2004 Ethics Roundup

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The phrase “the art of writing” is a misnomer. Writing well is a skill, not an art. Like all skills, improvement and quality are the product of training, practice, and an understanding of the applicable rules. Of course, equal effort among different people may not result in equal quality. No matter how many hours I might spend practicing hitting a baseball or a golf ball, my abilities would not come close to those of Ted Williams or Tiger Woods. For almost all of us the goal of writing well is to communicate clearly rather than win any competition. We do not need to be the Ted Williams or Tiger Woods of writing in order to achieve this goal.

I am writing about this topic for a few reasons. First, as my tenure as the chair of the Los Angeles Lawyer Editorial Board comes to a close and I reflect upon the many years I have served on the Board, I am impressed by the overall quality of the articles we receive and the excellent editing performed by the magazine’s volunteer and professional editors. (I especially enjoyed last month’s From the Chair column written by Patric Verrone, a very skilled, professional, and Emmy award-winning writer.) Despite all the fine writing, however, I have observed many consistent errors.

Second, after spending many years as an editor, I cannot help but evaluate the writing that I encounter reading other publications in a nonprofessional capacity, when I am not performing my duties for Los Angeles Lawyer. I cringe at the grammatical errors that are printed, especially in magazines and newspapers.

Third, I want to thank the many mentors who have helped me improve my writing skills and have taught me to avoid many of the grammatical errors that I read (and hear) on a regular basis. During a recent spring cleaning I found some papers I wrote during my freshman year of college. Reading those papers was humbling and embarrassing, and I am grateful for the vast improvement in my skills.

Some repeated errors are worth noting. A semicolon is neither a modified comma nor a substitute for two complete sentences. As Bryan Garner explains in the second edition of The Elements of Legal Style, the semicolon may be used: 1) to join statements too closely related to be split into two sentences by a period but not related closely enough for a comma to suffice, and 2) to separate enumerated items that themselves contain commas in order to avoid confusion.

“Each” is singular and should be used with a singular verb and pronoun. Generally, the same rule applies to “none.”

The plural of “money” is “moneys” (not “monies”), and the plural form means different forms of currency, not more than one dollar of U.S. currency.

“Effectuate” is not a synonym or fancy version of “effect.” “Effectuate” means to give effect to, whereas “effect” means to cause or accomplish.

Lawyers seem to love splitting infinitives. We feel the need to fully emphasize words, and for some reason we think that if we place a word or two between “to” and a verb that the reader will better understand our point. Trust me, the point is not made any stronger by a split infinitive, and the reader is often confused by this usage. Although infinitives may be split in some circumstances, it should be avoided for the most part.

The proper past tense and past participle form of “plead” is “pleaded,” not “pled.” And with that Andy Rooney-like list of irritants completed, I pass the chairmanship of the Editorial Board to R. J. Comer, whose writing standards likely are higher than mine. It has been a great pleasure serving as the 2004-05 chair and working with the Editorial Board and staff of Los Angeles Lawyer. I am grateful for and enriched by the many things I learned during the past year.
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Creating Independent Record Labels for Artists

FOR SOME TIME NOW the music industry has been consolidating, downsizing, and signing fewer artists and songwriters. The industry continues to struggle with piracy, illegal downloading, and the challenge of new technologies. Attorneys who represent musical artists, songwriters, producers, and others with musical ambitions likely have noted the resultant chilling effect and despair among their clients. The doors to the major labels and music publishers were never open wide. Now, fewer doors exist.

One outlet remains, however, for clients who need to find a path to rock stardom: independent record companies. The good news is that there are thousands of independent labels. Some are vanity labels that feature one artist (and may be owned by that artist). Many vanity labels start small but then sign a number of artists and procure national distribution of their recordings (if the music interests the distributor). An indie label with a track record can persuade a major label to handle distribution on a national and even international level. Major labels look to indies to locate new and edgy artists. Large and small companies may work together on joint venture releases. Sometimes, a major acquires the indie as an affiliate.

Advising clients to form an independent record company is relatively easy. Many steps in formation resemble those taken to form any other type of business. Capital is necessary to establish and conduct the business. The type of entity depends on the client’s budget, needs, expertise, and the anticipated size and scope of the business. A sole proprietorship can work if the client knows how to find talent as well as handle business matters such as licenses, applications, and contracts. This form requires applying for a city business license and filing a fictitious name certificate.

A partnership, on the other hand, may work best if one party’s strengths are in the creative area and others have a better aptitude for running a business. The city business license and fictitious name filing are again necessary, and a partnership agreement is advisable. A corporation, an LLC, or other form can be considered in weighing the business. The type of entity depends on the client’s budget, needs, expertise, and the anticipated size and scope of the business. A sole proprietorship can work if the client knows how to find talent as well as handle business matters such as licenses, applications, and contracts. This form requires applying for a city business license and filing a fictitious name certificate.

Name clearance and protection are needed to avoid later conflicts and disputes. If a client cannot finance a professional search and trademark application, it is advisable to make as thorough an informal search as possible. In addition to checking registered trademarks (federal and state), clients can research music industry publications, source directories, and online databases. The names chosen should not be similar to other labels, music publishers, distributors, music marketing companies, or other music industry companies.

The client may be the label’s only artist for a while. If and when another artist is signed, an exclusive artist recording agreement grants the company rights to record the artist’s performances and release records, subject to payment of royalties to the artist. The agreement should include the label’s right to shop the recordings to a distributor or other label. Most companies, large or small, will not obligate themselves to release an artist’s recordings.

Written agreements are essential to keep the artist from jumping ship after clients have invested in the artist’s career. Most agreements provide that the artist’s performance and producer’s work were rendered on a work-for-hire basis. A producer agreement secures the copyright in the producer’s work on the recording. Producers can be hired for a flat fee or for royalty payments on a project-by-project basis. The agreement may grant the producer some creative control over the choice of studio and recording and mixing process.

Rap and hip-hop labels sometimes have staff producers whose talents become synonymous with the label’s name. Musicians who are hired only for the particular recording project need to enter into a side-man agreement or service release so that the label owns the copyright and other proprietary rights in their performances. Compensation is usually handled with a flat fee. If a client has sufficient funds, it is advisable to pay parties for the project and thus dispense with the need for future accounting. Clients will need assistance with registering copyrights in the sound recordings and obtaining mechanical licenses for the use of copyrighted music on the recordings. Forms and information are available at www.loc.gov/copyright. Music with or without lyrics is registered on Form PA, and recordings are registered on Form SR.

Independent label clients are well advised to acquire a publishing interest in their artists’ songs. Publishing income from various uses of music is often the way the label funds its recording expenses. Publishers have duties to register song copyrights; file clearances with a performing rights society such as ASCAP, BMI, or SESAC; collect earnings; and account to songwriters.

Some artists who are less typically commercial may not get much radio play but can sell if promoted to specialty shops such as the Nature Company, Starbucks, Victoria’s Secret, and so on. The Internet has become a fertile ground for marketing independent artists and labels. Until clients have the budget for promotion, they can count on the favor of college radio program directors who look for unusual, less mainstream releases. Live performances can be set up at shopping centers, colleges, universities, high schools, athletic events, restaurants, and typical nightclub venues. Local newspapers and underground publications are happy to hear about new creative ventures and should be contacted often. Press reviews are useful to help sell product.

Attorneys for small labels should be careful to avoid potential conflicts of interest when clients bring musicians, producers, songwriters, and others to discussions. In such situations, attorneys should clarify who the client is and encourage everyone else to seek independent legal counsel. In so doing, attorneys may avoid a claim of breach of fiduciary duty.

Perhaps the best focus is to encourage clients that they can create their careers in the music industry. Besides legal input, attorneys can provide their creative clients with support for, and confidence in, their ambitions.

Susan Rabin practices entertainment law and is of counsel to Sayegh & Pham, and F. Freddy Sayegh is a partner with Sayegh & Pham.
Enforcement of Binding Arbitration Provisions in Retainers

Most attorneys require their clients to sign a retainer agreement setting forth the basic scope of the lawyer’s representation, the hourly rate to be charged, and other important issues. Retainer agreements are mandatory if the attorney is representing a client on a contingency basis. The typical retainer agreement often includes a binding arbitration provision, requiring any dispute that arises between client and lawyer to be adjudicated conclusively before a neutral arbitrator.

Since the enactment of the California Arbitration Act (CAA), California courts have strongly supported the enforceability of arbitration agreements. Given the courts’ powerful endorsement of contractual arbitration, many attorneys might feel reasonably secure in believing that a fee-related dispute with a client would be controlled by a mandatory binding arbitration clause included in a retainer agreement. In fact, however, statutory and case law has created large uncertainties as to whether or not binding retainer agreements are enforceable when clients and lawyers have a dispute over unpaid fees. Attorneys must tread carefully when they embark upon any kind of fee-related litigation with a client and must take care if they wish to have an eventual arbitration award made enforceable.

The complicating factor is the Mandatory Fee Arbitration Act (MFAA). First adopted in 1978, the MFAA constitutes a distinct arbitration scheme that exists solely for the resolution of fee disputes between attorneys and clients. It provides clients the statutory right to invoke mandatory arbitration in fee disputes with their attorneys. However, any award made in such an arbitration will be nonbinding unless both parties agree in writing to be bound after the dispute over fees and costs has arisen. The differences between MFAA arbitration and traditional arbitration under the CAA are evident. Arbitration under the MFAA can be commenced by a client without any prior agreement by the parties to resolve their dispute outside the court system, whereas such an accord is required under the CAA. Moreover, arbitration under the MFAA will only be binding if, after the development of a fee dispute between the parties, they choose for it to be so. This situation is very different from most commercial arbitrations.

After a few years of practice under the statute, lawyers began to notice that there was a possible conflict between the CAA and the MFAA. This issue became especially prominent after 1996, when the MFAA was amended to state that arbitration could only be made binding if both parties agreed “after the dispute over fees, costs, or both, has arisen.” Specifically, the CAA’s provisions allowing the enforceability of precontroversy binding arbitration agreements and the MFAA’s requirement that postdispute arbitrations invoked by clients must be nonbinding without both parties’ consent seemed to be incompatible. The conflict was not addressed in any appellate court decision until 1998. That year, the Fourth Division of the First District Court of Appeal decided Alternative Systems, Inc. v. Carey, which appeared to put into doubt the viability of binding arbitration provisions in attorney-client fee disputes. Alternative Systems involved an attorney-client retainer agreement in which both parties agreed to submit any future dispute to binding arbitration before the American Arbitration Association (AAA). After a fee dispute arose, the attorney invoked the arbitration provision and demanded binding arbitration before the AAA. The client demanded a nonbinding arbitration under the MFAA. Nonetheless, it participated in the binding arbitration hearing, appearing to con-
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client who does not want to have a fee dispute submitted to binding arbitration can invoke the MFAA at the beginning of a dispute, refuse to agree to binding arbitration, reject the award (if it is negative) in a timely manner, and oppose any petition to compel arbitration after the lawyer has commenced the trial de novo. Conversely, lawyers who were counting upon their arbitration clauses in fee disputes saw them virtually nullified by Alternative Systems.19

This was the status of the law until 2001, when the Fifth Division of the First District Court of Appeal published Aguilar v. Lerner.20 This case concerned a fee dispute and a retainer agreement with a binding arbitration provision.21 Just as in Alternative Systems, a binding arbitration was held and an award was made in favor of the attorney that was confirmed in superior court.22 The client also filed a malpractice claim against the attorney, a fact that would later become determinative when the supreme court decided to review the decision of the court of appeal.

Unlike the outcome in Alternative Systems, however, in Aguilar the court of appeal upheld the judgment.23 The Aguilar court seemed to both sidestep and confront the reasoning of Alternative Systems. It found that the client was estopped from employing the same argument that the client in Alternative Systems had successfully used, since the Aguilar client had never invoked its MFAA right to a nonbinding arbitration.24 Yet at the same time, the Aguilar court declared that the MFAA is not “the exclusive mechanism for resolution of fee disputes. Granting finality to the arbitrator’s award is indeed consistent with the Legislature’s strong support for private arbitration, as articulated in title 9 of the Code of Civil Procedure.”25 As a result of this, the court concluded, “[T]he challenged clause providing for binding arbitration is not violative of ‘an explicit legislative expression of public policy’ and will not be invalidated on that ground.”26

With a conflict between the Aguilar and Alternative Systems decisions now more or less explicit, the California Supreme Court granted review of Aguilar. Attorneys and clients hoping to receive a clear statement about enforceability were disappointed, however, when the court released its decision.

**Evading the Question**

The court’s decision acknowledged that the case “poses the question whether the parties’ agreement to arbitrate is enforceable or is superseded by the MFAA.”27 But the court’s majority opinion28 then proceeded to evade that question. Instead of resolving the conflict between the lower courts’ decisions in Aguilar and Alternative Systems, the court decided the matter on a limited basis. Since the client in Aguilar had filed a malpractice lawsuit against his attorney, the court concluded that he had waived all of his rights under the MFAA, and that therefore the binding arbitration clause was operative and enforceable.29 As for the central issue of the case, the court declined to address it: “Because plaintiff waived his MFAA rights, we have no occasion to address whether or to what extent an arbitration agreement is enforceable if a client properly invokes the right to arbitrate under the MFAA, but subsequently exercises his statutory right to reject the arbitrator's decision and have a trial de novo.”30 The majority decision therefore left Alternative Systems and the appellate decision in Aguilar alive. The confusion over the enforceability of binding arbitration agreements in attorney-client retainer agreements persisted.

Nevertheless, the decision left some palpable hints as to what the supreme court may do if it addresses this issue again in the near future. A reading of those tea leaves puts the continued viability of Alternative Systems in doubt. A strong concurring opinion in Aguilar, written by Justice Ming W. Chin,31 argued that the court should have upheld the enforceability of the binding arbitration provision, stating that the invocation of nonbinding arbitration and the request for a trial de novo does not preempt an earlier arbitration clause but simply constitutes a complementary set of procedures that may or may not resolve an attorney-client dispute before it proceeds further.32 Despite some inconsistencies in the wording of the MFAA, the concurrence argues that, taken as a whole, it must be read to permit the enforcement of a binding arbitration clause, especially given the fact that the Alternative Systems rationale gives the client the option of evading such a clause by simply invoking nonbinding arbitration.33 The concurring opinion concludes that the majority has effectively overruled Alternative Systems, and that the court should do so explicitly.34 In addition, a second concurring opinion written by Justice Carlos R. Moreno agreed that “there is no incompatibility between the [MFAA and CAA], at least in this case,” but, like the majority, refused to decide the issue of the viability of predispute binding arbitration provisions.35

In the wake of the Aguilar decision, attorneys have to continue to be very careful about invoking binding arbitration agreements in any fee dispute with their clients. The case law is clear that if the client commences litigation against the lawyer, launches the binding arbitration process, or participates “voluntarily” in a binding arbitration session, any award resulting from the process will be valid, regardless of the MFAA.36

The difficulty arises in cases in which MFAA arbitration is invoked but either party refuses to accept any award as binding. Calling for a trial de novo and then commencing binding arbitration procedures is risky for the lawyer. If the client properly objects, any award granted to the lawyer could later be vacated under Alternative Systems, which is still officially good law under Aguilar. The choices available to a lawyer confronted with this situation are to continue with the regular judicial process to a verdict or to press on with the arbitration and convince a judge or the appellate court that the arbitration was valid.

Lawyers selecting the second option can garner encouragement from Chin’s concurring opinion in Aguilar. Its reasoning seems sounder than that of Alternative Systems and more likely to fit into the supreme court’s preference for harmonizing statutes rather than determining that the legislature has implicitly repealed a previous law.37 The Chin concurrence, should it be adopted by the court as a whole, would also serve to obviate the gamesmanship that is permitted by the Alternative Systems decision, under which a client who previously agreed to binding arbitration may evade his or her commitment by employing procedural tactics. The Aguilar majority clearly showed its distaste for similar maneuvers by rejecting the client’s argument that the MFAA could be invoked to short-circuit a CAA arbitration after he had already waived his MFAA rights.38

The question ultimately becomes whether an attorney believes a binding arbitration hearing is so much preferable to court that it outweighs the possible need to go to the appellate court (and possibly the supreme court) if an award is vacated at the trial level. Attorneys may someday get some clarity from the supreme court about attorney-client binding arbitration provisions. Until then, attorneys in fee disputes with clients that involve the binding arbitration provisions in their retainers should proceed with full knowledge of the possible consequences of their actions.

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2 See BUS. & PROF. CODE §§6147, 6148. Even when a written retainer agreement is not required, a written explanation of the fee agreement is preferred. Model Rules of Prof’l Conduct R. 1.5(b).
3 CODE CIV. PROC. §§1280 et seq.
4 The California Supreme Court has declared that there is a “strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.” Monchash v. Blase, 3 Cal. 4th 1, 9 (1992). Arbitrators’ decisions are generally unreviewable for legal error (id. at 11), and even the issue of whether an arbitration agreement was induced by fraud can be adjudicated in the arbitration process. Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St., 35 Cal. 3d 312, 323 (1983).
5 Mandatory Fee Arbitration Act (codified at BUS. &
It is important to note that a client would not be able to use this procedure to circumvent a binding arbitration clause with regard to anything other than a fee dispute with the lawyer. Other claims, such as malpractice, are not affected by the MFAA, and the preemption analysis undertaken by the Alternative Systems court will not apply to them. See Bus. & Prof. Code §6200(a), (b)(2).


38 Aguilar, 32 Cal. 4th at 981. The supreme court has previously taken a dim view of gamesmanship in the arbitration process (Christensen v. Dewor Devs., 33 Cal. 3d 778, 784 (1983)), as have other appellate courts. See Manatt, Phelps, Rothenberg & Tunney v. Lawrence, 151 Cal. App. 3d 1165 (1984) (client’s attempt to answer complaint and therefore terminate arbitration after client had already invoked arbitration provision was rejected as procedural gamesmanship).
The Statutory Framework for Appeals Bonds

Ordinarily, the Perfecting of an Appeal stays proceedings in the trial court. The purpose of this automatic stay is to “‘protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided.’” Many statutory exceptions to the automatic stay rule, however, require posting a bond or undertaking to obtain a stay of enforcement. The most significant exception is for money judgments. A bond is also required to stay enforcement of: 1) certain hazardous waste orders, 2) a judgment that “directs the assignment or delivery of personal property,” 3) a judgment that orders sale or delivery of real property, 4) a judgment appointing a receiver, and 5) a right to attach order.

The trial court also has discretion to require a bond in any case not specified in the statutes that govern appeals bonds (Code of Civil Procedure Section 917.1 to 917.8). The court may impose this requirement when 1) the appellant possesses “money or other property belonging to the respondent,” 2) the appellant “is required to perform an act for [the] respondent’s benefit pursuant to [the] judgment or order under appeal,” or 3) the judgment is solely for costs awarded under Code of Civil Procedure Section 1021 that would otherwise not require a bond. Conversely, the court of appeal has recently confirmed that trial and appellate courts have discretion to exempt the indigent from the bond requirement.

The most common method of satisfying the bond requirement is to post a bond issued by an admitted surety insurer. The other two principal methods are 1) personal sureties—i.e., individuals who guarantee payment of the judgment on the basis of their personal assets and 2) a deposit of cash or other financial instruments in lieu of a bond. Recent case law developments in the area of appeal bonds have focused on three different areas: the extent of the bond obligation, bonding a judgment for costs, and the effect of a deposit in lieu of a bond.

The Enduring Nature of the Bond Obligation
Two recent cases—Conservatorship of O’Connor and Lewin v. Anselmo—make clear that once an appeal bond has been given by a surety, the resulting obligations cannot easily be set aside. In O’Connor, the administrator of an estate appealed a judgment that rescinded a performance bond. On appeal, the surety argued that rescission of the bond was appropriate in part because the bond had never been filed or approved by the court and therefore had never become effective.

The court of appeal refused to release the surety from liability because neither filing nor approval of the bond was consideration for issuance of the bond. Instead, the court held that once the bond premium was paid, a technical defect such as failure to file or obtain approval did not affect the validity of the bond. In reaching this conclusion, the court cited the “savings” clause in Code of Civil Procedure Section 995.380(a) that forgives technical errors or mistakes.

If a bond does not contain the substantial matter or conditions required by this chapter or by the statute providing for the bond, or if there are any defects in the giving or filing of the bond, the bond is not void so as to release the principal and sureties from liability.

In Lewin, two individuals agreed to give a personal surety bond to stay enforcement of a judgment pending the defendants’ appeal, but the agreement gave the sureties 15 days to rescind. The judgment was then affirmed on appeal. The plaintiff, who had not been informed about the 15-day rescission period, made a motion to enforce the personal sureties’ liability. The trial court ruled in favor of the sureties, and the plaintiff appealed.

The court of appeal reversed, holding that the 15-day rescission period had to be disregarded because, if enforced, it could prevent the bond from taking effect for 15 days, in violation of the statutory directive that “‘a bond is effective at the time it is given.’” The court also invalidated the 15-day rescission period because it conflicted with Code of Civil Procedure Section 996.110, which requires a court determination to release any surety from liability on a bond, noting: “These statutory procedures are more than mere formalities….As [the sureties] did not comply with these procedures,…[they] were not released from liability on their bond.”

Bonding a Judgment for Costs
Costs awarded under Code of Civil Procedure Sections 998 and 1141.21 that would not have been awarded under Section 1033.5

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(which lists the items allowable as costs to a prevailing party) must be bonded to stay their enforcement on appeal.21 However, no bond is required to stay enforcement of a judgment solely for costs awarded pursuant to Section 1021.22 This exception covers a broad category of cost awards (such as filing fees, motion fees, jury fees, attorney's fee awards, and court reporter fees)23 and has been interpreted in several recent cases.

One case, Ziello v. Superior Court,24 involved a dispute between a mortgagor and mortgagee over the proceeds of an insurance policy. The judgment awarded approximately $62,000 plus routine costs and attorney's fees of approximately $160,000. The principal amount of the judgment having been paid, the judgment debtor bank appealed only from the cost award. When the judgment creditors sought to execute on the cost and attorney's fee award, the bank obtained an order quashing the writ of execution. The judgment creditors then filed a writ petition seeking to execute on the cost and attorney's fee award notwithstanding the bank's appeal.25

The court of appeal denied the writ petition, holding that if the defendant appeals only from an award of costs (which includes an award of attorney's fees when authorized by contract, statute, or law)26 the order on appeal is “solely” for costs within the meaning of Code of Civil Procedure Section 917.1(d). Accordingly, no bond is required to stay enforcement of that order pending appeal.27

In Dowling v. Zimmerman,28 the plaintiff appealed from a judgment dismissing his complaint under the anti-SLAPP statute, Code of Civil Procedure Section 425.16, and awarding the defendant attorney's fees and costs under the attorney's fee provision of that statute.29 The plaintiff did not file an appeal bond to stay enforcement of the attorney's fee award, and the defendant sought to enforce the award by issuing a subpoena and noticing a judgment debtor exam. When the trial court denied a motion to quash the subpoena and vacate the debtor exam, the plaintiff sought a writ of supersedeas to stay enforcement of the award on the grounds that an anti-SLAPP attorney's fee award is a judgment “solely for costs” and is therefore automatically stayed without bond under Code of Civil Procedure Section 917.1(d).30

The court of appeal held there was no automatic stay because “[a]n award of reasonable attorney fees and costs under the anti-SLAPP statute cannot be construed as an award of routine or incidental costs subject to the automatic stay rule under Section 917.1(d).”31 Although the court recognized that a judgment for attorney's fees awarded pursuant to statute is ordinarily a judgment

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for costs under Section 1033.5 (which allows as costs attorney’s fees authorized by statute), the court found the legislative intent of the anti-SLAPP statute required the appeal bond statutes to be interpreted in a manner favoring the bond requirement:

We are persuaded the Legislature intended to deter SLAPP litigation not only at the trial court level, but also in the appellate courts. Requiring a SLAPP plaintiff who appeals from an adverse judgment under the anti-SLAPP statute to give an undertaking to stay enforcement of the portion of the judgment awarding reasonable attorneys fees and costs to the prevailing defendant...will promote meritorious appeals, and will deter continued SLAPP litigation at the appellate level.32

A third case, Gallardo v. Specialty Restaurants Corporation,33 dealt with a judgment consisting of expert witness fees awarded under Code of Civil Procedure Section 998, for which a bond is required to stay enforcement under Section 917.1(a)(2), and routine costs awarded under Section 1032, for which a bond is not required under Section 917.1(d) if the judgment is solely for such costs. The question was whether a bond was required for both amounts or whether the appellant’s bond for only the Section 998 costs was sufficient. The court of appeal held that no bond was required for the routine costs awarded under Section 1032. The court relied on Section 917.1(d), which specifies that costs are to be included in the amount of the bond only for purposes of a money judgment as specified in Section 917.1(a)(1). The court reasoned that Section 998 costs are not a money judgment for purposes of Section 917.1(a)(1) because such costs are separately treated under Section 917.1(a)(2), and therefore costs awarded in such a judgment do not require a bond.34

By statute, a deposit in lieu of an appeal bond has the same force and effect as any other form of appeal bond.35 Under Rule 27 of the California Rules of Court, the “cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral” is recoverable in the event of a successful appeal.36 In Cooper v. Westbrook Torrey Hills37 the court of appeal held that because a deposit is equivalent to a bond, the cost of making a deposit is a recoverable cost on appeal, just as the cost of procuring a surety bond is recoverable under Rule 27.38

Recent case law interpreting the appeal bond requirement emphasizes that appeal bonds are creatures of statute.39 Therefore, the starting place to determine whether an appeal bond is required and, if so, how to obtain one, should always be the provisions of the gov-
eering statutory scheme, which is found in Section 917.1 through 917.9, as well as Sections 995.010 through 996.510, of the Code of Civil Procedure.

1 See CODE CIV. PROC. §916(a).
3 CODE CIV. PROC. §995.210. The terms “bond” and “undertaking” may be used interchangeably.
4 CODE CIV. PROC. §917.7(a)(1).
5 CODE CIV. PROC. §917.4. Current case law notes that this exception to the automatic stay rule does not apply to an appellant who has neither possession of nor the right to possess the real property. Royal Thrift & Loan Co. v. County Escrow, Inc., 123 Cal. App. 4th 4th 24, 36-37 (2004).
6 See CODE CIV. PROC. §§917.2, 917.5, 917.15, 917.65. The trial court also has discretion to require a bond in any case not specified in the statutes governing appeal bonds. CODE CIV. PROC. §§917.1-8.
7 See CODE CIV. PROC. §§995.10-520.
8 See CODE CIV. PROC. §§995.710-770.
10 Id. at 1102-03.
11 Id. at 1103 n.21.
13 Id. at 700 (citing CODE CIV. PROC. §955.420).
14 Id. at 700-01.
15 CODE CIV. PROC. §917.1(a)(2), (3).
16 CODE CIV. PROC. §917.1(d).
17 See CODE CIV. PROC. §1033.5.
19 Id. at 653-54.
20 See CODE CIV. PROC. §1033.5(a)(10).
21 Ziello, 75 Cal. App. 4th at 655.
23 Id. at 1405.
24 Id.
25 Id. at 1432.
26 Id. at 1433-34; see also Banks v. Manos, 232 Cal. App. 3d 123 (1991) (An award of attorney’s fees as sanction under §128.5 is not routine and therefore must be bonded to be stayed pending appeal.).
28 Id. at 465-70.
29 CODE CIV. PROC. §995.730.
30 CAL. R. OF CT. 27(c)(1)(E).
32 Id. at 1298-1300.
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.

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PROFESSIONAL ETHICS permeated the legal news last year. Writing an unusual non mea culpa opinion, U.S. Supreme Court Associate Justice Antonin Scalia declined to recuse himself from a case involving Vice President Dick Cheney despite taking a duck-hunting trip with Cheney while the case was pending before the Court. News reports revealed that Bush Administration lawyers (who have since been elevated to positions as U.S. attorney general and on the Ninth Circuit Court of Appeals and the Boalt Hall faculty) had written memos brushing aside the Geneva Conventions as “quaint” and “obsolete” while redefining torture as a tool of interrogation, and opining that any legal restraints on the president’s power to direct the detention and interrogation of enemy combatants would be unconstitutional—a position rejected by the Supreme Court as a “blank check.”

In 2004, an attorney was held in contempt and referred to the State Bar for discipline after no one from his firm showed up for oral argument before the California Supreme Court and he falsely denied knowing about the scheduled argument. News reports revealed that the notoriety of a Beverly Hills law firm’s abusive lawsuits against thousands of small businesses under Business and Professions Code Section 17200, followed by the prosecution of the lawyers and their resignations from the State Bar, helped propel an initiative to reform the statute to electoral victory in November of last year.

Conflicts of Interest
In two recent published decisions, Farris v. Fireman’s Fund Insurance Company and Brand v. 20th Century Insurance Company, courts of appeal addressed conflicts of interest arising in successive representation cases—that is, cases in which a lawyer who has already ended his or her representation of one client subsequently undertakes to represent another client against the former client. Courts have adopted a two-step test to determine whether the lawyer must be disqualified pursuant to Rule 3-310(E) of the Rules of Professional Conduct. First, did the lawyer have a direct and personal relationship with the former client? If so, is there a “substantial relationship” between the two representations? Successful representations are sub-

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A conflict also may develop when a lawyer switches sides while a matter is pending. In *North Pacifica, LLC v. City of Pacifica*, the District Court for the Northern District of California disqualified lawyers who were retained by a city to provide expert testimony regarding a development permit. The lawyers previously provided advice on the permits to the developer. Without the former clients’ informed written consent, the lawyers could not provide expert testimony on behalf of the city. The court, however, declined to disqualify the city’s law firm, which had retained the disqualified lawyer-experts.

In *City of Santa Barbara v. Superior Court*, a lawyer also switched sides during the pendency of a matter. While in private practice, the lawyer represented homeowners in an action against Santa Barbara for damages caused by water and sewage. Before the resolution of the action, the lawyer quit her firm and joined the city attorney’s office, which was representing Santa Barbara. Upon hiring the lawyer, the city attorney’s office created an ethical screen to prevent the lawyer from gaining access to any information, documents, or other materials related to the homeowners’ action. The office also instructed its employees not to involve the lawyer in any communications about the case. The plaintiffs sought to disqualify the city attorney’s office, but the court of appeal declined to do so, concluding that the ethical screen was sufficient.

*City of Santa Barbara* is a case of first impression in California, in that ethical screening was found sufficient when a lawyer with direct, personal knowledge of client confidences relating to a specific litigation matter went to work for the client’s adversary while the litigation was pending. Previous cases have permitted ethical screens as a defense against disqualification, but generally only when the newly employed lawyer did not personally work on the matter at issue during his or her former employment. Does *City of Santa Barbara* mean that ethical screening is always effective as a means to avoid conflict and disqualification? Not necessarily. The court of appeal specifically limited its holding to ethical screens erected in public law offices as opposed to private law firms. The court based this distinction on the fact that 1) public sector lawyers do not have a financial interest in the matters on which they work and, therefore, have less, if any, incentive to breach client confidences, 2) public sector lawyers do not recruit clients or accept fees, and 3) vicarious disqualification in the public sector context would impose different burdens on the affected public entities—for example, it would place public sector offices at a further competitive disadvantage in recruiting. Lawyers must wait and see whether an appellate court will approve ethical screening in a similar situation in a private law firm.

Absent effective screening, the entire law firm of a conflicted lawyer is also subject to disqualification because, in theory, the lawyer’s knowledge is imputed to his or her law firm. Should the lawyer’s knowledge also be imputed to his or her spouse so that the spouse’s law firm is also subject to disqualification? In *Derivi Construction & Architecture, Inc. v. Wong*, the court of appeal declined to do so. In *Derivi*, former clients successfully moved to disqualify their former law firm from representing their adversaries in a breach of contract action. The adversaries then engaged a new lawyer. That lawyer was married to the lawyer who handled the prior engagement at the disqualified law firm. Assuming that the married lawyers shared confidential information about their cases, the former clients moved to disqualify their adversaries’ new law firm. The trial court denied the motion to disqualify, and the court of appeal affirmed, reasoning that “[s]peculative contentions of conflict of interest cannot justify disqualification of counsel.” Just as a court will not presume that lawyers will disclose confidences to their close friends, courts will not presume that lawyers will disclose confidences to their spouses.

Disqualification is not the only risk resulting from a violation of Rule 3-310. Lawyers improperly handling conflicts also risk claims for legal malpractice and breach of fiduciary duty. In *Benasra v. Mitchell Silberberg & Knapp LLP*, former clients of a law firm sued the firm and two of its former partners for legal malpractice and breach of the duty of loyalty based on the lawyers’ conduct in arbitration proceedings. In the arbitration, the lawyers represented the former clients’ adversary. No confidential information was disclosed, but the lawyers vigorously cross-examined the former clients. The former clients alleged that this constituted a violation of Rule 3-310 and a breach of the duty of loyalty.

The trial court dismissed the legal malpractice claim under the anti-SLAPP statute. The court of appeal reversed, holding that legal malpractice claims are not subject to the anti-SLAPP statute.

The court of appeal was not troubled by the fact that the lawyers had not disclosed confidential information. The court reasoned that a violation of Rule 3-310 occurs when a lawyer abandons one client (even a former client) to represent a new client in proceedings in which the new client may benefit from the lawyer’s relationship with the former client. A former client “is simply not required to forfeit the right to control the
1. Before accepting a new representation, an attorney must seek informed written consent from clients with adverse interests if the attorney obtained confidential information in a former representation that is material to the new representation.
True.
False.

2. Confidential information obtained in a prior representation is material to a subsequent representation if the two representations are substantially related.
True.
False.

3. There is an absolute time limit on how long confidential information obtained in a previous representation can be material to a subsequent representation.
True.
False.

4. California state courts in some cases have approved the use of ethical screens involving public law departments but have not done so for private law firms.
True.
False.

5. A California lawyer can switch sides during an ongoing dispute without informed written consent, so long as he or she acts as an expert witness, and not as a lawyer, against the former client.
True.
False.

6. It is reasonable to presume that married lawyers will share with each other the confidences of their clients.
True.
False.

7. Lawyers who switch sides during an ongoing matter cannot be disqualified unless they disclose the former client’s confidential information.
True.
False.

8. A lawyer who fails to obtain a client’s written consent to a fee-sharing arrangement with another lawyer in violation of Rule 2-200 of the Rules of Professional Conduct nevertheless may recover in quantum meruit for the reasonable value of his or her services.
True.
False.

9. Class action lawyers who successfully obtain a settlement for their clients cannot be second-guessed if they fail to consider an additional theory not contemplated by the court order certifying the class.
True.
False.

10. A lawyer may not solicit clients in an Internet chat room for mass disaster victims because the solicitation would intrude or cause distress.
True.
False.

11. The use of an attorney’s former government title on business stationery without a statement that the attorney is retired or no longer holds the position is inherently misleading.
True.
False.
had denied the existence of the promised payment under oath and then sued to enforce it after the lawyers refused to divide the spoils.

**Limited Scope of Representation**

There is a public interest in making legal representation available to all, including those who ordinarily may not be able to afford counsel or who seek only limited services. However, as the seminal case *Nichols v. Keller*, the supreme court applied Rule 2-200 and an agreement to split attorney’s fees must be in writing. In *Chambers v. Kay*, in *Chambers*, the supreme court applied Rule 2-200 and an agreement to share fees complied with Rule 2-200 even though the client did not sign off on the arrangement until the end of the litigation, after the services already had been provided. The court explained that the rule only required the client’s written consent prior to any division of the fees.

In *Mink v. Maccabee*, an agreement to share fees complied with Rule 2-200 even though the client did not sign off on the arrangement until the end of the litigation, after the services already had been provided. The court explained that the rule only required the client’s written consent prior to any division of the fees.

In *McIntosh v. Mills*, the court drew a clear distinction between an agreement to share fees among lawyers governed by Rule 2-200 and an agreement to split attorney’s fees with a nonlawyer, which is prohibited by Rule 1-320(A). The *McIntosh* court refused to enforce an illegal contract between the plaintiffs’ counsel and a supposedly independent banking consultant to share the financial benefits from several successful class actions against Bank of America, noting that the contract was part of an “appalling abuse of the civil justice system” in which the expert

**Advertising**

Two opinions by the State Bar’s Standing Committee on Professional Responsibility and Conduct (COPRAC) addressed legal advertising issues governed by Rule 1-400 of the Rules of Professional Conduct. In Formal Opinion 2004-166, the committee considered a form of Internet ambulance advertising. Truthful advertising is protected by the First Amendment, but Rule 1-400 and Standard (6) promulgated by the State Bar guard against even truthful advertising that may mislead the public into believing that a lawyer is connected to a government agency. The opinion considered three examples. First, a private law firm called itself the Workers Compensation Relief Center. This name was deemed misleading because it suggested a connection between the firm and a state agency and because of the nature of the services offered by the firm. The firm could avoid the problem by always including a prominent disclaimers such as “A Private Law Firm,” next to its name. Second, an attorney who also serves as a part-time government official could not include her official title on her firm letterhead or business cards without violating Standard (6) because this would blur her public and private roles in a manner likely to be misleading to the public. The reach of Standard (6) is narrow, however, and would not prohibit the lawyer from listing her government position in her resume or firm brochure, or from claiming expertise on government law by virtue of her work as a public official. These allusions to her government service provide the necessary context for

An attorney who undertakes one matter on behalf of a client owes that client a duty to advise the client if there are apparent related matters that the client is overlooking and that should be pursued to avoid prejudicing the client’s interests.
potential clients. Third, lawyers who no longer hold a government position may not use their former title in their firm’s name or on their letterhead without including the qualification that they are retired or that the title alludes to a former position. Absent this qualification, the use of the former title is inherently misleading and presumptively violates Rule 1-400.40

Duties to Nonclients
A lawyer’s liability for professional wrongdoing extends beyond the client only in limited circumstances. Nonclients stating claims against lawyers have included 1) intended beneficiaries in connection with estate planning,41 2) a party to a transaction who reasonably relies on a lawyer’s inaccurate letter opinion,42 3) franchisees injured by a misleading prospectus,43 and 4) a client’s spouse for a lawyer’s failure to advise the client and his or her spouse of a potential loss of consortium claim.44

During 2004, in Osornio v. Weingarten,45 the Sixth District Court of Appeal concluded that the named executor and sole beneficiary under a will should have been afforded leave to amend a complaint against the testator’s lawyer for alleged failure to prepare a certain probate certificate necessary to make the bequest effective. The court reached this conclusion based on an analysis of the factors enumerated in the 1958 case Biakanja v. Irving46 and the 1961 decision Lucas v. Hamm.47 While stating that it did not intend its decision to imply “that a transferor’s attorney guarantees the success of the client’s intended transfer,”48 the court also noted that public policy supports encouraging lawyers to devote their best professional efforts on behalf of their clients in order to ensure that transfers of property to intended beneficiaries are free from any avoidable challenges.49

Although an intended beneficiary may be able to assert a claim for negligence against the testator’s lawyer, in Boranian v. Clark50 the court ruled that children could not assert a claim for negligence against their mother’s lawyer when three days before the mother’s death—while the mother was heavily medicated, hallucinating, and semiconscious—the lawyer changed the will to bequeath the mother’s entire estate to a male companion the mother first met about a year before her death. The court reasoned that the lawyer’s primary duty was to the mother—the testator-client—whose intention the lawyer must serve and carry out. To make the lawyer an arbiter of a dying client’s true intent or responsible to third parties whom the client does not designate as beneficiaries would compromise the lawyer’s duty of undivided loyalty to the client.

Communications with Represented Parties
Rule 2-100 of the Rules of Professional Conduct prohibits a lawyer from communicating directly or indirectly about the subject of a representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the party’s lawyer. If a party has two sets of lawyers, need one obtain the consent of both? This issue was analyzed in La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court.51 A minority shareholder petitioned to dissolve a corporation. During the litigation, the shareholder sought appointment of a receiver. In support of the motion, the shareholder submitted declarations of two of the corporation’s directors whom the shareholder had appointed to the board. Although the shareholder’s lawyers had permission from the directors’ separate lawyers to speak with the directors, the corporation’s lawyers refused to give their consent. Alleging a violation of Rule 2-100, the corporation moved to disqualify the shareholder’s lawyers. The court of appeal concluded that disqualification was not required in this case because 1) the shareholder’s lawyers had the consent of the direc-

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Permitting the disclosure of confidential information to prevent death or serious bodily harm remains the only exception to California’s strict duty of attorney-client confidentiality.

Who Is the Client?
Occasionally even the identity of the client is a matter in dispute. In *Borisoff v. Taylor & Faust*, the court-appointed administrator of an estate retained lawyers to assist him with tax issues for the estate. When he died, a new administrator was appointed for the estate. Unfortunately, the lawyers missed a deadline for filing some tax forms, which precluded the estate from claiming a refund for certain expenses. The new administrator sued the lawyers for malpractice. Though both the trial and appellate courts found that the lawyers owed no duty to the successor administrator, the state supreme court reversed, concluding that the successor administrator was the lawyers’ client. According to the supreme court, the lawyers represented the previous administrator in his representative capacity only, and therefore the successor administrator became the client upon his appointment by the probate court. The successor acquired the same powers as the predecessor had with respect to trust administration, including the power to sue for malpractice. The duties of confidentiality and loyalty were not compromised because the predecessor’s and successor’s interests were identical regarding matters of estate administration. Although the predecessor and successor administrators are different people, they constitute one client.

Bad Acts
A lawyer who lied to the California Supreme Court was held in contempt and referred to the State Bar for discipline in *In re Aguilar*. Raul Aguilar sued his former divorce lawyer for malpractice. A novel issue arose whether, after filing suit, his claims were subject to arbitration under the mandatory fee arbitration statute, and the case was accepted for review by the supreme court. Aguilar was represented by Arthur Kent, a lawyer in his law firm. Five days before the scheduled oral argument in the supreme court, Kent left Aguilar’s law firm, claiming constructive discharge. Kent did not notify the court that he would not be appearing for the argument, and no one from the firm was present when the case was called. The supreme court clerk telephoned the law firm while the justices waited, and Aguilar claimed that he was unaware of the scheduled oral argument in his own case. The court ordered Aguilar and Kent to show cause why they should not be held in contempt of court for willful neglect of the duty to appear for oral argument.

In an unusual session before the court, Aguilar repeated that he had not been aware of the argument date. This alibi was rejected, however, after an evidentiary hearing before the State Bar Court, and the supreme court held Aguilar in contempt for repeatedly lying to it and thereby violating Business and Professions Code Section 6068(d) and Rule 5-200(B) of the Rules of Professional Conduct, which prohibits misstatements to a judge. Furthermore, holding that Aguilar’s law firm, not Kent, was the counsel of record, the supreme court held Aguilar as the managing lawyer of the firm in contempt for intentionally failing to assign another lawyer to appear at the oral argument. The court fined Aguilar $1,000 and referred the matter to the State Bar for the imposition of possible further discipline. The court also found Kent in contempt for failing to advise the court of his nonappearance and fined him $250.

In *Tuttle v. Combined Insurance Company*, the plaintiff arranged for an employee of the defendant insurance company to travel from Oregon to Fresno to testify in her case. The evening before the employee was scheduled to testify, attorneys for the insurance company met with her, and she abruptly left town. When it was revealed the witness was missing, the insurance company lawyers denied knowing her whereabouts. The magistrate judge asked for permission to speak with her, but the insurance company refused and instead offered to provide a declaration from the witness explaining the reasons for her departure from the jurisdiction. The following day, the witness telephoned the court and stated that the declaration drafted by the insurer’s lawyer did not describe the real reasons she had left, and she would not sign it. She described her meeting with the insurance company lawyers, during which she felt pressured to go home. After she agreed to leave, the insurance company moved her from the hotel where she was staying when she first arrived in Fresno to another hotel until she could catch an early plane. In the call to the court, the witness offered to return, and...
that the client may seek the advice of an independent lawyer of the client’s choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

In Fletcher v. Davis, a lawyer and his corporate client (through the client’s president) orally agreed at the commencement of an engagement that, in lieu of a retainer, the lawyer’s hourly fees and costs would be secured by a lien on the proceeds of any judgment received on a conversion claim the lawyer was prosecuting on behalf of the client. The lawyer described the terms of the lien in a memorandum, which he sent to the corporate client’s president for signature. The president, however, never signed the document. After many months of litigation, including a mistrial, the client discharged the lawyer—who was owed significant hourly fees—and replaced him with another. Thereafter, the client obtained a monetary judgment on the conversion claim. The client then paid nearly all the proceeds of the judgment to a different creditor and his current lawyer. The first lawyer received nothing.

The first lawyer sued the client, the client’s new lawyer, and specified creditors of the client for violating the terms of his lien. The trial court sustained the defendants’ demurrer and dismissed the action, but the court of appeal reversed. The supreme court, in turn, reversed the court of appeal’s decision, concluding that the lawyer’s lien was an adverse interest within the meaning of Rule 3-300.

The supreme court reasoned that an interest is adverse if it is reasonably foreseeable that the interest could become detrimental to the client. With a charging lien, a lawyer could impair the client’s interests by detaining all or part of a recovery whenever a dispute arises over the lien’s existence or scope. Moreover, because the first lawyer did not obtain the client’s written consent to the lien, it was unenforceable. The court did not extend its ruling to contingency fees, however.

Confidentiality of Settlements

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association, in its Formal Opinion No. 512, considered the propriety of confidential settlements that restrain not only the parties but also the lawyers from disclosing the fact and amount of a settlement. Except in situations involving employment agreements or retirement, Rule 1-500 of the Rules of Professional Conduct prohibits lawyers from entering into agreements that restrict the right of a member of the bar to practice law. The question presented in Formal Opinion No. 512 was whether a confidentiality clause that would prevent a lawyer from disclosing the fact and amount of the settlement to other clients—a clause that is acceptable to the lawyer’s first client—would violate the rule. The opinion concluded it would not, explaining that an agreement that prohibits the disclosure of information about the settlement does not prevent the lawyer from using the information and, therefore, does not constitute a restriction on the right to practice law.

New Exception to Duty of Confidentiality

The supreme court adopted a new rule of professional conduct, effective July 1, 2004, to mirror the legislature’s amendment to the statutory duty of attorney confidentiality in Business and Professions Code Section 6068(e). The legislature amended Section 6068(e)(1), which provides that a lawyer must preserve the secrets of his or her client “at every peril to himself or herself,” to permit a lawyer to disclose confidential information to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm. New Rule 3-100 restates the exception to the duty of confidentiality now found in Section 6068(e)(2) and the similar exception to the
attorney-client privilege in Evidence Code Section 956.5. Neither the rule nor the statutes impose an affirmative obligation on the lawyer to reveal information, and the rule states that if the lawyer elects not to reveal the information, he or she does not violate the rule.67

Before revealing confidential information, the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client or a third party not to commit the criminal act or to act so as to prevent the threatened death or injury. The lawyer also must inform the client of the lawyer’s ability or decision to reveal the information, if the lawyer can reasonably do so.68 The reasonableness of the circumstances includes the risk of harm to the attorney or the attorney’s family or associates.69 Among the factors to be considered by the lawyer when determining whether to disclose confidential information are the amount of time available to make a decision, whether the client or the third party has ever acted on threats in the past, whether the lawyer believes efforts to dissuade the potential criminal actor have been successful, and the client’s rights under the U.S. and California Constitutions. The imminence of the harm may be considered, but the lawyer may reveal the information without waiting until just before the harm is likely to occur.70

Permitting the disclosure of confidential information to prevent death or serious bodily harm remains the only exception to California’s strict duty of attorney-client confidentiality. Unlike the ABA Model Rules of Professional Conduct, there is no exception in the California Rules of Professional Conduct or the Business and Professions Code that would permit revealing confidential client information for the purpose of preventing financial harm or fraud.

Multijurisdictional Practice

The California Supreme Court adopted new California Rules of Court, effective November 15, 2004, permitting out-of-state lawyers to provide legal services in California. The new rules increase the scope of multijurisdictional practice by creating safe harbors for four categories of lawyers who are admitted to the bar in other states and who seek to practice law here in California:

1. Legal services attorneys providing services to indigent clients on an interim basis.71
2. In-house counsel providing out-of-court legal services exclusively for a single, full-time employer.72
3. Litigating lawyers providing legal services in anticipation of legal proceedings in California or as part of proceedings in another jurisdiction.73
4.Transactional and other nonlitigating lawyers providing services on a temporary and occasional basis.74

Legal services lawyers and in-house lawyers are required to register with the State Bar and meet all MCLE requirements within the first year of practice. Legal services lawyers must pass the California bar examination after three years if they wish to continue to practice in this state, but there is no limitation on the number of years that in-house counsel may register.75 The out-of-state nonlitigation lawyers must limit their advice to transactions in which a material aspect is taking place in a jurisdiction outside California and in which the lawyer is admitted, or to advice to California lawyers on an issue of federal law or the law of a jurisdiction other than California, or, if the lawyer is an employee of a client, to advice to the client or the client’s subsidiaries or affiliates.76 Among other restrictions, the out-of-state litigator and nonlitigator must not establish or maintain a resident office or other systematic or continuous presence in California for the practice of law or regularly engage in substantial business or professional activities in the state.77 Information about the implementation of the new rules and applicable fees will be available on the State Bar’s Web site.78

Meanwhile, in public hearings throughout the state, the State Bar’s Commission for the Revision of the Rules of Professional Conduct continued its multiyear project of reviewing and rewriting California’s ethics rules.79
(another case involving supreme court review of ethical screening in a public law firm).


21 Id. at 1273 (quoting Castro v. Los Angeles County Bd. of Supervisors, 232 Cal. App. 3d 1432, 1443 (1991)).

22 Id. at 1276.


24 CODE CIV. PROC. §425.16.


26 Id. at 1188 (quoting American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, 96 Cal. App. 4th 1017, 1040 (2002)).


30 Id. at 838.


34 Janik, 119 Cal. App. 4th at 940.

35 Id. at 946.


37 Id. at 5-6.


39 Id. at 3.

40 Id. at 4-5 (Truthful statements nevertheless may be found to violate Cal. R. of Prof’l Conduct R. 1-400.).


46 Biaknan, 49 Cal. 2d 647.

47 Lucas, 56 Cal. 2d 583.

48 Osornio, 124 Cal. App. 4th at 335.

49 Id.


52 Id. at 788.


54 Id. at 530.

55 Id. at 534.

56 In re Aguilar, 34 Cal. 4th 386 (2004).


58 In re Aguilar, 34 Cal. 4th at 394.

59 Id.


61 Id. at 427.

62 Id. at 430, 432.


64 Id. at 68.

65 Los Angeles County Bar Ass’n, Prof’l Responsibility & Ethics Comm., Formal Op. No. 512, at 6-7.

66 Business and Professions Code §6068(e)(2) states: “Notwithstanding paragraph (1) an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent an attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”

67 CAL. R. OF PROF’L CONDUCT R. 3-100(B), (E); cmt. 5.

68 CAL. R. OF PROF’L CONDUCT R. 3-100(C).

69 CAL. R. OF PROF’L CONDUCT R. 3-100, cmt. 9.

70 CAL. R. OF PROF’L CONDUCT R. 3-100, cmt. 6.

71 CAL. R. OF PROF’L CONDUCT R. 3-100, cmt. 5.

72 CAL. R. OF PROF’L CONDUCT R. 3-100, cmt. 6.

73 CAL. R. OF CT. 964.

74 CAL. R. OF CT. 965.

75 CAL. R. OF CT. 966.

76 CAL. R. OF CT. 967.

77 CAL. R. OF CT. 964, 965.

78 See http://www.calbar.ca.gov.

79 The commission’s schedule of public meetings and draft amendments to the Rules of Professional Conduct are available at http://www.calbar.ca.gov.

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In an effort to resolve Comprehensive Environmental Response, Compensation, and Liability Act claims, the U.S. Environmental Protection Agency or other federal or state government agencies may make relatively attractive settlement offers. In these offers, the EPA may be willing to settle with a particular potentially responsible party (PRP) for a small fraction of the expected cleanup cost—for example, $2 million when the cleanup might cost more than $100 million. To encourage acceptance of the settlement, the EPA may reveal that it will shortly be issuing a unilateral administrative order requiring the potentially settling party and all other PRPs to implement the cleanup or risk treble damages and/or $25,000 per day in penalties.

Additionally, the EPA may point out that, as a result of CERCLA's joint and several liability provisions, a failure to settle could result in a $100 million verdict against the potentially settling party. Finally, the EPA may note that if the settling party does accept, it will receive a release from the United States and the state government in which the cleanup site is situated, and the consent decree will include “contribution protection,” indicating that no other PRP can assert a CERCLA (or similar state law claim) for the “matters addressed” in the decree. In effect, the decree should act as an insurance policy for the settling party barring future claims related to the site.

In this situation, it makes sense for the settling party to sign the consent decree and pay the $2 million. However, this may not end the matter with the finality that the party expects. If any non-PRP has incurred response costs, that party may be able to assert a cost recovery claim against the settling party. A non-PRP may contend that a consent decree's contribution protection provision bars only CERCLA Section 113 contribution claims and has no effect on Section 107(a) cost recovery claims. Therefore, although the client paid $2 million to resolve liability at the site, it may still face litigation (and joint and several liability) for the full $100 million site cleanup cost. Not only could this scenario actually occur but also the plaintiff’s legal position might well be upheld in court.

CERCLA has two primary purposes: to impose the cost of cleanup on the responsible parties and to achieve the prompt cleanup of hazardous waste sites. To accomplish these purposes, CERCLA couples a harsh liability scheme with a mechanism to encourage prompt set-
CERCLA’s liability scheme has been described “as a black hole that indiscriminately devours all who come near it.” This is because a CERCLA PRP confronts strict liability as well as joint and several liability, and CERCLA’s list of four broad PRP classes encompasses almost all persons associated with a particular site: 1) the current owner and operator of the facility, 2) the past owner or operator of the facility at the time of a disposal of hazardous substances, 3) the person who “arranged for” disposal or treatment of a hazardous substance, and 4) in certain cases, transporters of hazardous substances.

CERCLA recognizes three potential defenses: an act of God, an act of war, or an act or omission of a third party. This third category includes the “innocent owner” defense, which is available if a current owner can show that 1) the owner did not know and had no reason to know of the contamination when the site was acquired, 2) the owner is a government entity that acquired the property by escheat, involuntary transfer, or exercise of eminent domain authority, or 3) the owner acquired the property by inheritance or bequest.

In addition to the above defenses, recent CERCLA amendments have carved out exceptions to the current owner-liability class to exclude, among others, an otherwise innocent owner of a property contaminated by hazardous substances from a contiguous or nearby site; a “bona fide prospective purchaser” of a contaminated site, as that term is defined in CERCLA; a lender with only indicia of ownership or, in certain instances, that has foreclosed upon a site; or a unit of government that acquired the site involuntarily.

CERCLA provides two causes of action to prospective plaintiffs: 1) a cost recovery action under Section 107(a) through which PRPs are jointly, severally, and strictly liable for “costs incurred by any other person consistent with the national contingency plan,” and 2) a contribution action under Section 113(f)(1) through which, “any person may seek contribution from any other person who is liable or potentially liable” under CERCLA. Typically, the government asserts a cost recovery claim under Section 107(a), and PRPs assert contribution claims against other PRPs under Section 113.

To encourage prompt and efficient settlement of CERCLA claims with the government, Section 113(f)(2) of CERCLA provides the significant incentive of contribution protection, which provides that a party that settles with the government “shall not be liable for claims for contribution regarding matters addressed in the settlement.” Therefore, a party that elects not to settle may later face a disproportionate amount of liability. For example, if three PRPs are liable for a $50 million CERCLA cleanup, and one party settles with the government for $5 million, the remaining two parties may not seek contribution from the first party even if its fair share is later demonstrated to actually be $40 million. Congress recognized that this “measure of finality” is of significant value to a potential settling party and thus fosters prompt settlement.

The Section 107(a) Loophole

In the 1990s, certain PRPs asserted Section 107(a) claims against other PRPs for a variety of reasons. For example, Section 107(a) allows joint and several liability whereas liability under Section 113 is pursuant to “such equitable factors as the court deems appropriate.” Another incentive for a PRP to assert a Section 107(a) claim rather than a Section 113 claim was to bypass CERCLA contribution protection; that is, PRPs contended that CERCLA contribution protection barred only Section 113 claims, not Section 107(a) claims. In such cases, district courts were “fairly uniform” in restricting plaintiffs from making an “end-run around the damages immunity provided by §113(f)(2) to persons who have resolved their liability to the government.” In other words, the district courts generally did not allow a plaintiff PRP to assert a Section 107(a) claim against a settled PRP.

Ultimately, in a series of cases—which might be termed the PRP Section 107(a) cases—the federal courts of appeal created the bright-line rule that PRPs could not assert Section 107(a) claims and were limited solely to Section 113 contribution claims. Although the rule applied regardless of whether the defendant PRP had settled, the courts of appeal reached their conclusion in part on a concern that an alternate rule would render Section 113’s contribution protection provision irrelevant. The courts of appeal were correct to be concerned, for at least two federal district courts had allowed a PRP to assert a Section 107(a) claim against settled PRPs that enjoyed contribution protection.

As explained by the First Circuit, an interpretation allowing a PRP to assert a Section 107(a) claim would “emasculate the contribution protection component of CERCLA’s settlement framework.” If a PRP were allowed to assert a claim against a settling PRP under Section 107(a), the mechanism for encouraging settlements would “be gutted,” and Section 113(f)(2) would “afford very little protection.” This, in turn, would thwart CERCLA’s aim to achieve prompt cleanups.

Because of the rule established by the PRP Section 107(a) cases, a PRP cannot assert a Section 107(a) cost recovery claim. However, this did not entirely close the loophole. Section 107(a) claims remain available to non-PRPs. Therefore, one must consider whether Section 113(f)(2) equally bars a non-PRP from pursuing a Section 107(a) claim.

Because a Section 107(a) action brought by a non-PRP is not, by definition, a contribution action, it is inviting to conclude that Section 113(f)(2)’s contribution protection is inapplicable to a Section 107(a) claim. Indeed, the rationale set forth by the federal courts of appeal in the PRP Section 107(a) cases supports this conclusion, for otherwise there would not have been a concern that a plaintiff PRP could circumvent Section 113(f)(2) by asserting a Section 107(a) claim.
As succinctly stated by one district court, “It is an inescapable conclusion that §113(f)(2) bars only contribution claims because Congress intended that responsible and potentially responsible parties be able to bring only contribution claims.”

Similarly, one recent court that addressed this issue in a case involving a non-PRP plaintiff held that Section 113(f)(2) does not act as a bar to a Section 107(a) claim. In Borough of Throop v. Gould Electronics, a non-PRP municipality landowner brought action against a prior landowner alleging abatement of a statutory nuisance, quantum meruit, and violations of CERCLA and a Pennsylvania statutory equivalent. As one of its defenses raised at the summary judgment stage, Gould Electronics pointed to the multiple consent orders it had entered into with the EPA and state authorities and asserted that Throop’s CERCLA claim was barred by CERCLA contribution protection and its remaining claims preempted. The Middle District of Pennsylvania court held that since it was allowing the municipality to proceed as an innocent owner under Section 107(a), “Gould’s arguments regarding contribution protection and preemption are moot.”

Likewise, a Northern District of Ohio court indicated in dicta that Section 113(f)(2) does not bar a non-PRP’s Section 107(a) action. In Advanced Technology Corporation v. Elkism, Inc., the court offered a hypothetical scenario in which a settling party (X) was sued in contribution by two non-settlers (Y and Z). The court concluded that such a claim would be barred, “[u]nless, of course, Y or Z is an innocent landowner and can pursue cost recovery under §107(a).”

However, the legal conclusion that Section 113(f)(2) does not bar a Section 107(a) claim runs contrary to the rationale set forth by the federal courts of appeal (and several district courts) in the PRP Section 107(a) cases. If a PRP does not obtain finality by its settlement with the government, it will be unwilling to enter into such a settlement. For example, in the PRP Section 107(a) case that it decided, the First Circuit held, “Exposing early settlers…to later contribution actions…would greatly diminish the incentive for parties to reach early settlements with the government, thereby thwarting Congress’s discernible intent. This result makes little sense.”

It makes even less sense to expose the early settler to a cost recovery action and its attendant strict, joint and several liability. A PRP will then have even less incentive to settle early with the government. Indeed, a practitioner would be remiss to recommend that a client provide a significant monetary settlement to the government if the settlement does not release the client from liability for the matters addressed in the settlement agreement. Therefore, it follows that CERCLA contribution protection should apply equally to Section 107(a) and Section 113 claims.

Arguments to the contrary are not persuasive. For example, one could contend that a settling PRP should always pay under the “polluter pays” principle of CERCLA. However, as the First Circuit’s holding points out, this rule would thwart CERCLA’s other purpose of obtaining funds for prompt cleanups. Further, it is not always equitable for a “polluting” PRP to pay rather than the “innocent” non-PRP. For example, the polluting PRP may have contributed little contamination, and in fact, may even be classified as a de minimis PRP. In contrast, a non-PRP could conceivably obtain the site at a steep discount, clean up the site (thereby substantially increasing its value), and then obtain 100 percent recovery of cleanup costs from the de minimis PRP settlor. This would result in a windfall for the non-PRP.

Another potential argument against extending Section 113(f)(2) to non-PRP Section 107(a) actions is the unease associated with the government bargaining away a non-PRP’s rights in settlement. However, this is simply an accepted part of the CERCLA statutory scheme. As the circuit courts have explained, “The consent decree and the covenant not to sue regulate only the settling parties’ liability to the United States and to [the state]. How…can language so limited extinguish claims by strangers? The answer is: because §113(f)(2) says so.”

Therefore, if courts interpret Section 113(f)(2) as inapplicable to a Section 107(a) claim, this interpretation will thwart CERCLA’s goal of encouraging prompt cleanups.

The Growth of Non-PRP Claims

Until recently, most prospective CERCLA plaintiffs fell into at least one of CERCLA’s four broad PRP categories and were thus limited to Section 113 claims. However, the recent amendments to CERCLA simultaneously reduced the classes of PRPs associated with a site and expanded the classes of non-PRPs. Now, a Section 107(a) claim is likely to be asserted by any number of non-PRPs, including bona fide purchasers, contiguous property owners, lenders, government agencies, and otherwise “innocent owners.”

More significantly, in the recent case of Cooper Industries, Inc. v. Aviall Services, Inc., the U.S. Supreme Court suggested that even certain PRPs may be able to assert Section 107(a) claims. The Court explicitly acknowledged that the PRP Section 107(a) cases prohibit a PRP from asserting a Section 107(a) claim, but the Court declined to resolve this contradiction, because the issue was not before it, and instead directed the Fifth Circuit to confront the issue. However, in dissent,
Justice Ginsburg, joined by Justice Stevens, suggested the issue was before the Court and held that a PRP could bring a “contribution action” under Section 107(a). Therefore, the universe of potential CERCLA plaintiffs that can assert Section 107(a) claims is greatly expanding. These parties will look to viable defendants—including (or especially) those PRPs that previously settled claims with the government.

Moreover, the cleanup of a site is frequently underfunded, and a non-PRP may step in to complete the work. This happens when the aggregate settlement funds provided by PRPs are less than the actual cleanup cost due to a variety of reasons, including, among others, cost overruns, orphan shares, and recalcitrant PRPs. If any of these risks is realized, the cleanup will not be fully funded and an interested non-PRP may complete the remedy.

Indeed, the government has a financial interest in allowing this to occur. As an example, assume the government has settled with several PRPs for an aggregate of $25 million. Subsequent to the settlement, the remaining universe of PRPs disappears through bankruptcies, ability to pay settlements, or the like. If any of these risks is realized, the cleanup will not be fully funded and an interested non-PRP may complete the remedy.

Because the government has released all viable PRPs, the government faces the option of either completing the remedy using $15 million in federal funds or allowing an interested non-PRP (for example, the bona fide or innocent site owner) to fund the completion of the remedy itself. Obviously, the government has a financial interest in choosing the latter option, but this may allow a non-PRP to recover the unfunded $15 million from PRPs that had settled.

Of course, an underfunded cleanup is not the only scenario in which a non-PRP could incur site cleanup costs. A non-PRP may incur response costs on its own volition at any time. If the costs incurred are consistent with the National Contingency Plan (NCP), the non-PRP may recover the costs from a settling PRP. Likewise, a non-PRP may incur response costs consistent with the NCP but outside the scope of work envisioned by the government. This could lead to an unfair result in which a settling PRP pays twice to implement the same remedy—one to the government with an understanding that the government would implement the remedy and once to a non-PRP that actually incurred response costs.

Addressing the Dilemma

The simplest solution to this problem would be to amend CERCLA to confirm that Section 113(f)(2) applies to Section 107(a) claims. An amendment to this effect was suggested in Section 508 of the proposed Superfund Cleanup Acceleration Act of 1998. However, the bill did not become law, and legislation containing similar language does not appear on the horizon.

Therefore, a PRP contemplating settlement with the government should carefully investigate the status of the site to ascertain whether a non-PRP—such as an innocent owner, contiguous owner, or bona fide purchaser—has or will have a vested interest in undertaking a response. Of course, no amount of investigation can foreclose the possibility of a non-PRP obtaining an interest in the site in the future, but due diligence can provide a client with some peace of mind—or, at least, raise a red flag.

If a potential plaintiff non-PRP exists, a PRP should consider approaching the non-PRP to include it in settlement discussions with the government. The non-PRP will likely have an interest in seeing funds devoted toward cleanup and may be willing to provide a release to the settling party in exchange for the settling party’s contribution of funds devoted toward cleanup. In some cases, the non-PRP may even be a necessary or indispensable party to settlement negotiations with the government. For example, if the...
non-PRP has already incurred substantial response costs or enjoys unique access or facilities to conduct the cleanup, it is imperative that a settling PRP include the non-PRP in settlement negotiations. These cases have been analogized to a three-legged stool—all three parties must agree on the settlement terms or the settlement will fall.

If an interested non-PRP refuses to cooperate, a practitioner may find an ally in the U.S. or local state government. Government agencies will protect themselves from being rendered irrelevant and may support an argument that contribution protection applies to all claims. Indeed, in at least one instance, a state has entered into a settlement agreement providing that contribution protection applied not only to contribution claims but also to Section 107(a) cost recovery claims and non-CERCLA claims that seek substantially similar relief. A case weighing the validity of such a clause in a settlement agreement has not been found, so the clause would be of even greater value if it were accompanied by a promise of defense or indemnity from the state government in the event a court holds the clause invalid.

A creative approach involving the federal government is through citation to CERCLA Section 122(e)(6), which requires EPA approval of any action taken by a PRP after a remedial investigation/feasibility study (RI/FS) occurs at a site. Action taken without EPA approval would be inconsistent with the NCP, and costs not incurred consistent with the NCP are not recoverable under Section 107(a). If the EPA has control over attempts by non-settlors to incur post-RI/FS remedy costs, a settling PRP could demand that the EPA wield this control to ensure that a non-PRP does not incur recoverable costs.

Unfortunately, the language of Section 122(e)(6) indicates that the EPA’s approval is required only for actions taken by a PRP. A non-PRP could then argue that under the principle of expressio unius est exclusion alterius, it may take action without EPA approval. Although this counterargument is persuasive, there is little logical basis to allow a non-PRP to take action carte blanche, while a PRP must obtain EPA approval. This provides further evidence that CERCLA’s drafters did not envision that private parties would assert Section 107(a) cost recovery actions.

At the very least, a settling PRP should provide all interested non-PRPs with notice of the potential settlement between the government and the PRP. If a non-PRP did not receive notice and an opportunity to be heard prior to entry of the consent decree memorializing the settlement, a court may have due process concerns before dismissing a non-PRP’s Section 107(a) claim in response to a Section 113(f)(2) argument.
Finally, although this issue will typically arise when there is an unfunded liability, in rare instances a remedy may be fully funded by settling parties, but the government may fail to properly expend or distribute the funds so that a non-PRP incurs response costs. In that case, the settling PRP should investigate impleading the government.

There presently remains an often unrecognized risk associated with settling CERCLA claims with the government. Therefore, a PRP should ascertain and address as fully as possible the probability of non-PRP claims arising at the site. Yogi Berra was right when he said, “It ain’t over ‘til it’s over.” But the aphorism will be of little comfort to clients faced with liability for a costly matter that they believed to be over.

2 Long Beach Unified Sch. Dist. v. Godwin, 32 F. 3d 1364, 1366 (9th Cir. 1994).
5 42 U.S.C. §9607(b).
6 42 U.S.C. §§9601(35), 9607(b).
8 42 U.S.C. §§9601(40), 9607(r).
10 42 U.S.C. §§9601(20)(D).
15 See Cannons Engg’r Corp., 899 F. 2d at 90-91; United Tech. Corp., 33 F. 3d at 103.
16 See, e.g., Matter of Reading Co., 115 F. 3d 1111 (3rd Cir. 1997); Bedford Affiliates v. Sills, 136 F. 3d 416 (2d Cir. 1998).
21 However, at least one court has adopted an exception to this rule and allowed a PRP that has not polluted the site in any way to assert a §107(a) claim. See Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F. 3d 1235, 1241 (7th Cir. 1997).
22 Federal courts of appeal expressed two further concerns in creating this rule. First, the courts were concerned that if a plaintiff PRP could assert a §107(a) claim against another PRP, then, given joint and several liability, the plaintiff PRP could conceivably avoid liability entirely and foist all response costs on the defendant PRP. See, e.g., Colo. E.R.R., 50 F. 3d at 1336; New Castle County, 111 F. 3d at 1121-1122; Pinal Creek Group, 118 F. 3d at 1303. Second, §107(a) claims had a six-year statute of limitations versus §113(f)(1)’s three-year statute of limitations; thus, courts were concerned that a PRP would avoid the statute of limitations by categorizing its claim as a §107(a) claim. See, e.g., Colo. E.R.R., 50 F. 3d at 1336; Pinal Creek Group, 118 F. 3d at 1303.
24 United Techs. Corp., 33 F. 3d at 102-03; see also
Colo. E.R.R., 50 F. 3d at 1536; Akzo Coatings, 30 F. 3d at 764. But see Burlington Northern R.R., 738 F. Supp. at 1342-43 (PRP allowed to proceed with a §107 claim against a settling PRP).

24 United Techs. Corp., 33 F. 3d at 102-03.

25 Id.

26 “By its nature, contribution only occurs between co-liable parties...” Pinal Creek Group, 118 F. 3d at 1306.

27 See, e.g., Akzo Coatings, Inc., 30 F. 3d at 764. In holding that a PRP’s §107(a) claim sounded in contribution and thus could be barred by §113(f)(2), the court recognized that the plaintiff experienced no injury of the kind to give rise to a §107(a) claim: “[i]t is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands.”


32 Contribution protection associated with a de minimis settlement is governed by §9622(g)(5), but that provision’s language, and thus the issues, are identical. In fact, it should be understood that the issues raised likely apply to most types of CERCLA settlements with the government, e.g., a PRP that enters into an ability-to-pay settlement remains subject to a non-PRP’s §107(a) claim.

33 United States v. Colo E.R.R., 50 F. 3d 1530, 1536-37 (10th Cir. 1995) (quoting Akzo Coatings, Inc. v. Aigner Corp., 30 F. 3d 761, 771 (7th Cir. 1994)).


36 Id. at 584-86.

37 Id. at 586-88 (Ginsburg, J., dissenting).

38 40 C.F.R. 300 et. seq. The National Contingency Plan is the federal government’s blueprint for responding to hazardous substance releases.

39 42 U.S.C. §9607(a) (B).

40 EPA's Web site discussion of de micromis contribution protection indicates a view that contribution protection is expansive. “Such a settlement may provide the waste contributor with a covenant not to sue and contribution protection from the United States. As a result, the settling party is protected from future legal actions brought by EPA or other parties at the site.” EPA, Superfund Frequently Asked Questions, at http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/index.html (visited Nov. 10, 2004). See also Akzo Coatings, Inc. v. Aigner Corp., 30 F. 3d 761, 764 (7th Cir. 1994) (United States as amicus curiae supports position that PRP cannot seek §107 relief); United States v. SCA Servs. of Ind., Inc., 849 F. Supp. 1264, 1281 n.16 (N.D. Ind. 1994) (United States files a brief stating that allowing a §107 claim, “would undermine the contribution protection provision of Section 113(f)(2) and discourage CERCLA defendants from settling with the government.”).


California recognizes that goodwill may exist in the individual professional. But the hallmarks of goodwill—an ongoing business and continued patronage—correctly attach to an enterprise, not an individual. Thus, the absence of a market and of a real value for the individual’s personal goodwill are indicators that goodwill as a quantifiable asset does not exist in small and solo professional practices. Indeed, the legal basis for assuming that small and solo practices have goodwill is flawed.

Goodwill is the expectation of the continued popularity of a business. An intangible asset, it has been called the most intangible of intangibles.¹ Two hundred years ago, John Scott, Lord Eldon, chancellor of England, defined goodwill as “the probability that the old customers will resort to the old place.”² Echoing Lord Eldon, California and several

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other states succinctly define goodwill as “the expectation of continued public patronage.” Goodwill has been more fully defined as: The advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or afluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient particularities or prejudices.

Thus, the significant attributes of goodwill are that: 1) it is acquired by a business, 2) its value is in excess of hard assets such as capital, stock, funds, or property, and 3) it is based on the likelihood of continued popularity and patronage resulting from the business’s reputation. The existence of an ongoing business is a crucial aspect of goodwill.

When first examining the issue of goodwill in a professional, California courts distinguished between goodwill in the individual and goodwill in the professional’s business. Some states clearly affirm the difference between individual and business goodwill by using separate nomenclature: The individual holds “personal goodwill,” and the business holds “enterprise goodwill.” This nomenclature allows for more precise conceptualization of goodwill—and, ultimately, for more equitable resolution of the issue of goodwill.

In 1958, the California Supreme Court examined whether goodwill could attach to an advertising agency—a personal services company. In resolving the question, the court distinguished between the work of a talented individual and the business created by that individual. The court concluded that although the goodwill of a business or company may be the result of the skill or reputation of an individual connected with the company, the resultant goodwill attached to the company and continued with it even after the skilled individual was no longer associated with the company. Thus, the court acknowledged the distinction between a personal service organization and the person providing the personal service and allowed goodwill to attach only to the organization.

Relatively contemporaneously, the California Court of Appeal also examined whether or not goodwill could attach to a business driven by the skills of its owner. In a marital dissolution action, the husband, a dental technician, argued that goodwill could not attach to his dental laboratory business because, he alleged, the business depended solely on his personal skill and ability. He was suggesting that, absent him, dentists would not choose his dental lab. The court rejected his argument, ironically tracing it to the “early and narrow definition given to goodwill by Lord Eldon.” Yet it is precisely this “narrow definition” that is embraced by many states in their statutory definitions of goodwill.

The court endorsed what it believed was a better doctrine from American Jurisprudence, which suggested that goodwill could also exist in a professional practice or in a business that is founded upon personal skill or reputation because “winning the confidence of [the skilled individual’s] patrons and securing immunity from successful competition for their business” exemplifies the species of goodwill capable of being transferred.

Thus, the two early California cases recognized goodwill that existed in a company in which the public patronage of the company survived the absence of its founding professional and goodwill that could be transferred. Transferable goodwill in the business was distinguished from the skill of the individual involved in founding the business. This distinction has been developed more fully in decisions by other states, but it became blurred in later California decisions.

In 1974, in the landmark case of Marriage of Foster, the California Court of Appeal stated confidently that “it is well-established that the goodwill of a husband’s professional practice as a sole practitioner is taken into consideration in determining the community property award to the wife.” But this concept was not so well-established. The careful distinction made in the early cases between the individual and the individual’s company was omitted in later opinions and, ultimately, in finding the concept of goodwill in the solo practitioner to be well-established, the Foster court relied upon the abbreviated dicta of the later cases. Yet none of the cases cited as support by Foster held that goodwill exists in the solo practitioner or professional. In one case, the husband had not contested on appeal the finding that goodwill existed in his medical practice; he merely contested the valuation of the goodwill. In a second case, the appellate court did not analyze whether goodwill existed in the husband’s medical practice but concluded that goodwill should be considered in determining the property award to the wife. In a third case, the court simply acknowledged that the wife had an interest in her husband’s law practice that had been developed during the marriage. The case included no discussion of goodwill.

**Ingrained Assumption versus Nuanced Analysis**

The assumption that goodwill exists in a professional practice is so ingrained in California law that the legal discussion in published opinions generally centers on valuation of that interest rather than on the existence of the interest. In the 30 years since California courts first examined goodwill and distinguished the individual from his or her business or company, the distinction between personal goodwill and enterprise goodwill has almost disappeared.

Indeed, New York courts have sought to characterize a person’s talents and popularity as an asset. These courts have analogized a person’s expertise in a field that allowed him or her to become an exceptional wage earner to that of the goodwill of a business. New York cases focused on a person’s “enhanced earning capacity,” calling it an asset of the marital estate. (New York courts did not adopt the nomenclature “professional goodwill” or “personal goodwill.”) The source of that enhanced earning capacity was not relevant: It could be education, professional license, or fame.

New York’s concept of enhanced earning capacity as a divisible asset of the marriage is based upon the premise that marriage is an economic partnership to which both parties contribute, as spouse, parent, wage earner or homemaker. Focusing on the enhanced earnings capability as the marital asset, New York courts have continued to expand the various training and professional resources that they recognize as an asset. Indeed, New York courts have found the asset of enhanced earning capacity to exist in a supermodel/actress, an opera singer, a stockbroker, and a police lieutenant.

Outside of the two giants—California (whose courts obscure the distinction between the goodwill in a business and the goodwill in an individual professional) and New York (whose courts view the enhanced earning capacity of the individual as personal goodwill)—other states have advanced the law on the issue of goodwill attaching to the individual in a more careful and thoughtful fashion.

In the state of Washington, the courts have recognized the distinction between goodwill and earning capacity—and their nuanced analysis exposes the notion of personal goodwill as a fiction. Goodwill is not the earning capacity itself; it is the asset that supplements the earning capacity of another asset, the business or profession. Moreover, goodwill is a distinct asset of a business or professional practice that may influence or be influenced by earning capacity. The concept of goodwill as the expectation of sustained business and continued patronage, of “old customers [resorting] to the old place,” must survive an individual, with patrons continuing to go to a store absent the original founders or to a law firm absent the found-
The Value of Celebrity

A SUBSET OF PERSONAL GOODWILL is celebrity goodwill, which generally refers to a person’s fame or enhanced earning capacity. As with personal goodwill, celebrity goodwill should not be characterized as an asset. California does not recognize celebrity goodwill as an asset; only New Jersey has done so, declaring it to be a distributable asset. The issue arose in the case of actor Joe Piscopo, best known for his work on Saturday Night Live. However, the Piscopo case is not authority for the legitimacy of the concept of celebrity goodwill because Joe Piscopo conceded at the appellate level that celebrity goodwill could be a distributable marital asset. Thus, the appellate court addressed itself exclusively to valuing the asset. It never examined—or struggled with—the problems inherent in the underlying concept of celebrity goodwill.

Celebrity goodwill should not be confused with the right to publicity, which is an individual’s right to exploit his or her own name and likeness for commercial gain. While goodwill is dependent on continued patronage by strangers, the right to publicity is entirely within the control of the individual celebrity.

Goodwill cannot be valued in any way that takes future earnings into consideration. However, a consideration of future earnings is not prohibited in all situations: Future earnings are relevant to determining the need or ability to pay child or spousal support.

Although the question of whether an individual can be forced to exploit his or her celebrity status has not been fully explored in the case law, it is established that courts may include a present value for future commercial exploitation of name and likeness when determining a celebrity’s net worth relative to punitive damages.—H.K.A.
Similarly, the uniquely personal skills of a celebrity cannot—by nature—be shared with another person. Thus, recognizing the distinction between personal and enterprise goodwill underscores that celebrity goodwill is not a marital asset. (See “The Value of Celebrity,” page 41.)

Valuation and Future Earnings

Goodwill presupposes continued patronage and continued popularity. But goodwill cannot be valued in any way that incorporates future earnings, because future earnings are the separate property of the earning spouse.40 Future earnings represent the future effort and work of the individual and no longer belong to the community.41 (In California, a community property state, earnings are separate property after the date of separation. In other states, the beginning of separate property earnings may be marked by the date of separation or the date of judgment. Whatever date is used, any asset that incorporates future earnings is reliant on separate property earnings.) While future earnings are relevant to determining spousal support and alimony, they are not a proper consideration for dividing marital assets.42

Indeed, as the Missouri Supreme Court noted, “[T]he concept of professional [personal] goodwill evanesces when one attempts to distinguish it from future earnings.”43 The distinction cannot be made because goodwill assumes the continuation of work. Further, maintaining personal goodwill requires the individual to continue nurturing or honing and marketing his or her skills. Those efforts necessarily occur postseparation, giving rise to postseparation earnings.

The concept of personal goodwill as an asset evaporates further as one attempts to value it. Absent a recent actual sale of the professional practice or a real offer to purchase the practice, or absent evidence of the goodwill value in a similar practice in a relevant geographic and professional market, the existence and value of goodwill is entirely speculative.44

It is remarkable that some states, including California, have held that personal goodwill can be valued even if it cannot be sold.45 But the fiction of value—notwithstanding the magical working of numbers by forensic accountants—has not been lost on some courts. Following the lead of the Missouri Supreme Court, the Missouri Court of Appeals held that “a professional practitioner is not required to pay a spouse a share of intangible assets at a judicially determined value that could not be realized by a sale or other method of liquidating value.”46 In even stronger language, the District of Columbia Court of Appeals called this forced purchase of an intangible asset at a judicially deter-
mined value a “disturbing inequity.”47

The court could not have chosen a more apt phrase. No professional should be forced to pay a speculative price for the privilege of using his or her own talents. The law cannot sustain the concept of personal goodwill in the individual as a divisible asset.

3 See, e.g., BUS. & PROF. CODE §14100 (California); 60 OKLA. STAT. §315 (Oklahoma); MONT. CODE ANN. §30-13-121 (Montana); S.D. CODIFIED LAWS §43-35-6 (South Dakota).
4 Marriage of Foster, 42 Cal. App. 3d 577, 581-82 (1974); May v. May, 214 W. Va. 394, 589 S.E. 2d 536, 541 (2003). See also WYO. STAT. ANN. §1-26-713 (1977) (“‘Goodwill’ consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality and any other circumstances resulting in probable retention of old or acquisition of new patronage.”).
6 See, e.g., May, 589 S.E. 2d at 541.
7 Smith, 50 Cal. 2d at 301.
8 Id. at 302.
9 Id.
10 Mueller, 144 Cal. App. 2d 245.
11 Id. at 240 (citing 24 AM. JUR. 2d 808).
12 Id. Ultimately, the court rejected the husband’s claim that the business depended solely on his personal skill and abilities, noting that the business employed five technicians in addition to the husband.
13 Smith, 50 Cal. 2d 294.
14 Mueller, 144 Cal. App. 2d 245. This concept of transferability is especially important in any discussion of professional goodwill involving an attorney. In some states, law practices cannot be bought and sold like other professional practices. See Hershewe v. Hershewe, 931 S.W. 2d 198 (Mo. 1996); Travis v. Travis, 1990 Okla. 57, 795 P. 2d 96, 97 (1990).
21 Id., 139 Misc. 2d at 444, 527 N.Y.S. 2d at 949; O’Brien v. O’Brien, 66 N.Y. 2d 576, 498 N.Y.S. 2d 743, 489 N.E. 2d 712 (1985) (“A professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also the enhanced earning capacity it affords its holder, which may not be revoked without due process of law.”).
23 Allocco v. Allocco, 152 Misc. 2d 529, 578 N.Y.S. 2d 995 (1991) (police lieutenant) (“The two degrees [associate’s and bachelor’s degrees] obtained by the Defendant in this case constitute marital property, which enhanced the Defendant’s earning capacity...”).
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because of the knowledge and other skills represented by those degrees. In addition, successful completion of the civil service examinations, which resulted from the knowledge represented by those degrees as well as the direct studies for such examinations, enhanced the Defendant’s earning capacity, and should be considered as marital property subject to equitable distribution.”; Moll v. Moll, 187 Misc. 2d 770, 774, 722 N.Y.S. 2d 732, 734 (2001) (stockbroker) “[A]n interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and nonfinancial contributions made by caring for the home and family.”


26 Id.

27 Id.

28 Hershew v. Hershew, 931 S.W. 2d 198, 204 (Mo. 1996).

29 Hanson, 738 S.W. 2d at 433.

30 Id.

31 Id. at 434 (emphasis added).


33 Prahinski, 321 Md. at 239.

34 Id. at 239-40.


37 Id. at 547.

38 Id. at 545-46.

39 Marriage of Slater, 100 Cal. App. 3d 241, 247 (1980); Marriage of King, 150 Cal. App. 3d 304, 309 (1984); Hanson v. Hanson, 738 S.W. 2d 429, 435 (1987). Valuing goodwill may also result in a “double dip” into a spouse’s future earnings: The income stream used to value goodwill is distributed as property and is also used to pay support. See Donald J. Miod, The Double Dip in Valuing Goodwill in Divorce, CPA LITIGATION SERVICE COUNSELOR, vol. 1998, Issues 4 & 5, at 1 (Apr. & May 1998).


42 Hanson, 738 S.W. 2d at 434 (citing Holbrook v. Holbrook, 103 Wisc. 2d 327, 309 N.W. 2d 343, 354 (1983)).

43 Id. at 435.

44 Marriage of Foster, 42 Cal. App. 3d 577, 584 (1974); Marriage of Watts, 171 Cal. App. 3d 366, 372 (1985); Hall v. Hall, 103 Wash. 2d 236, 239 (1984), disapproved on the issue of valuation only in Hanson, 738 S.W. 2d 429.

45 Marriage of Hershew, 931 S.W. 2d 198, 203 (1996).

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21031 Ventura Boulevard, 12th Floor, Woodland Hills, CA 91364, (818) 347-7550, fax (818) 347-7905, e-mail: chrolin@chrolin.com. Web site: www.chrolin.com. Contact Christopher Rolin. Christopher Rolin is a highly effective trial attorney with over 38 years of trial activity in civil litigation. His area of emphasis is attorney malpractice, focusing on the applicable community standard of care for practicing attorneys in the litigation areas. His trial experience has resulted in numerous assignments as an expert witness on trial and standards of care issues. He has been retained as an expert by both plaintiffs and defendants in legal malpractice cases. He has spoken before numerous professional groups concerning trial practice issues.
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**CLE Preview**

**Substance Abuse and Sexual Addiction Allegations in Family Law Cases**

ON SATURDAY, JUNE 11, the Family Law Section will present a program on allegations of substance abuse in custody cases. Ron Siegel, an expert on drug testing, will discuss the effects of alcohol, prescription medication, and street drugs on behavior. He will also discuss methods and the limits of drug testing. Allegations of sexual addiction and the use of Internet pornography have also become increasingly frequent in custody cases. Controversy exists, however, about the application of the term “addiction” to sexual behavior and whether it should be a factor in custody orders. John Sealy, medical director of Del Amo Hospital Sexual Addiction Recovery Unit, will discuss sexual addictions, dual diagnoses with substance abuse, and treatment options for addictions.

Each speaker will be followed by a panel discussion including a judicial officer, attorney, and custody evaluator about the issues raised by these types of allegations in family law cases. Panelists will include Judge Robert Schnider, Judge Marjorie Steinberg, Ronald F. Brot, Linda Gross, Stan Katz, and Jeffrey Lulow. This program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 8 A.M., with the program continuing from 9 A.M. to 4 P.M., with lunch at noon. The registration code number is 009020. The prices below include the meal.

- $80—CLE+Plus members
- $150—Family Law Section members
- $170—other LACBA members
- $185—all others
- $195—all at-the-door registrants

5.5 CLE hours, with family law legal specialization credit

**Practical Persuasion**

ON WEDNESDAY, JUNE 15, the Los Angeles County Bar Association will present an interactive program led by speaker Scott Wood on the key principles for writing motions and briefs. In addition to these principles, the workshop includes a brisk review of 10 tips for clarity and conciseness. This program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. On-site registration and a meal will begin at 5:30 P.M., with the program continuing from 6 to 9:15 P.M. The registration code number is 009020. The prices below include the meal.

- $100—CLE+Plus members
- $175—other LACBA members
- $225—all others

3.25 CLE hours

**END-OF-LIFE ISSUES AFTER SCHIAVO**

ON FRIDAY, JUNE 17, the Individual Rights Section will present a program exploring the legal and ethical issues that arise from the difficult choices individuals and society face at the end of life. Topics to be discussed include physician-assisted suicide, surrogate or proxy decision making, advance directives, the role of the courts, and the impact on the disabled of expanding end-of-life options.

A prestigious panel will present these important and timely topics. Speakers will include Lloyd E. Levine, California Assembly member and principal coauthor of the California Compassionate Choices Act; Jon Eisenberg, a member of the Michael Schiavo legal team; and Vicki Michel, an expert on bioethics. This program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 11:30 A.M., with the program continuing from noon to 2 P.M. The registration code number is 009014. CLE+Plus members and others may attend for free ($10 meal not included).

2 CLE hours

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

For a full listing of this month’s Association programs, please consult the County Bar Update.

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THE MILLER-AYALA ATHLETE’S AGENT ACT became effective on January 1, 1997, to stem what was perceived to be an increase in unethical conduct by agents. In support of the legislation, one of its sponsors, former Senator Ruben Ayala, a USC season ticket holder, stated: “I’ve had enough of these unscrupulous agents who offer kids money to sign with them. Under current law, they can get a university on probation or make a kid ineligible to play and nothing happens to the agent. They just move on to the next kid.”

The act covers anyone, including attorneys, who solicits a student athlete, or acts as his or her agent in negotiating a sports, endorsement, or financial services contract. “Negotiate” is broadly defined as having contact with any pro sports organization and as being present during contract discussions with a pro representative.

Agents must register with the secretary of state, provide detailed personal information, and either obtain a $100,000 errors and omissions policy or post $100,000 as security. Agents’ dealings with students are also highly regulated, but this is largely moot, because both common law and the Rules of Professional Conduct establish stricter regulations for attorneys, and 98 percent of all agents are attorneys.

Violations carry a minimum $50,000 penalty, but higher actual damages may be recovered. If a university loses a bowl invitation, it could seek to recover the appearance fee from the agent. The act also establishes a presumption of damage if an athlete or school is suspended or disqualified by the NCAA due to an agent’s violation of the act. Punitive damages, court costs, and attorneys’ fees are also recoverable.

While the act is designed to protect student athletes, in reality, it hinders their ability to obtain legal advice by creating a duty of disclosure by agents to schools and thereby compromising the duty of confidentiality attorneys have to their clients. This requirement may make it impossible for agents to represent students effectively when the adverse party is the school to which the act requires disclosure.

The act provides no remedy for schools against boosters, coaches, teachers, and other university personnel who destroy student eligibility, which is where the real danger lies. Since 1982, no California school has been found guilty of a major violation of the NCAA rule regarding benefits to athletes by agents. In the past ten years, the only two major infractions involving California schools have been committed by university personnel.

So why the statute? The NCAA targets agents to preserve its low-cost work force. Universities claim that the profits from basketball and football support non-revenue-producing sports. This means that minority-dominated, revenue-producing sports are funding Caucasian-dominated, non-revenue-producing sports such as tennis, fencing, swimming, and volleyball. Universities also pay millions to predominately white athletic directors and coaches.

If California must regulate agents, the Uniform Athlete Agents Act would be preferable to the Miller-Ayala act. The UAAA was drafted in 1977, and 31 states have since passed it. The UAAA defines an “athlete agent” as an individual who solicits a student athlete for, or signs, an athlete agent contract. Persons who merely have contacts with professional sports organizations or who are simply present at pro negotiations are excluded. Unlike the Miller-Ayala act, the UAAA requires an agent to report to a school only that an agency contract has been signed. These differences would relieve attorneys from most of the conflicting burdens created by Miller-Ayala. There is no presumption of damage under the UAAA, and punitive damages are not expressly recoverable.

An even more radical alternative would be to allow each educational institution to decide whether to field a true amateur team or a semiprofessional team. True amateurs would not receive athletic scholarships or any other compensation. The semiprofessionals could be paid whatever the market will bear and be allowed to hire agents. Competition could include semiprofessional teams not affiliated with educational institutions in order to allow athletes who cannot satisfy the requirements of academia to participate.

In its 2001 report on college athletics, the Knight Commission concluded that “the problems in big-time college sports have grown rather than diminished.” The commission saw “a widening chasm between higher education’s ideals and big time college sports” and sought a coalition of presidents to seek academic reform, deescalation of the athletic arms race, and a deemphasis on commercialization. The recommendations of the Knight Commission are worth considering as an alternative to the overregulation of athlete agents.

1 Miller-Ayala Athlete’s Agent Act (codified at BUS. AND PROF. CODE §§18895 et seq.).
3 Black Teams and White Coaches: African Americans Continue to Make Limited Progress in Coaching Positions, THE J. OF BLACKS IN HIGHER EDUCATION, July 31, 2003, at 43. In 2001, blacks made up 52% of all athletes on football scholarships and 59.8% of all men on basketball scholarships, and both percentages have increased significantly since. Blacks represent only 6% of all athletes on baseball scholarships.

Robert P. Baker is senior litigation partner at the Los Angeles office of Jeffer, Mangels, Butler and Marmaro, LLP, specializing in intellectual property, real estate, and general business litigation. He is the author of a more extensive article on this subject appearing in the Spring 2005 issue of the UCLA Entertainment Law Review.
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