees under Code of Civil Procedure Section 1021.5, the private attorney general fee statute.1

In Serrano v. Priest, the California Supreme Court noted that the “experienced trial judge is the best judge of the value of the professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appel-
late court is convinced that it is clearly wrong.”2 After the enactment of Section 1021.5, the California Court of Appeal took this language from Serrano—which clearly applied only to the adequacy of fees to be awarded under Section 1021.5—and, without any discussion, simply asserted that abuse of discretion was the standard of review with respect to all the statutory prerequisites for the award of fees under Section 1021.5.3

The supreme court has followed suit, repeating the conclusion of the court of appeal, without much commentary, that the standard of review governing Section 1021.5 attorney fee entitlement is abuse of discretion.4 Yet, in each of the cases in which the supreme court has done so, it has essentially conducted a de novo review of the trial court’s decision by affording no deference to the trial court. In addition, further confusion has ensued over court of appeal decisions stating that “[d]etermining the statutory basis for an attorney fee award is a legal question subject to de novo review.”5

The Ninth Circuit applies a de novo standard of review on issues of law and a party’s entitlement to fees under 42 USC Section 1988 and employs an abuse of discretion standard of review regarding the adequacy of fees.6 Both Code of Civil Procedure Section 1021.5 and 42 USC Section 1988 are codifications of the common law private attorney general doctrine. Furthermore, because “[t]he Legislature relied heavily on federal precedent when enacting [Section 1021.5]...California courts often look to federal decisions when interpreting it.”7

The threshold issue of whether a case has resulted in the enforcement of an important right affecting the public interest should be subject to de novo review. Many reviewing courts, including the California Supreme Court, have explicitly applied a de novo standard—and they have used the language of abuse of discretion while actually conducting a de facto de novo analysis based upon the trial court’s legal errors.8 In addition, a de novo standard of review would be consistent with the de novo review of the legal basis for other statutory fee awards.9

A de novo standard of review better serves a host of public policies:

• The encouragement of the private enforcement of important rights affecting the public interest.
• Uniformity and predictability in judicial decision making.
• Judicial efficiency and quality.
• Judicial integrity.

Whether an important right has been vindicated and whether a significant benefit has been conferred require determinations regarding public policy. Given the benefit of appellate collegiality and plurality as well as the time and opportunity for more thought-
ful debate on appeal, appellate judges are better suited to make these determinations than are trial judges.

Private litigants and lawyers will be discouraged from enforcing important rights affecting the public interest if they cannot discern some reasonable level of certainty that Section 1021.5 fees will be awarded. That certainty is best promoted by de novo review. Allowing appellate judges to make judgments regarding Section 1021.5 fees will promote statewide consistency in the interpretation and appli-
cation of law and avoid inconsistent trial judge determinations as to which rights can be deemed important.—D.M.D.

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1. The private attorney general fee doctrine was first recognized in California more than 100 years ago.
   True.
   False.

2. The private attorney general fee doctrine has been applied in:
   A. Zoning challenges.
   B. Contract disputes.
   C. Malpractice actions.
   False.

3. The term “successful party” under the private attorney general fee doctrine has the same meaning as the term “prevailing party” under other attorney’s fees statutes.
   True.
   False.

4. The California Supreme Court followed federal precedent when it adopted the catalyst theory in 1983.
   True.
   False.

5. The catalyst theory allows a court to award private attorney general fees to a plaintiff whose lawsuit motivated the defendant to provide the primary relief sought by the plaintiff even if the plaintiff does not obtain a final judgment in the plaintiff’s favor.
   True.
   False.

6. Despite the fact that the plaintiffs did not obtain a final judgment, private attorney general fees were upheld on appeal in:
   A. Boscali v. City of Hermosa Beach.
   B. Wallace v. Consumers Cooperative of Berkeley, Inc.
   C. City of Sacramento v. Drew.
   True.
   False.

7. Private attorney general fees may be denied if a causal factor other than the plaintiff’s lawsuit influenced the change in the defendant’s behavior.
   True.
   False.

8. Other causal factors leading to a change in the defendant’s behavior that could influence the award of private attorney general fees include:
   A. Administrative proceedings initiated by a state agency against the defendant.
   B. A previously filed lawsuit by a different plaintiff.
   C. A and B.
   True.
   False.

9. According to the court, the plaintiff could not establish a causal link between the plaintiff’s lawsuit and the defendant’s change of conduct in:
   A. Press v. Lucky Stores, Inc.
   B. Folsom v. Butte County Association of Governments.
   C. Crawford v. Board of Education.
   True.
   False.

10. In 2001, the U.S. Supreme Court abolished the California private attorney general fee doctrine.
    True.
    False.

11. Under federal law, a plaintiff cannot obtain an award of private attorney general fees if a lawsuit is settled before a final judgment or other significant court order such as a consent decree.
    True.
    False.

12. The purpose of the private attorney general fee doctrine is to:
    A. Encourage private enforcement of strong public policies.
    B. Reward successful lobbying efforts.
    C. None of the above.
    True.
    False.

13. In Graham v. DaimlerChrysler, the California Supreme Court affirmed the catalyst theory under California law.
    True.
    False.

14. Under the rule in Graham, a successful party under the catalyst theory must:
    A. Establish a causal connection between the lawsuit and the relief obtained.
    B. Demonstrate that the lawsuit was not frivolous.
    C. A and B.
    True.
    False.

15. The Graham court balanced the policy of encouraging lawsuits in the public interest against the policy of:
    A. Discouraging extortionate lawsuits.
    B. Encouraging quick settlements.
    C. Discouraging court congestion.
    True.
    False.

16. A trial court can evaluate whether a lawsuit is not frivolous based upon declarations or an evidentiary hearing.
    True.
    False.

17. In order to obtain private attorney general fees under the catalyst theory, the plaintiff should avoid contacting the defendant before filing a lawsuit.
    True.
    False.

18. Under the rule in Graham, a plaintiff can establish a rebuttable presumption, shifting the burden of proof, that the plaintiff’s lawsuit was the catalyst under the private attorney general fee doctrine by showing only that the defendant changed its conduct after the plaintiff’s lawsuit was filed.
    True.
    False.

19. California decisions have consistently applied an abuse of discretion standard of review to the determination of whether a plaintiff is a successful party entitled to private attorney general fees.
    True.
    False.

20. Under federal law, a de novo standard of review is applied to the issue of a party’s entitlement to private attorney general fees.
    True.
    False.
full relief they sought because they obtained a declaration that the sheriff's activities were illegal and they caused the sheriff to cease those activities. Thus, injunctive relief was not necessary, and “the lawsuit was a material factor in halting the ongoing distribution of anti-Bird postcards through the Sheriff’s Department.”

In a case involving the catalyst theory that was decided after Wallace and California Common Cause, the court of appeal held that the prevailing defendant had established a right to private attorney general fees and remanded for a determination of the amount. In City of Sacramento v. Drew, the defendant, Charles Drew, prevailed on a summary judgment motion in an action brought by the city of Sacramento to declare the validity of a special tax assessment district. Before the lawsuit, Drew had sent a letter of protest to the city claiming that the special tax assessment district was unconstitutional. The city brought a validation proceeding to determine whether the assessment was proper. Drew filed an answer as an interested person and then prevailed on summary judgment. But the trial court denied Drew’s request for private attorney general fees on the grounds that the special tax assessment “presumably” would have been declared invalid regardless of Drew’s participation, and Drew “belatedly” raised the prevailing legal theory. The court of appeal reversed, holding that Drew met the requirements for an award of private attorney general fees, and remanded for the purpose of determining the amount of those fees.

These court of appeal decisions, coupled with the prior California Supreme Court cases, failed to enunciate a general, predictable rule for awarding private attorney general fees under the catalyst theory. Subsequently, in 2001, the U.S. Supreme Court virtually abolished the catalyst theory under federal private attorney general statutes.

In Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, the U.S. Supreme Court held that a plaintiff seeking attorney’s fees under the private attorney general fee statute and determining that the catalyst theory must have made a reasonableness of prelitigation settlement discussions before filing a lawsuit. Prior to Graham, in the cases in which private attorney general fees were allowed, the settlement discussions ranged from nonexistent (or not discussed) to a letter of protest or request to cease unlawful activity to more lengthy negotiations. If there is an urgent need for litigation to prevent impending illegal action, one letter or telephone call may suffice. But if no urgency exists, counsel should engage in serious settlement negotiations before filing a lawsuit in order to preserve the right to pri-
vate attorney general fees under the catalyst theory.

Counsel taking on a case hoping to recover private attorney general fees must also consider the ability to demonstrate the merits of the action. The proof could include declarations and documentary evidence but may also require testimonial evidence at an evidentiary hearing. If a case is resolved quickly, before any discovery is taken, counsel may find it difficult to present sufficient evidence. Although Graham does not specifically authorize limited discovery to elicit the necessary evidence, a court may allow it. The policy reasons that the Graham court enunciated in encouraging public interest litigation as well as early settlement of disputes support allowing limited discovery. The more prudent course, however, would be to obtain the necessary documentary evidence during settlement discussions.

Although the decision in Graham affirmed the existence of the catalyst theory in California and added some requirements, it did little to clarify the rule regarding the often litigated issue of the causal connection between the plaintiff’s lawsuit and the relief obtained. Courts repeatedly have denied recovery of private attorney general fees under the catalyst theory when a causal factor other than the lawsuit—such as the legislative process,44 administrative proceedings initiated by state agencies,45 or another pending case46—influenced the change in the defendant’s conduct, or when the lawsuit was filed after some action had been initiated by the defendant—such as after an agency began the process of promulgating regulations or after a city commenced its consideration of whether to amend an ordinance. With these precedents in mind, counsel considering a lawsuit that could result in private attorney general fees should investigate whether state agencies have already taken some action or whether the proposed defendant has already begun to take corrective actions through internal processes. Even if the proposed lawsuit would contribute to or hasten such actions or processes, a court will likely not award private attorney general fees.47 Thus, during the investigation of the potential lawsuit and the prelitigation settlement negotiations, counsel should not only look for evidence of the merits of the proposed lawsuit but also evidence to prove the causal connection between the lawsuit and the defendant’s action, with a specific focus on the absence of other factors that could be determined to be the catalyst.

Although Graham preserved the catalyst theory under California law, the weight of the California Supreme Court and Court of Appeal decisions demonstrates that private attorney general fees are not easily obtained.

As the dissent in Graham observes, in those cases in which fees have been allowed under the catalyst theory, there has been some “material alteration of the legal relationship of the parties” or a “judicial imprint” as required under Buckhannon.48 In addition, the numerous cases determining that there was no causal connection between the lawsuit and the defendant’s change of conduct—even in circumstances in which the defendant’s change of conduct occurred after the lawsuit was filed—demonstrate a judicial proclivity to avoid awarding private attorney general fees except in the most compelling cases. Even though the decision in Graham has preserved the catalyst theory, the decision likely will not result in a flood of extortionate lawsuits (as the dissent in Graham fears), because before attorneys seeking fees under the catalyst theory file suit, they must not only conduct a careful evaluation of the merits of their cases but also engage in serious settlement discussions. Thus, although the decision in Graham upholds the policy of encouraging private enforcement of important public rights, the new requirements under the catalyst theory, along with the established law regarding the necessary causal connection between the lawsuit and the defendant’s action, restrict the broad language contained in the earlier California Supreme Court cases and substantially reduce the number of situations in which private attorney general fees are recoverable.

1 The California Supreme Court first enunciated the private attorney general fee doctrine in 1977. Serrano v. Priest, 20 Cal. 3d 25 (1977). That same year, after Serrano, the California Legislature enacted Code of Civil Procedure §1021.5 to codify the doctrine and its underlying policy. The purpose of the private attorney general fee doctrine is to encourage suits enforcing strong public policies that benefit a large class of people by awarding attorney’s fees to the successful party. Woodland Hills Residents Ass’n v. City Council, 23 Cal. 3d 917, 933 (1979).
3 CODE CIV. PROC. §1021.5.
6 Id. (quoting Robinson v. Kimbrough, 652 F. 2d 458, 465 (5th Cir. 1981)).
7 Id. at 352.
8 Id. at 350.
9 Id. at 354-56.
10 Id.
11 Folsom v. Butte County Ass’n of Gov’ts, 32 Cal. 3d 668 (1982).
12 Id. at 685 (quoting Woodland Hills Residents Ass’n v. City Council, 23 Cal. 3d 917, 938 (1979)).
13 Id.
14 Id. at 685-86.
15 Id. at 685 n.31 (citing F&M Schaefer Corp. v. C. Schmidt & Sons, Inc., 476 F. Supp. 203, 206-07 (S.D. N.Y. 1979)).
17 Press, 34 Cal. 3d at 315-16, 321.
18 Maria P., 43 Cal. 3d at 1287.
19 Id. at 1288.
20 Id. at 1292-93.
22 Bocatto, 158 Cal. App. 3d at 811-12.
23 Crawford, 200 Cal. App. 3d at 1407-08.
24 Id. at 1408.
25 Id. at 1407 (quoting Folsom v. Butte County Ass’n of Gov’ts, 32 Cal. 3d 668, 683 (1982)).
28 Id.
30 Wallace, 170 Cal. App. 3d at 841-42.
31 Id. at 844.
32 Id. at 846.
33 California Common Cause, 200 Cal. App. 3d at 744.
36 Id., 532 U.S. at 604-05.
37 Id.
38 Graham v. DaimlerChrysler Corp., 34 Cal. 4th 553 (2004). In response to a request from the Ninth Circuit Court of Appeals for a clarification of California law regarding the catalyst theory, the California Supreme Court also issued an opinion on the same day it issued Graham in a companion case. Tipton-Whittingham v. City of Los Angeles, 34 Cal. 4th 604 (2004).
39 Graham, 34 Cal. 4th at 575 (quoting Buckhannon, 532 U.S. at 628 (dissent by Ginsburg, J.)).
40 Id. at 577.
41 Woodland Hills Residents Ass’n v. City Council, 23 Cal. 3d 917 (1979); Press v. Lucky Stores, Inc., 34 Cal. 3d 311 (1983); Maria P. v. Riles, 43 Cal. 3d 1281 (1987); Folsom v. Butte County Ass’n of Gov’ts, 32 Cal. 3d 668 (1982).

Los Angeles Lawyer July-August 2005 33
when, almost 200 years ago, Charles Colton called imitation the “sincerest of flattery,” he could hardly have envisioned the recent glut of copycat reality television programming. From *Wife Swap* to *Trading Spouses*, *The Amazing Race* to *Race around the World*, *Survivor* to *Boot Camp*, as the popularity of so-called reality television has risen meteorically over the past several years, more and more producers have opted to “flatter” their competitors by airing nearly identical knockoffs of the latest hit, in lieu of conceiving their own original programs. Although flattery is supposed to get you nowhere, in this instance it has landed the producers of conspicuously similar reality fare in federal court to answer claims of copyright infringement.

In only one case, *CBS Broadcasting Inc. v. ABC, Inc.*, has a court had occasion to discuss in any detail the applicability of the Copyright Act to reality television. Many commentators misinterpret *CBS v. ABC* as precluding meaningful copyright protection for reality television programs. In fact, that case confirmed that “reality” may constitute protectable expression, the infringement of which is actionable under the Copyright Act.

In *CBS v. ABC*, CBS and the producers of *Survivor* filed suit to enjoin ABC from airing *I'm a Celebrity—Get Me out of Here* on the grounds that *Celebrity* was substantially similar to CBS’s highly successful *Survivor* and thus infringed the plaintiffs’ copyright in that program. Although the New York federal court, in a fact-specific opinion, denied the plaintiffs’ motion for a preliminary injunction, the court did not intimate that reality television, simply because of its unscripted nature, is devoid of protectable expression. Indeed, the significance of *CBS v. ABC* is that the court applied to the plaintiffs’ reality program the same copyright analysis applicable to...
shows in all other genres of scripted or unscripted television programming, including concepts like “plot” and “characters” not intuitively associated with reality television.

A plaintiff attempting to establish copyright infringement of a reality television program must tread familiar ground. The plaintiff must prove ownership of a copyrightable work and copying of the work’s protected elements amounting to improper appropriation. Because direct evidence of actual copying is frequently unavailable, the plaintiff may demonstrate copying by showing that the defendant had access to the plaintiff’s work and that the defendant’s work bears substantial similarities to protected expression in the plaintiff’s work.5 “Not all copying, however, is copyright infringement” since copyright protection extends only to the components of a work that are “original.”6 Nor are the facts and ideas within a work protected by copyright.7 Because ideas are “as free as the air,” only an original expression of an idea is entitled to copyright protection.8

Courts in the Ninth Circuit apply a two-part test in determining whether two dramatic works are substantially similar. For the first test, the court examines the “extrinsic” similarities between “the plot, theme, dialogue, mood, setting, pace, characters, and sequence of events” of the two works.9 In applying the extrinsic test, the court must distinguish between the protectable and unprotected material in a work because a party claiming copyright infringement may place “no reliance upon any similarity in expression resulting from unprotected elements.”10 The Ninth Circuit has held that “[t]he test for ‘substantial similarity of ideas’ compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters.”11 That comparison “should not include unoriginal elements of the plaintiff’s work; rather, the comparison should take place after filtering out the analysis elements of plaintiff’s work that are not protectable.”12

“Filtration” involves three steps. The court begins by “analytically dissecting” the work to separate unprotected facts and ideas from protectable expression. The court then applies “the relevant limiting doctrines in the context of the particular medium involved,” including the scenes a faire and merger doctrines.13 Scenes, situations, incidents, characters, or events that flow naturally from an unprotected theme, setting, or basic plot premise are scenes a faire.14 The merger doctrine is implicated when there are so few ways of expressing an idea that the expression and the corresponding idea have merged to become one and the same.15 In the third step, “having dissected the alleged similarities and considered the range of possible expression, the court must define the scope of the plaintiff’s copyright.”16 That scope will fall somewhere along the “continuum” between highly original works entitled to the most ‘broad’ protection offered under copyright, at one end, and works of a primarily factual or functional nature, to which only ‘thin’ protection is afforded, at the other.”17

For the second test, once the court has concluded that the works are extrinsically similar, the trier of fact must determine whether the two works are also “intrinsically” similar, in other words, whether “the ordinary, reasonable person would find the total concept and feel of the works” to be substantially similar to support a finding of improper appropriation.18 Whether any similarity is sufficiently “substantial” is dictated by the scope of protection—broad or thin—that was defined as part of the extrinsic test.19 The “thinner” the protection, the greater the similarities must be before the works will be deemed “substantially similar.”20

**Reality TV Sets In**

The application of copyright law to reality television, like the genre itself, is a phenomenon of relatively recent vintage. Before the reality television craze, scripted programming dominated network television for over 50 years. Sitcoms and dramas were the heart and soul of the primetime lineup. From *I Love Lucy* and *Gunsmoke* to *Friends*, networks historically relied upon scripted shows to draw audiences. Consequently, existing case law applying copyright principles to television programming is crafted almost exclusively in the context of scripted or, occasionally, quasi-scripted series such as game shows.

The television landscape has changed dramatically during the past five years. Unscripted programming is now at the forefront of television, with networks competing to create—or, failing that, copy—and air provocative reality-based shows. Not surprisingly, the ratings success of ground-breaking reality programming has engendered the development of patent similar programs by producers attempting to cash in on the popularity of those pioneering reality television shows. In addition, copying in the reality genre may run more rampant than in scripted programming because the relatively low production costs and unscripted formats of reality television facilitate the quick and inexpensive development of knockoff shows. Whatever the motive for this seemingly unchecked cloning, a handful of producers and their networks have turned to the federal courts to call a halt to the practice through copyright infringement lawsuits. Unfortunately for anyone seeking broad guidance as to the courts’ receptiveness to such claims, all but one of those cases have been resolved, by settlement or otherwise, without a reported court decision.

In 2000, for instance, Fox Family, the producer of *Race around the World*, sued CBS for copyright infringement and sought to enjoin the production of CBS’s *The Amazing Race*.21 Both series featured teams traveling to multiple countries in a competition to be the first to return to New York City. The court acknowledged the “serious questions” raised by Fox Family’s copyright claims, but denied Fox Family’s request for a preliminary injunction as unwarranted by the balance of hardships.22 Ultimately, the case was voluntarily dismissed.23

CBS turned around and sued Fox in 2001, claiming that Fox’s *Boot Camp* infringed CBS’s copyright in *Survivor*. CBS alleged that *Boot Camp* copied the premise and format of *Survivor*, including the concepts of placing nonactor contestants in severe conditions, requiring them to work together as a team to accomplish difficult physical tasks or face possible elimination, ending each show with an elimination ceremony, and offering one contestant per episode a reprieve.24 Fox responded that CBS sought “a monopoly over reality television game shows/contests of elimination.”25 The parties settled before the court considered the merits of the case.26

In a third such case, a court finally had occasion to consider the merits of protecting reality television programs under the Copyright Act. In *CBS v. ABC*, CBS attempted to enjoin ABC from broadcasting the reality series *I’m a Celebrity—Get Me out of Here*. CBS claimed that ABC’s series infringed CBS’s copyright in *Survivor*.

In *Celebrity*, eight B-list celebrities are dropped by helicopter into a remote part of Australia, where they are forced to fend for themselves with few amenities. The celebrities are provided basic rations, but better food is available if a celebrity accomplishes a physical challenge involving a humorous or repulsive task. Through call-in voting, the at-home audience determines which celebrities are voted out of the jungle. The celebrities receive prize money for designated charities based upon the number of votes they receive and the length of time they remain in the jungle. The last surviving celebrity is crowned king or queen of the jungle, and his or her charity receives the largest sum of prize money.

CBS sued, alleging that *Celebrity* “imitates the distinctive style and the look and feel” of *Survivor*, including the use of overhead shots of fireside chats and elimination ceremonies, panoramic shots of jungle landscapes, and scenes of participants discussing upcoming votes.27 According to CBS, *Celebrity* infringed
CBS’s copyright in Survivor by copying Survivor’s format of stranding a group of strangers in a remote and uncivilized location, requiring the contestants to provide for themselves, subjecting the contestants to challenges to win immunity or luxuries, and eliminating them one by one in a ritualized ceremony at the end of each episode. CBS argued that Celebrity should be enjoined from airing because Survivor was the first show to combine the elements of its unique format.

In an opinion delivered from the bench on January 13, 2003, District Judge Loretta Preska of the Southern District of New York denied CBS’s motion to preliminarily enjoin the broadcast of ABC’s Celebrity. The court held that CBS had failed to demonstrate a likelihood of success on the merits of its copyright infringement claim because the protectable expression of the two series was not substantially similar. In assessing the merits of CBS’s application for a preliminary injunction, the court emphasized that it was “crucial to consider each program series as a whole.” After doing so, the court concluded that the two programs shared a nonprotectable idea (the “Survivor concept”), but found that they presented that idea via “different expressions.” After the court denied CBS’s motion for a preliminary injunction, CBS dismissed its complaint with prejudice.

What is often overlooked in CBS v. ABC is the court’s analysis in reaching its conclusion. Faced with a dearth of precedent in the context of reality television, the New York federal court turned to cases applying copyright law to scripted and quasi-scripted programs and other literary works. From these cases, the court extracted a list of show elements to be compared, some of which, at first blush, might seem inapplicable to an unscripted, reality program. Specifically, the court identified the “total concept and feel,” “setting,” “characters,” “plot,” “sequence,” “pace and setting,” of each program and, without discussing possible differences between scripted and unscripted television, assumed the existence of corollary elements in reality television programs.

The court distilled the “total concept and feel” of the two programs into two components equally applicable to scripted and unscripted television, namely, the overall “tone” and “production values” of each series. The court contrasted the “unalterable seriousness” of Survivor against the “comedic” tone of Celebrity, citing the differences in the elimination sequence in each show as especially illustrative of the contrasting tones. The court observed that the elimination ceremony in Survivor was a “highly ritualized sequence” occurring in the dark, with torches, and accompanied by dramatic tribal-sounding music. Celebrity, on the other hand, had no comparable ritual. The departing contestant was announced in the morning while the contestants were standing around drinking coffee and escorted onto a “completely silly-looking party barge with fireworks, waiters, and glasses of champagne.”

With respect to the production values, the court compared the “lush, artful photography and painstaking etiquette” of Survivor and the “home video look” of Celebrity. Of “less importance,” but also contributing to the total concept and feel, were Celebrity’s live action and audience participation elements. The Celebrity audience is “constantly reminded by the hosts” that they are watching live action (or footage less than 24 hours old) from around the world and that they have the opportunity to vote to influence what happens next, whereas the Survivor audience is watching “an adventure in the past” with “more drama and more of what passes for character development...because of the [producer’s] opportunity to edit while in some measure already knowing the outcome.” The court concluded that the two series were “substantially different in concept and feel.”

The court next considered the “setting” of each show and concluded that the mere concept of a remote, inhospitable locale was too “generic” to be protectable on its own. Focusing on the “visual expression” of that generic concept, the court contrasted the “dry Outback bush area” featured in Survivor with the “dense vegetation” that provided the backdrop in Celebrity and found that the inhospitable settings were expressed differently.

The “characters” of each series were the next element to be examined, which the court identified as the hosts and the contestants. The court made no mention of the fact that the dialogue was unscripted or that the interactions of the “characters,” unlike those in a scripted program, were not concocted by a staff of writers. First, the court held that the two shows expressed the “generic element” of a host in a different fashion. The host of Survivor, according to the court, appears relatively infrequently in the program, is “nothing but serious,” and plays the dual role of “judge” and “group therapist.” By contrast, the hosts of Celebrity appear frequently and perform as comic entertainers. Second, the court observed that the contestants in Survivor are “regular folks about whom the audience knows nothing” who are competing to win a million dollars, while the participants in Celebrity are celebrities competing for the honorific of being king or queen of the jungle and prize money for a favorite charity. The “cut-throat competition” evident on Survivor is thus entirely absent from Celebrity. The court concluded that the characters and their interactions are expressed differently.

The court also found that the “plot” of each series was expressed differently. The court defined the “plot” by reference to the “game show” rules of each program, rather than the sequence of events as they unfold on the screen. The court noted that, in Survivor, the contestants are required to participate in challenges, the challenges are physically difficult, and the “immunity challenges” are particularly serious and result in a “life or death decision.” In Celebrity, on the other hand, the challenges are voluntary, they are “silly or gross” rather than physically difficult, and only the loss of “upscale rations” is at stake. In addition, while the contestants vote each other off at the end of each episode...
of *Survivor*, the contestants on *Celebrity* are ousted based upon the results of voting by the at-home audience.37

Finally, in passing, the court held that the music in each series was very different (“deep, chanting, tribal” versus “upbeat and kicky”), the interstitial shots of wildlife were expressed differently (emphasizing the “serious, dangerous nature of the animal” versus the “pretty or comic features of the wildlife”), and the panoramic landscape photography was expressed differently (“fabulously beautiful shots” versus “one step up from home video”).38

In sum, based upon all of these differences, the court concluded that CBS was “not likely to prove that a lay observer would consider the works as substantially similar to one another.”39

The court conducted its analysis without acknowledging the novelty of reality television or suggesting that the unscripted nature of the genre might complicate the application of traditional copyright principles. It is clear from the court’s opinion, however, that some adaptation of conventional concepts of scripted expression, like “plot” and “characters,” was necessary before those concepts could be applied to *Survivor* and *Celebrity*. What is less clear is whether, as the reality genre continues to expand, any of the elements that the court in CBS v. ABC deemed “expressive”—or additional elements not yet identified—ultimately will come to be viewed as unprotected scenes a faire or as merged with a noncopyrightable idea. (The court in CBS v. ABC identified only “worm-eating” as part of the scenes a faire of expressing a remote, hostile environment.40) In a burgeoning genre that has been the subject of only a single court opinion, it is likely premature to determine what “flows naturally” from any “basic plot premise” of any reality program.

In any event, a finding that a particular element (or even every element) of a reality television series is scenes a faire does not preclude a finding of copyright infringement. As the court noted in CBS v. ABC, it is not dispositive that “both shows combine well-known and frequently used generic elements of earlier works.”41 “Although certain similarities may not be protectable when considered individually because they are too generic or constitutive scenes a faire, . . . the presence of so many generic similarities, and the common patterns in which they arise, may help a party ‘satisfy the extrinsic test’ for substantial similarity.” Notably, under CBS v. ABC, if a copyright infringement claim is based upon the alleged replication of a compilation of expressive but unprotected elements (i.e., scenes a faire), those individual elements still must be expressed in each program in a substantially similar fashion. The court rejected CBS’s compilation argument on the grounds that the elements identified by CBS were “nonprotectable generic ideas,” rather than expressive content.42

**Switching Channels**
The court in CBS v. ABC cited Barris/Fraser Enterprises v. Goodson-Todman Enterprises, Ltd.,43 litigation in which the producers of the pilot of a new game show, *Bamboozle*, filed a declaratory judgment action for a decree that their program did not infringe the copyright in the game show *To Tell the Truth*. The producers of *To Tell the Truth* counterclaimed, alleging that *Bamboozle* did in fact infringe their copyright. Both shows featured a panel of three contestants, two of whom were liars, who claimed to be telling the truth about an incident, talent, or identity, and a panel of celebrities who had to determine which contestant was telling the truth. The court held that the idea of a game show in which contestants lie and a panel guesses who is telling the truth is not protected by copyright. Moreover, many of the similarities between the two shows—“flow[ed] from the logic and necessities of television game shows and as such were not protectible.”44

Nevertheless, the court denied both parties’ summary judgment motions on the ground that there remained an issue of fact as to whether the overall composition of *Bamboozle* infringed *To Tell the Truth*. The court held that “even though a television game show is made up entirely of stock devices, an original selection, organization, and presentation of such devices can . . . be protected, just as it is the original combination of words or notes that leads to a protectible book or song.”45

The Ninth Circuit likewise has recognized that a copyright infringement claim may be based on an “original selection and arrangement of unprotected elements.”46 In *Metcalf v. Bochco*,47 the Ninth Circuit held that the “particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.”48 Thus, even if one reality television program infringes only the expression of individually unprotectable “stock devices” of another reality television program (whatever those stock devices may be), a copyright infringement claim should remain viable.

Producers of reality television programs should also be aware that, given the right set of factual circumstances, the actual format (as distinct from the expressive content) of a program may be protectable under other legal doctrines. The “implied-in-fact contract” theory, for example, may protect a format idea if a plaintiff submits the idea to a defendant and the defendant produces a program based upon the idea without compensating the plaintiff.49 Other theories of idea protection include quasi-contract, express contract, and a confidential relationship theory.50 The applicability of each theory obviously depends upon the circumstances of the alleged idea appropriation and the viability of a copyright preemption defense.

Despite speculation that CBS v. ABC raises the bar for demonstrating infringement of a reality television show to insurmountable heights, it is clear from the court’s opinion that the expressive content of reality programs is entitled to and receives the same degree of protection as any other expressive content. Although the identification of the scenes a faire of reality television remains unresolved, the application of scenes a faire will at most thin, but not eliminate, protection in a case involving a compilation of exclusively stock devices.

Reality television is here to stay, certainly for the foreseeable future. So long as there is vigorous competition among rival networks, copyright infringement cases involving the reality genre undoubtedly will continue to be filed. Indeed, at least two such actions have recently been commenced involving disputes between the reality programs *Wife Swap* and *Trading Spouses*51 and between New Zealand-based *Dream Home* and Fox’s *The Block*.52 And with so many other suspiciously similar reality shows on network schedules, more infringement actions cannot be far behind. As the *Survivor* case suggests, producers of knockoff reality programs have no immunity from copyright infringement liability.

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3 Charles Caleb Colton, *Lacon: Or, Many Things in Few Words, Addressed to Those Who Think 127* (1822).
6 See Three Boys Music Corp. v. Bolton, 212 F. 3d 477, 481 (9th Cir. 2000).
7 See Walker v. Time Life Films, Inc., 784 F. 2d 44, 48 (2d Cir. 1986); see also Castle Rock Ent’m’n, Inc. v. Carol Publ’g Group, Inc., 150 F. 3d 132, 137 (2d Cir. 1998).
9 Shaw v. Lindheim, 919 F. 2d 1353, 1356 (9th Cir. 1990).
11 Narell v. Freeman, 872 F. 2d 907, 912 (9th Cir. 1989).
12 Apple Computer, Inc v. Microsoft Corp., 35 F. 3d
40 Id. at *40.
41 Id. at *19.
42 Id. at *8-11, 22-25 (quoting Metcalf v. Bochco, 294 F. 3d 1069, 1074 (9th Cir. 2002)).
44 Id. at *15-16.
45 Id. at *17; see also Sheehan v. MTV Networks, 1992 U.S. Dist. LEXIS 3028, at *8-10 (S.D. N.Y. Mar. 13, 1992) (holding that game show proposal was entitled to copyright protection because it was an original work of authorship that included a distinctive selection and arrangement of stock game show devices).
46 Apple Computer, Inc v. Microsoft Corp., 35 F. 3d 1435, 1446 (9th Cir. 1994).
47 Metcalv v Bochco, 294 F. 3d 1069 (9th Cir. 2002).
48 Id. at 1074; see also Apple Computer, 35 F. 3d at 1445-46; Satava v. Lowery, 323 F. 3d 805, 811 (9th Cir. 2003).
49 See Desny v. Wilder, 46 Cal. 2d 715, 739 (1956). In order to state a claim to enforce an implied-in-fact contract, the following elements must be satisfied: 1) the idea purveyor must have “clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used” by the person to whom the idea was communicated, 2) the idea recipient must have known the condition before he or she knew the idea, and 3) the idea recipient must have voluntarily accepted the disclosure of the idea on that condition. Id.
The hurdle for bad faith claims after an insurer’s reservation of rights is to prove financial harm

WITH RESERVATIONS

by Andrew S. Williams and Vivian I. Orlando

A reservation of rights has long been a legally permissible and proper way for an insurer to protect its rights to challenge coverage under an insurance policy while fulfilling its contractual obligations to its insured. When a claim raises coverage questions or an insurer has not completed its claim investigation, it is common for the insurer to pay benefits under a reservation of rights as a means to protect itself from liability and comply with its contract. Increasingly, however, insureds have filed lawsuits—most often for breach of contract and bad faith—against insurers that pay benefits under a reservation of rights. This is particularly true for disability insurance matters, which typically involve claims that are considered and paid monthly, often over a period of years.

Intuitively, most attorneys likely would agree that when an insured has been timely paid all benefits due under an insurance policy, the insurer should not be liable for breach of contract or bad faith. After all, actual damage is an essential element of any breach of contract action. Moreover, it is black letter law that a bad faith action will not lie unless: (1) the benefits due under the policy are withheld, and (2) the reason for withholding benefits is unreasonable or without proper cause.

Nevertheless, in practice, when insureds who receive benefits under a reservation of rights bring actions containing claims for breach of contract and for bad faith—the tortious breach of the covenant of good faith and fair dealing—they typically argue two points. First, they assert that the insurer is paying benefits with a string attached, and therefore, because there is a possibility that the insurer

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will seek repayment of the money, the full benefits of the insurance contract are not realized. Second, they claim that bad faith liability should attach if there is no reasonable basis for paying under a reservation of rights. Insurers respond to these allegations by arguing that there can be no breach of contract or bad faith liability because, with insurers paying benefits fully and in a timely manner, there is no damage.

In California, whether an insured can properly sue based on an allegedly improper reservation of rights is unclear. Some courts hold that an insurer must have a good faith or reasonably based belief in the existence of some right to a defense regarding payment before reserving its rights. Other courts have granted summary judgment against insureds because they have found that the insured has not suffered financial harm.

The courts that grant summary judgment apply general contract principles and established bad faith law. They conclude that even when an insurer has no legitimate reason for reserving its rights, there is no liability because there are no damages until benefits are actually withheld.

**Reservation of Rights**

When presented with a third party claim, an insurer generally has three options. First, the insurer may choose to defend without objection, thereby waiving any right to contest coverage at a later date. Second, the insurer may refuse to furnish a defense and potentially risk a bad faith lawsuit from its insured. Third, insurers may choose to defend but under a reservation of rights. An insurer that avails itself of this option can then, at the end of the underlying case, file an action for declaratory relief and attempt to obtain a declaration that no duty to defend or indemnify exists. Such a declaration “would allow it to withdraw from the defense without subjecting the carrier to a claim of breach of contract or bad faith.”

In the context of first party insurance, as disability insurance, a reservation of rights provides the insurer the opportunity to investigate fully the insured’s disability claim and to later seek reimbursement for benefits paid if the insurer determines the insured was not entitled to benefits.

In 2003, a federal district court in California addressed whether a disability insurer could be liable in bad faith for paying benefits under a reservation of rights and simultaneously seeking a declaration that it had no obligation to pay the benefits. In *Providence Life and Accident Insurance Company v. Van Gemert*, the insurer paid disability benefits under a reservation of rights and then sued for declaratory relief. The court concluded that the insured’s disabling condition could be cured with appropriate care. The insured counterclaimed for breach of contract and bad faith.

In analyzing the counterclaim, the *Van Gemert* court noted that “when an insurer pays benefits under a reservation of rights and files a declaratory relief action regarding insurance coverage, the insurer may be liable for breach of the implied covenant.” It held, however, that for liability to attach, the insurer’s position must be both erroneous and unreasonable.12 That is, the insured must show that the acts of the insurer not only are a breach of the policy but also were prompted not by “an honest mistake, bad judgment or negligence, but rather by a conscious and deliberate act.”13 If there is a genuine issue as to the insurer’s liability, no bad faith liability arises from an insurer advancing its side of the dispute. The court ultimately concluded that there was a genuine dispute as to whether, under California law, an insured could be required to undergo the treatment that the insurer demanded. Thus, summary judgment was granted against the insured on its counterclaim.

*Van Gemert* potentially presents an obstacle for insurers because it embraces the insured’s argument that a bad faith action may lie when an insurer pays benefits but improperly reserves its rights. The decision, however, provides only limited guidance. The court does not address what damages, if any, the insured might be entitled to if the insured had been able to proceed with the case. Moreover, the court’s conclusion that bad faith liability may be appropriate even though benefits are paid under a reservation of rights is based on *Dalrymple v. United Services Automobile Association*, a case in which the insured alleged that policy benefits were paid in such an untimely manner that the benefits were effectively withheld. Finally, a consideration of whether the insured could pursue a bad faith claim even though the insurer was paying benefits without subjecting the carrier to a claim of breach of contract or bad faith is unclear.7

Another case commonly cited to support the claim that a bad faith action may be sustainable for an improper reservation of rights is *Sprague v. Equifax, Inc.* In *Sprague*, one of the defendants, an insurer, terminated the plaintiff’s benefits but later restored them, with interest, under a reservation of rights. The court settled before trial, and the case proceeded against Equifax, which was found liable for conspiring with the insurer to fraudulently deny coverage.

The jury awarded damages for emotional distress covering the time period before and after benefits were restored. On appeal, Equifax conceded that emotional distress benefits were appropriate for the period in which benefits remained unpaid but argued that the plaintiff could not show any damage after benefits were restored. The court of appeal disagreed. It reasoned that the insured bought disability insurance for peace of mind, and the conditional payment of benefits did not restore that mental state for the insured. The court concluded that “an assertion of an insurer’s rights is privileged only if there is a good faith existence of the right asserted.” That is, if there is no good faith belief that the plaintiff is not entitled to benefits under the policy, no privilege will exist for payment under a reservation of rights.

Significantly, the *Sprague* court found that the insurer’s termination of benefits satisfied the threshold requirement of economic loss and the plaintiff was entitled to recover damages for emotional distress caused by the termination of benefits—even after the benefits were conditionally restored. The court pointed to authority that supports the “continuation of damages for mental distress where...compensation for economic loss is not finally settled.” Thus, *Sprague*, like *Van Gemert*, does not resolve whether an insured can pursue a breach of contract or bad faith claim when there has never been a denial of insurance benefits.

In *Morris v. The Paid Revere Life Insurance Company*, the insurer faced a claim that it acted in bad faith by discontinuing benefits rather than paying under a reservation of rights and seeking declaratory relief.24 Addressing this contention, the court of appeal discussed the effect of a reservation of rights on potential liability. It noted that an insurer’s decision to cut off benefits rather than pay under a reservation of rights relates to the issue of damages, not liability. Thus, it concluded, an insurer may choose to pay disputed benefits under a reservation of rights in order to mitigate damages, including possible punitive damages, should the insurer ultimately lose a coverage dispute. The court observed, “Such a strategy, while perhaps beneficial to an insured in the short run, is primarily a self-protective measure, not an obligation.”

Last year, the U.S. District Court for the Southern District of California cited *Crenshaw v. Mono Life Insurance Company*, in which the insurer—after several years of making disability benefit payments and while continuing to pay—issued a reservation of rights letter in which it disputed the severity of the insured’s disability. However, the district court also noted that a “proper reservation of the right to sue its insured to recover benefits paid requires the insurer have a good faith belief in the existence of some right or defense to payment.” Thus, *Crenshaw* suggests that
a reservation of rights can subject an insurer to liability when the insurer has no good faith basis for the reservation.

A Different View

Despite the cases discussing the potential for bad faith liability, one question lingered unaddressed until recently: How is an insured damaged when an insurer fully and timely pays benefits under a reservation of rights? In Sherman v. The Paul Revere Life Insurance Company, the U.S. District Court for the Central District of California tackled the issue head-on last year. While Sherman is an unpublished decision and therefore not controlling law, it contains reasoning that may be persuasive for future courts. The plaintiff insured in Sherman sued the defendant disability insurer for breach of contract and bad faith even though benefits were being paid under a reservation of rights. The insurer took the position that the insured, a dentist, could and should pursue surgical care to alleviate his disabling carpal tunnel syndrome. In its unpublished ruling, the district court dismissed the complaint, with prejudice, finding that there was no breach of contract or bad faith liability when benefits were paid under a reservation of rights.29

In deciding the issue, the Sherman court found Travelers Indemnity Company v. Walker & Zanger, Inc. persuasive and held that “a reservation of rights where the insurance carrier has contested the duty to pay benefits to the insured does not amount to a breach of contract.”30 The Travelers court held that an insurer, in the context of third party insurance, may choose to defend under a reservation of rights and simultaneously file a declaratory relief action seeking a declaration that no duty to defend or indemnify exists. According to Travelers, a judicial determination in the insurer’s favor allows it to withdraw its defense without subjecting itself to liability for breach of contract or bad faith.31 From this, the Sherman court concluded that payment under a reservation of rights cannot amount to breach of contract.

The Sherman court noted that the maximum recovery on a contract is limited to the equivalent of performance. Thus, when payment of benefits is made under a reservation of rights, there is no actual damage to sustain a breach of contract claim. Although the insured argued that he could not make full use of disability benefits because he might have to give them back if he did not win his lawsuit, the court found this argument frivolous: “[I]f the judgment in such a lawsuit is against the Plaintiff and he is required to pay back all the benefits, he was never entitled to enjoy the benefits in the first place.” On the other hand, “if Plaintiff was to prevail, he would be entitled to full use of all the benefits paid both before and after the lawsuit.” The mere fact that pending litigation results in the plaintiff being “more thrifty in his management of the money paid in benefits does not mean that he has been deprived of any benefit under the Policy.”32

The Sherman court was unsympathetic to the insured’s argument that the reservation of rights imposed litigation costs upon him. It noted that the plaintiff, not the insurer, chose to file suit when a denial of benefits and litigation were merely speculative.33

Finally, in discussing the plaintiff’s bad faith claim, the court reiterated the long-established rule that a plaintiff must establish that 1) benefits due under the insurance policy were withheld, and 2) “the reason for withholding benefits must have been unreasonable or without proper cause.”34 The court concluded that the complaint failed to plead that benefits had been withheld.35

Several published California cases lend support to the argument that no bad faith liability may attach for reserving rights. For example, in Massachusetts Casualty Insurance Company v. Rosen,36 the court noted that “a reservation of rights is made by an insurer to protect that insurer’s right to later seek reimbursement for payments made under the reservation of rights if it is shown that the insured was not entitled to such payments.” The court explained that payment under a reservation of rights protects an insurer from potential bad faith if it were to withhold benefits and provides the insured with funds to use while a determination of coverage is made.37

Likewise, in Blue Ridge Insurance Company v. Jacobson,38 the insured argued that an insurer should not be permitted to terminate its defense obligations by settling a claim under a reservation of rights. The court held, however, that an insurer has a right to settle a case within policy limits when the settlement is reasonable and to reserve its right to reimbursement for the settlement.39 A reservation of rights has also been deemed appropriate in “mixed actions” when an insurer contends that a portion of the defense costs are not covered and seeks reimbursement of those costs.40

Other jurisdictions generally have held that an insurer cannot be liable for bad faith for reserving its rights. For example, in Hartford Fire Insurance Company v. B. Barks & Sons, Inc.,41 the insurer defended under a reservation of rights regarding its duty to indemnify the insured. The court held that the insurer’s decision did not constitute bad faith.42 Similarly, in Pasco v. State Automobile Mutual Insurance Company, the court rejected the notion that a bad faith claim could be maintained against an insurer that defended its insured under a reservation of rights.43 For third party insurance matters, some courts even encourage insurers to defend under a reservation of rights.44

Reconciling the Conflict

Exceptional circumstances may warrant a finding of bad faith even though a claim is paid. As the Daily temple court stated: “[T]here may be cases in which the insurer’s delay in paying the claim or other misconduct causes special harm to the insured even if the claim is ultimately paid or settled.” In these cases, tort liability may be imposed.
History of the Red Mass

The first recorded Red Mass, a special Mass for the Bench and Bar, was celebrated in Paris in 1245. The tradition began in England about 1310, during the reign of Edward I. The entire Bench and Bar would attend the Red Mass together at the opening of each term of Court. The priest and the judges of the High Court wore red robes, thus the Eucharistic celebration became popularly known as the Red Mass.

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even though the insurer has satisfied its contractual obligations. Thus, for example, an unreasonable delay in the processing or payment of a claim may be evidence of bad faith. Likewise, in a worker’s compensation action, an insurer may be liable for bad faith if it pays too much for the worker’s compensation claims and thus causes the premium of the insured employer to increase correspondingly.

Although some California cases support the notion that an insurer may be liable for bad faith when it pays benefits under a reservation of rights, none of those cases confronts the issue directly. More significantly, the cases are at odds with long-established tenets of contract and insurance law.

A fundamental requirement for recovery under a contract is actual damage. Moreover, “[e]xcept as provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides.” This means that, with life and disability insurance, the permissible recovery is limited to “the sum or sums payable in the manner and at the times provided in the policy.” Based on these contractual principles, it follows that an insurer cannot be liable if full insurance policy benefits are paid or are being paid.

Similarly, “[b]reach of the implied covenant is actionable in the insurance context because such conduct causes financial loss to the insured, and it is that loss which defines the cause of action.” Stated otherwise, “the award of damages in bad faith cases for personal injury, including emotional distress, is incidental to the award of economic damages.” Thus, for example, there can be no emotional distress damages arising from alleged bad faith conduct on behalf of an insurer if the insured suffered no economic harm. Moreover, even when an insurer delays the payment of insurance benefits, a bad faith action will not lie in the absence of financial harm to the insured during the delay.

In most cases an insurer should not face liability if benefits are fully and promptly paid under a reservation of rights—even if there is no reasonable support for the reservation. The seemingly conflicting cases can be reconciled by concluding that, while an unreasonable reservation of rights might be evidence of unreasonable conduct, bad faith liability cannot arise solely from an insurer’s decision to pay benefits under a reservation of rights. This conclusion is consistent with the law of contracts and bad faith in California, which requires financial harm to maintain breach of contract and bad faith actions. It is also consistent with the public policy of promoting the payment of policy benefits when coverage is unclear or further investigation remains to be done.

4. Third party insurance policies provide coverage for liability of the insured to another. Examples include life, disability, fire, theft, and casualty insurance.
6. Id. at 993-94 (citing Campbell v. Superior Court, 44 Cal. App. 4th 1308, 1319 (1996)).
8. First party insurance policies provide coverage for loss or damage sustained by the insured. Examples include life, disability, health, fire, theft, and casualty insurance.
11. Id. at 1050.
12. Id. at 1052 (citing Dalrymple v. United Servs. Auto. Ass’n, 40 Cal. App. 4th 497, 515 (1995)). In Dalrymple, the insurer paid under a reservation of rights, then brought a declaratory relief action. The insured filed a counterclaim arguing that the insurer acted in bad faith in filing the declaratory relief action and delaying the payment of benefits, among other things. Dalrymple, 40 Cal. App. 4th at 515. The court noted, “It is at least arguable that pursuing a declaratory relief action regarding the insured’s entitlement to benefits provides the best and most efficient way for resolution of the dispute.”
13. Id.
15. Id. (citing Chateau Chamberay Homeowners Ass’n v. Associated Ins’rs, Co., 90 Cal. App. 4th 335, 346 (2001)).
16. Id.
17. Id.
19. Id. at 514.
20. See Export Group v. Reef Indus., Inc., 54 F. 3d 1466, 1472 (9th Cir. 1999) (holding that statements "not necessary to the decision" of the case “have no binding or precedential impact”).
22. Id. at 1029-30.
23. Id.
24. Id. at 1031.
25. Id. at 1026.
27. Id.
29. Id. at *22 (citing Sprague v. Equifax, 166 Cal. App. 3d 1012, 1032 (1985)).
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Encryption Technology for Keeping Computer Data Safe

LAW FIRMS HAVE GOOD REASONS to keep information secret, including the ethical duties imposed on lawyers to maintain client confidences and a growing number of statutory duties. For example, the Graham-Leach-Bliley Act of 1999 requires lawyers who are providing financial services to maintain customer security and privacy policies, and the Healthcare Portability and Accountability Act of 1996 requires implementation of privacy and data security procedures. One way for individual attorneys to safeguard the information they maintain on their computers is with encryption technology.

Encryption involves taking information that is in readable form and converting it into a format that is not readily understood. This conversion is called encryption, and the conversion back to a readable format is called decryption. Algorithms are used to scramble and unscramble the data. Typically, a key of random characters of a predefined length—for example 128 characters—is mixed several times (according to the algorithm) with the data in the original. The resulting gibberish can be decrypted with a password or key that instructs the algorithm to reverse the process. The longer this key is, the more secure the encryption will be, and the longer it will take for a computer to encrypt and decrypt the data. When encryption works, encrypted information that falls into the wrong hands is safe as long as the wrongdoer is not able to find the key or crack the encryption algorithm.

Today it is considered highly unlikely that encryption that uses a 128-bit key could be decrypted within a period of time in which the information would be of use. It is possible, however, to get very lucky and discover the proper key on the first few tries, just as it is possible to win the lottery on the first try. Therefore, direct decryption is possible, but encryption programs make it extremely unlikely to be useful.

When the code is well protected, it may be easier to focus on the user. The weakest part of an encryption procedure may be the user’s security scheme. Users typically employ no more than three factors, which may be remembered as: something you know, something you have, and something you are. The something you know can be a phrase, word, or series of characters. The longer and more random the series of characters, the stronger the password. A weakness in this method is that it is tempting to write down a complicated password near the computer. Another problem is simply that a complicated password may be forgotten. The something you have may be a card or small device with an embedded pass code. A weakness of this method is that the user may lose the security card, or it may be damaged. The something you are generally is equal to biometrics: fingerprints or retinas that can be read by a device attached to the computer. Weaknesses in this method are the cost of scanners and the lack of accuracy of many scanning devices that are currently available. Assuming that the physical security of the computer is adequate, however, an examination of encryption returns to the selection of software.

Encryption can be applied to the entire hard drive or to particular files, folders, or partitions. Encryption of the entire hard drive adds a valuable layer of security. This is because whenever a user opens a file, copies of the file or information relating to it are often stored in miscellaneous temporary directories. If the entire hard drive is encrypted, there will be no easy viewing of these temporary files. If the computer is stolen, the data would remain secure. A weakness of the whole disk method is that the disk must be decrypted for use, and once the disk is decrypted, all its data is too. Some vendors have implemented a timer feature that causes encryption after a period of nonuse, and others have a type of on-the-fly encryption that only decrypts the data and programs that are in use. Another disadvantage of whole disk encryption is that it is time-consuming to encrypt and decrypt an entire hard drive.

File or directory based encryption systems are an alternative. A file can be encrypted for transportation on a portable medium and, assuming the user has the appropriate encryption software on whatever computer receives the data, the file can be reopened. Some applications mask the identity of the file itself, so a casual user will not see the encrypted file on the computer. Some file-based encryption systems create a virtual drive on the computer that contains the encrypted files, making access and encryption and decryption easier. With a file-based solution the user is exposed when files are opened and decrypted, but the balance of the encrypted files remain secure (although various temporary files may be available to those who know how to look for them). A growing number of vendors provide encryption systems that can encrypt a whole disk and/or files. With a file-based encryption system, different users of the same PC or server can keep their files protected from one another. On a related note, one factor to consider in the implementation of an encryption system is whether it will need administrative capabilities and passwords.

With these considerations in mind, here are a few examples of the encryption programs that are currently available. Assuming that the user may lose the security card, or it may be damaged. The something you are generally is equal to biometrics: fingerprints or retinas that can be read by a device attached to the computer. Weaknesses in this method are the cost of scanners and the lack of accuracy of many scanning devices that are currently available. Assuming that the computer is adequate, however, an examination of encryption returns to the selection of software. Encryption can be applied to the entire hard drive or to particular files, folders, or partitions. Encryption of the entire hard drive adds a valuable layer of security. This is because whenever a user opens a file, copies of the file or information relating to it are often stored in miscellaneous temporary directories. If the entire hard drive is encrypted, there will be no easy viewing of these temporary files. If the computer is stolen, the data would remain secure. A weakness of the whole disk method is that the disk must be decrypted for use, and once the disk is decrypted, all its data is too. Some vendors have implemented a timer feature that causes encryption after a period of nonuse, and others have a type of on-the-fly encryption that only decrypts the data and programs that are in use. Another disadvantage of whole disk encryption is that it is time-consuming to encrypt and decrypt an entire hard drive.

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An encryption program may be a wise investment for many attorneys who are concerned with the preservation of client confidentiality yet need ready access to data.

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encryption software that is available.
• EFS. Built into Windows 2000 and XP is a
file-based encryption system called Electronic
File Security. This system cannot encrypt root
directory files and is limited to disks formatted
as NTSF (as opposed to FAT 32 or other
formats). Another weakness is that the pass-
word is the same as the one used to access the
computer. On the other hand, this software
comes free with Windows 2000 and XP.
• PGP. This encryption software (www.
pGP.com), the letters of which stand for
“pretty good privacy,” is possibly the best-
known encryption program. PGP offers file-
based solutions and is testing a whole disk
solution.
• BestCrypt. This product (www.jetico.com)
creates a virtual drive, called a container,
that contains all files to be encrypted. This
encryption is not limited to NTSF-formatted
hard drives. When creating the container
the user can select from a number of encryp-
tion algorithms and key lengths. In the
alternative, Cryptoexpert (found at www.
secureaction.com) and Truecrypt (http:
//truecrypt.sourceforge.net) are freeware pro-
grams that offer container-based solutions
with fewer features.
• PC Guardian. At another level are PC
Guardian (www.pcguardiantechnologies.
com), Securstar (www.securstar.com), and
Utimaco (www.utimaco.com). PC Guardian
is a company based in California, and
Securstar and Utimaco are based in Germany.
Each of these companies offers products that
include file, container, and whole disk encryp-
tion. Their whole disk solutions purport to
address one of the weaknesses of whole disk
encryption by encrypting on the fly, so that
only the portion of the file in use is exposed
and not the balance of the data on the hard
drive.

An encryption program may be a wise
investment for many attorneys who are con-
cerned with the preservation of client confi-
dentiality yet need to have ready access to
data. Recently, Choice Point, a data collection
and resale company, appeared in the news
after it notified more than 100,000 consumers
that their personal information may have
been compromised by a group posing as busi-
ness purchasers of Choice Point’s data. This
disclosure was motivated in part by Choice
Point’s need to comply with Civil Code
Section 12345, which provides that compa-
nies must notify their customers if personal
data held by the company is subject to an
unauthorized release. A law firm could be the
subject of the next news item about the
perils of keeping information accessible but
private.

1 See also BUS. & PROF. CODE §6068(e); Orange County
SUBJECT INDEX


Los Angeles Lawyer Vol. 27, Nos. 1-11 March 2004—February 2005

Index to Articles

70 Los Angeles Lawyer July-August 2005

Los Angeles Lawyer Vol. 27, Nos. 1-11 March 2004—February 2005

Index to Articles

**Government Law:** “Fair Hearing,” by Thomas J. Casamassima (MCLE Test No. 130), Oct ’04:47.


**Los Angeles County Bar Association:** “A Full Year of Barristers Opportunities,” by Luci-Ellen Chun, Barristers Tips, Sept ’04:10; “Making Law Practice Improvements Job Number One,” by John J. Collins, President’s Page, Jul/Aug ’04:10.


**Personal Finance:** “Faith and Credit,” by Robert F. Brenner, Nov ’04:36.

**Pro Bono:** “Going beyond Traditional Pro Bono,” by Rebecca A. Dellino, Barristers Tips, June ’04:10.


**Author Index**

Abrams, Jeffrey L., “A Firsthand View of the Middle East,” Closing Argument, June ’04:44.


Bloom, Judith Ilene, “Bad Compromises” (MCLE Test No. 131), Nov ’04:29.


Boyle, Kevin (with Brian Panish), “Multiple Choice” (MCLE Test No. 125), Apr ’04:37.

Brander, Jason (with Carole Levitt and Mark Rosch), “Keeping Up-to-Date with Blogs,” Computer Counselor, Dec ’04:47.


Ricketts, Donald W., “Proof and Pretext,” Marcellus A. McRae), June ’04:12.
Suess, Greg (with Richardson R. Lynn), “The Of Counsel Role and Its Implications for Law Firms,” Practice Tips, Jul/Aug ’04:15.
Tepper, Bruce, “Federal Court Limitations on Redevelopment Agencies,” Practice Tips, Mar ’04:12; “New Water Requirements for Large-Scale Developments,” Practice Tips, Jan ’05:18.
Willenburg, Don, “Fixing the Damage,” June ’04:22.

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A New Paradigm for Mentoring

THE FIRST DEATH KNELL of traditional lawyer mentoring sounded in the 1980s when large New York City law firms began to open branch offices in other cities and thereby transformed the practice of law. While some firms sent lawyers directly from their New York offices to other cities, many others recruited lateral partners from local firms. These new partners frequently brought clients from their old firms, a move that emphasized loyalty to the partner over loyalty to the firm. Eventually, firms outside New York followed the same pattern, adding multiple offices by taking on lateral partners from local firms in new cities. Partners soon began to move freely to and from firms within a single city.

This increased movement of partners and clients had its unintended consequences. The first law of client dynamics states that a client at rest tends to stay at rest, but a client that moves tends to move again. After a client was convinced to move once, it did not take long before it moved all or part of its legal needs to another firm. Similarly, firms that brought lateral partners in from other firms often found themselves hoisted on their own petard, losing partners to other firms.

As partners and clients became more portable, many types of legal work morphed into fungible commodities, whereby a demurrer drafted by one law firm was easily replaced by one drafted by another. Some clients began developing a schedule of fees for litigation work product, providing, for example, $2,000 for demurrers or $5,000 for summary judgment motions. Law firms themselves encouraged similar pricing strategies.

The development of the Internet also increased the fungible nature of legal services, since virtually anyone can find, download, and use a wide variety of legal forms of great length—and sometimes great sophistication. Essentially the same language can be found in the agreements drafted by different law firms, so many clients sought discounted fees because they discounted the value of the talents that lawyers bring to the table.

Ultimately, these trends trickled down and eroded the time-honored tradition of lawyer mentoring. As older lawyers became less convinced that younger lawyers would remain long-term colleagues, their incentive to provide time-consuming mentoring diminished. As client loyalty withered, clients sometimes accompanied younger lawyers to a different firm, creating a disincentive for older lawyers to share knowledge and relationships. While competent assistance from a junior lawyer helps keep a client happy, a junior lawyer who is too competent can become too much of a competitor. Over the last two decades, these factors have created a legal environment increasingly less conducive to mentoring relationships.

The changes in the practice of law—at least in firms, companies, and institutions in which long-term association with a single entity has become the exception and not the rule—demand new paradigms of mentoring. One radical change would be to institute a medical-style residency requirement after completion of law school and the bar exam, but this probably could not be implemented. The only corollary to the hospital in the legal sector is the court system, which is not at all equipped to provide space for, much less train, the number of new lawyers graduating each year. Standing at the other end of the spectrum would be a program encouraging a purely voluntary effort by firms and institutions of all sizes that hire new lawyers. Many quality firms have already done so, but exhorting others to initiate voluntary programs is like yelling into the Grand Canyon—the echoing sound quickly diminishes into an indecipherable susurration.

A much more promising reform would be to adjust the existing continuing legal education requirements to reflect the following plan:

- Require an additional 12 hours of specialized training during the first three years of practice.
- Establish an optional but recommended curriculum and course materials for lawyer training.
- For a significant portion of the newly required hours, allow credit for time spent in a mentoring relationship with a lawyer who has practiced for at least 7 or 10 years.
- Provide mentors with CLE credit for up to 6 hours of mentoring each year.
- Establish an e-mail list service for mentoring, through which questions from young lawyers can be answered by prequalified, experienced lawyers.

A mentor need not work in the same firm as the young lawyer. While a mentor in a different firm may not be able to offer advice on firm policies or politics, it is almost always a benefit for a young lawyer to develop a relationship with a more senior lawyer at a different firm. Who knows? As the number of these cross-firm relationships grows, there might even be an increase in intrafirm collegiality.

No doubt the practice of law will continue to evolve as online data sources multiply and lawyers approach 24-hour connectivity. Perhaps mentoring will wither away over time, or perhaps mentoring will take place in a structured and normative instant messaging system. But before we lose what many lawyers believe was the most meaningful part of their professional development, the State Bar should consider ways of preserving the best parts of the mentoring tradition.

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