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for NEW ATTORNEYS in California
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The colors of fall, the tricks and treats, the smell of Thanksgiving dinner. For a California lawyer, the experience of these annual delights will be forever intermingled with the memory that autumn is also the season of bar results. Time will dim the power of this memory, at once frightening and exhilarating. It will do the same with the realization that the bar exam did little to prepare you for the practice of law. In the meantime, the pages that follow in this Survival Guide for New Attorneys offer real-world advice from experienced practitioners to help you survive your metamorphosis from law student to lawyer.

After a positive reaction to last year’s inaugural edition of the Survival Guide, we now present the second edition, which retains a few of the articles from the first and discusses a wide variety of additional hurdles new attorneys face as they build their practices. In truth, calling these matters hurdles unfairly minimizes their size when they are faced for the first time. Every lawyer remembers the early days of practice when the process of lawyering commanded more energy and attention than grappling with substantive law. But as you grow as a lawyer, you will learn to do things unconsciously that years earlier pervaded your dreams (and nightmares). That unconscious mastery of procedure will prepare you to deal early and calmly with the realities of practice.

Consider this example from my own practice. Early in my career I was sent to defend the deposition of a client, a Vietnam veteran, at the office of an opposing (and imposing) lawyer who was a retired police officer. The fact that the lawyer was wearing a shabby tweed sportcoat while taking the deposition in his own office was something I did not think much about at the time. After a predictable, uneventful, but heated hour and a half of deposition, we took a break for counsel to make copies of documents.

As I perused my notes, my client clutched at my arm and asked me to step outside. I thought he meant outside the conference room, but he kept on walking, scurrying really. As he proceeded to the parking lot, I chased after him with pleas to slow down. Only when we arrived at the lot did he reveal that opposing counsel had a pistol holstered in the small of his back. My client explained that he was deathly afraid of guns and therefore refused to continue the deposition unless counsel put the gun away and “proved” that he had done so. I told my client I would ask counsel to lock up his gun and started to walk back to the deposition. But my client’s feet were set in concrete. He was not budging from the lot until I secured the agreement.

Back inside the conference room, the situation deteriorated when counsel refused to even say whether he had a gun. On the advice of my supervising partner, I terminated the deposition and moved for a protective order under a section of the Code of Civil Procedure I had not yet read, much less contemplated needing. At the hearing, opposing counsel similarly refused to tell the judge whether he was carrying a gun, even after being ordered not to bring a gun into court or to depositions. The moral of this story is simple: You cannot make this stuff up, so you must be ready for anything.

A guiding principle behind the creation of the Survival Guide for New Attorneys is the hope that beginning practitioners will be able to avoid the traumas, big and small, that we on the guide’s Editorial Committee experienced in our early days of lawyering. Perhaps more important, we seek to help new lawyers think about the development of their cases and their careers in a purposeful way rather than leaving the future to chance.

The members of the Survival Guide’s Editorial Committee are Jerry Abeles, Ethel W. Bennett, R. J. Comer, Kerry A. Dolan, Daniel A. Fiore, Stuart R. Fraenkel, Lawrence J. Imel, David A. Schneider, Gretchen D. Stockdale, and myself, Michael A. Geibelson. On behalf of all the authors and editors of the guide, I wish you all success and happiness in your practice, wherever it may take you.

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Be a Dog

Advice for new lawyers would be incomplete without a serious and thoughtful discussion of the attorney-client relationship. As it happens, that discussion will not be found here. This page, rather, is devoted to the three words that summarize everything needed to maintain comprehensive personal guidelines for ethical behavior:

Be a dog.

New practitioners are well aware of the parallels with our canine counterparts: the shared humiliation of obedience school (we of the two legs know it as “law school”), followed by an invasive procedure required to receive a license (rabies shots and surgical neutering pale next to the California Bar Exam), capped off with the daily fitting of a tight, clutching collar (patterned silk and studded leather are merely fashion distinctions). Perhaps the better question is “In what respect is a lawyer not a dog?”

Pups quickly learn the value of duty, loyalty, obedience, and getting fed. Young lawyers, similarly, must become acquainted with the concepts of competence, conflicts, confidentiality, and getting paid. Not surprisingly, the instincts that guide these principles are substantially similar.

The basis of all professional conduct is competence. This is so in the four-legged world as it is in the two. The padded paw must be no less steady than the learned hand. Dogs do what they are trained to do and, often, what no other creature is allowed to do. The competent completion of a difficult task earns the highest commendation among both the Milk Bone set and the Belgian endive crowd. Praise and rewards do wonders for both human and beast.

Competence goes beyond strict training. Lawyers, like their canine counterparts, must learn first and foremost how to do it on the paper (for lawyers, that means mastering legal writing skills), but they must learn much more. Every jurisdiction, like every dog owner, is set in its ways, and the new arrivals need to learn the appropriate tricks. Know when, where, and how to fetch, sit, and heel, or you will more often than not find yourself forced to roll over and play dead.

A further element of competence is specialization. This concept has worked in the canine world for 10,000 years. Some dogs guard, some hunt, some retrieve. Some just sit and watch. (These are the senior partners.) Why should several millennia of dog breeding be any different from a few centuries of jurisprudence? Labrador retrievers are not trained to wrangle sheep like border collies, and a probate practitioner should not dabble in the field of patent law. If you do not know what you are doing, sniff around a bit, and find a dog who does.

Conflicts of interest and canine loyalty go hand in paw. If man’s best friend is known for anything, it is loyalty. Dogs heed their master’s voice and do so in spite of any other. Certainly, dogs will do tricks for others but not tricks their masters disapprove of, or most assuredly, might defy or harm them. When faced with a potential conflict, the blank stare of passive refusal is as powerful as any waiver or disclosure of informed written consent.

When it comes to duty and compensation, lawyers can also learn from dogs. Regarding financial relations with a client, dogs always seem to know when feeding time is, and only the ones who are poorly trained beg at the table. Retainer agreements may be more complicated than a bowl with “Fido” written on it, but the purpose is the same. As for the constraints against sexual relations with clients, anyone needing any further explanation than the image of your leg and a dog in heat should dig a hole in the garden and jump in.

Client confidentiality, often difficult for attorneys, is easy for dogs. Essentially mute, dogs have an admitted leg up in this matter, but their example is still worth following. Dogs keep their mouths shut unless there is a palpable provocation to start barking or howling. A backyard possum may provoke an overzealous response, but dogs never fall victim to gossip, boastfulness, and inadvertent slips of the tongue, fax, or e-mail. As to record keeping, note taking, and file preservation, look no further than dogs who are entrusted with a bone. They may bury it, but their instinct is purely protective, and when the time comes to retrieve it, they always remember where it is.

One final instance to look for guidance from our furry friends is in the event of a mistake or even misconduct or malpractice. When caught doing something wrong, dogs inevitably put their tail between their legs and act remorseful. State Bar courts regularly serve up sanctions more severe than a smack on the nose with a rolled newspaper, but admitting errors, striving to correct them, and learning from them is the best way to avoid either.

Naturally, not all canine instincts work in every legal situation. For example, licking your clients’ faces is neither an appropriate nor advisable way to let them know that they won their appeal. Still, developing a well-trained response to the question “What would Rover do?” often is a professionally responsible way to avoid ending up in the doghouse.

Patric M. Verrone is an attorney; a television writer and producer; the president of the Writers Guild of America, west; a member of the Los Angeles Lawyer Editorial Board; and a dog (when appropriate).
Who does not remember a parent, teacher, or other grownup who made a significant impact on our young lives, motivating growth and improvement in some meaningful way? Yet, as adult professionals, finding the time to locate, develop, and maintain those types of nurturing relationships becomes increasingly difficult. What may have worked as a casual way for adolescents to better their skills in cooking, math, mechanics, or carpentry lacks enough structure to propel professional development—a goal far too important to leave to chance.

In the legal world, being involved in a mentor-mentee relationship may be the only way that lawyers can get as much out of the law as they put into it. In a large firm, mentoring is essential in ensuring that associates have equal opportunities to succeed and that their work is noticed. It also helps bridge the gaps between departments and practice groups, which weekly assignments may not permit. In a small office, mentoring is a necessary label to identify an organic process that otherwise might get lost in the hustle of running the practice. And in every setting, mentoring makes the transition from law school to professional life a little easier, the learning curve a little less steep, and the practice a little more fulfilling.

While no formula exists to make every mentoring relationship successful, you can apply simple tactics to create meaningful and productive mentor-mentee matches. Pick a mentor. If your firm does not have a mentoring program, test the waters to determine interest in setting up a formal process, which can take the awkwardness out of finding an appropriate mentor and provide a graceful mechanism for finding a new one if the first does not work out.

Formal or not, locating an appropriate mentor is critical to the development of a solid, productive mentor-mentee relationship. A potential mentor must be interested, willing, and committed. Beyond that, the faces of mentors vary as widely as those of their mentees. As a general rule, a mentor must be old enough to offer sage advice gained from a variety of practice experiences, yet young enough to be attuned to developing areas of the law, the practice, and the future of the profession. Above all else, a mentor must be someone you trust as a confidant in matters of legal and business judgment.

Unfortunately, these qualities are hard to glean merely from an introductory lunch. Simply put, if you discover the relationship lacking, find another mentor.

Keep it confidential. Young associates consistently express concerns that their mentors are evaluating them even while trying to teach them. How the mentor uses (or does not use) the information the mentee ultimately discloses will determine whether the relationship evolves into one of the utmost trust and confidence or whether it falters because the mentor uses (or is perceived to use) confidential information against the associate.

To alleviate some of this concern, the mentor and mentee must agree from the outset that all communications are confidential, with one caveat: The mentor must be permitted to make disclosures required by law, the Rules of Professional Conduct, or the policies of the firm. While the level of confidentiality of the relationship falls short of what is required for other relationships lawyers have, the caveat ensures that the mentor can do the right thing and thus teach the important lesson of admitting fault when appropriate. The mentor must make the required disclosures anyway, so new attorneys might as well agree to this protocol from the beginning.

Make mentoring a regular part of practice. Those who want to mentor but fail to do so adequately often blame the lack of time of both parties and the lack of the mentee’s commitment. Unfortunately, they fail to rec-
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\textbf{Recognize that mentoring is a long-term process that should not get lost in the shuffle of other work. To fully realize its potential (for example, skills improvement, successful marketing, associate retention), mentoring must become a regular part of practice. This requires the imposition of structure on what otherwise should be a fluid relationship involving teaching and learning. In time, the relationship will evolve into a more natural one. Until then, a bit of planning is required.}

\textbf{Pick dates now.} Attorneys’ calendars fill up fast. However, you cannot leave to chance the opportunities for meetings and discussions about issues other than the work at hand. Pick dates in advance for the entire year, and save impromptu mentoring for less foreseeable issues that arise. Set the meetings either in your office or over a meal to prevent your mentor from being distracted.

\textbf{Select the topics for discussion.} Imposing structure on the relationship need not stop at picking dates. Individual meetings should be devoted to one or two topics related to the advancement of the practice. Prepare for the meetings as you would for meetings with a potential client; that is, don’t think of the mentoring relationship as a one-way street with the mentor merely giving advice. Instead, actively engage yourself in the process by preparing bullet points, lists of ideas, plans, and goals. Tie these to the topics to be discussed at the individual meetings.

Marketing skills are an essential discussion topic for attorneys interested in the management and continued success of a firm. Tap mentors to help develop and implement a marketing plan with realistic goals for a young associate. Seek out direction about how to publish an article or participate in a bar committee or community group. Talk about the type of publications and organizations that would be meaningful for your practice area.

Training in substantive law and procedure is another issue that requires planning. Your mentor’s input into your continuing legal education plan should round out knowledge of the law by including in-depth courses in areas practiced every day as well as courses about topics not regularly encountered in practice.

The ongoing development of a variety of legal skills must be arranged. In addition to
training in substantive areas of law, young litigators must learn the practice ropes from depositions to court appearances, from mediation and settlement conferences to arbitrations and trials. Mentors play an invaluable role in identifying these practice milestones and the ways to reach them through case opportunities and through formal training via entities such as the National Institute for Trial Advocacy, the American Board of Trial Advocates Masters in Trial, and the local Trial Advocacy Project.

Honoring your writing skills is even more important now as fewer and fewer courts consider oral argument to be a right rather than an option for which a litigant must demonstrate a need (in writing, by the way). Mentors offer another set of eyes to comment on and critique young lawyers’ written work and to help develop a style. Mentees should provide their mentors with a writing sample untouched by other hands to review, edit, and discuss on a regular basis. Submit the sample far enough in advance of a meeting to allow the mentor enough time to review it and make substantive comments.

Exposure to a variety of cases early on is essential to choosing a path for your legal career. Too many lawyers get burned out and either have to take steps backward in their career path when moving to another job, or fall out of the law entirely because they follow a path of least resistance in the cases assigned to them. Mentors are well suited to keeping an eye on a new lawyer’s exposure to a variety of cases and to discussing opportunities for getting other kinds of cases, even ones that are outside the mentor’s area of practice.

Set an action plan. Too many mentees complain of having infrequent discussions about the same topics. They describe these discussions as little more than periodic check-ups. While the above mentor-mentee strategies may likely resolve these complaints, mentees must do their part to assure that the discussion moves forward. What is the best way to do so? Prepare an action plan containing action items for the short, medium, and long terms. The action plan becomes a starting point from which to focus on approaches for professional development. It should reflect a breadth of skills and practice opportunities over a number of years. While the action plan is not meant to be an all-inclusive list of professional opportunities nor a gauge of ability, it should be used on an ongoing basis to keep the mentor and mentee engaged in the process and to mark progress over time.

By John W. Amberg

Seven Myths of California Legal Ethics

You sat through the required legal ethics course in law school and passed (with a prayer) the Multistate Professional Responsibility Exam. Now you plan to put that dry, theoretical subject out of your mind and focus on the serious business of earning a living and paying off your student loans. While your goals are laudable and understandable, you will find that the subject of ethics cannot be placed conveniently on a shelf, to be addressed only from time to time. You simply cannot be an effective lawyer if your mind is lulled by several pervasive myths about legal ethics.

Myth 1: Professional ethics is just a subject on the bar exam. There is more to legal ethics than just some abstractions concocted by test writers. First, the California Supreme Court deems professional ethics important enough to require every member of the State Bar to complete a minimum of four hours of continuing legal education in ethics every three years. This requirement ensures that you will refresh your knowledge throughout your career.¹

Second, you will confront legal ethics issues continually in your practice. Just like those criminal law procedures or contract principles from the first year of law school that seem suddenly relevant to the work you do daily, so too will conflicts of interest, privileges, and other ethical questions arise routinely in your practice because they are inherent in what lawyers do.

Third, a great lawyer adheres to the fundamental values of the profession, which are embodied in the California Rules of Professional Conduct. Abraham Lincoln advised young lawyers: “Better to make a life than a living.”² It is impossible to make your life in the law unless you live by the ethical precepts that have defined the attorney-client relationship for hundreds of years. New lawyers often think they must earn their spurs by being tough and aggressive, but respected lawyers have learned that courtesy, honesty, and professional integrity are the hallmarks of success. As a pillar of the New York bar, James F. Gill, recently put it: “[T]he great lawyer is a person of unflinching and undiluted integrity.”³

Myth 2: I can rely on my boss to make all the tough ethical decisions. The new lawyer usually is the lowest-ranking member of the team—the most recently hired prosecutor or public defender, the least experienced member of the corporate legal department, or the most junior employee of the law firm. The new employee owes a duty of loyalty and obedience to the employer and ordinarily should respect the judgment of

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more experienced superiors. Faced with an ethical question, it would be easy to shrug and say, “Let the boss decide.” However, every lawyer is expected to perform in accordance with the duties set forth in the State Bar Act—codified at Business and Professions Code Sections 6000 et seq.—and the Rules of Professional Conduct. Among these duties is the duty to act competently. This means applying to all matters the lawyer’s diligence; learning and skill; and mental, emotional, and physical ability.

Sometimes it is the new lawyer—just graduated from law school and fresh from the rigors of preparing for and taking a professional responsibility exam—who spots an ethics issue first. Faced with an ethical dilemma, who makes the call: the boss or the employee? There is no California ethics rule directly on point.

However, in the absence of California ethics authority, courts look to the ABA Model Rules of Professional Conduct for guidance. They provide that, in this instance, a subordinate lawyer does not violate ethical standards if he or she acts in accordance with the supervising lawyer’s reasonable resolution of an “arguable question of professional duty.”

Myth 3: The Rules of Professional Conduct are merely aspirational. Several years ago, Stanley W. Lamport, a member of the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee, wrote that the most significant development in legal ethics over the past 25 years was the evolution of the Rules of Professional Conduct from purely aspirational concepts to disciplinary rules that are woven into every aspect of lawyering. He joked that it now takes two lawyers to represent a client—the lawyer and the lawyer’s lawyer.

Even today, some lawyers mistakenly think that the ethical precepts enshrined in the State Bar Act and the Rules of Professional Conduct are merely aspirational targets or hopeful guidelines, the violation of which carries no penalty. However, violation of certain ethical rules can have dire consequences, including discipline by the State Bar, disqualification by courts, sanctions, getting fired, losing the right to collect your fees, or being forced to disgorge fees already collected, to name a few. Dismissing the rules as mere hopeful statement without real consequences would be foolhardy these days.

Myth 4: If you follow the Rules of Professional Conduct, you cannot get into trouble. While lawyers can get into trouble by minimizing the reach and power of the Rules of Professional Conduct, it is equally dangerous for lawyers to believe that the Rules of Professional Conduct are the sole definition of a lawyer’s duties. It is incorrect to assume that if a particular action or procedure is not prohibited by the rules, it must be permitted. In fact, a lawyer can be disqualified based on a trial court’s inherent power to control the conduct of all persons connected with a judicial proceeding and the court’s own notions of ethical standards. The California Supreme Court, in an opinion directing that a law firm should be disqualified, explained: “The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar.”

Furthermore, a lawyer can be punished for violating a court order, failing to perform the duties set forth in Business and Professions Code Section 6068, or being convicted of a crime (whether misdemeanor or felony) involving moral turpitude. The crime does not even need to be connected to the practice of law, and moral turpitude is broadly defined as any act “contrary to honesty and good morals.” Therefore, in addition to whatever criminal penalties the lawyer may face, he or she can be disciplined by the State Bar for such non-law-related crimes as spousal abuse, income tax evasion, or drunk driving. And an acquittal at the lawyer’s criminal trial does not prevent the State Bar from imposing discipline.

Myth 5: If misconduct occurs outside California, you cannot be disciplined.

Members of the State Bar of California are subject to the Rules of Professional Conduct wherever they are practicing, even in another state. Rule 1-100(D)(9) of the Rules of Professional Conduct provides that the rules “shall govern the activities of members in and outside of this state,” unless lawyers are required by another jurisdiction to follow a different rule. California will punish ethical violations even if they occur in another state. In a recent case, a California lawyer moved to South Carolina where she practiced for five years without a South Carolina law license. When she moved back to California, the State Bar filed disciplinary charges and convicted her of the unautho- rized practice of law in another state.

Also, sanctions imposed by a court or disciplinary board in another state may subject a lawyer to discipline in California.

Myth 6: If you practice in federal court or before a federal agency, the Rules of Professional Conduct do not apply. The State Bar Act does not regulate practice in federal courts, which is governed by federal law and federal court rules. However, federal law does not preempt the authority of the State Bar to discipline attorneys practicing in federal court. Moreover, all federal district courts in California have incorporated the Rules of Professional Conduct and State Bar Act in their local rules.

Myth 7: You will never understand the ethics rules. Do all these ethical directives and proscriptions seem confusing? Take heart—there is plenty of guidance available on what to do and how to sort through the difficulties. In addition to Business and Professions Code Section 6068 and the Rules of Professional Conduct, a lawyer’s duties are set forth and discussed in advisory opinions issued by the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee and the State Bar’s Committee on Professional Responsibility and Conduct. The State Bar maintains an Ethics Hotline for confidential questions from attorneys, and COPRAC sponsors an annual ethics symposium and various ethics seminars at the State Bar’s annual meeting. And to keep abreast of recent developments, check out the ethics roundup article published every year in Los Angeles Lawyer.

8 CAL. R. CT. 95B(G); MINIMUM CONTINUING LEGAL EDUCATION RULES & REGULATIONS §2.1.1.
11 CAL. RULES OF PROF’L CONDUCT R. 3-110(A).
12 CAL. RULES OF PROF’L CONDUCT R. 3-110(B).
17 In re Scott, 52 Cal. 3d 968, 978 (1991).
20 BUS. & PROF. CODE §6049.1.
21 Paul E. Iacono Structural Eng’r, Inc. v. Humphrey, 722 F. 2d 435 (9th Cir. 1983).
22 Gadda v. Ashcroft, 377 F. 3d 934, 943 (9th Cir. 2004).
23 See, e.g., CENTRAL DISTRICT LOCAL R. 83-3.1.2.
24 The Ethics Hotline can be reached at (800) 238-4427.
As Benjamin Franklin wrote in Poor Richard’s Almanac, “You may delay, but Time will not.” Lawyers often write more and under greater time constraints than many journalists, novelists, and other professionals. They write under the pressure of relentless deadlines and the need to communicate successfully to the most demanding and impatient of all readers—judges and other lawyers. To survive, lawyers need a consistent, efficient plan for structuring the analysis or argument, and then drafting and editing. They need to understand writing as a staged process similar to building a house.

Legal writing is a practical tool dependent on major principles and minor rules. The principles, which must be embraced and followed in every memorandum or brief, can be reduced to four: constantly consider the reader, point first at every level, make the client’s story compelling, and combine the five types of law.

**Constantly consider the reader.** Your readers are busy judges, judges’ law clerks, and supervising attorneys in your firm. They want the goods: analysis and argument that meet their expectations for normal legal writing. Remember IRAC? Virtually every first-year law student learns the mantra of Issue, Rule, Application, and Conclusion because it teaches the normal syllogistic structure of legal analysis and argument. Since virtually all legal analyses and arguments can be structured with a syllogism, much legal writing follows this form. Using this form to deliver the goods up front, every part within the section—paragraph and sentence—also should make the point first. Law-trained readers expect point first at every level. This principle assures readers from the outset the memo or brief will be easy to parse and understand after the first reading.

**Point first at every level.** Effective legal writing is a “pointed text.” Begin the memorandum or brief with an issue statement, whether titled Introduction or Preliminary Statement. This section provides a succinct overview that sharply focuses the dispositive issues in the same order as the analysis or argument to come. The sections that follow then develop each major issue or contention.

Just as each major section of the analysis or argument delivers the goods up front, every part within the section—paragraph and sentence—also should make the point first. Law-trained readers expect point first at every level. This principle assures readers from the outset the memo or brief will be easy to parse and understand after the first reading.

**Make the client’s story compelling.** Law school is mostly about the law; law practice is mostly about the facts. Since the facts of each case are unique, tell your client’s story. Always include a Statement of Facts and, depending on the case, sometimes provide a Procedural History. Facts persuade and form the basis for effective storytelling. Cognitive psychologists have shown experimentally that most people do not think effectively in abstract general propositions. Rather, most people understand concepts best when they are expressed in the form of stories.

Few lawyers have ever been taught how to tell a compelling story; a few tips will make a considerable difference. First, find a theme, a proposition about the nature and meaning of what happened. Think of the theme in Shakespeare’s play, Macbeth: An ambitious general, pressured by his more ambitious wife, assassinates the king but wears the crown only briefly as he is haunted and cornered by his own violent death. Distill the theme of your client’s story, and build the story around it. Since the rules

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sciously and strategically will produce a persuasive, compelling drama rather than a mundane chronology. In effect, an artful Statement of Fact is a powerful argument because it moves readers emotionally as well as logically to see the case your client’s way.

**Combine the five types of law.** One difference between novices and experienced lawyers is the latter habitually combine two or more of the five types of law: text, intent, case precedent, equity, and public policy.7 The five types provide a checklist for lawyers who are drafting briefs. Analysis or argument based on text considers the plain meaning of the constitution, statute, or other legal document. Intent is based on the purpose of the text, the legislative intent, or, in a contract, the mutual intent of the parties. Case precedent, the most common type, provides the rule as illustrated, which is either analogized or distinguished. Equity is a broad type including tradition, morality, and fundamental fairness. Finally, public policy is based on a prediction about social effects, an analysis or argument about how the law will affect the public.

Each of the five types provides a major premise for a syllogistic analysis or argument. In the context of trial court litigation, the five types form a hierarchy, with text, intent, and case precedent controlling. Therefore, if the statutory text is directly on point or the leading case precedent applies, the trial court is bound to decide accordingly. Still, the best advocates combine arguments based on equity or public policy for maximum persuasive impact. Similarly, a comprehensive analysis includes two or more types of law.

“**If you don’t keep it awfully simple, it will become simply awful.**”6 The practical tools for clear and concise legal writing also rely on numerous rules, but most depend on the context. Some rules are points about style. Others pertain to grammar or punctuation. And some are techniques for formatting and organizing. Remembering a few general rules can invariably produce clear writing that is easy to read.

Certain grammar and syntax rules have particular importance for legal writing, but since even these few cannot be adequately taught in a short article, study one of the many excellent books on this subject.7 One of the most useful is Richard Wydick’s famous treatise, *Plain English for Lawyers*.8 A few years ago, a lawyer said that Wydick’s book got him through the bar exam. He had failed the essay part the first time, so during his next preparation, he worked through every exercise in *Plain English for Lawyers*. His writing skills made a quantum leap. Yours will, too.

**Keep sentences short.** Conciseness is an often achieved, hallmark of the best legal writing, and many judges wholeheartedly agree. Keep it short, not just sentences, which should average about 25 words, but also paragraphs, which should measure about half a page.

**Prefer the active voice.** Readers appreciate active voice sentences where they can quickly find the actor and the action without hacking through a thicket of clauses and qualifiers: “The court denied the motion” rather than “It was decided that the motion would not be granted.” “Counsel argued the gun was inadmissible” rather than “It was argued by counsel that the gun was inadmissible.” Remember the structure this way: Active people do things; passive people have things done to them.

Generally, avoid the passive voice because it is wordy and harder to read. However, sometimes the passive is useful, e.g., to hide the actor (“Mistakes were made”) or when the actor is irrelevant (“The Summons was served on defendant last Tuesday”). But prefer the active voice because “[t]he difference between an active verb style and a passive verb style—in clarity and vigor—is the difference between life and death for a writer.”9

**Use verbs, not nominalizations.** “Verbs are the most important of all your tools. They push the sentence forward and give it momentum.”10 In contrast, nominalizations—nouns created from verbs—bog down the sentence with abstractions. These words, all-too-familiar bureaucratic lard, are the words ending with -tion, -ancy, -ment, or -ence. Avoid them. Edit them out by finding the verbs they bury, and use those verbs to drive the sentence forward:

- **Conform, not be in conformity with,**
- **Discuss, not contain a discussion of,**
- **Amend, not make amendments to,**
- **Refer, not make reference to.**

Nominalizations create wordiness because they require articles and prepositions to prop them up. The strong verb not only moves the sentence but needs fewer words to do so.

**Avoid left-handed sentences.** Avoid lengthy phrases and clauses before the main subject and verb. The first few words in a sentence determine readability, but lengthy preambles provide no context and make the reader work too hard to find the main clause. Introduce with short phrases. Similarly, move long subordinate clauses out of the middle. Those qualifiers may be essential to precision but are better placed at the end. Keep the main subject and verb together.

**Omit needless words.** Draft early, and edit without mercy. Cut and condense by attacking flatulent words and phrases:
- **Unnecessary prepositions:** He edited the memo with regard to omitting needless words.
- **Unnecessary pronouns:** The judge said that it was an issue that counsel should address.
- ****

**Needless “to be” forms:** He is a man who believes that there is no single method for effective editing exists.

**Meaningless expressions:** It should be noted that there are two separate agreements.

Any survival guide is short on long term support. For that, you need not only one or more of the many fine books available on legal writing but also something more important— a personal commitment to improve your writing. With sustained effort over time, you can achieve consistent clarity and persuasive impact. Then you will not merely survive, you will succeed.

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2. In an objective memo or law, the facts should be stated neutrally. The goal is not persuasion but an emotionally detached analysis.
4. Nonfacts can have potent persuasive power. Consider the defense of a fraud case in which plaintiff’s reasonable reliance is in issue. The plaintiff’s nonactions show a lack of reasonable diligence. A catalog of nonfacts compels the inference that the plaintiff’s reliance was not reasonable.
10. Id. at 69.
By David A. Schnider

Getting the Most out of Support Staff

There is a story about an eager young lawyer, fresh out of law school, who launched his own practice. On his lawyer’s first day in his new office, he peered out the door and saw a prospective client approaching. Wanting to appear as a successful professional, he picked up the phone and pretended to be engaged in a serious conversation. As the stranger entered his office, the lawyer motioned for him to sit down while he said into the phone, “Mr. Smith, the insurance company agrees I have them over a barrel, and they will pay our demands in full. Glad I could be of service. Of course, I also would be happy to help you manage your sizable estate. My assistant will schedule some time for you next week.” Certain he had properly impressed the prospective client, the lawyer hung up the phone and proudly turned to the waiting visitor. “Pardon me,” said the visitor. “I am here to connect your phone line.”

Lawyers, especially new ones, tend to preen their feathers, even if they cannot fly. We all recall people in our law school classes who asked questions that were not really questions just so they could share their brilliant opinions on the case law. You see it in practice too. Lawyers often make threats that they know they cannot carry out just to try to scare the other side into backing down. Some might say that such strutting serves a legitimate purpose. That may be so when dealing with opposing parties, but it is a mistake to think that it will work when dealing with your office staff.

Some people find it hard to accept that despite years of higher education, they know less about the practice of law than an experienced legal secretary. Even a decade at Harvard cannot compare to a few years in the field.

Experienced staff can be an invaluable resource to a new lawyer. They may not know the elements required to establish specific jurisdiction, but they can tell you when your filing needs a blueback or whether a particular court rejects pleadings filed without pre-punched holes. Staff members are often familiar with complex legal procedures such as noticing a corporate deposition in state or federal court. They also may have useful information about the other people in your office, such as how they want their memoranda prepared or what resources are best for certain kinds of research. As a new attorney, you have the option to draw on that experience or spurn it.

My first year in practice, I recall dictating a document and handing the tape to my secretary, a 20-year veteran in the profession. After listening to it, she pointed out that the approach I was taking was unusual and that I might want to do it in a different way. I could have responded that I was the attorney and knew what I was doing. Instead, I swallowed my pride, thanked her for her help, and asked her to make the change. I probably learned more about the practice of law from her that year than I did in all my days in law school.

Like all people, staff members want to be treated with respect. If you treat them as part of your team, as people who work with you rather than for you, they are far more likely to share their knowledge and help you succeed. If treated as your inferiors, on the other hand, they may keep their advice to themselves and react with some satisfaction when you make a mistake. Of course, that does not mean you should stand back and let your staff run the show. As the attorney, you—not your staff—are ultimately responsible for the work product that goes out the door. But in performing your supervisory role, you will have to decide whether to view your staff as valuable assistants or as merely the hired help.

Know what your staff can and cannot do for you. My first secretary took advantage of my naiveté and let me do most of my clerical work myself. Months later, I was reassigned to the veteran secretary, who caught me making copies of my letters and sending them out. When she asked who made my “chron” copies (a separate file of all correspondence an attorney sends out, in chronological order), I inquired, “What is a chron copy?” She disapprovingly snatched the documents from my hand and sent me to my office.

Staff members’ capabilities vary from person to person and office to office. Generally speaking, secretaries or legal assistants can help you make copies, find documents, create templates, prepare and file pleadings, schedule court reporters, arrange payment to vendors, and handle other nonlegal tasks incidental to the practice. Some also may be able to prepare basic pleadings or documents, communicate with clients, and even help identify the appropriate legal procedures to use in certain situations. Paralegals can be invaluable in reviewing and arranging documents, preparing witness and exhibit lists, summarizing depositions, and preparing basic filings. They also may be able to assist with legal research or other more complicated tasks. Some firms have librarians, litigation support staff, accounting and billing departments, marketing departments, and others who provide various support services. When in doubt, inquire about each person’s particular skills so that you engage them in appropriate tasks that maximize their utility.

It may sound obvious, but the key to effective interaction with staff members is communication. To get the most from your staff, talk...
Building a Profitable Practice with an LRIS

While there are many good reasons for any lawyer to belong to a lawyer referral and information service (LRIS), the one that will most likely attract the attention of young lawyers is the most basic—money. Many lawyers mistakenly believe that an LRIS is legal aid with a longer name. In reality the target market for all but a few of the 69 State Bar-certified LRIS programs in California (and hundreds more throughout the nation) is the middle-income legal consumer. While the economically disadvantaged arguably have social service agencies such as Legal Aid to turn to, and the wealthy likely know an attorney from whom they can seek a referral, the vast majority of the general public have no such resources. For this group, rather than relying upon a photograph in a Yellow Pages ad or a television spot, an LRIS provides a reliable means through which individuals can obtain an experienced attorney in their area of need. LRISs throughout the country generate millions of dollars in fees for their attorney panel members. In 2005 alone, the Los Angeles County Bar Association’s LRIS referred cases to its panel members that generated more than $9 million in fees. California was one of the first states to implement a formal statutory structure for the operation of LRIS. This regulatory scheme was developed in response to the appearance of sham referral services whose sole goal was to obtain more favorable placement in local Yellow Pages directories by casting themselves as legitimate referral services. Besides enhancing the public’s access to legal services by formalizing the mechanism by which a person can be referred to a qualified lawyer, this framework has also ensured that any lawyer who wishes to participate in a certified LRIS will be operating on a level playing field with all other lawyers in that service.

Before joining an LRIS be sure to conduct due diligence

Experience requirements should not deter an attorney from joining an LRIS

An LRIS may bring the best return on a new attorney’s marketing dollars

LRIS membership has, quite simply, the best potential return on investment of anything a young lawyer is likely to invest in as part of building a practice. For only a modest out-of-pocket fee ($150 per year in the case of the LACBA LRIS), an LRIS panel attorney receives the benefit of the LRIS’s much larger marketing budget. In addition, in the case of a bar-sponsored LRIS, panel members get the benefit of not only the advertising dollars spent by the LRIS itself (generally used for a prominent Yellow Pages ad, Web site announcements or banners, and other more targeted outreach efforts), but also the money spent by the sponsoring bar association to promote itself and its programs, including the LRIS.

Sheldon J. Warren, a civil trial attorney in Long Beach, is former chair of the Los Angeles County Bar Association LRIS Advisory Committee and former member of the ABA Standing Committee on Lawyer Referral and Information Service.
Of more immediate benefit to attorneys is the fact that they will receive referrals of potential clients that have been pre-screened by LRIS counselors to ensure that the caller has a legal problem appropriate for referral and the wherewithal to pay the attorney’s fees. Does every referral a lawyer receives from an LRIS become a fee-paying client? Of course not. However, having been pre-screened, LRIS referrals have a far greater likelihood of becoming fee-paying clients than do calls generated by an expensive ad in the Yellow Pages or local newspaper.

There are a number of things lawyers should do to determine whether a particular LRIS is right for them. First, confirm the LRIS is certified. Only certified LRISs may operate in California and, more important, lawyers are prohibited from accepting referrals from a noncertified service.3

Next, avoid an LRIS that promises that you will receive all of the referrals from a specific geographical area (e.g., a particular zip code) or, alternatively, that you will receive a guaranteed number of retained referrals in any given period. LRISs in California are prohibited from making all referrals from a specific geographical area to any single lawyer or law firm.4 Rather, referrals must be made on a strictly rotational basis, which ensures that referrals are distributed to all panel members in a fair manner.5

Then, find out what percentage of callers to the LRIS are actually referred to that service’s panel attorneys and, further, what is done with callers who are not referred. The “information” component of legitimate LRISs in California is designed to satisfy the requirement that they “provide general, legal and dispute resolution information needed by the public.”6 Services that are actively prescreening calls before referring callers to a lawyer should be providing information on alternative resources (such as the Social Security Administration or Legal Aid) to individuals who really do not have a problem that requires legal representation or simply are not going to be able to afford representation.

In evaluating an LRIS, a lawyer should also determine what experience requirements the LRIS has established for its various panels. All LRISs in California must maintain “subject matter panels.”7 These panels are established in one or more areas of the law that require the lawyer to meet certain objective experience criteria, such as a specific number of trials in the previous five years. The goal of the subject matter panels is to ensure that an LRIS is making referrals that are actually responsive to individual client needs.8

However, young lawyers should not be discouraged from joining an LRIS simply because they are concerned about satisfying these experience requirements. LRISs in California are also allowed to, and some do, maintain, in addition to their subject matter panels, general panels9 that do not have the same strict experience requirements that the subject matter panels do. These panels allow younger lawyers to gain the necessary experience to broaden their participation in the various LRIS panels. (While LACBA’s LRIS does not maintain general panels, several of its subject matter panels include subpanels with experience requirements that may be met by young lawyers.) In addition, many LRISs also allow attorney applicants to request an exemption from satisfying the experience requirements of a particular subject matter panel if they can establish by alternative means that they have the requisite experience and knowledge to handle such matters. Finally, some LRISs maintain attorney-to-attorney or apprenticeship programs, which provide a means by which young lawyers can gain experience to qualify for subject matter panel membership.10

A lawyer should also determine whether the LRIS has counselors capable of responding to inquiries from non-English speaking callers. Obviously, this broadens the pool of potential clients that the LRIS can then refer to its panel members. (Similarly, panel members increase the likelihood of receiving LRIS referrals if they are able to work with non-English speaking clients.) Finally, LRISs in California are required to randomly sample 10 percent of all the potential clients they refer to their panel attorneys to determine the client’s satisfaction with the attorney’s handling of the case and whether the client believed the fees charged were reasonable.11 The knowledge that this sampling is being done should encourage young lawyers to accept only those cases they believe they have the expertise to handle properly and, further, to regularly communicate with their clients as to the progress of any particular matter. (Interestingly, the sampling undertaken by most services rarely results in adverse feedback. Rather, the responses of most LRIS-referred clients are statements of thanks and appreciation for the job done by the LRIS panel attorney.)

In sum, with a little time, only modest effort, and a relatively small amount of money, LRIS membership can become an integral component in the development of a young lawyer’s practice. Information about LACBA’s LRIS can be found at www.smartlaw.org. Additional information regarding LRIS participation can be found at the State Bar’s Web site (www.calbar.org) and the Web site for the American Bar Association (www.abanet.org).
Establishing Your Own Practice

By Laine T. Wagenseller

If you watch movies, you undoubtedly already have your mind set on establishing your own law firm. You will drive a Porsche (A Civil Action) and litigate on behalf of the good guys and against the bad guys (Erin Brockovich, Philadelphia). So how do you live this glamorous life? To create a successful solo practice you need to follow a few simple rules.

Have faith in yourself. A quick review of articles and books on starting your own practice will likely sap your confidence and fill you with doubt, because many authors begin by outlining the risks of failure and estimating a huge start-up budget. Your practice will undoubtedly be busy on some days but slow on others. Do not get bogged down worrying where your next payment is coming from. Believe that it will come and, in the meantime, get to work.

Find mentors. You do not need to reinvent the wheel. Learn from the mistakes of others. Seek mentors who can serve as a resource as you establish your practice and deal with day-to-day issues that arise. Read books and articles on well-known lawyers to learn what makes them successful. Call sole practitioners you know and ask them to cof- fer their advice.


Avoid overhead. Focus on building income rather than building expenses. Many attorneys are working from home. You can sign up for a corporate identity package with an executive suite. These packages give you an office address and telephone number, the use of conference rooms if you need to meet with clients, and various other office amenities. If you are looking for an office, consider a short-term agreement rather than a long-term lease. Do not forget everything that you need to make an office usable: telephones, a copy machine, computers, printers, a postage machine, a Westlaw or Lexis-Nexis subscription, and office supplies. Subleasing an office from a law firm or renting from an executive suite will help you keep costs down, since you will have the use of a preexisting telephone system, copier, and the like. Consider being counsel to a firm that can refer hourly contract work to you while you build your practice. Consider doing contract work for other attorneys to bring in income. Unless you are independently wealthy, remember to budget in your day-to-day living expenses for the first few months.

Write your goals. It is said that most people spend more time planning a dinner party than they spend planning their life. It is easy to get distracted by the emergency of the day. Set aside time to consider the big picture: What type of practice do you want to build? If asked, have you thought through a 50-word description of your practice that you can present? Develop a marketing plan to reach your potential clients. Spend a day away from everything and everyone, and use the time to focus on your plan. Turn off your phone and the radio. Take a blank pad of paper and brainstorm uninterrupted.

Work efficiently. Once you have set your goals, start each day with a list of what it is that you want to accomplish that day. Stick to the list and check off each task as you complete it. Do not start each day reacting to the latest e-mail. In fact, do not even look at your e-mail during the first few hours of the day. Do not let others determine what you will work on each day. Turn off the automatic notification feature on your e-mail application and only check your messages between other tasks.

Leverage yourself. Recognize that your highest-value activity is billable hours. As soon as possible, hire others (even on a part-time or assignment basis) to type, copy, file, bill, and take care of other nonbillable tasks. Internet services allow you to fax a document and receive back a typed Word document by e-mail quickly and without the...
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**Solo or partnership?** While it is easy to enter into a partnership, it can be extremely difficult to get out of one. Before entering into a partnership, make sure that you have a frank discussion with your potential partner about your goals, your business, your work style, your vision for the future, and what you hope to achieve. How will you split the costs and income? If you decide to enter into a partnership, make sure that you have a well-thought-out partnership agreement that sets forth a dispute resolution mechanism in the event that the relationship sours. Think through the issues that may cause tension in the future and decide on how to resolve these disputes beforehand.

**Learn the 15 percent rule.** The 15 percent rule states that 15 percent of your clients are not worth the trouble and aggravation. When you are just starting out, you do not want to turn clients away, but some should be turned away. There will be clients who call to complain every 20 minutes but fall behind on their bills. They will challenge every entry on your bill. They are more likely to sue you for malpractice, especially when you try to get them to pay their bills. Have the confidence to “unhire” these clients. In the same vein, insist on a retainer large enough to commit your client. If the client cannot pay a retainer before hiring you, what makes you think he or she will be able to pay after you have completed the first month’s worth of work? When clients begin to fall behind on the bill, cut them off sooner rather than later. A deadbeat client will have more incentive to fight or sue if he or she owes $40,000 rather than $4,000. It is advisable to offer to discount a late bill if the client will pay immediately.

**Sell value.** Clients typically seek a solution to their problem. Price is typically not their primary motivating factor in hiring a lawyer. Instead, they want peace of mind from knowing that a qualified lawyer is going to resolve their dispute or structure their transaction. Be confident of the rate you quote your client and do not discount it as a matter of course. Build a reputation for the service you provide and not for the “blue light specials” that you offer.

**Take action!** There is no substitute for just doing it. As lawyers we tend to overanalyze everything. Our clients are often those who jump right in and make things happen. Be willing to take risks and, again, have faith that you will succeed.

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**By Thomas L. Browne and Thomas P. Sukowicz**

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**The Importance of Professional Liability Insurance**

Until the last decades of the twentieth century, clients who wanted to sue their lawyer for malpractice might have had difficulty finding counsel willing to bring such a suit. Sadly, this is not the case today.

In 1973, malpractice claims were filed against 5 percent of attorneys nationwide.² Statistically, by 1986, a new lawyer could expect to be the subject of three claims before finishing a legal career.² Considering the significant increase in legal malpractice claims over the years, it is crucial that attorneys maintain appropriate professional liability insurance policies.

**Know your coverage.** Understanding the need for insurance is only the first step. Knowing what your current policy covers is an important next step. Most lawyers have not read their professional malpractice insurance policies. Some have no idea of the nature and extent of their coverage or only a generalized understanding of what their policies do and do not cover.

When evaluating a professional liability policy, the first concern should be whether the firm has coverage for the persons and the risks that need coverage. In particular, you need to know who are the “insureds” as defined by your policy. If there are lawyers who are “of counsel” to your firm, or lawyers with whom you have referral relationships, ascertain whether they are covered under your policy. Since you may face claims arising out of their conduct, these questions are not merely academic.

Likewise, know what conduct is covered or, more accurately, what conduct is excluded from coverage. Policy exclusions for highly regulated industries are common. If your policy excludes coverage for any practice area or legal services that may expose you to the risk of a claim, you should seek an appropriate endorsement providing the necessary coverage.

**What coverage does your firm need?** Your professional liability insurance policy is your number one line of defense. It is critical that it does what you want and need it to do. The standard claims-made legal malpractice policy forms cover a wide spectrum of circumstances, errors, and omissions. These forms are adequate for most lawyers. But all lawyer practices are not the same, and the basic risk factors of each lawyer and each firm are different. Your firm should consider several factors when reviewing its malpractice insurance options.

The first consideration is the firm’s realistic maximum-dollar exposure. The potential
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civil liability exposure on any legal representation always is at least as large as the dollar value of the matter involved. For example, intellectual property lawyers may not draw a large number of claims compared to other practice areas, but the claims that are made usually involve very large sums of money.

The second consideration is the nature of the firm’s practice. Some areas of law are far riskier than others. For example, plaintiff’s litigation, domestic relations, and estate planning tend to draw large numbers of claims compared with other areas of practice. On the other hand, securities, banking, and corporate practices result in fewer claims, but those claims tend to be severe. If your practice is primarily litigation-based, you may want coverage for Rule 11-type claims. Conversely, if you never step foot in a courthouse, such coverage is superfluous. If your practice carries with it a substantial risk of bar grievances and disciplinary complaints, such as personal injury and family law practices, you may want to consider coverage offered by some insurers for the cost of defending these proceedings.

Another factor is the firm’s location. The citizens of some geographic locations are far more litigious than others and thus are more likely to file suit for professional malpractice. Moreover, juries in different counties will award significantly different damages for the same injury. Lawyers tend to know what counties in their states pose increased risk. If your firm practices in one of those counties, you should take that into consideration when determining how much coverage you need.

The fourth consideration is the nature and extent of the risk management policies and procedures that the firm has implemented. Many legal malpractice claims are completely avoidable. If a firm has reliable internal controls, it is far less likely to be sued than a firm that does not.

The final factor is the number of lawyers in the firm. Common sense dictates that more lawyers mean more chances for a claim of legal malpractice. Accordingly, a greater number of lawyers usually requires larger aggregate limits.

Kinds of policies. Just as no two firms are alike, all lawyers’ professional liability policies are not alike. Aside from having different coverages, there are different kinds of policies. Policies written on an “occurrence” basis may provide insurance for a claim that is made in the future. “Claims-made” policies offer coverage for claims made during the policy period even though the error or omission occurred prior to the policy period. An attorney also should consider policies that are excess or umbrella to the primary coverages since they form part of the basic insurance protection.

Insuring the cost of defense. Law firms need professional liability insurance for two purposes. One is indemnity. The other is to finance the cost of the legal defense of the claim, a valuable benefit under a professional liability policy.

Some professional liability policies reduce aggregate limits by the cost of defense. Legal malpractice actions involve substantial discovery. Experts are numerous and expensive. In a case of significant legal and factual complexity, even a $500,000 policy may be insufficient to provide a complete defense, particularly if the firm’s desire is vindication at trial. The bottom line for a firm that has a declining limits policy is that it may have less coverage than it thinks.

Risk management program. A firm with a strong risk management program is less likely to be sued for malpractice. The firm should have the proper systems and procedures in place to address conflicts of interest, docket and calendar, handling files and communications with clients, and other issues. In addition, a critical component of an effective risk management program should be obtaining and keeping the right insurance coverage.

Regulation of professional liability insurance. The trend in recent years is that lawyers are being required to disclose to clients and potential clients whether they have malpractice insurance. In California, the State Bar is considering two proposed insurance disclosure rules. One would require direct disclosure of the absence of insurance to the client. The other would require attorneys to certify to the State Bar whether they are covered by insurance; the State Bar would make publicly available the identity of individual attorneys who inform the State Bar they are not insured.

While there is no one correct answer for how much professional liability insurance a firm should carry, one never hears any lawyer say, “I wish I had less coverage.”

By Jennifer Kowal

The Benefits of a Tax Controversy Practice

Steve Renshaw needed a change. Although he had excelled as a litigator while working as an assistant U.S. attorney and as a partner in a boutique litigation firm, Renshaw wanted to move away from the discovery disputes and gamesmanship of general litigation. So, in 2003, Renshaw began the Tax LL.M. program at Loyola Law School, attending courses part-time in the evening until he completed the program and earned his LL.M. degree last December. Renshaw says he is happy he invested the time in the program—because he really enjoys tax practice and because he met his wife Christine, a fellow Tax LL.M. student, in an international tax class. Today, Renshaw is a partner with Nordman, Corman, Hair & Compton in Ventura, handling tax and trust and estate controversies.

“Looking for an intellectual challenge that would also still provide me with the opportunity to utilize my courtroom skills, I decided to get my LL.M. in tax, thinking that if nothing else, I could spend less time fighting over questionable discovery issues and more time actually advancing a client’s interests. What I found was that the LL.M. opened up tremendous avenues for me, including the opportunity to do not only estate planning but to litigate tax and trust and probate issues with a full understanding of the issues presented,” Renshaw explains.

In tax controversy practices, tax lawyers represent their clients in disputes with the Internal Revenue Service and state taxing authorities. Clients generally turn to tax lawyers in high-stakes or complicated audits, while leaving more straightforward audits to their accountants. Representation often begins during the audit stage and may continue with an appeal of the audit result through the IRS administrative appeals process (or its state equivalent). While some cases are fully litigated, most are resolved at the audit and appeals stages. In comparison to general litigation, tax controversies involve significantly less discovery and motions work.

Thanks to recent increases in IRS enforcement efforts, most tax controversy attorneys agree that practice is booming. During the past three years, the IRS and U.S. Department of Justice have significantly increased their enforcement efforts against the participants in, and promoters of, abusive tax shelters. “Due to the recent emphasis by the IRS on enforcement, the tax controversy business is booming and there are not enough qualified tax controversy lawyers to go around,” explains Edward M. Robbins, a partner at Hochman, Salkin, Rettig, Toscher & Perez, P.C. in Beverly Hills.

Furthermore, in 2003, the IRS entered into an agreement to share information on abusive tax avoidance transactions with taxing authorities from 40 states. Also in 2003, California’s Franchise Tax Board launched a special unit to target abusive tax shelters. According to a recent Sacramento Bee article, the special unit has identified $1 billion worth of suspect transactions to audit. In addition to the tax shelter controversy work, increased enforcement in the general income and estate tax areas has created great opportunities for business among those pursuing tax controversy work.

Although the practice is busy, many tax controversy lawyers say it offers a more pleasant lifestyle than traditional litigation. Steven Toscher, also a partner at Hochman, Salkin, Rettig, Toscher & Perez, P.C., appreciates the collegiality among tax practitioners. “One of the biggest drawbacks in civil litigation is the growing lack of civility among counsel. In the area of tax litigation and controversy, all lawyers, both government counsel and the private bar, are held to a higher standard, and we are all the better for it,” Toscher explains. Toscher also enjoys the continued intellectual challenge offered by the complexity of tax controversy practice. “Tax litigation requires an understanding of the Internal Revenue Code you can only get through years of experience, or through a concentrated course of study such as a Tax LL.M. program,” Toscher says.

Ellen Aprill, Associate Dean for Academic Programs and the former director of the Tax LL.M. program at Loyola Law School, has found that most students who choose to go into tax controversy work after completing the Tax LL.M. program truly enjoy the work. “Tax controversy work seems to offer intellectual challenge, the chance to make creative arguments while thinking on your feet, collegiality even among opponents, and the chance to have a busy yet manageable practice. It’s a terrific niche practice for those who have strong litigation skills but don’t want a traditional litigation practice,” Aprill says. In additional to students studying for the LL.M. degree, Loyola also welcomes students who are interested in tax controversy practice but do not have the time to complete the full LL.M. program. “Our full-time and adjunct tax faculty enjoy using their experience and contacts in the tax bar to help students design a custom package of classes that will best prepare them for the type of practice that they would like to pursue,” Aprill explains.

Jason Trenton, an associate at McDermott Will & Emery LLP and a graduate of Loyola’s Tax LL.M. program, found that his comprehensive study of tax law during the
The program was like a rigorous athletic training for the mind. It was hard work, and at times I both loved and hated it. But each class, each paper, each exam left me feeling like my mind worked better and I could take on new challenges. There is no doubt it made me a better lawyer and gave me a skill set I could not have acquired any other way.

-Terri Wagner Cammarano
Waller, Lansden, Dortch & Davis
LLM ‘03
LL.M. program makes him much more effective. Trenton practices in the firm’s private client group, where he does tax planning as well as estate tax controversy work. “Tax controversy is really the best of both worlds because you get to use your tax brain and your litigation brawn,” says Trenton. “Since tax issues are often complex, an LL.M. in tax gives you a leg up on nearly everyone else in the room. I found that the solid background in tax that I gained from the LL.M. makes it much easier for me to understand how the tax and nontax pieces fit together and to resolve controversies in ways that satisfy both my clients and the other side.”

Jeff DeFrancisco, of Callington, Merritt, De Francisco & Real-Salas in Pasadena, an estate planning firm that handles estate tax controversies, agrees with Trenton that good tax lawyers play a big role in shaping settlements that the IRS and clients can both agree to. De Francisco explained that because an audit of an estate tax return often involves many different aspects of the income and the estate and gift taxes, handling the audits requires a thorough grounding in the entire tax law area. Francisco also believes that his LL.M. from Loyola helps him to understand the big picture so he can explain the issues to the IRS auditors in a persuasive way. DeFrancisco recommends tax controversy work for lawyers who enjoy the challenge of more traditional litigation but want to avoid its high stress.

Working for the IRS or a state taxing authority such as the California Franchise Tax Board offers lawyers interested in tax controversy work another perspective. Recruiting materials for the IRS Office of Chief Counsel note the many highly respected tax attorneys who have spent a part of their careers in the Chief Counsel’s Office and say how much they value the training they received and contacts they made there. Robert Berman, who received his Tax LL.M. from Loyola in 2005 and had been a sole practitioner for many years prior to joining the IRS Office of Chief Counsel, thinks the IRS is a great place to begin his career as a tax lawyer. “By transitioning to the Office of Chief Counsel, I gave up the freedom of my own practice, but gained immense security, great benefits, and a good and stable income. In addition, there are training and resources available to me that I could only dream of as a sole practitioner. The work is challenging, but there is plenty of time to research and learn and yet go home at the end of the day and have a life outside of work,” Berman says.

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That said, let's consider real vacations, the one-, two-, three-weekers where you forget what's on calendar, much less worry about the possibility of handling a CourtCall from a satellite phone on the back of a mule trudging around the side of a volcano. Here's the rationale for actually asking for one.

Every law firm knows that headhunters aggressively recruit associates and that associates constantly assess their options. Law firms only care about retaining their valued associates; if your law firm thinks you're valuable, then it wants to keep you. And it will pay a reasonable price to do so in addition to your salary.

Law firms value talent. Talented young attorneys in law firms tend to be busy and in demand while their less talented office-mates tend to be hungry for hours. The power of talented young attorneys is that law firms come to depend on those associates' talents. Power then seeps ever-so-slightly into the being of the talented associates. (The greater power always rests with the firm, of course, but it is the associates' low self-esteem that deludes them into thinking they hold no power at all.) Talent does equal power, although talent does not equal "equal power."

Talent without hard work, however, will not earn you a vacation. No amount of talent makes up for laziness, and if you think a law firm equates a vacation with laziness, you're right. But a law firm only equates a vacation with laziness when the partnership and senior counsel have already labeled the vacationing associate "lazy" or "unmotivated." In that instance, everything the associate does is lazy.

By contrast, hard work in a law firm is essential and can make up for a deficit in talent. A hardworking associate on a vacation is enjoying a well-deserved break. So bill a solid amount of hours every year. A solid amount likely means the law firm's stated annual minimum billable hours plus 100.

After talent and hard work is demonstrated, you must behave reasonably when seeking a vacation. Reasonableness means that associates only request vacation time when a vacation is earned, that they give plenty of advance notice, and that they make sure they've got things covered in their absence.

While there are no concrete rules, following some general principles will prevent partners from resenting your vacation and lowering your status. Do not take a real vacation any earlier than one year after passing the bar exam. Do not take a real vacation more often than every 14 to 18 months. This interval between vacations creates the illusion among the partnership and senior counsel that the associate is dedicated to practicing law above snowboarding, scuba diving, or shopping a screenplay at the Cannes Film Festival. Engage in these other activities on long weekends, and don't forget the sunscreen.

With the exception of family obligations, the sacrosanct status of which is unquestionable in American society, never, ever let the partners or the senior counsel conclude that your vacation involves some priority greater than the firm. You are taking your vacation to restore to your life those qualities that drive you daily (except for those days when you are taking long weekends) to be the talented, hardworking attorney that you are.

Win lawsuits. Don't cause them.

Recent events have taught us that today, more than ever, you need to protect your client data from catastrophic loss. With Cbeyond’s Secure Backup & Fileshare service, you can easily and automatically backup important files to a secure off-site location for restoration in the event of loss. Discover why thousands of legal professionals have chosen Cbeyond’s Cisco powered network – and how you can get all of your communications services through one provider and on one bill.

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Reasonableness also means forewarning. You must alert all partners and senior counsel that you intend to take vacation on a certain date at least four to six months before you go. This applies to long weekends and real vacations. Do it again one month before you go. Do it in person. Do it by e-mail. Tell their assistants too. Arrange for your voice mail to be reviewed and handled. Have a colleague check your in-boxes. If you foresee events occurring in your absence, let the cocounsel and the client know who will handle matters in your absence. Some people choose to leave an outgoing voice mail message or autoreply e-mail explaining that they are on vacation and who may help during their absence. In other words, do everything necessary to avoid infuriating clients, partners, and senior counsel who cannot reach you and have no one else to contact.

You must prepare a vacation memo, and you must trust your secretary or your assistant to support you. List every matter you are working on and person to contact if something comes up. Distribute your memo to everybody with whom you work. Post it in your office. If you hate your secretary, your secretary probably hates you too, so reconcile your differences before you leave on vacation.

But how do you know that your firm recognizes your talent and hard work and that you have earned a vacation? If you’re unsure after a few years on the job whether you are recognized as talented and hardworking, then either you are not recognized as talented and hardworking or your self-esteem is so low that you are incapable of reading the obvious signs. The failure to figure this out is a clue in itself. Part of your job is to figure out the subtleties of professional success in a hierarchical environment. It’s your job to realize that you are in the open ocean of professional predation and survival. Your job is to demonstrate that you have an immense talent and a work ethic so great that the firm must indulge you a reasonable amount of time off for a vacation or lose you to a competitor.

If all else fails, ask. Law firms hate to tell an associate, “You stink.” They prefer to isolate the associate, starve the associate for hours, then ding the associate for not being productive. Do not indulge your law firm its cowardice. Only you will suffer.

Vacation time is when the important economy of favors kicks in. If you are going to collect anything during your tenure in a law firm, collect favors. By the time you are a mid-level associate, collected favors will allow you to ask your colleagues to cover you while you take a real vacation. Let’s say, for example, that you don’t observe certain religious holidays. Work for those who do during key holiday periods. You don’t have kids? Cover for parents so that they can spend time with their kids.

Last thing: If you are talented and hardworking and reasonable, but your law firm gives you grief about taking vacation, quit.

Don’t let the pay, prestige, and seductive swank of a law firm devour your private, part-time passions. There are plenty of law firms that genuinely want their talented hardworking associates to enjoy some time off once in a while. Any law firm worth working for will value satisfied associates that are graciously aware of their own worth. After all, if you can’t wisely advocate for your own rights, how well will you advocate for the rights of the firm’s clients?
Demystifying Filing

Rules differ for filing in state and federal courts
District courts also use local rules
Remember these Web sites: www.cacd.uscourts.gov and www.lasuperiorcourt.org

By Debora Sanfelippo

Emerged. Notice of Discrepancy. Bounced. These are words you do not want to hear when filing a document, especially when you rushed to meet a deadline, and your document arrived at court with only moments to spare. Let’s face it: You do not want to hear these words even when you are ahead of your deadline. So what exactly needs to happen to ensure smooth sailing? In most instances, your capable, knowledgeable, experienced assistant will handle everything for you. When that is not possible, and you must go it alone, here are some guidelines to follow to eliminate the mystery.

Let’s start with preparing your documents to be copied. If you have exhibits, they should be consecutively paginated. This is required in federal court and is a good practice in state court. If your exhibits are attached to your pleading or declaration, and it is 9 pages long, then number your exhibits beginning with 10. Separate each exhibit with appropriate exhibit dividers.

Next up, the proof of service. Except for an initial filing such as a complaint or petition, your document is not complete without one. It belongs at the end of the document, where the clerk will look for it, especially in federal court. Beyond that, you will need copies for everybody on the service list, one for your file, and perhaps one to send to your client. Always provide an extra copy of each caption page to be conformed and returned to you; there is no need to weigh down a messenger with a complete copy to lug to the courthouse and then back to you when only the first page will be stamped.

For a document containing an order that you request the judge to sign, you must provide enough additional copies and stamped, addressed envelopes for the clerk to mail to each party on the service list once the order has been signed. Don’t forget one addressed to yourself, or you will never see it again. This is particularly true in state court. However, with the federal court’s optical scanning program, in which attorneys elect to receive notice by e-mail or facsimile, failure to provide stamped, addressed envelopes with extra copies of proposed orders does not result in refusal by the clerk’s office to accept the document for filing.

Important note: The two-hole punch is your friend. You cannot get your document filed without it. All courts require that you punch two holes in the top of your document, and if you check closely, you will see that the rules are very specific about the diameter of the holes and how far apart they should be. Clerks have not been known to pull out a ruler and check these things, but they do notice if the holes are not there at all. Basically, set your two-hole punch at the 8.5” paper mark, and you will be safe.

Documents also must be bound in some way. Manuscript covers, affectionately known as bluebacks, are required in the Central District of U.S. District Court, although they are not required to be blue. They are not required in state court. Most documents presented for filing can be stapled, and nothing fancy is required. A staple

Debora Sanfelippo is a litigation secretary at the law firm of Sedgwick, Detert, Moran & Arnold LLP with 33 years of experience in the profession.
in the top left-hand corner will do. But if you like security, you can staple once in the middle of the two holes you just punched, once to the left of the left hole and one last time to the right of the right hole. Of course, if your document is just too big to accommodate staples, an ACCO fastener base with a compressor works well. The document must be bound in some way, however, or it simply will not be accepted by the court. If you are filing in district court, you will also need to place labels on the bottom right portion of each blueback where it extends beyond the document. Those labels should contain the title of the document, abbreviated if necessary. The bottom left corner of each blueback should be stamped “original,” “copy,” or “courtesy copy” as appropriate.

Next up, the “buck slip” or instruction sheet for your attorney service. Fill this out clearly, and be as specific as you can. The messenger does not like mysteries and generally prefers not to guess what you want done with the document. For example, if you are filing an original and one copy of a motion in district court and then need to provide a conformed courtesy copy to the judge’s chambers at another location, indicate this on the buck slip.

What about filing fees? In federal court, you will only need to handle a filing fee for the initial pleading, be it the complaint, petition, or a notice of removal. State court is another matter. There is an entire fee schedule that needs to be consulted as fees are charged for just about everything, even a stipulation and proposed order to continue a stay. There is an entire fee schedule that needs to be consulted as fees are charged for just about everything, even a stipulation and proposed order to continue a stay. State courts or U.S. District Court, Central District of California Local Rule 79-5.1. For attorneys, the court has a number of options, including a stipulation and order to continue a stay, which is often accompanied by leave to amend the complaint, your client most likely will eventually have to file an answer one way or another. The answer is one of the first opportunities to set forth your client’s position. In the answer, the defendant admits or denies all material allegations in the complaint and sets forth affirmative defenses to the plaintiff’s claims. The answer, along with the complaint and any counter- or cross-claims, identifies the issues that will be tried in the case.

While there is room for stylistic differences and personal preferences in drafting answers, certain rules govern much of the content and structure. Here are some of the highlights:

**Timing.** In state court, an answer must be filed and served within 30 days of service of the complaint. In federal court, an answer must be filed and served within 20 days of service of the complaint. In both, the parties can stipulate to extend the time to answer the complaint without court approval—up to 30 days in federal court and 15 days in state court. Lengthier extensions require court approval.

If you choose initially to attack the complaint by filing a demurrer or a motion to dismiss, your answer will not be due, if all, until your motion or demurrer is resolved by the court. In state court, the court will generally set a pleading schedule if a demurrer is overruled. In federal court, if the court denies your motion to dismiss, your answer will be due within 10 days after notice of the denial unless the court rules otherwise. A verification. A complaint is verified if it contains a statement by the plaintiff under penalty of perjury that the allegations set forth therein are “true of his own knowledge, except as to the matters which are therein stated on his or her information or belief, and as to those matters that he or she believes it to be true.” Although verification is required in certain cases (e.g., actions to quiet title and petitions for writ of mandate), most complaints are not verified.

Even when not required, a state court plaintiff may choose to verify the complaint because if the complaint is verified, the answer must specifically admit or deny every material allegation in the complaint individually and, with a few exceptions, must itself

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1 These guidelines assume you are filing in Los Angeles County courts or U.S. District Court, Central District of California. They do not cover filing documents under seal. Those requirements are set forth in Central District of California Local Rule 79-5.1.
2 C.D. Cal. Local R. 11-5.2.
3 Cal. R. of Ct. 311(e); C.D. Cal. Local R. 11-5.3.
4 C.D. Cal. Local R. 11-5.2.
5 Code Civ. Proc. §1005(c).
7 To sign up for electronic notification, go to the court’s Web site at http://www.cacd.uscourts.gov, click on Optical Scanning Program, and follow the instructions.
8 Cal. R. of Ct. 201(e)(4); C.D. Cal. Local R. 11-3.5.
9 C.D. Cal. Local R. 11-3.5.
10 See http://www.lasuperiorcourt.org/fees.

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**By Lauren Sudar**

**Answers about Answering a Complaint**

Your client is served with a complaint. Your client denies all liability and contends that the plaintiff, in fact, owes the client money. Before taking action against the plaintiff, the client must respond to the complaint either by filing a demurrer or a motion to dismiss or by immediately filing an answer. Of course, if the motion is denied or the demurrer is overruled, your client will be required to answer. And because an order granting a motion to dismiss or sustaining a demurrer is often accompanied by leave to amend the complaint, your client most likely will eventually have to file an answer one way or another. The answer is one of the first opportunities to set forth your client’s position. In the answer, the defendant admits or denies all material allegations in the complaint and sets forth affirmative defenses to the plaintiff’s claims. The answer, along with the complaint and any counter- or cross-claims, identifies the issues that will be tried in the case.

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Lauren Sudar is an associate in Alschuler Grossman Stein & Kahan LLP’s business litigation and entertainment and media departments.
be verified. By contrast, if a complaint in state court is not verified, a general denial of the complaint is sufficient to challenge all material allegations of the complaint, and the answer need not admit or deny each material allegation in the complaint.

In federal court, there is no reason to verify a complaint when not required to do so, as it leaves the plaintiff vulnerable to impeachment. A general denial is always permitted in federal court, and a federal answer need not be verified even if the complaint is verified.

Denials. If you cannot or choose not to generally deny all material allegations in the complaint, your answer must specifically admit or deny each such allegation. A material allegation is one that is essential to the claim (or defense) and that could not be stricken from the pleading without leaving it insufficient as to that claim (or defense). If a material allegation is not effectively denied, it is deemed admitted.

There are various ways to deny the material allegations in a complaint. For example, in state court, it is permissible to deny specific sentences, paragraphs, or portions thereof. Alternatively, you can expressly admit certain sentences, paragraphs, or portions thereof and simply deny all allegations not expressly admitted.

Moreover, just as plaintiffs can allege facts in a complaint “upon information and belief,” defendants can deny an allegation upon information and belief. In addition, if defendants lack sufficient information to enable them to admit or deny an allegation, they can deny it on that basis.

All facts not effectively denied are deemed admitted. Thus, if you are not certain whether an allegation is material, it is best to deny the allegation (if untrue). Otherwise, if the court disagrees with your assessment that an allegation is not material, your failure to deny that allegation could result in an admission. When an allegation is admitted, the party making the allegation need not prove it at trial.

Affirmative defenses. In addition to admitting or denying all material allegations in the complaint, an answer must plead all affirmative defenses to the claims or causes of action in the complaint. Affirmative defenses are those for which the defendant has the burden of proof at trial. In most cases, all affirmative defenses not raised in the answer are waived.

When drafting an answer, you must plead the ultimate facts needed to establish each affirmative defense (as opposed to mere legal conclusions) just as you are required to do when pleading a claim or cause of action in a complaint. In fact, the plaintiff can move to strike or file a demurrer to affirmative defenses in an answer just as a defendant can file a demurrer or move to dismiss claims in a complaint. Thus, while many attorneys may favor a kitchen-sink approach to make sure they do not inadvertently fail to raise, and thus waive, a viable affirmative defense, such overinclusiveness may leave the answer vulnerable to a motion to strike or a demurrer.

Moreover, because the answer, along with the complaint and any counter- or cross-claims, is intended to frame the issues for trial, carefully consider and research the affirmative defenses available to your client before you file. While you should, of course, include all possible affirmative defenses even if discovery is needed to determine whether those defenses are viable, you should not include an affirmative defense that you know is not available.

A defendant can plead alternative or even inconsistent affirmative defenses. Common affirmative defenses include statute of limitations, waiver, estoppel, unclean hands, fraud, mistake, duress, assumption of risk, release, and comparative fault. For actions in state court, California Forms of Pleading and Practice provides a checklist of defenses, which is an excellent starting point. For federal answers, the Rutter Guide identifies specific defenses that must be pleaded as affirmative defenses.

Prayer for relief. In state and federal court, it is not required but customary to include a prayer for relief in an answer. The prayer generally requests the following: 1) the plaintiff take nothing by way of the complaint, 2) attorney’s fees and costs, if available, and 3) any other or further relief the court deems just and proper.

Jury demand. In state court, a jury demand can be made orally or in writing and need not be made in a complaint or an answer. In federal court, a defendant, like a plaintiff, has the right to request a jury trial on any or all issues triable by a jury. Such a request should be included in an answer.

Affirmative relief. In state court, an answer cannot claim affirmative relief; such relief must be asserted in a separate cross-complaint. In federal court, any affirmative claim against the plaintiff must be pleaded as a counterclaim.

These basic rules should be enough to get you started when it comes time to draft that first answer. But always consult the local rules of your specific jurisdiction whenever you need answers to questions about answers.
Effectuating service of process and subpoenaing deposition testimony is essential for any litigator. Most of us know how to accomplish these tasks in California, but what happens when your practice takes you out of state? The Fourteenth Amendment requires that a summons provide notice and an opportunity to be heard. In other words, you are required to make a reasonable effort to notify defendants of the proceedings pending against them and of their right to appear and defend the action. The best method is personal service. But it is not constitutionally required; nor is it always practical when the defendant is outside the state.

All that is required is a reasonable attempt to provide notice. If the attempt is reasonable, due process is satisfied even if the defendant did not receive actual notice of the proceedings. Under California law, if a defendant does not reside in California, a summons may be served upon him or her in any of the following ways: 1) by any of the four methods California law permits service on California residents, 2) by first class mail, postage prepaid in a manner requiring a return receipt, or 3) by any other method prescribed by the law of the jurisdiction in which you will serve the defendant.

THE FOUR CALIFORNIA METHODS Service may be effected inside California in the following four ways: 1) personal delivery to the defendant, 2) delivery to someone else at the defendant’s usual residence or place of business, 3) service by mail coupled with acknowledgment of receipt, and 4) service by publication with the court’s approval. To meet any of these requirements, you must follow the rules that you would if the defendant resided within the state.

Service by registered or certified mail with a return receipt is often most practical because of its ease and cost. Service is deemed completed on the 10th day after mailing the summons and complaint. However, jurisdiction is not established when service is effected by registered or certified mail unless the nonresident has had “minimum contacts” with California. The U.S. Supreme Court has held that if a defendant's name and address are reasonably ascertainable (that is, contained in a public record), notice by mail or other means that are likely to ensure actual notice is all the U.S. Constitution requires. However, this minimum standard does not constitute valid service under California law.

Under California law, the summons and complaint must be mailed with two copies of the notice, an acknowledgement form, and a postage prepaid return envelope addressed to the sender. The notice must inform the defendant that unless he or she signs and returns the acknowledgment within 20 days, service will be made in some other manner, and he or she will be held liable for the costs incurred. Service is deemed completed on the date the defendant signs the acknowledgment (rather than the date it is mailed back). If a defendant refuses or fails to sign and return the acknowledgment, service is not completed and must be made in some other manner.

If the defendant is a corporation there are additional considerations. Effecting service upon a corporation requires delivery of the summons and complaint to some person authorized to accept service on behalf of the corporation. Thus, mailing the summons to the corporation itself is not valid and effective service. It must be mailed to an individual who may be served on the corporation's behalf. For example, service may be made upon the president, other officer of the corporation, or its appointed registered agent. Also, the summons must provide notice that the person is being served on behalf of the corporation. Foreign corporations must file biennial statements designating a local agent for service of process if conducting business in California. And, foreign insurers doing business in California must stipulate to service on the insurance commissioner under certain circumstances. If you are trying to find a business, the secretary of state of the relevant state is a good place to start. In California, the business portal of the secretary of state Web site, located at http://www.ss.ca.gov/business/business.htm, has a business name search engine. This is an extremely useful tool for locating businesses and their agents for service of process. Many other states have similar search engines.

If there is no such officer or appointed agent and the corporation is doing business in California, service on the California secretary of state may be appropriate. But, in order to serve the secretary of state, the plaintiff’s counsel must first obtain a court order authorizing hand delivery to the secretary of state or the secretary's assistant or deputy. When attempting to serve an out-of-state corporation, the plaintiff's counsel must also make a factual showing (by affidavit or declaration) that the corporation is doing business in California or otherwise has contacts with California sufficient to subject it to personal jurisdiction. Serving the secretary of state may be unnecessary, however, because the corporation will likely authorize local counsel or its insurer to accept service of process on its behalf.
When you are required to effect service outside the United States, you must consider whether the country has signed the Hague Convention on Service of Process (which includes many European countries). If not, consider whether service is possible under the Inter-American Convention on Letters Rogatory (valid for Latin American countries and Spain). Each of these treaties has its own procedures for service that may assist you in serving a foreign defendant. The Department of State also has a Web site that provides valuable information concerning the service of process on defendants in foreign countries: http://www.travel.state.gov/law/info/judicial/judicial_680.html.

**DEPOSITION TESTIMONY** There are three types of deposition subpoenas: 1) testimony only, 2) business records, and 3) business records and testimony. A testimony-only subpoena commands the witness to appear and testify. A business records subpoena may command only the production of business records for inspection and/or copying. While the statutes do not define business records, the term includes every kind of record maintained by every kind of business, governmental entity or organization, profession, or occupation, whether carried on for profit or not. Alternatively, you may obtain business records by use of a records and testimony subpoena, which requires the custodian to both produce the records and testify at the deposition.

When you seek to obtain records outside California, the records and testimony subpoena covers the most ground. Case law has not yet clarified whether service of a business records subpoena on a nonparty in California compels production of its records that are located outside the state. The business records and testimony subpoena, however, extends to records not in the control of the subpoenaed party, and is not limited to those in the party’s custody. Therefore, when you anticipate that records exist outside California, a business records and testimony subpoena may be useful to guide the next stage of discovery.

Special rules apply to subpoenas for the personal records of a consumer or an employee. When these records are requested, the deposition subpoena cannot be served on the records custodian until at least five days after copies of the subpoena and a Notice of Privacy Rights have been served with copies on the affected consumer or employee. In addition, the deposition subpoena must be accompanied by either a written release from the consumer or employee or proof that he or she has been served with copies of the subpoena and Notice of Privacy Rights. This requirement provides the consumer or employee an opportunity to seek a court order to quash or limit the subpoena.

The deposition of a party or party-affiliated witness who resides in another state may be noticed at any place within 75 miles of the deponent’s residence or business office. The deposition notice is sufficient to compel appearance. However, a court order is required to hold the deposition farther away than within this 75-mile radius.

If a nonparty witness lives in another state, his or her attendance at a deposition can only be compelled under the law of the jurisdiction in which the deposition is to occur. A commission is often required to achieve this. A commission is a request from a California court to a court in another jurisdiction, asking for that foreign court’s assistance in facilitating the process of the California proceeding. Commissions are thus used to secure a subpoena in a foreign state or country in order to obtain documents from or depose a nonparty witness outside California. Commissions are ordinarily obtained by stipulation or upon an ex parte application to the California court in which the action is pending. Many states routinely issue deposition subpoenas. And many states authorize courts to subpoena local residents to appear for depositions wherever the party seeking the deposition makes a showing that the testimony is required for an action pending in another state. Still, other states require a showing of materiality or relevance of the testimony sought to be obtained before issuing a deposition subpoena. And other states require that the court in which the action is pending appoint an officer to administer oaths and take the deposition. California’s Discovery Act authorizes California courts to issue a commission to a deposition officer in another state when necessary. This effectively authorizes a person (usually an attorney, reporter, or judicial officer in the other state, designated by the moving party) to take testimony for use in the California action.

Similar to a commission, letters rogatory are used when seeking to obtain documents from or depose a nonparty witness who resides in a foreign country. A letter rogatory is essentially a request to the foreign government, asking it to appoint a deposition officer and compel the witness to appear and give testimony to the officer. Letters rogatory are ordinarily obtained by stipulation or motion in the California action. Letters rogatory may be addressed to the “Appropriate Judicial Authority in [name of foreign nation].” Nevertheless, when seeking to depose a foreign entity that is a party (or affiliated with a party) that is subject to the jurisdiction of a California court, service of a deposition notice is effective by itself to compel attendance and, if requested, production of documents and other matters described in the notice. In addition, the Hague Convention provides other procedures for discovery abroad.

A careful reading of the California Rules of Civil Procedure, the relevant statutes of the jurisdiction in which your defendant or witness is located, and consideration of the Hague Convention and the Inter-American Convention on Letters Rogatory, where relevant, will prepare you for a practice that allows you to reach outside the state the country. And, a firm command of your options for service and discovery will allow you to make intelligent and cost-effective decisions to serve process and take discovery.

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7. Id.
11. Id.
13. Id.
15. Corp. Code §§1502(a)(b); 2105(a).
22. Weil & Brown, supra note 1, §8:540.4.
25. Id.
28. Id.
29. Id.
New lawyers must understand which hardball tactics will lead to sanctions
Respond to opposition requests in a timely manner or politely ask for an extension
Innocent mistakes and delays may still lead to punishment

By Casey L. Morris and Kevin A. Shaw

Discovery Sanctions in Federal and State Court

In law school, we are taught to zealously advocate for our clients within the boundaries of our adversarial system of justice. What we learn in our practice is precisely where those boundaries lie. During discovery, for example, lawyers often coax documents and data from the opposing party while remaining evasive about their own information. Discovery, however, is meant to be a fair system in which each party can become familiar with the other side’s evidence and witnesses.

Dodging discovery requests and counseling clients to refuse to cooperate with the opposing party can be a risky and expensive strategy. While sometimes it may be necessary for lawyers to play hardball to get the opposing party to the negotiating table, certain lines should not be crossed. New lawyers must understand which tactics cross those lines and will lead to sanctions.

FEDERAL DISCOVERY RULES According to the Federal Rules of Civil Procedure, parties in federal court are expected to cooperate in discovery and make mandatory disclosures. Under Rule 37(a), if a party fails to cooperate in discovery requests or make the mandatory disclosures, opposing counsel may make a motion for an order to compel. A motion for an order to compel also is appropriate if: 1) a party fails to make the mandatory disclosures required by Rule 26(a), 2) a deponent fails to answer a question under Rules 30 or 31, 3) an entity fails to designate an agent to testify on its behalf under Rules 30(b)(6) or 31(a), 4) a party fails to answer interrogatories submitted under Rule 33, or 5) a party fails to respond to a request for inspection under Rule 34 or fails to permit such an inspection. Evasive or incomplete responses are treated as a failure to respond, and a motion for an order to compel would be appropriate.

Keep in mind, however, that similar to California state law, parties must satisfy a “meet and confer” requirement before making a motion for an order to compel. Parties bringing the motion must certify that they have conferred in good faith or at least attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. If this requirement is not met, the court will not grant the motion and may impose sanctions on the moving party.

If the motion is denied, the court must impose sanctions on the moving party or the attorney who filed the motion. The party or the attorney must pay the reasonable expenses incurred by the other side in opposing the motion, unless an exception applies. Likewise, if the motion is granted, the court, with certain exceptions, must impose sanctions and require the party whose conduct necessitated the motion, and/or the party’s attorney, to pay the reasonable costs of the moving party, including attorney’s fees.

If the court does grant a motion for an order to compel, and the party compelled to respond fails to comply with the court order, the party and the party’s attorney may be sanctioned. Similarly, if a party fails to participate in framing a discovery plan, the court can order that designated facts will be deemed established for the purpose of the action in accordance with an attorney’s fees. However, parties—not attorneys—face sanctions on their own for failing to disclose information, disclosing false or misleading information, failing to attend depositions, failing to serve answers to interrogatories, failing to respond to requests for inspection of documents, and improperly refusing to admit facts.

The decision to impose sanctions generally falls within the discretion of the district court. Rule 37 directs the court to impose monetary sanctions, such as costs and attorney’s fees, on any party who, by failing to obey a court order or make the proper disclosures, necessitates the filing of a motion to compel. While an order imposing these types of sanctions is usually mandatory, the court in its discretion may find that the failure to comply was substantially justified and refuse to impose sanctions.

While monetary sanctions are the most common method that the court uses to secure compliance with discovery orders, there is a wide range of other sanctions available to the court to impose on parties who fail to obey court orders. According to Rule 37(b)(2), in lieu of or in addition to monetary sanctions, the court can order that designated facts will be deemed established for the purpose of the action in accordance with the claim of the party obtaining the order. The court can prohibit the disobedient party from supporting or opposing claims or defenses, or introducing matters in evidence. Even worse, the court can make an order striking pleadings, staying further proceedings until the order is obeyed, dismissing the action in its entirety, or rendering a judgment by default against the disobedient party. In addition, the court can treat the failure to obey a court order as a contempt of court.

The harshest sanctions, however, may be imposed only in extreme circumstances. The moving party must show that the opposing party’s failure to comply with the court order was due to willfulness, bad faith, or fault. The district court must engage in a balancing test and weigh various factors before imposing the sanction of dismissal or default.

An attorney’s abuse of discovery also

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can lead to sanctions imposed under the inherent authority of the federal court as well as under 28 U.S.C. Section 297, which permits sanctions against an attorney who unreasonably or vexatiously complicates the proceedings. These sanctions also can be imposed on attorneys when sanctions under the Federal Rules of Civil Procedure are not available, such as at depositions. An attorney who improperly refuses to produce a witness for deposition or directs a witness not to answer questions on substantive issues and fills the record with improper objections and remarks may be subject to pay the excess costs incurred as a result of his or her misconduct.12 Attorneys also must make sure they comply with local court rules and the standing orders of individual courtrooms, as judges have the power to impose sanctions when these rules or orders are violated.

CALIFORNIA STATE COURT DISCOVERY RULES Unlike Rule 26 of the Federal Rules of Civil Procedure, which mandates initial disclosures between litigants, the California Civil Discovery Act does not require parties to disclose and exchange information at the commencement of litigation. Instead the Discovery Act provides parties with broad flexibility to conduct discovery for any information that is relevant to the underlying action and not subject to privilege or protection. California’s civil discovery sanctions are codified at Code of Civil Procedure Section 2031.210.

Special interrogatories are an effective tool for requesting answers from opposing parties to written questions. Responses to special interrogatories should be complete and straightforward.14 A party that fails to respond to interrogatories may be subject to monetary sanctions for the expenses incurred by the moving party to compel responses.15 Moreover, a party that fails to obey an order compelling answers to interrogatories may be subject to issue sanctions, an evidence sanction, or a terminating sanction in addition to monetary sanctions.16 A party requesting responses to interrogatories also may compel the responding party to provide further responses if the initial responses are inadequate.17 The same sanctions that are available on an initial motion to compel responses are also available on a motion to compel further responses.18

A request for production of documents is the method by which attorneys seek to obtain written materials that opposing parties have in their custody, possession, or control. Code of Civil Procedure Section 2031.210 provides the procedures for attorneys to follow when making requests for production of documents. If an opposing party fails to respond to a request for documents or fails to produce documents, the party making the request may move for an order compelling a response or responses.19 A party who unsuccessfully makes or opposes a motion to compel responses to a request for production of documents may be subject to the same sanctions that are available for similar actions with regard to interrogatories. A responding party who loses on a motion to compel, absent substantial justification for refusing to provide responses, is subject to monetary sanctions.20 Failure to obey an order compelling responses subjects the party to the same sanctions for refusing to comply with an order regarding responses to interrogatories.21 A party who has received an inadequate response to a request for production of documents may move for an order compelling further responses to the demand.22 A party who unsuccessfully makes or opposes a motion compelling a further response to an inadequate response to a request for production faces the same sanctions as those available for inadequate interrogatory responses.23

Requests for admissions are used by attorneys to force the opposing party to admit or deny the truth of a relevant fact or the genuineness of relevant documents.24 Responding to requests for admissions requires an attorney to comply with Section 2033.210 of the Code of Civil Procedure. The genuineness of documents and/or the truth of any matters specified in the requests may be deemed admitted if the responding party fails to respond to the request.25 Monetary sanctions also are available to a party that successfully compels a party to respond to requests for admissions.26

Sanctions arise in connection with depositions under a number of circumstances. A new attorney should be aware of the two most important rules: 1) a party giving notice of a deposition who fails to attend the scheduled deposition is subject to monetary sanctions,27 and 2) a deponent who fails to attend a duly noticed deposition is subject to sanctions.28 When a deponent fails to attend his or her deposition, an attorney may file a motion to compel the attendance. An attorney filing a motion to compel a party to appear at a deposition must first meet and confer with opposing counsel. The court is required, absent substantial justification by the deponent, to award monetary sanctions as compensation for the party that was forced to file the motion to compel.29 If a deponent fails to obey the order compelling attendance, the court may impose issue sanctions, an evidence sanction, or terminating sanctions against the party in addition to monetary sanctions.30

The discovery provisions of the Code of Civil Procedure are a compass for young lawyers navigating their way through discovery practice in California.31 The overarching message to new attorneys and their more experienced counterparts regarding abuse of the discovery process is “beware.” While courts are more inclined to impose sanctions for conduct that is willful and in bad faith, this does not mean that innocent mistakes and inadvertent delays go unpunished.

Attorneys always must answer interrogatories and requests for admissions or production in a timely manner or politely request an extension from opposing counsel. Organization, proper calendaring, knowledge of the discovery rules, and effective communication between attorneys and their clients are the best defenses against being sanctioned.

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1 FED. R. CIV. P. 37(a)(3).
3 FED. R. CIV. P. 37(a)(4).
4 id.
5 FED. R. CIV. P. 37(b).
6 FED. R. CIV. P. 37(g).
7 FED. R. CIV. P. 37(c)(d).
8 FED. R. CIV. P. 37(a)(4), 37(d)(c)(E), 37(c)(i).
10 Henry v. Gill Indus., Inc., 983 F. 2d 943, 948 (9th Cir. 1993).
14 CODE CIV. PROC. §2030.210(a).
15 CODE CIV. PROC. §2030.290(a).
16 Id.
17 CODE CIV. PROC. §2030.300.
18 Id. at (b) & (e).
19 CODE CIV. PROC. §2031.300(b).
20 Id. at (c).
21 Id.
22 CODE CIV. PROC. §2031.310.
23 Id. at (d) & (e).
24 See CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §§8:1255.
25 CODE CIV. PROC. §2031.280(d).
26 Id. at (c); see also CODE CIV. PROC. §2033.290(d).
27 CODE CIV. PROC. §2025.430.
28 CODE CIV. PROC. §2025.440.
29 CODE CIV. PROC. §2025.450.
30 Id. at (c)
31 CODE CIV. PROC. §§2030.290(c), 2031.310(c), 2033.290(c)
Corporate Depositions in State and Federal Court

Congress and the California Legislature recognize the inefficiencies of requiring a party to depose countless employees in a search for those few who have the needed information. To deal with this problem, both codified timesaving alternatives. There are key differences, though, in the state and federal procedures, and familiarity with these differences is crucial for success.

In state court, a party can notice the deposition of a corporation or other entity rather than a specific person. When the identity of a particular employee is unknown, the deposition notice must provide a “general description sufficient to identify the person or particular class to which the person belongs” and “describe with reasonable particularity the matters on which examination is requested.” The corporation is then required to designate “those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent.” The corporation thus has a duty to produce the person most qualified to testify on its behalf.

The person selected does not need to be an employee but must at least be an agent who is authorized to testify on the company’s behalf. If appropriate, the corporation is required to produce more than one person most qualified on the selected topics, such as when the development and marketing of a product were conducted by two different managers who are not particularly familiar with the other’s work. The corporation, though, is not required to produce a former employee, even if one has more information about the topic than any current employee. Of course, former employees can be subpoenaed and deposed once they have been identified by the corporation.

The corporation cannot merely select a person and rely on that person’s knowledge to satisfy its obligation. The designated person also must be able to testify about the knowledge of other corporate employees, since the corporation must produce somebody to testify regarding “any information known or reasonably available to the deponent.” Thus the designated person also has a duty to become educated about the matters on which he or she will testify by speaking with other employees and reviewing pertinent documents.

A corporate deposition notice also may seek the production of documents. The designated witness must produce his or her documents that are responsive to the request. Moreover, the witness must make inquiries to all persons who are likely to maintain responsive documents and search those places in which responsive documents are likely to be stored.

You cannot use the procedure to require a particular corporate officer or employee, such as the vice president of marketing, to become familiar with specified categories of topics. If you want to depose a particular person, you must send out either a notice or subpoena for the named individual, depending on his or her position within the company, in which case you may not specify categories of inquiry. It typically makes sense to ask the corporate designee what information he or she obtained from a particular employee in which you are interested to decide if it is necessary to take that person’s deposition as well.

If you elect to specify categories of inquiry, the deposition notice in state court should be addressed to the corporate entity, the notice, for example, should be directed to XYZ Corporation; it should not be presented as a notice for the deposition of the vice president of research pursuant to Code of Civil Procedure Section 2025.220. The topics of examination should be set forth in the notice in as much detail as possible—for example, the research and development of the ABC braking system used in 2004 Ford Explorers.

The requirements for a corporate deposition in federal court are notably different from those in state court. While state procedures require that the corporation identify a person most qualified to testify on its behalf, in federal court a company may select a person that will testify for the company—regardless of whether that person already has any particular knowledge on the specified topics or if that person is even an employee or agent of the company. A deposition notice in federal court that names a company (or partnership, association, or government agency) as a deponent must “describe with reasonable particularity the matters on which examination is requested.” When a corporation receives the notice, it must “designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify.” Under this rule, a corporation may designate a junior employee, a retired middle manager in a wholly unrelated division, or even counsel’s unemployed brother-in-law who has no information whatsoever about the company. Unlike state court pro-

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By Jerry Abeles

Federal and state requirements are notably different
The notice must identify the deponent as the corporation rather than a particular person
Do not forget to inquire about the reasons the designated witness was selected
Preparing a Witness for a Deposition

Virtually all lawyers would agree that depositions are crucial to discovery and the outcome of litigation. New lawyers are often given an important responsibility—to prepare witnesses for deposition. While the job of taking key depositions is often reserved for more senior lawyers in a case, defending depositions—even those of relatively major witnesses—is often delegated to the junior lawyers on the litigation team. Despite the importance of depositions, it is not unusual for a witness to receive only a brief summary of the process over a hurried breakfast on the morning of the deposition or during a telephone call the day before. Busy executives, already unhappy about losing a day or more of work to be deposed, may be reluctant to take time out of their schedules for a preparation session. Others who have been deposed in other matters may feel sufficient familiarity with the process to forego meaningful preparation.

Regardless of these common attitudes, you will do well as a new associate to become familiar with the deposition process. Despite the many rules and procedures, virtually all lawyers would agree that depositions are crucial to the outcome of litigation. New lawyers are often given an important responsibility—to prepare witnesses for deposition. While the job of taking key depositions is often reserved for more senior lawyers in a case, defending depositions—even those of relatively major witnesses—is often delegated to the junior lawyers on the litigation team. Despite the importance of depositions, it is not unusual for a witness to receive only a brief summary of the process over a hurried breakfast on the morning of the deposition or during a telephone call the day before. Busy executives, already unhappy about losing a day or more of work to be deposed, may be reluctant to take time out of their schedules for a preparation session. Others who have been deposed in other matters may feel sufficiently familiar with the process to forego meaningful preparation.

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PRIOR EVIDENCE  The witness may incorrectly believe that the deposition will be the first time he or she has testified in the case. If the witness has verified a complaint or discovery responses, or supplied declarations in connection with motions, then he or she has already effectively testified. Such documents often provide fertile ground for examination at deposition, especially if subsequent discovery has shed further light on, or contradicted, earlier stated positions. When conflict arises between the current evidentiary record and earlier written testimony, you should carefully review the prior testimony and related issues with the witness and fully discuss responses.

Although lawyers often believe otherwise, it is the witness who controls the deposition, not the examining lawyer. Indeed, the deposition cannot go forward without the witness’s participation. You should encourage the witness to avoid being intimidated or swayed by the questioner’s browbeating or solicitousness.

At the same time, remind the witness not to argue with opposing counsel. Not only is the examining lawyer unlikely to be swayed, but the witness will appear uncooperative when the deposition transcript is eventually brought before the court. While the witness should understand that he or she is in control of the process, he or she also must understand that his or her credibility and answers will ultimately be evaluated by others in deciding the case, whether for settlement purposes or on the merits. Accordingly, the witness should maintain a calm and professional demeanor.

The witness should listen to each question carefully. He or she should wait until the question has been fully stated and not try to anticipate where the examining lawyer is going. An unexpected twist at the end of a question could lead to an answer that is very different from the one the witness had initially anticipated making. Instruct the witness to pause before answering all questions. This enables you, as the defending lawyer, to object if necessary, and allows the witness to thoughtfully compose a response. Also explain to the witness that objections are often raised to help alert the witness to thoughtfully compose a response. Where appropriate, the witness can break the answer into parts. Such a response might be as follows: “With respect to part one of your question, my answer is...” and “With respect to the second part of your question, my answer is....”

The witness should never assume that his or her testimony as rephrased by the questioner is accurate. Lawyers often rephrase or, worse, mischaracterize prior testimony when they are unhappy with the original answer. This tends to be a problem late in the day when the questioner is “helpfully” trying to “move things along” so he or she can “wrap things up.”

Similarly, when the examining lawyer uses predicates such as “it is fair to say,” the witness should answer the question as if the clause does not exist. An objection from you as the defending lawyer would also be proper in such an instance.

The witness must understand that it is acceptable not to remember an event. The witness should use common sense when it comes to this area. For instance, it may be credible for a witness not to remember what he or she ate for lunch on a certain day last month, but it would be less credible for him or her not to remember if he or she had been in an auto accident the week before.

In answering, the witness should never speculate. You should explain the difference between speculating (improper) and estimating (proper) as follows: If the witness is asked the size of the conference table in front of him or her, an estimate would be proper. If the witness is asked the size of the conference table in a room on another floor, which the witness has not seen, a response would be speculation and improper.

SMALL TALK  The witness (and you) should avoid small talk with the examining lawyer or others in the deposition while on the record. Such comments usually appear unprofessional when the transcript is printed, regardless of how witty the statements seem at the time. Further, you should warn the witness to avoid all conversations, aside from exchanging common courtesies, with the examining lawyer and other parties during breaks and in the hallways. In particular, the witness should not try to explain answers. Many comments made in the hallway find their way onto the record when the deposition resumes.

Perhaps the most effective part of a deposition preparation session is to conduct a mock deposition. In the mock session, be alternatively aggressive with and solicitous of the witness. Focus on the areas that are likely to be most troublesome in the actual deposition. Use documents, the complaint, and written discovery responses (especially if the witness has verified the responses) as part of the process, so as to give the witness the feel of the actual deposition. Such practice will serve several purposes. These include exposing the witness’s weaknesses so that further preparation can be undertaken, and familiarizing the witness with the deposition process.

Even the most experienced witness is most vulnerable after lunch or near the close of the deposition, when the witness is tired and less alert. At such times, a desire to “finish up after just a few more questions” may lead a witness to tell the questioner what he or she thinks the questioner wants to hear. To avoid witness fatigue, keep track of the length of questioning and require regular hourly breaks, even if only for a few minutes, to give the witness time to stretch and get some fresh air.

Of all the advice you can offer your witness in deposition preparation, the most important is to always tell the truth. Failure to adhere to this obligation undermines the legal system and almost invariably leads to serious problems. Depending on the complexity of the case and the witness’s role in the action, the proper preparation of a witness can take anywhere from an hour to days. Any such time will be well spent. As a young lawyer seeking to make an impact on the team and impress the client, your skillful preparation of deposition witnesses will be noticed.
You can assert appropriate objections

Certain evidentiary objections are technically only appropriate at trial but can be asserted at a deposition

There is no need to be subjected to rude behavior

Defending Depositions

Bad testimony from a single witness can destroy your case at trial, and bad deposition testimony may prevent you from ever getting to trial. Therefore, defending a witness at deposition is among the most important tasks involved in preparing a case for trial.

The job begins with preparing the witness, who must understand that the deposition is not an opportunity for him or her to tell the story behind the case. Rather, the deposition is an opportunity for the opposing counsel to obtain testimony and information that is helpful to his or her case and harmful to yours. Despite the best efforts of counsel to prepare witnesses, they commonly, and understandably, become nervous, forget instructions, and start rambling. When your witness starts to talk too much or ramble, he or she should be politely interrupted and reminded of the question.

You can also assert appropriate objections. When your witness is asked improper questions, you must object before the witness answers. When appropriate, also instruct the witness not to answer. If your witness answers before the objection, do not worry. Just assert your belated objection and remind your witness to give you time to object. If an objection based upon privilege is not made and the witness answers the question, the objection is waived.¹

Because the permissible scope of examination is broad, the grounds for objecting to deposition questions are limited. The most common objections are those based upon privileges, privacy, the attorney work product doctrine,² and various objections to the form of the question (vagueness, ambiguity, compound). You may hear counsel claim that relevancy is not a proper objection at deposition, but an objection that a question asks for information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence is appropriate.

Objections based upon the attorney-client privilege, the attorney work product doctrine, privacy rights, and other privileges should be made whenever a question may require the disclosure of privileged or protected information. The objections should be followed by an instruction to the witness not to answer. An objection without such an instruction is meaningless if the witness answers the question. It can be more risky to allow the witness to respond to a question than for you to respond later to a motion to compel.

Objections should be asserted when the question is so vague or ambiguous that it is unintelligible, is compound, calls for a narrative, lacks foundation, calls for a legal conclusion, or is argumentative.

Although instructing a witness not to answer on the basis that a question is unintelligible is not technically proper, if you do not understand the question, you may not be able to determine which objections and privileges apply. Your objection alone may help your witness realize that the question is not understandable. On the other hand, objections cannot properly be used to tell a witness how to testify.³ Questions that call for a legal conclusion are improper at a deposition; instruct the witness not to answer.⁴

Certain evidentiary objections are technically only appropriate at trial but can be asserted at a deposition. Specifically, objections based upon relevancy, hearsay, or lack of foundation are improper at a deposition and are not waived at trial if you fail to object at the deposition.⁵ However, an objection noting that the question “lacks foundation and calls for speculation” is appropriate.⁶

Objections based upon the improper questions or behavior, and, if the behavior continues, suspending the deposition and moving for a protective order.⁷

No matter how much more experience opposing counsel may have or how good their reputation may be, there is no need for you or the witness to be subjected to rude behavior. If you encounter this behavior, go on the offensive. Warn counsel that you will seek a protective order. If your warning is ineffective, walk out of the deposition and take your witness with you. You will then need to file a motion for a protective order to prevent the deposition from going forward.

By Valerie D. Rojas

INAPPROPRIATE BEHAVIOR You can expect to encounter counsel who insist on engaging in inappropriate behavior. Steps you can take when this happens include objecting to

Valerie D. Rojas is an associate in Sedgwick, Detert, Moran & Arnold’s Los Angeles office.
By David Nolte

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How to Succeed with Expert Witnesses

Expert witnesses are more important than ever. Most complicated cases do not settle until after the experts issue comprehensive reports or have their depositions taken. This trend will continue because general education has not kept pace with the continuing increase in knowledge, causing an ever-widening gap between what the average person knows and what specialists know.

The first step is selecting an expert witness. Your selection process should begin with the candidates’ resumes. To save time, some candidates should be eliminated before a meeting occurs, and a review of resumes can facilitate this process.

Select someone who was previously successful as a witness and is enthusiastic about doing it again. Serving as a witness is an unusual and rigorous job. Many people are not suited to what is required. Let’s face it: The first time we do anything, we are not likely to be good at it. We fall; we get it wrong; we may even embarrass ourselves. The same thing is true when serving as an expert witness.

Select only experts who have the premier credential in their field. Avoid the numerous, nearly meaningless credentials that require little more than an application fee and a basic test that most people pass. Also troubling are credentials that are given using a point system that credits unrelated experience. In contrast, most noteworthy credentials require difficult tests, lengthy experience requirements, and peer evaluation.

Insist that the expert’s firm perform a comprehensive conflict check. This is particularly true of the large firms that have multiple service offerings. It is costly to learn of a conflict after you have committed yourself. A conflict could even disqualify you. I have replaced firms that have not been conscientious in this area, and am always surprised when this basic inquiry is ignored.

› Make sure your expert understands how his or her opinions fit into the overall case arguments

› Your expert’s work is not complete until it is supported with charts, graphs, or other visually appealing exhibits

After qualifying under these initial screens, meet (or at least have an extended telephone conversation) with the candidate. This meeting should preview how the expert will act in his or her expert role. You should evaluate several areas.

A WARNING SIGN Be careful when your potential expert witness is too quick to agree with your position. As a better alternative, the expert should understand the opposing party’s position and thoughtfully explain why it is incorrect. An expert who is too agreeable with your position may either become too agreeable with an opponent who provides additional information or not have the character strength to tell you the

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weaknesses in your position. For these reasons, you are better off with an expert who will reach a conclusion more thoughtfully and hold to that conclusion under pressure.

Test an expert’s ability to provide short and direct answers. Experts who regularly provide longer-than-necessary answers will get themselves and your case into trouble.

Select witnesses who can explain their craft to those who will serve on your jury. Most experts primarily work with highly educated and motivated peers and students who have the training necessary for their specialized field. These people are nothing like your jury. Before employing an expert, test his or her ability to explain difficult concepts quickly in simple terms.

Identify people with energy and enthusiasm. The love that experts have for their field should be contagious. Experts should be quick to offer an illustration, chart, or analogy to enliven technical explanations. Don’t presume that a candidate will become engaging and charismatic with your coaching.

Gain a general understanding of the methodology that your proposed expert will use. Does it appeal to common sense? Inquire whether the methodology will meet the standards of the *Daubert/Kumho* cases in federal court or the applicable state standard (*Kelly/Frye* in California).

As the last step, investigate the proposed expert’s writings. In some fields, regular publications indicate accepted expertise. But prior publications also are a minefield of potential conflicting positions or nuances that your opponent can exploit. Most jurors will quickly grasp the importance of a contradictory position. But since they do not live in the academic world, they will probably not care if the expert is publishing. If you have two otherwise suitable experts, the safest course is to avoid the well-published expert.

**IMPROVING YOUR EXPERT’S CHANCE FOR SUCCESS** You and your expert should outline the analytical procedures to be performed and create a related schedule. Reach agreement regarding how much time the analyses will require and ensure that this works with other deadlines, such as discovery deadlines. Although seemingly basic, this type of scheduling is often a problem because your opponent sometimes has key records that your expert needs. Regardless of the reason for the delay, experts cannot produce good work instantaneously. This means you need to anticipate discovery battles for critical records and build this into your schedule.

**KEEPING TRACK OF THE BIGGER PICTURE** Make sure your expert understands how his or her opinions fit into the overall case arguments. Communicate the time line of key events and their consequences. In complex litigation, the expert must often address multiple key dates. To avoid reworking conclusions, ensure that your experts are using data pertinent to those dates.

Well before your expert reaches final conclusions, meet to learn how the work is progressing. These meetings should discuss the good news and the not-so-good news. Have the expert explain:

- Favorable and unfavorable facts.
- Available testing methods to address potential challenges.
- False or weak assumptions or other inadequate work.
- Opinions upon which reasonable experts may differ.
- Possible “long shots” that might be worth the effort to investigate.

Your opponent will usually discredit an expert who does not adhere to his or her professional’s analytical rigor. Insist that your expert support his or her conclusion with analysis, testing, and inspection. Descriptions beginning with phrases such as “I saw,” “I heard,” and “I examined” are the strongest support for the conclusions. Judges and juries are less persuaded by summaries beginning with “in my opinion” or “based on my experience” than they are by more positive phrases such as “my analysis indicates,” “the data supports,” or “the market tells us.”

Discuss with your expert whether there is government data that can corroborate your position. Government information is often highly credible to a judge or jury. So-called learned treatises or academic publications, on the other hand, are not as useful. These works are as numerous and varied as the experts who prepare them. If you find a learned treatise that supports your argument, you can probably also find another treatise by an equally qualified author that conflicts with your position.

If you have more than one expert working on the same case, arrange for them to meet with you in a joint conference in which they discuss their methodology and tentative conclusions. Many litigators avoid this because the meeting is subject to discovery. While unfavorable disclosure is a risk, the greater problem is having your multiple experts impeach one another with inconsistent testimony.

Avoid the ever-present temptation to have experts accept additional responsibility in areas in which they are not truly qualified. Experts who are discredited in an area that they are covering as a favor to you will lose credibility in the more important areas of their true expertise.

Your expert’s work is not complete until it is supported with demonstrative charts, graphs, or other visually appealing exhibits. Your expert may have the best conclusion and credentials but may lose in the courtroom to someone who has prepared a presentation that is more intuitive and easier to understand. If you have selected a superior and experienced trial expert, this person should be able to prepare good graphics with little assistance. The advantages of having experts prepare their graphics include:

- It is usually less costly, because the expert already is familiar with the entire effort.
- The graphics will be more faithful to your expert’s methodology.
- The expert will be more confident and convincing because of his or her personal involvement with the graphics creation.

Help your expert avoid accidentally supporting your opponent’s case. The fact that you did not hire an expert to address a particular subject does not prevent your opponent from asking the expert questions about it. Because of your familiarity with the dispute, you may not appreciate how your witness may face these surprise attacks. Forewarn your expert of these matters, including related hypothetical questions.

The importance of all these issues requires that you begin employment of experts early. Your litigation plan should allow sufficient time 1) to identify the right expert, 2) for the expert to perform sufficient analysis (in the role as a confidential consultant) to know whether it will be helpful to your position, and 3) for you to alter your plan based on the consultant’s preliminary conclusions.

**TAKING AN EFFECTIVE DEPOSITION OF YOUR OPPONENT’S EXPERT** Before the deposition begins, determine whether you plan to use the deposition for persuading your opponent to settle or to prepare for trial. Whatever strategy you adopt will involve tradeoffs.

If you aggressively cross-examine during the deposition, you may exact admissions and a better chance of settlement. However,
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you will also show your attacks, which will allow your opponent to create responses between the deposition and trial. This is particularly troubling with experts, who presumably are required to modify their opinions as new information is learned.

If you just ask for the expert’s opinion and the basis for the opinion, your opponents are more likely to remain unaware of their vulnerabilities. However, you will also lose opportunities to obtain concessions.

Your deposition preparation should include a session with your own expert. If you’ve hired the right expert, he or she will provide years’ worth of insights and understanding. Your expert can educate you about weaknesses and flaws in the opposing position as well as the jargon necessary to understand what is being said. Your expert may also know information about your opposing expert that you would otherwise have difficulty learning.

OPEN-ENDED QUESTIONS Since the deposition is your time to learn, ask plenty of questions that you would never ask or use at trial. Most examiners make insufficient use of open-ended questions that force the witness to explain what work was done and what the rationale for the conclusions was. Questions that start with who, what, where, when, why, and how will generate information that you would never get with questions that demand a yes or a no response. Questions that demand a yes or a no response should be limited to those areas in which you already know, or specifically wish to clarify, what the expert’s conclusion and rationale are.

Add questions that usually challenge expert witnesses. Make extensive use of simple follow-up questions such as: “How do you know that?” or “Why is that true?” Also ask questions that elicit limitations in, or concerns with, the work that the opposing expert has performed. Examples of such questions include:

- What assumptions did you make?
- What is the factual basis for this opinion, and how do these facts lead to your conclusion?
- What information have you relied on that was provided by counsel or your client?
- What concerns do you have regarding your conclusions?
- Under what circumstances would you use a different methodology?
- What alternative hypotheses could explain what you observed?

- What other work would you have liked to have performed?
- Use hypothetical questions to move an expert witness off the established script that your opposing counsel is presenting. Hypothetical questions can turn an opposing expert into your witness when a different set of facts are presented. Hypothetical questions can also support the positions of your other witnesses.
- Reverse psychology is sometimes the best way of isolating a witness. Test the limits of how far the opposing expert will go to support the untenable. Discredit extreme witnesses by taunting them into taking positions that most will see as being silly.

DON’T WASTE TIME ON BACKGROUND Most depositions take proportionately too much time on the expert’s background. Unless the expert is truly inexperienced in the relevant field, many background questions can be covered by simply having the expert agree that his or her resume or CV is accurate. However, you should spend time looking for areas where the current testimony is contradictory or is impeached.

For example, you may mine the witness’s writings. The Internet is useful for obtaining this and other background information. Has this witness written or testified previously with inconsistent conclusions?

Become familiar with authoritative works in the field, including texts that the witness uses as references or in classes taught by the witness. Get the expert to acknowledge which works are authoritative.

Learn of the witness’s testimony in other matters. Some of this can be obtained through databases that provide such information for a fee.

Find on whose behalf the expert usually testifies. An impartial expert can work on behalf of plaintiffs and defendants.

These same questions can also help your expert prepare. Review the above areas with your expert well in advance of his or her deposition. Allow sufficient time for your expert to perform whatever additional work is cost-justifiable to remedy the problems you uncover.

Experts often make a huge difference. The many issues that attorneys must address regarding expert testimony highlight the importance of hiring the right expert in the first place. Serving as an expert witness is a difficult job. The attorney’s job is also daunting, but selecting an experienced witness will make that challenging task much easier.
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The Dangers of the “Usual Stipulation” in Deposition Practice

By Steven D. Archer

he seemingly endless and sometimes tedious questioning in the deposition is finally over. Counsel have asked all the questions they could think of, and in the general rush to conclude the proceeding, someone proposes that all parties agree to “the usual stipulation.” Beware: Agreeing to the usual stipulation without understanding its contours may lead to unexpected results when it becomes necessary to use the deposition later in the case.

Generally, depositions are useful for two intertwined reasons. They permit the discovery of information directly from witnesses, unfiltered by lawyers, and they create a record of people’s recollections that can be used as evidence in motions and at trial. Seldom will a deposition be used only to discover information. Much more frequently, the deposition will be used to support a motion, to provide a foundation for an expert’s opinion, or to cross-examine a witness.

Careful practitioners must understand exactly what the usual stipulation is and how it will be applied in a given case to avoid problems with the later review, correction, custody, use, and admissibility of the deposition transcript.

In deciding whether to enter into the usual stipulation, careful practitioners must consider the fiveWs.

Who. Who is the audience? The rules of civil procedure vary depending on whether your case is pending in state or federal court. For instance, the Federal Rules of Civil Procedure permit a party or the deponent to request the opportunity to make changes to the deposition, in which case a signature is required. If neither the deponent nor a party requests an opportunity to make changes, no signature is required. Under the California Code of Civil Procedure, on the other hand, a deponent has 30 days or a different time agreed to by the parties within which to review the deposition, make any changes to it, and either sign it or refuse to sign it.2

Determine which set of procedural rules apply and review the applicable rules before the deposition begins. These differing rules control all aspects of the deposition process and, therefore, the things that you need or need not agree to if you are going to enter into the usual stipulation.

What. What are you being asked to agree to? Question whether you really understand the terms of the proposed stipulation. Frequently, the usual stipulation may be framed something like this:

I propose that we agree to relieve the reporter of his/her statutory duties under the code and that the original transcript be sent to [counsel or the witness], that the witness may then review the transcript, make any changes that he/she deems necessary, sign the transcript under penalty of perjury and return the transcript to [counsel] for safekeeping through trial. [Counsel] will advise all parties of any changes or corrections made to the transcript as well as the date on which the deponent signs the transcript. [Counsel] will agree to produce the original transcript upon reasonable request and will lodge the transcript with the court at the time of trial.

This proposal seems innocuous enough. A careful review of the reporter’s statutory duties, however, suggests that this proposal should be refused if the deposition is ever going to be used as evidence. For example, the reporter has a statutory duty to accurately transcribe the testimony and to thereafter certify that the deponent was duly sworn and that the transcript is a true record of the testimony given by the deponent.3 Waiving the reporter’s duties to do these things would make the transcript useless. Asking the attorney across the table whether you are being asked to waive these requirements will go far to demonstrate that opposing counsel does not really know what the

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statutory duties are, setting the groundwork for a more reasonable stipulation.

Similarly, while it might not happen in every case, depositions sometimes do not get transcribed. More frequently, original transcripts are lost or misplaced. The court reporter has a statutory duty to maintain the stenographic notes of depositions either on paper or electronic media for a period of “not less than eight years from the date of the deposition, where no original transcript is produced, and not less than one year from the date on which the transcript is produced.”

Stipulating away this statutory duty may seem harmless in the abstract. However, when you cannot find the deposition transcript of the other side’s expert—and that expert is set to take the stand the following morning—the statutory duty may seem harmless in the abstract. You do not have to agree to any stipulation that calls for their release of the original transcript. Rather, the Northern California procedure requires that the court reporter maintain custody of the transcript, advise all counsel and the deponent of its transcription, and make the original transcript available at the court reporter’s office for review, correction, and signature by the deponent within 30 days thereafter. The court reporter then maintains custody of the original transcript and lodges it directly with the court upon request by one or more parties. In Southern California, court reporters will usually agree to abide by a stipulation entered into between all counsel present at the deposition that calls for their release of the original transcript.

Why. Why are you entering into a stipulation? You do not have to agree to any stipulation at the close of a deposition, and you can always insist on the further handling of the original transcript by the court reporter in a manner consistent with the applicable code, which is consistent with Northern California practice. But just because it is the procedure set forth in the code does not mean that it is necessarily the most convenient procedure for all parties, counsel, and the deponent. Civility and convenience benefit all parties long after the completion of the deposition.

To accommodate these competing interests and after confirming the deponent’s availability to read and review the transcript, the following stipulation is a practical, convenient alternative to the usual stipulation:

I propose that we agree to relieve the reporter of his/her statutory duty to maintain custody of the original transcript. After it has been transcribed, the reporter shall send the original transcript [by UPS, FedEx, DHL, or the equivalent] to the witness at [witness’s office or residence address]. The witness shall have 30 days within which to read and review the transcript, make any changes that he/she deems appropriate and list any such changes on the errata page provided by the reporter. Upon completion of the review and listing the changes, if any, the witness shall then sign the transcript under penalty of perjury where indicated at the end of the transcript. The reporter shall provide a preposted and preaddressed envelope so that the witness may then send the reviewed, corrected, and executed original transcript and errata page to [counsel]. [Counsel] will maintain custody of the original executed transcript and will agree to produce it and lodge it with the court at the time of trial or for any motion for which it may be required upon reasonable request. [Counsel] will also advise all other counsel in writing of any changes, corrections, additions, or deletions made by the witness at the time of the review of the transcript and will provide all counsel with a copy of the errata and signature pages within 10 days of counsel’s receipt of the original executed transcript from the witness. Should the original executed transcript not be reviewed, corrected (if necessary), or signed by the witness within that time frame, or should the original executed transcript later become lost or otherwise unavailable, the parties agree that a certified copy may be used for all purposes, as if it were a duly executed and corrected original transcript.

This stipulation serves the client far better than the usual stipulation, which may leave to chance and your opponent’s good faith whether the deposition can be used at trial.

With all the day’s attention focused on the deposition questions and answers, there is no need to add the pressure of committing this stipulation to memory. Copies of this stipulation tucked into a briefcase and readily available at the deposition will do.

Understanding the who, what, when, where, and why of depositions will lead the careful practitioner to reject the usual stipulation in favor of a more precise, more user-friendly one that will avoid later problems with the handling, possession, lodging, and use of the deposition transcript. ■
As commercial activity takes on an ever greater interstate and international character, litigation arising from a single incident or transaction more frequently breeds parallel and overlapping proceedings in different federal and state courts. When multiple proceedings threaten the efficient, economic, and consistent resolution of the dispute, counsel must consider whether consolidation, coordination, or multidistrict litigation (MDL) provides a solution.

Consolidation unites separate actions pending before the same court involving common questions of law or fact. Under federal law, consolidation is governed by Federal Rule of Civil Procedure 42(a), which provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.1

The California state law equivalent, Code of Civil Procedure Section 1048(a), was amended in 1971 to conform to Federal Rule of Civil Procedure 42(a), which provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.1

Any party to an action may file a motion to consolidate. In federal court, parties should follow the regular noticed motion procedure. In California, however, the filing, service, and notice requirements for a motion to consolidate are governed by Rule 367 of the California Rules of Court.

To merit consolidation, the actions must satisfy two threshold requirements. First, the cases must be pending in the same court—in the same district for federal actions and in the same county’s superior court for state litigation.2 Second, common questions of law or fact must exist. While neither federal nor state rules demand complete identity of parties or evidence in the actions, a significant factual or legal overlap must exist.3 Accordingly, the trial court undertakes a comparison of the facts and law justifying consolidation against the potential prejudice, inconvenience, confusion, or delay that may result.4 Ultimately, the court’s decision will not be disturbed on appeal absent a clear showing of abuse of discretion.5

In federal court, consolidation is generally held not to merge separate lawsuits into a single action nor change the parties’ substantive rights. Rather, the consolidated actions retain their separate character.6 However, in California state court, the effects of consolidation hinge on whether consolidation is “complete” or merely for “purposes of trial.” An order for complete consolidation merges the separate actions into a single action, leaving one set of pleadings and a single judgment. By contrast, consolidation for trial keeps the verdicts, findings, and judgments separate.7

COORDINATION AND MDL

While similar actions pending before the same court are consolidated, the procedural analog for uniting cases pending in different courts is either coordination in state court or the creation of a multidistrict litigation, frequently referred to as an MDL, in federal court.

In California, Code of Civil Procedure Sections 404 et seq. authorize coordination of two or more complex actions sharing common questions of fact or law that are pending in different courts. It contains four threshold requirements. First, the potentially coordinated cases must share common factual or legal issues. This usually means that the actions arise out of a single or series of related transactions or that the legal foundations of the pleadings are the same. Second, the actions must be “complex” under the definition and standards set forth by the Judicial Council in California Rules of Court 1800. Third, coordination must “promote the ends of justice” taking into account specific factors enumerated in Code of Civil Procedure Section 404.1. Fourth, the coordinated actions must be pending before different California courts.8

To coordinate actions, either the presiding judge or one or more parties with permission from the presiding judge, files a direct petition for coordination with the chair of the Judicial Council pursuant to California Rules of Court 1511 et seq., and Code of Civil Procedure Section 404. Alternatively, a petition may be submitted indirectly by filing a motion with the presiding judge requesting permission to commence a coordination pro-

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ceeding. The petition requests the Judicial Council to assign a coordination motion judge to determine whether the proposed coordinated actions satisfy the threshold requirements. Within 30 days of the Judicial Council’s order assigning a coordination motion judge, a hearing date is set and the petitioner notifies all parties in each included action. Any opposition or response in support of coordination must be filed and served within nine calendar days before the hearing. Ultimately, the coordination motion judge evaluates whether coordination is appropriate in light of the statutory criteria and evidence. Following a grant of coordination, the Judicial Council assigns a coordination trial judge. The trial judge may transfer actions as required, and conduct hearings, conferences, and a trial at any site deemed appropriate.

In federal court, coordination is accomplished through an MDL, which transfers actions pending before different federal districts to one district, but only for coordinated pretrial proceedings. In 1968, Congress created the Judicial Panel on Multidistrict Litigation (JPML) and enacted the MDL statute. Consisting of seven circuit and district court judges, the panel is authorized to transfer actions for coordinated or consolidated pretrial proceedings upon satisfaction of three requirements: 1) the civil actions involve “common questions of fact,” 2) the transfer is “for the convenience of parties and witnesses,” and 3) the transfer will “promote the just and efficient conduct of such actions.”

Any party or the panel itself may initiate MDL transfer proceedings. A party seeking a Section 1407 transfer must file a motion with the panel and lodge a copy of the papers in each court in which a potentially affected action is pending. Once filed, the panel notifies all parties of the time and place of any hearing on the motion to transfer. During the pendency of this ruling, the court where the action was originally filed retains jurisdiction over the matter. However, once the motion is granted, the panel selects a transferee district and presiding judge to exclusively manage all pretrial proceedings in accordance with the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. The transferee judge exercises broad authority in coordinating discovery, ruling on dispositive motions, and resolving pretrial disputes. Further, although lacking jurisdiction to conduct a trial, the transferee judge may indirectly terminate actions upon motions to dismiss, for summary judgment, or through settlement or consent decrees. Section 1407 directs the panel to remand remaining actions to the respective transferor courts for trial, whereupon jurisdiction over the remanded case returns to the transferor court. Consolidation, coordination, and MDL promote efficiency and reduce costs by potentially avoiding duplicative discovery and trials. When multiple, related proceedings are pending, counsel must consider consolidation, coordination, and MDL in order to represent their clients effectively.

1 R. R. CIV. P. 42(a).
2 JUDICIAL COUNCIL OF CALIFORNIA, COORDINATION OF CIVIL ACTIONS 6, n.2 (2d ed. 2000); see also Oregon Egg Producers v. Andrew, 458 F. 2d 382, 383 (9th Cir. 1972).
3 Takeda v. Turbodyne Techs., Inc., 67 F. Supp. 2d 1129, 1133 (C.D. Cal 1999) (Rule 42 does not require that actions be identical before they are consolidated); Todd-Stenberg v. Dallkon Shield, 56 Cal. Rptr. 2d 16, 17 (Cal. Ct. App. 1996).
4 Johnson v. Celotex Corp., 899 F. 2d 1281, 1284-85 (2d Cir. 1990); Todd-Stenberg, 56 Cal. Rptr. 2d at 17.
5 Johnson, 899 F. 2d at 1285; Todd-Stenberg, 56 Cal. Rptr. 2d at 17.
8 JUDICIAL COUNCIL OF CALIFORNIA, supra note 2, at 6, n. 9 if all parties, plaintiff or defendant, do not agree to coordinate the actions, “a party may request permission to submit a petition for coordination to the Chair of the Judicial Council.” Cal. R. Ct. 1520(a)-(b); see Cal. R. Ct. 1520(b)(3) (The presiding judge of the court in which action may be subject to coordination may “stay all related actions pending in that court for a reasonable time not to exceed 30 days.”).
9 Cal. R. Ct. 1527(b).
10 Cal. R. Ct. 1525, 1526.
16 28 U.S.C. §1407(c); J.P.M.L. R.R. 5, 12(d), G.
19 J.P.M.L. R.R. 5.
20 28 U.S.C. §1407; see J.P.M.L. R.R.
21 MANUAL FOR COMPLEX LITIGATION (Fourth) §20.133 (2004).
Preparing for Contractual Arbitration

The initial step in preparing for contractual arbitration is an analysis of the arbitration clause in the contract. The clause typically identifies the parties, the arbitrable issues, and the remedial relief available. Code of Civil Procedure Sections 1280 et seq. outline the procedural components of arbitration, but these statutory provisions do not encompass all decisional law essential to arbitration advocacy. Contractual arbitration, as distinct from court-ordered arbitration, imparts finality to a dispute—and the language of the arbitration clause has a direct impact on the nature of the award ultimately issued by the arbitrator following a hearing.

Procedure. Federal and state courts have analytically separated their review of an arbitration clause and whether the underlying dispute may be resolved in an arbitral forum from any consideration of the merits of the claims in the underlying dispute. Notwithstanding this doctrine of separability, counsel may confront familiar procedural law within the confines of the arbitration clause, including a variety of terms frequently invoked in litigation. A clause may include references to the performance of conditions precedent, consolidation of multiple arbitrations, and time limitations for the initiation of arbitration, and may contain forum selection as well as choice of law provisions. All these factors may affect the preparation of the parties as they address the substantive law of the dispute. Moreover, specific statutes and case law apply to arbitration clauses in employment contracts, consumer contracts, real estate agreements, and cases involving medical malpractice, health care issues, and construction defects.

The party seeking arbitration—identified as the claimant—initially submits a demand for arbitration to the other party accompanied by a Statement of Claims. If pleadings in conjunction with a lawsuit are on file and the court has granted a petition to compel arbitration and stay the litigation, the complaint in the lawsuit may be used to identify claims, and parties may choose to present a stipulation adopting the complaint’s causes of action as a substitute for a Statement of Claims. The Statement of Claims identifies the specific issues to be resolved. Careful preparation of the Statement of Claims is important to avoid future challenges to an award on the ground the arbitrator did not rule on a specific issue, included the wrong party, erroneously cited the legal capacity of a party, or issued the wrong remedy.

The opposing party—identified as the respondent—can file counterclaims or offsets as well as dispositive objections to arbitration, including objections based on the statute of limitations, laches, res judicata, collateral estoppel (if there was a previous litigation or arbitration), or summary judgment. Demurrers and motions to strike are impermissible in arbitration. In some instances the court will have resolved these issues. But once the court orders arbitration, the court retains no jurisdiction to intervene except to issue provisional relief; appoint an arbitrator if the parties cannot agree on one; and confirm, correct, or vacate an award.

Parties. When ordering the parties to arbitrate in response to a petition to compel arbitration, the court does not always identify the parties and their legal capacity. The court should require the moving party to 1) confirm the correct names and capacity of the parties to the arbitration, and 2) specify whether unnamed third parties are affected. Whether the arbitration is court-ordered or the parties have agreed to arbitrate, this clarification is important for the determination of issues involving alter ego, individual or joint liability, corporate capacity, and agency. Moreover, it is critical for the determination of liability by joint venturers, assignees, doctors or hospitals, partnerships, and third-party beneficiaries.

An arbitration award is potentially admissible in subsequent litigation or arbitration between the parties (and possibly third parties). Thus the proper categorization of the parties and arbitrable issues is crucial in resolving allegations of collateral estoppel or res judicata.

Issues. Arbitration agreements often “carve out” parties or issues. If arbitration clauses exist in contracts among multiple parties to the arbitration, or third parties have contracted with the claimant but selected different arbitrators, the court will need to sort out the parties and arbitrators. In the absence of a court resolution of this issue, or the emergence of a third party subsequent to the order compelling arbitration, an arbitrator may have to return the matter to the court for further proceedings. Whether the arbitrator should attempt resolution of collateral litigation and arbitration claims is unresolved in case law. Third parties, however, may elect to join an arbitration voluntarily.

Jurisdiction. Contractual arbitration may fall under the jurisdiction of federal or state law. It is important to determine which jurisdiction governs because the Federal Arbitration Act (FAA)1 and the California Arbitration Act (CAA)2 often conflict. Most arbitration clauses designate the procedural rules of federal or state law, but parties are often confused about the statutory differences between the two. If the parties agree,
they can choose to abide by either the CAA or FAA as the source of the procedural rules. No matter what procedural rules the parties select, however, arbitrators will reach their resolutions on the merits of the arbitration based on state substantive law.

Rules of arbitration. An arbitration clause usually will identify an arbitration service provider or an individual arbitrator to administer the arbitration. Most service providers have drafted rules that govern specific types of arbitration (such as rules for class actions or complex cases). Copies of the applicable rules generally are available online or from the appointed case manager.

Discovery. Unless an arbitration clause permits discovery, contractual arbitration under the CAA and the FAA disallows this litigation tool except in personal injury, wrongful death, and employment cases decided under California law. Despite these limitations, parties routinely request arbitrators to allow discovery. Parties commonly seek, at a minimum, for permission to exchange documents that provide support for each side’s claims or defenses. While arbitrators differ widely regarding their responses to discovery requests, they frequently allow the taking of depositions of the parties. Discovery disputes, if permitted, mirror those in litigation, and the arbitrator must resolve disagreements. To limit uncertainty about the arbitrator’s decision in a discovery dispute, the prevailing party (or the arbitrator) should prepare an order documenting the nature of the dispute and its resolution.

Prearbitration conference. Civil litigators are familiar with pretrial status conferences conducted pursuant to court rules. A prearbitration conference among counsel and the arbitrator is a similarly valuable tool in resolving issues and identifying the scope of the dispute. A prearbitration telephone conference allows the parties to voice evidentiary objections, notice motions, and determine the dates, time, and location for the arbitration.

Counsel can inform the arbitrator of substantive and procedural issues likely to emerge during the arbitration, frame stipulations, and discuss scheduling conflicts. Many arbitrators provide counsel with a preconference form listing all potential issues for discussion and require counsel to work together to resolve as many of the issues as possible prior to the conference.

Winnowing the causes of action and framing the issues will guide the arbitrator to focus with specificity on the claims that must be resolved. The prearbitration conference can alert all parties to 1) viable claims, cross claims, and defenses, 2) the remedies sought, whether legal or equitable, and 3) the availability of punitive damages, provisional remedies, attorney’s fees, and costs.

Prior to arbitration, all parties should submit a list of witnesses to the arbitrator in conjunction with their arbitration briefs (which should be prepared in a manner comparable to trial briefs). Counsel and the arbitrator can structure the order of testimony, which may involve taking witnesses out of chronological order or otherwise accommodating participants. Since arbitrations are less formal than trials, counsel can typically stipulate to evidence by declaration or affidavit, conduct telephonic testimony, or use videoconferencing in lieu of live testimony.

Exhibits. The creation of a joint exhibit list by the parties eliminates unnecessary duplication and facilitates numbering. If counsel require computers for Power Point presentations, shadow boxes for X rays, VCRs, or overhead projectors, they should inform opposing counsel and the arbitrator in advance.

One common method to avoid documentary disputes is for parties to stipulate to the foundation and authenticity of each document. The only issues that will remain are relevance and materiality. The parties should alert the arbitrator to any anticipated disputes over document authenticity during the preconference discussion.

Depositions. Standard practice in litigation requires the submission of a deposition transcript to a deponent for review and correction. In arbitration, parties should identify any corrections for the arbitrator. If a party elects to submit excerpts of a transcript in evidence, those portions should be highlighted. If the parties have agreed to engage in discovery, excerpts from interrogatories, requests for production of documents, or requests for admissions also should be marked to facilitate the arbitrator’s reading of these materials.

Evidence. Case law and the Code of Civil Procedure allow the arbitrator to consider evidence without regard to the strictures of the Evidence Code (although the arbitrator should respect the Evidence Code on statutory privileges). The rules of evidence do not necessarily apply in arbitration. However, counsel should determine whether the arbitrator intends to follow the Evidence Code. Parties can ask the arbitrator to rule according to case law and the Evidence Code, but arbitrators are not necessarily bound by such a request. Appeals from adverse evidentiary rulings in arbitration are severely limited.

In addition to stipulating to facts not in dispute and exchanging exhibits prior to the arbitration, parties are often asked by arbitrators to exchange the names of any expert witnesses who will testify and the witnesses’ CVs and reports.

Facilitating the process. Arbitration offers the potential of an expeditious and inexpensive alternative to litigation. To facilitate the process, parties should discuss with the arbitrator the possibility of bifurcation to enable the arbitrator to separate the resolution of liability from the determination of remedies. Evidence matures as the preparation for arbitration takes its course. This often mandates changes in strategy. In some cases, counsel will dismiss claims or seek to amend claims. The arbitrator has discretion on whether to allow amended claims, although the arbitrator may be limited by the rules governing the arbitration.

At the prearbitration conference, or immediately prior to arbitration, the parties should discuss whether to make opening and closing statements. Some arbitrators prefer to rely on the arbitration brief, while others request an opening statement that outlines the case chronologically and summarizes the evidence in support of the claims or counterclaims.

Arbitration is as formal or informal as the arbitrator decides. The arbitration setting provides the potential for increasing contact between an arbitrator, parties, and witnesses. Counsel should remind all participants that the arbitrator is prohibited from engaging in ex parte conversations.

Provisional relief. The Code of Civil Procedure permits the court to issue an injunction during arbitration only if the award would be ineffective without one. Arbitrators lack contempt power for the violation of a temporary restraining order or preliminary injunction and should not entertain requests for injunctive relief or appointment of a receiver. If a party seeks this type of provisional remedy, the arbitrator should refer the matter to the superior court.

Arbitration is becoming a standard method of resolving a host of business disputes and civil matters that previously resulted in litigation. Familiarity with the expectations of parties as well as the differences between litigation and arbitration will allow attorneys to better advise their clients regarding which method is preferable and how an arbitration will be conducted.

1 9 U.S.C. §§1-16.
2 Code Civ. Proc. §§1280 et seq.
Payments from a structured settlement are guaranteed for life
Structured settlement brokers are not paid by any party at the table
It is possible to get both cash and a structured settlement

A ny trial lawyer can attest to the fact that practically all clients who receive extra cash spend it—quickly. Whether one has won the lottery, received an inheritance, gotten early retirement money, or settled an insurance claim, odds are that unless something is done to protect it, the cash will soon disappear.

This risk of dissipating all or part of the settlement funds can be devastating for clients, especially for the severely injured who depend on that money for future medical care and income. When this happens to clients, they may end up on welfare or come back to their lawyers for more money.

An awareness of the settlement tools that can help protect the financial future of clients will therefore benefit everyone involved in the process. One of the settlement tools that you are probably already familiar with are structured settlements, which utilize annuities to make periodic payments to injured parties. The most important benefit structured settlements provide is their tax-free guaranteed payments and protection from misuse. Even though settlement annuities have been used since the mid-1970s, misconceptions still abound. As a new lawyer, you need to distinguish fact from fiction.

Fact: Structured settlement brokers design the settlement package, explain the plan, answer questions, and handle the paperwork. Traditionally, the majority of structured settlement brokers have been solicited by the defense. However, in the last few years, plaintiffs and even mediators have requested the presence of structured settlement brokers to assist them during mediation and facilitate a settlement.

Fiction: Structure brokers represent a conflict of interest.
Fact: Structured settlement brokers are interested in getting the case settled. They may be restricted by the funds available, but ultimately they are working toward a settlement plan that will be beneficial to all sides. Brokers may be asked by the defense to develop and present a plan. However, they are working to settle the case, and they know that a client is not going to choose something that he or she is not comfortable with.

Fiction: Brokers will not disclose the cost of the settlement.
Fact: The settlement cost is part of the structured settlement proposal. The cost of the annuities and the amount of up-front cash are stated. There is no reason to withhold the cost, and your client’s knowledge of the cost does not lead to constructive receipt (and its tax consequences) as was once thought.

Fiction: Brokers can reduce the value of the settlement.
Fact: Structured settlement brokers want to gather as much future income for the settlement package as they possibly can. The better the package, the more likely the case will settle with a settlement annuity. The structured settlement broker can design a settlement annuity plan that will outperform a cash settlement.

Structured settlements are a valuable settlement tool. Most people realize how the value of tax-free compounding enhances the return on their investments. Many of us would like to contribute even more to our retirement accounts on a tax-free basis, but statutory limits prevent us from doing so. It is no simple task to get a guaranteed return in the marketplace. Regardless of what happens to the stock market, the economy, or interest rates, the payments from a structured settlement are guaranteed.

In addition to separating fact from fiction, you should be able to answer the many questions that your clients will undoubtedly have about structured settlements. Here are a few:

Question: Why can’t my client take cash and buy an annuity without doing a structure?
Answer: There are a number of reasons, but probably the most important is that the interest earned and brokerage fees would not be tax free, so your clients would have to earn a much higher rate of return. Lawyers know that lump-sum cash settlements are tax-free to the injured party. However, when the client invests the cash outside of a settlement, there are tax consequences for the resulting investment income. In addition, investment fees are also deducted from the interest income. The yield of a structured settlement annuity would therefore be greater than that of an annuity an injured party could buy because all the proceeds from settlement annuities are tax free, while the earnings on an annuity purchased outside a structure would be subject to federal, state, and local taxes. Especially in larger settlements, these taxes and fees can add up to a lot of money.

Another advantage of settlement annuities is that most life carriers offer higher

By James J. Brady

Fact and Fiction of Structured Settlements

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return rates on settlement annuities than can be found in the financial marketplace. Other drawbacks to injured parties buying their own annuities include possible penalties and limitations on deferral periods. Taxes must also be paid eventually on tax-deferred annuities, which are highly publicized today as a way of reducing individual income taxes. In addition, settlement annuities carry reduced risk and increased financial security lacking in annuities that an individual might purchase on the market. Structured settlements are backed by life insurance companies with the highest safety rating, and these companies are backed, in turn, by state guarantee funds. Structured settlements are therefore safe, “sleep tight” investments.

**Question:** Can an injured person take cash now and decide to structure later?

**Answer:** No. The structured settlement must be fully executed at settlement. When injured people require lifetime care and support, they should think about how much money they could afford to lose. Studies indicate that one way or another most recipients of cash awards wind up dissipating their funds in a short period. They should be confronted with the prospect that they will be vulnerable and susceptible to losing all or part of their money. Incidentally, lawyers can structure all or part of their fees as well. Instead of a lump-sum payment for fees, the lawyer can receive periodic payments, usually over a set period of time. However, their structured fees are not completely tax free, as are their clients’. Instead, their fees are tax-deferred, which reduces tax liability.

**Question:** Is it possible to have both—cash and a structured settlement?

**Answer:** Yes. Most injured parties believe that they have to choose one or the other—cash or a structure. However, that is not the case. Structured settlements may involve immediate cash payments that cover items such as attorney fees and medical liens, plus additional cash for injured parties to spend at their discretion. The settlement annuity portion provides periodic payments (often for life) for medical costs, lost wages, attendant care, mortgage payments, etc. In sum, a settlement annuity provides secure, guaranteed, tax-free settlement funds—for life, if requested.

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1 See Roy Kaplan, LOTTERY WINNERS: HOW THEY WON AND HOW WINNING CHANGED THEIR LIVES (1978). Kaplan surveyed 54 lump-sum winners of at least $1 million and lists the 10 most common mistakes that led to the dissipation of their earnings.
Choosing Venue in California Courts

When a civil case comes into your office involving a matter that clearly needs to be filed in the Superior Court of the state of California, how do you determine in which venue to file the case? There actually may be more flexibility in choosing a venue than you think, but before you choose, it is absolutely necessary to conduct a careful reading of the California Code of Civil Procedure, California Rules of Court, and the local rules of the various courts.

Numerous factors drive a desire to have the action sited in one venue over another. In some matters, a party may wish to have the action in their home court, while others may wish to have the action far removed from where the conduct giving rise to the action took place. In some cases, a party may wish to have the action filed where statistically more favorable verdicts are reached. Hence, while your clients’ needs may drive the venue decision, the California Code of Civil Procedure and the local rules for the superior court provide the parameters of where any given action may be filed in this state.

The Code of Civil Procedure governs all cases in California. In particular, Section 395 specifies the court in which an action may be filed. Section 395 provides that for injury to person or property:

Except as otherwise provided by law and subject to the power of the court to transfer actions or proceedings as provided in this title, the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action.

The Code specifically provides that an action for injury to person or property shall be filed in the county where a defendant resides or where the injury occurs. However, your inquiry does not end there because many California counties have multiple judicial districts. Additionally, most counties have their own set of local rules that must be addressed to determine where in any given county the action may be filed.

For instance, Los Angeles County has 12 delineated judicial districts. The Los Angeles County Superior Court Rules specify within which of these districts an action shall be filed. Specifically, Rule 2.0(b)(1) provides, “Every unlimited action for bodily injury, wrongful death or tortuous damage to property shall be filed in the district where the injury or damage occurred.”

Thus, unlike the Code of Civil Procedure, the Los Angeles County Local Rules look to the place of the injury, without mentioning the defendant’s residence, to determine venue for the action. A conflict arises in a situation in which there is a Los Angeles County defendant and the injury occurs outside the county or state. As an example, suppose your case involved an accident that occurred in a foreign jurisdiction with the sole defendant residing in Los Angeles. The result may not turn out to be what seems the obvious answer.

Initially, it may appear that the action must be filed in the specific Los Angeles judicial district where the defendant resides. Typically the defendant would want to have the matter litigated in that judicial district. However, a careful reading of all the rules reveals that the filing of an action is not limited to the defendant’s home court; rather, it may be filed in any judicial district in the county where the defendant resides.

In the scenario involving a single Los Angeles defendant with the injury or damage occurring outside the county, Los Angeles Superior Court Rule 2.0 permits a filing anywhere in Los Angeles County, and the defendant has no legal right to have the action transferred to the judicial district in which the defendant resides.

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age occurred in a foreign jurisdiction. Hence, the local rule does not apply. Rather the Code of Civil Procedure governs. Plaintiffs are therefore free to choose any judicial district within Los Angeles County to file the action.\(^8\)

Plaintiff's counsel should be well versed in this scenario and the interplay between these rules so as to be able to file in a judicial district most suitable to their clients. The decision as to where to file must be sound however, because Los Angeles County Superior Court Rule 2.1(d) provides for the discretionary award of reasonable expenses and attorney's fees to the prevailing party of a motion to change venue.

A careful reading of the rules is essential and may lead to results that are not what you might originally expect. Close attention to the subtleties of this area of law can pay significant dividends and get you in front of the vailing party of a motion to change venue.

Defense counsel, too, should also be well aware of these various rules prior to attempting to move the court to transfer an action to their home court. In particular, Los Angeles County Superior Court Rule 2.1(d) provides for a discretionary award of reasonable expenses and attorney's fees to the prevailing party of a motion to change venue.

A careful reading of the rules is essential and may lead to results that are not what you might originally expect. Close attention to the subtleties of this area of law can pay significant dividends and get you in front of the best available court for your case.

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1 See Cal. R. of Ct. 201.B. That rule requires the filing of a Civil Cover Sheet (Judicial Counsel form CM-010) that identifies the jurisdictional basis for the case and whether it is complex. Failure to file this form may subject counsel to sanctions.

2 The Code of Civil Procedure also addresses other matters (not discussed in this article), including dissolution of marriage and family law matters; contract disputes; and actions concerning an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use (with certain exceptions).

3 See L.A. County Super. Ct. R. 2.0 and S.D. County Super. Ct. R. 1.7.C.

4 Included in the local rules are maps that delineate specific boundaries for each judicial district. Zip Codes are listed for other types of cases, such as small claims. If you are ever unsure, most attorney services/process servers are very familiar with the boundaries and can provide assistance.

5 L.A. County Super. Ct. R. 2.0(c) provides for the option of filing in the Central District for a number of listed actions.

6 Of course, many issues can arise with regard to a corporation's residence. Generally, a corporation has two legal residences: 1) the location of its headquarters and 2) the place of its operations. See also Code Civ. Proc. §3355.5.

7 Motions to change venue are provided for in L.A. Super. Ct. R. 2.1.

8 The conflict between these two rules is under consideration by the California Judicial Counsel and the local rules may be modified in the future.
the overall effort involved and possibly limiting the length of the examination, and 3) assist the auditor in understanding the nature and type of the taxpayer's business activity. In addition, if during your preparation you discover any inaccuracies in the return and have reconciled them, it can be beneficial to provide the reconciliation schedules to the revenue agent. If you do not have time to thoroughly prepare for the audit, ask the revenue agent, in timely fashion, to postpone the examination.

During the information gathering stage of an audit, a revenue agent may verbally ask for information or may issue an Information Document Request (IDR). In responding, avoid the presentation of any false or misleading information or false statements by the taxpayer and the taxpayer’s representatives, but, at the same time, reasonably limit the information provided. Second, make sure that the positions you present during the course of the audit are well documented. All requested documents and information should be provided in a timely and orderly fashion, and you should keep a record (and copy) of each document provided to the agent during the audit.

If responses to an IDR are not satisfactory, the revenue agent may issue an administrative summons for documents or testimony. The IRS has broad authority to summons books and records from a taxpayer (or from any person having custody of the records) in order to ascertain the correctness of a taxpayer’s return, to make a return, or to determine a taxpayer’s liability.

A summons witness is entitled to decline to produce documents or to answer particular questions if a good-faith basis exists for an objection. If a taxpayer fails to comply with a summons, the IRS may proceed with summons enforcement.

Revenue agents often seek testimonial evidence through interviews of a taxpayer and third parties. A taxpayer has the right to resist a request for an interview. You are not required to produce the taxpayer for questioning unless the IRS issues a summons and may, instead, represent the taxpayer before the revenue agent. In determining whether the taxpayer should consent to an interview or invoke various applicable privileges and Constitutional protections, consider whether there are extremely sensitive issues (especially, potentially criminal fraud issues) that would lead the taxpayer to consider invoking the Fifth Amendment privilege against self-incrimination.

Before agreeing to submit the taxpayer to an interview, attempt to determine the extent of the information that the revenue agent has and the agent’s positions on the audit. If possible, try to tie agreement on the interview to an understanding that if the taxpayer answers the questions, the revenue agent will proceed to close the audit. To assist in preparing the taxpayer for the interview, you should try to obtain actual questions or determine areas that the revenue agent will question in advance.

Sometimes a revenue agent may request that the taxpayer complete a Taxpayer History Questionnaire or ask those questions during the taxpayer’s interview. Extreme caution should be followed before allowing the taxpayer to complete the questionnaire. Depending on the particular issues involved, the taxpayer’s answers may be tantamount to admitting having committed civil or criminal tax fraud. It may be preferable to submit responses, if at all, in the form of a narrative statement—and only to the extent certain questions are capable of being answered. As always, you must prevent presentation of false or misleading information or false statements by the taxpayer.

An examination may be closed on an “agreed” or “unagreed” basis. If closed on an unagreed basis, the taxpayer will receive a revenue agent’s report that enumerates the disputed issues, explains the IRS’s position, and computes the tax liability. The taxpayer may have an opportunity to appeal this determination if there is sufficient time remaining on the statute of limitations.

THE APPEALS OFFICE The Appeals Office, an independent function within the IRS, is the civil administrative dispute resolution office authorized to settle tax disputes. The appeals level provides an additional opportunity to settle cases prior to litigation. To get to appeals, the taxpayer must file in a timely manner a “protest” in response to the revenue agent’s report. Generally, the appeals process involves one or more face-to-face conferences, although telephone conferences are encouraged. The appeals officer will consider the probative value of evidence likely to be presented, the credibility and availability of the taxpayer and witnesses, the ability of the taxpayer to demonstrate the accuracy of his or her position, and the likelihood that evidence presented will support the taxpayer’s position.

A matter may be returned to Examinations if substantial additional information is required to resolve an important issue or if there are significant unresolved factual issues. If a matter is returned to Examinations, it is usually returned to the same revenue agent who performed the initial audit. Accordingly, it is rarely beneficial to withhold information during an audit on the theory that the taxpayer will receive more beneficial consideration from Appeals.

Prior to meeting with an appeals officer, you must be thoroughly prepared regarding the facts and relevant legal authorities. It is often advantageous to seek a copy of the administrative file, which would include the internal memorandum and documents prepared by the revenue agent or received from third parties. Disputes are resolved on an issue-by-issue basis, so it is beneficial to anticipate the IRS’s position on each issue and to prepare in advance various settlement possibilities.

In order to encourage a more open and productive discussion of the issue, it is usually preferable that the taxpayer not be present during the meeting with the appeals officer. It is sometimes beneficial to provide statements from potential witnesses. It is also important to corroborate the most significant facts through independent sources and to be prepared to provide and summarize relevant documentary evidence.

Appeals officers are expected to exercise their best judgment in identifying and defining the “real issues” in order to structure a potential resolution. The appeals officer will usually not raise new issues unless their basis is substantial and the potential effect upon the tax liability is material. However, during the course of settlement negotiations, appeals officers can raise alternate positions on issues previously raised by the agent.

If the taxpayer agrees to the resolution of the issues and a Notice of Deficiency has not been issued, the resolution will usually be presented in the form of a Report of Examination Changes (Form CG-4549) and a Consent to Assessment (Form 870). If the taxpayer does not agree to a resolution of some or all of the issues, a Notice of Deficiency will be issued.

LITIGATION If a dispute is not resolved at Appeals, the taxpayer can proceed to litigation. Taxpayers have the unique opportunity to litigate civil tax disputes in three forums: as a case in the U.S. Tax Court, or in U.S. District Court or the U.S. Court of Federal Claims as a refund suit after paying the liability.

If the taxpayer desires to proceed to Tax
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Court, the case is initiated by filing a petition with the court within the 90-day period following the issuance of a Notice of Deficiency. After doing so, the only trial court that can resolve the case is the Tax Court; the taxpayer has waived the right to go into any other trial court. A benefit of proceeding to Tax Court is that the taxpayer does not have to pay the tax liability until the case is completed, which can take more than a year.

The case will be litigated before a single Tax Court judge, typically in the community where the taxpayer resides. Currently, docked cases are being calendared for trial in the Tax Court within approximately one year of the filing of the petition. After the trial is completed, the parties file briefs setting forth proposed findings of fact based upon the trial testimony, the exhibits, and any stipulations. The argument portion of the brief incorporates the legal authorities and factual arguments that support the party's conclusions. After the briefs are filed, the Tax Court will typically issue an opinion within three to six months. The parties are then requested to prepare computations of the amount of tax due based on the opinion. Typically, the parties agree on the computations. However, if they cannot, the Tax Court will schedule a hearing or briefing schedule to resolve the dispute.

Either party has the right to appeal the Tax Court opinion to the federal court of appeals in which the taxpayer resides. If the taxpayer is not successful in Tax Court, the government has the right to enforce collection even if the taxpayer has filed an appeal. If the taxpayer prevails on appeal, excess payments will be refunded.

If the taxpayer instead elects to forego the Tax Court (by not filing the petition within the requisite 90 days), the tax deficiencies (including interest and penalties) are assessed. After the bill is received, the IRS has the right to proceed with enforced collection. If the taxpayer is unable to pay the full amount of tax liability, you may negotiate an installment payment arrangement. The tax deficiency will continue to accrue interest. If payment is not timely made, there will also be a late payment penalty that accrues at a rate of 0.5 percent per month, up to a maximum of 25 percent of the outstanding liability.

Once the taxpayer satisfies the liability for taxes and interest due for a given year, the taxpayer has a right to file an administrative claim for Refund of taxes paid within the two years prior to filing the claim. This means that if tax payments are made on an installment basis, the taxpayer must make the last payment within two years after the first payment in order to be able to claim a full refund. Once the claim is filed, it will be reviewed by the Examinations Department and either disallowed or allowed in whole or in part. After Examinations issues a formal notice of its action, the taxpayer can typically file an appeal and attempt to resolve the case at that level.

If the Claim for Refund is not successful, the taxpayer has the right to file a Complaint for Refund in U.S. District Court or the U.S. Court of Federal Claims. The earliest a complaint can be filed is six months after filing the refund claim with the IRS (even if the claim has not been acted on) or, sooner, once the IRS has rejected the claim. The last date for filing the Complaint for Refund is two years after the IRS rejects the claim. If the IRS delays action on the claim, there is no limit within which the complaint must be filed. Once the complaint is filed, the case will normally proceed to trial within one year. The decision on a refund action is appealable to the appropriate U.S. Court of Appeals.

1 The process should not be abused merely because a taxpayer wants to delay the determination and collection of a potential liability. Collection-related issues should be resolved through installment payment arrangements negotiated through the collection process following conclusion of an audit.

2 During a review, it is recommended that separate files be prepared for relevant documents that may be requested by the revenue agent and documents that contain potentially confidential, privileged information.

3 See, e.g., I.R.C. §7602.


5 See, e.g., United States v. Powell, 379 U.S. 477, 481 (1964); United States v. Arthur Young, 465 U.S. 805 (1984); (accountant’s tax accrual work papers discoverable by administrative summons; IRS is not required to establish relevance in a technical, evidentiary sense).

6 See, e.g., I.R.C. §7521(c).

7 If the statute of limitations within which an assessment must occur is expiring within approximately six months, the IRS will often issue a Notice of Deficiency to preserve its interests. Extending the statute of limitations provides additional time to explore resolution of an audit without litigation.

8 The protest must include the basic information (i.e., identification of the taxpayer, return, amounts, and years involved), a statement of facts supporting the taxpayer's position, and the law or other authorities supporting the taxpayer's position.

9 See, e.g., I.R.M. §8612(1) (June 17, 1986); Treas. Reg. §601.106(c).

10 Formal request for the administrative file may be made pursuant to the Freedom of Information Act.

11 See, e.g., I.R.M. §6612(1) (June 17, 1986).


13 See I.R.C. §6651(a).
Preparing for the details results in a less stressful experience

The less stressed you are, the more likely you will do a better job

As a new attorney, knowing what to expect when you go to court will help you prepare more effectively and feel more confident. In turn, you will seem like an old pro before the judge, opposing counsel, and your client.

Before going to court, find court locations and maps on the Los Angeles Superior Court’s Web site at www.lasuperiorcourt.org. Most California counties also have their own court Web sites. Look up your case number on the court’s calendar after making sure your hearing is listed; the hearing may have been calendared incorrectly by you, your firm, or the court. If the court decides to be “dark” that day with little or no notice, your hearing needs to be rescheduled. While you are online, investigate how your judge runs the courtroom. You can find Los Angeles Superior Court judicial profiles on the Los Angeles County Bar Association’s Web site at www.lacba.org under Know Your Judges.

When preparing for a court appearance, bring your firm’s most current pleading file, an extra copy of the pleadings that were filed for the hearing, your notes, a legal pad and several pens, and possibly a proposed order.

The court’s case file should be in the courtroom unless you are appearing on an ex parte matter, but sometimes a filed pleading does not make it to the court file. Likewise, a copy of the filed pleading may be missing from your firm’s case file. Before leaving the office, ensure all relevant pleadings to the hearing have been fastened into your file, especially a proof of service if you represent the moving party.

Bring your calendar and a copy of the lead attorney’s calendar for the next few months. The judge expects you to know all relevant individuals’ schedules to set a date for a hearing, a continuance, or other event.

Bring a map, the department phone number where you will appear, at least two business cards, and no less than $20 in your wallet; parking lots and court cafeterias require cash. Do not forget a charged cellphone; you may need to call the court clerk, your office, your client, or an expert. Camera cell phones are not permitted in courthouses.

Arrive early. Allow extra time for traffic, getting lost, standing in the courthouse security line, finding the courtroom, and meeting with your client, if expected. After you find your courtroom, if you are too early, you can buy a cup of coffee, relax on a bench outside the courtroom, and review your notes and the case file before you have to perform.

Being late to court is risky. You may not be able to check in until there is a break. If the policy is first-come, first-served, you will have to wait longer than otherwise necessary, wasting your time and your client’s money. The judge could hold the hearing without you. The judge could dismiss your motion, or you could be sanctioned personally. The judge may not give you an opportunity to explain your tardiness. If you are going to be late, call the department to let the court know.

Every courthouse lobby contains a wall directory of department locations. Each department posts the court’s daily calendar outside its doors. Write on two of your business cards the name of your case, whether you represent the plaintiff or defendant, and the court’s calendar number. The bailiff or the clerk usually opens the courtroom to the public at approximately 8:30 A.M. (sometimes earlier) and starts checking in the attorneys. When you check in, give the business cards to that person, and indicate whether you expect the other attorney and/or your client to appear. You may ask for priority, i.e., to be heard at the beginning of the court’s calendar if you need to leave the court by a certain time, you have an appearance in another department, or your matter will take only five minutes. Judges frequently call cases out of order to hear short matters first.

Turn your cell phone to “vibrate” or “off” before court is in session. Courtrooms do not permit food or drink, although you may eat and drink in the hallway or the court cafeteria. After the judge sits on the bench, you must not talk or even whisper to your client or opposing counsel unless you want a stern look from the bailiff.

Each courtroom runs a little differently. Do not fear asking questions of other attorneys or the check-in person. Make questions brief and to the point when asking the court clerk, who is extremely busy and may seem curt.

If yours is not the first case called, watch how the judge reacts to other attorneys. Determine what the judge likes and finds annoying.

The judge will call your case by the court calendar number, case name, or case number. When called, let the judge know you are present. Walk up and stand on the correct side of the counsel table according to the signs that read PLAINTIFF or DEFENDANT. Wait until you feel it is appropriate to sit or the judge instructs you to do so.

The judge will ask you to make your appearance. State your name and which party you represent, e.g., “Good morning, Your Honor. Chris Associate, Smith & Jones Law Firm, for petitioner, who is present and sitting to my left.” Opposing counsel may jump in before the judge says anything.

Nancy A. Kaiser recently became a deputy attorney general in the Licensing Department of the California Department of Justice. She was in private practice for eight years.

By Nancy A. Kaiser
when opposing counsel finishes, make your appearance.

The judge will indicate when it is time to hear from the attorneys. The moving party—the one who filed the documents requesting the hearing—speaks first unless the judge asks a question of the responding party. The judge may or may not have read the pleadings for the hearing. Some judges skim the paperwork during the hearing and ask the attorneys about the motion on the spot.

Remain calm, pleasant, and assertive. Judges prefer to keep proceedings business-like and cordial; do not become angry or emotional while asserting your client’s position. Show respect to the judge, opposing counsel, and court staff. Address comments to the judge, not to opposing counsel, and do not interrupt or talk while another person speaks; the court reporter cannot type two remarks simultaneously. Get to your point quickly; months of preparation may result in appearing 10 minutes or less in front of the judge.

Watch the judicial officer for cues, and listen carefully to comments and questions. Recognize when the judge no longer wants to hear from you. When the judge makes a ruling, do not keep arguing unless an important and relevant issue or fact has been ignored; then do speak up respectfully.

Before leaving the judge’s presence, be sure you understand the judge’s order. Ask questions if you need to clarify the terms of the order, e.g., the effective date of the order and which attorney is expected to prepare the written order. If desired, you can obtain a copy of the “minute order” from the clerk, which is the clerk’s summary of what transpired in the courtroom, or order a transcript directly from the court reporter for a fee.

At the end of the hearing, thank the judge regardless of the outcome. If you need to speak to the clerk afterward, return to the audience, and wait for a break. Otherwise, leave the courtroom quietly, and reconvene in the hallway with opposing counsel or your client to discuss what happens next.

In summary, the day before the hearing, prepare a list of items to bring to court, double-check the files you will use, research your judge, and check the court’s calendar on its Web site. On the day of the hearing, arrive early. In court, watch and listen to other attorneys and the judge to learn what is expected. Always act professionally and courteously. If you prepare thoroughly for the expected, you will be better equipped to handle the unexpected, which almost always occurs in every case.

By Judge Margaret M. Morrow

Practicing in Federal Court

Each year, the Los Angeles Chapter of the Federal Bar Association sponsors a one-day seminar titled “Taking the Step to Federal Court.” Years ago, the lawyers who attended this program were seasoned state court practitioners who wanted to expand their practice to federal court and sought information regarding the differences between federal and state practice. Times have changed. Today, it is difficult to confine one’s practice exclusively to one court or the other.

Given ever-expanding federal jurisdiction, many lawyers who once practiced primarily in state court find themselves increasingly engaged in federal court litigation. Almost from the start of their careers, many attorneys practice simultaneously in federal and state court. The rules and practices of the two courts differ, however. The wise practitioner must be aware of these differences and consider not only how they affect the outcome of his or her client’s case but also what they require in terms of litigation conduct.

Jurisdiction. The most fundamental difference between state and federal courts is their respective jurisdiction. State courts are courts of general jurisdiction, while federal courts are courts of limited jurisdiction. Before a case can be brought properly in federal court, it must raise a federal question or be a dispute between citizens of different states that involves more than $75,000.

Federal courts have a continuing obligation to assess their jurisdiction. As a consequence, one of the first things a federal court does after a complaint is filed or a state court action is removed to federal court is review whether it has jurisdiction to hear the case. If the court is in doubt about its jurisdiction, it will issue an order to show cause why the case should not be dismissed for lack of subject matter jurisdiction or remanded to state court. The party invoking federal jurisdiction—the plaintiff in a case filed directly in federal court, the defendant in a case removed to federal court—will have the burden of convincing the court that jurisdiction is proper. Generalized allegations of jurisdiction are not sufficient to meet this burden. When the amount in controversy in a removed case is in doubt, for example, you will be required to produce “summary judgment-type” evidence showing that the amount exceeds $75,000.1

If you are the party in control of the jurisdictional choice, consider a variety of factors before choosing between federal and state court. In 1992, the American Law Institute conducted a statistical study of attorneys representing parties in cases removed from state to federal court. Of those surveyed, 77 percent of defense attorneys reported that they perceived an advantage to trying a case

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in federal court. By contrast, 45 percent of plaintiffs’ attorneys perceived an advantage to trying a case in state court.2

These perceptions stem from, among other things, differences in the jury pool. Federal jury panels in Los Angeles are drawn not only from Los Angeles County but from Santa Barbara, Ventura, and San Luis Obispo Counties as well. A federal jury drawn from this wide geographical area sometimes will be more conservative and more defense-oriented than a state court jury selected exclusively from Los Angeles County. Jury verdicts in federal civil trials also must be unanimous, which increases somewhat the plaintiff’s burden of persuasion.

In addition to strategic concerns about differing jury practices, many lawyers perceive that federal judges, on average, are more likely to grant summary judgment motions than their state court counterparts. Further, if the judge is not to their liking, federal litigants have no right to challenge the assigned judge as they do in state court under Code of Civil Procedure Section 170.6.

For these and other reasons, studies show that plaintiffs’ lawyers feel the federal courts are not as user friendly as state courts. They believe there is more paperwork involved in federal court litigation and that federal judges are stricter or more aloof than their state court counterparts. Some of these perceived differences are more anecdotal than real. Nevertheless, they are relevant factors in determining whether to file a case in, or remove it to, federal court.

Judges’ individual rules. One significant difference between state and federal court that can increase the cost and complexity of federal litigation is the fact that many federal judges have adopted “local local” rules or standing orders. These rules concern matters as varied as the form in which pleadings must be filed, filing deadlines that differ from those found in the Central District’s Local Rules and the Federal Rules of Civil Procedure, and the manner in which counsel must conduct themselves during court appearances and at trial. Federal judges’ individual standing orders may differ in significant respects. For this reason, it is not sufficient to be familiar with the Federal Rules of Civil Procedure and the Central District’s Local Rules and follow them. Rather, you must adhere to the particular rules of the judge to whom your case is assigned. Therefore, you must visit the court’s Web site, check with the judge’s deputy courtroom clerk, and review the materials sent to you upon assignment of the case.

Initial disclosures and limitations on discovery. Another significant difference in federal and state practice is the fact that parties to federal court litigation are required to disclose, without awaiting a discovery request, the names and addresses of all witnesses likely to have discoverable information that may be used to support their claims or defenses. Parties also must provide copies of all documents and evidence that support claims or defenses. Plaintiffs must provide a computation of their damages, and defendants must disclose all insurance policies that will be called upon to respond to the action.4

Federal court litigants ignore these disclosure obligations at their peril. Under Rule 37 of the Federal Rules of Civil Procedure, a failure to make the disclosures required by Rule 26 will result in the exclusion of evidence at trial unless the party who fails to disclose can show that the failure was either substantially justified or was harmless.5 No similar disclosure requirements exist in state court.

The Federal Rules also impose different limitations on discovery than state statutes and rules. In federal court, for example, there is a presumptive limit of 10 depositions per side, with each deposition limited to one seven-hour day. There is no similar limit in state court, although no more than one deposition can be taken of a witness without court approval.6 Similarly, absent a court order, federal court litigants are limited to 25 interrogatories versus 35 in state court (not including form interrogatories).7 Finally, 90 days before trial, federal court litigants must disclose the expert witnesses they expect to call. State statutes mandate disclosure only if a party demands it and direct that the exchange take place no earlier than 50 days before trial.

The information that an expert must disclose under the Federal Rules is more detailed than that required by state rules. Under Rule 26, federal litigants must provide a written report, prepared and signed by the expert, that sets forth the expert’s opinions and the basis or reasons for them. The report must identify the information the expert considered in forming the opinions as well as the exhibits that the expert will use to explain or support the opinions. Additionally, federal court litigants must disclose their expert’s qualifications—including a list of publications in which the expert has appeared and other cases in which the expert has testified—and the compensation the expert will receive. State court litigants, by contrast, need only provide a brief narrative statement of the expert’s qualifications and the general substance of the testimony the expert expects to give, along with information regarding the expert’s fees.8

Motion practice. State and federal courts also differ in their pretrial motion practice. State court judges hear pretrial motions every day, while federal judges in the Central District typically hear them only on Mondays. Sometimes this makes it harder to place a motion on calendar in federal court and requires more forethought and planning.

Unlike state court, there is no right to oral argument in federal court. Local Rule 7-15 permits the court to dispense with oral argument on most motions if it determines that a hearing is not necessary. It is particularly important, therefore, that you file thorough, accurate briefs, since they may be your only opportunity to address the merits of a motion and persuade the judge that your position is correct. Each federal judge is fortunate to have two law clerks, so you can be sure that your papers will be read and your record and legal citations checked before you appear for argument. You also may receive a relatively detailed tentative ruling guiding your presentation at the hearing. The court’s final ruling often will be set forth in an opinion that may contain language that goes beyond the actual disposition of the motion and will have consequences for future proceedings in the case. Federal courts devote a substantial amount of time to pretrial motions and use them to some extent as a tool for case management, including the narrowing of issues, because they have the resources to do so. Practitioners should be aware of this fact and, as a result, consider carefully the motions they choose to bring prior to trial.

Although there are procedural differences between state and federal court, attorneys who research the applicable rules, know their judge, and arrive in court prepared will be successful in either forum.

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3 Id. at 400.
4 See FED. R. CIV. P. 35(a)(1).
5 See Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001).
6 Compare Fed. R. CIV. P. 30(a)(2)(A) with CIVIL PROC. §2034(a).
7 Compare Fed. R. Civ. P. 33(a) with CIVIL PROC. §2034(a).
Leading the list of pet peeves was the lack of civility
Some attorneys may feel they can practice “hit and run law” with impunity
Recognize your higher duties of respect—if not for the court, then for the cause of justice

After passing the bar exam, you will discover that judges tell you their pet peeves every time they have a chance to do so. They usually highlight the obvious examples of bad conduct by lawyers, such as discourtesy and insufficient preparation. Unfortunately, too many attorneys ignore our admonitions. Maybe lawyers do not believe that this conduct should bother judges. They are wrong. Judges invariably become the arbiters of disputes that should have been resolved by counsel acting with civility. If members of the bar cannot solve their own problems with one another, those problems invariably land in the already full in-boxes of judges.

Lawyer misbehavior does more damage than lengthening court calendars, increasing costs, and prolonging cases. The lack of civility and professionalism hurts the cause of justice.

To test this proposition, I asked a number of experienced, well-respected lawyers to answer the following question: If you were a superior court judge, what would be your pet peeves—and why? Granted, this informal survey may be no more reliable than the 1936 Literary Digest poll that predicted Alf Landon would defeat Franklin Roosevelt. Nonetheless, the answers were remarkably consistent with my personal pet peeves—and most were better articulated than my own.

Leading the list of pet peeves was the lack of civility—or, as a business litigator in a Santa Monica firm described it: Anything that turns into, boils into, or is tantamount to incivility, with that being the “touchstone” such as tardiness, failures to provide reasonable extensions, and sloppiness.

A plaintiffs’ class action and securities lawyer wrote:
Every once in a while counsel should ask themselves: “Is this really something that the judge will want to see us arguing about? How is this likely to be resolved, and how do I get a result close to that without a motion?” The court is a dispute resolution mechanism, and as officers of the court, counsel should be focused on dispute resolution among themselves so that the court is only needed for the calls that reasonable counsel cannot resolve in good faith. On a sliding scale, liability and damages would be issues at the top of the list of things the court would be needed to resolve. Whether a deposition gets continued two weeks (absent truly extenuating circumstances) should normally be at the bottom.

A partner at a large firm who specializes in business litigation essentially agreed when she identified what her pet peeves would be if she were on the bench:
1) Lawyers who don’t answer questions directly;
2) (More trivial but still annoying), lawyers who speak too informally (e.g., in response to an order to give notice, “Uh, yeah...” instead of “Yes, your Honor”);
3) Lawyers who interrupt the judge;
4) Lawyers who dress inappropriately;
5) Lawyers who won’t stop talking when the judge has already indicated that [he or she] is ready to rule.

Another business litigator noted that inappropriate behavior by lawyers includes: Ad hominem language in the briefs or at argument and its cousin, efforts to “educate” the judge (i.e. poison the well) with tons of extraneous, irrelevant, slanted “facts” about the case contained in the briefing that have nothing to do with the issue.

Civility includes common courtesies by lawyers to each other and to the court. One attorney promised that if he were a judge, he “would not have patience for lawyers who don’t notify the court that their matters are off-calendar.” Several more said the same thing.

They must have been reading my mind. Even though it happened several years ago, an incident in a case before me still makes me grit my teeth when I recall it. A large firm filed a motion to sanction a sole practitioner because he was “engaging in incivility.” Uncertain if I had the authority to do what

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the firm was asking, I spent two hours researching the matter and writing a detailed tentative ruling. The following morning someone showed up just long enough to say the moving party was taking the motion off calendar. I am not even sure that the individual was a lawyer, given the way he darted in and out of my courtroom. To say I was peeved is an understatement.

Another litigator’s peeves are all traceable to a lack of consideration:
1) Not informing the court when a motion has been withdrawn/that the opposition has been withdrawn/that the case has settled...until after you have prepared for the hearing.
2) Oral argument by counsel that is no more than a simple repetition of what is already in the pleadings, which could be made doubly bad by the giving of evasive or nonresponsive answers to your direct questions at oral argument that are being asked to get at something not in the pleadings.
3) Counsel coming into your courtroom late without even trying to call the clerk first and alert him/her.
4) Irresponsible claims of “priority” on the calendar for no compelling reason.
5) Trial counsel who do not have their witnesses lined up and ready, thus forcing the jurors and the court to waste time.
6) Cell phones going off, laptops starting up with those jarring Windows noises, even Blackberries loudly vibrating have to be a real irritant; and no matter how many times people are warned, and despite the number of posted signs, there is always one of the above that occurs.

A sole practitioner specializing in family law and personal injury lamented the misconduct of counsel exemplified by “briefs that are not brief” and witnesses who are never ready to testify, thereby delaying trials.

The people who answered my question were annoyed with lawyers who are unprepared or, worse, mislead the court. A partner at a boutique litigation firm voiced the following pet peeve:

When an opposing counsel misrepresents an issue of law or fact—which by design or neglect—and the judge responds with no outrage. Why a pet peeve? Because it creates the impression the judge doesn't necessarily know what's happening and also ends up encouraging the other side's antics. Bottom line—there is a time for indignation.

An international practitioner identified other examples of misbehavior in court:

Attorneys who could not answer questions about the case since they were just covering the hearing for someone else, attorneys who genuinely misstate the law (in contrast to legal advocacy) or omit crucial facts or legal principles, and attorneys who have thought less about the case than I have as a judge and do not know where they are going in representing their client.

Moreover, the practitioner added, “The variant of this pet peeve would be an attorney who seems to be more interested in keeping a case alive than resolving it—perhaps to continue to bill the client.”

A veteran attorney wrote that if he were on the bench, he would:

[R]equire in my standing orders that lawyers in my court read the book Lawyer Lincoln, about Lincoln’s career at the bar before his election as president. Not all trial lawyers can be Lincolns, but they can help a judge put matters in perspective by seeing the case for what it is and communicating some of that thoughtfulness and maturity in their arguments.

None of these comments explains why uncivil conduct persists. Perhaps because our community is so large, some attorneys may feel they can practice “hit and run law” with impunity. Perhaps lawyers justify bad conduct to themselves because they feel mounting economic pressure or because they believe this is what their clients expect. As the law becomes strictly business, as client loyalties evaporate, and as the appearance of justice is threatened, the frustration level among litigators may be rising. Whatever the cause of the incivility epidemic, we should identify it and treat it.

This challenge is perhaps beyond the reach of a new lawyer handling an individual case. Still, I urge each of you to reduce the symptoms of this epidemic by recognizing your higher duties of respect—if not for the court, then at least for the cause of justice. If you act in a courteous, professional manner, your conduct may well be contagious.
Effective direct examination in which counsel questions witnesses without asking leading questions is a key to victory at trial. Developing a vivid and successful direct examination—one so persuasive and memorable that jurors carry it with them as they enter their deliberations—requires at least three sets of skills: command of the rules of evidence, skillful listening, and mastery of courtroom basics. Each can be learned and honed over time with guidance, practice, and discipline.

A winning trial strategy evolves from a command of the rules of evidence. This is a simple truth that too many lawyers either overlook or ignore. Attorneys practicing criminal law frequently know the rules of evidence better than civil litigators because they tend to try cases more often. Opportunities exist for civil litigators to develop their trial skills by participating in pro bono activities, such as the Los Angeles County Bar Association’s Trial Advocacy Project. Civil attorneys may find similar opportunities in drafting and responding to declarations filed in support of written motions.

A declaration is nothing more than carefully tailored testimony in writing. The court may consider the evidence in a declaration only if it is admissible and not subject to an objection under the Evidence Code. Persuading a court to admit or reject evidence means directing the court to the correct evidentiary standard. By doing so, counsel who draft declarations gain an opportunity to develop a better understanding of the rules of evidence.

While trial preparation is essential, over-preparation can distract an advocate. Questioning a witness requires knowing the facts, researching the law, outlining the questions, asking the right questions—and listening to and watching witnesses as they deliver the answers. The examiner should not only listen to a witness’s answer but also observe the witness’s conduct while answering. Counsel should put their pens down after asking a question and truly listen and watch the witness. Witnesses do not follow scripts, and neither should advocates.

Sometimes witnesses—especially sophisticated witnesses—remember facts or recognize gaps in the case that an advocate—especially an inexperienced advocate—overlooks. These witnesses may try to draw a lawyer’s attention to a problem. The lawyer needs to listen carefully to profit from this opportunity.

This situation can emerge in a variety of ways. In one scenario, an experienced police officer from an elite unit is testifying in a drug possession case. He responds to the questions of an inexperienced prosecutor, who asks how the officer was able to see the defendant drop a bag containing drug paraphernalia in the dead of night on a dark street. The prosecutor asks, “Were the patrol car’s headlights facing the defendant?” The officer responds, “No.”

However, the prosecutor does not ask about lighting from overhead lamps. In answering the prosecutor’s routine questions, the officer twice explains how his partner drove past streetlights while following alongside the defendant, who was walking down the street. The prosecutor, glued to his notes, misses the cue until the officer is practically shouting about the lighting. This prompts the defense attorney to object to the officer’s testimony, an objection that finally awakens the prosecutor. So advocates must always listen and observe intently when a witness is answering a question. Your next question—maybe the most crucial question of all—depends on your listening skills.

Courtroom basics must become second nature. With a little luck, a lawyer who stumbles over his or her questions may charm the jury—the first time. After that, lack of preparation frustrates everyone. With so many trial elements to juggle, a lawyer should not have to worry about the basics when conducting a direct examination.

Outlining the direct examination. Direct examination is the means by which attorneys prove their client’s case. It presents the evidence promised in the opening statement and develops the inferences necessary for the jury to decide the case correctly. To do this, a direct examination must 1) elicit the elements of the civil claim or criminal charge and 2) present what the jury instructions require the party to prove. An outline is a crucial first step in orchestrating a powerful direct examination.

Some attorneys use the jury instructions as a means to outline the direct examination. This often leads to disjointed and tedious testimony. The correct outline for a direct examination addresses the three issues in the question that is always critical to a case: Who did what to whom? The answer, in turn, should appear in the broader context of when, where, how, and why. Using the jury instructions as an outline will bore everyone—but telling a story in which the advocate weaves the elements of the claim or defense makes the case colorful and memorable.

The opening statement. Consider how a juror, a stranger to the case, may react to another stranger, a witness, who is stepping into the courtroom.
into the witness box. The juror wants to know who the witness is, why the testimony is important, and why the juror should believe the witness. Counsel should address these matters in the opening statement.

Tell the jury whom they will meet and why they should believe your witnesses. “Ladies and gentlemen, Officer Smith was there. He saw the defendant drop the drugs and the pipe. And he could see the defendant drop the drugs and the pipe because of the well-spaced, brightly shining streetlights, photographs of which you will see.” With an outline of the direct examination as your road map, you can ensure that the key facts to which each witness will testify are clearly and memorably explained to the juror.

**Headlining.** When the witness begins to testify, remind the juror who he or she is. The process is sometimes referred to as “headlining,” because it involves brief announcements of the content to follow:

Q. “Officer Smith, you are a sergeant in the Los Angeles Police Department?” (A brief leading question is permissible.)
A. “Yes.”

Q. “I’d like to ask you about the work you do in the elite Metropolitan Division of the Los Angeles Police Department.”

As you move to the next subject, make sure you present a fresh set of headlines.

**Credibility.** As the direct examination begins, always make sure to first establish the credibility of the witness. Elicit information linked to the topic on which the person will testify. Whether the witness is a police officer in a drug prosecution or a vice president of human resources in a wrongful termination claim, establish credibility by discussing the witness’s training, education, and experience. Next, try to eliminate bias, self-interest, or a motive to lie. For instance, if the vice president of human resources no longer works for the defendant business, emphasize this fact: “Mr. Jones, do you still work for Acme Company?”

Sometimes people mistake nervousness for dishonesty. If the witness is nervous, address the issue rather than avoiding it:

Q. “Mr. Jones, have you ever testified in a courtroom?”
A. “No, sir.”
Q. “Are you nervous?”
A. “Yes.”
Q. “Mr. Jones, that’s natural—any of us would be. Will being nervous affect your testimony?”
A. “No. I’m just nervous.”

**Marking exhibits.** Exhibits in civil cases are often premarked, unlike in many criminal cases. Yet, even in civil actions, the need to mark exhibits in the middle of testimony arises. Every trial lawyer should know how to do this. The basics are: 1) describe the exhibit briefly, 2) confirm that the opposing side has seen it, 3) receive permission to mark the exhibit, 4) mark the exhibit, and 5) establish its foundation for admission into evidence. Memorize this formula:

- **Describe:** “Your Honor, I’m holding a one-page document, dated January 2, 2003, with the words ‘Employee At-Will Agreement’ printed on the top of the page.”
- **Confirm:** “I have previously shown it to counsel.”
- **Permission:** “May it be marked for identification as Defendant’s Exhibit A?” (The court responds, “It may be so marked.”)
- **Mark:** “With the court’s permission, I will place an ‘A’ on the bottom right corner and circle it. May I approach the witness?” (The court responds, “You may.”)
- **Establish:** “Mr. Jones, do you recognize Defendant’s Exhibit A?” (The witness responds, “Yes.”)

After the witness has laid the foundation, or at a more convenient time—perhaps at the close of the case in chief—the advocate should simply ask: “May Defendant’s Exhibit A be admitted into evidence and published to the jury?”

**Anticipatory rebuttal.** Most testimony is deficient in some way. One goal of cross-examination is to expose the weakness of testimony by focusing on 1) the meaning of the testimony—which may involve alternate explanations of the evidence, 2) deficiencies in the witness’s perception, 3) faults in the witness’s memory, or 4) lack of truthfulness. Your direct examination of the witness should anticipate some of these attacks. Advocates can use the advanced technique of anticipatory rebuttal to bolster the credibility of a witness. Anticipatory rebuttal is a unique approach in which the questioner prompts the witness to respond during direct examination to the attacks expected from the opposing attorney during cross-examination.

For example, during a DUI prosecution, the arresting police officer is prepared to testify about observing that the defendant’s eyes were red and watery and concluding that this was evidence of impairment. During cross-examination, the defense attorney will certainly ask the officer to admit that some people have red and watery eyes for reasons not linked to alcohol impairment, such as fatigue or allergy. Using anticipatory rebuttal, the prosecutor should ask the officer during direct examination why the officer concluded that the condition of the defendant’s eyes suggested impairment when there were potentially more innocent explanations. The officer may state, “The slurred speech, odor of alcohol, and lack of balance made me conclude that alcohol, and not pollen, caused the defendant’s bloodshot and watery eyes.” The direct examiner anticipates the point that will be sought on cross-examination and then rebuts it, thus denying the cross-examiner the benefit of establishing the point. Using anticipatory rebuttal gives the direct examiner the opportunity to put the first spin on potentially damaging evidence.

**Reinforcing testimony.** Before ending direct examination, recall the central issue of the testimony and reinforce it. Tell the juror again why the testimony is important.

“Officer, do you have any question whether you saw the defendant open his hand and drop the baggie in which you found the drugs and crack pipe?”

**Cautionary notes.** Numerous things can, and do, go wrong during direct examination. Advocates need to be agile in handling the problems that frequently arise. These include:

- **Bad questions.** Never ask a question that contains a double negative. For instance, what if a lawyer asks, “You didn’t go there?,” and the witness answers, “No.” Did the witness go there or not? Some questions are clunkers. Alternatives always exist.
- **Surprise answers.** Every lawyer will experience the situation in which bad responses are given to good questions. The only acceptable response is to maintain a stoic bearing and move on.

Before trial, always walk a witness through the demonstration you intend to present to the jury. Consider this actual example of a failure to rehearse a presentation. A prosecutor asked the victim to step out of the witness box and approach a map of an intersection posted on the bulletin board near the jury. The prosecutor said, “Using this red pen, please place an ‘X’ in a circle on the street corner on which the crime occurred.” The witness stood baffled. The prosecutor asked again. The embarrased witness mumbled, “I can’t read maps.”

**Dismount.** Close the direct examination with professionalism and courtesy: “Thank you. Nothing further at this time.” Above all else, your reputation is your livelihood. Zealously protect it by preparation and professionalism.
Make sure the case record is full and complete

Objections not made are waived

The presumption on appeal is that the trial court ruled correctly

The daily heat generated by a litigation battle can distract litigators from focusing on what is around the corner, let alone miles down the road. Failing to plan ahead, however, can prove fatal to an effort to secure appellate relief. One of the most fundamental maxims of appellate review is “If it’s not in the record, it doesn’t exist.” This rule lies at the heart of what appellate courts do: They examine whether the trial court erred by reviewing the record of what happened in the lower court. The record consists of what was “said” (the reporter’s transcript of the hearing or trial) and what was “read” (the pleadings, motions, exhibits, and other written materials presented to the trial court). Without a record, there is simply nothing to review. It is essential, therefore, for the record to fully reflect any meaningful aspect of the case.

Without careful attention to creating and preserving the record, a future appeal may be lost before it even begins. To help prevent such an unfortunate occurrence, practitioners should follow several basic tips for preserving the record for appeals to California’s appellate courts.

Unreported events. The classic example of an important record omission is the “off the record” sidebar conference or meeting in the judge’s chambers. What transpires in these exchanges—for example, a ruling on the admissibility of a vital piece of evidence—may be critical to the case. But if the discussion does not appear in the record, it never happened for appellate purposes and cannot be reviewed.

To avoid this problem, insist that the court reporter record all interactions with the judge and opposing counsel. When that is not possible, memorialize unreported requests and rulings once everyone is “back on” the record. Moreover, submit a proposed order or file a reconsideration motion to create a written record as well.

Waiving issues. The cardinal rule of record preservation is the familiar “raise it or waive it” formulation: Objections not made are waived. A reasonable philosophical foundation underlies this rule. Requiring points of error to be raised with the trial court provides a fair opportunity for the judge to correct the errors and potentially avoid the need for appellate review. Conversely, even without a change in the trial court’s ruling, raising the error at least prompts the trial court to consider the ruling and provide reasons supporting it—a process that is useful for the appellate court. A waiver may be express—such as agreeing with the trial court’s action—or implied—such as acquiescing in the trial court’s action without objection. Either way, the issue will be precluded from consideration on appeal.

Preserving evidentiary issues. Evidentiary issues emerge from either of two situations: Your attempt to admit evidence was thwarted, or your opponent succeeded in having improper evidence admitted. In both circumstances, affirmative steps are required to preserve the issue for review.

To preserve a claim of erroneous exclusion, the thwarted party must object to the court’s exclusionary ruling and make an offer of proof. This entails explaining what the excluded evidence is and what it would have shown. Without this context, the appellate court will never understand precisely what was rejected from evidence and why that rejection matters. If the offer of proof involves a document or some other type of tangible exhibit, the exhibit should be marked for identification to ensure its inclusion in the record. Similarly, to complain about the erroneous admission of an opponent’s evidence on appeal, you must make a timely, proper objection to the introduction of that evidence when it is offered—and the objection preferably should be coupled with a motion to strike the evidence as improperly admitted. A proper objection provides specific grounds for excluding the evidence.

The ultimate goal is to create a full and complete record of the evidentiary dispute, enabling an appellate court to review precisely what happened and what might have happened had the evidentiary offer been handled differently. This step includes obtaining a definitive, final ruling. Beware of the wishy-washy ruling in which the judge denies admission momentarily but leaves the door open for admission later. When this happens, without a repeated attempt to

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Summary judgment. Evidentiary objections also are required to preserve evidentiary errors relating to summary judgment motions. The summary judgment statute provides that objections to declarations or affidavits are deemed waived if not made at the hearing on the motion. Objections may be made in writing and filed before the hearing or at the hearing. Again, merely making an objection is not enough: Preserving errors for appeal requires obtaining a final ruling. Without a final ruling, objections are deemed waived.

Case theories and issues. Because appellate courts are in the reviewing business, they do not take kindly to parties raising new legal theories or issues on appeal. For that reason, ensure that the topics and arguments for appeal are raised in the trial court. While it is true that appellate courts may consider pure issues of law based on undisputed facts on appeal, the safest approach is to get the issues in the record.

Jury instructions. Jury instructions are a fertile ground for error. Although the Code of Civil Procedure provides that jury instructions are “deemed excepted to,” the careful advocate will not rely on this built-in statutory objection. Case law has limited the scope of this automatic objection—and it has dangerous exceptions.

Improper jury arguments. With respect to misconduct by counsel or improper jury arguments, make a proper objection, and request an admonishment. Further, request a mistrial to prevent the argument. The appellate court will assume that the trial court made whatever findings were necessary to support the judgment. Similarly, once a statement of decision issues, a party wishing to raise omissions or ambiguities in the statement on appeal must object to the statement or else a waiver applies.

Challenging damages. To challenge the amount of damages on appeal as either excessive or inadequate, the appellant must first raise the issue by way of a motion for a new trial.

Trial exhibits. Materials not presented to the trial court generally cannot be presented to the appellate court. This makes sense because the appellate court’s function is to review what happened in the trial court, not provide an opportunity for a do-over. It would be unfair for an appellate court to reverse a trial judge based on materials the trial judge never saw in the first place.

Remember, the presumption on appeal is that the trial court ruled correctly. The appellant bears the burden of demonstrating prejudicial error by citing to the record. This can be done only if there is a record to cite and if the issues on appeal have not been waived.

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7 For record preservation doctrines in federal practice, see FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE §§7:80–7:198 (2002).
9 Furthermore, ensure that all deposition transcripts read aloud and all videotapes played at trial are transcribed for direct insertion into the record.
15 Evid. Code §354.
16 Evid. Code §353(a).
17 Id.
21 Cal. R. of Ct. 343, 345.
31 Of course, to complain about an improper argument, the record must include a transcript of the argument. Calhoun v. Hildebrandt, 230 Cal. App. 2d 70, 71-72 (1962).
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