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Under the fugitive disentitlement doctrine, those who flee the jurisdiction of the court will lose their right to appeal.

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It is early in the morning and still dark outside. You get to the office and turn on the lights. You are the first to arrive. As you approach your desk you can see that your phone message light is already on. You will soon discover that you have several new e-mail messages as well. As you sit in your chair—and hopefully you have a fancy ergonomic chair, because you will be sitting in it for a very long time—you hear in your head a loud bell and a voice saying, “And they’re off!” For the average lawyer, this is how the day begins. It is a daily race, and all bets are off.

Your inbox has several inches of paper in it, but your outbox is noticeably slimmer. Several files sit on and around your desk, your priorities for today. Your calendar tells you that this will be yet another workday when you will not have time for lunch. As the day progresses, you volunteer, or others volunteer you, to handle a new matter.

When asked when you can complete the new work, you probably cannot answer the question with certainty. You know you are behind in the work you have designated as your priorities, and you are not quite sure how much must be done before you can tackle fully your newly added responsibility. Your inability to give your colleagues a firm deadline troubles you.

Many hours have gone by and it is now time for a break. You stretch in your ergonomic chair while gazing at your view of the busy city, extending your arms and adjusting your back as you turn from side to side. The stretch is your exercise for the day and you are now proud of yourself for multitasking. It is dark outside again. Your phone message light is back on, and you have some new e-mail messages. The cleaning crew came and went, as you tried to concentrate with the vacuum cleaner running in the background. Your inbox looks as full as when you arrived that morning. You decide you have had all you can take for one day. You turn off the lights on your way out.

If you are like me, it is not the amount of work or the long hours that raise your blood pressure. Rather, it is the lack of time to reflect on the day that just finished and the new day that will soon begin. Taking time to reflect reduces your anxiety and makes you a happier and more successful person. There was a direct, positive correlation between time invested in reflection and sales production. Now that I am a busy lawyer, I have revived this good old habit.

If you are not already taking time for daily reflection, I encourage you to try it for 30 days. If you adopt reflection as one of your new habits, I am certain you will find that its rewards are priceless.
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FROM THE TEAPOT DOME OIL SCANDAL in 1924, to Watergate, Enron, and Abu Ghraib, we have painfully relearned that whenever there is an unchecked accumulation of power or the temptation of fame or money, governmental, corporate, and nonprofit abuses will almost always inevitably follow. Human self-interest always tempts, and it frequently trumps the collective greater good of the people and their institutions.

History has shown us that citizens of a republic may, in times of peril, turn against the republic itself. More than 2,000 years ago, Brutus slew Julius Caesar because Brutus feared that Caesar’s legions would destroy the Roman republic. More than 200 years ago, Napoleon seized power and overthrew France’s First Republic. During the 1920s, the Italians willingly turned their democracy over to their popular Prime Minister Benito Mussolini. In 1934, more than 50 percent of the German electorate approved Adolf Hitler and his coalition partner’s complete assumption of political and military power. In such perilous times, only the judiciary remains to protect individual liberty.

When the framers of the U.S. Constitution arrived in Philadelphia in 1787 to consider a new form of government for the United States, they worried about the accumulation of governmental power. They wanted to make sure that the government had enough power to solve the country’s problems, but not too much to ride roughshod over individual liberties or the rights of the states. The framers carefully crafted a constitution with a system of separated powers wherein each branch would check the power of the other two. Commenting on the powers of the three branches of government in The Federalist No. 78, Alexander Hamilton wrote of the dangers of unchecked power: “The executive not only dispenses the honors, but holds the sword of the community….The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.” Hamilton and other framers viewed the judicial branch as “the least dangerous to the political rights of the Constitution.” The creation of the judiciary as a third, separate branch was designed to protect judges and ensure the independence of a branch that had “neither force nor will but merely judgment.”

Lately, the role of the courts in our tripartite form of government has been the subject of intense political focus. On the national level, there have been attempts to influence judicial decision making—from the introduction of bills to strip courts of jurisdiction to calls for withholding funds and threats of impeaching judges who cited foreign law or reached results that some find objectionable. In California, misunderstanding abounds about how our courts decide cases and the basis upon which those decisions should be made. Those who disagree with decisions have, at times, criticized the results based on political considerations rather than on legal analysis.

Our courts are—and should be—expected to decide cases as determined by law and precedent and not by poll results. •44 percent did not understand the responsibilities of the judiciary. We have a duty as attorneys to educate others about the meaning of judicial independence and to act on behalf of the judiciary, who cannot—and should not—be political advocates for themselves.

Your Association is trying to meet that obligation. It sponsors the Dialogues in Freedom program, chaired by David Parker, in which volunteers go into classrooms to teach about the law, government, and the role of the judiciary. This June, the Association cosponsored with Loyola Law School the first Journalist Law School, through which we helped bring 34 journalists to Los Angeles for a three-day program to teach the principles and fundamentals of law. Journalists from ABC, CBS, NBC, PBS, the Wall Street Journal, Chicago Tribune, the Daily Journal, and the Los Angeles Times were among those who attended.

What we can do, we must do, for these are dangerous and trying times. We are fighting a long-term war against forces that we do not yet fully appreciate nor clearly understand. We will face new challenges that will be difficult and costly, and through it all we must be ready to sacrifice and to fight for the republic and its institutions.

In 1787, at the end of the Constitutional Convention, an anxious Philadelphia woman asked Benjamin Franklin, “What form of government have we got?” Franklin thought for a moment and replied, “A republic, madam, if you can keep it.” Franklin had great faith in the future of America and the American people. His faith was not misplaced, for Americans have shown themselves to be a noble, great, and resolute people, who, when aroused, have met every challenge. If we, as lawyers, meet our obligations to preserve the rule of law, the republic will survive.

Charles E. Michaels, vice president and general counsel of LAACO, Ltd., is 2006-07 president of the Association. He can be reached at charles.michaels@laaco.net.
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When a General Counsel Is Your Client

**A GENERAL COUNSEL’S PRIMARY OBJECTIVE** is to ensure that the company for which the counsel works receives legal services that are reasonable, valuable, and necessary. Outside lawyers hired by the company can maintain good relations with a general counsel by pursuing the same goal. The way this goal is accomplished will depend upon the client's industry, management, and business objectives. However, some particular issues tend to affect most California businesses with general and outside counsel.

For example, outside counsel should be careful about billing, because an in-house attorney is going to recognize the difference between billing for its own sake and billing for work that is going to advance the client's position. In-house attorneys are sophisticated clients and know that a letter should not cost $10,000 in billable hours, regardless of its content or how prominent the law firm. They also know that because discovery summaries and constant updates do not bring much value to the litigation, their use should be limited. Alternatively, general counsel understand the need and cost of depositions, motions for summary judgment, and thorough legal research. The bottom line is that attorneys must bring added value—not just billing. Outside attorneys should also remember that while general counsel may not always complain when they receive the bill, they will remember it when deciding whom to retain on the next case.

Next, outside counsel should make sure they understand the role that insurance plays in the client's industry. If the client is in a high-liability industry (e.g., construction or transportation), then how an insurance portfolio is utilized will be a key aspect of business operations. What role insurance plays in the client's industry will affect when matters are tendered, to which carriers they are tendered, and how the defense should be handled.

Even when insurance policies provide coverage for litigation, general counsel should not be ignored, even when the general counsel is not involved. If the client business has a low deductible policy, its loss runs are not important to it, and there is little possibility of any claim exceeding the policy limits, the general counsel will not want to be involved with the matter. On the other hand, if the client has a high deductible, loss runs are important, or the claim could exceed the policy limits, the general counsel will probably take a more hands-on approach.

General counsel will also expect the company's insurance defense counsel to be mindful of in-house opinions and not simply obey the insurance adjustor without consideration of the client's wishes. This may seem obvious to some, but it is unfortunate how many insurance defense lawyers show little or no respect for the insured even when the insured has six-figure deductibles and foots the entire defense cost. The outside lawyer may not face the consequences immediately, but at the next time a claim is made and the claims adjustor suggests hiring that lawyer's firm, it is unlikely that the general counsel will support an attorney who did not improve the company's bottom line. Insurance costs can make or break a client, and this should directly affect how an attorney advises a client.

In addition, outside litigators should not forget that in-house legal departments are assets to a litigation. A good in-house lawyer is going to be familiar with the company's operations, the job duties of various types of employees, and the political climate within the company. Usually, in-house counsel is also familiar with the personalities involved. This knowledge can be a huge advantage to a litigator, while saving time and money for the client. However, if outside attorneys ignore this asset, they may spend substantial time searching for the answer to a question that the general counsel could have answered in seconds.

Finally, outside counsel should not fear losing the client by bringing in specialists when necessary. The reality is that if an attorney has a decent relationship with the client, this fear is misplaced. By the time the outside attorney sees a need for a specialist, the general counsel probably has seen it too. If the general counsel has to mention it first, this may cause damage to the attorney-client relationship, because the general counsel will question the judgment of the outside attorneys and lose faith in their ability to set their egos aside and admit to having limitations. No attorney is proficient in all areas of law, and failure to acknowledge that fact may lead to serious problems.

There is no secret to impressing the general counsel—and expensive suits, fancy meals, or the gift of gab are not it. Providing methodical, efficient, and practical legal services that improve the company's bottom line will garner far more respect in the eyes of a general counsel and will go much farther to ensure a regular stream of future work.

Laura D. Each has been general counsel for C.A. Rasmussen, Inc., for the past four years and is a sole practitioner representing several other closely held companies in a general counsel capacity.
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Local Regulation of Alcohol Licensees

IN CALIFORNIA, THE REGULATORY AUTHORITY for alcohol sales, consumption, production, and transportation is vested in the Department of Alcoholic Beverage Control, which has the responsibility for the issuance of liquor licenses and the regulation of existing licensees. As authorized under the Twenty-first Amendment to the U.S. Constitution, the California Legislature has created a comprehensive regulatory environment governing all aspects of alcoholic beverage sales and services, but the role of local government in preventing the deleterious effects of alcohol sales and consumption is less defined. What a local government can do to mitigate social, economic, and criminal consequences of alcohol use within the confines of a preemptive state regulatory scheme is therefore worthy of a detailed examination.

Few observers of the social challenges posed by alcohol abuse would question that neighborhoods where bars, restaurants, liquor and other stores that sell alcohol are close together or concentrated suffer more frequent incidents of violence, social dislocation, medical emergencies, and property crimes.1

Although the Department of Alcoholic Beverage Control is a statewide agency, its actions directly affect the quality of life in local communities. This can create tension between the department and local communities, which may argue that decisions about distribution, concentration, and operation of alcoholic beverage outlets are better made by local government officials and community stakeholders familiar with the social problems and law enforcement needs of their community. Notwithstanding these considerations, the department is the ultimate arbiter in the issuance and regulation of liquor licenses.

The department largely preempts local government authority to regulate alcohol sales and related activity, and thus the challenge for local governments is to regulate the ancillary aspects of alcohol sales through local land use powers. To do so, local governments must be meticulous in documenting police problems associated with licensees, actively monitor and intervene as necessary in proceedings to license the establishment of new alcoholic beverage outlets, and be resourceful and creative in finding police power alternatives to assert a degree of control over the sale of alcoholic beverages within their communities, should the department fail to protect local community welfare.

State Authority to Regulate Alcohol

In 1955, the California Constitution was amended to establish a uniform framework for licensing alcoholic beverage sales throughout the state. The constitution provides: “The State of California...shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State.”2 The department was given the power to issue and revoke liquor licenses.3 The legislature established the department to “ensure a strict, honest, impartial, and uniform administration and enforcement of the liquor laws throughout the State.”4

In order to ensure honest, impartial, and uniform administration, the legislature granted the department specific guidance for overseeing the licensing process. The department may only grant a license if it determines that the license will not be contrary to the “public welfare or morals.”5 Moreover, the department is precluded from issuing a license that is contrary to a valid local zoning regulation. In fact, license applicants are required to provide a zoning affidavit affirming that issuance of the license will not be contrary to applicable zoning standards.

Courts have stated that the department has a “solemn responsibility” to protect the public from the potential harms that coincide with the sale of liquor.6 Thus, assuming the license is consistent with local zoning, in order to carry out its mandate to protect the public welfare and morals, the department is required to conduct a “thorough investigation” to determine that the license will comply with all statutory criteria for the issuance of a liquor license.7 The discretion vested in the department is therefore “not absolute” and “must be exercised in accordance with the law.”8 Furthermore, any decision by the department “must be supported by sufficient evidence” or risk

Steven Meyers, the founding principal of Meyers Nave, is head of the firm’s Redevelopment and Housing Practice Group, and Stephanie J. Stuart is an associate with Meyers Nave and advises the San Leandro Board of Zoning Adjustments and Planning Commission.
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enforcement personnel. 14 Moreover, when public welfare, the Department must be this subjective criterion, courts have limited this for denial by stating that the courts have reinforced the statutory grounds for issuance of the license, the department could best ful

Section 23958 sets forth objective and subjective grounds for denial. If objective evidence of the number of crimes in the applicant’s reporting district mandates denial, the department must deny the license, as no facts beyond those establishing a statistical undue concentration are necessary to mandate this result.13 If subjective evidence demonstrates that the license would cause or exacerbate a law enforcement problem, the department must deny the license. However, even under this subjective criterion, courts have limited the discretion of the department: “[I]n appraising the likelihood of future harm to the public welfare, the Department must be guided to a large extent by past experience and the opinions of experts,” including law enforcement personnel.14 Moreover, when attempting to assess the future impact of the issuance of a license, the department’s decision must be “based on experience, sound reason and evidence in the record,” again requiring the department to defer to the local law enforcement agency.15

Given this framework, it seems clear that the department could best fulfill its mandate of protecting public health and safety by cooperating with local police departments and planning agencies who know how alcohol sales affect their community. Indeed, the courts have reinforced the statutory grounds for denial by stating that the “liquor industry is one which greatly affects the public health, safety, welfare and morals of the people” and that the welfare the statute seeks to protect is that of the people of the state and not the liquor industry.16 However, despite this seemingly clear mandate, the department tends not to err on the side of the community and issues licenses even when faced with strong opposition from local government and community leaders. In such instances the department’s broad discretion may undermine a local jurisdiction’s ability to manage alcohol-related social and police problems.

In practice it is also extremely difficult to overturn a decision of the department. While the department may delegate the power to hear from all parties and decide a licensing question to an administrative law judge, the department must render the final decision whether to adopt the recommendation of the administrative law judge or to render a decision notwithstanding the administrative law judge’s recommendation.17

If a party disagrees with the decision of the department to grant or deny a liquor license, the challenge must go to the Alcoholic Beverage Control Appeals Board. After reviewing the entire record of the proceedings before the department, the board must determine whether there is substantial evidence to reason-ably support the findings of the depart-ment.18 Substantial evidence “cannot be deemed synonymous with ‘any’ evidence. It must be reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.”19 However, the appeals board “will indulge all legitimate inferences in support of the Department’s determina-tion.”20 If, after reviewing the department’s decision, the appeals board determines there is substantial evidence in the record to support the department’s decision, the appeals board will not reverse the department’s deci-sion. The courts will also review the depart-ment’s decisions under the same standard of review.21 Judicial review of the department’s decisions, however, is limited to the California Court of Appeal and California Supreme Court, and only by writ of review.22 Review is wholly discretionary with the court, and the courts are under no obligation to accept cases. Nothing guarantees that the depart-ment’s decisions will be subject to judicial review.

This deferential standard of review serves to protect the department’s interpretations and decisions regarding its statutory mand-ate. While this is the same deferential standard of review that shields local governing bodies, its application to the decisions of the department is unique. A substantial evidence test is an appropriate standard to apply to local governmental decisions made by elected officials, because courts typically defer to the legislative branch and its understanding of the effects a decision will have. The local govern-ment bod-y is afforded a deferential standard of review because that body is in the best posi-tion to make such determinations, due to its knowledge of local affairs.

If a local government wishes to protest the issuance of a liquor license, it must produce compelling statistical and analytical data connecting the dots of social and economic dis-location to the prevalence of alcohol sales in order to convince the department that a license should not be issued, because a local government is unlikely to overturn the depart-ment’s decision on appeal.23 This includes presenting clear, indisputable statistics that demonstrate whether an undue concentration of crime (as defined by statute) exists in the area surrounding the applicant’s store.24 It also includes presenting relevant, expert tes-timony that establishes that the issuance of the license will create a law enforcement problem and citing specific facts and occurrences to support this testimony. While the department is still the ultimate arbiter of licensing, the stronger the evidence the local government produces, the more likely the department will decide in the government’s favor.

Local Zoning Authority

A substantial body of research establishes a relationship between alcohol availability and negative social and environmental effects, including increases in criminal activity, public nuisances, loitering, and drunk driving.25 A study of 74 cities in Los Angeles County revealed that a higher density of alcohol outlets was associated with higher levels of vio-lence, even when taking other factors into account.26 The study also found that in a typical city in Los Angeles County with approximately 50,000 residents, 100 alcohol outlets, and 570 incidents of assaultive vio-lence, the addition of one alcohol outlet was associated with a .62 percent increase in the number of violent offenses.27 When the department fails to act appropriately, local governments must seek other means of protecting the public welfare. One way to do so is local zoning, which can be an extremely effective tool to manage alcohol availability. State law precludes the department from issuing a license contrary to a valid zoning code. Notwithstanding the power delegated to the department, state law reserves for local government the authority to establish and enforce land use and zoning regulations related to the operation of alcoholic beverage outlets.28 While the department is vested with the exclusive right and authority to regulate and license alcohol, local governments may constitutionally regulate alcohol-serving busi-nesses in the interest of preserving the public health, safety, welfare, and morals.29

In recognition of the negative effects associated with alcohol availability, courts have upheld local zoning ordinances that restrict the proximity of alcoholic beverage establishments to churches, schools, and residential districts. In Floresta, Inc. v. City Council of San Leandro,30 the court examined the
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constitutionality of a local ordinance that restricted the geographic location of alcoholic beverage establishments. The ordinance prohibited establishments engaged in the sale of alcoholic beverages from locating within 200 feet of a residential district without a use permit. The ordinance also provided that a permit could only be issued upon findings by the legislative body “that the establishment, maintenance, or operation of the use of the building applied for will not...be detrimental to the health, safety, peace, morals, comfort, or general welfare of persons residing or working in the neighborhood of such proposed use nor be detrimental or injurious to property and improvements in the neighborhood, or to the general welfare of the City.”

The plaintiff in Floresta was a merchant who had been denied a use permit for a cocktail lounge due to its proximity to a residential district. In considering the plaintiff’s application, the legislative body considered comments from a nearby homeowners association, which opposed the establishment of a cocktail lounge so close to a residential neighborhood. The legislative body ultimately denied the use permit due to the potential threat to the peace, morals, and welfare of the residents.

The plaintiff challenged the city’s denial on the grounds that it was arbitrary and discriminatory. The plaintiff also challenged the constitutionality of the ordinance on the grounds it improperly regulated an activity that was properly regulated by the state. The court noted that the San Leandro ordinance did not prohibit the establishment of cocktail lounges in the city; rather, the ordinance operated to restrict the location of the establishments within 200 feet of sensitive uses such as residential neighborhoods. The court held that San Leandro’s ordinance was a valid exercise of its zoning authority and that the regulation did not infringe upon the state’s general authority to regulate the consumption of alcohol.

Cities and counties are accorded broad authority under the constitutional police power. However, their police powers may only be exercised to the extent the regulations are not in conflict with general laws. When state laws are in conflict with local police power regulations, state law supersedes the local regulations.

In response to the adverse effects associated with the availability of alcohol, some California cities have opted to enact land use laws and zoning ordinances, such as density restrictions, nuisance abatement, restrictions on hours of operation, and standards of operation and facility design, to curb the negative activities associated with establishments that sell or serve alcohol.

Role of Local Government

In an attempt to define the limitations local government may impose on establishments that serve alcohol, courts have consistently held that local ordinances that do not directly affect the sale of alcohol are not preempted by the powers granted to the department. In 1994, in Korean American Legal Advocacy Foundation v. City of Los Angeles, the California Court of Appeal examined the extent to which the state had preempted the field of alcohol regulation. The case developed from the effort to rebuild stores destroyed during the 1992 Los Angeles riots.

Since 1985, Los Angeles has required business engaged in the sale of off-site alcoholic beverages to obtain conditional use permits. In 1987, the city adopted a plan that required conditional use approvals, contingent on specified findings, for establishments dispensing alcohol in South Central Los Angeles. Businesses in operation before the effective dates of either ordinance enjoyed “deemed approved” conditional use status. In the aftermath of the riots, the city adopted ordinances to facilitate rebuilding, with expedited procedures to process building permits in conformity with existing code provisions.
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However, all conditional use permitees, including those with conditional use permits for selling alcoholic beverages for off-site consumption, had to submit plans for approval before rebuilding. Approval could be made contingent on conditions (such as graffiti removal, adequate lighting, trash removal, security guards, and limited hours of operation) imposed on the same basis as those for new conditional uses. In addition to the plan approval process, the city instituted “revocation hearings” to revoke or condition an owner’s deemed approved status or use permit in the event the business threatened to become, or had become, a nuisance or law enforcement problem. The plaintiffs, many of whom had stores destroyed during the riots, brought suit, challenging the validity of the ordinance imposing the plan approval process and establishing revocation hearings. They alleged that the city’s plan approval and revocation processes were completely preempted by the state constitution, which specified that the state had exclusive authority to regulate the sale of alcoholic beverages— and the state exercised this exclusive jurisdiction through the Alcoholic Beverage Control Act.

In addressing the preemption issue, the court examined the purpose of the ordinance and noted that the conditions imposed by the city did not have the effect, either direct or indirect, of regulating the “manufacture, sale, purchase, possession or transportation” of alcoholic beverages. Rather, the conditions imposed under the plan approval process were aimed at controlling or eradicating the negative secondary effects often associated with establishments that sell alcoholic beverages. Accordingly, the ordinance was deemed permissible, because it was aimed at land use and zoning—in particular, to abate or eradicate nuisance activities—rather than the regulation of alcohol. The validity of the ordinance was underscored by the fact it focused on the negative conduct occurring in the immediate vicinity of businesses selling alcohol for off-site consumption. The court held: “That the conditions imposed under the ordinance may have some indirect impact on the sale of alcoholic beverages does not transmute the purpose and scope of the ordinance into a regulation merely seeking to control alcohol sales.”

The Oakland Model

The City of Oakland pushed the limits of the state preemption issue by instituting a program that tested the effects of “deemed approved” ordinances similar to the one at issue in Korean American Legal Advocacy Foundation. Oakland’s program was created as a means of imposing operating standards on legal nonconforming businesses established prior to the city’s conditional use permit requirements. As part of its pilot program, Oakland adopted a comprehensive code enforcement scheme that the California Court of Appeal has upheld as a permissible use of the city’s police power and authority to regulate nuisances and criminal activities in the areas surrounding alcoholic beverage retail sellers. The primary issue in the challenge to Oakland’s ordinance was whether Oakland could apply the ordinance to licensees that had sold liquor prior to the adoption of the ordinance. Did the ordinance violate Business and Professions Code Section 23790, which prohibits new zoning regulations barring the sale of liquor at a site from being applied to “grandfathered” establishments? The court ruled that the regulations were not intended to control the sale of alcoholic beverages but instead to eliminate nuisance and criminal activities. While the ordinance did not prohibit licensees from selling alcoholic beverages, it did prevent them from creating nuisances and facilitating criminal activity at their stores and in surrounding areas.

Under the Oakland ordinance, titled the Deemed Approved Alcoholic Beverage Sale Regulations, the sale of alcoholic beverages in Oakland is an approved commercial

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activity so long as the seller complies with the city’s Deemed Approved Performance Standards. The performance standards require that the sale of liquor at a site does not:

- Result in adverse effects to the health, peace, and safety of persons residing or working in the surrounding areas.
- Jeopardize or endanger the public health or safety of persons working in or residing in the surrounding area.
- Result in repeated nuisance activities within the premises or close proximity of the premises, including but not limited to: illegal drug activity, public drunkenness, drinking in public, harassment of passersby, gambling, prostitution, the sale of stolen goods, public urination, thefts, assaults, littering, loitering, police detentions, and arrests.
- Violate any city, state, or federal regulation, ordinance, or statute.
- Have upkeep or operating characteristics that are incompatible with the surrounding area or adversely affect the liability of appropriate development of abutting properties.44

If the sale of liquor causes a violation of one of the performance standards, the city will hold an administrative hearing to review the complaint. Complaints can come from the police department or the general public. The hearing officer—a city staff person—holds a hearing to determine whether the standards have been violated and may impose conditions on the merchant to enforce the standards. If the merchant violates these conditions, the deemed approved status may be revoked. Once appeals of the administrative hearing officer’s decision to the city council are exhausted, the city may seek to have the activity abated as a nuisance. The city may also refer the matter to the department for revocation of the liquor license. To pay for the enforcement of the ordinance, Oakland imposes a $600 fee on liquor licensees.

Violations of the ordinance do not result in the forfeiture of the merchant’s liquor license. Only the department has the constitutional authority to revoke a liquor license. A violation, however, does prevent the merchant from selling liquor at the location where the violation occurred. Furthermore, violations can be forwarded to the department for possible revocation.

A local agency may also file an accusation against a liquor seller with the department, which has discretion to decide whether to proceed with a formal accusation. Business and Professions Code Section 24201 provides: “[A]ccusation may be made to the department by any person against any licensee. Accusations shall be in writing and shall state one or more grounds which would authorize the department to suspend or revoke the license of the licensee against whom the accusation is made.”

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grounds—after notification by the city attorney—for suspension or revocation are: 1) continuance of the license would be contrary to public welfare or morals, 2) failure of the licensee to take reasonable steps to correct objectionable conditions on the licensee’s premises or immediately surrounding area, including public sidewalks and streets within 20 feet of the premises, 3) failure to abate nuisances, such as disturbance of the peace, public drunkenness, drinking in public, and harassment of passersby. Reasonable steps are defined as timely calls to law enforcement asking for assistance in abating nuisance conditions, asking persons engaging in nuisance activities to cease such activities, and the removal of items that facilitate nuisances, such as furniture. The license holder is entitled to a hearing to address the validity of any accusations made against it.45

Courts have ruled that the existence of a public nuisance, regardless of fault by the license holder, may support the revocation of a license. In Yu v. Alcoholic Beverage Appeals Board,46 the court ruled that ample evidence was presented that the store had become a law enforcement problem, which the owners were actively or constructively aware of, and the owners were not effective in controlling the drug trade nuisance the store was creating. The fact that a license holder is passive in the management of the licensed establishment will not excuse actions deemed sufficiently objectionable for the revocation of a license. Moreover, dismissal of criminal charges against a license holder does not mandate dismissal of the same charges in a subsequent disciplinary proceeding.

Business and Professions Code Section 24203 also provides: “[A]ccusations may be filed with the Department by the legislative body...of any city...requesting the suspension or revocation of a retail license. Upon the filing of the accusation, the Department shall provide for a public hearing...and determine whether or not the license should be revoked or suspended.” Furthermore, if the local legislative body certifies that “the public safety, health, or welfare requires immediate hearing of the accusation, the public hearing shall be held within 60 days after the filing of the accusations with the Department.”47 Using this provision allows the city to directly file an accusation against a license holder and entitles the city to a hearing before the department to determine whether or not to revoke or suspend a liquor license. The department does not have discretion to deny a hearing if it is requested by a city council. Under this course of action, however, discretion remains in the hands of the department. The department ultimately decides whether to revoke or suspend a license. Moreover, the depart-
ment’s decision is difficult to overturn through a legal challenge.

In order to successfully proceed with an accusation against a license holder, a city will have to accumulate substantial evidence that a license holder is creating a public nuisance or creating a law enforcement problem as a result of its sale of liquor. To accomplish this, a city will need to direct the police department to patrol the areas surrounding troublesome alcohol sellers and document problems with citations and reports. At the revocation hearing, the city will need to present sufficient evidence to the department in order for a license to be revoked. This approach is in stark contrast to Oakland’s deemed approved ordinance, in which it is the city that determines whether a store is creating a nuisance.

Although the adoption of nuisance abatement ordinances may be an effective tool, there are drawbacks. One is that cities must wait until a nuisance arises before they can address the problem. However, if a local government wants to take a more proactive approach to regulating the nuisances associated with establishments that sell alcohol, it may do so through its power to impose zoning restrictions.

While the state has express authority over the licensing and regulation of alcohol sales, local governments retain the right, under their police power, to regulate the effect of alcohol availability on public health, safety, and welfare. When the existence of licensed alcoholic beverage establishments creates negative effects, local governments must continue to find creative ways to address those effects while being mindful of the state’s broad authority over liquor licensing.

Cities can take a strategic approach to managing alcohol availability through land use controls and zoning regulations. Local governments can impose density restrictions that limit alcohol availability by population or geographic area. Another option is to implement zoning restrictions that specify alcohol outlets may not be established within a certain distance of sensitive uses such as schools, churches, and playgrounds. A third option is to use the conditional use permit process to impose standards of operation and facility design that promote safer environments in the area in and around the alcohol outlet.

With regard to alcohol outlets that predate a local government’s land use and zoning laws and therefore have certain vested rights as a legal nonconforming use, local governments should consider using nuisance abatement laws to address nuisance activity associated with a particular alcohol outlet. Finally, local governments faced with alcohol-related problems should carefully document them and create a detailed record that can be used
to address problems locally and through complaints to the department.


2 CAL CONST, art. XX, § 22.


4 BUS. & PROF. CODE § 23049.


7 BUS. & PROF. CODE § 23958.


9 Torres, 192 Cal. App. 2d at 543.

10 BUS. & PROF. CODE § 23958.

11 BUS. & PROF. CODE § 23958.4(a)(1).

12 Id.


14 Kirby v. Alcoholic Beverage Control Appeals Bd., 7 Cal. 3d 433, 441 (1972).


17 BUS. & PROF. CODE § 24210.


19 Estate of Teed, 112 Cal. App. 2d 638, 644-45 (1952) (citing Consolidated Edsion Co. v. National Labor Relations Board, 303 U.S. 197 (1938)).


21 BUS. & PROF. CODE § 23090 2.

22 BUS. & PROF. CODE §§ 23090-23090.7.

23 BUS. & PROF. CODE § 24013.

24 BUS. & PROF. CODE § 23958.


26 Stewart, supra note 1.

27 Id.

28 BUS. & PROF. CODE § 23791.


31 Id. at 602-03.

32 Id. at 602.

33 Id. at 603.


35 CAL CONST, art. XI, § 7.


37 Id. at 385.

38 Id. at 385-87.

39 Id. at 387.

40 Id.


42 Id. at 765.

43 City of Oakland Deemed Approved Alcoholic Beverage Sale Regulations, Title 17 Planning, §§17.156 et seq.

44 Id.

45 Id.


47 BUS. & PROF. CODE § 24203.
amendments to the Los Angeles Superior Court Local Rules governing trial preparation went into effect. Of particular importance is new Local Rule 7.9(i), which augments long-existing trial preparation rules concerning the filing of joint pretrial documents prior to the final status conference.

Local Rule 7.9(i) now permits judges to require an “in person” meeting of counsel to discuss joint trial documents before the final status conference and the filing of those documents. The documents covered by this rule include a joint statement to be read to the jury, a joint witness list, a joint exhibit list, a set of agreed-to jury instructions in proper format with all changes and modifications (including correct references to the parties and no blanks, brackets, empty spaces, or inapplicable options), and an agreed-to general verdict form or special verdict form with interrogatories.

Mutual collaboration and good faith compliance by opposing parties with this new rule and existing procedures will enable trial attorneys to better present their cases at trial.1 With the new rule now almost a year old, effective compliance strategies have emerged.

The joint short statement of the case, which the court reads to prospective jurors, is one of the most vital pieces of information that jurors will receive at the beginning of trial. The statement provides an opportunity for counsel representing both sides to tell the jurors about the case in a concise and clear manner.

Counsel all too frequently pay insufficient attention to the short statement during trial preparation. This essential statement should be drafted by the attorneys who try the case. Turning the task over to paralegals or colleagues undercuts the importance of the statement, which should reflect the direct and complete involvement of trial counsel.

Counsel sometimes forget that jurors are unfamiliar with legal jargon and trial procedures, apprehensive about the jury selection process, and intimidated by the courtroom. An effective short statement without legalese puts jurors at ease, saves
time in voir dire, and paves the way for informative opening statements. Trial counsel should confer to prepare a brief, neutral short statement that succinctly informs the jury about the parties and their claims, catches jurors’ attention without favoring either side, and suggests reasons why serving as a juror on the case will be an interesting experience.

A short statement should be composed in plain English. It should avoid factual or legal advocacy and refrain from expounding legal theories. An effective short statement sets the scene, identifies the players, and gives the jurors a sense of the parties’ ultimate contentions.

In a simple case, for example, a short statement using no subjective assertions or legal terms might read as follows: This action concerns a slip and fall accident involving plaintiff Barton Griswold, which occurred on April 6, 2005, at the premises of defendant Coop Grocery Store in Ames, California. Plaintiff Griswold alleges that he slipped and broke his arm when he fell on a slippery area inside the store that was not properly maintained. He seeks recovery for medical expenses, lost wages, and pain and suffering.

Defendant Coop Grocery Store denies responsibility for plaintiff’s injuries and alleges that the area where plaintiff fell was well-maintained, there had been no reports of a slippery floor, and plaintiff’s injuries were due to his own fault. The short statement is the first factual introduction of the case to the jurors, so counsel should not give it short shrift.

**Listing the Witnesses**

A joint witness list with time estimates for direct and cross-examination is due five court days before the final status conference. Counsel should confer regarding the preparation of a single joint list of witnesses for trial. The parties are entitled to list all possible witnesses so that the court does not exclude a witness from testifying at trial. However, some witness lists look more like pages from a telephone book than realistic forecasts. There is no reason to set forth a cast of thousands.

A good practice for counsel is to list those whom they truly expect to call as witnesses at trial. Counsel should refrain from attempting to “sandbag” their opponents by submitting a list of every name that could conceivably be connected to the case. Sandbagging is inappropriate and a detriment to proper planning for trial. Counsel should keep in mind that the court most likely will inquire about which witnesses on the list actually will be called, the order of witnesses, the nature of the testimony, and the length of the expected testimony.

A thorough witness list should state whether a witness is percipient or expert (and note the area of expertise), identify adverse witnesses (such as Evidence Code Section 776 witnesses), and state realistic time estimates for direct and cross-examination. Counsel should avoid padded guestimates. For instance, an attorney should not state that the potential testimony time for a witness will be 4.5 hours just because that is how long the deposition lasted or to ensure an abundance of time to “get in the testimony.”

The time needed for direct or cross-examination cannot be estimated without genuine consultation with opposing counsel. Practitioners should not play “hide the ball” with witness testimony, except for legitimate impeachment or rebuttal purposes. The goal is to eliminate surprised reactions and objections from opposing counsel and enhance credibility with the court.

**Mapping an Exhibit List**

Counsel must prepare a joint list of exhibits that will be marked for identification and introduced at trial. Creating this list marks the pretrial moment at which all exhibits are presented and exchanged. An agreement to rely on the documents produced in discovery, attached to deposition transcripts, or subpoenaed by the parties is not a substitute for an honest exchange of exhibits for a joint exhibit list. Counsel should not approach the exchanging of trial exhibits by promising more to come later. Both sides should be completely forthcoming when the joint list is prepared.

After all potential trial exhibits have been exchanged, counsel should seek agreement on stipulations for authentication and evidentiary foundations for exhibits. These agreements may obviate the calling of custodians of records or other unnecessary witnesses, particularly if there are no real disputes. They also help to reduce the time needed for trial preparation, eliminate needless motions in limine, cut expenses, and expedite the trial itself.

Early diligence in identifying trial exhibits also minimizes surprises at trial, such as when a new exhibit surfaces after a witness takes the stand and counsel objects, “I have never seen that exhibit before this moment, your Honor.” No one benefits from unnecessary delays caused by counsel haggling over exhibits during trial.

While working with opposing counsel to form the exhibit list, counsel also should note evidentiary stipulations that may be placed on the record before trial begins. If these discussions do not resolve evidentiary issues, the opponents should prepare how they will raise them with the court, such as with a motion in limine.

Judges invariably have their own preferences how exhibits should be numbered, listed, premarked (or not), and how to handle demonstrative exhibits (including boards, videos, slides, models, and Elmo and Power Point displays). Some judges specify a particular format for listing exhibits. Others may admonish counsel to consult the local rules. Attorneys should ask the court at a status or case management conference, or contact the clerk, to determine the court’s format preferences for listing exhibits if this is not apparent.

The joint exhibit list should follow a rational order. Counsel should ensure that the list begins with the plaintiff’s exhibits in the expected order of presentation. These should be followed with those exhibits less likely to be introduced. Jurors often can best follow evidence presented in the order in which witnesses are called. For each exhibit, ask this important question: “Do I have a witness or stipulation establishing foundation and admissibility for this exhibit?”

The joint exhibit list must use arabic numbers, with exhibits grouped by party (for example, plaintiff exhibits are numbered 1 to 100; defendant exhibits, 200 to 300). Parties should list the exhibits in consecutive numerical order, each followed by a short description. The exhibit numbers and descriptions should be used uniformly by all counsel throughout the trial (for example, Exhibit 1—Master Lease, dated 11-7-02; Exhibit 2—Plaintiff’s Medical Records, Dr. Thayer; Exhibit 3—Diagram, Accident Scene).

One straightforward approach for numbering exhibits is to start by renumbering originally produced documents or those attached to deposition transcripts with new page numbers (such as 31-1, 31-2, and the like). Using letters for exhibits is discouraged (such as Exhibit C, Exhibit 16A, or Exhibit 18-A-1). Moreover, even though some courts use numbers for one side’s exhibits and letters for the other’s, experience indicates that mixing numbers and letters can become baffling during trial. Courts and jurors seldom distinguish and are rarely concerned about which side introduces an exhibit.

It is also not a good idea to place a series of items under a single exhibit number. A group of letters, memos, e-mail messages or photographs should not be presented as a single exhibit simply for convenience or because the items within each group are related in a general way. Each item should be distinct and have its own exhibit number.

It is astonishing how many judges, attorneys, and witnesses cannot locate the correct page of an exhibit during trial. This is often due to a failure to properly number the exhibits. Placing a number on each page of the documentary exhibits keeps everyone on the same page.
at the same time. Counsel should uniformly number every individual documentary exhibit in the lower right-hand corner of each page. This is particularly valuable when the exhibit is a lengthy medical record or other type of report. The numbers should be distinctive and consistent (such as 1-1, 1-2, 1-3). At the same time, it is essential to eliminate from the documents any prior numbering created for document productions, deposition use, and miscellaneous attorney or client notes that are unrelated to the original document.

Numbering photographs as trial exhibits frequently causes needless confusion. Each photo should be treated as a separate exhibit. Thus, photos should have their own exhibit numbers and be presented separately (such as Exhibit 1-1, Exhibit 1-2, or consecutively numbered exhibits starting with Exhibit 1, followed by Exhibit 2, and so forth). Placing more than one photo on a page creates more problems than any of the supposed benefits for doing so, such as saving paper or reducing the amount of exhibit numbers. General descriptions, like “seven accident photos,” which too often are seen on exhibit lists for all kinds of documents, do not assist in identifying an exhibit with adequate specificity. Moreover, unless a group of photos are linked together for a particular illustrative purpose, a photo board with more than one picture should never be used. If color photos will be offered, it is best to make color photocopies for each exhibit book (even if blow-ups will be presented).

Counsel may be tempted to number exhibits with Bates-stamped numbers. Avoid this temptation. It may seem easier to stamp a large number of exhibits with Bates numbers, but a long series of numbers only slows down trial and detracts from a smooth presentation.

Placing “reserved” numbers on the list without listing an actual exhibit serves no real purpose. Also, if there is no legitimate basis for the introduction of an exhibit, do not list it. Examples of inappropriate exhibits that should not be listed include: deposition transcripts; general discovery items, such as “defendant’s interrogatories and plaintiff’s responses” or “all discovery produced by opposing party”; and generically described categories—such as “photos,” “medical texts,” “anatomical diagrams,” and the like—without specific descriptions of individual items.

Nothing drives attorneys to distraction more than opposing counsel supplying evidence at the last minute before or during trial. Indeed, avoiding this type of situation is one of the purposes behind Local Rule 7.9(i). Engaging in this disfavored practice can only generate vociferous complaints from opposing counsel who has not seen the evidence before trial or had no opportunity to present objections. This is especially true regarding exhibits proposed for the opening statement or, worse yet, placed before a witness for examination without notice to opposing counsel. Of course, items intended for impeachment purposes may be held back in reserve for use at trial. But counsel must be sure to have extra copies ready to provide to the attorneys for the other side and to the court.

Demonstrative evidence and blow-ups must be marked for identification and shown to or played for opposing counsel before trial. Counsel should not wait until the last minute to prepare demonstrative evidence and blow-ups or present them in court without warning. Many types of demonstrative evidence take much time to prepare and are expensive. Failure to disclose them early and resolve potential objections may be costly. Late disclosure also comes with the risk that the evidence may be excluded.

It is useful to provide the court, clerk, witnesses, and all counsel with three-ring exhibit binders, with the exhibits separated by numbered divider tabs. This usually means preparing at least five sets of exhibit binders for trial purposes. Turning the pages in a neat binder looks much more professional than fumbling with loose documents during trial—and that includes a bench trial.

**Motions in Limine**

Thoughtful and well-conceived motions in limine can narrow and define issues at trial, particularly those involving evidence and witness problems. Vague, ill-conceived motions consume valuable time and may not be granted.

Despite the prevailing rules, different judges have their own preferences on the presentation of motions in limine. Indeed, there appears to be no single practice followed by all judges regarding when to file motions in limine and oppositions or when these will be heard. Counsel must inquire how the trial judge handles pretrial motions. Unless counsel specially set motions in limine for hearing as noticed motions in advance of trial, courts frequently hear them shortly before or on the first day of trial—but attorneys should not assume they know the procedures without asking for clarification.

Counsel for the litigating parties must meet and confer before filing motions in limine. This requirement is intended to avoid the generation of unnecessary motions. Filing motions without first discussing clearly resolvable matters does not advance the interests of clients. There is no need to lay waste to more trees by adding superfluous motions to already bulging files. Pretrial stipulations on typical trial matters can frequently settle differences before commencement of the trial.

For example, counsel should not need to produce “standard” motions in limine on exclusion of witnesses before testimony, use of demonstrative evidence, document authenticity, mention of insurance coverage, admission of uncontested reports and records, bifurcation of punitive damages, financial information, attorney’s fees, and other usually agreed-to matters. Straightforward stipulations can address all these matters and eliminate a variety of troublesome issues. The court in *Kelly v. New West Federal Savings* offers a candid and instructive discussion on the uses and abuses of motions in limine.

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dence under Evidence Code Section 402 should be filed early. Oral motions in limine presented during trial, especially those regarding evidentiary admissibility issues that could have been anticipated, are strongly discouraged by most courts.

Each motion in limine and opposition should be filed separately with its own points and authorities, supporting declarations, and other evidence. Counsel should not staple or bundle together various motions in limine or file the motions as an omnibus, single pleading. Unless requested, proposed orders most likely are superfluous.

The caption of each motion in limine should clearly and concisely identify the subject of the motion (such as “Plaintiff’s Motion in Limine to Exclude the Testimony of Dr. Casner, An Undisclosed Defendant’s Expert, Due to Improper Designation Pursuant to Code of Civil Procedure Section 2034.300”). Counsel should not simply inform the court that they are presenting a motion in limine to exclude some evidence without including more description (for example, do not simply designate a motion as “Defendant’s Motion in Limine #5 to Exclude Evidence”). Without a proper descriptive caption, a motion in limine is off to a shaky start and may be headed in the wrong direction.

Notices of motions that do not explicitly state the objective or purpose of the motion in precise and direct language may get lost in the pretrial maneuvers. A concise but complete notice of motion might begin by stating: “Plaintiff moves to exclude the testimony of Dr. Leach, an undisclosed defendant’s expert entomologist, based on the grounds that he was not properly designated in the defendant’s pretrial expert witness exchange pursuant to Code of Civil Procedure Sections 2034.230 and 2034.260.”

The memorandum of points and authorities in support of a motion in limine should avoid boilerplate verbiage and pro forma citations. Vague motions to “exclude testimony” without specifics do not assist the court. Counsel should get right to the heart of the matter and use appropriate—and brief—citations to supporting legal authorities and evidence. Courts are not overly impressed by lengthy quotations from statutes and cases, much less string citations that do not advance an argument. It is important to keep in mind that judges are very busy, with much to do to get a trial launched and running, and they want to resolve pretrial issues efficiently and quickly.

An opposition to a motion in limine should be equally to the point. The opposing party should not only state the grounds for opposition in the caption but also ensure that the reasons for the opposition are front and center in the text. These reasons should
be supported with pertinent legal authori-
ties and appropriate facts.

Jury Instructions and Verdict Forms
Counsel must create a joint set of proposed,
agreed-to jury instructions. Also, they must
prepare separate sets of jury instructions on
which they disagree. These sets must be filed
before the final status conference.\(^\text{12}\)

Despite the critical role of jury instructions
in making or breaking cases at trial or on
appeal, counsel sometimes look for short
cuts in handling this important aspect of trial
preparation. This is a mistake. It is essential
for counsel to not only know and under-
stand the law that applies to the case but
also consider how the jury will utilize the
jury instructions to decide the case.

Thus counsel must determine which “stan-
dard” CACI instructions are applicable and
what areas of law may require formulating
special jury instructions. Relying on well-
worn instructions from a past case or bor-
rowing a set of supposedly trial-tested instruc-
tions from an attorney down the hall may
prove insufficient.

The local rules detail obligations for the
preparation of CACI jury instructions and the
procedures that the court will follow in
reviewing proposed instructions with coun-
sel.\(^\text{13}\) Counsel should read these in conjunc-
tion with the requirements for use of the
instructions by the jury.

Preparing an initial list of proposed CACI
instructions to the court is only the beginning
of the process of preparing joint jury instruc-
tions that support the theories of the case
and are accepted by the court for presentation
to the jury. Counsel should first compile a list
of boilerplate CACI instructions (such as
CACI 200. Obligation to Prove; More Likely
True Than Not True; and CACI 5000. Duties
of Judge and Jury). Then they should turn to
the case-specific CACI instructions that are
applicable to their case (such as CACI 400.
Negligence-Essential Factual Elements).

The next step involves filling in the blanks
of the jury instructions to tailor them to the
case. Counsel from both sides should work
together to fine-tune the instructions for final
submission by combing through each instruc-
tion and selecting the singular or plural, cross-
ing out brackets, removing inapplicable
options, and perfecting appropriate language.
Each attorney should be certain to note objec-
tions, which should be posed later in writing
or orally on the record.

After completing these tasks, counsel are
ready to add case-specific special instructions
not covered by the standard CACI instruc-
tions. It is essential that these instructions
contain clear, accurate statements of law with
complete citations. Opposing attorneys should
discuss all jury instructions with one another

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before the Local Rule 7.9(i) meeting rather than just faxing or e-mailing sets of instructions back and forth and considering the job done. With these premeeting discussions, counsel stand a better chance of obtaining agreement and avoiding adverse consequences for their clients.

Counsel should not presume that the preparation of jury instructions is a mundane matter that will wait until trial testimony is complete and closing arguments are about to begin. The process of preparing the final jury instructions that will be typed on perforated tear-off forms, placing them on the record with objections noted, the court reading them to the jury, and sending a set into the jury room for deliberations begins pretrial and may continue until the jury eventually returns a verdict.

Another mistake that counsel make is approaching the drafting of general or special verdict forms as an afterthought. A proposed, agreed-to special verdict form with interrogatories or a general verdict form must be filed five court days before the final status conference. If counsel cannot agree in advance on a verdict form, alternative verdict forms should be submitted. As with jury instructions, it is smart to prepare a computer disk containing proposed verdict forms and have it ready at trial.

Counsel should take sufficient time and care to reach agreement during the pretrial process on the wording of a jury verdict form that fits the elements of the parties’ claims. This will eliminate the anxiety of working late nights during trial devising an acceptable verdict form, particularly when that time might be better spent focusing on the upcoming examination of witnesses. Verdict forms are what the jury ultimately will complete in deciding the case, so counsel should give them the careful thought and consideration they deserve.

It is said that an attorney who looks well-prepared increases his or her chances of prevailing at trial. Local Rule 7.9(i) is intended to encourage counsel to cooperate in order to be effective advocates. Familiarity and compliance with this and the other pretrial rules will make trying cases easier, avoid headaches and nightmarish scenarios, and help ensure greater success.

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1 See L.A. SUP. CT. LOCAL R. 7.9(h) (Final Trial Preparation).
2 L.A. SUP. CT. LOCAL R. 7.9(b), (i).
3 L.A. SUP. CT. LOCAL R. 8.60 (Marking of Exhibits).
6 L.A. SUP. CT. LOCAL R. 8.70 (Use of Depositions, Interrogatories and Requests for Admissions), 8.71 (Signing, Certification and Lodging of Depositions). Deposition transcripts or a binder of condensed transcripts should be provided to the court before trial.
7 L.A. SUP. CT. LOCAL R. 8.40 (Use of Graphic Devices in Opening Statements), 8.74 (Graphic Devices Used in Argument), 8.75 (Maps, Plans and Diagrams).
8 L.A. SUP. CT. LOCAL R. 8.92 (Motions in Limine).
9 See L.A. SUP. CT. LOCAL R. 8.92(a)(2).
11 L.A. SUP. CT. LOCAL R. 8.92(a)(1) (clear identification needed of specific matter alleged to be inadmissible and prejudicial).
12 See L.A. SUP. CT. LOCAL R. 7.9(h), (i); 8.24 (Jury Instruction Conference); 8.25 (Duty of Counsel to Modify CACI Instructions); 8.26 (Form of Proposed Jury Instructions). See also CODE CIV. PROC. §§607a, 609 and CAL. R. OF CT., TRIAL CT. R. 229 (Proposed Jury Instructions).
14 L.A. SUP. CT. R. 7.9(i).
15 L.A. SUP. CT. R. 8.95 (Special Verdict and Findings Forms); CAL. R. OF CT., TRIAL CT. R. 230 (Request for Special Findings by Jury).

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Clause and Effect

Parties agreeing to standard arbitration clauses may unwittingly alter their rights

Arbitration clauses are ubiquitous and profoundly alter the rights of parties to agreements containing them. Often, however, it is not until an actual dispute arises that parties and their counsel first become aware of just how profound an effect these clauses can have.

In the momentum of closing a deal or settlement, the parties often fail to focus on the language of the arbitration clause. Although the parties may agree to use a specific arbitration provider, little attention generally is given to the rules that will govern the arbitration. Unfortunately, the clauses “recommended” by arbitration providers and included in many contracts are extremely broad and often have unexpected, and undesired, consequences. One of the most significant and least anticipated of these consequences is to vest the arbitrator with the power to decide “arbitrability”—whether a claim is subject to arbitration—although this is one of the few issues still traditionally relegated to the jurisdiction of the courts.

The impact of these unanticipated consequences is magnified by the strong presumption favoring arbitration. The U.S. Supreme Court in Buckeye Check Cashing, Inc. v. Cardegna recently explained that even when an agreement containing an arbitration clause is alleged to be illegal as a whole and therefore void ab initio, the arbitration clause is severable and an arbitrator, not a court, decides whether the agreement is in fact illegal. The only exceptions the Supreme Court allowed to this rule are when the arbitration clause itself is challenged or if the very existence of the contract is contested due to a defect, such as fraud, in its formation or execution.

The Supreme Court’s willingness to require arbitration even if an agreement is illegal illustrates the importance of clearly stating in each agreement what the parties are agreeing to arbitrate and who will decide what. Because arbitration clauses take a wide variety of forms, the rights of parties can be affected either expressly or implicitly by the language chosen for the clause. The informed and careful selection of an arbitration clause is crucial.

Michael A. Geibelson and Bernice Conn are partners with Robins, Kaplan, Miller & Ciresi L.L.P. in Los Angeles. They try complex, multidistrict, and class action cases on behalf of plaintiffs and defendants, focusing on business disputes and consumer rights, including misappropriation of trade secrets, unfair competition, fraud, and antitrust.
eral arbitrability law, which is applicable to led to the judicial creation of a body of fed-

tration. For the most part, arbitrability

arbitration provision, a presumption of arbit-

agreement has neglected or refused to arbitrate.5

In construing an arbitration agreement, as with any other contract, the controlling

factor is the intentions of the parties. Nevertheless, those intentions are “generously

Any doubts concerning the scope of arbitrable issues typically are resolved in favor of arbi-

As a general rule, questions of arbitrability must be addressed with “a healthy regard for the federal policy favoring arbitration.”9 In fact, when contracts contain an arbitration provision, a presumption of arbitrability arises, and questions about the scope of arbitrable issues are decided in accordance with that presumption.9

When deciding whether the parties agreed to arbitrate a certain matter, including arbitrability, courts generally should apply the same state law principles that govern the formation of contracts.10 However, the FAA has led to the judicial creation of a body of federal arbitrability law, which is applicable to any arbitration agreement covered by the act.11 Since courts commonly decide issues of arbitrability, this body of law is substantial. Even when applying general state law principles of contract interpretation to an agreement within the scope of the FAA, courts give due regard to the federal policy favoring arbitration and, typically, resolve any ambiguities in an arbitration clause to broadly embrace rather than limit the applicability of arbitration.12

The Gateway Issue

A party to a contract cannot be required to submit to arbitration any dispute for which the party has not agreed to do so.13 The concept of arbitrability refers to whether parties agreed to submit a particular dispute to arbitration. For the most part, arbitrability involves two interrelated concepts: 1) whether the court or the arbitrator should decide the scope of the parties’ agreement to arbitrate, and 2) whether the parties agreed to arbitrate their present dispute. The FAA’s policy favoring arbitration requires that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.15 However, if an agreement contains any ambiguity as to who decides the “gateway issue” of arbitrability, the act’s presumption favoring arbitration is reversed. Once that occurs, the court ordinarily will decide a crucial thresh-

Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question of who has the primary power to decide arbitrability turns upon what the parties agreed to about that matter. Did the parties agree to submit the arbitrability question itself to arbitration?21

Parties are free to assign to an arbitrator the question of whether a claim is arbitrable.17 But “unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”21

Unfortunately, this critical presumption favoring the court’s authority to decide issues of arbitrability is often unintentionally extinguished by 1) adopting a standard, broad arbitration clause recommended by an arbitration provider, and 2) failing to carefully consider which arbitration provider is selected. Either way, a client may subse-

In construing arbitration clauses, courts have at times distinguished between “broad” clauses that purport to refer all disputes out of a contract to arbitration and “narrow” clauses that limit arbitration to specific types of disputes. If a court concludes that a clause is a broad one, then it will order arbitration and any subsequent construction of the contract and of the parties’ rights and obligations under it are within the jurisdiction of the arbitrator.21

Courts have explained that an objective reading of an arbitration clause that refers “[a]ny and all controversies” to arbitration leads to the conclusion that the parties intended to arbitrate issues of arbitrability.22 Thus the referral to arbitration of “all disputes...concerning or arising out of” an agreement evinces a “clear and unmistakable intent to submit questions of arbitrability to arbitration.”22 This view is bolstered by the policy against dividing disputes into substantive and procedural aspects to be determined partly by arbitrators and partly by the courts.24 Some courts have held that the language of these broad clauses does not clearly and unmistakably demonstrate the requisite intention of the parties to arbitrate arbitrability.25 However, the general trend appears to be to interpret broad arbitration clauses consistent with the general policy favoring
By routinely incorporating an arbitration provider’s rules into an agreement, the parties may unknowingly agree to have the arbitrator determine the scope of his or her own authority.

Informed decisions about the language of an arbitration clause and carefully considering the rules of the selected arbitration provider can help clients avoid unwelcome surprises should future disputes develop.

**Divesting Courts of Jurisdiction**

Arbitration clauses commonly state that the parties agree to be bound by the rules of the arbitration provider they select. Often, the parties specifically incorporate the rules of a particular arbitration provider into their agreement. Even if the agreement does not expressly incorporate the provider’s rules, the rules themselves often state that merely by agreeing to arbitrate with the specified provider, the arbitration rules are deemed to be incorporated into the parties’ agreement.26

By routinely incorporating an arbitration provider’s rules into an agreement, the parties may unknowingly agree to have the arbitrator determine the scope of his or her own authority. In fact, most arbitration rules contain specific provisions divesting the courts of jurisdiction to decide gateway issues of arbitrability.

Rule R-7(a) of the AAA’s Commercial Arbitration Rules provides:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

The National Arbitration Forum Rules state at Rule 20(F):

An Arbitrator shall have the power to rule on all issues, claims, responses and objections regarding the existence, scope, and validity of the arbitration agreement, including all objections relating to jurisdiction....

The JAMS rules similarly submit questions of the arbitrator’s jurisdiction and arbitrability to the arbitrator. Rule 11(c) of the JAMS Comprehensive Arbitration Rules and Procedures provides:

Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

Likewise, Rule 8.1 of the CPR rules27 expressly provides that:

The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. The CPR states that Rule 8 “should allow arbitrators to decide all issues, including arbitrability questions, without the necessity for court intervention.”28 In its “Commentary on Individual Rules,” the CPR explains that Rule 8 is meant to express principles consistent with the U.S. Supreme Court’s decision in First Options of Chicago v. Kaplan.29 Thus, pursuant to Rule 8, the arbitrator has the authority to decide whether the arbitration will proceed in the face of a jurisdictional challenge.

Courts have affirmed that language like that in the providers’ clauses eliminates the “First Options” presumption and vests the arbitrator with the authority to determine all challenges to his or her jurisdiction as well as the scope of the arbitration agreement. In Lifescan, Inc. v. Premier Diabetic Services, Inc.,30 a case arising out of a contract for the sale of medical devices and supplies, the Ninth Circuit concluded that the parties incorporated the AAA’s rules into their agreement by referring to them in their arbitration clause. Those rules “in turn, recognize the arbitrators’ discretion to interpret the scope of their authority.”31

Despite the similarity of the language in the JAMS rule to the AAA rule, the two courts that have addressed the JAMS rule have split on whether the incorporation of the JAMS rule expresses a clear and unmistakable intent to submit the issue of arbitrability to arbitration.32

The effect of incorporating an arbitration provider’s rules into an agreement is not based solely on the FAA. State law contract principles also regularly apply the rule of incorporation by reference to enforce arbitration rules referred to in an arbitration clause. For instance, Delaware has a long history of enforcing the intention of parties to incorporate into the agreement any documents to which the agreement refers.33

Pursuant to the rules of the National Association of Securities Dealers, arbitrability issues also can encompass the timeliness of arbitration demands—and this can directly affect applicable statutes of limitations. NASD Code Section 10304 provides that no dispute “shall be eligible for submission...where six (6) years have elapsed from the occurrence or event giving rise to the...dispute.” Section 10324 further provides that “arbitrators shall be empowered to interpret and determine the applicability of all provisions under this
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CLAUSE AND EFFECT

1. If an agreement containing an arbitration clause is illegal as a whole and therefore void ab initio, the arbitration clause is severable.
   True.
   False.

2. All arbitration agreements affecting interstate commerce are subject to the Federal Arbitration Act.
   True.
   False.

3. If a contract affects intrastate commerce in California, the California Arbitration Act will apply.
   True.
   False.

4. Once the court determines that the formation of an arbitration agreement is not at issue, the court will direct the parties to proceed to arbitration in accordance with the terms of their agreement.
   True.
   False.

5. Courts, not arbitrators, decide the issue of whether one party to an agreement has neglected or refused to arbitrate.
   True.
   False.

6. In construing an arbitration agreement, as with any other contract, the parties’ intentions control—but those intentions are “generously construed as to issues of arbitrability.”
   True.
   False.

7. A valid arbitration agreement creates a presumption of arbitrability.
   True.
   False.

8. A party cannot be required to submit to arbitration any dispute for which he or she has not agreed to do so.
   True.
   False.

9. “Arbitrability” is a term that refers to whether a particular claim is arbitrable and is also known as a gateway issue.
   True.
   False.

10. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the arbitrator.
    True.
    False.

11. Agreeing to arbitrate “any controversy or claim arising out of or relating to” the subject contract is the paradigm of a broad clause.
    True.
    False.

12. A broad arbitration clause, by itself, cannot demonstrate a clear and unambiguous intention to arbitrate arbitrability.
    True.
    False.

13. If the agreement merely selects an arbitration provider but does not expressly state that arbitrability is to be decided by the arbitrator, arbitrability will be decided by the court.
    True.
    False.

14. Under Delaware law, incorporation of the AAA arbitration rules into the arbitration clause constitutes a clear and unmistakable intent to submit the issue of arbitrability to the arbitrator.
    True.
    False.

15. Like the FAA, state law permits the incorporation by reference of an arbitration provider’s rules into an arbitration agreement.
    True.
    False.

16. Parties to an arbitration agreement are free to select only portions of a particular arbitration provider’s rules.
    True.
    False.

17. Under the FAA, arbitration clauses can only properly bind clients to rules that existed at the time the agreement was made.
    True.
    False.

18. The California Court of Appeal has held that parties can agree to arbitration rules that do not yet exist.
    True.
    False.

19. An arbitration award can only be reviewed for a manifest disregard of the law.
    True.
    False.

20. The cost of arbitration is:
    A. Always less than a court proceeding.
    B. Always more than a court proceeding.
    C. Extremely difficult to compare to the cost of a court proceeding.
    True.
    False.
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Code.” In Housam v. Dean Witter Reynolds, Inc.,34 the U.S. Supreme Court, citing to these two provisions, resolved a lower court split by holding that the NASD’s time limit rule does not fall within the class of gateway arbitrability disputes that are within the court’s jurisdiction.35

So despite any statute of limitations rule that would otherwise govern the parties’ dispute, if the parties have agreed to NASD arbitration, their claims may be untimely under the NASD rules. In a recent case, Pellegrino v. Auerbach,36 the trial court deferred to the arbitrator to determine which statutes of limitations governed the claims and whether the statutes expired before the claims were filed with the NASD.

As is clear from First Options, parties may expressly agree not to be bound by specified rules among the arbitration provider’s rules. They also may expressly state that, notwithstanding their agreement to be bound by the provider’s rules, they do not agree, nor intend, to divest the court of its jurisdiction to decide issues of arbitrability and jurisdiction and expressly do not agree to have such issues determined by the arbitrator. However, counsel should be sure to review the arbitration provider’s rules to see if doing so jeopardizes the enforceability of the arbitration clause. For example, the National Arbitration Forum’s Rule 48(E) provides that the NAF or the arbitrator may decline to arbitrate “where the agreement of the Parties has substantially modified a material portion of the Code.”

Another option is simply to refrain from selecting a specific arbitration provider at the time the agreement is signed. The parties should clearly state in the agreement 1) the specific claims and types of disputes the parties intend to arbitrate, and 2) their intention that the court decide all issues of arbitrability, including the scope of the arbitrator’s jurisdiction and the applicable statute of limitations. Further, the parties can agree to the method and deadline for selecting an arbitrator, thus ensuring that no party’s rights have been unintentionally waived or altered.

Rules That Do Not Yet Exist

The selection of a specific ADR provider and routine incorporation of an ADR provider’s rules as part of an arbitration clause can subject a client to rules that did not even exist at the time the agreement was signed. For instance, Rule 1(a) of the AAA’s Commercial Arbitration Rules provides in part:

These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules.

Rule 1(C) of the National Arbitration Forum’s Code of Procedure provides:

Arbitrations will be conducted in accord with the applicable Code of Procedure in effect at the time the Claim is filed, unless the law or the agreement of the Parties provides otherwise.

The ICC Rules of Arbitration state:

Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

CPR Rule 1.1 requires:

Unless the parties otherwise agree, these Rules, and any amendment adopted by CPR shall apply in the form in effect at the time the arbitration is commenced.

Thus, by incorporating an arbitration provider’s rules into an agreement, or by agreeing to be bound by the rules, the parties may be agreeing to be bound by rules the arbitration provider may modify or create in the future. As a result, the parties may be subjected to future arbitrations governed by rules very different than those that existed at the time of the execution of the agreement. In addition, the rules may be unlike any the parties intended to apply at the time of the agreement’s formation. For instance, even if an arbitration provider’s rules do not vest the arbitrator with the power to decide issues of arbitrability, by the time future disputes develop, new rules may have divested the court of any authority over an arbitrability dispute, contrary to the intention of the parties. By expressly adopting an arbitration provider’s rules and failing to make any exception to them, or by failing to specify that a specific version of the rules will govern the parties’ disputes, the parties will most likely be deemed to be bound by rules they did not even know about when they signed their agreement.

The California Court of Appeal recently addressed this issue with respect to the JAMS arbitration rules in Evans v. Centerstone Development Company.37 The parties in Evans agreed to settle disputes arising from the operation of a real estate development company according to the Streamlined Rules of JAMS. Among these was Rule 3—a part of the 2000 rules—which stated that “JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration...will apply...unless
the Parties have specified that another version of the Rules will apply.” The court held that the arbitrator did not exceed his authority by applying the 2002 rules, although the parties’ agreement was executed when the 2000 rules were in effect.

There is no reason for clients to agree to be bound by future, unknown arbitration rules, some of which may profoundly affect their rights. The rules of most arbitration providers acknowledge that the parties may want to agree that prior, specific versions of their rules will govern arbitrations. If clients are allowed to do so, they will achieve precisely what they bargained for.

Deciding When to Arbitrate

Parties to a deal often believe that even if an arbitrator gets it wrong, the courts will serve as a last resort to correct errors of law. But aside from limited statutory grounds such as demonstrable bias, the decisions of arbitrators are usually reviewed only for a manifest disregard of the law. Courts are limited by the presumption that parties who authorize an arbitrator to give meaning to the language of the agreement should not have their awards rejected by a court on the ground that the arbitrator misread the contract. The Ninth Circuit Court of Appeals recently reiterated that a court’s review of an arbitration panel’s decision interpreting a contract is "extremely narrow." The court noted, “If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced.”

A simple error in reasoning by the arbitrator does not provide an opportunity to review the merits of the arbitrator’s conclusion. Indeed, “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”

For one court, the mere reference to the contract as a basis for the decision was enough to reject the argument that the arbitrator manifestly disregarded the law: “A ‘misinterpretation of [a] contract’ will not, in itself, vitiate the award. As long as the arbitrators did not disregard the language of the contract in their interpretation of it, their decision is not manifest disregard of the law. Here, the arbitrators explicitly stated that they reached their decision by construing the language of the contract. Therefore, the Court rules against Plaintiffs on this ground as well.”

Parties should carefully consider the breadth of the matters they agree to arbitrate and carefully exclude from arbitration those matters for which they want to preserve their rights to trial and appeal in the courts.
The FAA creates a strong presumption in favor of arbitration. Arbitration providers suggest, and parties commonly adopt, arbitration clauses that confer on the arbitrators the power to decide issues ordinarily decided by courts. Judicial review of arbitration awards is so limited that even blatant errors of law cannot be remedied by the courts. As a result, parties who are dissatisfied by an arbitral award are left with few, if any, options but to comply with the award.

Careful consideration should be given to the language of the arbitration clause and to whether to choose an ADR provider to govern future disputes. If an ADR provider is selected, counsel should carefully review the rules of the arbitration provider. The parties should not only agree to use a specific version of the rules — they should also agree to any rule modifications that might be appropriate.

Most importantly, however, when drafting an agreement with an arbitration clause, counsel must be sure to fully investigate and explain the nature of the arbitration provisions to clients so that they know precisely what has been agreed to and what to expect in the future. Do not agree to let the arbitrator decide the extent of his or her jurisdiction. The client should make that choice.

1 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. ___, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (Feb. 21, 2006).
3 See CODE CIV. PROC. §§ 1280 et seq. Like the FAA, the California Arbitration Act requires the enforcement of a contract according to its terms “save upon such grounds as exist for the revocation of any contract.” CODE CIV. PROC. § 1281. Also, the CAA vests the arbitrator with broad authority to control the proceedings. CODE CIV. PROC. § 1282.2(c). Unlike the FAA, the CAA contains a number of provisions for the appointment of an arbitrator in the absence of the parties’ intentions in an agreement. See CODE CIV. PROC. § 1281.6. Those provisions, however, are not without their limits; for instance, a court cannot appoint an arbitrator or require the application of rules to an arbitration to which the parties do not agree. See Martinez v. Master Protections Corp., 118 Cal. App. 4th 107, 120-21 (2004). But see Crons Invs., Inc. v. Concierge Servs., 35 Cal. 4th 376 (2005) (allowing parties to opt out of the FAA).
9 AT&T Techs., Inc. v. Communications Workers of Am., 473 U.S. 643, 648 (1986); Mitsubishi Motors, 473 U.S. at 626.
13 AT&T Techs., 473 U.S. at 648 (quoting United

14 The arbitrator may be one person or a panel, according to the choice of the parties.

15 Moses H. Cone, 460 U.S. at 24-25.


17 See id.


19 CPR Standard Contractual Provisions ¶A.

20 Collins & Aikman Prods. Co. v. Building Sys., Inc., 58 F. 3d 16, 18 (2d Cir. 1995); Fleet Tire Serv. of North Little Rock v. Oliver Rubber Co., 118 F. 3d 619, 621 (8th Cir. 1997).

21 McDonnell Douglas Fin. Corp. v. Pennsylvania Blue Shield, 484 U.S. at 38 (9th Cir. 1995).


23 Shaw Group Inc. v. Tripleline Int’l Corp., 322 F. 3d 115, 121 (2d Cir. 2003).


25 See Sparh v. Secco, 330 F. 3d 1266, 1270-71 (10th Cir. 2003) (use of “any controversy” or “any and all disputes” does not clearly and unmistakably demonstrate an agreement to arbitrate arbitrability); Carson v. Giant Food, Inc. 175 F. 3d 325, 330-31 (4th Cir. 1999) (broad provision committing all interpretable disputes to arbitrator does not satisfy the “clear and unmistakable test”); McLaughlin Gormley King Co. v. Terminix Int’l Co., 105 F. 3d 1192 (8th Cir. 1997) (clause requiring arbitration of “any controversy arising out of” or “relating to” the agreement, did not clearly and unmistakably evidence arbitrator’s authority to determine arbitrability).

26 See, e.g., JAMS R. 1(b), AAA R. R-1(a), CPR R. 1.1, NAFL R. 1(A).

27 CPR Rules for Non-Administered Arbitrations of the International Institute for Conflict Prevention and Resolution.

28 See id.; “Salient Features of the Rules” ¶5.


30 LifeScan, Inc. v. Premier Diabetic Servs., Inc., 363 F. 3d 1010, 1012 (9th Cir. 2004).


Maryland district court in Martek applied Delaware law to interpret the arbitration clause. In James & Jackson, L.L.C. v. Willie Gary, L.L.C, the Delaware Supreme Court, applying Delaware law, held that the corporation by reference of the AAA rules, standing alone, constituted a clear and unmistakable intent to submit the issue of arbitrability to the arbitrator.


35 Id. at 85-86. See also PaineWebber Inc. v. Bybyk, 81 F. 3d 1193 (2d Cir. 1996); Pellegrino v. Auerbach, 2006 WL 563643 (S.D. N.Y.) (notwithstanding conflicting choice of law provisions, statute of limitations dispute was for arbitrator to decide).

36 Pellegrino, 2006 WL 563643.


38 Id. at 158.


41 Id. (quoting Sheet Metal Workers Int’l Ass’n, Local 359 v. Ariz. Mech. & Stainless, Inc., 863 F. 2d 647, 653 (9th Cir. 1988)) (internal quotation marks omitted).

42 Employers Ins. of Wausau, 933 F. 2d at 1486.

43 Sheet Metal Workers, 863 F. 2d at 653 (quoting United Paperworkers, 484 U.S. at 38) (internal quotation marks omitted).

Flight or FIGHT

Originally invoked in criminal cases, the fugitive disentitlement doctrine is equally applicable in civil disputes.
The fugitive disentitlement doctrine is an equitable doctrine that permits a court to dismiss actions or appeals by persons who are “fugitives from justice.” It is codified in neither federal nor California law. Under the doctrine, a fugitive may, in the court’s discretion, be precluded from “calling upon the resources of the Court for determination of his claims.”

This equitable remedy has been available for more than a century, although its use has spiked in recent years with the increasing global nature of litigation. The U.S. Supreme Court first applied the fugitive disentitlement doctrine in the 1876 case of Smith v. United States. In Smith, the Court declined to entertain the petition of a criminal defendant who had escaped and remained at large when his petition came before the Court. The Court reasoned that, since the petitioner was outside the reach of the law and would likely ignore an unfavorable result, it had no assurance that whatever judgment it rendered would be enforceable. A few years later, in 1880, the California Supreme Court affirmed the availability of the doctrine in California trial proceedings, holding that it would be a “farce to proceed” with a criminal appeal while the criminal defendant had escaped and was a fugitive from justice.

The rationale that prompted the development of the fugitive disentitlement doctrine more than a century ago survives today, as recently expressed by the Eleventh Circuit:

It is well-settled law that an appellate court may dismiss the appeal of a party who is a fugitive from justice during the pendency of her appeal....

Aside from the difficulty of enforcing a judgment against a fugitive, other rationales underlying the doctrine include promoting the efficient operation of the courts, discouraging flights from justice, and avoiding prejudice to the other side caused by the appellant’s fugitive status.

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the court in the forfeiture suit will waste its time rendering a judgment unenforceable in practice.”28 It is unlikely that this rule would have broad application beyond the relatively rare—and lucky—plaintiff who has custody or control over disputed property at the outset of litigation and does not require any action or compliance from the fugitive party to obtain complete relief. Under Degen, the doctrine does not apply simply to punish the fugitive or coerce his or her appearance before the court. The fugitive’s absence must actually hinder the enforcement of the judgment, rendering its affirmation an empty victory.

This limitation is underscored in Empire Blue Cross v. Finkelstein.29 In Finkelstein, the Second Circuit dismissed the appeal of defendants who refused to participate in postjudgment discovery and fled the jurisdiction in order to avoid the impact of a large monetary judgment. The court held, “[W]e have discretion to dismiss the appeal of a civil litigant who becomes a fugitive to escape the effect of the civil judgment.”30 The Finkelstein court distinguished the case from Degen, holding:

Disentitlement is appropriate in the present situation, for several reasons. (i) In contrast to Degen, the disappearance of the defendants does not affect some related matter; it impacts the very case on appeal. We see no reason to entertain the cause of one who will respond to a judgment only if favorable. (ii) In Degen, the judgment in the civil proceeding could be enforced despite Degen’s absence. Enforceability concerns clearly animate disentitlement doctrine…here, Judge Wexler has found that “the defendants’ absence rendered Empire’s judgment against them unenforceable.”…This factor weighs heavily in favor of disentitlement. (iii) There is nothing that the district court can do, consistent with the efficient conduct of its functions, that might restore the balance of equities, because the civil proceeding—other than the futile efforts to enforce it—is complete. Disentitlement therefore represents the sole remaining means of minimizing the prejudice to Empire caused by defendants’ fugitive status.31

Fugitive Disentitlement under California Law

The development of the fugitive disentitlement doctrine under California law has diverged somewhat from its development under federal law. California generally is more liberal in permitting parties to invoke the doctrine. One would think that this would result in a greater use of the doctrine in California, but this apparently is not the case. Few published cases have discussed the doctrine, suggesting that it is not used as extensively as it could be.

Like federal courts, California’s courts have extended the fugitive disentitlement doctrine to civil cases. In one of its earliest cases invoking the doctrine in the civil context, the California Supreme Court dismissed the appeal of a father who had left the country with his children in violation of orders awarding custody to their mother. Although the appeal related only to attorney’s fees awarded to the mother—and not to the custody dispute itself—the court did not hesitate to apply the doctrine:

[Appellant’s actions have] wilfully and purposely evaded legal processes and contumaciously defied and nullified every attempt to enforce the judgments and orders of the California courts, including the very order from which he seeks relief by this appeal. Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal.”32

As in federal court, the doctrine may be applied both at the trial and appellate level.33 However, in one well-publicized case, the court concluded that it would violate due process to prevent Roman Polanski from defending a civil action based on his fugitive status in a related criminal prosecution.34 In this case, a Jane Doe plaintiff brought civil litigation against the famous director based on his
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alleged seduction of her as a minor and asked that he be prohibited from defending the civil lawsuit unless he presented himself in the United States to respond to the criminal indictment arising from the same events. The court rejected the plaintiff’s request, distinguishing other fugitive disentitlement cases because “[i]n each, the relevant proceeding was initiated by the fugitive.”

Although it declared Polanski’s absence from the country to be “reprehensible, irresponsible, and unlawful,” the court found that it could not preclude his right to defend the litigation absent failure to comply with discovery requests or a similar violation of a court order.

The doctrine also has been invoked to dismiss a civil appeal for failure to comply with postjudgment discovery; an appeal from an order appointing a trustee, based on the appellant’s fugitive status in related criminal proceedings; and guardianship proceedings in which the appellant submits to the court’s jurisdiction but then absconds with the child; among others. Also, under California law, as with federal law, it is irrelevant whether the dismissal may thwart review of the order giving rise to the fugitive status. The California Supreme Court has explained:

This argument overlooks the fact that even though a portion of the order appealed from may be void, or erroneous, or unsupported by sufficient evidence, nevertheless the adjudication of contempt is presumably valid, and until that contempt is purged appellant is not entitled to a hearing before an appellate tribunal. The merits of the claims urged by him in support of his appeal will not be determined, nor will the appeal be heard while he persists in his contumacious attitude.

California law and federal law also are similar, in many respects, in their definition of a “fugitive.” For example, for criminal defendants, the doctrine applies only while the fugitive remains outside of the court’s custody.

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California permits dismissal of an appeal even if the appellant has not been held in contempt. In *TMS, Inc. v. Aihara*, for example, the court answered in the affirmative the question whether an appeal may “be dismissed for the willful failure of judgment debtors to comply with a court order to answer post-judgment interrogatories.” The court explained, “It is well settled that this court has the inherent power to dismiss an appeal by any party who has refused to comply with orders of the trial court.” It went on to make clear that “[n]o judgment of contempt is required as a prerequisite to our exercising the power to dismiss,” which exists “in a variety of circumstances.” Thus, the court ordered the appeal dismissed solely on the appellants’ willful refusal to comply with the trial court’s order compelling responses to postjudgment interrogatories and their absence from the jurisdiction of the court.

In another case, the court explained that the appellant was not a fugitive, because he had served his prison sentence and lawfully left the United States. The court nonetheless dismissed the appeal because appellant’s attorneys could not find him, explaining that one concern underlying the fugitive disentitlement doctrine is “the circumstance that in the event the conviction were reversed and a new trial ordered, the defendant ‘will appear or not, as he may consider most for his interest.’” The court further explained:

The circumstances which have called forth application of the principle have varied greatly, but all the instances of its application illustrate and confirm the basic limitation under which this Court functions, namely, that it can entertain a case and decide it only if there is a litigant before it against whom the Court may enforce its decision.

Another difference between California and federal law lies in the necessary relationship between the order giving rise to fugitive status and the matter on appeal. In contrast to the U.S. Supreme Court decision in *Degen*, which established that dismissal is available only if the fugitive status will in some way thwart enforcement of any order entered by the appellate court, current California case law does not appear to follow that rule. In one California Court of Appeal case predating *Degen, In re Scott’s Estate*, the court permitted dismissal of an appeal based on appellant’s fugitive status, although the contempt proceedings giving rise to the fugitive status occurred in a different case, and would not affect enforcement of any order entered in the dismissed case. The court rested its holding on the rationale “that it would be a flagrant abuse of the principles of
equity and of the due administration of justice to consider the demands of a party who becomes a voluntary actor before a court and seeks its aid while he stands in contempt of its legal orders and processes."

However, because Degen rests upon constitutional due process grounds, the rule set forth in In re Scott’s Estate may not remain good law.

The fugitive disentitlement doctrine is an effective way to deal with a recalcitrant party if that party refuses to submit to the court’s authority. In both federal and state courts the doctrine is available in a variety of circumstances to prevent one party from embarking on a “heads I win, tails you’ll never find me” approach to litigation.

Although the fugitive disentitlement doctrine has not seen much use since its creation more than a century ago, that is changing. With the increasing globalization of commerce—the Internet being one huge and rapidly evolving source of global disputes—the opportunities to invoke this doctrine should drastically increase in the years to come.


2 E.g., Degen v. United States, 517 U.S. 820, 823 (1996); Goya Foods v. Unanue-Casal, 275 F. 3d 124, 128-29 (1st Cir. 2001); Pesin v. Rodriguez, 244 F. 3d 1250, 1252-53 (11th Cir. 2001); Empire Blue Cross v. Finkelstein, 111 F. 3d 278, 280-81 (2d Cir. 1997).


4 Smith v. United States, 94 U.S. 97 (1876).

5 People v. Redinger, 55 Cal. 280, 298 (1880).


7 Conforte v. C.I.R., 692 F. 2d 587, 589 (9th Cir. 1982) (citation omitted).


9 Id.

10 Antonio-Martinez v. INS, 317 F. 3d 1089, 1093 (9th Cir. 2003); accord Knoob v. Knoob, 192 Cal. 95, 97 (1923); People v. Brych, 203 Cal. App. 3d 1068, 1077 (1988).


12 Pesin, 244 F. 3d at 1253; see also Conforte, 692 F. 2d at 589 and Goya Foods v. Unanue-Casal, 275 F. 3d 124, 128-29 (1st Cir. 2001).

13 Pesin, 244 F. 3d at 1252.

14 Id. at 1253; see also Empire Blue Cross v. Finkelstein, 111 F. 3d 278, 282 and United States v. Barnett, 129 F. 3d 1179, 1185-86 (11th Cir. 1997) (dismissing defendant’s appeal from contempt ruling because the defendant “is a fugitive from the contempt order and the ensuing bench warrants”); Goya Foods, 275 F. 3d at 129.

15 But see Motorola Credit Corp. v. Uzan, 115 Fed. Appx. 473, 475 (2d Cir. Oct. 22, 2004) (refusing to apply the fugitive disentitlement doctrine where the contemnor were foreign citizens who resided in a foreign country throughout the proceedings; holding that the “nonresident who appeals an adverse judgment is in a different position than the typical fugitive who leaves a jurisdiction for the sole purpose of evading a judg-
14 Conforte v. C.I.R., 692 F. 2d at 589; see also Parretti v. United States, 143 F. 3d 508, 510-11 (9th Cir. 1998) (withdrawing opinion ordering release from custody given subsequent fugitive status) and Antonio-Martinez v. INS, 317 F. 3d 1089, 1093 (9th Cir. 2003) (refusing to review BIA decision denying asylum given fugitive status).

15 Conforte, 692 F. 2d at 590. The court ruled, however, that if the plaintiff submitted himself to authorities “within 56 days,” he could move to reinstate his appeal. Id.

16 Finkelstein, 111 F. 3d at 281 (emphasis in original).

17 See, e.g., Pesin, 244 F. 3d 1250.

18 Id.

19 See Feit & Drexler, Inc. v. Green, 760 F. 2d 406, 413-14 (2d Cir. 1985).

20 Id.

21 Id. at 431.

22 Id. at 432.

23 Id. at 432-49 (1993). This also is the rule in California.

24 United States v. Real Property Located at Incline Village, 47 F. 3d 1511, 1514, 1516 (9th Cir. 1995), reversed on other grounds sub nom Degen, 517 U.S. 820; see also Barnette, 129 F. 3d at 1184, 1185 (dismissing an appeal under the doctrine despite the appellant’s claim that the underlying orders were invalid and hence “there is nothing from which [appellant] is a fugitive”).


27 Id.

28 Id. at 825.

29 Empire Blue Cross v. Finkelstein, 111 F. 3d 278 (2d Cir. 1997).

30 Id. at 282.

31 Id. (citation, internal quotes omitted).

32 MacPherson v. MacPherson, 13 Cal. 2d 271, 277 (1939); accord Rude v. Rude, 153 Cal. App. 2d 243 (1957) (dismissing appeal of husband, then residing in Switzerland, based on his contempt of orders related to child custody and support and attorneys’ fees).


35 Id. at 1409 (emphasis in original).

36 Id. at 1410.


38 In re Scott’s Estate, 150 Cal. App. 2d 590 (1957).


40 In criminal cases, the doctrine also extends to misdemeanants who flee the court’s jurisdiction. People v. Kubby, 97 Cal. App. 4th 619, 621 (2002).

41 MacPherson v. MacPherson, 13 Cal. 2d 271, 279 (1939).


44 Id. at 379 (citations omitted).

45 Id. (citations omitted).

46 Id. at 380.


48 Id (citation omitted).

49 Id. at 1076 (citation, internal quotes omitted; emphasis in original).


51 In re Scott’s Estate, 150 Cal. App. 2d 590, 592 (1957).

52 Id. at 592-93.
The Cybersleuth’s Guide to the Internet

By Carole A. Levitt and Mark E. Rosch

IFL Press, 2006
$59.95, 268 pages

THOSE WHO USE THE INTERNET for investiga
tive and legal research should have The Cybersleuth’s Guide to the Internet at their fingertips. Reflecting the growth in the amount of information available on the Internet, the book has tripled in size from previous versions. The authors have made it easy for novice and advanced researchers alike to save time and avoid frustration. The Cybersleuth’s Guide to the Internet includes numerous research examples based on real-world research scenarios and is written in plain English.

Lawyers no longer have the luxury of ignoring the Internet for research, and even lawyers used to Internet research can learn to use resources more effectively. Other attorneys, however, are still not as comfortable with Internet research tools as they should be. Consider the following:

• In a recent Indiana decision, the court was incredulous that the plainti
ff failed to try Google to find the missing defendant as part of his due diligence. The court upheld the defendant’s claim of insufficient service of process and affirmed the dismissal.1

• In another recent case, the Louisiana appeals court upheld a decision in which the trial court nullified a government tax sale because the original tax-delinquent owner would have been “reasonably identifiable” and locatable if the government had run a simple Internet search to “locate the named mortgagee.” It was the trial court judge who conducted an Internet search and determined that the owner was “reasonably identifiable.” Part of the basis of the appeal was whether or not it was appropriate for the judge to conduct such a search at all to determine this. The appeals court dismissed this argument.2

• The ABA’s most recent technology survey found that while nearly 90 percent of attorneys used the Internet for activities such as reading news or checking their stock portfolios, less than half were using the public records or company background information that are freely available on the Internet.

The guide is organized with clear headings, hundreds of screen shots of Web pages, Web site names in boldface type, and URLs to make it easy to use. Background information about the sites is provided, so the researcher can easily find target sites before starting a search. The book begins with an overview of the Internet and then delves into specific chapters on how to best use search engines. This section is especially helpful for the novice researcher, because it goes into detail about how to use the advanced search functions to limit queries to particular formats (such as a Microsoft Word Document, PDF, or Power Point presentation) and how to find pages that have been recently updated. Even a more advanced researcher can benefit from the tips on how to find pages that are similar to a specific page.

The authors go into detail on how to unlock the secrets of the invisible Web—the billions of pages that are not indexed by search engines and are often overlooked by the casual researcher. Using their suggestions, one can find pages in databases and even deleted pages that no longer appear on search engines.

The chapter on how to investigate people and their background is especially eye-opening. The authors illustrate how easy it can be to find phone numbers, addresses, Social Security numbers, one’s political persuasion, assets, and the names of one’s neighbors on the Internet. Using their suggestions, it is even possible to find photos of individuals and messages that one has posted to discussion groups.

The Internet can be used to research companies as well as people. The book lists several government Web sites that one can use to trace company assets by researching the company’s ownership, registered agents, and fictitious business names. One can even conduct a free, full-text search of a company’s filings and find bankruptcies, judgments, and liens. It is easy to see the importance of knowing this information when suing or defending a company. In these chapters, the reader is informed of the best sites for a particular topic, along with detailed instructions on how to get the most out of the sites listed.

For those who work in litigation, the book is especially helpful. The authors have provided detailed chapters on where to find and how to research expert witnesses, how to verify licenses of would-be experts (including medical licenses), and where to find and how to use research databases (many of which are not accessible through search engines). In the chapter on using the Internet for legal research, the authors illustrate the value of legal-specific portals and directories. Free commercial legal portals are reviewed, with dozens of screen shots and tips on how to get the most from these resources. The Cybersleuth’s Guide to the Internet shows its strength by covering the design changes that have recently taken place on these major portals.

Abraham Lincoln once said that if he had six hours to cut down a tree, he would spend the first four hours sharpening his axe. This book operates on the same philosophy. By using the techniques in this book, readers will sharpen the tools necessary to effectively conduct legal research on the Internet before beginning their search. Indeed, given how easy the authors make it to use the Internet to find pertinent information on companies, people, experts, judges, government resources, substantive legal content, and more, it may be malpractice not to use the skills contained in this book.


Jim Robinson is an attorney and president of JurisPro Expert Witness Directory, an online directory of expert witnesses.
Computer Counselor

BY CAROLE LEVITT AND MARK ROSCH

Should Attorneys Use Macs?

IF YOU USE A COMPUTER IN YOUR PRACTICE, the odds are better than 90 percent that you are running some version of the Windows operating system. Some attorneys, however, use alternative operating systems, the best known of which is the Mac. For many years a number of concerns kept attorneys from using Macs. Most often heard were: “There’s no law office software for the Mac,” “You can’t share files with clients or opposing counsel,” “It’s too hard to learn a new system,” or “They’re too expensive.” The currently available Apple hardware and software, however, address most of these concerns, giving attorneys new reasons to consider making the switch to Macintosh.

Randy Singer is a Northern California attorney who uses Macs in his law practice. In the mid-1990s, he founded the online MacAttorney.com resource for attorneys who use Macs. The MacAttorney site features a directory of Mac software for lawyers. Singer also offers a free newsletter for attorneys who use (or are considering buying) a Macintosh computer for use in their practice. Boasting over 5,000 subscribers, the site and e-mail list contain tips on using the Macintosh, the latest computer news, events, and products for law office use, as well as special promotions for attorneys. Singer is also the author of The Macintosh Software Guide for the Law Office.

One advantage he cites to using a Mac is ease of use and maintenance. As he puts it, “On the Mac, things just work.” Because Apple designs the computers and the operating system, “Incompatibilities between the hardware and software are just about nonexistent,” he says. Because of this, Mac-using attorneys get their work done and do not have to worry about their computers. “Overall, my experience is that Windows-using attorneys spend a lot of time and money each year making sure that their computer runs OK.”

For Jeffrey Allen, a principal in the Oakland law firm of Graves & Allen who has been using Macs in his practice since the early 1980s, it boils down to this: “The Mac is better hardware. Additionally, it is easier to use. Moreover, to the extent I want to use graphics, Mac does it better.” Houston attorney and legal technologist Craig Ball described his MacBook Pro as “a well-constructed, well-engineered, svelte machine that will inspire envy,” calling it “the trophy wife of personal computers.”

Poll Results

Apple owners are certainly happier with their machines than are the owners of most other computers. In a recent reliability and service survey, PC World magazine polled 35,000 readers about their experiences with technology purchases in six categories. Apple Computer rated ahead of all other manufacturers—with the exception of the niche gaming computer manufacturer Alienware—in the desktop computer category, and Lenovo (what was formerly IBM) in the notebook computer category.

Apple offers a wide range of computers, from the Mac Mini, iMac, and MacPro desktops (starting at $599, $1,299, and $2,499 respectively) to the MacBook and MacBook Pro notebooks (starting at $1,099 and $1,999 respectively). While these may seem expensive compared to entry level desktop computers running Windows, it is important to consider what is included (or not) with each machine. The inexpensive Windows machines usually rely on the slower and less powerful Intel Celeron chip. In contrast, all of Apple’s current models use the faster Intel Core chip (which is found only in more expensive Windows machines). The inexpensive Windows machine usually shares its RAM chips between the video processing card and any open applications. The Mac Mini does not share its RAM chips. Therefore, nothing is slowed down.

Most of the inexpensive Windows machines come bundled with the Home version of Windows XP rather than the more full-featured Professional version preferred by most technology consultants for its stability and security. The lowest price Mac Mini includes the same, full-featured operating system as the most expensive MacBook Pro.

The hardware offerings can vary considerably, and another factor to consider is software.

Familiar Software

“There is a huge amount of law office software for the Macintosh,” says Singer. To make it easier to find, Singer compiled a list of more than 170 titles on his MacAttorney.com Web site. Each entry includes the program’s name and Web site address, and e-mail and phone contacts when they are available. Some of these entries also include a brief annotation regarding functions, compatibility, and other matters.

While software is available to perform many of the necessary practice management functions (e.g., time and billing, document assembly, accounting) these programs are more likely to be Mac-only programs rather than Mac versions of familiar Windows applications. Ball has taken that lack of familiar programs to heart, lamenting: “Beyond the ‘core’ Office programs, few of the applications I use are available for the Mac OS.”

Some of the same productivity software (such as Microsoft Office’s Word, Excel, Power Point, and Adobe Acrobat) that is used on

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Windows machines is available for the Mac. Thus, many of the features, functions, and menus of Microsoft Word for Mac will be familiar to users of Word for Windows. In both operating systems, cutting, pasting, dragging, and dropping function the same way. Ball notes one major difference between Mac and Windows that stands out for him: “The later Mac version of Power Point did less in critical functionality than the earlier version in Windows! That’s not Apple’s fault—it’s Microsoft’s—but it meant I could not use the Mac for my heavily animated Power Point presentations.” Ball is known as a Power Point user whose presentations teach attorneys how to use Power Point more effectively. So for him, that was enough to stop him in his tracks. “I quit looking when I couldn’t use Power Point motion path animation. That was enough for me.”

Outlook Express for the Mac no longer exists, but Microsoft does offer the Entourage e-mail client as part of the Office Suite. Entourage 2004 works with Outlook Exchange servers. One other bonus of Office for Mac is the included Project Center software, which is not offered in the Windows version. Project Center aims to make users more organized and efficient by putting project-related e-mail messages, files, notes, contacts, and schedules in one place.

Another advantage of Office for Mac over Windows, touted on the Apple Web site, is the ability to “take full advantage of Mac OS X Tiger’s powerful ‘Spotlight’ search, which indexes file names, metadata, and even the content inside your Office documents; with one search, you can quickly find the exact document you’re looking for even if you don’t know what it’s called or when you wrote it.” The suggested retail price of the standard Office software for Mac is $399. Another frequently used program is Acrobat. Those familiar with Acrobat for Windows will find the most frequently used features, functions, and menus (including the document commenting and collaboration tools) in the Mac version of Acrobat 7 Professional. The Windows version includes Adobe’s Live Cycle interactive form designer and the ability to “collect, convert, and organize Microsoft Outlook e-mail into searchable Adobe PDF documents.” This feature is not included with the Mac version. The suggested retail price of Acrobat Professional is $449 for Mac or Windows. Users of previous versions can upgrade for $159.

For trial presentation using the Mac, Allen likes Trial Smart (www.trialsmart.com), which is similar to Trial Director or Sanction in Windows. The suggested retail price of Trial Smart software is $245 for an individual license and $1,225 for a five-user license. One year of technical support is available.
for an additional $50 per user. Visync (www.visync.com) offers Mac and Windows versions of its trial presentation software. The suggested retail price of Visync is $695 for either version. A free demo version of each is available for download. Some software publishers, however, have stopped supporting the Mac. For example, the last version of WordPerfect for Mac was released in the last millennium. Similarly, Timeslips discontinued support for its Mac version in 2002.

**Macs Do Windows**

In late 2005, Apple shifted to the same chips that powered high-end Windows computers. Many industry observers commented that it was only a matter of time before Windows could be run on a computer that had been manufactured by Apple. They were right. It was only a brief time later that Apple released Boot Camp (http://www.apple.com/macosx/bootcamp/publicbeta.html), a free program that allows the newest Macs to run the Windows operating system and Windows applications. While Boot Camp is free, a properly licensed, installable version of Windows XP (Home or Professional editions only) is also required.

Boot Camp is still in beta (public testing) mode, and is not considered a final version of the product. Printing the long list of installation instructions before beginning is a good idea, because there is a danger that one could delete the contents of the hard drive by not following the installation instructions properly. That said, Boot Camp offers those who want to use a Mac the ability to run Windows applications without having to own a separate computer. For Ball, Boot Camp “works very well….When you follow the directions, it’s XP on a Mac and, by rebooting, you can switch back and forth between OS X and XP.” Ball does, however, voice a common complaint about Boot Camp: “I wish it were easier to move data back and forth between the two,” he says, citing a need for a static clipboard to hold data as the user boots between the two operating systems. Another complaint about Boot Camp is that users cannot operate both operating systems simultaneously.

However, simultaneous use is possible with the third-party software Parallels Desktop for Mac (www.parallels.com). Parallels is capable of running a wide variety of Windows versions, including DOS, 3.1, 3.11, 95, 98, Me, 2000, NT, and XP. Running Windows and OS X simultaneously makes it easier to move files back and forth between the two environments. As with Boot Camp, after installing Parallels Desktop, users must then install Windows. Parallels Desktop works only with the new Intel-powered Apple computers, including iMac, Mac Mini,
MacBook, and MacBook Pro. The suggested retail price of Parallels Desktop for Mac is $79.95. (Currently, the better-known Virtual PC, which runs Windows and the Mac OS simultaneously on an Apple computer, is not yet available for the new Intel-based Macs.)

To Switch or Not to Switch

Many of the Mac faithful (and Apple itself) point to the lack of malware (viruses and other malicious code) that affect the Mac. For many, this is good enough reason by itself to switch, with only one documented virus and only a few security exploits targeted at the Mac OS or Mac applications. In contrast, security vendor Sophos has identified more than 180,000 different pieces of malware targeted at Windows. For those who choose to run Windows on their Apple computers, it is important to remember that those machines will be vulnerable to the same viruses, trojans, worms, and other malware as any other Windows computer. This is in addition to being vulnerable to whatever malicious code is targeted at Apple computers running OS X. Apple computer users should protect themselves by installing antivirus software to cover all operating systems they have installed.

When asked for advice for the attorney considering switching to an Apple computer, Ball describes himself as “a Windows guy” but thinks that “most lawyers will be pleased with the Mac, and they will have a better overall experience within a visually richer, more stable, and secure environment.”

“|If you don’t need to do more than Office applications, e-mail and the Net, you will love the Mac,” continued Ball, “and chances are you’ll rarely miss Windows. If you use apps that don’t have a Mac version, Windows on the Mac is just...Windows in a sleeker box.” Ball does, however, bemoan the lack of a second button on his MacBook Pro to perform the right click functions of a two-button mouse in Windows. (An inexpensive, add-on USB mouse can overcome that shortcoming.)

Allen puts it succinctly: “Unless you have a specific need for a piece of software that is important to your practice and you will use heavily, there is no good reason not to get the Mac.”

MacAttorney.com site owner Singer is a bit more circumspect. When asked the same question, he describes himself as “somewhat ambivalent about suggesting that other attorneys switch to the Macintosh. I consider the Macintosh to be a huge advantage that I have over other attorneys. I don’t want to lose that edge.” Apple has recently reported that 50 percent of customers polled in their retail outlets are new to the Mac. Should you switch? The choice is yours.
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**Common Electronic Discovery Mistakes**

ON TUESDAY, OCTOBER 10, the Los Angeles County Bar Association will host an online seminar led by Alexander H. Lubarsky addressing the most common errors made by attorneys, corporate IT staff, paralegals, record managers, and even law firm litigation support technology staff and vendors when dealing with electronic discovery. Learn how to avoid sanctions and adverse inference rulings by not spoiling metadata, running afoul of reasonable retention policies, causing client data to be deemed inadmissible, failing to file appropriate motions in support of or in opposition to e-discovery techniques, going over budget, and breaking the all-important chain of custody. Learn from the mistakes of others before you make them yourself. Registration will be held from 11:50 A.M. to noon, with the webinar continuing from noon to 1 P.M. The registration code number is 009420.

- **Free—CLE+Plus members**
- **$50—Barristers, Litigation, and Family Law Section Members**
- **$65—LACBA members**
- **$80—all others**
- **1 CLE hour**

**Thirty-ninth Annual Securities Regulation Seminar**

ON FRIDAY, OCTOBER 20, the Business and Corporations Law Section will host its annual seminar on securities regulation. Top Washington and regional Securities and Exchange Commission officials, together with representatives of other regulatory agencies as well as leading private practitioners, will present a comprehensive review of current events and developments in the securities field. This seminar will include an overview of judicial, regulatory, and enforcement developments, as well as recent trends in the public and private offerings of securities, mergers and acquisitions, and other matters of interest to the securities bar. The keynote speaker will be SEC Chairman Christopher Cox.

On-site registration and continental breakfast will begin at 8 A.M. After a general address on securities regulation, breakout panels will cover such topics as corporation finance, advising companies when criminal allegations arise, mergers and acquisitions, financing small and medium-sized companies, securities litigation update, executive compensation, enforcement developments, and ethics and the securities lawyer. The seminar will take place at the Millennium Biltmore Hotel, 506 South Grand Avenue, Downtown. The registration code number is 009256. The prices below include the meal.

- **$250—CLE+Plus members**
- **$270—Business and Corporations Law Section members**
- **$375—all others**
- **6.5 CLE hours, including 1 hour of ethics**

**DATABASE SEARCHES AND TAX RETURNS**

ON WEDNESDAY, OCTOBER 25, the Los Angeles County Bar Association will host a seminar led by Marc Kaplan titled “Use of Electronic Database Searches and Income Tax Returns to Uncover, Discover and Recover Property, Locate People and Avoid Being Sued for Malpractice.” All who attend the seminar will receive a book of useful material for future reference. There will also be a review of individual, partnership, and corporate income tax returns, and how to read and understand them, where to look, how to find hidden assets, liabilities, and other items. The second part of the seminar will cover the use of free and premium databases to run searches on individuals and businesses, and how to uncover other “secret gems” such as undisclosed assets. You will learn what records are available quickly, easily, and inexpensively, to change the outcomes of your cases. See what your opponents already know about you and your clients. You will be shocked and amazed at what records are available. Learn how the use of database searches yields dramatically higher judgments; locates missing people, hidden entities, and assets; and uncovers critical information about a case or party. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration and the meal will begin at 5 P.M., with the program continuing from 5:30 to 9:15 P.M. The prices below include the meal. The registration code number is 009399.

- **$75—CLE+Plus members**
- **$125—Family Law, Litigation, and Taxation, and Barristers Section Members**
- **$150—LACBA members**
- **$205—all others**
- **3.5 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/](http://calendar.lacba.org/). For a full listing of this month’s Association programs, please consult the County Bar Update.
Step Away from the Laptop, Please

I recently received my law school alumni magazine. Prominently displayed on page one was a photograph of students in a contracts class. In the foreground stood this little speck of a teacher, and up the stadium seats sat all the students—row after row of students with row after row of laptops in front of them. And I thought, “Wow! Look at all those computers.” But then I quickly became grateful that when I was in law school we students still took notes using those prehistoric tools of pen and paper, because the sound of keys clacking, clacking in the classroom would have driven me clean out of my mind.

Fast forward a couple of months. I am at the firm talking to one of my colleagues about all those laptops I see everywhere. In law schools, in coffee shops, on airplanes, at bar exams. Now before I go further, let me say that I have a laptop, and I use it—a lot. I use it when I travel; I use it to work from home; I use it to watch movies and to download photographs and music; I use it for remote access to my office files; and I use it to surf the Internet. I love my laptop, and I use it for all sorts of things.

Anyway, my colleague and I were in the lunchroom discussing the laptop issue from very different perspectives. He took the bar exam using a laptop and has taken his laptop to depositions. He told me that he thinks better when he is typing, that he cannot write his thoughts as fast as he can type them. I think many people would agree with him. And I think in some situations he is right to be typing and not hand writing. The bar exam might be one of them. You should do what you need to do to get through that horrible exam. So maybe the use of laptops might be necessary to get you through the bar, but laptops should not journey with you through your whole life as a lawyer. I think a laptop has a definite and tailored role in the life of a lawyer and should not be seen or heard in certain situations. Like depositions. In my view, the only person typing at a deposition should be the court reporter.

Maybe I am just lucky; I had early intervention. Once upon a time, in my greener days, a really great trial lawyer I used to work with sent me to a deposition. I took my laptop. And boy, did I take notes. There was not one thing I missed. My deposition summary was 30 pages long, single-spaced, with a huge staple in the upper left corner. I transcribed every single thing that man said and organized it all under a hundred headers and subparts. I was so proud.

I gave that “summary” to the partner. He smiled at me and said, “So what did he say?” And I sat there. And sat there. And I tried to think of what the man said, what the man told me that was important to my client and to what we wanted to say at trial. And I could not. Because I was so immersed in getting it all down, in capturing every single thing the deponent said, I never really heard him at all. The partner handed my deposition treatise back to me and said, “Take this back to your office, read it, and come back and tell what I need to know—in one paragraph, using as few words as possible.

So I went back to my office and read my dissertation on the life and times of the witness, really paid attention to it. And it was right there, exactly what we needed.

I learned something that day. I was so busy typing that I might have missed what the deponent was really saying. Depositions are a conversation. You need to listen and you cannot listen—really listen—if you are typing. I have had some great moments in depositions that happened only because I was really listening to what the deponent was saying and was closely watching the person’s body language.

Words and messages can be subtle; you have to be ready. Just as you cannot be married to a question outline if you want to get somewhere with a witness, you cannot be so consumed with your deposition “summary” that you are not truly hearing what the deponent is saying. And believe me, if you have a laptop there, you will want to make sure your sentence structure is perfect. You will not be able to type what the person says and ignore grammar. You will find yourself with an obsessive need to make sure that what the deponent says goes under the proper section of your summary. I mean, think how much time you are saving by getting that sentence perfectly punctuated and under the proper header right then and there. After all, those of us who take notes at a deposition have to go back to the office and spend more time creating a summary after the fact. Whereas those of you who take laptops to the deposition really are multitasking, attending the deposition and summarizing at the same time—two tasks for the effort of one. Except that you are not really present in the moment if you are typing.

But if you must bring that laptop with you, here are a few rules: Step away from the laptop when it is your turn to talk to the witness. Never ever disrespect the witness by playing solitaire on your laptop. And finally, don’t feel the need to type everything; instead, use your time with your laptop to create something meaningful for the person who will be reading it. Be sure to highlight those few moments, those few words that really matter to your client and your case.

And if you see me at a deposition and you have a laptop with you, don’t worry. This is just my view and not everyone is going to walk my way—away from their laptops.

BY DANA H. SHERIDAN

A laptop has a definite and tailored role in the life of a lawyer and should not be seen or heard in certain situations.

Dana H. Sheridan is an associate in the Los Angeles office of Tressler, Soderstrom, Maloney & Priess, LLP, where she specializes in complex multiparty civil litigation in the areas of bad faith, insurance coverage and defense, products liability, toxic and mass torts, and general litigation.
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