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**From the Chair**

By R. J. Comer

Is “business casual” an oxymoron? Or is business attire an inevitable casualty of a new business paradigm that favors choppy and inelegant e-mail messages over formal letters and prefers teleconferences to meetings? In a world in which technology allows us to connect to the office in our bathrobes, the business suit seems almost quaint.

Business casual pervaded the legal profession during the dot-com boom, when lawyers shed their stuffy suits and began dressing down to woo young and badly dressed entrepreneurial clients. Perhaps it was a good idea for lawyers to go casual for clients who were years away from their 10-year high school reunion and carried a Gen-X mistrust of baby boomer lawyers who looked and acted like their clients’ parents. Although the dot-com era flamed out, business casual attire proved flame-retardant.

The evidence on the benefits of business casual in the post-dot-com era is conflicting. According to a 2002 national poll of human resource managers by Jackson Lewis, an employment firm, 44 percent of managers thought casual attire encouraged tardiness and absenteeism, 30 percent said it encouraged flirting, and 40 percent said it encouraged overall workplace laxity. By contrast, in the same poll 75 percent of managers said casual dress improved morale, and 34 percent said it was an effective recruiting tool.

One study indicates that business casual is healthier than business attire. The March 2005 issue of *Shape* magazine reported that University of Wisconsin-La Crosse researchers monitored 53 pedometer-equipped workers. Casually attired workers took an average of 500 more steps than they did in business attire. This 8 percent increase in steps equals 125 calories burned per week and 6,250 calories per year.

In an attempt to define “business casual” and keep some semblance of business in the equation, law firms and other legal employers have devoted themselves to establishing dress codes with ever-more-complicated lists of specific prohibitions. Mules (those horrible open-heel and often open-toe women’s shoes that clap-clap down a hallway) are often banned for being noisy—and ugly. But the strappy open-toe pump is acceptable, even though it can be just as noisy and just as ugly on an ugly foot. Capri pants are often banned, but a skirt of the same length is acceptable. Men must wear collared shirts, but the faded roll atop a raggedy polo shirt that once might have been described as a collar is acceptable. And then there is the elusive standard for the tucked or untucked shirttail.

Perhaps this explains a January 1, 2005, *USA Today* report that a growing number of employers are abandoning casual dress policies in favor of more formal business attire. The March 17, 2005, edition of the *Washington Post* ran an article titled “More Business, Less Casual,” which identified a connection between the economy, world affairs, and business dress. Business casual arose in a boom economy, but as the economy levels off and a somber era of world conflict ensues, a more serious attitude permeates the business world and is reflected by a return to more formal attire.

Whatever the reason, employers should abandon the thankless responsibility of good taste enforcement and return to business professional dress codes. If Walter Cronkite were anchoring the evening news today, he might well declare that the fight for a coherent business casual dress code is unwinnable and has devolved into a quagmire. Indeed, the business casual campaign has outlived its purpose and must fail because it lacks a rational and socially relevant concept of couture. The time has come to admit the shame of khakis, polo shirts, and mules, and bring our legal professionals home to the honor and dignity of suits and ties and closed-toe shoes.

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

Mentoring

Matthew Fragner’s suggestion in “A New Paradigm for Mentoring” (Closing Argument, July/August 2005) could be extended one step further. To require specialists to provide 10 hours per year of mentoring as a condition of retaining specialty certification.

Wendy Cole Lascher

Total Return Trusts in California

In the Practice Tips article in the September 2005 issue (“The Advantages of Creating Out-of-State Trusts,” by Edward J. McCaffery, Alan T. Yoshitake, and Keith A. Davidson), the authors assert that “total return trusts are not available under California law.” Such is not the truth. There is no provision in California law that prevents the establishment of total return trusts. They exist in California and are administered by banks and trust companies as well as individual trustees. California’s Uniform Principal and Income Act is not an obstacle to such trusts. Section 16335(a) expressly provides that the terms of the trust or will override those of the act. If one drafts a total return trust, its provisions apply under California law.

Valerie J. Merritt

Authors’ reply: We agree that California does not specifically prohibit the establishment of a total return trust, and thank the writer for pointing this fact out. Unlike other states, however, California does not provide for a statutory total return trust. Individuals can create total return trusts in California by drafting particular language in their estate planning documents, but there will necessarily be uncertainty as to how such language will be interpreted due to the absence of express statutory authority under California law. Further, the other advantages discussed in our article—such as California’s lingering rule against perpetuities—give strong enough reasons for individuals to consider sending their trusts away from home.

BBB Arbitrations

I felt that “Handling Better Business Bureau Vehicle Claims” by Michael B. Rainey (Practice Tips, November 2005) contained omissions, misimpressions, and errors that required comment. As I see it, the overall problem with the article is that although the title is about participating in a Better Business Bureau arbitration (And why is the article limited to just BBB arbitration? There are other qualified dispute resolution processes in California. See the Web site of the Department of Consumer Affairs at http://www.dca.ca.gov/arp/arbprocess.htm#state-certified.) it continually advises about what purportedly is or is not required for a claim under the California Lemon Law. That is where it goes off the rails.

The article only discusses the “presumption” portion of the law, intimating that a consumer must qualify under the presumption language to have a claim. Not so. The statutory requirement is that the manufacturer or its authorized repair facilities were first afforded a “reasonable” number of repair attempts before a claim may be brought. (See Jiagbogu v. Mercedes-Benz USA, 118 Cal. App. 4th 1235, 1245 (2004).) In the great majority of my Lemon Law cases over the past 20 or more years, the presumption was not involved—either because the consumer did not want to go through the manufacturer’s dispute resolution (arbitration) program or because nonconformities were spaced over more than the first 18 months or 18,000 miles on the odometer of the vehicle that was in question.

Further, the “requirement” of advance “notice” to the manufacturer applies only to situations in which the consumer wishes to avail himself or herself of the “presumption” that a reasonable number of repair attempts have been afforded. On the other hand, no notice is required under the act in nonpresumption situations. (See Krotin v. Porsche Cars North America, Inc., 38 Cal. App. 4th 294, 302-03 (1995).)

In any event, it is incorrect that for the presumption the vehicle must have been subject to repair on two (or four) occasions for the same problem and that “the vehicle must be out of service for a cumulative period of 30 days.” Rather, the presumption comes into play either if two (or four) repair attempts have been given for the “same nonconfor-
The Lemon Law portion of the Song-Beverly Consumer Warranty Act does not apply to “the part of a motor home primarily used for human habitation.” However, this is largely immaterial because the larger Song-Beverly Consumer Warranty Act (which contains remedies identical to or comparable with the “Lemon Law” part) applies to all new “consumer goods,” including the entirety of motor homes. (See Civil Code Section 1791(a).) The article implies otherwise.

There is no “reasonable use expense” deduction under the Lemon Law. Rather, a statutory formula applies to the mileage shown on the odometer prior to the time the nonconformity was first brought in for repair. (See Civil Code Section 1793(d)(2).) There is no additional deduction for the “use” of the vehicle thereafter. (See Jiagbogu, 118 Cal. App. 4th at 1244.)

It is also not so that the act requires a “nonconformity [that] adversely affects the use, value, and safety” of the vehicle. Rather, the act refers to a substantial impairment of the “use, value, or safety” of the vehicle to the buyer. Thus, it is not required that the vehicle be unsafe—the only thing the article discusses. A substantial impairment of the “use” or “value” also qualifies. This might explain the result in a matter that the author seems to think was odd—there were a series of complaints about “squeaks” that required repairs over a 37-day period in the first full year. As so often happens, the BBB arbitration resulted in a loss for the consumer, but the manufacturer apparently paid promptly when confronted with a lawsuit. From the facts presented, it seems that the consumer there qualified for the presumption and that there had been a substantial impairment of “value” if not of safety.

Last, the basic unstated premise of the article—that it is necessary or desirable for consumers to go through a manufacturer’s qualified dispute resolution process before seeking court relief—is debatable. It is true that the “presumption” may not be asserted if he or she does not do so. But arbitration is an option, not a requirement.

There are practical considerations: As implied in the article, arbitrators tend to favor the manufacturer. The consumer who proceeds through arbitration and obtains an unsatisfactory result has lost two or three months that could have been used pursuing the claim through the court system with the aid of counsel. Also, when a consumer wins or obtains settlement “in an action under this section” (i.e., a lawsuit) the manufacturer is responsible for the consumer’s reasonable attorney’s fees. (See Civil Code Section 1794(d).) There is no comparable provision for a consumer who may obtain a favorable result through prelitigation. As a result, it is the rare Yugo or Escort driver who will wish to pay his or her own attorney’s fees through an arbitration and then not be reimbursed even if he or she is able to obtain a favorable result.

Author’s reply: Thank you for your comprehensive letter in response to my article. Your letter indicates that the article accomplished the intended goal of educating and encouraging dialog. Your letter is an excellent adjunct to the article. The best a writer can hope is to bring a bit of enlightenment to his or her audience. With your help, I think that goal has been accomplished.
Contracts of Adhesion

MOST WRITERS IN HOLLYWOOD are thrilled at a chance to get their scripts turned into movies. Most writers, however, have few meaningful choices in negotiating their movie deals. The reality is that the majority of actors, writers, and production people do not strike a great deal with a studio. The imbalance of bargaining power and the standardization of terms result in an agreement that may be described as a contract of adhesion, which has been defined as “a standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates the subscribing party only the opportunity to adhere to the contract or reject it.”

Uneven bargaining strength does not necessarily make a contract unconscionable. The Uniform Commercial Code generally defines “unconscionability” as “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” 1 Unconscionability points to negotiation as well as the terms negotiated.

Can a charge of unconscionability render a contract unenforceable? California Civil Code Section 1670.5(b) provides a court with several options: “If the court as a matter of law finds the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

Under Section 1670.5(b), the contract and the circumstances surrounding its formation are to be examined: “When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect and to aid the court in making the determination.”

Prominence and success do not guarantee fairness in negotiations. The late rock promoter and producer Bill Graham, for example, was ruled to be the adherent in signing contracts with members of the musicians’ union. The American Federation of Musicians required its musicians to utilize a contract with Graham that permitted only the union to resolve disputes between the musicians and Graham. When a dispute arose, a decision was first rendered against Graham without a hearing. Later, a former union officer held a hearing that ascribed all disputed losses to Graham, who subsequently successfully appealed a trial court ruling upholding this contract.

The intentions and reasonable expectations of the parties to a contract are fundamental to a review of its validity and enforceability. The court in Graham v. Scissor-Tail, Inc., propounded that courts could limit enforcement of contracts of adhesion according to two criteria: 1) a provision of the contract does not fall within the reasonable expectations of the weaker or adhering party, or 2) “a contract of adhesion, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or ‘unconscionable.’” 2 The court held that largely due to the contract term dictating a union forum for the resolution of any disputes, Graham was subject to oppression and overreaching.

Contracts of adhesion are not limited to the entertainment industry. When people travel, rent cars, and purchase insurance, for example, they accept form contracts, which can be a normal and even relatively efficient way of doing business. Some of these contracts, for example involving commercial credit and insurance, are subject to government regulation, and if they contain clauses that are unclear, unexpected, or unconscionable they will not be enforced.

In one case, when a party attempted to rescind a stock repurchase agreement, the plaintiff claimed that the agreement was an adhesion contract. The court chose not to interpret the adhering party’s expectations or give weight to circumstances following the making of the contract. The court held: “[H]indsight and subsequent circumstances cannot be determinative of the issue of disappointment of reasonable expectations.” 3 The contract was not invalid merely for being a contract of adhesion.

The trend of opinions in film industry lawsuits reflects a general emphasis on fairness and a tight hold on access to remedies. For example, when Art Buchwald challenged the net profits system a studio, he achieved a partial victory. The trial court determined that Coming to America, starring Eddie Murphy, was based on Buchwald’s story. His challenge to the studio’s net profits system garnered invalidation of several standard contract provisions and a relatively modest award. 4 After Buchwald reached a settlement, however, the industry soon returned to familiar structures for net profit participation.

With fairness being held as a standard, court dramas involving challenges to entertainment industry contracts have often generated con-
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siderable attention and may even inspire fear in the boardrooms, but decisions often tread lightly. In Batfilm Productions, Inc. v. Warner Bros., Inc., the court read Section 1670.5(b) as making a clear distinction between an unfair contract and an unconscionable one.

“To be unconscionable, a contract must ‘shock the conscience’ or, as the plaintiffs alleged...it must be ‘harsh, oppressive, and unduly one-sided.’”10 In the judgment of that court: “[A] contract of adhesion is not the same as an unconscionable contract, which is no contract at all.” While enforcement could be denied of any part of the contract found to be unconscionable under Section 1670.5(b), the contract as a whole and certain provisions of the net profits definition and the method of calculating interest were held not to be unconscionable.11

The court in Batfilm Productions appeared to have little empathy for the plaintiffs’ charges of unfairness, particularly since the plaintiffs did not prove they could have negotiated a better deal elsewhere. The stature and experience of the plaintiffs seemed to hurt their argument, in the court’s view. The court wrote: “No one is less likely to have been coerced against his will into signing a contract like the Warner Agreement than Mr. Melniker. This former general counsel and senior executive of a major motion picture studio (Metro-Goldwyn-Mayer) knew all the tricks of the trade; he knew inside and out how these contracts work, what they mean, and how they are negotiated.”12

Care must be taken in reviewing even supposedly standard contracts. One-sided or adhesive contracts are very often enforceable, and unconscionability is a high threshold. Contract negotiations should be given adequate time for full disclosure and discussion of intentions, expectations, facts, assumptions, and definitions. Objectionable provisions must be challenged during negotiations. Writings that evidence that objections were communicated may prove valuable in a subsequent dispute. Until a writer reaches the studio’s A-list, contracts must be thoroughly analyzed and negotiated.

3 Graham, 23 Cal. 3d 807.
4 Id. at 820.
5 Id. at 817-18.
8 Id. at 325.
11 Id.
12 Id.
Assessing the Amended Labor Code Private Attorneys General Act

ON OCTOBER 12, 2003, Governor Gray Davis signed SB 796, the Labor Code Private Attorneys General Act, into law. PAGA quickly became known among employers and the defense bar as the Bounty Hunter Law. Codified as Labor Code Section 2699, the law gave employees the right to sue for penalties to enforce virtually any provision of the Labor Code, thus exposing employers to potentially enormous liability for very minor violations. In addition to creating this right, PAGA also established a scheme for assessing significant penalties against those who violate Labor Code provisions that do not contain specified civil penalties.

The legislature amended PAGA in 2004 with the passage of SB 1809. The amendments limit employees’ right to sue over inconsequential, technical violations and provide new procedural prerequisites for filing suit. These procedural changes, however, generally will have little practical effect.

The legislature justified its passage of PAGA by pointing to the need for the enforcement of California’s labor laws despite the inability of the financially strapped state to investigate more than a small portion of claims made by employees. Lawmakers reasoned that active enforcement of California’s legal protections of workers is necessary to deter employers from engaging in unlawful practices. However, staffing levels and budgets for state labor law enforcement agencies have not kept pace with the growth of the labor market. Given California’s budget crisis, the legislature was not optimistic that the situation would improve in the foreseeable future, and so it passed the Labor Code Private Attorneys General Act as a way to bridge the gap.

Despite the legislature’s rationale, employers feared PAGA, with some justification. Under PAGA, employees do not have to show that they suffered actual harm from the employer’s violation. Thus, the statute encouraged employers to sue over insignificant technical violations. This effect was heightened by the fact that a prevailing plaintiff in a Section 2699 suit is awarded attorney’s fees and costs. Moreover, PAGA allows an employee to bring a representative suit on behalf of the employee and other current and/or former employees but does not require the employee to show that the case meets the requirements for filing a class action. By providing this back-door route to a class action lawsuit, the statute greatly increases an employer’s potential liability.

Further, PAGA provides hefty penalties for violations of Labor Code provisions that do not contain language specifying civil penalties for those violations. For each of these provisions, Section 2699 established a $100 penalty for an initial violation and a $200 penalty for each subsequent violation. Penalties are assessed on a per employee, per pay period basis. Thus, if an employer with 25 employees is found liable for a violation spanning 52 pay periods, the penalty will be $237,500. (For the initial violation, the penalty will be $100 x 25 = $2,500. For the next 51 pay periods, the penalty will be $200 x 25 x 25 = $255,000.) For violations of Labor Code sections containing their own penalty schemes, plaintiffs still follow the procedures of Section 2699, but the penalties awarded are those determined by the appropriate statute. Any civil penalties awarded in a lawsuit under Section 2699 are divided between the employee (25 percent) and the state (75 percent). These penalties, combined with the attorney’s fees and costs that employers must pay to victorious plaintiffs, result in substantial potential liability.

In the first seven months after PAGA took effect, about 65 cases were filed. The California Chamber of Commerce reported that plaintiffs in the first nine suits sought penalties totaling more than $336 million. Many of these cases alleged only minor violations. Nonetheless, the penalties allowed by Section 2699 are substantial, particularly when a company with numerous employees is sued. For example, the chemical company Amgen, which employs 6,000 workers, was sued for $170 million for primarily technical violations. Specifically, the suit alleged Amgen violated a requirement that employers file with the Division of Labor Standards Enforcement (DLSE) a copy of their employment applications if employees are compelled to sign them. Amgen also allegedly violated the law by posting a statement of rights for whistle blowers that was printed using a type size that was smaller than 16-point type. The fact that the company posted the statement was insufficient for the employees who sued over the small size of the font.

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business groups lobbied for the repeal of PAGA. Though repeal efforts failed, the author of SB 796, Senator Joseph Dunn, introduced SB 1809 with an intent to reform the law, and Governor Arnold Schwarzenegger signed the bill on August 11, 2004. The law took effect immediately and retroactively. As a result, suits based solely on violations no longer covered by Section 2699 have been dismissed. Other cases that involve insignificant technical violations as well as more substantial violations have not been dismissed entirely. The potential liability in these cases has decreased significantly, because causes of action based on posting requirements have been dismissed. In *Umbrasa s v. Amgen, Inc.*, for example, only a single cause of action for damages remained after the amendments took effect. Thus, SB 1809 achieved its primary aim while still preserving the right of aggrieved employees to seek enforcement of the Labor Code.

The elimination of suits over essentially harmless technical violations is SB 1809’s single most important change to PAGA. Section 2699(g)(2) states, “No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.” In addition, SB 1809 repealed Labor Code Section 431, which compelled employers to file with the DLSE a copy of any application that employees were required to sign. As a result of these changes, the most frivolous claims under Section 2699 have been dismissed. Although relatively few cases since the passage of PAGA were based solely on technical violations, the amended law reduces the potential liability of employers facing the same circumstances as Amgen.

Another substantive change affects Labor Code Section 98.6, which protects employees against discrimination and retaliation for exercising their rights under the Labor Code. Under Section 98.6, an employee cannot be fired for filing a complaint with the Labor Commissioner or for testifying in an investigation of an employer. SB 1809 revised Section 98.6 to explicitly include employees who initiate actions under Section 2699. That protection includes not only employees who eventually file suit but also those who simply notify the Labor and Workforce Development Agency (LWDA) of a claim. This change in the law further highlights the legislature’s commitment to safeguarding the rights of workers while ironing out the wrinkles of PAGA as it was originally enacted.

**New Administrative Requirements**

Still, most of the text of SB 1809 addresses procedural issues. The amendments create administrative requirements that must be met before filing suit, provide for greater judicial oversight, and change the way penalties are divided between plaintiffs and state agencies.

The administrative requirements that an employee must meet prior to bringing suit are codified in Labor Code Section 2699.3. The statute classifies violations into three categories: Serious Labor Code Violations, Health and Safety Violations, and Other Labor Code Violations. For any violation, the employee must first notify his or her employer and the appropriate state agency of the alleged violation. The specific procedures an employee must follow in addition to this notification depend on the type of violation alleged.

The first category, Serious Labor Code Violations, includes breaches of the approximately 150 provisions specified in Section 2699.5. Most of these provisions address setting and paying wages and salaries; hours of work, meals, and rest breaks; employment of minors; employment under state and public works contracts; and protection of whistle blowers. Several other miscellaneous provisions, which seem somewhat less serious, are included as well. For example, a violation of Labor Code Section 232’s prohibition of employer-imposed policies against employees disclosing their wages to one another is classified as a Serious Labor Code Violation for the purposes of PAGA. Although some of these miscellaneous violations do not rise to the level of, for example, violating child labor laws or firing whistle blowers, their inclusion in the PAGA’s enforcement scheme poses considerably less risk of abuse than the inclusion of the extremely minor technical violations that were enforceable under SB 796.

To pursue the remedy for a Serious Labor Code Violation under Section 2699, an employee must first notify the employer and the LWDA. The LWDA will decide whether to investigate the claim and must inform both the employer and the employee of its decision within 33 calendar days. If the LWDA chooses not to investigate, or if it does not inform the parties of its intent to take action within 33 days, the employee may file a lawsuit. If, on the other hand, the LWDA does intend to investigate, it has 120 days to complete the investigation. Following the investigation, the employee may file suit if the LWDA gives notice of its decision not to cite the employer or if the LWDA takes no action within 158 days of the employee’s claim.

The second category, Health and Safety Violations, includes most violations of Labor Code Division 5—the California Occupational Safety and Health Act of 1973. These violations involve a wide range of workplace safety issues, including the use of proper safety devices, the implementation of injury prevention programs, and the reporting of workplace injuries and illnesses. Not included in this category are violations of sections that prohibit retaliation or discrimination against employees who report unsafe conditions, refuse to work under unlawful hazardous conditions, or participate in an investigation of possible health and safety violations.

Violations of these provisions are included within the Serious Labor Code Violations category.

Before filing suit under Section 2699 for one of the violations included in the Health and Safety Violations category, an employee must notify his or her employer, the LWDA, and the Division of Occupational Safety and Health (DOSH) of the complaint. DOSH will inspect the work site or investigate the complaint according to its own rules and timetable. If DOSH fails to inspect or investigate, the employee may proceed according to the procedure for claims under the third category of violations, Other Labor Code Violations. DOSH may allow the employer to correct the violation. If this course is taken, DOSH must notify the employer and the employee within 14 days of certifying that the violation has been corrected. If the agency issues a citation, no lawsuit may be filed. If DOSH does not issue a citation, the employee can challenge that decision in court. However, if the court directs DOSH to issue a citation, the employee cannot sue. No private lawsuits may be filed when the employer and DOSH have an existing agreement regarding the abatement of conditions, or when they have previously entered into a consultation agreement addressing a condition at a particular work site.

The third category, Other Labor Code Violations, includes numerous miscellaneous infractions as well as any health and safety violations that DOSH fails to investigate. After an employee notifies his or her employer and the appropriate state agency, the employer has 33 days to cure the alleged violation and notify the employee and state agency of the actions taken. PAGA defines “curing” as coming into compliance with the law and making whole any aggrieved employee. If the employer fails to timely cure the violation, the employee may file a private action. If the employee believes that the employer’s actions did not cure the violation, the employee may notify the state agency. The agency can then take up to 17 days to investigate and may grant the employer 3 additional business days to cure the violation. If the agency determines that the alleged violation has not been cured, the employee may file suit. If the agency determines the violation has been cured, but the employee disagrees, the employee may appeal the decision to the superior court by filing a petition for writ of mandamus. If the court holds that the violation was not cured,
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the employee can then file suit under Section 2699.

The first appellate decision interpreting the amended PAGA directly addressed these administrative procedures. In Caliber Bodyworks, Inc. v. Superior Court, a the plaintiffs sought civil penalties as well as other forms of relief for several Serious Labor Code Violations. However, they failed to plead in their complaint that they had complied with PAGA's procedural requirements. Thus, the court held that the defendant's demurrer should have been sustained without leave to amend as to causes of action seeking only civil penalties.

In other causes of action, the plaintiffs sought civil penalties in combination with statutory penalties that could have been recovered directly by the plaintiffs before PAGA took effect. The distinction between civil penalties and statutory penalties is important. Prior to the enactment of PAGA, civil penalties could only be assessed by state agencies. However, some Labor Code provisions provided that plaintiffs could recover statutory penalties through private actions. For example, Labor Code Section 203 states that a terminated employee whose wages are not paid at the time of discharge may recover a statutory penalty equal to the employee's daily wages for each day, up to 30 days, that the payment is delayed. In addition, Section 256 authorizes the Labor Commissioner to assess civil penalties for the same violation. The Caliber plaintiffs sought their unpaid wages, plus civil and statutory penalties. The court ordered stricken the portions of those causes of action that prayed for civil penalties.

Significantly, however, that ruling did not foreclose the possibility that the Caliber plaintiffs may still recover civil penalties. In a footnote, the court cited Section 2699.3(a)(2)(C), which states that "a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part which states that..." The court stated that the plaintiffs could file the required notice with the LWDA and then—assuming the LWDA chose not to investigate or not to cite the employer—amend their complaint and pursue civil penalties. The court left open the question whether the plaintiffs should be permitted to amend a complaint after the 60-day period lapses.

This issue in Caliber arose at the demurrer stage. The court did not address at what point during the course of litigation amendments should no longer be allowed. However, the court's quotation of Aubry v. Tri-City Hospital District for the proposition that "in the furtherance of justice great liberality should be exercised" in this regard suggests that at least some courts will be lenient with plaintiffs who do not initially comply with Section 2699.3.

**Judicial Oversight and Division of Penalties**

An additional procedural change to PAGA is increased judicial oversight of penalties and settlements. Under Section 2699(e)(1), a court has discretion to reduce a penalty in circumstances in which the LWDA would have discretion to do so. The court's discretion is "subject to the same limitations and conditions" affecting the LWDA. Section 2699(e)(2) gives courts further discretion to award less than the maximum civil penalty amount if the award would be "unjust, arbitrary and oppressive, or confiscatory." This is a high standard to meet, so the potential for employers to incur extremely severe penalties remains.

Disagreement exists among attorneys regarding these provisions. Some have suggested that Section 2699(e)(2) gives courts broader discretion than is given to the LWDA—and thus, in essence, Section 2699(e)(2) trumps Section 2699(e)(1). A better interpretation is that Section 2699(e)(1) applies to violations of Labor Code provisions with their own statutory penalties, and Section 2699(e)(2) applies to violations for which the penalties are derived from Section 2699. The language of Section 2699(e)(2) supports this interpretation. Specifically, the provision refers to penalties "available under subdivision (a) or (f)" and to reducing the "maximum civil penalty amount specified by this part." Thus, for violations of provisions specifying their own penalty schemes, courts are given the same degree of discretion exercised by the LWDA; courts may also exercise discretion to reduce the amount of penalties calculated according to Section 2699, but only when the penalty is unjust or arbitrary.

Under Section 2699(l), courts also must review and approve all settlements of cases with a Section 2699 cause of action. Whether this provision will significantly reduce the size of settlements remains to be seen.

The final procedural issue addressed by SB 1809 is the division of penalties awarded when a settlement is reached or when a verdict is in favor of the plaintiff. Under Section 796, 30 percent of the penalties went into the state's General Fund. An additional 25 percent was given to the LWDA, with the remaining 25 percent going to the aggrieved employee. Under the amendments to PAGA, the LWDA receives 75 percent of the penalties. The funds are to be used for enforcing labor laws and for educating employers and employees of their rights and obligations under the Labor Code. SB 1809 further specifies that these funds are intended to "supplement and not supplant" funding otherwise provided to the agency. Prevailing employees continue to receive 25 percent of the penalties, plus attorney's fees and costs.

**Practical Impact of the Amendments**

The most readily apparent effect of SB 1809 is that employers no longer face penalties for minor technical violations. This greatly reduces the potential of frivolous litigation. Aside from abolishing these penalties, however, the amendments are unlikely to significantly affect litigation between employees and employers. This is perhaps not surprising, given that the majority of the changes to PAGA only address procedural matters. In addition, the amendments fail to substantially change the types of cases that are filed under Section 2699.

Indeed, the new procedural guidelines of Section 2699.3 do not impose significant obstacles to plaintiffs. A primary reason for the passage of Section 2699 was the inability of state labor agencies to effectively enforce the Labor Code or investigate more than a small percentage of claims. Presumably, the new procedural requirements will only increase the number of claims received by the LWDA, further adding to the agency's workload. Clearly, the LWDA will not investigate most claims, and employers will be free to file suit. An attorney for the DLSE has reported that the agency does not even attempt to investigate the majority of the complaints it receives. As a result, aside from imposing a 33-day waiting period, Section 2699.3 will have little practical effect in many cases. That said, the notice provisions do give state agencies the option of intervening in particularly egregious cases. Additionally, the agencies have the authority to help resolve disputes without resorting to litigation.

Similarly, the provision allowing employers an opportunity to avoid liability by curing violations is unlikely to significantly change the application of PAGA. The most common Labor Code violations for which employees bring Section 2699 suits—such as claims for unpaid overtime and the lack of meal and rest breaks—are classified as Serious Labor Code Violations. The cure provision of the PAGA amendments does not apply to that category of infractions, nor to Health and Safety Violations. Thus, the cure provision will have only a minimal impact. Because employers cannot cure the violations that most often result in Section 2699 suits, they can still be sued even after coming into compliance with the law and making whole employees affected by the violations. Therefore, it is not entirely clear what purpose is served by compelling the employee to notify his or her employer of the employee's administrative complaint. The legislature may have intended the notice requirement to forestall litigation by encouraging the parties to reach
a solution before a lawsuit is filed.

Aside from eliminating relatively trivial causes of action, the PAGA amendments have not had an impact on the types of lawsuits being filed. That is, the majority of cases filed both before and after SB 1809 took effect involve wage and hour disputes and classification of employees as exempt or nonexempt. The amendments do not significantly affect the prevalence of these types of cases. Rather, plaintiffs now are simply adding Section 2699 claims to their more traditional causes of action to create a larger potential overall recovery. Section 2699 does not prevent employees from recovering their damages, such as unpaid overtime. Plaintiffs still seek their actual damages but also pursue a strategy to increase their awards through Section 2699 penalties.

PAGA was passed to facilitate active enforcement of legal protections for workers. In its original form, however, the law had the potential for overly harsh penalties for employers. The amendments in SB 1809 alleviate the risk faced by employers under PAGA of being sued by employees for minor technical violations. Nevertheless, many of the amendments—particularly the LWDA notification requirement for potential plaintiffs and the cure provision—will not significantly change the liability exposure for employers. Thus, PAGA still remains a powerful tool for aggrieved employees.

1 The exclusive remedy provided by the workers’ compensation provisions of the Labor Code is not affected by PAGA.
2 This penalty scheme applies to employers who, at the time of the alleged violation, employed “one or more employees.” Section 2699(f)(1) provides a separate penalty for “the person who does not employ one or more employees” at the time of the alleged violation. However, it is unclear whether the Section 2699(f)(1) penalty would ever be applied. After all, who could bring suit?
4 The Amgen case also involved an allegation that the arbitration agreement employees were required to sign was illegal. Thus the entire $170 million figure did not result from technical violations.
5 The 158-day time limit includes the initial 33-day period in which the LWDA must decide whether to investigate, 120 days for completing any investigation, and 5 days allowed by the statute for the LWDA to notify the employer and the employee of its decision whether to issue a citation.
6 LAB. CODE § 6310.
7 LAB. CODE § 6311.
8 LAB. CODE § 6399.7.
10 This provision applies only to actions seeking penalties for Serious Labor Code Violations.
12 DOSH may (but is not required to) grant the employer 14 days to correct a Health and Safety Violation.
Tax Reassessments of Transferred Property

PRIOR TO THE DEVELOPMENT OF REAL PROPERTY, owners often want to transfer their interests in the property to a partnership or limited liability company to facilitate development. Thereafter, the owners may want to transfer ownership interests in the new entity among themselves or to nonowners for business or personal purposes. For the unwary, such actions may cause unintended property tax reassessment consequences. If the property has appreciated in value since the time of its acquisition, the reassessment will generally increase property tax. Practitioners therefore need to be aware of the California property tax reassessment consequences of transfers of California real property to partnerships and limited liability companies, transfers of real property by these entities to their constituent owners, and transfers of ownership interests within these entities.

Under Proposition 13, real property located in California is generally reassessed when it is purchased, newly constructed, or a “change in ownership” occurs. California Revenue and Taxation Code Sections 61 through 66 apply this basic definition to various transfer scenarios and describe when these transfers will and will not cause a change in ownership for property tax purposes.

As a general rule, the transfer of California real property to a legal entity constitutes a change in ownership and will cause a reassessment. In this case, the transferred property will generally be reassessed for property tax purposes to its then-current fair market value. Like most rules, there are exceptions. Section 62(a)(2) provides that there is no change in ownership if the transfer merely changes the method of holding title to the transferred property and the proportional ownership interests in the property remain the same before and after the transfer.

The application of Section 62(a)(2) can be illustrated by example. First, assume that two individuals own a property as equal cotenants. If the two transfers the property to a newly formed partnership (or limited liability company) and each receives an equal capital and profits interest in the new entity, the transfer would not constitute a change in ownership, the proportional ownership interest of each remains the same before and after the transfer. Accordingly, the property would not be reassessed upon transfer. However, if the two cotenants each receive a 49 percent interest in the capital and profits of the newly formed entity and a third party receives a 2 percent capital and profits interest in the entity, there would be a change in ownership, and the entire property would be reassessed.

Next, assume that one individual owns 100 percent of one property and another individual owns 100 percent of a separate property. If each transfers their respective properties to a newly formed partnership (or limited liability company) and each receives an equal capital and profits interest in the new entity, there will be a change in ownership of 100 percent of both properties, and each will be reassessed.

This is due to the fact that the proportional ownership interests of the two owners have changed. Before the transfer each owned 100 percent of their respective properties, while after the transfer each indirectly owns 50 percent of both properties. Accordingly, the transfers are not afforded the protection of Section 62(a)(2).

The general rule governing transfers of real property by a partnership or limited liability company to its constituent owners is that the transfer will cause a reassessment of the transferred property. However, Section 62(a)(2) applies to these types of transfers as well. Accordingly, if the transfer merely changes the method of holding title to the transferred property and the proportional ownership interests in the property remain the same before and after the transfer, there will not be a change in ownership of that property.

For example, assume that a limited liability company owns two properties of equal value and that two individuals each own a 50 percent capital and profits interest in the LLC. If the LLC transfers one property to one of the individuals and the other to the other individual, there would be a 100 percent change in ownership of both properties, and each would be reassessed. Before the transfer the two individuals each held a 50 percent indirect ownership interest in each property, while after the transfer, one owns 100 percent of one property and the other owns 100 percent of the second property. However, if the LLC transfers both properties to both individuals as joint tenants or as equal tenants in common, then, pursuant to Section 62(a)(2), there would not be a change in ownership, and the properties would not be reassessed.

In Munkdale v. Giainnini, transfers similar to those described in the above example were considered by a court of appeal. Steven and Paul Munkdale dissolved their general partnership, which owned 11 parcels of real property located in San Mateo County. Five parcels were deeded to Steven, and five were deeded to Paul. The remaining parcel, the so-called Magnolia parcel, was deeded to Steven and Paul as tenants in common. Immediately after the transfers, the county assessor reassessed all the parcels except the Magnolia parcel. Steven challenged the reassessment, arguing that the transfer of the other 10 parcels did not give rise to a reassessment event. Steven alternatively argued that if the transfers did cause a reassessment, only 50 percent of each of the other 10 parcels should be reassessed, since the partnership could have transferred each property to Steven and Paul as equal cotenants (a transfer that would be excluded from reassessment pursuant to Section 62(a)(2)), and each brother could then have conveyed his undivided interest in the parcels that the other was to receive to that individual.

In rendering its decision, the court first found that the county assessor’s reassessment of the non-Magnolia parcels that were distributed to Steven was proper since the partnership’s transfer of these prop-

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entities constituted a change in ownership unless otherwise exempted. The court found that Section 62(a)(2) was inapplicable to the transfers, since Steven’s ownership interest in each property had changed. In doing so, the court stated that Steven had, at most, a 50 percent interest in each parcel before the transfer and obtained a 100 percent interest in each parcel after the transfer. With respect to the Magnolia parcel, the court recognized that the transfer did not cause a reassessment, since the brothers’ proportional ownership interests in the property had not changed.

In determining whether 50 percent or 100 percent of each non-Magnolia parcel should be reassessed, the court found Steven’s argument unpersuasive. The court stated that even through a two-step procedure could have been implemented that would have caused a reassessment of only 50 percent of each property based on a technical interpretation of the statute, the step-transaction doctrine (discussed infra) would have prescribe this, since the evidence in the record indicated that the brothers intended to sever their business relationship completely and to go their separate ways as independent owners of a fee simple interest in each of the non-Magnolia parcels. Accordingly, the court found that the reassessment of 100 percent of each non-Magnolia parcel was proper.

Transfers among Entity Members

After real property has been transferred to or acquired by a partnership or limited liability company, the entity’s constituent owners may want to transfer ownership interests in the entity amongst themselves or to outside investors. The general rule governing such transfers is to honor the legal entity, resulting in no change in ownership of the real property owned by the entity. However, there are several exceptions to this rule. The two main exceptions for partnerships and limited liability companies are the “change in control” exception and the “original co-owner” exception.

The change in control exception provides that when an entity or person obtains control through direct or indirect ownership or control of more than 50 percent of the voting stock of any corporation or obtains a majority ownership interest in any partnership, limited liability company, or other legal entity through the purchase or transfer of corporate stock, partnership or limited liability company interest, or ownership interests in other legal entities, including any purchase or transfer of 50 percent or less of the ownership interest through which control or a majority ownership interest is obtained, the purchase or transfer of that stock or other interest shall be a change of ownership of the real property owned by the corporation, partnership, limited liability company, or other legal entity in which the controlling interest is obtained.

In order to obtain a majority ownership interest in a partnership or limited liability company, the acquirer must obtain direct or indirect ownership of more than 50 percent of the total capital and profits of the entity. In other words, when a person or entity obtains more than 50 percent of the total capital and profits of a partnership or limited liability company, a change in control of the entity will generally be deemed to have occurred, and the real property owned by the entity will be reassessed.

For example, assume two individuals each own a 50 percent capital and profits interest in an LLC. The LLC acquires a property from an affiliated third party, and that property is reappraised upon acquisition. One individual transfers a 30 percent capital and profits interest in the LLC to a third individual, and the second individual later transfers a 25 percent capital and profits interest in the LLC to the same third individual. Upon that person’s acquisition of a 55 percent capital and profits interest in the LLC, a change in control occurs, and the property is reappraised.

The original co-owner exception, found in Section 64(d), applies only if the entity acquired the property after March 1, 1975. The exception provides that if property is transferred to a legal entity on or after that date, and the transfer is excluded from a change in ownership under the “same proportional interest” provisions set forth in Section 62(a)(2), the owners of the entity are deemed to be original co-owners. Section 64(d) further provides that when cumulatively more than 50 percent of the original co-owner interests are transferred, the property previously excluded from reassessment is reassessed. The reassessment date is the date of the transfer of ownership interests representing individually or cumulatively more than 50 percent of the interests in the entity.

The original co-owner exception can be illustrated by the following example: Two individuals hold equal interests as tenants in common in a property, which they transfer to an LLC. In exchange the two individuals each receive a 50 percent capital and profits interest in the LLC. There is no change in ownership pursuant to Section 62(a)(2) since the transfer is merely a change in the method of holding title. Pursuant to Section 64(d), the two individuals become original co-owners. One co-owner transfers 30 percent of his or her capital and profits interest in the LLC to a third individual, and the second co-owner then transfers a 25 percent capital and profits interest in the LLC to a fourth individual. There will be a change in ownership of the property upon the second co-owner’s transfer, since this transfer will result in a transfer of more than 50 percent of the original co-owner interests.

More Complex Transactions

The transfer of an ownership interest in any legal entity must pass both the change-in-control and the original-co-owner exceptions to avoid a reassessment. If an entity owns more than one property, there are certain instances in which a transfer of an ownership interest in the entity may cause a reassessment of one property but not the other.

For example, assume an individual is the sole member of an LLC that owns a single property. In 2005, the sole member transfers a second property to the LLC. This transfer is excluded from constituting a change in ownership pursuant to Section 62(a)(2), and the individual is deemed to be the original co-owner of the second property. If the individual subsequently sells a 20 percent capital and profits interest in the LLC to each of three other individuals, the transfers will constitute a change in ownership for the second property because more than 50 percent of the original co-owner interest was transferred. However, the first property has not changed ownership because no one person has obtained control of the LLC. If, on the other hand, the original member sold a 51 percent capital and profits interest in the LLC to any single individual, there would be a change of control under Section 64(c), and all the real property owned by the LLC would be reappraised.

Section 64(c)(1), which sets forth the change-in-control rule, provides that there is a control change when a person or entity obtains control through direct or indirect ownership or control of more than half of the stock or ownership interests of an entity. The statute seems to suggest, therefore, that upon the transfer of a direct and/or indirect interest in any legal entity, each ownership interest directly and/or indirectly held or acquired by the transferee should be aggregated to determine whether the transferee has obtained control of the applicable property owning the entity.

For example, assume an individual and a partnership each own 50 percent of the capital and profits of a second partnership. The individual then acquires 10 percent of the capital and profits of the first partnership. A literal reading of the statute seems to suggest that the individual has acquired control of the second partnership because the individual owns 50 percent of the second partnership directly and 5 percent indirectly by virtue of the newly acquired ownership interest in first partnership. Accordingly, it would appear that individual has obtained control of the first...
partnership, and any property owned by that partnership would be reassessed. However, a 1999 advisory letter from the State Board of Equalization provides that ownership interests of a partnership in subter entities will not be attributed to any partner of the partnership until that partner owns more than 50 percent of the capital and profits of the partnership.27

For example, assume P1 is a partnership that owns real property in California. P1 is owned 40 percent by A, an individual; 50 percent by P2, a partnership; and 10 percent by C1, a corporation. Assume A then acquires 50 percent of the capital and profits of P2. A literal reading of Section 64(c) seems to provide that there would be a reassessment of the property owned by P1 since A now holds a 40 percent direct interest in P1 and a 25 percent indirect interest in P1 (i.e., 50 percent x 50 percent). Accordingly, it seems that A would now have control of P1.

However, in analyzing this scenario, the State Board of Equalization determined that the transfer would not cause a reassessment.28 In its analysis, the board stated:

There is a change in ownership of the real property owned by P1 only if A obtains direct or indirect ownership or control of more than 50 percent of the total interests in both the partnership capital and profits in P1. Under the facts posited, A directly owns only 40 percent of P1 and acquires a 50 percent capital and profits interest in P2. Upon such acquisition, A would not own a controlling interest in P2, and therefore, indirectly owns no interest in P1 through his 50 percent capital and profits interest in P2. Accordingly, no change in control of P1 would occur. In order for A to acquire an indirect interest in P1 attributed to him through P2, he must own more than a 50 percent direct interest in P2.29

While Section 64(d) generally provides that when more than 50 percent cumulatively of the original co-owner interests in an entity are transferred, the property previously excluded from reassessment is reassessed, it does not address how the original co-owner rule is applied when the original co-owners are legal entities. In a 2001 advisory letter, the State Board of Equalization seems to have adopted the approach that unless a transfer of an ownership interest in an original co-owner results in a change in control of the original co-owner, the transfer will not constitute a transfer of the ownership interest of the original co-owner in the property-owning entity for purposes of applying the original co-owner rule.30 However, if the transfer results in a change in control of the original co-owner, then it will constitute a transfer of the entire ownership interest held by the original co-owner for purposes of applying the rule.31

The Step-Transaction Doctrine

Even if a series of transfers, when viewed separately, do not cause a reassessment based on a technical reading of the statutes, the transfers may be subject to the step-transaction doctrine. For example, in McMillin-BCED/Miramar Ranch North v. County of San Diego,32 the owner of 1,200 acres of undeveloped land decided to develop the property with the assistance of an experienced residential developer. In order to achieve this goal, the following steps were undertaken, all in a two-week period: 1) The owner conveyed a 70 percent undivided interest in the land to its wholly-owned subsidiary, BCE Development Properties, Inc., 2) The owner and BCE refinanced the land with a $50 million loan from an affiliate of the original owner, which reduced the amount of equity in the land that a future developer/investor would be required to buy into, 3) The owner and BCE contributed their respective undivided interests in the property to a newly-formed partnership formed by and between the owner and BCE, and 4) McMillin Communities, Inc., a developer, contributed $5 million in cash to the new partnership, and the original owner withdrew as a partner of the partnership. At the time of the withdrawal, the original owner had a 30 percent interest in the partnership and BCE had a 70 percent interest in the partnership.

With McMillin’s admission into the partnership, the partnership’s name was changed to McMillin-BCED and the partnership agreement was amended to reflect that McMillin had acquired a 14 percent interest in the capital of the partnership, a 30 percent interest in the profits, and a 50 percent management interest. The San Diego County Assessor reassessed the property, claiming that a 100 percent change in ownership occurred on the date that McMillin bought into the partnership. The partnership challenged the reassessment. Although the trial court recognized that each step, when viewed independently, did not cause a property tax reassessment, it relied on the step-transaction doctrine to find for the county. The partnership appealed.

In reviewing the lower court’s decision, the court of appeal stated that the step-transaction doctrine applies when any single one of the three basic tests are met: 1) The “end result test,” in which purportedly separate transactions will be considered as a single transaction when it appears that they were taken from the outset for the purpose of reaching an ultimate result. 2) The “interdependence test,” requiring an evaluation of whether, upon reasonable interpretation of the facts, the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series. 3) The “binding commitment test,” which requires that if one transaction is characterized as a first step, there must be a binding commitment to take later steps.33

The court noted that although there are significant differences between the tests, each is faithful to the central purpose of the step-transaction doctrine—that is, to assure that the tax consequences turn on the substance of a transaction rather than on its form.34

In ruling for the county, the court held that the interdependence test applied since all of the steps were aimed toward accomplishing the purpose of developing the land by an experienced developer, with the original owner and BCE having dominant capital and profit-sharing roles and an equal management role with the actual developer.35 The court further held that the existence of an independent business purpose for each of the steps, while relevant, did not preclude the application of the step-transaction doctrine, since the steps undertaken would have been fruitless if a developer was not found to join the project.36 Accordingly, McMillin-BCED illustrates that even if a series of transfers, when viewed separately, do not cause a reassessment event, a court may use the step-transaction doctrine to consolidate the transfers if they are undertaken to prevent a property tax reassessment.

A property tax reassessment of any property can severely affect the financial return expected from the property. With the appreciation of California property values over the last few years, a reassessment could result in a property tax increase of more than 100 percent. Unfortunately, a reassessment does not represent a one-time cost. Rather, the tax consequences of the reassessment will be felt by the property owner year after year until the property is disposed. Accordingly, prior to transferring any real property to or from a partnership or limited liability company or an ownership interest in any partnership or limited liability company that owns a direct or indirect ownership interest in California real property, the property tax reassessment consequences of the transfers must be analyzed.

1 CAL. CONST. art. XIII A.
2 REV. & TAX CODE §§60 and 61(j); Prop. Tax R. 462.180.
3 REV. & TAX CODE §62(a)(2); “A change in ownership shall not include any transfer between an individual or individuals and a legal entity or between legal entities, such as a cotenancy to a partnership, a partnership to a corporation, or a trust to a cotenancy, that results solely in a change in the method of holding title.
to the real property and in which proportional ownership interests of the transferees and transferors, whether represented by stock, partnership interest, or otherwise, in each and every piece of real property transferred, remain the same after the transfer."

9 See Prop. Tax R. 462.180(b)(2) (providing for a similar example based on the transfer of real property to a corporation); Advisory Letter from the State Board of Equalization (May 28, 1992), cited as Property Tax Annotation 220.0488. Note that advisory letters are only advisory in nature and are not binding on any person or entity. Accordingly, the counties are not bound to follow the rules set forth in the advisory letters.

10 See Prop. Tax R. 462.180(b)(2) (providing for a similar example based on the transfer of real property to a corporation); Penner v. County of Santa Barbara, 37 Cal. App. 4th 1672 (1995); Kodaira v. County of Los Angeles, 2001 WL 1471656 (Cal. App. 2d Dist. 2001), unpublished (finding that Taxation and Revenue Code §62(a)(2) was inapplicable to the transfer of real property by a revocable living trust to a family limited partnership composed of the trust, the grantors of the trust, and the children of grantors). See Prop. Tax R. 462.180(b)(2) (providing for a similar example based on the transfer of real property to a corporation).


12 Id. at 1109-10.

13 Id. at 1110.

14 Id.

15 Id. at 1112-13.


17 Rev. & Tax. Code §64(c).

18 Rev. & Tax. Code §64(d).

19 Rev. & Tax. Code §64(c)(1). Rev. & Tax. Code §64(c)(2): “On or after January 1, 1996, when an owner of a majority ownership interest in any partnership obtains all of the remaining ownership interests in the partnership or otherwise becomes the sole partner, the purchase or transfer of the minority interests, subject to the appropriate application of the step transaction doctrine, shall not be a change in ownership of the real property owned by the partnership.” See EHRMAN & FLAVIN, supra note 16, §2:15. See also Prop. Tax R. 462.180(d)(1)(B).

20 See Prop. Tax R. 462.180(d)(2) (providing for a similar example based on transfers of stock in a corporation).

21 Rev. & Tax. Code §64(d).

22 See Prop. Tax R. 462.180(d)(2) (providing for a similar example based on transfers of stock to, and ownership interests in, a corporation); Advisory Letter from the State Board of Equalization (Feb. 15, 2000) cited as Property Tax Annotation 220.0375.015 (analyzing property tax reassessment consequences of distribution of property to a single-member limited liability company to its sole member).


25 Id. at 1109-10.

26 Id. at 1110.

27 Id. at 2-3.

28 Id.

29 See Advisory Letter from the State Board of Equalization to Hon. Dick Frank, assessor of the County of San Luis Obispo (July 5, 2001).

30 However, note that the old rule on transfers of ownership interests in original co-owners is that a transfer of an ownership interest in an original co-owner is a proportional transfer of the original co-owner’s interest in the property-owning entity for purposes of applying the “original co-owner” rule. For instance, the old rule provides if 1) Partnership A and Partnership B are original co-owners and each owns a 50% ownership interest in Partnership AB and 2) a partner who owns a 10% ownership interest in Partnership AB transfers its interest to an unaffiliated third-party, then such transfer would constitute a transfer of a 5% ownership interest in the Partnership AB for purposes of applying the original co-owner rule. (i.e., 50% x 10%). See id. at 3.

31 See Advisory Letter from the State Board of Equalization to Hon. Dick Frank, assessor of the County of San Luis Obispo (July 5, 2001).


33 Advisory Letter from the State Board of Equalization (Feb. 15, 2000), cited as Property Tax Annotation 220.0375.015.

34 Advisory Letter from the State Board of Equalization (Feb. 15, 2000), cited as Property Tax Annotation 220.0375.015.

35 Advisory Letter from the State Board of Equalization (Feb. 15, 2000), cited as Property Tax Annotation 220.0375.015.

36 Advisory Letter from the State Board of Equalization (Feb. 15, 2000), cited as Property Tax Annotation 220.0375.015.

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Los Angeles Lawyer February 2006  21
The Computer Fraud and Abuse Act (CFAA) is a sweeping federal statute that prescribes criminal and civil penalties, including injunctive relief, to halt the unauthorized accessing of computer information. Once confined to cases involving hackers and viruses, in recent years the CFAA has become a powerful litigation tool for employers seeking to exert continuing control over departing employees—and subject the hiring practices of their competitors to judicial scrutiny.

Under the right circumstances, the CFAA enables employers to obtain injunctive and monetary relief against a departing employee—and his or her new employer—without having to confront many of the procedural and evidentiary hurdles posed by traditional trade secrets and unfair competition laws. Among other things, an employer suing under the CFAA can bring its action in federal court; need not necessarily prove that the information accessed by the former employee was a trade secret; and need not show that the defendant is actually using, or threatening to use, the information. Additionally, the CFAA has teeth even in California, where covenants not to compete are disfavored. Indeed, an employer who can establish a CFAA violation may be able to effectively enjoin a former employee from working.

But the comparative ease with which the CFAA can be utilized by companies seeking to rein in departing employees is a double-edged sword. In a world in which information is transmitted instantaneously and employees can change jobs almost as quickly, every company that has a serious interest in protecting its competitive computer information is equally at risk of being accused of stealing someone else’s. Liability under the CFAA is not limited to cases of intentional theft or industrial espionage. Every time a departing employee accesses information from a current employer’s computers after accepting employment at a new firm, or downloads materials from company computers and forgets to return them before starting a new job, the former employee and the new employer face a risk of exposure to the CFAA’s criminal and civil penalties.

The CFAA was enacted in 1984 to protect classified information as well as financial and credit information on government and finan-
cessful institution computers.2 In 1986, the CFAA was amended to provide additional criminal penalties for fraud and related activities affecting “federal interest computers.”3 The Computer Abuse Amendments Act of 1994 added civil remedies, which allow any person who suffers damages or loss resulting from a violation of the CFAA to maintain a civil action against the violator for compensatory damages and injunctive relief.4

The scope of these civil remedies was dramatically expanded in 1996 when Congress extended the reach of the CFAA to cover not only governmental computers but also any “protected computer,” which was defined to include any computer “which is used in interstate or foreign commerce or communications.”5 Virtually all modern computers can be used now for interstate or foreign communications via the Internet. Thus the CFAA has evolved from a statute that originally concerned only the federal government’s interest in specific computers to a law that now covers practically every computer in the United States.

To establish liability under the CFAA, the plaintiff must show that the defendant 1) either fraudulently or “intentionally” accessed a protected computer “without authorization or [in excess of] authorized access,” and 2) as a result of this conduct, caused damages of at least $5,000.6

“Access” is defined broadly. For example, one court held that a competitor’s use of a “scraper” software program to methodically glean prices from a tour company’s public Web site, in order to allow systematic undercutting of those prices, exceeded the authorized access otherwise allowed to Web users.7 Similarly, in America Online, Inc. v. National Health Care Discount, Inc.,8 a case concerning a defendant who sent e-mail spam, the court held that the CFAA’s prohibition against “accessing” computers is violated when someone sends an e-mail message from one’s own computer that is then transmitted through other computers (without permission) until it reaches its destinations. The concepts of “damage” and “loss” are also broadly defined. Congress defined “damage” under the CFAA to mean “any impairment to the integrity or availability of data, a program, a system, or information that causes loss aggregating at least $5,000 in value during any 1-year period to one or more individuals.”9 The CFAA defines “loss” as “any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.”10 Because the costs involved in adding security and replacing software following an unauthorized access can constitute losses under the statute, the $5,000 loss or damages threshold can be met in most commercial situations. Indeed, the costs for a forensic computer investigation alone will almost always surpass $5,000. For example, in EF Cultural Travel BV v. Explorica, Inc.,11 the court held that a company’s payment of consultant fees for the purpose of assessing whether its Web site had been compromised was a compensable loss under the CFAA, even though there was no physical damage to the company’s data or systems.12

Most all the initial CFAA cases involved efforts by computer information owners to obtain redress against hackers and spammers who had unlawfully accessed the protected computer database of another for either personal or competitive business purposes.13 In recent years, however, employers have increasingly seized upon the CFAA as a litigation tool to exert continuing control over departing employees.

**Pleading and Proof**

**Shurgard Storage Center v. Safeguard Self Storage**14 was the first reported decision involving an employer’s attempt to state a CFAA claim against a former employee and its business competitor. In Shurgard, the plaintiff and the corporate defendant were competitors in the self-storage business. The plaintiff alleged that the defendant embarked on a systematic scheme to hire away key employees for the purpose of obtaining the plaintiff’s trade secrets, and that some of these employees—while they were still employed by the plaintiff but after they had already met with the defendant and had started acting as the defendant’s agents—used the plaintiff’s computers to send e-mail to the defendant containing the plaintiff’s trade secrets and proprietary information.

The defendants moved to dismiss, challenging the scope of a civil claim under the CFAA. The district court denied the motion after finding that the employees’ access to the defendant’s computer was “without authorization,” according to the CFAA’s use of that term. The court held that even though the employees were still employed by the plaintiff at the time they sent the e-mail, each employee was alleged to have accessed the computer “as an agent” for the defendant. The employees therefore lost the authorization they otherwise had to use the former employer’s computer even while they were still employed.15

The defendants in Shurgard also argued that the CFAA only applies to information that, if stolen, “could affect the public,” and the information from the storage business is not the type of information that the CFAA was intended to protect. The court rejected this argument, finding that the CFAA is “unambiguous” in applying to “any protected computer if the conduct involved an interstate or foreign communication.”16

The Shurgard court dealt only with the pleading requirements for asserting a CFAA claim. A later case, U.S. Greenfiber v. Brooks,17 addressed the CFAA’s proof requirements and the showing a plaintiff must make to obtain injunctive relief. The case involved quite outrageous conduct by a former employee. The defendant, a quality control manager, worked out of her home and kept numerous company documents there. On the day she was terminated, the defendant accessed the company’s e-mail system and took various corporate documents from the company, then later accessed the company’s computer communications system to solicit other employees.18 In light of the defendant’s blatant refusals to return the company’s materials and her post-termination conduct, the court found that the plaintiff was likely to succeed on the merits of all its claims and issued a preliminary injunction. The injunction specifically directed the defendant to return the plaintiff’s property and enjoined the defendant from using or disclosing confidential information or soliciting the plaintiff’s employees using the plaintiff’s communications systems. Notably, the injunction did not prevent the defendant from actually working for a competitor—it focused only on the defendant’s use of information.19

In *Pacific Aerospace & Electronics, Inc. v. Taylor,*20 the plaintiff sued its former employees and their new company alleging violations of the CFAA, misappropriation of trade secrets, and other violations of Washington state law. The district court held that it was appropriate for employers to utilize the CFAA in federal court to sue former employees (and their new companies) who seek a competitive edge through the wrongful use of information taken from their former employer’s computer system.21 After determining that it had jurisdiction based on the plaintiff’s allegations of violation of the CFAA, the court then ordered a preliminary injunction based on the plaintiff’s claims for misappropriation of trade secrets under the Washington Uniform Trade Secrets Act, breaches of confidentiality, and violations of various common law duties.22

**Comparing CFAA Claims to Other Actions**

As these cases highlight, the CFAA offers a number of potential advantages to employers seeking to regulate the conduct of former employees. Among other things, an employer suing under the CFAA may 1) bring its action in federal court, 2) face more liberal plead-
ing and proof requirements than under traditional unfair competition laws, and 3) obtain potentially broader injunctive relief.

In employment cases involving the unauthorized access of protected computer information, the CFAA gives federal courts jurisdiction over employee mobility disputes that would otherwise be restricted to state court unfair competition actions. The availability of federal jurisdiction can be a marked advantage for plaintiff employers in cases that would otherwise be governed by state laws and procedures favorable to employees.

For example, because of the strong public policy in California in favor of employee mobility, most noncompetition agreements are unenforceable under California law.23 California also does not recognize the doctrine of “inevitable disclosure”24 with respect to trade secrets misappropriation, making the use of the CFAA—and its federal forum remedies—an attractive alternative to state court. An employer whose employment relationship with a former employee would otherwise be governed by California law has the option of avoiding these restrictive state court doctrines if it can state a federal claim under the CFAA.

In many cases, the CFAA’s pleading standards will be easier to satisfy than those required to state claims for trade secrets misappropriation or breach of employment contract. There is no requirement that the plaintiff allege the existence of actual trade secrets or the misappropriation or unauthorized use of those trade secrets. There is no requirement that the plaintiff allege the existence of an enforceable noncompetition agreement. Nor is there any requirement that the plaintiff allege the existence of an enforceable confidentiality agreement or the use of measures to maintain the confidentiality of the information at issue.

To state a claim under the CFAA, all an employer need allege is that 1) a former employee was acting as an agent for the new employer, 2) the former employee was doing so at the time he or she accessed a company computer without authorization, and 3) this unauthorized access caused at least $5,000 in losses. The allegations involving agency and access often can be satisfied when an employee continues working at the current employment for a period of time after an interview with, or job offer from, another employer, and accesses a protected computer during the interim period for nonwork purposes. These circumstances are fairly common in today’s workplace.

Assume, for example, that an employee interviews and accepts a position with a new company but continues to work for the former employer for a few weeks. In that period the employee downloads information from the former employer’s computers or otherwise accesses the former employer’s computers. If the former employer can demonstrate a good faith belief that specific instances of accessing the computer system by the employee after accepting the new position (or even after the first interview with the new employer) were for the benefit of the new employer and not the former employer, the employer may allege that the employee’s actions constitute a violation of the CFAA. As a practical matter, the departing employee will then need to respond to each alleged instance of improper access by showing that he or she accessed the former employer’s computer to further the employee’s job duties for the former employer and not to benefit the new employer in any way. This showing may not necessarily be easy to make in situations in which the departing employee cannot articulate legitimate, work-related reasons for each and every time the employee accessed the former employer’s computers.

Finally, the allegation of loss can be satisfied as long as the employer can allege, in good faith, that the injury from the unauthorized access exceeds the jurisdictional amount. In most instances, it will not be difficult to allege that the injuries resulting from unauthorized disclosure of the accessed information exceed $5,000, especially since remedial expenses have been deemed to constitute losses.

In California, an employer seeking to state a claim for misappropriation of trade secrets against a departing employee or the new employer (or to enforce a noncompetition agreement to the extent that it prohibits the disclosure of trade secrets) must establish, at a minimum, that the misappropriated information constituted trade secrets. The Uniform Trade Secrets Act (UTSA) defines a “trade secret” as information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and
2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.25

Alternatively, an employer may state a claim of breach of a confidentiality agreement by a departing employee. The former employer must prove 1) the existence of a valid and enforceable confidentiality or nondisclosure agreement, and 2) that the information allegedly disclosed constituted confidential information, for which there were reasonable efforts made to ensure its confidentiality.

By contrast, to prove a CFAA claim there is no requirement that the accessed information be a trade secret or even confidential. Moreover, a plaintiff is not required to allege the existence of a valid confidentiality or noncompetition agreement. All that is required to prove a CFAA claim is the showing that an unauthorized computer access caused a loss in excess of $5,000. CFAA claims therefore can apply to a much broader range of cases involving the unauthorized access of computer information. For example, an employer may devote substantial resources toward the research and development of a new project but—because of carelessness or oversight—not place sufficient emphasis on maintaining the confidentiality of the project. The employer may fail to have employees sign confidentiality agreements or institute other measures to maintain the secrecy of the project. If a departing employee intentionally accesses computerized information for the benefit of a new employer and then leaves with the information, the former employer may have a difficult time establishing that the accessed information was a trade secret or subject to sufficient confidentiality safeguards. But the former employer may be able to state
a claim under the CFAA, so long as it can demonstrate that the costs resulting from the unauthorized access exceed $5,000.

Misappropriation of trade secrets is an intentional tort. Thus, a former employer must show more than the employee’s mere possession of the alleged trade secret, or (in most jurisdictions, including California) that use or disclosure of the trade secret is “inevitable” given the nature of the new employment. Instead, an employer must show that the former employee has actually used or disclosed the trade secret, or that there is a “substantial threat” of use or disclosure.

Similarly, to establish a violation of a confidentiality or nondisclosure agreement, a former employer must prove that the former employee has in fact breached the obligation by disclosing or threatening to disclose the confidential information. The former employer generally must have at least some evidence about what the departing employee is doing at the new employment—such as the position that the employee now holds, and the substantive areas in which the employee is now involved.

By contrast, a plaintiff suing under the CFAA is frequently in control of all facts needed to establish the violation. The former employer usually can establish, through a forensic computer examination, when, how, and to what extent its computers were accessed by the departing employee. The former employer usually will be able to determine by itself whether the access was authorized. Moreover, a former employer need only show costs of $5,000 required to investigate and remedy the problem caused by the departing employee in order to satisfy the CFAA’s loss requirement. Thus, the CFAA plaintiff need not set forth specific evidence about what the former employee is doing at the new employment in order to establish a violation.

According to the act, “[a]ny person who suffers damages or loss by reason of a [CFAA] violation...obtain injunctive relief and other equitable relief.” The successful CFAA plaintiff should be able to obtain an injunctive order that, at a minimum, requires the former employee to return all the company’s improperly accessed materials, refrain from using any accessed information, and desist from further accessing the company’s computer system.

Also, because the CFAA allows a plaintiff to obtain “other equitable relief,” the successful plaintiff actually may be able to obtain an even broader injunction than one obtainable under a trade secrets or breach of confidentiality theory. For example, a plaintiff may be able effectively to prevent a former employee from working in a certain field or subject area by seeking an injunction preventing the use of any information that could have been derived from improperly accessed information on the former employer’s computer. This may be a far broader injunction than one limiting the former employee’s use of trade secrets.

Prevention and Defense
In view of the incentives to former employers to use the CFAA, it is important for new employers to take preventive steps when hiring new employees—especially those who worked previously for a competitor. Moreover, because a federal court examining a proposed injunction sits in equity, preexisting preventive measures can play an important role in limiting the scope of any potential injunction.

Employers hiring employees who worked with computers at their former employment should consider taking a number of precautionary steps. The most effective way to prevent CFAA claims is to limit the scope of information “taken” by a new hire from the former employer. During the interview process, the new employer should make clear that potential employees must not gather information from their former employer at any time. Once hired, the new employer should require the new employee to certify that the employee has returned all computerized information to the prior employer before beginning work. Further, the new employer should instruct the new employee to refrain from transferring any preexisting data or information to the new employer’s computer without the express consent of the new employer. The new employee’s compliance with these requests should be clearly documented. Because a new employee’s direct supervisor may not be aware—or may choose to remain ignorant—of the risks associated with a new hire bringing information taken from a former employer, preventive measures like these should be incorporated into the normal hiring process.

Still, litigation is sometimes unavoidable despite the presence of an employer’s preventive measures. For employers forced to defend against CFAA claims, a number of litigation strategies could potentially limit exposure to, or defeat, a CFAA cause of action.

A defendant employer may be able to defend against a CFAA claim by showing that the employee’s access to the former employer’s computer system was for legitimate, work-related reasons. This is a highly fact-based showing that will focus on the former employer’s specific allegations of unauthorized access and the circumstances under which the employee actually accessed the information. While it is conceivable that an employee may have accessed a computer at the behest of the future employer, simply because an employee, in fact, accessed the computer after accepting a job (or even after an interview) obviously does not establish that all further use of the computer was unauthorized.

Therefore, simply because unauthorized access can be easily alleged does not mean that it should be conceded—especially in the context of a motion for a preliminary injunction. Counsel for the departing employee and new employer should work closely together to determine the precise factual circumstances surrounding each alleged access of the former employer’s computer system. The objective is to establish that the conduct was benign.

Depending on the dynamics of the situation, the new employer may want to distance itself from the new employee. The employer may want to establish that, even if the former employee engaged in unauthorized access, he or she was neither acting as the new employer’s
agent nor for the new employer’s benefit. For example, there have been many cases in which departing employees have downloaded materials from their former employer in anticipation that the materials may be useful in the new employment. If the downloaded materials become the subject of a CFAA litigation, the new employer should make clear that the materials were downloaded and taken by the employee without the new employer’s knowledge and without any request to do so by the new employer. Challenging the concept of agency may be particularly important when seeking to limit the scope of a temporary restraining order or injunction.

When investigating a CFAA claim, an employer should consider immediately hiring an outside consultant to perform a forensic examination on the new employee’s computer. IT personnel do not usually have expertise in the forensic analysis of a computer and thus may destroy valuable evidence or limit a forensic consultant’s ability to provide useful testimony. Because the IT personnel examining the computer are likely to be key witnesses, it is crucial that the employer’s counsel properly prepare them to provide effective testimony.

The new employer also should consider seeking an evidence preservation order. The defendant may be able to challenge the quality of the plaintiff’s computer system or even establish that someone other than the former employee in fact accessed the computer. The only way to effectively challenge a CFAA claim is for a defendant to actually examine the plaintiff’s computer system. Further, the new employer should consider challenging the reliability of the investigation the former employer used to establish that the former employee accessed the computer system. A forensic expert may be able to show that the methods used by the former employer were unreliable or the evidence collection method was defective.

Finally, the new employer should take immediate steps to preserve its own computer systems. Even if the defendant did nothing wrong, deleting data and e-mail may create an impression of guilt.

An injunction is an extraordinary remedy and, in the context of trade secret and unfair competition litigation, is often used by aggressive plaintiffs as a way of stifling competition and punishing employees who may have inadvertently kept a former employer’s documents. A defendant defending against a CFAA claim should therefore be vigilant in objecting to the entry of an injunction under the CFAA that is materially broader than one that would ordinarily be obtained under a trade secrets or unfair competition theory. For example, the CFAA defendant should challenge any injunctive order that would effectively prohibit the employee from working in his or her new employment or in a particular field, because this type of injunctive relief would not otherwise be permissible absent proof of a trade secrets violation.

In ruling on a motion for preliminary injunction, a state or federal court must balance the relative hardships to the parties. The impact of an injunction can be devastating to a former employee.30 If proposed injunctions will preclude employees from working at their new jobs and supporting themselves and their families, those facts should be emphasized in any opposition to a request for injunctive relief.

California has a strong public policy against the enforcement of noncompetition agreements. Business and Professions Code Section 16600 specifically states that “every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.”31 Relying upon Section 16600, courts routinely have invalidated contracts containing covenants restricting an employee’s right to work for a competitor after the employee departs as well as restrictive covenants that are not absolutely necessary to protect the misuse of trade secrets.32 CFAA defendants therefore should seek to limit the entry of any injunction under the CFAA that would in any way run afoot of California’s fundamental public policy.

It is critical that former employers and new employers remember that the CFAA is also a criminal statute. Instead of filing a civil action, a former employer may elect simply to turn its findings over to law enforcement. While it is a violation of ethical rules to threaten criminal actions,33 it is not a violation to actually report conduct to the authorities in lieu of, or in addition to, pursuing civil remedies.

Defendants have a particular interest in being aware of the CFAA’s criminal component. A claimed CFAA violation may raise questions unique to criminal investigations. For example, is joint representation appropriate? Should the new employer pay for the employee’s counsel? In response to civil discovery, should the former employee exercise his or her Fifth Amendment rights? If an investigative agency has conducted a search, was the search legal and appropriate? The potential criminal remedies under the CFAA create a host of land mines for an attorney who is not experienced in the intricacies of the criminal process. Defense counsel therefore should be especially vigilant in identifying potential criminal issues associated with a CFAA claim.

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1 The Computer Fraud and Abuse Act, 18 U.S.C. §§1030 et seq.
2 See Shurgard Storage Ctr., Inc. v. Safeguard Self Storage, Inc.
3 Id. (citing S. REP. No. 99-432, at 4 (1986)).
4 18 U.S.C. §1030(g).
7 EF Cultural Travel BV v. Explorica, Inc., 274 F. 3d 577 (2d Cir. 2001).
9 18 U.S.C. §1030(e)(8).
See In re DoubleClick, Inc. Privacy Litig., 154 F. Supp. 2d 497, 521 (S.D. N.Y. 2001) (Legislative history makes “clear that Congress intended the term ‘loss’ to target remedial expenses borne by victims that could not properly be considered direct damage caused by a computer hacker.”).
11 EF Cultural Travel BV, 274 F. 3d 577.
13 See, e.g., YourNetDating, Inc. v. Mitchell, 88 F. Supp. 2d 870, 872 (N.D. Ill. 2000) (A hacker sent users from a former employer’s Web site to a pornographic Web site.); United States v. Morris, 928 F. 2d 504 (2d Cir. 1991) (The violator was the creator of an Internet worm program.).
15 Id. at 1125.
16 Id. (quoting 18 U.S.C. §1030(a)(2)(C)) (emphasis supplied by the court).
18 Id. at “1”-“2.”
19 Id. at “6.”
21 Id. at 1195-97.
22 Id. at 1199-1204.
24 Under the “inevitable disclosure” theory, if an employer can show that the nature of the former employee’s new job would necessarily require the former employee to disclose confidential and trade secret information, the former employee can be enjoined from working at the new job. See, e.g., PepsiCo. Inc. v. Redmond, 54 F. 3d 1262, 1269 (7th Cir. 1995). But see Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1461 (2002) (rejecting PepsiCo and holding the inevitable disclosure doctrine invalid in California).
25 The Uniform Trade Secrets Act, BUS. & PROF. CODE §3426.1(d).
28 18 U.S.C. §1030(g).
29 Id.
30 It is well established that “injunctions against carrying on a legitimate business should go no further than is absolutely necessary to protect the lawful right of the parties seeking such injunction.” People v. Mason, 124 Cal. App. 3d 348, 354 (1981).
31 BUS. & PROF. CODE §16600.
33 See Application Group, Inc. v. Hunter Group, 61 Cal. App. 4th 881 (1998) (The prohibition against covenants not to compete is a “fundamental” public policy of California.).
34 See, e.g., RULES OF PROF’T. CONDUCT R. 5-100(a).
Every attorney has felt unpleasantly surprised at one time or another by motions, ex-parte applications, discovery, or motions to compel that are totally without merit. Often, propria persona litigants with time on their hands are guilty of making these baseless filings. What can one do to stop this train? One may seek to have the litigant named a vexatious litigant. The finding of vexatious litigant places very effective restrictions on a litigant’s conduct.

A vexatious litigant is defined by Code of Civil Procedure Section 391. According to the statute, a vexatious litigant is one who does any of four acts:

One: In the immediately preceding seven-year period, the litigant commenced, prosecuted, or maintained in propria persona, at least five litigations other than in a small claims court that have been 1) finally determined adversely to the person or 2) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.1

The immediately preceding seven-year period is measured from the date that the motion for relief from a vexatious litigant is filed.2 It is not from the date the lawsuit itself was filed. The final determination refers to a judgment that is final for all purposes after all avenues for direct review have been exhausted.3 Finally determined means that the time for appeal has expired or that an appeal has been concluded and is no longer pending.

Two: After a litigation has been finally determined against the person, he or she repeatedly relitigates or attempts to relitigate...
gate in propria persona either the validity of the decision or the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by a final determination against the same defendant or defendants. For these purposes, the court may consider cases that the plaintiff has voluntarily dismissed without prejudice.5

Three: In any litigation while acting in propria persona, the litigant repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.6

Four: The litigant has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.7

Any one of these four acts is sufficient to qualify the litigant as vexatious. In Stolz v. Bank of America National Trust and Savings Association, the appellate court found that six prior cases prosecuted or maintained by Stolz in propria persona met the definition of a vexatious litigant.8 In determining Stolz’s status as a vexatious litigant, the court relied upon the fact that in the previous cases filed by Stolz not only had the litigation been concluded adversely to him but also Stolz had unjustifiably permitted five of the matters to remain pending for at least two years without prosecution. The court further found that Stolz had no reasonable probability of prevailing in the pending action.9 The court found Stolz to be a vexatious litigant within the statutory meaning of the term.

Similarly, in Tokerud v. Capitol Bank Sacramento, the appellate court found that the plaintiff met the statutory requirement to be declared a vexatious litigant by prosecuting five actions in propria persona within the previous seven years that were finally determined adversely to him.10 The key finding in Tokerud was that even a voluntary dismissal without prejudice placed Tokerud within the statutory framework of a vexatious litigant. The court reasoned that although the statute was enacted to ease the burden placed upon a defendant who was a target of obsessive and persistent litigants, an action dismissed, with or without prejudice, is a burden on the target of litigation and the judicial system.11 The court explained, “A party who repeatedly files baseless actions only to dismiss them is no less vexatious than the party who follows the actions through to completion. The difference is one of degree, not kind.”12 The underlying sentiment was that by unduly burdening court calendars, a real detriment is caused to litigants who have legitimate controversies to be determined. The common thread in Stolz and Tokerud is repeated filings that are without merit against the same defendants or opposing party.

A propria persona litigant is not necessarily a single individual. The statute provides the plaintiff who has caused litigation

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### Federal Law Regarding Vexatious Litigants

**FEDERAL LAW** also addresses the problem of vexatious litigants. In Molski v. Mandarin Touch Restaurant, the court held that a disabled restaurant patron’s claim under the Americans with Disabilities Act (ADA) against a restaurant owner comprised vexatious litigation.1 The court found Molski’s behavior extreme and egregious because of his filing, since 1998, of more than 400 federal lawsuits alleging violations of the ADA. There were 223 separate complaints that alleged the same five causes of action: a federal ADA claim and the same four claims under California state law.2

The record reviewed by the court demonstrated that the plaintiffs and their attorneys participated in a pattern of abusive litigation bordering on extortionate stalkerism. By requiring the architects of such a scheme to seek leave of court before filing any similar complaints, the court employed the least restrictive measure available to achieve the goal of protecting the public and the judicial system.3 The court believed that it must exercise its inherent power to protect the judicial system and the public from abusive and predatory litigation.4 A district court has the power and obligation to protect the public and efficient administration of justice from vexatious litigation.5

Within the federal statutory rules, the source for declaring one as a vexatious litigant could be found within the Federal Rules of Civil Procedure. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or renewal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.6 If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a representative party, or both an appropriate sanction.7 Rule 11 of the Federal Rules of Civil Procedure expressly authorizes monetary and nonmonetary sanctions.

Local Rules of the U.S. District Court authorize sanctions against parties or counsel for failure to comply with those local rules.8 Within the Local Rules for the U.S. District Court of the Central District for California there is a section titled Vexatious Litigants.9 Of particular note is the fact that

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2 Molski, 359 F. Supp. 2d at 926.
3 Id. at 937.
4 Id. at 926-38.
5 In re Martin-Trigona, 737 F. 2d 1264, 1262 (2d Cir. 1984).
7 Id.
9 Id. at Rule 83-8.
10 Id. at Rule 83-8.1.
11 Id. at Rule 83-8.2.
12 Id. at Rule 83-8.3.
13 Id. at Rule 83-8.4; see also Code Civ. Proc. §§1251-391.7.
MCLE Test No. 145

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

1. When considering whether a litigant is vexatious, the period for determining whether the litigant has commenced, prosecuted, or maintained litigations is the immediately preceding 10 years.
   True.  
   False.  

2. The number of litigations commenced, prosecuted, or maintained in propria persona must be at least seven.
   True.  
   False.  

3. The litigations considered can include not only those in state or federal court but also those filed in a small claims court.
   True.  
   False.  

4. The filed litigations must have been either finally determined adversely to the litigant or unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.
   True.  
   False.  

5. In order to be declared as a vexatious litigant one must do all four of the specific acts listed in Code of Civil Procedure Section 391.
   True.  
   False.  

6. A propria persona litigant must be a single individual.
   True.  
   False.  

7. A vexatious litigant may be required to post security.
   True.  
   False.  

8. A vexatious litigant may become subject to a prefiling order, which requires a litigant to obtain leave of court before filing a new action.
   True.  
   False.  

9. If a motion for security is filed, the litigation is stayed until the motion has been heard and determined.
   True.  
   False.  

10. Before ordering the plaintiff to furnish security, the court needs to determine not only that the litigant is vexatious but also that there is no probability that the plaintiff will prevail.
    True.  
    False.  

11. The amount of security to be posted is 20 percent of the dollar amount of damages requested by the plaintiff.
    True.  
    False.  

12. A ruling declaring the plaintiff to be a vexatious litigant is a ruling on the merits of the plaintiff's claims.
    True.  
    False.  

13. An indigent plaintiff is not required to post security.
    True.  
    False.  

14. A prefiling order, which requires the plaintiff to obtain leave of court prior to filing a new action, can only be obtained by a hearing on a motion filed by the defendant.
    True.  
    False.  

15. When a prefiling order is in place, the vexatious litigant must obtain leave of the judge who made the order before making any new filings.
    True.  
    False.  

16. Disobedience of a prefiling order may be punished by contempt of court.
    True.  
    False.  

17. The Judicial Council maintains a record of vexatious litigants.
    True.  
    False.  

18. One of the purposes of the vexatious litigant statute is to protect defendants against the financial burden of defending against repetitious, nonmeritorious lawsuits.
    True.  
    False.  

19. One of the purposes of the vexatious litigant statute is to prevent the abuse of the judicial process.
    True.  
    False.  

20. Security must be posted within 45 days after a motion to post security is heard and granted.
    True.  
    False.  

MCLE Answer Sheet #145

Name__________________________________________
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Instructions for Obtaining MCLE Credits
1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
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Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.  □ True  □ False
2.  □ True  □ False
3.  □ True  □ False
4.  □ True  □ False
5.  □ True  □ False
6.  □ True  □ False
7.  □ True  □ False
8.  □ True  □ False
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13. □ True  □ False
14. □ True  □ False
15. □ True  □ False
16. □ True  □ False
17. □ True  □ False
18. □ True  □ False
19. □ True  □ False
20. □ True  □ False
to be commenced, instituted, or maintained may be deemed a vexatious litigant, including an attorney at law acting in propria persona.13 In addition, case law has held that attorneys who represent an individual or corporations that are controlled by an individual may also be declared to be vexatious litigants.15 For example, in In re Shieh, the attorney filed innumerable complaints in federal and state courts, many of which were duplicative and most of which were based upon similar facts. The court found that the attorney ostensibly represented the litigant but that the attorney served as a mere puppet.16

THE DEFENDANT may bring a motion for security at any time until final judgment is entered, upon notice and hearing for an order requiring the plaintiff to furnish security. Like any other motion, the motion must be filed and served at least 16 court days before the hearing date.

The court also concluded that Shieh had filed a groundless, wholly frivolous complaint with highly improper motives and had filed other documents for purely vexatious reasons. As a result, Shieh was found to be a vexatious litigant.17 The court found that simply limiting Shieh from filing in propria persona would be ineffective as a means of curbing his unreasonable behavior. Because Shieh had not engaged attorneys as assessors of his claims but only as scriveners to ostensibly represent him, the ruling extended to Shieh’s filing through an attorney as well as in propria persona.18

In Say & Say, Inc. v. Ebershoff, a corporation was held to be a vexatious litigant responsible for the acts of the individual who controlled it.19 Say & Say discusses the fact that generally a corporation is a legal entity with a separate existence from its shareholders or officers. However, under general theories of corporate law, the corporate entity may be disregarded under certain circumstances. The court held that because the plaintiff’s attorney dominated and controlled the corporate entity and was attempting to circumvent the vexatious litigant law by using the corporation as the plaintiff,20 the court could disregard the corporate fiction and find the corporation to be a vexatious litigant. Thus, corporations are subject to the vexatious litigant law.21 If the corporate veil can be pierced, a corporation can be found to be a vexatious litigant.

Remedies

When a person or his or her proxy is declared a vexatious litigant, two protective remedies become available. The vexatious litigant will be required to post security or will become subject to a prefling order.22 The prefling order requires a litigant to obtain leave of court before filing a new action or motion.

A party is declared a vexatious litigant as a result of a motion to obtain protective relief from the litigant’s vexatious behavior. A pattern of vexatious litigation exists. When the defendant brings a motion for security, the litigation is stayed until the motion for security has been heard and determined and until the security, if any, has been posted.30

At the hearing on the motion, the court can consider written or oral evidence by witnesses or affidavit.31 If the court determines that the litigant is a vexatious litigant and that there is no probability that the plaintiff will prevail, the court shall order the plaintiff to furnish security in an amount fixed by the court.32 A ruling on a vexatious litigant motion, however, should not be confused with a ruling on the

Defendant files a noticed motion for a prefling order or an order requiring the plaintiff to post security,23 and as part of the motion facts are presented showing that the plaintiff is a vexatious litigant. The motion is controlled by the requirements for any motion.24

The defendant may bring a motion for security at any time until final judgment is entered, upon notice and hearing for an order requiring the plaintiff to furnish security.25 Like any other motion, the motion must be filed and served at least 16 court days before the hearing date.26 A careful attorney will check with the clerk of court that will hear the motion to be certain that the hearing date is available and not arbitrarily set the date.

As with other motions, the motion must be supported by a declaration and a memorandum of points and authorities.27 The declaration should show that the plaintiff is a vexatious litigant as defined by statute and that there is no reasonable probability that the plaintiff will prevail in the litigation.28

If the propria persona litigant has filed frivolous motions in another case, good practice dictates that an attorney attach conformed copies of the motions and the ruling on those motions as exhibits to a Request for Judicial Notice.29 This will enable the judicial officer hearing the motion for vexatious litigant remedies to understand what happened in the other cases and to appreciate that a

The Prefiling Order

In addition to requiring security, on the motion of a party or the court’s own motion, the court can issue a prefling order, which prohibits the vexatious litigant from filing any new litigation in propria persona with-
out of court. 39 A request for a prefilling order may be part of the original motion to declare the party a vexatious litigant. A prefilling order requires the vexatious litigant to obtain leave of the presiding judge of the court where the proposed litigation is to be filed prior to any such filing. 40 Disobedience of a prefilling order may be contempt of court. 41

If it appears to the presiding judge that the litigation has merit and has not been filed for the purposes of harassment or delay, the judge may condition the filing of litigation upon the furnishing of security, consistent with the requirements of a motion for security. 42

If the court grants a motion to have the plaintiff declared a vexatious litigant, the moving attorney should advise the clerk of the court of the order and provide the clerk with a copy of the order. The clerk can then advise the court’s filing windows in the county not to accept any new pleadings from the propria persona litigant unless the litigant first obtains an order allowing the filing of the specific documents. The Judicial Council shall maintain a record of vexatious litigants and shall annually disseminate a list of those persons to the clerks of the court of the state. 43

The prefilling order may also be applied to the filing of an appeal in the case giving rise to the prefilling order. It will not apply to any appeal filed in another matter. 44 As the court held in Wilmot v. Commission on Professional Competence: The appellant’s “name appears on the vexatious litigant prefilling orders list compiled and disseminated by the Judicial Council of California. According to the list, the prefilling order was made in In re The Marriage of Wilmot (Sup. Ct. Kern County, No. 52 5300) on May 10, 1993, and pertains only to filings related to that action. The case presently before us is not action No. 525300. We therefore treat the present appeal no differently than we would if appellant’s name did not appear on the list.” 45

In another case, McColm v. Westwood Park Association, a rehearing was denied when the appellate court entered an order requiring McColm to post an undertaking as a condition to proceeding with her appeal. 46 McColm had been declared to be a vexatious litigant. The court held that for purposes of vexatious litigant requirements, “litigation” encompasses civil trials and special proceedings, including proceedings initiated in the courts of appeal by notices of appeal or by writ petitions, and thus the vexatious litigant statute applied to the plaintiff’s appeal. 47

The statutory provisions that address the vexatious litigant protect defendants against the financial burden of defending against repetitious, nonmeritorious lawsuits and prevent the abuse of the judicial process. 48 The unreasonable burden placed upon the courts by groundless litigation prevents the speedy consider

1 CODE CIV. PROC. §391(b)(1).
4 CODE CIV. PROC. §391(b)(2).
6 CODE CIV. PROC. §391(b)(3).
7 CODE CIV. PROC. §391(b)(4).
9 Id. at 221.
10 Tokerud, 38 Cal. App. 7th at 778.
11 Id. at 775.
12 Id. at 779.
13 CODE CIV. PROC. §391(d).
16 In re Shieh, 17 Cal. App. 4th 1154.
17 Id. at 1166.
18 Id. at 1167.
20 Id. at 1759.
21 Id. at 1767.
22 CODE CIV. PROC. §§3919(d), 391.1, 391.7.
23 CODE CIV. PROC. §§391.1, 391.7.
24 See CAL. R. CT. 301 et seq.
25 CODE CIV. PROC. §391.1.
26 If service is by mail, the required 16 days are increased by 5 calendar days for mail service that is within California. CODE CIV. PROC. §1005(b); CAL. R. CT. 317(a).
27 CAL. R. CT. 312(c), 313.
28 CODE CIV. PROC. §391.1.
29 CODE CIV. PROC. §391.1.
30 CODE CIV. PROC. §391.6.
31 CODE CIV. PROC. §391.2.
32 CODE CIV. PROC. §391.3.
33 CODE CIV. PROC. §391.2.
34 CODE CIV. PROC. §391.3.
35 CODE CIV. PROC. §391.4.
37 CODE CIV. PROC. §391.4.
39 CODE CIV. PROC. §391.7(a).
40 Id.
41 CODE CIV. PROC. §391.7(b).
42 CODE CIV. PROC. §391.7(e).
44 Id. at 1133 fn.2.
46 Id. at 1217.
48 Id. at 870.

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Most claims of defamation for negative employee references will fail due to First Amendment protection of unflattering opinions

Fortunately, defamation claims involving negative employee references rarely survive summary judgment because the First Amendment protects name-calling and the making of many kinds of unflattering, opinionated remarks. Similarly, California’s statutory “common interest” privilege protects a former employer who responds to a request, without malice, about the job qualifications of a former employee. The one-two punch of the First Amendment and the common interest privilege should deliver a knockout to most employee reference defamation claims.

To state a defamation claim that survives a First Amendment challenge, a plaintiff “must present evidence of a statement that is provably false.” Statements imply a provably false factual assertion—and thus can form the basis of a defamation claim—if they can “reasonably [be] interpreted as stating actual facts about an individual.” The question of whether the challenged statements are provably false is a question of law for the court to decide.

There are a whole host of remarks an employer can say about a former employee that, no matter how hurtful or nasty, are

by Allen B. Grodsky

AN ATTORNEY receives a call from the human resources manager for one of the attorney’s major corporate clients. The HR manager had spoken to a competitor who wanted the manager’s “off the record” opinion of an employee the manager recently fired. The former employee was applying for a job with the competitor. The manager told the competitor that the former employee was a “no-good, lunatic crook” and that the manager would never hire the former employee again. Not surprisingly, the competitor did not hire the ex-employee. But now the attorney’s client has received a demand letter from the former employee’s lawyer asking for $10 million in damages for defamation.

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protected by the First Amendment. These fall into several categories, including 1) name-calling, 2) remarks that cannot be verified, and 3) negative opinions that are based upon nondefamatory facts.

It is well established that “rhetorical hyperbole,” vigorous epithet[s], “lusty and imaginative expression[s] of...contempt,” and language used “in a loose, figurative sense” do not state provable facts and cannot constitute libel or slander. As the California Court of Appeal has stated: “[S]atirical, hyperbolic, imaginative, or figurative statements are protected because ‘the context and tenor of the statements negate the impression that the author seriously is maintaining an assertion of actual fact.’” In other words, name-calling—no matter how hurtful—is not defamatory.

For example, calling a former employee “crazy” or “a lunatic” will almost never constitute actionable defamation. In Lieberman v. Fieger, a lawyer, in an interview on Court TV, described an expert witness with whom he had worked and who was suing him for unpaid fees as “mentally unbalanced,” one of the “Looney Tunes,” and “nuts.” The Ninth Circuit affirmed the trial court’s grant of summary judgment on the defamation claim, noting that no reasonable viewer would have perceived these phrases as anything other than a “stream of rhetoric.” Cases from throughout the United States have come to the same conclusion when the plaintiff has been called “crazy,” “undoubtedly paranoid,” or “mentally ill.”

Courts have held that referring to the plaintiff as “stupid” or “lousy” at his or her occupation is protected rhetorical hyperbole. Indeed, the more colorful the insult, the more likely it is constitutionally protected.

Courts also have held that the First Amendment protects unflattering remarks that cannot be verified. What this means is that an employer cannot be held liable for defamation for making a remark about a former employee that cannot be proven true or false—even if everybody hearing the remark will grasp that the remark impugns the plaintiff’s reputation. There is a wide range of unflattering remarks that fall within this category.

For example, general negative opinions about a plaintiff’s performance at his or her occupation usually are not verifiable and almost always are considered protected. One court made the following distinction: A statement that an employee was terminated for “poor performance” is protected as opinion, but a statement that an employee was terminated for engaging in a particular wrongfulness practice with respect to a particular client would be defamatory if false. Courts have found the following statements nonverifiable and therefore protected:

- A student calling a high school teacher the “worst teacher” in the school.
- A lawyer calling a judge “ignorant,” a “buffoon,” and “the worst judge in the United States.”
- E-mail messages describing the “lousy performance” of the defendant’s distributor.
- A reference to a plaintiff as a “poor lawyer.”
- A reference to a plaintiff as a “cancer” to the team.
- A principal saying that a teacher was “lazy,” “burnt out,” and “doesn’t want to work.”

While some courts find the word “stu-
The rational for this rule is that: "When the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented, and they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts. When the facts supporting an opinion are disclosed, readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts."  

So, for example, the district court in Nicosia v. de Rooy dismissed a defamation claim based on the defendant's statement that the plaintiff engaged in "embezzlement" because the defendant disclosed the facts—all of which were proven true—upon which he reached the conclusion that embezzlement was committed. Similarly, the Ninth Circuit in Standing Committee v. Yagman found a lawyer's accusation that a judge was "anti-Semitic" and "had a penchant for sanctioning Jewish lawyers" to be protected by the First Amendment because the lawyer disclosed the basis for his conclusion: He and several other Jewish lawyers had been sanctioned by the judge. As the Ninth Circuit noted, readers of the lawyer's comments "were free to form another, perhaps contradictory opinion, from the same facts."  

Finally, in determining whether an unflattering remark is protected by the First Amendment, the issue of context is a "major determinant." For example, in ComputerXpress, Inc. v. Jackson, the plaintiff sued for trade libel based on statements posted on the Internet claiming that the plaintiff engaged in a stock "scam" and a "fraud." Notwithstanding that these words might seem defamatory out of context, the court of appeal reversed the denial of a motion to strike, stating that "while the postings certainly could be considered disparaging, their tone and content identified them as statements of opinion and not fact." The court emphasized that the postings were "hyperbolic, informal, and lacked the characteristics of typical fact based documents."

Defendants in a defamation action should always consider bringing a summary judgment motion because "[s]ummary judgment is a favored remedy in defamation...due to the chilling effect of protracted litigation on First Amendment rights." Furthermore, summary judgment is particularly appropriate because the question of whether the allegedly defamatory statements are provably

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false is a question of law for the court to decide.40

Common Interest Privilege

Even if an employee plaintiff can survive a First Amendment challenge, he or she must still get by Civil Code Section 47(c)’s common interest privilege. Section 47(c) protects a communication made without malice to a person interested in the communication by one who is requested to give the information. The statute expressly applies to a “communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant.” Moreover, the statute specifically authorizes “a current or former employer, or the employer’s agent, to answer whether or not the employer would rehire a current or former employee.”

The defendant has the initial burden of showing that the allegedly defamatory statement falls within the common interest privilege. The burden then shifts to the plaintiff to prove that the defendant acted with malice.42 The existence of the privilege is ordinarily an issue of law for the court to decide.43

Normally, in an employer reference case, a defendant can carry its burden of showing that the allegedly defamatory statement falls within the common interest privilege.44 The burden then shifts to the plaintiff to prove that the defendant acted with malice.42 The existence of the privilege is ordinarily an issue of law for the court to decide.43

To defeat summary judgment, the plaintiff must create a factual dispute on the issue of malice. A showing of malice requires evidence that the publication of the allegedly defamatory statement was motivated by hatred or ill will or that the defendant lacked reasonable grounds for believing that the statement was true.45 This is easier said than done. According to Civil Code Section 48, malice cannot be inferred from the communication itself. Furthermore, it is not sufficient to prove malice by showing that the statements were “inaccurate” or even “unreasonable.”46 And courts will grant summary judgment based on the common interest privilege when the plaintiff cannot produce evidence of malice.47

Ultimately, it is probably not a good idea to respond to a request for information about a former employee with name-calling or non-verifiable insults. These comments can cause as much damage as any verifiably false statement. Still, case law protects them and makes
lawsuits based on them an enterprise sure to be unsuccessful.

5 Id. at 1401.
6 Id. (quoting Greenbelt Coop. Pub. Ass’n v. Bresler, 398 U.S. 6, 14 (1970)).
8 Lieberman v. Fieger, 338 F. 3d 1076 (2d Cir. 2004).
9 Id. at 1078-79.
10 Id. at 1080.
18 Yeagle v. Colgate Times, 497 S.E. 2d 136, 138 (Va. 1998). (holding that the phrase is “disgusting, offensive, and in extremely bad taste, but it cannot reasonably be understood as stating an actual fact”).
19 Ferlauto v. Hamshier, 74 Cal. App. 4th 1394, 1398, 1404 (1999) (concluding that these remarks—though made in a nonfiction, autobiographical book—were “devoid of any factual content.”).
22 Moyer v. Amador Valley Joint Union High Sch. Dist., 225 Cal. App. 3d 720, 725 (1990) (calling the plaintiff the “worst teacher” is not a “factual assertion capable of being proved true or false”).
23 Standing Comm. v. Yagman, 55 F. 3d 1430, 1440 (9th Cir. 1995).
24 Micrins Surgical, Inc. v. Neuroregen, LLC, 2004 WL 1697837, at *4 (D. Md. 2004). (“Statements about ‘lousy performance’ are too loose, imprecise, and inherently subjective to have a readily understood meaning or to be objectively verifiable” and merely represent the author’s “subjective evaluation of [the plaintiff’s] performance under the distributorship agreement.”).
25 Sullivan v. Conway, 157 F. 3d 1092, 1097 (7th Cir. 1998). (“To say that he is a very poor lawyer is to express an opinion that is so difficult to verify or refute that it cannot be the subject of inquiry by a jury.”).
27 Lifton v. Board of Educ., 416 F. 3d 571, 578-79 (7th Cir. 2005).
32 Franklin, 116 Cal. App. 4th at 387 (quoting Yagman, 55 F. 3d at 1439).
33 Nicoisa v. de Rooy, 72 F. Supp. 2d 1093, 1102-03 (N.D. Cal. 1999).
34 Yagman, 55 F. 3d at 1440.
35 Id. (quoting Lewis v. Time, Inc., 710 F. 2d 549, 555 (9th Cir. 1983));
38 Id. at 1013.
42 Id.
43 Id.
46 Kashian, 98 Cal. App. 4th at 931.
47 Noel, 113 Cal. App. 4th at 222.

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Podcasting for Lawyers

WHAT THE VCR AND TIVO HAVE DONE for video content, podcasts are doing for audio content. A podcast is an audio stream, usually in mp3 format, that is downloaded via the Internet and can be played on an mp3 player. Apple has set the standard with its iPod (from which the word “podcast” derives), which allows users to load their favorite music and audio content into their iPod. The major advantage of an mp3 player is that it allows the user to carry a large amount of audio content in a compact gadget. For example, my 4-by-2-inch iPod, with its 20 gigabytes of memory, can hold 5,000 songs. Having an iPod can be very much like having a jukebox with about 500 compact disks in it.

The portable mp3 player has generated a tremendous supply of online content that includes all types of audio. The podcasting community is producing thousands of podcasts every day. Some of these audio programs are produced by businesses. For example, my law firm posts podcasts on legal topics that can be downloaded from its Web site. Titles include “Terminating the Employment Relationship” and “Alternative Fee Arrangements.” To download either of these two podcasts, a user goes to the Web site, selects the podcasts link, and clicks on the desired podcast.

Other sites offer a host of podcasts for downloading. For example, iTunes.com, which is Apple’s Web site for music and podcasts, offers over 25,000 podcasts from a variety of sources. Users download the iTunes software for free and select the desired podcasts. A user can also subscribe to podcasts, with the result that podcasts are automatically downloaded (and synced with the user’s iPod) each time the iTunes software is run. This feature allows users to get the latest podcast for a particular topic or program. For example, legal professionals can subscribe to a serial podcast called Coast to Coast, which contains discussions about current legal issues by attorneys and bloggers Robert Ambrogi and J. Craig Williams. National Public Radio has series now available as podcasts (for example, Sunday Puzzle) that can be downloaded through iTunes or at www.npr.org/rss/podcast/podcast_directory.php. Those who need to get a daily dose of Bill O’Reilly’s Radio Factor can obtain it via iTunes or by signing up at www.billoreilly.com. Similarly, liberals will be comforted to know that they can download a podcast of Al Franken’s radio program on Air America Radio from iTunes (or, alternatively, at www.airamerica.com) without being charged. There are even podcasts that help you brush up on your French (at www.frenchpodclass.com) if you are so inclined.

Finding Podcasts


Some podcasts offer regular content on various legal topics. For example, the Legal Talk Network (www.legaltalknetwork.com) has several legal podcasts, including one presided over by F. Lee Bailey titled Conversations with F. Lee Bailey.

Listen in Your Car

For many, Los Angeles is a particularly good place to listen to podcasts during the city’s traditionally long morning and evening commutes.
mutes. Many car manufacturers are developing iPod integration with their car stereo systems, and older cars can have this feature added. BMW and Mercedes already offer full iPod integration for several of their models. You can review a list of car manufacturers who have, or will soon have, iPod integration on Apple’s Web site.

IPods and other mp3 players can be fitted with a device that broadcasts a weak FM signal. This allows for a cheap method to listen to podcasts while driving. With the iPod in the car (for example, in the glove box or on the seat next to the driver) and broadcasting on its FM adapter, the driver tunes the car’s stereo to the iPod’s frequency, and the podcast is heard over the car’s stereo. This accessory eliminates wires, but its major drawback is sound quality. Interference from other radio stations can cause the sound from your player to be interrupted, fade in and out, or simply be difficult to hear.

A more expensive and better method is to hard-wire podcast capability into a car’s stereo system. This can cost from $600 to $900. However, there are some major advantages to hard-wiring your car. Foremost, the sound quality will improve. Further, because the wiring is adapted to the vehicle, the owner can place the wiring where he or she wants it to be. For many commuters, the front seat is cluttered enough already, and having a dedicated place for the mp3 player is welcome—especially if it keeps the player from sliding around during cornering and braking. For example, in my vehicle, I have a center arm rest that opens up for storage. I placed the iPod wiring inside this storage area for ease of access and so that the wire is out of sight when not in use.

Adapters are also available that allow iPods or mp3 players to play via a car’s cassette player. The cassette adapter produces pretty good sound quality (not as good, in my opinion, as the hard wiring). The major drawback, however, is that the wires from the cassette adapter dangle outside the stereo, which can be distracting while driving.

As iPods and other mp3 players continue to sell well, useful accessories proliferate. For example, the JBL On Stage speaker for the iPod is compact and provides good sound. The iPod plugs into this circular speaker and can fill the room with music or other audio. This is ideal for using your iPod away from your computer. Another advantage is that the speaker system also charges your iPod while it is docked in the speaker.

Podcasts offer an ideal way to keep current on topics of interest, and the legal community will undoubtedly continue to offer more content options, supplementing newsletters and client alerts with podcast versions as this medium continues to grow.
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CLE Preview

THE GOOD AND BAD OF SECTION 998 OFFERS

ON THURSDAY, FEBRUARY 9, the Los Angeles County Bar Association will present a discussion of Code of Civil Procedure Section 998, which serves as a cost-shifting measure, encouraging early settlement of lawsuits and penalizing litigants who fail to accept reasonable settlement offers. The course will cover the mechanics and common concerns regarding offers of compromise, the elements of an offer of compromise, and the implications of offers of compromise. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration and the meal begins at 5:30 P.M., with the program continuing from 6 to 9:30. The registration code number is 009170. The prices below include the meal.

$50—CLE+Plus members
$95—LACBA members
$125—all others
3.25 CLE hours, including 1 hour in ethics

Los Angeles Superior Court Walk-Through Program

ON SATURDAY, FEBRUARY 25, the Los Angeles County Bar Association and the Barristers will present a general overview of the Los Angeles Superior Court. The presenters, representing the bench and bar, will share valuable ideas for successful pretrial and trial techniques and discuss common pitfalls to avoid in the courtroom. The first hour will involve court administration issues and alternate dispute resolution. Among the topics to be covered during the afternoon session are opening statements, voir dire, cross-examination, and final arguments. Interested lawyers, law students, and paralegals are encouraged to attend. The program will take place at the Los Angeles Superior Court, 111 North Hill Street, Downtown. On-site registration and a reception will begin at 8 A.M., with the program continuing from 8:30 A.M. to 4:30 P.M. The registration code number is 009212. The prices below include the meals.

$50—CLE+Plus members
$85—all others
$95—all at-the-door registrants
$25—law students
6 CLE hours

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

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

THE LOS ANGELES COUNTY BAR ASSOCIATION’S Solo and Small Firm Section recently scheduled a well-intentioned CLE seminar titled “Can Katrina Happen Here?” The program hoped not only to help lawyers prepare for and protect their practices against the consequences of a Katrina-sized (or smaller) disaster but also to explore their ethical responsibilities for safeguarding client files.

The seminar never took place. The reason? Lack of interest. Holiday timing might have been a factor, or perhaps it was the relatively small target audience, but the larger reason was far more insidious—complacency.

The American Bar Association fared somewhat better. Last May, before the Katrina catastrophe, its Standing Committee on Law and National Security brought together experts from government, business, legal, law enforcement, emergency responder, public health, public works, and the nonprofit sector to discuss operational continuity for the public and private sectors in the event of a catastrophic event. Participants at the conference, which was titled “Law Amid the Ruins: Doing Business after Disaster,” contemplated U.S. emergency preparedness, response, and recovery planning on a mass scale.

It is possible that the ABA conference succeeded because the actual issues it addressed generated more interest than LACBA’s planned seminar. After all, why think about mundane disasters like hurricanes, fires, and power outages when there are grander, more devastating scenarios to contemplate? Perhaps sexier legal issues—like detention, rules of engagement, and the scope of legal authority—and the vulnerability faced by state and local agencies during a catastrophe trump everyday concerns like computer backup systems and file protection.

Regardless of the reason, it is now more than 100 days since Katrina hit, and as time passes since the last disaster—whether it be September 11, Katrina, or the Pakistani earthquake—so wanes our attention. It is said that the attention span of the average television and video viewer is about 10 seconds—10 seconds to pack in an increasing array of disturbing scenarios. Just recently the members of the former 9/11 Commission (now the Public Discourse Project) issued their report card on how the government is doing four years after the September 2001 attacks. Here’s the 10-second version: The government deserves an F for preparedness; we’ve lost all sense of urgency; the institutional change to make the grade will take vigilant pressure and constant attention; and people think things have been done that have not.

The same can be said for the situation in New Orleans. More than four months after the official declaration, the city remains under a state of emergency. According to the Los Angeles Times, the situation in the city is desperate. “New Orleans Is Not Bouncing Back. ‘We Are Not OK,’” blared a headline.

Perhaps we need to try something a little lighter, like the Centers for Disease Control and Prevention’s new computer games.

The big questions—where to lay blame, whether mud-and-mold ravaged areas should be rebuilt or bulldozed, what the government’s duty to the victims should be—I cannot answer. But I can attest that New Orleans is not OK. I gathered my evidence in mid-October when I was part of a television crew interviewing members of the Coast Guard: moldy refrigerators lined up like dominos along streets, some bearing mysterious missives like “Katrina got the house, now child support”; a ten-foot sign hanging from the balcony of a lovely home off Rampart, “French Quarter Health Department IN EXILE”; a boarded-up storefront warning looters, “Don’t try. I am sleeping inside with a big dog, an ugly woman, two shotguns, and a claw hammer.” And that’s just in the relatively untouched French Quarter and Garden District.

In the Lower Ninth Ward, Chalmette, and St. Bernard Parish, the message was far more funereal: a bus tossed onto a St. Claude median strip bedecked with black bunting as if in mourning; a grouping of white wooden crosses stuck into the ground just beyond the Industrial Canal proclaimed as “Toxic Art”; two figures ominously wrapped in white suits and helmets picking through piles of household memories, mold-blackened, on the lawn of a water-ravaged home.

Maybe the only answer to tackling the difficult subject of disaster prevention and preparedness is to change our attitude entirely. Perhaps we need to try something a little lighter, like the Centers for Disease Control and Prevention’s new computer games that help prepare first responders facing bioterror attacks, nuclear accidents, and pandemics. Or along the lines of one two-story house I saw in the lower Ninth, whose entire front was peeled away like the top of a sardine can. On its exposed inside wall, someone had wryly scrawled, “Cheap room for rent, bright and airy, skylights, in quiet neighborhood near the water.”

Katrina displaced thousands of lawyers and destroyed law offices throughout New Orleans and the rest of the Gulf Coast. I did not meet any lawyers while I was there—the closest I came was a law school friend’s nephew who lost everything, and I cannot say whether he or anyone might have fared better had they undertaken adequate precautions. I share my observations here for two reasons: One, I don’t want to forget. And two, they are not OK. None of us are OK. And I don’t want that to be old news.

Karen Miller is an attorney specializing in trademark and copyright law.
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