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dishonesty must be an element inherent in the human condition. That is the only way to explain its prevalence in society and the level of dishonest conduct that all of us must endure and accept on a daily basis. Dishonesty takes many forms, and there is a laundry list of different words to delineate its various types and nuances. When I entered the word into my computer’s thesaurus, the related words, and the variations for those words, seemed endless.

Honesty, on the other hand, should have a simple definition: truthfulness. However, the first definition given for honest in Webster’s New Universal Unabridged Dictionary is “honorable in principles, intentions, and actions; upright and fair.” Fair? For the most part, our culture and the human condition are not based upon fairness. Perhaps this explains our expectation that others will be dishonest with us and the fact that dishonesty is rarely punished. (Indeed, Abraham Lincoln was given the nickname Honest Abe apparently because people found his honesty strange and so contrary to usual human behavior.) The prevalence of dishonesty is succinctly captured in the film Closer when the character played by actor Jude Law bemoans, “Try lying for a change. It’s the currency of the world.”

This description of lying as currency is particularly poignant. Maybe it is my lawyer’s perspective, but people tend to be particularly dishonest when money is at stake. I am amazed by the dishonesty that I have experienced as a lawyer. Most notable is the dishonest testimony I have heard from opposing witnesses. What is perplexing is that neither the oath taken by witnesses nor the fact that perjury is a crime deters dishonesty.

At least in a legal dispute lawyers have the typical tools of cross-examination and the presence of a trier of fact to combat witness dishonesty. What is particularly frustrating and seemingly immune to change is institutional dishonesty, which appears in so many guises. For example, elected officials—the very people we have chosen to serve us in positions of governance—act dishonestly. Whether it is President Clinton wrangling with the definition of the word “is,” or President Bush trying to sell us on the existence of weapons of mass destruction, we know dishonesty when we hear it, and it does affect us. Another example is the endless barrage of spam e-mails, which contain multiple levels of dishonesty. First, the sender uses trickery (another word for dishonesty) to bypass the hurdles that have been installed for the very purpose of blocking receipt of the e-mail. Second, the e-mail itself is usually filled with dishonest assertions, all made in an attempt for financial gain.

I have often wondered why the legal profession has such a widespread reputation for dishonesty. It seems hypocritical and unfair in light of the prevalence of dishonesty in our society to cast the legal community in such a bad light. My personal experience is that lawyers tend to be more honest than others. Perhaps lawyers are perceived to be more skilled in their dishonesty. It is possible that frustration with lawyers may stem from what appears to be their enhanced ability to expose the dishonesty of others. Maybe the negative reputation is the result of envy.

Although I do not know precisely why lawyers are so closely linked with dishonesty, I believe that part of the perception involves the notion of justice. Ideally, laws are enacted to determine and implement fairness. As lawyers, working under that ideal, we are and should be held to a higher standard than others. Because of this, acts of dishonesty by lawyers create more of an impact. Unfortunately, lawyers’ negative acts significantly outweigh their positive acts in the minds of the public. If those who work within the system of justice do not abide by its rules, it becomes difficult to ask others to do so. That is the burden we lawyers must carry.

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Evaluating the Retroactive Application of Proposition 64

COMMON AMONG A NUMBER OF LAWSUITS filed in California are claims that an entity violated California Business and Professions Code Sections 17200 et seq., also known as the Unfair Competition Law. The UCL defines unfair competition as “any unlawful, unfair or fraudulent business act or practice.” Before November 2, 2004, private parties and public prosecutors had standing to bring suit under the UCL on their own behalf and on behalf of members of the public. The UCL allowed persons to bring a lawsuit who were not injured by the allegedly unfair business practice, which led one judge to call the UCL a “standardless, limitless, attorney fees machine.”

Prior to November 2, 2004, several aspects of the UCL were problematic for businesses. First, representative actions brought on behalf of members of the public are not class actions. Consequently, in a representative action, a plaintiff could assert UCL claims on behalf of the general public in a representative capacity, without satisfying class action requirements. Defendants did not necessarily receive the protections that are available in class actions, including finality and protection against more than one lawsuit arising from essentially the same allegations. Therefore, businesses that were not parties to a particular lawsuit are not bound by a settlement or judgment, which leaves nonparty entities open to multiple representative lawsuits brought on behalf of the same members of the public for the same alleged wrong.

Another problem associated with these representative actions is that because any infraction is a violation of the UCL, even an insignificant violation can result in a multimillion-dollar liability. Moreover, a single plaintiff can take a single law—even a minor one that has no significant violation—of each party to a representative action on behalf of others under the UCL must meet the standing requirements of Section 17201 (injury in fact) and comply with the requirements (adequacy, commonality, numerosity, and superiority) for class action lawsuits that are contained in Code of Civil Procedure Section 382.

Finally, civil penalties now assessed under the UCL must be designed for the exclusive use of the attorney general or local government prosecutor for the enforcement of consumer protection laws. The UCL still provides for a maximum of $2,500 in civil penalties per violation. Before passage of Proposition 64, local and state governments were allowed to utilize the civil penalties for general purposes.

One unresolved question is whether the limitations of Proposition 64 apply to cases filed before November 3, 2004. Many commentators believe that these new requirements should apply to every pending UCL action because they do not change the legal consequences of any past conduct or affect any common law or vested rights, and they are remedial or procedural. Accordingly, any pending action (other than one by the attorney general or another public prosecutor) brought by a person who has not suffered injury in fact and lost money or property as a result of the alleged unfair business practice should be dismissed.

In a recent trial court order, the court reinforced the rule that retrospective application of a statute is constitutional as long as it does not deprive a person of a substantive right without due process of law. The court found that since no party is being exposed to broader or expanded liability when the conduct occurred prior to Proposition 64, application of Proposition 64 to pending actions will not deprive any party of a substantive right. Further, the court noted that plaintiffs suing to recover for their own harm does not implicate Proposition 64 and, thus, there is no deprivation of rights for those who have suffered injury in fact. The court also distinguished plaintiffs suing as representatives, noting that they would lose nothing individually since they were not personally damaged; rather, representatives are suing on behalf of others. Finally, the court reaffirmed that plaintiffs are not losing a right to secure just compensation since damages are not allowed under the UCL, only restitution and injunctive relief. The court requested an expedited appellate review of its ruling pursuant to Code of Civil Procedure Section 166.1.

Notwithstanding, the retroactivity of Proposition 64 is currently unsettled. Prior to any appellate guidance, the trial courts will continue to wrestle with this important issue of retroactivity. Contrary rulings have been made with regard to retroactivity and the opportunity for appellate review with a definitive answer is several months away. In the meantime, the retroactivity issue is expected to be heavily litigated by plaintiff and defense attorneys and will likely need to be resolved by the California Supreme Court.

1 BUS. & PROF. CODE §17200.
2 BUS. & PROF. CODE §17203.
4 BUS. & PROF. CODE §17204 (as amended).
5 BUS. & PROF. CODE §17204 (as amended).
6 BUS. & PROF. CODE §17206(e) (as amended).
7 BUS. & PROF. CODE §17206.
10 Regarding the retroactivity of Proposition 64, see http://www.17200blog.com/Prop64Orders.html. See also http://www.metnews.com/osn0205%2FA1061899.

Alexander S. Gareeb is an associate with the Los Angeles office of Sedgwick, Detert, Moran & Arnold LLP practicing in complex multiparty business and managed care litigation. He would like to acknowledge the contributions of David M. Humiston and Jacqueline M. Jauregui to this article.
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The Prognosis for the Managed Care Liability Act after Davila

WITH AETNA HEALTH INC. V. DAVILA, the U.S. Supreme Court may have foiled the California Legislature’s efforts to provide insureds—or at least those whose benefit plan is subject to the Employee Retirement Income Security Act of 1974—with a statutory cause of action against their healthcare service plans or managed care entities for negligent treatment decisions. ERISA expressly supersedes “any and all State laws insofar” as they “relate to any employee benefit plan.” In Davila the Court held that state claims brought by health-care service plan participants or beneficiaries under the Texas Health Care Liability Act (THCLA) against a Health Maintenance Organization (HMO) for injuries arising from the HMO’s failure to exercise ordinary care in making coverage decisions were preempted by ERISA. In doing so, the Court broadly defined the scope of ERISA preemption to include “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedies.”

Davila will likely have a tremendous effect on California’s Managed Health Insurance Accountability Act of 1999 and in particular Civil Code Section 3428, which is based in large part on the THCLA. Given the Court’s expansive reading of ERISA’s preemption clause and the similarity of the THCLA to Section 3428, Davila casts serious doubt on whether an action against a healthcare service plan or managed care entity for the improper denial, delay, or modification of benefits that are due under a private, employer-sponsored benefit plan can withstand a preemption challenge.

Managed care liability acts fill what many believe to be a regulatory “gaping wound” in federal healthcare law resulting from a string of Supreme Court decisions that restrict the remedies available to beneficiaries of private, employer-sponsored benefit plans under ERISA. Instead of interpreting the civil remedies section of ERISA as providing for the traditional remedies of trust law, which are designed to make the plaintiff whole, the Court has held that plan beneficiaries suing under ERISA are precluded from recovering “extracontractual damages.” As a result, plan beneficiaries who have been harmed by a managed care organization’s misconduct are limited to recovering the value of the benefits due to them under their healthcare plan. States have reacted to the Court’s narrow construction of the ERISA remedies section by enacting managed care liability statutes that provide a more comprehensive set of remedial options. As a result, managed care organizations now face a “patchwork” of state-imposed liability risks.

Section 3428 is California’s attempt to enlarge patients’ remedial options beyond the legal damages available under ERISA. California’s statute seeks to hold healthcare service plans (and managed care entities that administer healthcare benefits pursuant to private, employer-provided benefit plans) liable for failing to use ordinary care when making healthcare decisions that affect a patient’s treatment. Managed care organizations covered by Section 3428 (and most other states’ managed care liability acts) perform two primary functions. First, they prepare and administer benefit plans. Second, they arrange for the medical treatment of plan beneficiaries either by employing doctors directly or by contracting with a network of doctors under a reimbursement plan. When managed care organizations decide whether to cover a particular patient’s medical care they make decisions that potentially alter the patient’s treatment. Although such decisions do not necessarily prevent patients from obtaining the healthcare treatment that they desire—the patient may always pay for a preferred noncovered healthcare service out of pocket or by other means—many patients may decide to forgo the treatment if it is not paid for by their health plan. Thus, managed care liability acts are a reflection of state legislative determinations that managed care organizations, in assessing the risks and benefits of various treatment options and deciding which are medically necessary for a patient with a particular condition, are essentially making medical judgments.

Civil Code Section 3428 was enacted in 1999 to “ensure that adequate state law remedies exist for all persons who are subject to the wrongful acts of those entities that contract to provide insurance for the life, health and disability of California citizens.” The legislature determined that these remedies were “necessary to protect the health and safety” of California residents.

The operative provision of Section 3428 imposes on health plans a tort duty of “ordinary care to arrange for the provision of medically necessary health care services” for subscribers and enrollees. In order to prevail on a claim under the statute, a subscriber or enrollee must show that 1) the healthcare service plan or managed care entity failed to exercise ordinary care, 2) this failure resulted in the “denial, delay, or modification” of medically necessary and covered healthcare services, 3) the healthcare services sought were recom mendation (HMO) for injuries arising from the HMO’s failure to exercise ordinary care, 2) this failure resulted in the “denial, delay, or modification” of medically necessary and covered healthcare services, 3) the healthcare services sought were recommended to or furnished to the subscriber or enrollee by a healthcare provider, and 4) that the denial, delay, or modification of the healthcare services resulted in substantial harm. The definition of “substantial harm” is “loss of life, loss or significant impairment of limb or bodily function, significant disfigurement, severe and chronic

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physical pain, or significant financial loss.”

Under the statute, an enrollee or subscriber does not need to receive a recommendation for the healthcare service at issue from an in-plan physician. Care recommended or furnished by any healthcare provider “practicing within the scope of his or her practice” — whether recommended or furnished before or after the occurrence of substantial harm to the patient — satisfies the statutory requirements.

A significant feature of Section 3428 is its damage provisions. These provisions hold healthcare service plans and managed care entities accountable for “all harm legally caused” by their negligent decision making. A plaintiff has recourse to the full panoply of tort remedies, including compensatory, emotional distress, and punitive damages. In addition, damage awards recovered for violation of this section against healthcare service plans and managed care entities are not subject to caps on liability under California’s Medical Injury Compensation Reform Act of 1975. Notably, the statute does not contain a provision addressing attorney’s fees.

While the remedies available to a plaintiff under Section 3428 are extensive, practitioners should note the statute’s limitations. Section 3428 does not create any liability on the part of a healthcare service plan or managed care entity for harm “attributable to the medical negligence of a treating physician or other treating health care provider.” Nor does the section create any liability on the part of an employer or an employer group purchasing organization that purchases healthcare coverage or assumes risk on behalf of its employees or on behalf of self-funded employee benefit plans.

Section 3428 and Davila

Parts of Civil Code Section 3428 were originally modeled on the THCLA, and in Davila, the U.S. Supreme Court considered a challenge against ERISA preemption under that Texas law. The California attorney general joined in an amicus brief submitted by the attorneys general of several states, including that of Texas, arguing in support of the plaintiffs that ERISA did not preempt the THCLA. Like Section 3428, the THCLA imposes a duty of ordinary care on health plans and other managed care organizations when they make healthcare treatment decisions. As does its California counterpart, the THCLA holds managed care organizations liable for all harm proximately caused by their negligence.

Davila involved two individuals alleging injuries due to the failure of their HMOs to use ordinary care in deciding to refuse to cover certain recommended medical services. One, Juan Davila, was a participant in an ERISA-regulated benefits plan administered by Aetna Health Inc. The second, Ruby Calad, was a beneficiary in an ERISA-regulated plan administered by CIGNA Healthcare of Texas, Inc. Davila allegedly suffered a severe reaction to the arthritis drug Naprosyn, which he ingested after Aetna refused to pay for Vioxx, the drug that Davila’s treating physician had originally prescribed. Calad allegedly experienced post-surgical complications after CIGNA denied her request for an extended hospital stay, despite her treating physician’s recommendations.

The Court held that the claimants’ state law causes of action under the THCLA were completely preempted by ERISA Section 502(a)(1)(b), which provides that an ERISA plan beneficiary may bring an action to “recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits.” Because Davila and Calad merely sought to “rectify a wrongful denial of benefits promised under an ERISA regulated plan” their claims were completely preempted and therefore removable to federal court.

Davila held that ERISA completely preempts state law if 1) the individual bringing the state law action “at some point in time, could have brought his claim under ERISA section 502(a)(1)(B)” and 2) there does not exist another “independent” legal duty implicated by the health plan’s alleged misconduct. Applying this test to the facts before it, the Court noted that ERISA remedies were available to Davila and Calad upon their respective plans’ denial of benefits. In particular, Davila and Calad “could have paid for the treatment themselves” and sought reimbursement through a 502(a)(1)(B) action, or they could have obtained a preliminary injunction to compel their respective plan administrators to provide them with their desired treatments. Although neither Davila nor Calad pursued either of these options, both individuals at some point in time possessed viable ERISA claims.

Furthermore, the Court determined that the statutory legal duty imposed by the state of Texas on health plans and managed care organizations by the THCLA was not “independent” because the statutory duty under Texas law was derived from the rights and obligations created by the claimants’ federally regulated employee healthcare benefits contracts.

Writing separately in a concurring opinion, Justice Ruth Bader Ginsburg, joined by Justice Stephen Breyer, noted that the Court’s “encompassing interpretation of ERISA’s preemptive” force coupled with its “cramped construction” of the relief allowable under ERISA Section 502(a)(3) has created a “regulatory vacuum.” Because virtually all state law remedies are preempted by ERISA, many individuals wronged by negligent treatment decisions of an ERISA healthcare plan cannot gain “make-whole relief.” The two concurring justices called on Congress to ameliorate what they considered to be an unjust ERISA scheme. They also intimated that if

The California Legislature Responds to Davila

The California Legislature has noticed the effect of Davila on Section 3428. In a Senate Joint Resolution introduced by State Senator Liz Figueroa and filed with the secretary of state on August 19, 2004, the California Senate and Assembly recognized that under Davila “states such as California and Texas have little or no ability to ensure that HMOs” are held accountable for their negligent denial of benefits and that Californians must now “rely on the United States Congress to provide this protection.” The resolution requests that the U.S. Congress enact, and the president sign, a “meaningful and enforceable HMO Patient’s Bill of Rights” that would permit patients to hold HMOs liable for all harms caused by their negligence or, alternatively, to enact and sign legislation amending ERISA to clearly authorize states to provide greater remedies than are available under federal law if states wish to provide their citizens with greater protections than federal law makes available.

Additionally, the resolution calls upon Governor Schwarzenegger to announce his support for the right of California patients to obtain damages from HMOs that wrongfully deny health care benefits and to “pledge that he will lobby Congress and the President for the prompt enactment” of the requested federal legislation.

Given the strong language of this resolution, it is possible that future legislative enactments—either from the California Legislature or the U.S. Congress—may alter the current state of the law with respect to a California patient’s inability to obtain extracontractual damages against an HMO for a negligent denial of benefits.—D.M.H. & J.A.T.

2 Id.
Congress does not act, the Court may some-
day construe ERISA Section 502(a)(3) as per-
mitting ERISA plan beneficiaries to recover the full array of trust remedies from a man-
egaged care organization on a breach of fidu-
ciary duty theory. Indeed, in recent years, the
U.S. House of Representatives and Senate have introduced numerous patient protec-
tion bills that would exempt state-managed care liability acts from federal preemption and thereby permit patients to obtain com-
plete relief when they are victims of man-
egaged care negligence. However, Congress has failed to implement any of this legislation.

Federal Preemption under Davila

In the wake of Davila, several federal courts of appeals have interpreted the scope of ERISA preemption expansively when addressing state law claims brought by health plan participants. Courts of appeals for both the Second and Fifth Circuits have interpreted ERISA as preempting state law claims arising out of a managed care organization’s refusal to cover experimental procedures. In the Second Circuit decision, Cicio v. Does, upon remand from the U.S. Supreme Court after Davila, the court of appeals determined that ERISA preemption extends to New York state law medical malpractice claims based on an HMO’s medical director’s denial of a patient’s request for a “tandem double trans-
plant” of blood stem cells to treat multiple myeloma—a prevalent type of blood can-
cer. Likewise, in the Fifth Circuit decision, Mayeaux v. Louisiana Health Services & Indemnity Company, the court of appeals relied on Davila in concluding that ERISA preempted a plaintiff’s Louisiana state law tort claims based on a denial of coverage for an antibiotic treatment allegedly needed for the plaintiff’s connective tissue illness. The Eleventh Circuit Court of Appeals has also held that state law malpractice claims against HMOs are preempted under Davila. Additionally, the Third Circuit Court of Appeals has applied Davila in determining that ERISA preempts Pennsylvania statutory actions against insurers for bad faith breach of contract.

Thus far, the California state courts and the Ninth Circuit have not issued a published or unpublished decision applying Davila to a state law claim by a health plan enrollee. However, the opinions of at least some of the judges of the Ninth Circuit concerning the scope of ERISA preemption under Davila can be gleaned from Providence Healthplan v. McDowell, in which the Ninth Circuit denied an en banc rehearing of a decision that permitted an insurer to bring an inde-
pendent, non-ERISA claim for reimbursement against an ERISA plan participant. Dissenting from the denial of a rehearing en banc, Judges Sidney R. Thomas, Harry Pregerson, Stephen Reinhardt, Michael Daly Hawkins, M. Margaret McKeown, and Marsha S. Berzon contended that allowing an insurer to pursue claims for reimbursement outside of ERISA was incongruent with the scope of ERISA preemption as construed by the U.S. Supreme Court. Citing Davila, the judges noted that ERISA has been interpreted to preclude health plan participants from enforcing state common law and statutory rights so as to insulate health insurers from tort liability. But, the dissenters pointed out, permitting an insurer to sue a health plan participant for reimbursement on a non-ERISA cause of action amounted to providing “a special exemption for one party while handicapping another.” These comments suggest that the dissenting judges view Davila as creating an expansive and uneven field of federal preemption in which the remedies available to health plan enrollees—but not health insurers—are restricted.

While neither the Ninth Circuit nor the California state courts have applied Davila to a state law claim by a subscriber or enrollee of a health plan, practitioners should be aware that a federal district court for the Northern District of California has done so in a published decision. Relying principally on Davila, the district court held that claims against a healthcare plan for breach of contract, unfair business practice, quasi contract, and declaratory relief arising out of a healthcare plan’s fail-
ure to pay for benefits are preempted by ERISA. The district court interpreted the scope of ERISA preemption under Davila broadly and concluded that such claims amounted to “an alternative enforcement mechanism” to ERISA Section 502(a).

The Impact of Davila on Section 3428

In light of Davila one can predict with confidence that a healthcare service plan or man-
egaged care entity that is administering benefits under an ERISA employee health benefits plan could successfully raise a preemption defense to an action brought under Section 3428. Like the THCLA provision at issue in Davila and the state law actions recently considered by the Second, Third, Fifth, and Eleventh Circuits, Civil Code Section 3428— as applied to a managed care organization administering benefits pursuant to an ERISA covered plan—imposes on managed care enti-
ties and healthcare service plans a legal duty of care that is derived from rights and obli-
gations created by a federally regulated con-
tract. Where a managed care organization breaches this duty, Section 3428 permits an enrollee or subscriber to recover “extracon-
tractual” damages. Moreover, a subscriber or enrollee who brings a viable Section 3428 claim could have at some point in time brought an action under ERISA. The California statute thereby supplements the remedies provided by ERISA and falls squarely within the limits of ERISA preemp-
tion as set forth in Davila.

Plaintiffs’ attorneys might argue that Section 3428 is not preempted because of the ERISA “insurance savings clause,” but this argument would likely be unavailing. The ERISA insurance savings clause provides that “nothing in this subchapter shall be con-
strued to exempt or relieve any person from any law of any State which regulates insur-
ance.” In the uncodified preamble to Section 3428 the California Legislature has declared that healthcare service plans and managed care entities are engaged in the busi-
ness of insurance. While upon first impres-
sion the argument that Section 3428 is pro-
tected by the savings clause would appear tenable, the Supreme Court rejected a similar contention in Davila. There, the Court dismissed the claimants’ argument that the THCLA was a state law regulating insur-
ance, despite the fact that by its own terms it applies to “health insurance carriers.” The Court concluded that even state laws that “arguably” regulate insurance are pre-
empted if they allow ERISA plan beneficiaries to assert claims for benefits outside of ERISA’s exclusive remedial scheme. Thus, it appears that the Court will not allow the states to end run around ERISA by characterizing their managed care liability acts as laws regulating insurance.

Although in many instances ERISA preemp-
tion will impair a plaintiff’s ability to assert a claim under Section 3428, this is not to say that the statute no longer has any practical application. It may prove to be an alternative for enrollees whose healthcare benefits plans are not regulated by ERISA, which applies only to employee welfare ben-
efit plans that are “established or maintained by an employer.” ERISA does not apply to welfare benefits plans maintained by public entities, governmental organizations, or churches. Plans purchased by individuals are also exempt. Subscribers to these types of plans may assert common law and statutory claims against their managed care organiza-
tions seeking extracontractual damages with-
out implicating ERISA and encountering a preemption defense based on Davila.

Ultimately, by interpreting the scope of ERISA preemption so broadly in Davila, the Court has ensured that there remain two classes of medical patients in California. The first of these, consisting of individuals whose healthcare service plans are maintained by a public entity or church or who purchase their plans individually, are free to sue their man-
egaged care organizations under Section 3428 or on a common law theory to gain complete
relief. The second class, however, comprising the majority of Californians whose healthcare service plans are maintained or sponsored by their private-sector employers, are limited to suing their health plan for benefits due under their plan.

In enacting Section 3428 the California Legislature sought to impose on healthcare service plans and managed care entities a statutory duty of ordinary care when arranging for the provision of medically necessary healthcare services and to hold managed care organizations liable for all harm legally caused when their failure to exercise that ordinary care results in the “denial, delay, or modification” of covered healthcare services that are recommended or furnished to a subscriber or enrollee. The Supreme Court’s holding in Davila that claims brought under the THCLA are preempted by ERISA indicates that the legislature’s intent will go unrealized. The similarity between the THCLA and Section 3428, the breadth with which the Court defined the scope of ERISA preemption in Davila, and the subsequent unwillingness of the federal courts of appeals to permit patients to pursue state law causes of action that expand the remedies available to them under ERISA, all suggest that a Section 3428 action is no longer a viable remedy for California insureds whose healthcare benefits are administered pursuant to an ERISA plan.

1 See Aetna Health Inc. v. Davila, 124 S. Ct. 2488 (2004); CIV. CODE §3438; and HEALTH & SAFETY CODE §1345(i).
3 Davila, 124 S. Ct. at 2495.
4 Id.
5 CIV. CODE §3428.
7 Id. (citing JOHN H. LANGBEIN, WHAT ERISA MEANS BY “EQUITABLE”: THE SUPREME COURT’S TRAIL OF ERROR IN RUSSELL, MERTENS, AND GREAT WEST, YALE LAW & ECONOMICS RESEARCH PAPER No. 269 (Jan. 2003)).
10 See, e.g., CIV. CODE §3428(j).
11 Cicio, 321 F. 3d at 107 (Calabresi, J., dissenting in part).
13 1999 Stat. ch. 536 §21(a)(2), (b).
14 Id.
15 CIV. CODE §3428(a).
16 Id.
17 CIV. CODE §3428(a), (a)(1).
Civil Code §3428(a)(1).


20 CIV. CODE §3428(g).

21 Compare CIV. CODE §3428(g) (health care service plan liable for “all harm proximately caused” by breach of duty).

22 CIV. CODE §3428(h).

23 See CIV. CODE §3428(h).

24 CIV. CODE §3428(g).

25 CIV. CODE §3428(e).

26 Civil Code §3428(C) specifies that healthcare service plans and managed care entities are not healthcare providers under any provision of law.

27 CIV. CODE §3428(f).

28 An employer group purchasing organization consists of a group of employers purchasing healthcare benefits on behalf of their collective employees.

29 CIV. CODE §3428(f).


32 Compare Tex. Civ. Prac. & Rem. Code §88.002(a) (“health care plan has the duty to exercise ordinary care when making health care treatment decisions”) with CIV. CODE §3428(a) (“health care plan or managed care entity…shall have a duty of ordinary care to arrange…”).

33 Compare Tex. Civ. Prac. & Rem. Code §88.002(a) (health care service plan liable for harm “proximately caused” by its breach of duty) with CIV. CODE §3428(a) (health care service plan liable for “all harm legally caused” by breach of duty).

34 Davila, 124 S. Ct. at 2492.

35 Id.


37 Id.

38 Davila, 124 S. Ct. at 2496.

39 Id. at 2497.

40 Id.

41 Id. at 2498.

42 Id. at 2504.


46 See Mayeaux, 376 F. 3d at 432.

47 See Land v. Cigna Healthcare of Fla., 381 F. 3d 1274, 1276 (11th Cir. 2004).

48 See Barber v. UNUM Life Ins. Co. of Am., 383 F. 3d 134, 141-42 (3d Cir. 2004).

49 The authors last Shepardized Davila on Nov. 16, 2004.


52 See 29 U.S.C. §1003(b)(2) (exempting employee group insurance policies issued to public entities from ERISA); 29 U.S.C. §1003(b)(1) (exempting benefit plans maintained or sponsored by churches).

53 Davila, 124 S. Ct. at 2500.

54 See Davila, 124 S. Ct. at 2500.

55 See Barber, 383 F. 3d at 141-42.


57 See 29 U.S.C. §1003(b)(1) (exempting employee group insurance policies issued to public entities from ERISA); 29 U.S.C. §1003(b)(2) (exempting benefit plans maintained or sponsored by churches).


59 Id.

60 See David M. Humiston & Robert C. Bohner, Treatment Options, LOS ANGELES LAWYER, June 2001, at 44.


62 Id. at 2495 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985)).


64 Id.

65 1999 Stats. ch. 536 §2(a)(1).

66 See Davila, 124 S. Ct. at 2500.

67 Id.


69 Id.

70 2498 (2004).

71 See Davila, 124 S. Ct. at 2500.

72 Id. at 2504.


76 See Mayeaux, 376 F. 3d at 432.

77 See Land v. Cigna Healthcare of Fla., 381 F. 3d 1274, 1276 (11th Cir. 2004).

78 See Barber v. UNUM Life Ins. Co. of Am., 383 F. 3d 134, 141-42 (3d Cir. 2004).

79 The authors last Shepardized Davila on Nov. 16, 2004.

HIRING A NANNY LEGALLY requires close consideration of several employment law, tax, and insurance issues. The process may appear daunting at first, but the resolution of the issues ultimately is not as complicated as many fear and yields benefits for employers and employees.1

Federal and California law are straightforward. In almost all cases, a nanny who works in a family’s private home is an employee, not an independent contractor.2 Determining whether or not a person is an employee depends upon the degree of direction and control the supervisor exercises over how the person performs his or her duties.3 The IRS presumes that a family will exercise a significant degree of control over how a nanny cares for the family’s child.4 Thus, the IRS deems almost all nannies to be employees, not independent contractors, requiring the household employer to pay employment taxes for the nanny’s work on the employer’s behalf.

The degree of exclusivity of employment is another indicator of a person’s employment status. For example, the fact that a nanny works exclusively for one family and no other employer indicates that the nanny is an employee, not an independent contractor.5 However, even if a nanny works for multiple employers, that does not necessarily make her an independent contractor. Instead, the more likely assessment is that the nanny is an employee of more than one employer.

There are limited exceptions to the nanny-as-employee rule. One of the most common arises when a parent pays an agency directly for the nanny’s services. When this occurs, usually the agency, not the parent, is the nanny’s employer, presuming the agency controls what work is done and how the work is performed.6 Similarly, if a parent brings the child to the home of a nanny for supervision, and especially if the child is not the only child supervised in the nanny’s home, the most likely conclusion regarding the status of the nanny is that she is offering her services to the general public and she is an independent contractor, not an employee of the child’s family. Certain family members—such as a spouse, children under 21 (unless being a nanny is their principal occupation), and parents (under certain conditions)—generally are not classified as employees. Finally, if the nanny exclusively controls how and when she works, and works for several households, she probably is an independent contractor rather than an employee. This is a very rare circumstance.7 How a nanny refers to herself, how her status is defined in an employment contract, and how she is paid (hourly or salaried) do not alter the criteria for determining her employee status.

Circumstances of Discovery

Many people believe that as long as a nanny does not report her employer to the authorities, the employer will not get caught hiring someone “under the table.” Recent history and the criminal docket are littered with people laboring under this misconception.

A terminated nanny’s reporting of an employer to the IRS is one way authorities learn of a nanny working illegally. Still, this is hardly the only way people get caught not complying with applicable laws. To the contrary, the far more common circumstance in which the government discovers that a nanny has been working under the table involves an amicable parting between a nanny and her employer. When the nanny applies for government benefits after the parting, she discovers she cannot have access to them. In the process, the government may discover the illegal employer.

Indeed, the scenarios that illuminate how an individual—the parent or other family member that will be designated as the employer of the nanny—will eventually be uncovered and penalized are legion. Some, however, are more common than others. First, an employer can be snared when a recently laid off nanny files for unemployment benefits. When asked about her last place of employment, she names her former employer—but the employer never paid employment taxes for the nanny.

Second, a nanny may be injured while working in the employer’s home and files for workers’ compensation. Because the employer hired

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the nanny illegally, the employer did not obtain workers’ compensation insurance. The nanny files a report in order to obtain benefits, and the employer is uncovered.

Third, a nanny reaches an age at which she wants to retire. When she files for Social Security, her benefits are lower than she expected, and she realizes that during the time she worked for her employer illegally, no Social Security contributions were made. In an attempt to receive more benefits, she reports her employment status to the Social Security Administration.

Fourth, an employer tells the nanny that, as an independent contractor, she is responsible for her own taxes. When the nanny’s tax bill comes due, she realizes that she is responsible for both the employer’s and employee’s share of Social Security and Medicare. Clearly her tax bill is much larger than she expected, and she complains to the IRS.

These are just the examples of unintended discoveries of employers acting illegally. The nannies in these scenarios ostensibly are merely seeking compensation and redress. They do not include a disgruntled nanny, upset over some slight, who quits and turns the employer in herself—or worse yet, tries to blackmail the employer. Or the neighbor, coworker, or family member who is envious or has a grudge against the employer and decides to alert the appropriate authorities about the employer. Or perhaps the IRS decides to audit the employer, notices the large amounts of cash or checks flowing out of the employer’s bank account every two weeks, and gets suspicious.

Under any of these scenarios, the result is the same: The employer gets caught and faces considerable consequences.

Penalties for Employing a Nanny Illegally

Some people believe that as long as they do not intend to seek political office or pursue other lofty professional aspirations, they do not have to worry about the consequences of hiring a nanny illegally. However, the criminal and financial repercussions are severe and have a negative effect on personal reputations far beyond the shadowing of career goals.

As a threshold matter, employers must report household employment taxes on their personal federal tax returns. Federal law requires the employer to pay his or her own taxes as well as remit the employee’s taxes that are collected by the employer to the federal government.

The intentional and willful failure to pay or remit the appropriate taxes constitutes a criminal violation of the federal tax laws. The penalties include fines of up to $100,000 and imprisonment for up to five years. Even in the absence of a criminal prosecution, an individual may face civil penalties and fines, including the payment of all back taxes with interest.

Further, if an employer advises or attempts to dissuade a nanny from paying her taxes, such conduct could constitute an additional tax crime and conspiracy, with penalties of three and five years’ imprisonment, respectively, as well as a maximum of $250,000 in fines on each charge. Independent of criminal action, there is no statute of limitations for failure to report and pay federal employment taxes.

Attorneys face particular professional consequences in addition to these civil and criminal penalties. For example, Business and Professions Code Section 6068(o)(4) requires attorneys who are charged with a felony, such as tax evasion, to report the charge to the State Bar. This requirement has the potential to jeopardize an attorney’s ability to practice and earn a living.

Of course, if a person is attempting to become a judge or seeking elected or appointed office, having a “nannygate” problem can lead to undesirable publicity that can damage a reputation and career, as Zoe Baird, Kimba Wood, Linda Chavez, or Bernard Kerik—political appointees who ultimately had to withdraw their names from consideration due to issues over household workers—can attest. Moreover, all attorneys—even those uninterested in political office or an appointment to the bench—trade on their reputation for integrity, and being labeled a tax cheat is not good for anyone’s business.

Finally, in addition to the criminal penalties and the impact on the employer’s professional reputation, the employer under a cloud faces the expenditure of substantial fees for the services of lawyers and accountants in mounting a defense in a regulatory proceeding, audit, or criminal prosecution. Given the likelihood of the employer’s getting caught and its significant costs and consequences, hiring a nanny illegally is not worth the risk.

Advantages of Hiring a Nanny Legally

Despite the common misconception that hiring under the table is financially advantageous, employing a nanny legally provides many economic benefits for both employers and employees. Household employers can save taxes by putting up to $5,000 pretax per family per year into a Dependent Care Account. Household employers can then draw down upon their contributions to a DCA to pay their household employees to care for a child or dependent. This technique, depending on the household employer’s effective tax rate, could save hundreds or even
thousands of dollars in taxes while the household employer uses the pretax money on eligible dependent care expenses, including paying a nanny.

Household employers also may be eligible to claim the federal Childcare Tax Credit. For 2005, the CTC, if applicable, allows the household employer to receive a minimum tax credit of 20 percent of the first $3,000 in qualifying expenses per year for each of the employer’s first two children under age 13. Significantly, the CTC is a tax credit, not a deduction, and therefore directly reduces the employer’s tax bill. Further, the 20 percent credit of the first $3,000 in qualifying expenses is the minimum percentage credit; it cannot be decreased (even for higher-income earners), and the percentage increases for lower-income earners, with a potential savings of even more money.

Employers should take note that, in most circumstances, an employer can use either a DCA or the CTC but not both. Generally the tax savings from a DCA outweigh the CTC tax savings. For example, assuming the employer qualifies for the minimum 20 percent CTC credit, the maximum tax credit for one child would be $600 (20 percent of $3,000). In contrast, assuming an effective tax rate of 20 percent, the tax savings of utilizing a DCA to shelter $5,000 of pretax income would be $1,000, significantly larger than the $600 credit of the CTC.

An exception to the rule requiring an election of either a DCA or the CTC occurs when an employer has two children under age 13 and $6,000 in child care expenses. In this instance, the employer can apply the first $3,000 of expenses toward a DCA (reaping the tax savings on the full $3,000) and the remaining $1,000 of expenses toward the CTC for an additional minimum credit of $200. This combination, however, is the absolute maximum savings. Employers with more children or higher expenses cannot garner any additional tax savings through a DCA or the CTC.

Another lesser known and little understood advantage to hiring legally is improved cash flow. Specifically, contrary to popular perceptions, employers typically pay out less each pay period when they employ a nanny legally. By withholding a nanny’s personal income and employment taxes, the employer’s weekly out-of-pocket cost to pay a nanny legally is often lower than what the employer would have paid illegally in a gross amount. For example, instead of paying out $500 under the table every week, the employer might pay out only $430 weekly to a nanny after withholding applicable taxes. Thus, although the employer ultimately will pay these withholdings to the state and federal governments later in the year, especially if the employer pays his or her taxes annually, the employer can reap the time value of holding this $70 difference and improve his or her weekly cash flow.

Hiring legally also allows a household employer to obtain proper insurance for injuries occurring in the employer’s home. An employer who pays a household employee under the table runs the risk of the employer’s homeowner’s insurance turning down a potential claim on the grounds that the employee was hired illegally.

Conversely, hiring legally allows an employer to obtain workers’ compensation insurance as part of the employer’s homeowner’s insurance. This access to insurance is a significant benefit that can protect the employer from the significant costs that would be incurred if a household employee were injured on the job and the insurance company refused to provide coverage based on the insured’s failure to disclose or the illegal nature of the activity.

Finally, although it is not a quantifiable benefit, peace of mind matters. Employers of household workers should not underestimate the personal and professional toll caused by worry over getting caught for an illegal hire. By complying with the appropriate requirements, employers of nannies can spend more time with their families and sleep well at night knowing that they have done everything right.

For a nanny, there are several significant advantages derived from working legally. These include access to unemployment and disability insurance, workers’ compensation, and Medicare and Social Security benefits. A nanny also may qualify for the federal earned income credit, which could result in her receiving a tax credit larger than the amount she paid in taxes.

Moreover, there are larger financial incentives for a nanny to work legally. By working for an employer who acts in compliance with the laws involving household workers, the nanny can establish an employment history—a necessity if she wishes to make a major purchase requiring credit, such as a car or a home. In addition, an employer’s withholding of a nanny’s state and federal taxes helps the nanny to properly budget for her tax bill and avoid potential penalties for insufficient withholding.

Finally, paying a nanny legally demonstrates respect for her and the important job she performs caring for a family’s children. A nanny is a role model for the children with whom she works, and honesty and integrity are important values for her to impart in how she conducts herself.

Employers should ask themselves these questions: If a nanny is willing to lie to the government about her taxes, is she willing to
lie to her employer as well? If so, what is she willing to lie about?

**Greatest Misconception**

Perhaps the greatest misconception about employing a nanny legally is that it will significantly increase an employer’s costs. However, when considering the additional costs and the considerable potential tax savings, the extra net cost of hiring a nanny legally is typically 5 percent or less of the nanny’s annual compensation.

The additional costs to the employer as a percentage of the nanny’s salary are 1) 7.65 percent for the employer’s share of Social Security and Medicare, and 2) 1.5 percent for state and federal unemployment and training taxes. Thus, the total tax burden—without considering any of the tax advantages—of hiring a nanny legally is slightly more than 9 percent. However, by maximizing tax savings with a DCA or the CTC, the cost of hiring legally decreases dramatically.

An example best illustrates the true cost. The tax burden of approximately 9 percent on a nanny’s $20,000 annual salary likely would cost her employer roughly $1,800. However, the employer could shelter $5,000 pretax in a DCA and use this money toward paying the employer’s nanny. Assuming the employer’s effective tax rate is 20 percent, the employer’s tax savings from the DCA would be $1,000. Subtracting this $1,000 savings from the roughly $1,800 paid in taxes yields an effective cost of approximately $800, or about 4 percent of the nanny’s annual salary. Thus, following the example, the bottom line cost of hiring someone legally is approximately 4 percent more than an employer would have paid if the employer were paying under the table. This is a small price to pay for the peace of mind that comes with hiring a nanny legally.

**Written Employment Agreement**

Once an employer decides to hire a nanny, it is advisable for both parties to enter into an employment agreement. This agreement should outline a nanny’s terms of employment and specify how the employer expects her to care for the children. Although an agreement is not legally required, it is enforceable and greatly reduces the potential for disputes.

This agreement should contain provisions regarding the nanny’s job duties, compensation, vacation and sick days, and holidays. It should describe how vacation and sick days are accrued and set limits on the number of available days. The agreement also should provide guidelines for releasing the children to the care of others, or administering medication, and should specify how the nanny should handle emergency situations. A confidentiality provision regarding the employ-
er’s household affairs is advisable. A hold harmless provision and release of liability for tax issues can be included as well. The agreement also should confirm the nanny’s at-will employment status.

The agreement may be complex and is not similar to employment agreements outside the household setting. Employers should make sure that the document is tailored specifically to ensure compliance with all applicable laws and to address all household employment issues. For example, the nanny’s duties should be drafted so that she qualifies for California’s daily overtime exemption.

Although hiring a nanny legally can seem overwhelming, it need not be. The rules are clear and relatively unambiguous. Additionally, there are numerous advantages to both employers and employees when the employment relationship complies with applicable law and avoids the costly consequences of the employer getting caught hiring the nanny under the table. Employers of nannies should always remember that paying employment taxes is not an option—it is the law.

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1 For an earlier discussion of the issues presented in this article, see Robert E. King, Thinking about Hiring Your Nanny under the Table? Think Again, ORANGE COUNTY LAWYER, June 2003, at 38.
2 See IRS Publication 926, HOUSEHOLD EMPLOYER’S TAX GUIDE; CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT (EDD) Publication DE 8829, HOUSEHOLD EMPLOYER’S GUIDE; and EDD Information Sheet DE 231L, HOUSEHOLD EMPLOYMENT.
3 IRS Publication 926, supra note 2.
4 Id. (specifically citing nannies as an example of household employees).
5 See EDD Publication 8829, supra note 2 (noting that persons who offer their services to the general public—and who therefore normally work for multiple individuals—usually are not considered to be employees).
6 IRS Publication 926, supra note 2.
7 See generally IRS Publication 926 and EDD Publication DE 8829, supra note 2, for descriptions of exceptions to the nanny-as-employee rule.
8 IRS Publication 926, supra note 2.
11 Because the $5,000 limit is for a family, both spouses cannot put $5,000 each into a DCA.
12 A DCA is normally offered through an employer. Thus, household employers should contact their own employers to determine if they offer such a plan. Enrollment in a DCA is usually limited to a certain time after a qualifying event such as the birth of a child or change in family circumstance. Household employers should not delay in inquiring with their own employers about the availability of a DCA or they might not have the ability to enroll in one until the next annual open enrollment period.
13 The decision to use a DCA or the CTC involves many variables. See IRS Publication 503, CHILD AND DEPENDENT CARE EXPENSES.
14 IRS Publication 503, supra note 13.
15 Id.
16 A household employer cannot claim either the DCA or the CTC if the employer or the employer’s spouse permanently stays at home with a child or dependent and that employer or spouse is not actively looking for work.
The property interest of an innocent spouse may still be subject to a federal lien

Protecting the Innocent

by David Lee Rice

Innocent spouse relief is granted under IRC Section 6015 when a spouse establishes that a federal tax liability is attributable to the other spouse and meets all the requirements for relief. Once an innocent spouse is relieved of a tax liability, in most instances the IRS will no longer pursue the spouse for payment. However, the property of the innocent spouse may still be subject to a lien and subsequent levy, depending upon the character of the property.

When seeking innocent spouse relief for clients in California, attorneys must consider the effect that California’s property laws will have on the relief their clients may receive. The relief that an innocent spouse may receive can depend upon whether the innocent spouse has divorced the liable spouse and agreed to be liable or share in the liability in a marital separation agreement. Even though an innocent spouse is not personally liable, the innocent spouse’s interest in community property and other property jointly owned with the liable spouse may continue to be subject to collection of the liability. The IRS and several state courts, including California, have not found it necessary to prohibit the IRS from looking to community property as a collection source.

If, under the law of the community property state in which the spouses reside, the IRS can look to community property to collect a liability of the liable spouse, the determination that the other spouse is entitled to relief under Section 6015 does not affect the IRS’s ability to collect the liable spouse’s liability from the community property.

It is important to note that this is not just an issue for an innocent spouse who is still married to the liable spouse. In certain circumstances an innocent spouse who received community property or jointly owned property in a divorce or separation agreement will find this property is subject to collection by the IRS despite the fact the former community property is now deemed to be separate property as a result of a proper division of property. This occurs if the tax has been assessed and the liable spouse’s property is encumbered by the federal tax lien, which arises by operation of law, regardless of whether a lien was previously filed by the IRS.

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Section 6321 of the Internal Revenue Code creates a federal tax lien to secure the government’s ability to collect unpaid taxes, interest, additions to tax, and any assessable penalties owed by a delinquent taxpayer. The lien imposed by Section 6321 arises when a deficiency is determined, the tax is assessed, and the taxpayer neglects or refuses to pay a tax liability after the IRS has sent a notice of assessment and a demand for payment. While the tax lien will not arise until the taxpayer refuses to pay, once the lien does arise, it will relate back to the date of assessment. This “secret” tax lien will arise automatically. The government need not file a lien or send a notice of federal tax lien to the taxpayer in order for it to be effective. The tax lien will attach to “all property or rights to property” belonging to the taxpayer. Internal Revenue Code Section 6323 gives the government access to an almost unlimited range of property that may be subject to a tax lien. To satisfy a tax deficiency, the government may impose a lien on any property or rights to property belonging to the taxpayer. The U.S. Supreme Court interpreted this language to allow the government to reach every species of right or interest protected by law that has an exchangeable value. The federal tax lien is perfected, and the government’s position of priority as to a particular taxpayer property is fixed, when the government files a Notice of Federal Tax Lien in the appropriate place—generally designated by the state in which the property is located.

There is only a handful of types of property that the government cannot reach. The property exemptions provided in the Internal Revenue Code do not exempt certain property from the imposition of a federal tax lien but rather exempt the property from levy. This means that while the government’s lien will attach to the property, it cannot be administratively seized and sold in order to satisfy the liability or part thereof. There is also a category of persons whose interests are protected from the federal tax lien. Their interests arise after the tax lien but before notices of the lien are filed. These interests are accorded superpriority status. These persons include security holders, purchasers at retail, mechanic’s liens, and judgment lien creditors. Therefore, any property subject to one of these superpriority interests are immune from the tax lien even if they were created after the tax was assessed.

State law is used to determine whether the taxpayer has any interest or rights in property and the extent of those property rights. Once it is determined under state law that a delinquent taxpayer has rights to a piece of property, federal law is then used to determine whether those rights constitute property to which a federal lien may attach. Once a lien is appropriate under federal law, any state law protections are inoperative to prevent the attachment of the federal lien.

**California’s Property Laws**

If a delinquent taxpayer has an interest in property as determined by California law, then that interest will be subject to a lien in favor of the government. While it is clear that property solely owned by the liable spouse is subject to a federal tax lien, whether the lien attaches to property that a liable spouse owns with an innocent spouse is determined by the application of various rules. The degree to which a federal lien may attach to the property and affect the innocent spouse’s interest in the property will vary depending on how the title is held. Moreover, regardless of how it is held, the parties may inadvertently change the character of property by commingling the assets, entering into a postnuptial agreement, making an estate plan with a community property agreement, or making a living trust that designates community property. In California, for example, married couples may hold property as joint tenants, as tenants in common, or as community property.

Generally, in California all property acquired during marriage (with the exception of any gifts or inheritances and certain damages for personal injuries) is presumed to be community property, unless the title of the property indicates otherwise. Gifts, inheritances, and damages for personal injuries may be community property if the spouse transmits the property, for example by placing it in a joint account. Community property is available to satisfy the debts of either spouse incurred before or during marriage, regardless of whether one or both spouses are parties to the debt or judgment. As a result, under California’s property laws, the government is allowed a lien not only on the liable spouse’s separate property but also on all community property of the liable spouse. This law, which allows a creditor to have a lien on all community property, creates a problem for any spouse owning property in California who has or is planning to seek innocent spouse relief under IRC Section 6015—innocent spouse relief will not protect any community property from a previously assessed tax and lien (whether the lien is secret or filed) against the liable spouse. Thus the community property would be subject to administrative and judicial actions to collect the assessed tax.

Also under California law, upon division of community property, the property received by one spouse in the division is no longer liable for a debt incurred by the other spouse before or during marriage. However, if there is a lien on the property at the time of the division, then that property will continue to be subject to the lien and available to satisfy the liability of the other spouse even if it becomes the innocent spouse’s separate property. Both spouses will be liable even if a property becomes the separate property of the innocent spouse when the property is divided by court order. If, however, tax is assessed after the division of community property and the requesting spouse is granted innocent spouse status, then his or her share of community property might very well be protected, so long as the division was not fraudulent.

Property not held as community property is separate property of a spouse, and a spouse does not have any interest in the separate property of the other spouse. In turn, the creditor of one spouse does not have any right to file a lien or execute a levy on the separate property of a nonliable spouse for the debts of the other spouse. California’s laws and federal government policy authorize collection of all property in which a delinquent taxpayer has an interest, but separate property is protected by innocent spouse relief as long as it was held as separate property at the time the tax lien arose.

When a couple holds property as tenants in common, each spouse has an undivided interest in the whole of the property. Each spouse’s interest is distinct to the individual. A tax lien attaches only to the liable spouse’s property and extends no further. The lien does not encumber the innocent spouse’s tenant-in-common interest. When the property is sold the government may only collect from the liable spouse’s interest, and the innocent spouse is entitled to his or her share of the proceeds free and clear of the tax lien. The transfer of a tenancy in common to 100 percent ownership of the innocent spouse will not, however, affect a preexisting lien. The portion of the property previously owned by the liable spouse will continue to be subject to the tax lien.

When property is held by a husband and wife as joint tenants, each spouse has an undivided half interest in the entire property and each has a right of survivorship in the property. Some courts have allowed the tax lien to attach to the interest of the joint tenant in the property. However, a nonliable spouse’s half interest may be immune from his or her spouse’s creditors. Generally a lien against the interest of one joint tenant does not sever the joint tenancy or affect the right of survivorship unless the property is sold prior to the death of the spouse who incurred the lien.

If one spouse is granted innocent spouse relief, the government will only be able to reach one half of the joint tenancy property. The innocent spouse’s interest is protected. The transfer of a joint tenancy interest of
the liable spouse—be it by a separate property agreement during marriage or as a result of a division of property—to the innocent spouse will not affect a preexisting lien on the liable spouse’s half interest in the property. The government will be allowed to collect the tax deficiency from the half interest in the property.

However, when property held as a joint tenancy is transferred upon the death of one joint tenant, nothing passes to the surviving tenant. Rather, the survivor takes from the instrument by which the joint tenancy was created.27 As a result, if the liable spouse dies before a joint tenancy is levied, the tax lien will disappear, because the deceased tenant’s interest terminates rather than passes to the survivor. The surviving innocent spouse will take the property free and clear of the tax lien, as would any other party who owned an interest as a joint tenant.

It is important to note that merely holding property as joint tenants or tenants in common will not necessarily protect the innocent spouse’s interest in the property from creditors. While it is presumed that property held as joint tenants is a joint tenancy, the presumption may be overcome by a factual showing that the couple intended the property to be held as community property.28 If a creditor can convince a court that the property is in fact community property, then the entire property may be subject to the federal tax lien and administrative levy. This rebuttable presumption does little to protect the general public. Few lay persons understand the difference between holding property as a joint tenancy and holding it as community property, and as a result the presumption of joint tenancy is sometimes easy for the government to rebut. Financial statements or estate planning documents such as a living trust, for example, may indicate that a couple’s property is held as community property.

**Fraudulent Transfers**

Under the California adoption of the Uniform Fraudulent Conveyance Act (UFTA), a creditor can set aside a transfer of assets if the creditor can prove actual or constructive fraud.29 If a liable spouse transfers all of his or her property to the nonliable spouse, and if there is no showing that the liable spouse received equivalent consideration, and if as a result of the exchange the liable spouse is unable to meet his or her debts, then a creditor may be able to set the transfer aside as fraudulent.30 When a transfer is set aside for this reason, the liable spouse will be deemed to have a right to the property, a lien will attach, and the creditor (which may be the government) may levy the property to collect the debt.31

It is clear that the UFTA applies to post-nuptial agreements. Until recently, there was a jurisdictional split regarding whether the fraudulent transfer doctrine could be applied in the context of a transfer between spouses.32 This split, however, was resolved when the California Supreme Court decided in Mejia v. Reed that the court of appeal correctly held that the provisions of the UFTA applied to marital settlement agreements.33 The court attempted to harmonize the UFTA with Family Code Section 916, which protects property transferred to a spouse incident to divorce from the debts of the other spouse. In so doing the court balanced the overall policy of protecting creditors with the legislative intent to ensure that in allocating the debts to the parties, the court in a dissolution proceeding takes into account the rights of creditors so there will be sufficient property available to satisfy the debt, provided the net division is equal. Accordingly, in the context of a marital settlement agreement in which property does not have to be divided equally, there is an inherent risk of transfers, which could result in defrauding creditors.

In light of Mejia, family law and tax attorneys need to be vigilant with respect to property divisions in divorces and postnuptial agreements. Even in the rare instance in which property is divided before the assessment of any tax or the filing of any tax lien, the IRS always has the ability to scrutinize the transaction to determine whether a fraudulent conveyance was made. Family law practitioners should become familiar with fraudulent conveyance laws or engage counsel to assist in determining whether a settlement may result in a determination of fraudulent conveyance. In doing so, family law attorneys can protect the interests of clients and protect themselves against not only malpractice claims but also civil suits in which the attorneys are obliged to defend themselves against conspiracy claims made by creditors. At a minimum, to preclude a creditor’s attempt to establish fraud, the family law attorney should seek to have the family law court find that there has been an equal division of property in the settlement.34 If the settlement contains an unequal division of property, the family law attorney should attempt to establish on the court record that the liable spouse received equal consideration, for example because the nonliable spouse waived spousal support. Some attorneys have considered using an indemnity clause for the nonliable spouse that will apply should a creditor successfully levy the nonliable spouse’s property. This clause, however, may amount to a red flag for the IRS or other creditor that obtains the settlement agreement.

**Right to Contribution**

Although neither the IRS nor the California Franchise Tax Board will pursue the separate property of the innocent spouse, the liable spouse may still have the right to contribution under California state law. The court of appeal held in Marriage of Hargrave35 that the supremacy clause has no impact on the state court’s ability to impose federal tax liability on the innocent spouse.36 Maryemma and Charles Hargrave were divorced in 1983. Charles had invested in a tax shelter that was under audit at the time of the parties’ divorce. Pursuant to the divorce decree, Maryemma and Charles had agreed to divide any tax obligations equally. Later, the IRS determined that Maryemma was an innocent spouse, and as a result the IRS looked to Charles for payment of the tax. In July 1992, Charles sought an order to show cause to obtain from Maryemma her share of the delinquent taxes pursuant to the divorce decree. The lower court ordered Maryemma to pay her share of taxes pursuant to the marital dissolution decree. Maryemma appealed, and the appellate court held:
The time to raise all issues relating to distribution of marital debts, including the property of assigning one-half the federal tax burden to an “innocent spouse,” was prior to the entry of the judgment. ...Appellant sought, in effect, to have the court reopen the 1983 judgment and re-apportion the previously adjudicated responsibility for tax liability. In the absence of extrinsic fraud, or some other recognized ground for granting such extraordinary relief, the court was correct in limiting its ruling to the rights and duties of the parties under the 1983 dissolution agreement.37

Based on Marriage of Hargrave, it is extremely important that a marital settlement agreement and/or divorce decree contain language with respect to dividing the tax debt in the event one party is later found to be an innocent spouse. Otherwise, the innocent spouse may win the battle with the taxing agency but lose the war in family law court by having to reimburse the liable spouse for the tax liability because of an ill-drafted marital settlement agreement.

If the government uses the innocent spouse’s separate property to satisfy the liability, the innocent spouse is entitled to a refund from the federal government for any liability, for which the innocent spouse was not liable.38 However, when the liability is paid by former community property, it is unclear what portion, if any, of the liability the innocent spouse is entitled to have refunded. What is clear is that when the property continues to be community property, the innocent spouse is not entitled to a refund of any portion of the community property used to pay the liability of the other spouse, because under Family Code Section 910, all community property is available to satisfy the debts of either spouse.

An innocent spouse is also entitled to a refund from the liable spouse for the value of the property levied in which the innocent spouse had an interest.39 A spouse may also have a right to contribution under the terms of a marital settlement agreement that places the duty to pay the liability on the other spouse and also establishes that the spouse is entitled to reimbursement for any funds or property contributed to the payment of the liability.

Innocent spouse relief at first glance seems like an equitable solution to protect the unwary spouse against a tax liability. However, upon closer examination, it becomes clear that all or most of the advantages provided by innocent spouse relief can be wiped out by applicable state laws governing the division of property, especially in community property states such as California.

It is extremely important for the family law practitioner to ensure that he or she is not using standard tax clauses in the marital settlement agreement. The time for assigning tax debts is prior to the entry of judgment, even though innocent spouse issues may arise after the parties have been divorced. In order to protect the putative innocent spouse, it is of utmost importance that any tax clause provide that “if any individual is granted innocent spouse status, then notwithstanding anything to the contrary herein, said party shall not be liable for any taxes to which the innocent spouse status applies.”

In addition, if property is subject to a tax lien, the family practitioner should insure that the marital settlement agreement provides for a right of reimbursement should any taxing agency proceed against property of the innocent spouse. Of course, the attorney should also clearly state to the client that notwithstanding the terms of the marital settlement agreement regarding taxes and rights to reimbursement, a bankruptcy by the other spouse will for all practical purposes void those provisions.
tain approval or jeopardy. See §6334(e) (The principal residence is subject to a levy when a district director or assistant district director of the IRS personally approves the levy of such property or when the secretary finds that the collection of tax is in jeopardy.).

13 See I.R.C. §6334.
14 I.R.C. §6323(a).
15 INTERNAL REVENUE MANUAL §517.2.5.1 (Oct. 31, 2000).
16 See Drye v. United States, 528 U.S. 49 (1999); see also United States v. Estes, 450 F. 2d 62, 68 (5th Cir 1971); I.R.C. §6334(c).
17 FAM. CODE §750.
19 California offers less protection to an innocent spouse than other community property states. See Melne v. United States, 2000-1 U.S. $50,291; In re Ackerman, 424 F. 2d 1148 (9th Cir. 1970); Hegg v. IRS, 28 P. 3d 1004 (Idaho 2001). Although some California courts have used the term “community debt,” that concept is not in line with existing California law. See Bab v. Schmidt, 495 F. 2d 957 (9th Cir. 1974).
20 FAM. CODE §916(a)(2).
21 FAM. CODE §752.
22 California does offer a homestead exemption under Code of Civil Procedure §704.910. A homestead exemption may be declared, and under Code of Civil Procedure §704.950 a judgment lien on real property will not attach to a declared homestead if certain requirements are met. However, the federal government is not subject to this protection, and the homestead exemption will not prevent the attachment of a federal tax lien.
23 See Shaw v. United States, 331 F. 2d 439 (9th Cir. 1964).
24 See I.R.C. §6321 (limiting the attachment of the lien to the property of the responsible person).
25 CIV. CODE §693.
26 See, e.g., In re Rauer’s Collection Co., 87 Cal. App. 2d 248 (1948).
28 See Hanford v. Lassar, 53 Cal. App. 3d 364 (1975); see also FAM. CODE §2580.
29 Uniform Fraudulent Transfer Act (codified at CIV. CODE §3439). See also I.R.C. §6015(c)(4) (Innocent spouse relief will not be granted if there was a fraudulent scheme between the spouses in the transfer of any property.) and State Board of Equalization v. Woo, 82 Cal. App. 4th 281 (2001).
33 Gagan, 73 Cal. App. 4th 835 (Assets transferred to a former wife under a marital dissolution agreement were not subject to the claims of the former husband’s creditors.).
34 I.R.C. §6015(g). See also Ravetti v. United States, 37 F. 3d 1393 (9th Cir. 1994) and FAM. CODE §920. It is important that family law attorneys draft marital settlement agreements in such a way that a nonliable spouse will be reimbursed for any contribution to a liability in order to make effective any agreements between the spouses that only one is liable for a debt.
36 I.R.C. §6015(g).
37 Hargrave, 36 Cal. App. 4th at 1321.
38 See also Ravetti, 37 F. 3d 1393.
39 FAM. CODE §920.
LITIGATION ATTORNEYS ARE FAMILIAR WITH Code of Civil Procedure Section 2034, the expert witness designation statute. Under Section 2034(a), any party may demand the exchange of expert witness information prior to trial. The statute is fairly clear regarding what information must be exchanged. A party may provide either “[a] list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial” or “[a] statement that the party does not presently intend to offer the testimony of any expert witness.”1 For retained expert witnesses, “the exchange shall also include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney.”2 This declaration must be under penalty of perjury and, according to Section 2034(f)(2)(B), must contain the following:

(A) A brief narrative statement of the qualifications of each expert. (B) A brief narrative statement of the general substance of the testimony that the expert is expected to give. (C) A representation that the expert has agreed to testify at the trial. (D) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony including any opinion and its basis, that the expert is expected to give at trial. (E) A statement of the expert’s hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

By any standard, the requirement of Section 2034(f)(2)(B) to provide “[a] brief narrative statement of the general substance of the testimony that the expert is expected to give” is extremely vague. Many attorneys interpret these words to only require disclosure of the “issue” the expert will testify about, such as damages or causation or, in medical malpractice cases, the standard of care. Nevertheless, while the naming of an issue is brief, it certainly cannot be characterized as narrative. Indeed, providing a vague description of an expert’s testimony in response to the mandate of Section 2034(f)(2)(B) can be a major and costly mistake.

Most litigation attorneys do not research or review Section 2034 when preparing an expert witness declaration—but they should.

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Section 2034(j) gives the trial court the power to exclude expert testimony if the party fails to “[s]ubmit an expert witness declaration.” Although some practitioners might believe that they have complied with this requirement by submitting a document entitled “Expert Witness Declaration,” this subsection has been interpreted by the California Supreme Court in Bonds v. Roy to require more than just the declaration itself. The declaration must provide all the information enumerated by Section 2034(f)(2), including the brief narrative statement. The Bonds court held that the exclusion sanction in subdivision (j) applies when “a party has submitted an expert witness declaration, but the narrative statement fails to disclose the general substance of the testimony the party later wishes to elicit from the expert at trial.”

Thus, with regard to the brief narrative statement, the devil is most definitely in the details. In Bonds, the defendant in a medical malpractice case tried to elicit testimony at trial from his damages expert on the standard of care. The expert, however, was designated as an expert on damages only and not the standard of care. Moreover, the expert’s deposition testimony was limited to the issue of damages. The California Supreme Court affirmed the appellate court’s affirmation of the trial court’s decision to exclude the expert’s testimony on the subject area that was not described in the expert declaration.

The Real Meaning of Bonds

It has been widely argued that Bonds requires more detailed disclosure than what is specified by Section 2034(f)(2). This debate misses the mark. What Bonds actually stands for is the proposition that an expert designation will be deemed inadequate and may result in the exclusion of expert testimony if the designation states that the expert will testify about a specific subject area—and in fact testifies at his or her deposition only about that subject area—but the designating party attempts at trial to have the expert testify concerning a completely different subject area without amending the designation to include that subject area.

Furthermore, it is apparent from the discussion in Bonds that the party’s failure to designate the expert as an expert on the standard of care was not the main reason for the problem with the expert’s testimony. Indeed, it was the failure of the expert to testify at his deposition regarding the standard of care that was the primary justification for the exclusion of his testimony. If the expert had testified at his deposition that he intended to offer his opinion on the standard of care, there would have been no prejudice to the other party, assuming the other party had already desig-

(Continued on page 32)
1. When does an expert witness designation require a declaration signed by the attorney or party (if the party has no attorney)?
   A. Always.
   B. When the expert is a retained expert witness.
   C. When the expert is not a certified expert.

2. If the brief narrative statement is not sufficiently detailed, the court can:
   A. Exclude the expert's testimony.
   B. Enter the designating party's default.
   C. Sanction the expert witness.

3. In Bonds v. Roy, the trial court:
   A. Sanctioned the designating party's attorney.
   B. Excluded the expert's testimony on the subject matter not disclosed in the designation.
   C. Ordered a mistrial.

4. A party will be deemed in compliance with Code of Civil Procedure Section 2034 if the party submits an expert witness declaration, notwithstanding its contents.
   True.
   False.

5. Expert witnesses must be fully prepared with their opinions when they are designated.
   True.
   False.

6. A party cannot withdraw its expert after the expert has been designated.
   True.
   False.

7. The work product protection with regard to an expert witness is absolutely waived once the expert has been designated.
   True.
   False.
8. A party can reestablish work product protection regarding its expert after the expert has been deposed.
   True.
   False.

9. After the initial exchange of expert witness information, the parties may not designate additional expert witnesses.
   True.
   False.

10. A party must always submit an expert witness declaration with an expert witness designation.
    True.
    False.

11. Section 2034 limits each party, in the absence of a court order, to designating five expert witnesses.
    True.
    False.

12. Section 2034 provides that an expert witness may not be excluded because of an inadequate designation unless it can be shown that the inadequacy prejudiced the other party.
    True.
    False.

13. The Bonds court held that prejudice must be shown to exclude an expert based on an inadequate designation.
    True.
    False.

    True.
    False.

15. An expert witness declaration must be signed by the expert witness.
    True.
    False.

16. The expert witness in Bonds was excluded because:
    A. The expert was not timely designated.
    B. The expert attempted to testify about a different subject area than the one disclosed in his designation and during his deposition.
    C. The expert was late to court.

17. In Williams, the court held that a party did not have to disclose specific facts and opinions in the exchange of expert witness lists.
    True.
    False.

18. In Williams, the trial court permitted the expert testimony.
    True.
    False.

19. If a party believes that its expert will need to testify regarding matters not disclosed in the expert witness designation, the party may make a motion to augment its expert witness designation.
    True.
    False.

20. If an expert testifies at his or her deposition regarding a subject area outside the scope of the designation, the designating attorney may request the opposing attorney to stipulate that the designation is sufficient.
    True.
    False.
nated its own expert on the standard of care or had time to designate one in response to the opposition expert’s testimony. Nevertheless, Bonds is now being used to justify the exclusion of experts because a designation did not provide sufficient details regarding the expert’s intended testimony, even if the expert’s testimony will be limited to the same subject area as the one listed in the designation and if there is no prejudice to the other party.6

The possibility of having one’s expert witness excluded under Section 2034(f) because of an allegedly insufficient expert witness declaration may lead an attorney to prepare the opposite of a brief narrative statement. However, providing a highly detailed statement of exactly what an expert will testify about is not really a solution. The problem is three-fold.

First, Section 2034 assumes that when experts are designated, they may not have fully prepared their opinions. According to Section 2034(f)(2)(D), an expert declaration must include “[a] representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.”7 The statute does not require a representation that the expert is sufficiently familiar with the pending action to submit to a meaningful oral deposition. Consequently, when an expert is not sufficiently familiar, it is difficult to provide details of the testimony that the expert will provide.

Second, if an attorney provides too much detail in the expert declaration, and the expert changes the rationale for reaching his or her opinion or changes an element or detail in his or her analysis, the expert may be impeached by the attorney’s declaration. Attorneys’ discussions with their experts are not privileged after an expert has been designated as a trial expert.8 Assuming the information provided in the attorney’s declaration was provided by the expert, the expert could be impeached by what he or she said to the designating attorney. Likewise, the trial attorney’s credibility will suffer if the expert testifies that what the attorney put in the declaration was incorrect.

Third, providing too much information about an expert’s testimony in the designation declaration is at odds with the attorney work product doctrine.

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substitute the wits of his adversary’s expert for wits of his own in analyzing the case.”

However, under discovery rules, once it appears “reasonably certain that the consultant-expert will give his professional opinion as a witness on a material matter in dispute, the attorney work-product privilege terminates and the expert’s knowledge and opinions are subject to discovery and disclosure.”

A party may withdraw a designated expert anytime before he or she is deposed and thereby reestablish the attorney work product privilege.

Accordingly, designating an expert as a trial witness is a conditional, not absolute, waiver of the work product privilege. After an expert is designated there is a conditional waiver and, until an expert is deposed, the work product privilege can be reestablished by withdrawing the expert. Therefore, if an expert decides to change his opinion and becomes unhelpful to the designating attorney before the expert’s deposition, the attorney can “undesignate” the expert.

To preserve a party’s right to reestablish the work product privilege by withdrawing an expert after the party has designated the expert but before the expert has been deposed, a party should not be required to disclose in the expert witness designation everything the expert did to reach his or her opinions and conclusions in the case. Otherwise, there would be no work product left to protect after the designation, and the designation itself would, as a practical matter, destroy the right to reestablish the work product protection by withdrawing the expert before his or her deposition.

The requirement that a party give an adequate description of what the expert’s testimony will be must be harmonized with a party’s right to undesignate the expert witness before deposition and reestablish work product protection. The work product protection can be preserved if the designating party is required only to describe in the declaration the ultimate opinion the expert intends to render, and not what the expert did to reach his or her opinion. This conclusion is supported by Code of Civil Procedure Section 2034, which requires only that the designation contain a declaration that provides “[a] brief narrative statement of the general substance of the testimony that the expert is expected to give.”

In Bonds, the supreme court held that a party is merely required to disclose enough information to allow the other party to “assess whether to take the expert’s deposition...and select its own expert who can respond with a competing opinion.” If an attorney is required to disclose additional and more detailed information concerning the basis of the expert’s opinion, the party will...
lose the right and option of withdrawing the expert and protecting undisclosed information prior to the expert’s deposition.

The dilemma for practitioners is exacerbated when they have to counter-designate an expert pursuant to Section 2034(h), which allows a party to designate an expert on a subject that was not originally anticipated but on which the opposing party has designated an expert. If a counter-designation is necessary, an attorney has only 20 days to find a qualified expert and then must make the expert “available immediately for a deposition.”17 The attorney must therefore act fast to find an appropriate expert and ensure that the expert can become sufficiently familiar with the facts of the case to provide effective testimony.

Prejudice and Exclusion

While the existence of prejudice is not required to exclude an opposing party’s expert who testifies on matters outside the designation, the absence of prejudice is a strong argument against exclusion of the expert’s testimony:

Although there is no statutory requirement that the objecting party has been prejudiced from the nondisclosure in order to object to the expert testimony at trial, absent some showing of prejudice, the court may be more likely to find that the failure to comply with §2034 was not “unreasonable.”18 In Williams v. Volkswagenwerk Aktiengesellschaft, a case that predates Bonds, the court of appeal held that former Code of Civil Procedure Section 2037.3 (now Section 2034), as interpreted by California courts, required a party to “disclose the substance of the facts and the opinions to which the expert will testify, either in the witness exchange list, or in his deposition, or both.”19 The court also held that a party did not have to disclose specific facts and opinions. Moreover, the court held that to exclude an expert’s testimony based on a deficient designation, the complaining party must establish that the expert testimony was admitted contrary to the provisions of Section 2037 and that the admission of such testimony constituted an abuse of discretion that prejudiced the other party. The Williams court concluded that, in the case before it, there were no “new,” “surprise,” or “undisclosed” opinions and that, even if they were undisclosed, the trial court did not abuse its discretion in permitting the testimony.20 Unfortunately, the supreme court in Bonds did not address the decision in Williams and thus left open the possibility that an expert may be excluded despite the absence of prejudice to the other side.

Although the existence of prejudice to the other party is not mentioned specifically in
Bonds or Section 2034 as a requirement for upholding an order excluding an expert’s testimony, the supreme court did note that “[t]he trial court stated any expansion of the scope of [the expert’s] testimony at that point would be unfair, prejudicial, and a surprise.”

Section 2034 mentions several times that lack of prejudice is a requirement for granting relief under Sections 2034(k) and 2034(l), which address circumstances in which a party may augment or amend a designation or serve a late designation. Therefore, prejudice is a basis for denying a Section 2034(k) or Section 2034(l) motion. Moreover, it follows that prejudice should be a specific requirement for exclusion of an expert when a party claims that the extent of the opposition expert’s opinion has not been fully disclosed. Logically, there is no reason to exclude an expert under Section 2034(j) if the other party has not been prejudiced. This is a flaw in the supreme court’s decision in Bonds, for without specifically stating that a showing of prejudice is required, the court appears to give trial courts the power to exclude experts for alleged deficiencies in a designation even in the absence of prejudice to the other party.

The unpublished case of Light v. Provident is instructive regarding how a miscarriage of justice can occur as a result of the supreme court’s failure to make prejudice a specific requirement to justify exclusion of an expert’s testimony following an alleged incomplete designation. In Light, a disability bad faith case, the plaintiff timely designated an expert in neuropsychology. The plaintiff’s counsel provided an expert witness declaration that stated “said expert will testify as to the medications plaintiff takes and how those medications effect his ability to perform the substantial and material duties of his occupation.” After the designation, the expert had the plaintiff undergo neuropsychiatric testing. The test materials were produced, and the plaintiff’s expert was deposed regarding the testing. Although there was clearly no prejudice, the court of appeal used Bonds to justify exclusion of the expert’s testimony following an alleged incomplete designation. In Light, a disability bad faith case, the plaintiff timely designated an expert in neuropsychology. The plaintiff’s counsel provided an expert witness declaration that stated “said expert will testify as to the medications plaintiff takes and how those medications effect his ability to perform the substantial and material duties of his occupation.” After the designation, the expert had the plaintiff undergo neuropsychiatric testing. The test materials were produced, and the plaintiff’s expert was deposed regarding the testing. Although there was clearly no prejudice, the court of appeal used Bonds to justify exclusion of the expert’s opinion, finding that the expert witness declaration was “insufficient” because it did not describe the testing the expert performed to arrive at his opinion. Notably, Bonds does not address whether it is proper to exclude an expert based on an inadequate declaration even if the expert fully discloses his or her additional opinions at a deposition.

Although an expert is not required to be prepared to give a meaningful deposition at the designation stage, attorneys are well advised to make sure that their experts are fully prepared regarding their opinions and the bases for them before the expert is designated and substantive information is disclosed in the designation. The expert’s involve-
ment in drafting or at least reviewing the designation before it is served is an eminently prudent method of decreasing the likelihood that the designation will later be deemed inadequate. However, the extent of the disclosure regarding the expert may result in a waiver of the attorney work product privilege and render meaningless the right to later withdraw the expert before his or her deposition. Until this issue is clarified by the legislature or the courts, an attorney must confront the risk of having an expert excluded. The wise attorney should disclose in the designation all pertinent information about the scope of the expert’s testimony and confirm with the expert that the designation accurately reflects the testimony that the expert expects to provide.

If the expert at his or her deposition provides testimony that could be considered outside the description given in the designation, the designating attorney should ask the other side to stipulate that the designation is sufficient. If the opposing counsel refuses, the designating attorney should consider making a prompt motion to augment and/or amend the designation pursuant to Section 2034(k) to include the additional information.

4 Id. at 149.
5 Id. at 142, 149.
10 County of Los Angeles, 222 Cal. App. 3d 647.
11 Id. at 654-55.
12 Id. at 655-56.
14 Kennedy v. Modesto City Hosp., 221 Cal. App. 3d 575, 581 (1990) (“The cardinal rule in construing a statutory scheme is to discover and give effect to the intent of the Legislature. We do not review the particular statute in isolation but in the context of the ‘whole system of law of which it is a part so that all may be harmonized and have effect.’”) (citing Morrison v. Unemployment Ins. Appeals Bd., 65 Cal. App. 3d 245, 250 (1976)).
20 Id.
21 Bonds, 20 Cal. 4th at 141.
Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism

By Geoffrey R. Stone  
W. W. Norton, 2004  
$35. 730 pages

Geoffrey R. Stone, a law professor and former dean of the University of Chicago law school, has written an insightful and engaging book that could not be more timely. In Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism, Stone weaves together six historical periods when civil liberties were severely tested during wars and national crises. This is at once a depressing and an exhilarating chronicle. Time after time we see weak or craven politicians and spineless or fearful judges making the same mistake of sacrificing liberty and punishing dissent in the name of protecting national security. Yet over time, in fits and starts, the historical narrative bends toward greater protection for civil liberties.

The ink was barely dry on the First Amendment, Stone recalls, when the Sedition Act of 1798 made it a crime to write, print, utter, or publish “any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States....” From July 1798 to March 1801, when the Sedition Act expired, the Federalists arrested approximately 25 well-known Republicans under the act. Ten cases went to trial, all resulting in convictions.

John Quincy Adams later observed that the Sedition Act had “operated like oil upon the flames.” As one of his first official acts as president, Thomas Jefferson pardoned all those who had been convicted under the Sedition Act. Forty years later, on July 4, 1840, as president, Thomas Jefferson pardoned all those who had been convicted under the Sedition Act. Ten cases went to trial, all resulting in convictions.

The second episode Stone examines is the decision by President Abraham Lincoln to suspend the writ of habeas corpus during the Civil War. Secretary of War Edwin Stanton imprisoned hundreds of alleged draft resisters without benefit of trial. It is unknown exactly how many civilians were arrested by military authorities, but estimates range from 13,000 to 38,000.

World War I, the third period Stone examines, prompted a devastating assault on civil liberties. The Department of Justice invoked the Espionage Act of 1917 to prosecute more than 2,000 dissenters for allegedly disloyal, seditious, or incendiary speech. Shortly before the armistice, Congress passed the Alien Act of 1918, which authorized the government to deport any alien who was a member of an anarchist organization. Under the act, the entire deportation process was made administrative. No judge or jury had to find that the potential deportee held anarchist beliefs or was a member of an anarchist organization, and there was no right of appeal. The preliminary investigation, a critical part of the proceeding, was conducted in secret. Naturalized citizens were among those caught up in the scheme. In 1918 alone, the United States deported 11,625 people under the act.

The World War I era also witnessed the establishment by Attorney General Mitchell Palmer of the General Intelligence Division (GID) within the Bureau of Investigation. Palmer appointed a young J. Edgar Hoover to gather and coordinate information relating to radical activities. Hoover quickly created an elaborate card system that held the names of more than 200,000 people suspected of radical activities, associations, or beliefs.

In November 1919, the GID conducted its first major roundup of aliens. Approximately 650 people were arrested on suspicion of radicalism. On December 21, 1919, the United States deported 249 of them. On January 2, 1920, the government rounded up an additional 4,000 suspected radicals in a series of raids in 33 cities. These arrests became known as the infamous Palmer raids.

Internment Camps

World War II represents the fourth major period during which civil liberties suffered in the name of national security. In 1942, William Dudley Pelley, an outspoken critic of President Franklin D. Roosevelt, was convicted under the Espionage Act of 1917, based on statements he had made in his newspaper, the Galilean, such as “To rationalize that the United States got into the war because of an unprovoked attack on Pearl Harbor, is fiddle-faddle,” and “No realist in his senses would contend that there is unity in this country for the war’s prosecution.”

Japan’s attack on Pearl Harbor killed more than 2,000 people and destroyed much of the Pacific fleet. Two months later on February 19, 1942, President Roosevelt signed Executive Order 9066, which authorized the Army to “designate...military areas” from which “any or all persons may be excluded.” Over the next eight months, 120,000 individuals of Japanese descent were ordered to leave their homes in California, Washington, Oregon, and Arizona. Two-thirds were American citizens, representing almost 90 percent of all Japanese Americans. Stone points out that “n[o] charges were brought against these individuals; there were no hearings; they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them.”

This was easily one of the most shameful chapters in American history, and Stone recounts how many years later the government tried to make amends. In 1983, the Commission on Wartime Relocation and Internment of Civilians unanimously concluded that the factors that shaped the internment decision “were race prejudice, war hysteria and a failure of political leadership,” not military necessity.

Stephen F. Rohde is a constitutional lawyer with the firm of Rohde & Victoroff. He is past president of the ACLU of Southern California and author of American Words of Freedom (2001).

By the Book

REVIEWED BY STEPHEN F. ROHDE
The following year, U.S. District Judge Marilyn Patel granted petitions filed by Fred Korematas and Gordon Hirabayashi to have their convictions for violating internment laws set aside for “manifest injustice.” Patel found that “the government had knowingly and intentionally failed to disclose critical information that directly contradicted key statements in General DeWitt’s final report, on which the government had asked the courts to rely.”

Stone treats the Cold War as the fifth period during which excessive concerns for national security trampled civil liberties, out of an obsessive fear of Communism. In 1947, President Harry S. Truman instituted a loyalty program for all federal employees, under which out of the more than 4.7 million individuals who were investigated, roughly 350 federal employees were discharged because of doubts about their loyalty. In addition, approximately 2,200 federal employees, upon learning they were under investigation, “voluntarily” resigned rather than allow the process to continue. In the end, Stone points out that only about one in 13,000 federal civilian employees who were investigated were discharged for disloyalty.

Meanwhile, the notorious House Un-American Activities Committee (HUAC) had launched a series of highly public investigations and hearings to expose Communists. In 1947 and 1948, HUAC compiled dossiers on 25,591 individuals and 1,786 organizations and created a list of 363,119 persons who at some time in the past had signed a Communist Party election petition.

In this atmosphere Senator Joe McCarthy made reckless charges about the extent of Communist spies in the government, and subsequent character assassinations ruined the lives of many innocent people. The Christian Science Monitor observed that McCarthy’s investigations had failed to produce the conviction of a single spy or to uncover a single Communist working in a classified defense position.

The final period Stone explores is the Vietnam War, during which the last throes of anti-Communism gave way to widespread efforts to suppress antiwar dissent.

In 1968, after the student protests at Columbia University, the FBI launched a program to hasten the collapse of the New Left. FBI agents were instructed to frustrate “every effort of these groups...to recruit new...members,” to disrupt the activities of these groups, and to promote suspicion, distrust, and disension within the leadership. J. Edgar Hoover exhorted his agents to approach these new responsibilities with “imagination and enthusiasm.”

Stone concludes his book with an examination of how and why the United States lost its way in these six episodes. He then levels very serious charges against the current government. “Like previous wartime leaders, members of the Bush administration have used fear to their political advantage and tarred their opponents as ‘disloyal.’ Shortly after September 11, President Bush warned, ‘You are either with us or with the terrorists.’”

Given the history he has so skillfully elucidated, Stone offers this challenge. “To strike the right balance, this nation needs political leaders who know right from wrong; federal judges who will stand fast against the furies of their age; members of the bar and the academy who will help Americans see themselves clearly; a thoughtful and responsible press; informed and tolerant citizens who will value not only their own liberties, but the liberties of others; and justices of the Supreme Court with the wisdom to know excess when they see it and the courage to preserve liberty when it is imperiled.”

Perilous Times should be required reading for everyone who is willing to help write a courageous, rather than another shameful, chapter in the history of the United States—one in which our precious civil rights and liberties are not sacrificed in the name of defending them.
Making Metadata Control Part of a Firm’s Risk Management

When a document is created on a computer, information about the document (for example, the date it was created) is automatically generated. This information is referred to as metadata or hidden data. It is not visible in the document, but it is part of the document. Metadata can also be inserted deliberately. For example, an author can place comments about the document in its metadata. Microsoft Word, Excel, and Power Point all add metadata to each document they create. Adobe Acrobat PDFs and Word Perfect files also contain metadata. This data can be hidden in many places within each document. Metadata may be accessed by anyone who can open the electronic file, including clients and opposing counsel. For example, a lawyer who receives the final draft of a contract from an opposing lawyer may be able to view revisions or learn who made them.

To view some metadata, open a Word document, click on File, Properties, and select any of five choices offered by the dialog box (General, Summary, Statistics, Contents, Custom). Each selection shows different information. Word generates much of this metadata automatically. The General selection shows the date and time the document was created (and modified and accessed), the size of the document, and the location of the document. The Summary selection shows the title of the document, the author’s name, and the author’s company, among other things. Users can also manually add comments about the document into fields under the Summary tab. Under the Statistics tab, anyone with access to the document can find the amount of time spent editing it, the name of the person who last saved it, the number of revisions, the date it was printed, and word count information. The Custom selection shows other documentation that the author chooses to include, such as the typist's name, the names of people the document was forwarded to, and the name of the client.

A Word file contains more metadata than what is found under Properties. Additional investigation can uncover routing slip information, templates, document versions, hidden text, embedded graphics, hyperlinks, and the last 10 authors of a document. Although metadata is not visible on the face of a document, text that has been added or deleted can be made visible if the document's author applies Word’s Track Changes. This feature records all changes made to the document and, when parties are collaborating on a document, remembers which user made which changes. To turn this feature on, click on Tools, Track Changes, Highlight Changes, and Track Changes While Editing. To view the changes on the screen, select Highlight Changes on screen. Similarly, select Highlight Changes in printed document to view the changes on paper. The author always may turn off the Track Changes feature during editing or before sending the document to another person. However, previously tracked changes will be visible to recipients of the document if they know to select Highlight Changes on screen, even if the author never selected it.

By itself, metadata is not sinister. It is intended to be useful to the author of the document. For example, before creating a new document out of an older one, an author can check its last modification date to ascertain whether it is already up-to-date enough to use for the new purpose. However, metadata can assuredly inconvenience an author as well. An attorney could inadvertently betray confidential information simply by forwarding a Word document without deleting the metadata first. When this occurs the authoring attorney and the recipient attorney could face embarrassment, ethical problems, or even malpractice exposure.

In 2001, the New York State Bar Association’s Committee on Professional Ethics held, in its Ethics Opinion 749, that it was unethical for a lawyer to surreptitiously examine and use metadata that an opposing lawyer failed to remove from a document e-mailed over the Internet. The committee explained that for a recipient lawyer to view the metadata was “an impermissible intrusion” into the attorney-client relationship. Claiming that it was unclear how to effectively block access to metadata, even by sophisticated computer users, and that “it is a deliberate act by the receiving lawyer, not carelessness on the part of the sending lawyer, that would lead to the disclosure of client confidences and secrets,” the committee opted not to hold the sender liable for failing to remove the metadata.

Deleting Metadata

Many sources suggest that before sending an electronic file that is laden with metadata as, for example, a Word document, attorneys should translate it into WordPerfect, rich text format, or portable document format. Unfortunately, only some, not all, metadata may reliably be removed through conversions. Some metadata is transferred to the new document and, of course, new metadata can be added as soon as a user starts editing the new document. The same is true even when the user employs the Select All, Copy, New Document, and Paste technique. To avoid transferring metadata, the user needs to use Paste Special and choose the Unformatted Text option. Unfortunately, using Unformatted Text also removes all the text and paragraph formatting that the user took pains to apply to the original.

Microsoft offers a free tool that it claims will remove hidden data. This tool, however, only works with Word 2003/XP, Excel 2003/XP, and Power Point 2003/XP files. The download is available

Carole Levitt and Mark Rosch are principals of Internet For Lawyers.
at www.microsoft.com/downloads. Word 2002 and 2003 also have security options that can remove some metadata. According to many experts however, it doesn’t remove all hidden data. Further, according to metadata expert Donna Payne, Microsoft’s add-on tool would be more useful if it emulated her company’s application, Metadata Assistant (http://tinyurl.com/4ykyn), which works with more versions of Word, Excel, and Power Point than Microsoft’s plug-in. According to Payne, Metadata Assistant can analyze versions 97, 2000, 2002 (XP), and 2003. The application displays its findings and offers a variety of options to remove the metadata. In addition, the software is integrated with e-mail applications and document management systems. Metadata Assistant can be customized and has technical support. The company recently added a new feature that cleans and converts a file into a PDF. This software costs $79 per work station, there is an enterprise price, and a free, limited-function trial version is available for download. The application can operate as a stand-alone that can clean multiple documents simultaneously or from within one Word, Excel, Power Point, or Outlook document at a time.

Other third-party software developers have also recognized the need for removing metadata. For example, Kraft Kennedy & Lesser’s ezCleaN (www.eklsoftware.com) analyzes and removes metadata from Word, Excel, and Power Point files and is integrated with Outlook. The price, however, may be prohibitive to many solo attorneys and small firms that do not need 25 licenses (the required minimum) at $20 per user. A fully functional, 45-day free trial version of the software is available for download at the site.

Work Share Protect (http://tinyurl.com/6uedz) analyzes and cleans Word, Excel, and Power Point documents, and it allows users to convert the cleaned document to a PDF without a copy of Adobe Acrobat. This application also integrates with Lotus Notes and Novell’s Group Wise as well as Outlook. Work Share Protect starts at $25 per user. A free trial version is available.

No third-party metadata removal software exists for WordPerfect, but Corel offers various tips on how to remove metadata.

Since the New York State Bar published its Ethics Opinion on metadata, much more information has been made available about metadata and how to remove it. If the opinion were written today, it may not be as forgiving of a lawyer who fails to remove metadata before sending electronic documents to the opposition. Even in the absence of specific, fully established guidelines regarding metadata, lawyers should develop the habit of vetting metadata before transmitting electronic files.
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Recent UCC Security Interest Options

ON WEDNESDAY, MARCH 16, the Commercial Law Section will present an update on recent developments in UCC security interest opinions. Speakers Jerome A. Grossman and Steven O. Weise will provide an introduction to the topic for new practitioners as well as an update for more experienced opinion givers and recipients. They will also cover the TriBar Opinion Committee’s report on UCC security interest opinions, the status of California’s report on UCC opinions, and how California’s report may differ from the TriBar report. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. On-site registration and the meal will begin at 11:45 A.M., with the program continuing from 12:30 to 1:30 P.M. The registration code number is 008683. CLE+Plus members may attend for free ($15 meal not included). The prices below include the meal.

$55—Commercial Law and Barristers Section members
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1 CLE hour

Environmental Due Diligence

ON WEDNESDAY, MARCH 9, the Real Property Section will present a program on the EPA’s recent changes for environmental due diligence. Speaker Shiraz D. Tangri will discuss the effects these changes will have on many real estate transactions, including those involving “clean” properties. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 008923. CLE+Plus members may attend for free ($15 meal not included). The prices below include the meal.

$45—Real Property Section members
$55—other LACBA members
$65—all others
1 CLE hour

The ABCs of Successful Arbitration

ON WEDNESDAY, MARCH 23, the Barristers Section will present a program on how to maximize your results in arbitration. Speaker Caroline C. Vincent will cover such topics as selecting the arbitrator, disclosure and disqualification, using the prehearing conference to manage discovery and design the evidentiary hearing, briefs, and hearing techniques. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 008730. CLE+Plus members may attend for free ($15 meal not included). The prices below include the meal.

$25—Barristers Section members
$30—other LACBA members
$40—all others
1 CLE hour

Current Issues in Surety Law

ON TUESDAY, MARCH 22, the Real Property Section will present a program on construction surety law in California. Speakers Marilyn S. Klinger and Laurence P. Lubka will address surety law issues from the point of view of the sureties and of the contractors. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 008732. CLE+Plus members may attend for free ($15 meal not included). The prices below include the meal.

$45—Real Property Section members
$55—other LACBA members
$65—all others
1 CLE hour

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

For a full listing of this month’s Association programs, please consult the County Bar Update.
Shattering the Glass Ceiling in the Los Angeles Legal Community

THE FIRST WOMAN LAWYER in California, Clara Shortridge Foltz, gained admittance to California’s bar in 1878, and now, over 125 years later, women constitute roughly 30 percent of the legal profession. In California, one out of every five lawyers over 55 years of age is female, but close to half the lawyers under 35 are women, and about half the students entering law school are women. Women have made great strides in our profession. Yet the number of women partners in law firms and the number of women in management positions do not reflect this equitable trend. Women account for approximately 16 percent of partners in large law firms nationwide and only 5 percent of managing partners.

These numbers illustrate that although fissures have been created, the glass ceiling remains largely intact for women attorneys. In the San Francisco Bay Area, lawyers have taken action. When Angela Bradstreet, now managing partner of Carrol Burdick & McDonough, LLP, became president of the Bar Association of San Francisco (BASF) in 2002, she took on the glass ceiling by assembling a blue-ribbon task force to address it. The BASF’s No Glass Ceiling Task Force included well-known partners from the city’s most prestigious law firms, general counsel from major corporations, and senior attorneys from public agencies. The theory Bradstreet and Task Force Chair Mary Cranston of Pillsbury Winthrop LLP embraced was that, if lawyers from Morrison & Foerster LLP, the San Francisco City Attorney’s Office, and Wells Fargo Bank sat on the task force, their firms, agencies, and corporations would be hard-pressed not to commit to its plan.

The task force was charged with developing a platform to challenge the Bay Area legal community to take action to improve opportunities for women lawyers to attain partnership and managerial positions. After gathering and summarizing the statistical information proving that women lawyers have not attained these positions in numbers corresponding to their presence in the profession, in April 2002 the task force published seven commitments, calling for specific steps to achieve the advancement of women. Firms, corporate legal departments, and public agencies were requested to sign the commitments to demonstrate their pledge to achieving participation in numbers corresponding to their presence in the profession. After gathering and summarizing the statistical information proving that women lawyers have not attained these positions in numbers corresponding to their presence in the profession, the BASF’s task force published seven commitments, calling for specific steps to achieve the advancement of women. Firms, corporate legal departments, and public agencies were requested to sign the commitments to demonstrate their pledge to achieving participation in numbers corresponding to their presence in the profession.

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The Bay Area legal community stepped up to the plate. By August 2004, 66 firms, agencies, and corporations had signed the commitments. The signatories include large and small firms, publicly traded corporations, and major private companies. Corporations and insurance companies are starting to realize the benefits of ensuring diversity in the law firms they retain, as many review the diversity profiles of firms before agreeing to hire them. If women are not provided opportunities to attain leadership positions, the legal profession is failing to take advantage of a large portion of its talent pool. Committing to increasing the number of women in partnership and management positions is the smart thing to do.

Some balk at the commitment to 25 percent women in partnership and management positions, calling it a quota. The statistics clearly show that the status quo has not worked and that women lawyers have not achieved parity in leadership positions commensurate with their numbers in the profession as a whole. Statistical numbers are not quotas but a legitimate measure of fairness. Clearly something operating in this profession is not fair to women lawyers. Where signs of unfair conditions exist, we should remove those conditions, even if nobody is at fault. That is what the commitments attempt to do. And they appear to be working. According to a survey of signatories released in November 2003, 28 responding law firms announced an average increase of 18 percent women partners and a whopping 26 percent increase in the number of women in management positions.

Since the BASF launched its initiative to break the glass ceiling, California Women Lawyers, with much assistance from Bradstreet, has sought to extend the initiative to other communities throughout the state. Lawyers in San Diego, Sacramento, Monterey County, Santa Barbara County, and Fresno have all expressed interest in doing so, and many of them are currently exploring ways to tailor the initiative to one that will work in their communities. It is time for the lawyers of Los Angeles to launch an initiative of their own, so that the many women lawyers who work here can start shattering some glass.


Andrea S. Carlise, a former president of California Women Lawyers, specializes in employment law in the San Francisco Bay Area.
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