Los Angeles lawyer Eric C. Peterson points out the personal liabilities faced by directors and officers of companies in bankruptcy.

Getting Personal

E–Discovery on Home Computers
Risks in Green Construction
Electronic Calendaring Services
Integrity . . .
Reliability . . .
Performance . . .

Lawyers’ Mutual Insurance Company
Professional Liability Insurance

1978 - Legal Malpractice Insurance Crisis
- LMIC born out of insurance crisis
1979 - First policy issued
1980 - Loss Prevention Programs launched
1983 - Bar Association Errors and Omissions Programs introduced
- Lawyer Referral Service Programs offered
1985 - LMIC provides a market for lawyers abandoned in another
Legal Malpractice Insurance Crisis
1990 - Preferred Policyholder and Longevity Credits inaugurated
1991 - New Admittee Program introduced
1998 - Return of Contribution to Surplus approved by Board of Directors
1999 - Criminal and Insurance Defense Programs introduced
2000 - Appellate, Immigration, Mediation and Arbitration Programs added
2001 - LMIC flourishes in spite of yet another Legal Malpractice Insurance Crisis
- Strong Start Program (formerly New Admittee) reintroduced
2003 - Online MCLE offered
2006 - 11th straight year of dividends
- over $30,000,000 paid to policyholders

2007 . . .

News Flash . . .

. . . 12th straight year of dividends just now declared!

Lawyers’ Mutual Insurance Company
3110 West Empire Avenue, Burbank, CA 91504
A.M. Best Rated “A” (Excellent) California Admitted
call 1.800.252.2045 or visit www.LMIC.com
Q: What’s the best surfing spot for a California lawyer?

A:

California Forms of Pleading and Practice.

It’s the place to be for attorneys who need to deal with all the complexities of California law.

As a California lawyer, you know that the waters aren’t always clear. With so many laws on the books, and emerging areas of law popping up all the time, you need the kind of research tool that makes you smarter, stronger, tougher and better. With California Forms of Pleading and Practice, you’re up-to-date and ahead of the curve.

With so much more than just forms, it provides today’s critical analysis from the most authoritative practitioners in their fields. You’ll find checklists, forms, legal background and research guides all integrated into one convenient source.

With more updates than the competition, you’ll not only know your facts cold, but get better coverage of new topics. When you build your next case, start with California Forms of Pleading and Practice. See why it’s the wave of the future.

To experience the difference the right kind of research makes, visit www.lexisnexis.com/carightsolution
Do corporate counsel really use Martindale-Hubbell® Peer Review Ratings™ to evaluate outside counsel?

JERRY TEMKO, VICE PRESIDENT & GENERAL COUNSEL, ASTELLAS PHARMA EUROPE

"Yes I do."

"I rely upon Martindale-Hubbell Peer Review Ratings when selecting outside counsel. They provide a great benchmark to determine if a lawyer is experienced and well thought of."

Martindale-Hubbell®

Are you rated? Find out how being Peer Review Rated can increase your exposure to corporate counsel seeking high quality, ethical representation.

Go to www.martindale.com/ratings or call 1.800.526.4902 x2191
FEATURES

22 Getting Personal
BY ERIC C. PETERSON
Bankruptcy status may strip away many of the personal liability protections directors and officers enjoy

29 Muddy Waters
BY EARL L. HAGSTRÖM
Recent court decisions on water contamination have chipped away at health-based standards in favor of property rights and product liability theories

Plus: Earn MCLE credit. MCLE Test No. 165 appears on page 31

38 Special Section
2007 Holiday Travel & Gift Guide

DEPARTMENTS

11 Barristers Tips
Understanding the 90-day rule
BY BENJAMIN G. SHATZ

12 Practice Tips
Gaining e-discovery access to home computers
BY BRIAN ZAYAS

37 Practice Tips
Managing liability risks in green construction
BY JEFFREY D. MASTERS AND JOHN R. MUSITANO JR.

36 Computer Counselor
Minimize risk with better calendar management
BY JOSEPH C. SCOTT

44 Closing Argument
Putting some common sense back into patent enforcement
BY ELIOT G. DISNER

7 Letters to the Editor

41 Classifieds

42 Index to Advertisers

43 CLE Preview
Karen Natapoff
Divorce Mortgage Specialist

“It is a rare mortgage broker with the skill and ability to bring to the dissolution table the expertise of a mortgage broker in combination with an in-depth understanding of related family law matters.”

-Nancy A. Kearson
Certified Public Accountant

“She has my highest endorsement, and I would recommend her, without reservation, as a professional in her field.”

-Steven Knowles, Esq.
Troppe and Troppe

Reginald A. Holmes, ESQ.
Mediator - Arbitrator - Private Judge
Intellectual Property • Entertainment International • Employment

THE HOLMES LAW FIRM
626-432-7222 (Phone)
626-432-7223 (Fax)
1-800-FAIR-ADR (324-7237)
R_Holmes@ix.netcom.com
www.TheHolmesLawFirm.com
Also available through the American Arbitration Association
213.362.1000 or www.adr.org

Asset Protection Planning Now Can Insulate Your Clients’ Assets From Future Judgments

Yes, it’s true. By properly restructuring your clients’ estate plan, their assets and the assets they leave to their family will be protected from judgment creditors. Here are some of the situations in which our plan can help protect your clients’ assets:

- Judgments exceeding policy limits or exclusions from policy coverage.
- Judgments not covered by insurance.
- Children suing each other over your client’s estate.
- A current spouse and children from a prior marriage suing each other over your client’s estate.
- A child’s inheritance or the income from that inheritance being awarded to the child’s former spouse.

STEVEN L. GLEITMAN, ESQ.
310-553-5080

Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.
Last year, after years of experience as a lawyer and CPA, I had, for the first time, the experience of being a client. My mother passed away, and I became the trustee of my family’s trusts. My mother was the last member of my immediate family, and although she was elderly, her passing was somewhat unexpected. While dealing with the loss, I found myself going through the house that had been our family home since my childhood, sorting through years of memorabilia and looking for records and documents to piece together the estate, which included commercial real property.

While I am a tax lawyer, I am not an estate planner, and I knew that I would need the help of a number of professionals, including an experienced estate lawyer. And even though I have negotiated many real estate transactions, I did not want to make the mistake of being my own lawyer. I also was fortunate to have the assistance of experienced accountants, real estate brokers, and appraisers.

But I knew I could not rely entirely on professionals. I would have to make a number of important decisions and ultimately be responsible for those decisions. I realized that I would need to coordinate the efforts of the various professionals and learn enough about estate law to ask the right questions. One of the professors who teaches estate taxation in USC’s master’s in business taxation program graciously invited me to sit in on a few classes. I also became familiar with the day-to-day property management issues, which I had never faced before and never imagined having to face.

Being a lawyer and a CPA, I believe, has helped me to make better decisions as a client. I know from personal experience that tax professionals are often asked to give simple answers to seemingly simple questions in sometimes very complex matters, without having the opportunity to review supporting documents or even prior year tax returns. This can be a dangerous practice. In tax law, even slight nuances in facts and circumstances that nontax practitioners would never recognize can often lead to strikingly different—and unexpected—results.

I also am aware that conferences among colleagues are often frowned upon as a waste of time. I disagree. My parents’ trusts involve numerous legal and tax issues, and I want my professionals to have the full benefit of reviewing all documents and discussing all issues among themselves. I am not shopping for answers among professionals. Rather, I appreciate the benefit of bringing professionals together—each with his or her different experiences and perspectives—to offer points and counterpoints, with the ultimate decision being mine.

My experience as a client has helped me to be a better lawyer. I have been able to see what it is like to work with professionals from a client’s point of view. But while I expect to make the ultimate decisions, I know many clients—particularly those who may not have the necessary background to understand the issues or inclination to make decisions—may place that responsibility on their counsel, even if the matter is largely a personal or business decision. Giving a client advice and guidance is one thing, but making their business decisions for them is quite another. Lawyers need to be careful regarding how far to go in making decisions for clients.

In my case, one of the hardest decisions I had to make was to sell the family home, which I did this past spring. To my surprise, it is now a vacant lot. While selling the home was the right decision at the right time, more important, it was my decision.

Chad C. Coombs is a shareholder in the Los Angeles office of Buchalter Nemer, APC, where he specializes in tax law. He is the chair of the 2007-08 Los Angeles Lawyer Editorial Board.
LOS ANGELES LAWYER is the official publication of the Los Angeles County Bar Association
261 S. Figueroa St., Suite 300, Los Angeles, CA 90012-1881
Telephone 213.627.2727 / www.lacba.org

ASSOCIATION OFFICERS
President
GRETCHEN M. NELSON
President-Elect
DANETTE E. MEYERS
Senior Vice President
DON MIKE ANTHONY
Vice President
ALAN K. STEINBRECHER
Treasurer
JULIE K. XANDERS
Assistant Vice President
JOHN D. VANDEVELDE
Assistant Vice President
ERIC A. WEBBER
Assistant Vice President
ANTHONY PAUL DIAZ
Immediate Past President
CHARLES E. MICHAELS
Executive Director
STUART A. FORSYTH
Associate Executive Director/Chief Financial Officer
BRUCE BERRA
Associate Executive Director/General Counsel
W. CLARK BROWN

BOARD OF TRUSTEES
P. PATRICK ASHOURI
PHILIP BARBARO, JR.
JOHN M. BYRNE
KIMBERLY H. CLANCY
LINDA L. CURTIS
PATRICIA EGAN BAERHKE
DANA M. DOUGLAS
KATHERINE M. FORSTER
ALEXANDER S. GAREEB
VICTOR GEORGE
LAURIE R. HARROLD
BRIAN D. HUBEN
K. ANNE INOUE
CINDY JOHNSON
PHILIP H. LAM
RICHARD A. LEWIS
ELAINE W. MANDEL
PATRICIA L. McCABE
DAVID F. MICHAIL
ANNALUISA PADILLA
ELLEN A. PANSKY
ANN I. PARK
THOMAS F. QUILLING
STEPHEN L. RAUCHER
SUSAN E. REARDON
ROGER D. REYNOLDS
DEBORAH C. SAXE
MARGARET P. STEVENS
KIM TUNG
NORMA J. WILLIAMS
ROBIN L. YEAGER

AFFILIATED BAR ASSOCIATIONS
BEVERLY HILLS BAR ASSOCIATION
BLACK WOMEN LAWYERS ASSOCIATION OF LOS ANGELES, INC.
CENTURY CITY BAR ASSOCIATION
CONSUMER ATTORNEYS ASSOCIATION OF LOS ANGELES
CULVER-MARINA BAR ASSOCIATION
EASTERN BAR ASSOCIATION
GLENDALE BAR ASSOCIATION
IRANIAN AMERICAN LAWYERS ASSOCIATION
ITALIAN AMERICAN LAWYERS ASSOCIATION
JAPANESE AMERICAN BAR ASSOCIATION OF GREATER LOS ANGELES
JOHN M. LANGSTON BAR ASSOCIATION
JUVENILE COURTS BAR ASSOCIATION
KOREAN AMERICAN BAR ASSOCIATION OF SOUTHERN CALIFORNIA
LAWYERS' CLUB OF LOS ANGELES
LESBIAN AND GAY LAWYERS ASSOCIATION OF LOS ANGELES
MEXICAN AMERICAN BAR ASSOCIATION
MEXICAN AMERICAN BAR ASSOCIATION
MEXICAN AMERICAN BAR ASSOCIATION
NEWPORT BEACH BAR ASSOCIATION
PASADENA BAR ASSOCIATION
SAN FERNANDO VALLEY BAR ASSOCIATION
SAN GABRIEL VALLEY BAR ASSOCIATION
SANTA MONICA BAR ASSOCIATION
SOUTHERN COMMUNITY BAR ASSOCIATION
SOUTH ASIAN BAR ASSOCIATION OF SOUTHERN CALIFORNIA
SOUTH BAY BAR ASSOCIATION OF LOS ANGELES COUNTY, INC.
SOUTHEAST DISTRICT BAR ASSOCIATION
SOUTHERN CALIFORNIA CHINESE LAWYERS ASSOCIATION
WHITTIER BAR ASSOCIATION
WOMEN LAWYERS ASSOCIATION OF LOS ANGELES

FROM BEGINNING TO END, I OFFER MY FULL SPECTRUM OF REAL ESTATE-RELATED SERVICES
SPECIFICALLY DESIGNED TO SERVE THE FAMILY LAW AND ESTATE/PROBATE PRACTICES.
MOREOVER, THESE NO-COST SERVICES ARE OFFERED WITHOUT OBLIGATION.

HOW CAN I HELP YOU?
REAL ESTATE FOR THE FAMILY HOME
REFERENCES AVAILABLE UPON REQUEST
WWW.MICKEYKESSLER.COM/FAMILYLAW.HTML

Mickey Kessler deftly handles the role of the joint realtor in dissolution cases. He is responsive, communicative, honest, hard-working, determined, undaunted by the conflict of a divorce, and he tops it all off by keeping his smile! I recommend him highly.
ROBERTA L. MURAWSKI, LAW OFFICE OF ROBERTA L. MURAWSKI

POLYGGRAPH
JACK TRIMARCO & ASSOCIATES
POLYGGRAPH/INVESTIGATIONS, INC.

9454 Wilshire Blvd.
Sixth Floor
Beverly Hills, CA 90212
TEL 310.247.2637
FAX 805.984.7042
email: jtrimarco@aol.com
www.jacktrimarco.com

Jack Trimarco - President
Former Polygraph Unit Chief
CA. P.I. #20970

Member Society of Former Special Agents
Federal Bureau of Investigation

Former Polygraph Inspection Team Leader
Office of Counter Intelligence
U.S. Department of Energy

Need a Realtor?
Mickey Kessler
Associate Manager
Direct 310-442-1398

When you need to impress someone with the truth.

DOUBLE BILLING APPROVED!
Earn 6.5 hours of MCLE credit while taking traffic school (live or online).

MCLE 4 LAWYERS
CALIFORNIA TRAFFIC SCHOOL

www.mcle4lawyers.com
(310) 552-5382
DMV license no. TV5 1343 - Since 1997

JACK TRIMARCO
POLYGGRAPH/INVESTIGATIONS, INC.
Stipulations in Deposition

As licensed court reporters and past presidents of Deposition Reporters Association of California, we sincerely appreciate Steven D. Archer’s article “The Dangers of the ‘Usual Stipulation’ in Deposition Practice” (The Survival Guide for New Attorneys, fall 2006). It is a good discussion of the hazards of the all-too-common practice of stipulating away proper handling of the transcript by the deposition officer. We would like to add some additional thoughts, from the perspective of the reporter, both for consideration and clarification.

Mr. Archer mentions that reporters follow different customary rules, depending on whether they are in Northern or Southern California. We wish to emphasize that the difference arises from the fact that in Northern California attorneys generally choose to follow the law as written, the provisions in the California Code of Civil Procedure, whereas in Southern California it has become almost unheard of to go “per Code”; it’s not a matter of whether to do a stipulation, but rather, what the stipulation should say.

It is a mystery how this practice of relieving the reporter of his/her statutory duties began, but it has resulted in many attorneys in Southern California believing—as we have actually heard stated in depositions—that a stipulation must be done before they can close the record. A favorite line was, “We have to do a stipulation, otherwise the reporter will just keep writing.” Perhaps it was said in jest, but no one so much as chuckled, and no one challenged the assertion.

Mr. Archer writes, “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.” Our silence should not be interpreted as agreement. If reporters don’t interject regarding the stipulation in a deposition, it is because we are in no position to educate attorneys on the law, are ethically bound not to comment on the proceedings in any way, and that we certainly don’t want to jeopardize working relationships by being labeled as a “troublemaker” because we refuse to accommodate the wishes of the parties.

Unfortunately, it appears that the stipulation has become so universal in Southern California that even well-respected attorneys and publications are unclear about how the transcript would actually be handled “per Code.” Under the section with the subheading “Where,” Mr. Archer writes, “The court reporter then maintains custody of the original transcript and lodges it directly with the court upon request by one or more parties.” With all due respect, that is not the practice in any area of the state, nor is it the Code per Code of Civil Procedure Section 2025.550(a). Realistically, no reporter would (or should) accept responsibility for maintaining the original transcript, let alone lodging a deposition transcript with the court.

That faulty premise makes Mr. Archer’s statement that “In Northern California, court reporters are loath to release possession, custody, and control of the original transcript” also inaccurate. The objection to deviating from the code requirements stems from an uncertainty whether attorneys have the right to stipulate away a deposition officer’s duties, either with or without agreement by the reporter. The Code of Civil Procedure clearly states that there are certain provisions that can be modified by stipulation; for instance, method of recordation of the deposition, Code of Civil Procedure Section 2025.330(b), and the ability to waive signature or change the time period for review and signing, Code of Civil Procedure Section 2025.520(a) and (b). Absent specific language that parties alone have discretion to modify procedures, many would contend that, at a minimum, the court reporter must be a party to the stipulation. Just as the Code of Civil Procedure provides that a witness must agree to waive signature, it seems reasonable that a reporter must agree to waive his/her duties.

Following that line of thought and adding to Mr. Archer’s nightmare scenario that a blanket stipulation relieving a “reporter of his/her duties under the code” has many unintended ramifications, consider that by entering into either the “usual stipulation,” or one along the lines of Mr. Archer’s suggestion that 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, it effectively removes the deposition reporter from any responsibility regarding review, corrections, signature, and notification to the parties thereof. Under that scenario, the reporter has no ability to certify the witness’s execution of the original transcript and cannot ensure that all parties are notified of corrections, if any. Reporters have often discussed the propriety of attorneys themselves assuming duties that, by law, are required to be done by the independent officer of the court.

Perhaps more importantly, when opposing counsel is made responsible for overseeing corrections and signature, any certified transcript provided by the reporter at a later date, either to a party or a nonparty, will not reflect such corrections or changes made by the witness. It then becomes incumbent on the attorney to seek out important information regarding witness review.

Lastly, we wish to express our belief that stipulating away the original to opposing counsel effectively means the noticing attorney is subsidizing his/her opponent’s case. Antitrust laws prohibit reporters from discussing specific rates; however, our combined personal experience of working for deposition firms throughout the state seems to bear out that rates for an O&1 are generally significantly higher in Southern California as compared to Northern California. It appears that Southern California rates reflect the fact it is customary for the noticing attorney to provide opposing counsel a “free” transcript (the original). In contrast, lower rates in Northern California for the O&1 reflect an expectation that opposing counsel will order a certified copy of the transcript, which would seem to be a proper allocation of expenses in civil cases.

A byproduct of opposing/witness’s counsel receiving essentially a free copy (the original) is that they have no financial stake in the length of the deposition transcript. Some have been known to take that opportunity to ask endless questions, sometimes exceeding that of the noticing attorney, to make his/her record. Perhaps it is a style; perhaps it is a tactic to increase costs for the noticing attorney. In either case, it has at times resulted in argu-
ment, with the reporter being asked by the noticing attorney to close the record, only to be reopened on opposing counsel’s dime, so to speak. Per Code of Civil Procedure Section 202.5.470, a reporter may not go off the record without agreement of the witness and all parties present unless a party or the witness states an intention to move for a protective order. Reporters cannot rule on whether the examination is “outside the protective order. Reporters cannot rule on

ness states an intention to move for a protective order. Reporters cannot rule on whether the examination is “outside the protective order. Reporters cannot rule on whether the examination is “outside the

In closing, we offer two thoughts: First, we repeat our appreciation that Mr. Archer’s article raised the topic and covered significant points. Second, should the current law need revision, perhaps attorneys and reporters can work together to change it, creating uniform practices throughout the state and eliminating the need to determine whether a stipulation protects or jeopardizes the integrity of the deposition transcript.

In the interim, given that procedures in the Code of Civil Procedure seem to work well in Northern California, we would advocate that Southern California attorneys rethink the custom and practice of a stipulation at the end of every deposition.

Lynda Goddard
Certified Stenotype Reporter

Holly Moose
Certified Stenotype Reporter

The Poor Loser Syndrome

I have been a member of LACBA for many years, and this is the first time that I felt compelled to complain about something related to the Association. However, I feel that the decision to publish the Closing Argument titled “Arbitration and the Poor Loser Syndrome” (Los Angeles Lawyer, September 2007) by Ronald E. Wood is, at a minimum questionable, if not totally inappropriate.

The article appears to me to be a vehicle for the losing party’s attorney to criticize a trial court judgment (“a court simply lost its way”) which is currently on appeal. Indeed, it does even more than that since it, in essence, appears to me to threaten the imposition of sanctions on the appellant. In short, I believe it is a totally one-sided presentation of matters in litigation which have not been finally resolved.

To me, the use of Closing Argument in this manner sets a bad precedent which is reinforced by a portion of the title given to the article (“poor loser syndrome”). I wonder who, indeed, is the poor loser at this stage of the proceedings? Does the publication of this article become the basis for any member of LACBA to vent in Los Angeles Lawyer his or her unhappiness with a case he or she is appealing? It seems to me that the proper place for such argument is in the appellant’s opening brief and not in Los Angeles Lawyer magazine, and the proper time for analyzing the result of the case is after it is concluded on appeal.

Harry B. Sondheim

Editors reply: The general policy of Los Angeles Lawyer is to avoid printing Closing Argument columns that merely rehash a losing party’s disagreement over a judicial decision. We felt that this column raised a sufficiently general point on arbitration to fall on the other side of a blurry line. After reading your response, we acknowledge that we may have been in error.

Correction on Probate Law

In the sixth paragraph of Elizabeth A. Nixon’s article, “Default Judgment—Dying without a Will” (Barristers Tips, Los Angeles Lawyer, October 2007), she states that when a married woman with two children dies intestate, half of her community property passes to her husband and the balance to her children. This is mistaken. What actually happens is that at death, the intestate succession statutes provide that the surviving husband will wind up with both halves of the community property—the children inherit no interest in the community. On the death of a married person, half of the community property belongs to the surviving spouse and the other half belongs to the deceased spouse. Probate Code Section 100(a). The surviving spouse then inherits the deceased spouse’s share of the community property by virtue of Probate Code Section 6401(a).

E. Grant Hardacre

I just finished reading your article on “Default Judgment—Dying without a Will,” by Elizabeth A. Nixon. Within the article she states that community property is to be divided equally between a parent and children if one parent dies without a will. This is completely inaccurate information, at least regarding the Probate Code. According to Probate Code Section 6400, if one spouse passes away without a will, the property immediately defaults to the surviving spouse, not the children, nor is it automatically split with the children.

Having recent personal experience with the death of a parent who did not leave a will and the remaining parent laying claim to the entire legacy (under California law), these types of articles carry a lot of weight to them. And, they carry a sense of hope for anyone who might presently be in a situation similar to the one given as an example.

Jennifer Jacobsen
Legal Assistant

More on Medi-Cal Rules

The article on Medi-Cal benefits in the October 2007 Los Angeles Lawyer, “Care Package” by James A. Busse Jr., contains a number of errors that require correction. The mistakes relate to in-home care, reverse mortgages, allowed maintenance amounts, gifts, the home exemption, liens and life insurance.

The article states a purpose of borrowing money from a home is “to generate funds for in-home care—which is not covered in any way by Medi-Cal.” Medi-Cal in fact provides in-home care under the In-Home Supportive Services program for about 150,000 people in Los Angeles County alone. See Welfare and Institutions Code Sections 14132.95 (Personal Care Services) and 14132.951 (In-Home Support Services Plus Waiver).

In addition, there are a number of significant statewide Medi-Cal waiver programs—combined as of January 1, 2007, under the Nursing Facility/Acute Hospital (NF/AH) Waiver—that allow persons who would otherwise be placed at intermediate, skilled nursing, or subacute facilities to obtain care at home instead of at an institution. See Welfare and Institutions Code Section 14132(t).

Information regarding Medi-Cal’s home-and-community based waiver services can be found at http://www.dhcs.ca.gov/formsandpubs/publications/Pages/HCBSWaivers.aspx.

The article says that “reverse mortgages by nature are counterproductive, because they increase the share-the-cost fraction.” While the structure of each loan must be examined on a case-by-case basis, reverse mortgages generally do not increase share of cost. State law provides that “reverse mortgage loan payments made to a borrower shall be treated as proceeds from a loan and not as income for the purpose of determining eligibility and benefits under means-tested programs of aid to individuals.” See Civil Code Section 1923.9.

The article says an institutionalized spouse is allowed to keep a small amount of spending money—“currently $30 per month.” Any institutionalized person is actually allowed to keep $35, not $30, per month for personal and incidental needs. See 22 California Code of Regulations Section 50605(a)(1).

In the article’s example, therefore, for the husband with a monthly pension of $2,000 and investment income of $1,666, the
Community Spouse Resource Allowance increase would not “result in $1,095 of husband’s retirement income being paid to the nursing home,” as stated in the article, but rather $1,095 (minus $35) being paid to the nursing home. See 22 California Code of Regulations Section 50605(a)(1).

The article says, under current rules, that “if an applicant gives $40,000 away, the applicant is disqualified from receiving nursing home care for $40,000 divided by $5,101, or almost 8 months.”

The disqualification penalty would actually be exactly 7 months because, in accordance with the current rules, the result of the equation is rounded down to the nearest whole number. See D.1 of Period of Ineligibility for Nursing Facility Level of Care Work Sheet in All County Welfare Directors Letter No. 98-08 (February 16, 1998).

“If the applicant gave $40,000 in September 2006 and applied for Medi-Cal in February 2007,” the article continues, “the period of disqualification would only be 1 to 3 months (depending on what day in each month the triggering event occurs).” The period would actually be zero to two months, depending on when the gift was made at once in September or in smaller increments, which totaled $40,000, on different days in September. Each separate gift in September would be divided by $5,101 and rounded down to the next whole number to get a penalty period that began in September. If the gifts of $40,000 were $5,000 each and made on different days in September, there would be no ineligibility period. If the gift was made at once on the same day in September, however, the penalty would expire seven months later in April and thus result in a maximum period of disqualification of only two months—that is, February and March. See Period of Ineligibility for Nursing Facility Level of Care Work Sheet in All County Welfare Directors Letter No. 98-08 (February 16, 1998).

The article states: “If item 51 [indicating the applicant’s intent to return home] is not checked, the home is not exempt.”

Even if item 51 regarding the applicant’s intent to return home were not checked, however, the home can still be exempt for a variety of other reasons, for example, if a spouse, child under age 21, or dependent relative is living there. See 22 California Code of Regulations Section 50425(c).

The article says that the “personal representative, successor trustee, or surviving spouse” of the Medi-Cal recipient must inform the state within 90 days of the recipient’s death and then the state “may then place a lien on the decedent’s property.” Currently, after the death of the Medi-Cal recipient, the state may only “propose” a “voluntary” lien on property if certain circumstances exist. See 22 California Code of Regulations Sections 50960.36, 50965.

Finally, the article says a Medi-Cal recipient is allowed to have “a life insurance policy with a face value of $1,500 or less.” A Medi-Cal recipient can actually keep life insurance policies with a face value well in excess of $1,500, since it is the net cash value of life insurance policies that is counted for policies with combined face value in excess of $1,500. Term policies are not counted at all regardless of the amount of face value. See 22 California Code of Regulations Section 50475.

Thus, for example, a senior’s universal life insurance policy with no net cash value and a very large face value—which can often be valuable if it is sold on the secondary life insurance market—would be counted as valueless in the determination of Medi-Cal eligibility.

Terry M. Magady

Author’s reply: I thank Mr. Magady for his comments. They do point out the complexity in the law.

It is important to note that the article was meant to discuss the differences between current policy and those we may see under the Deficit Reduction Act of 2005 (DRA) and not a treatise on current law and rules.

Mr. Magady correctly notes that Medi-Cal covers in-home care. The article correctly states that the method of financing in-home care by having the children pay a loan secured by the elderly person’s home is not paid for by Medi-Cal. The paragraph should be read as a proactive way for one to pay his or her own healthcare costs rather than a method used as a last resort because the taxpayers won’t. That is why the topic sentence reads, “One method that does not save the estate…” and uses the phrase “keeps the estate out of the home.”

I thank Mr. Magady for correctly pointing out the personal monthly allowance is $35, not $30.

Mr. Magady points out that reverse mortgages may not increase the share the cost fraction and that each reverse mortgage must be carefully examined. In some cases a reverse mortgage will not increase the share the cost fraction. Code of Civil Procedure Section 1923.9 says that the income from a reverse mortgage will be treated as receipts from a loan. Reverse mortgages or any loan payment will not be counted as income as long as they are spent within the same month they are received. If the funds are not spent, they are treated as income. Additionally, they could accumulate and push the recipient’s resources over the allowable limits for Medicaid or SSI eligibility. Finally, payments from a reverse annuity mortgage—a very common reverse mortgage loan—are counted as income for purposes of Medi-Cal whether or not the funds are spent within the month they are received.

I thank Mr. Magady for his work up of the exact period of disqualification under the current rules by rounding down. Additionally, he shows that by making the gift in installments the period of disqualification can be altered. I think this is of great value even though Mr. Magady’s example is not aligned with the article. There are many ways to give gifts that reduce or eliminate the waiting period. Each case is different, as he has pointed out.

As to the round down comment, the DRA requires the state not to round down, so under the new law the period of disqualification remains 7 months 25 days. Additionally, under the DRA, the state may aggregate the gifts and apply them at the latest date part of the gift was given. The important thing is the split gift strategy mentioned by Mr. Magady may not be advantageous when the DRA rules are implemented. Putting this together: The period of disqualification currently is zero to two whole months and not one to three whole months; so the impact of the DRA is worse by an additional one to two months than the five to seven months (rounded but not exceeding seven months 25 days) than the article shows.

Mr. Magady expands the article’s comment that the state may place a lien on the decedent’s property. The article correctly says the state may place a lien on the property if not notified within the 90-day period.

Mr. Magady points out the complexity in evaluating the value of a life insurance policy. However, the article correctly states that one can have a life insurance policy with a face value of $1,500 or less. The SSI instruction for the question regarding life insurance is:

Question 5 asks whether you (and your spouse, if you live together) have any life insurance policies with a total combined face value of $1,500 or more. The face value is the same as the death benefit—the sum of money that is paid when you die. If you answer “Yes” to Question 5, you must report the cash value—that is, the amount you would receive if your insurance policy was cashed in right now—even if it is less than the face value.

Important note: If you have any outstanding loans against the policy, the cash value is reduced.

Mr. Magady is correct that one can take a loan against the policy and reduce the cash value of the policy. However, if the face value...
of the policy is $1,500 or less, neither the face value nor the cash value need be reported. Mr. Magady's term policy example is interesting. Neither term policies without cash surrender value nor burial policies count in the qualification process.

Mr. Magady correctly points out that there are ways to ensure the home is “exempt” other than checking box 51. The paragraph dealt with the home being exempt for permanent transfer to anyone—i.e., if you transfer an exempt asset it remains exempt and, when transferred, is no longer available for recovery. His example of leaving a disabled person in the home only makes the home not subject to recovery for only the proportionate share of the decedent’s estate or property that passes to that recipient by survival or distribution, under Welfare and Institutions Code Section 14009.5(2). See Welfare and Institutions Code Section 14009.5(3). So more needs to be added to Mr. Magady's comment to make it correct under the statute. The regulations under 22 California Code of Regulations Section 5045(c) conflict in this regard with the statute in that it parses “personal property used as a home,” which is treated differently than real property used as a home.

In summary, Mr. Magady's letter to the editor is a welcome expansion of the article by a leader in the field. Mr. Magady's comments and alternate fact patterns add to the article and show this is a complex and evolving area of the law.

James A. Busse Jr.

Praise for Los Angeles Lawyer

I just finished the October 2007 issue of Los Angeles Lawyer and am again impressed with the high quality of the truly useful articles the magazine carries. I continue to be amazed by the number of in-depth insightful well written articles you present in each issue. The state bar should look to you as a model to improve its offering. Keep up the great work!

Robert Giffin

The Ethics of Bluffing

Robert A. Steinberg’s article on bluffing in settlement negotiations (“Calling the Bluff,” Los Angeles Lawyer, November 2007) was excellent but had what may be a puzzling omission.

While Mr. Steinberg correctly discussed the privileged nature of settlement negotiations, primarily through Civil Code Section 47’s litigation privilege, he failed to mention the powerful tool provided by Code of Civil

(Continued on page 40)
Understanding the 90-Day Rule

NEWS STORIES ABOUT BACKDATING often relate to corporate scandal, but the backdating of judicial decisions has recently received attention in the legal press too. Every California judge is familiar with the requirement to issue timely decisions under a constitutional provision (Article VI, Section 19) that sets a deadline for judicial decisions: 90 days after the matter is submitted for decision. This constitutional provision also includes a penalty: “A judge of a court of record may not receive...salaries...while any cause before the court...is hanging in the balance...or while any cause before the court of record may not receive...salary...while any cause before the court has not been submitted for decision.”

In other words, a judge’s paycheck is contingent on timely decision making. This is why judges typically end hearings or oral arguments with a variation of the phrase “the matter stands submitted.” This is the trigger for a decision. But how does the state controller (who issues judicial paychecks) know whether a judge has had a undecided pending matter on the court’s docket for more than 90 days? The “constitutional and statutory scheme for prompt decisions is largely self-enforcing. It depends on the good faith and industry of the judges.”

More specifically, the legislature implements the directive through Government Code Section 68210, which requires judges to “make and subscribe...an affidavit stating that no cause before him remains pending and undetermined for 90 days after it has been submitted for decision.” Thus, to be paid, judges must sign a salary affidavit shortly before the end of each month. A judge that falls behind does not forfeit pay for the delay; rather, payment is postponed until overdue matters are decided.

For several reasons, however, this does not mean that a decision is guaranteed to issue on or before the 90th day after submission. First, if the 90th day falls on a weekend or holiday, the deadline moves to the next business day by operation of law. Second, as a practical matter, judges are paid at the end of each month and only have to sign their salary affidavits shortly before then. Therefore, if the 90th day falls near the beginning or middle of the month, the judge still could have several days or weeks before having to sign the affidavit. In effect, the 90-day rule is not a strict 90 days but a practical deadline at the end of the month in which the 90th day falls.

Third, judges have the ability to vacate submission and resubmit cases—thereby restarting the 90-day period. That means judges have the power to grant themselves an extension. Exercising this power, however, is fairly unusual and requires a valid reason (e.g., a court is awaiting a decision from a higher court that will control the pending matter). Finally, it is possible—albeit rare—that a judge simply may fail to comply with the 90-day rule.

A superior court judge in Alameda County recently was publicly censured for “willful misconduct” based on his “reckless submission of erroneous salary affidavits at times when he was aware he had overdue rulings, with disregard for whether they were true or false.” Similarly, a superior court judge from Riverside County recently faced charges that he backdated orders to make it appear that he had not violated the 90-day rule. In one instance, a judgment apparently was backdated to nearly a year earlier, and when one of the parties appealed, the court of appeal dismissed the appeal as untimely since the notice of appeal was filed over a year after entry of judgment.

At the appellate level, the 90-day rule has an effect on the scheduling of oral arguments. Ninety days may not be enough time to carefully analyze complicated legal issues, draft a well-reasoned opinion (especially one for publication), and obtain a majority of justices to sign the opinion. As a result, California’s appellate courts typically ensure timely compliance by entertaining oral argument only after they have a tentative decision.

Although undue delay may provide a basis for a writ of mandate to compel a judge to make a decision, it seems unwise to take that step except in the most drastic circumstances. Fortunately, judicial misconduct of this sort is very rare. Indeed, from 1990 to 1999 the Commission on Judicial Performance imposed discipline only 50 times for misconduct categorized as “decisional delay/tardiness/attendance/other dereliction of duty.”

Clearly, the overwhelming majority of judges comply with their constitutional and ethical duties to issue timely decisions. Nevertheless, lawyers should understand the 90-day rule, if for no other reason than to answer the client’s inevitable question: “When can we expect a ruling?”

3 Id. at 1244-45.
4 Id. at 1243 (citing CODE CIV. PROC. §12a). See, e.g., Cal. R. Ct. 2.900(b); Cal. R. Ct. 8.256(c)(2), 8.524(b)(2) (Supreme Court or court of appeal may vacate submission only by an order stating the court’s reasons and setting a timetable for resubmission); see also INT. OP. PRAC. & PROC. OF THE CAL. SUPREME CT. §§77, 78 (“Unless good cause to vacate submission appears, the opinions are filed on or before the 90th day after submission.”).
5 Hassannally, 51 Cal. App. 4th at 1241 (improper to “resubmit” a case unless justified by “unusual circumstances”).
7 See http://cjp.ca.gov/CNCensure/Freedman%20Severe%20Censure%2006-26-07.pdf
10 Hassannally, 51 Cal. App. 4th at 1245-46 (“Only the boldest of counsel is likely to protest while the case remains undecided in the hands of the trial judge.”).

Benjamin G. Shatz is a certified appellate specialist in the Appellate Practice Group of Manatt, Phelps & Phillips, LLP.
Gaining E-Discovery Access to Home Computers

PERSONAL HOME COMPUTERS are indispensable. By offering a connection to an endless variety of services, computers play a variety of roles. They are a user’s confidant, career planner, and, most important, the ultimate communications tool. In performing these functions and more, computers house enormous amounts of data. By doing so, they are an invaluable source of e-discovery evidence. However, since home computers, unlike office computers, invariably contain a wealth of personal information, parties must navigate issues of privacy as they promulgate their discovery requests and responses.

Extracting electronically stored information (ESI) from computers for discovery purposes can be helpful in many circumstances. Sometimes the data is so intertwined with a complaint’s allegations that it would be malpractice to ignore it. Indeed, the subject matter of an action is often a key consideration for a court when weighing the merits of a motion to compel access to a home computer.

Actions that frequently contain e-discovery requests aimed at home computers include those involving the misappropriation of trade secrets or similar fact patterns. This trend seems to be based on the nature of the action, which draws attention to the alleged wrongdoer’s home computer. In these matters, courts tend to allow e-discovery access to a home computer. For example, in 2006 in Ameriwood Industries, Inc. v. Liberman, a federal district court in Missouri shed light on its rationale for doing so and how its reasoning may apply to other actions:

In cases where a defendant allegedly used the computer itself to commit the wrong that is the subject of the lawsuit, certain items on the hard drive may be discoverable. Allegations that a defendant downloaded trade secrets onto a computer provide a sufficient nexus between plaintiff’s claims and the need to obtain a mirror image of the computer’s hard drive.

Thus, as a general rule, if a complaint demonstrates a sufficient link between the allegations and the defendant’s personal home computer, courts will be more likely to allow access to the computer. In Frees, Inc. v. McMillian—a 2007 federal district court decision in Louisiana that also involved the misappropriation of trade secrets—the court emphasized the significance of this link and provided a sobering example on how it may be stretched. Following the plaintiff’s request for an order to grant access to the defendant’s home computer, the defendant objected on the basis that he had not purchased the computer until two years after the alleged misappropriation. However, the court granted access and noted that even if the defendant’s claim were true, “[i]t would certainly have been possible for McMillian to transfer computer data acquired from Frees in 2003 to a computer he did not obtain until two years later.” The mere fact that the defendant owned a home computer—no matter when he purchased it—and the fact the litigation involved misappropriated data was a sufficient basis to require the defendant to provide access to his computer.

While the subject matter of an action is arguably the most determinative factor in a court’s decision to allow a home computer to be searched, additional considerations include possible grounds for objections and the scope of, and basis for, the request. For example, a request to inspect the opposition’s hard drive will not likely be granted merely because the asking party wants to search for additional responsive documents. However, when a party has provided inconsistent discovery responses, courts are more likely to grant a request for access to a home computer. Still, requests based on a mere suspicion that a party’s previous responses were incomplete have been rejected.

Also, courts generally will deny motions to compel production of ESI when a request seeks unfettered access to computer equipment, and lesser intrusive means for obtaining discovery are available. Thus, courts carefully scrutinize requests for ESI from home computers as they do other discovery requests that seek evidence potentially intermingled with private or confidential information.

Data Review Protocol

When a court determines that the discovery request is sufficiently related to the subject matter of the action or is otherwise appropriate, the next hurdle is to propose a data review protocol that minimizes the extent of the intrusion caused by gaining access to an
Priority Banking® makes you the priority.

You give your clients the highest level of service. Why shouldn’t you expect the same from your bank? Priority Banking$ is a banking solution that delivers a higher level of attention, convenience and competitive pricing to successful attorneys like you. You’ll have a dedicated banker who will personally assist you in selecting the products and services that best fit your needs. You’ll also have access to a comprehensive range of fee-free and discounted banking services, including zero ATM fees worldwide.$

Welcome to the bank that makes you the priority.

Enjoy the advantages of a personal banker. Call 1-888-818-6060 or visit us online.

Invest in you®

$Requires minimum combined balances of $100,000 or more, which can be maintained in a combination of qualifying accounts. Two business checking accounts are free of the regular monthly service charge. Other charges, such as overdraft fees, will still apply. Fee will apply for accounts closed within 90 days of opening. You may be assigned to another program or product if you no longer meet the minimum balance requirement of Priority Banking. See our All About Business Accounts & Services Disclosure and Agreement for details. Union Bank will rebate any fee that an owner or operator may charge for use of their non-Union Bank ATM.

©2007 Union Bank of California, N.A. Member FDIC
opposing party’s hard drive. Frequently, an agreed-upon protocol consists of the asking party selecting an e-discovery vendor to create a “mirror image,” an exact copy of the opposition’s hard drive. The responding party employs search terms to produce the responsive ESI.

Although the process may appear relatively simple, parties frequently disagree on several aspects, including who will select the expert, who will identify and run the search terms, and who will have direct access to the data and when. Further, since home computers can contain private or confidential information, including data belonging to nonparty family members, a frequent concern is the extent to which that privacy is compromised. A common subject of ESI discovery motions to search home computers is the parameters of the data review protocol.

When parties fail to agree on a protocol, courts frequently impose one. In Freees, the court adopted features from a review protocol suggested by the plaintiff because it seemed fair and reasonable. After determining that the defendant’s personal home computer was “among the most likely places McMillian would have downloaded or stored the data allegedly missing,” the court granted access to the plaintiff’s computer forensics expert. The court noted that the review protocol proposed by the plaintiff was designed to offer protective measures against disclosure of “irrelevant personal information or...confidential or privileged information.”

Accordingly, the court ruled that the plaintiff’s forensics expert was permitted to access, and make images of, the defendant’s hard drives. The expert was required to provide the imaged drives to the defense so that the defense could “identify and seek protection for any objectionable information (such as privileged or work-product information).” The plaintiff’s expert then was permitted to perform keyword searches and provide both sides with the resulting file names. After this step, the defense was given an additional 10 days to object to the production of any of those files. Following the 10-day period, the defense was required to produce the remaining files. The court also indicated that it would permit the expert to repeat and refine the keyword searches if the expert determined that it was necessary to do so. Moreover, the court authorized the expert to determine if any data had been transferred to other memory devices.

Sometimes, courts require both parties, and their respective forensics experts, to collaborate and agree upon a review protocol. This occurred in Calyon v. Mizuho Securities USA Inc., a 2007 New York federal district court decision. Calyon, like Ameriwood and Freees, involved personal home computers, allegations of misappropriation of trade secrets, and objections based on privacy. The discovery dispute in Calyon was based, in part, on the plaintiff’s desire to allow its expert to have direct access to the defendant’s home computers. In response, the defendants argued that giving the plaintiff’s expert “unfettered access” to the Individual Defendants’ home computers and computer storage devices would impermissibly invade the privacy rights of the Individual Defendants and their non-party family members....”

The defendants also indicated they would be willing to make their expert available “to work cooperatively with Calyon’s counsel and expert on an on-going basis to develop and refine search techniques to ensure that all responsive information is identified.”

Ultimately, the court proposed a collaborative solution similar to the defendants’ suggestion. It also added a safeguard that would permit Calyon to renew its application for direct access to the mirror images if it could demonstrate “that relevant and responsive information [had] been withheld or [was] missing, or that the Individual Defendants’ expert [had] failed to consult fully, in good faith.”

### Missing Data

The discovery of ESI from personal home computers sometimes presents unique issues involving spoliation of evidence. In most business environments, IT professionals and other technical personnel are expected to manage and maintain the company’s network and individual office computers and other equipment. Corporate officers develop data policies and procedures and ensure that all employees are aware of their responsibilities regarding proper data storage preservation. Daily backup tapes in business environments generally are securely stored but easily retrievable.

In contrast, home computer users must make their own decisions about how they wish to manage their data. The average user has not developed protocols on data storage restrictions or system maintenance in the manner of most businesses, which is precisely what makes the discovery of home computer ESI so interesting. With home computer users, in the realm of data preservation, anything can happen—and frequently does.

A computer’s hard drive contains significant clues that explain, in great detail, critical aspects of data activity during a specific time frame. These clues may provide additional sources of discovery, including evidence of other storage devices to which data may have been transferred and other indicia of misconduct. Obviously, depending on the facts of the case, these details may be significant.

In Roll-Kraft, Inc. v. Grimes, a 2001 Illinois federal district court bench trial, the court found that the defendant had taken “steps to cover up his wrongful acts.” Specifically, the plaintiff alleged that the defendant had copied trade secrets to his personal computer and used them to benefit himself and his new employer during his new employment. When defense counsel refused to produce the defendant and others for deposition, the plaintiff sought court intervention.

Subsequently, the court ordered the defendant to produce his home computer to the plaintiff’s forensics expert for examination.

The order was issued November 15, 2001, and the defendant was to produce his personal computer on November 23, 2001. During the seven days following the issuance of the order, the defendant defragmented his computer three times and then did so once more on November 24, 2001. During the normal course of using a computer, the manner in which data is stored causes the data to become fragmented and negatively affects a computer’s performance. Most experts recommend that in order to restore lost efficiency, the average user should perform a disk defragmentation approximately once a month. One of the side effects of defragmentation is that remnants of deleted files are erased. The court found that the defendant defragmented his computer for the purpose of preventing the discovery of any remnants of trade secrets.

This finding of misconduct, among others, contributed to the court’s decision to rule in favor of the plaintiff.

Even when data seems to have been lost inadvertently, courts will not hesitate to issue penalties. In Teague v. Target Corporation, a 2007 North Carolina federal court case involving allegations of wrongful termination, not only was data missing but the plaintiff’s hard drive on her home computer had been discarded. The defendant, Target, sought to demonstrate that the plaintiff had failed to mitigate her damages. During discovery, it was learned that the plaintiff, upon her termination, had conducted her job search online with a home computer she had owned between 1995 and 2004. However, the plaintiff claimed that approximately a year following the time she obtained legal representation, her computer hard drive crashed. Making matters worse, “the only documented evidence of [the plaintiff’s] post-termination job search was the work search records she submitted to the North Carolina Employment Security Commission (ESC) to substantiate her claim for unemployment benefits.”

Further, there were contradictions between the ESC records and some of the plaintiff’s discovery responses regarding her job search.

The court found that the plaintiff “clearly had an obligation to preserve her computer because it contained electronic evidence relat-
ing to her claims against Target and her efforts to mitigate her damages.” The court further noted that because she had already hired counsel and filed an EEOC claim at the time of the alleged data destruction, there was sufficient evidence she discarded the computer with “a culpable state of mind.” As a result of these findings, the court decided to issue an adverse inference instruction to the jury at trial.35

**Foresight and Strategy**

Crashed hard drives, deleted files, and privacy concerns are daunting hurdles to gathering ESI from home computers. Nevertheless, ESI, whether found or missing, can have a powerful impact on a case. With all the challenges, parties must plan ahead whether they are requesting the evidence or responding to requests for it.

In a properly pleaded complaint, plaintiffs must pay careful attention to those allegations in which the plaintiffs need to demonstrate a sufficient association to data claimed to be housed on a home computer. The more specific the allegation regarding its nexus to the computer data, the more likely a court will grant access to the home computer. If amending the complaint is no longer an option, and if the facts of the complaint bear little relation to potential data on a computer, an alternative approach would be to seek to discredit the opposition by uncovering inconsistencies in discovery responses. This is, of course, a backdoor approach, but if it is employed effectively, it may serve to highlight the need to gain access to ESI. However, an effort to seek ESI merely for impeachment evidence, without a specific basis, will not likely succeed.36

Plaintiffs also should recognize and anticipate the privacy concerns that will be raised by defendants seeking to protect the personal data that is regularly maintained and stored on home computers. Broad requests that seek unfettered access to hard drives are disfavored. One Florida state court refused to grant access under circumstances in which the request was deemed overly broad, despite an unmistakable link between the plaintiff’s allegations and the ESI being sought.37 Carefully crafted requests accompanied by a proposed nonintrusive review protocol may win more favor with judges.

Defendants must preserve all relevant data at every stage of the litigation. This is particularly important given the recent passage of the 2006 amendments to the Federal Rules of Civil Procedure affecting e-discovery. The amendments require businesses to maintain all ESI in an organized manner so that data can be quickly retrieved, reviewed, and produced at a moment’s notice. At the inception of any litigation, counsel should consider all...
instances in which ESI could be involved. As illustrated in Teague, an important lesson is that even a seemingly innocent act, such as discarding an old computer, can have serious repercussions.\(^3\) The perils of failing to preserve evidence in an organized manner are illustrated by Coleman v. Morgan Stanley, a 2005 case that involved a devastating adverse jury instruction and a $1.5 billion verdict.\(^4\)

For both sides, seeking access to the opposition’s home computer may be merely an act of due diligence. A typical traffic accident provides an analogy. In that type of case, most lawyers would not think twice about seeking information from multiple sources, such as city traffic signal records and settings, street maintenance schedules, GPS devices, and even cell phone records to determine if one or both drivers may have been driving while distracted. Similarly, most business litigation involves ESI to some degree—and if ESI is involved, there is almost always a chance that ESI relevant to the matter is housed on someone’s personal home computer or portable storage device. Home computer ESI may not only be a fruitful source of information—it might be the additional leverage that changes the outcome of the case.\(^5\)

\(^3\) Frees, 2007 WL 1848889.
\(^4\) Id. at *2.
\(^5\) Ameriwood, 2006 WL 3825291, at *8.
\(^6\) Id. at *9.
\(^8\) Id.
\(^12\) Frees, 2007 WL 1848889, at *3.
\(^13\) Id. at *2-*3.
\(^14\) Id. at *3.
\(^15\) Id.
\(^16\) Id. at *4.
\(^18\) Id. at *2.* Also, the plaintiff’s proposed protocol required the plaintiff’s expert to return all data to the defendants so that they would have the opportunity to review it prior to production to designate documents that were irrelevant, private, or privileged.
\(^19\) Id. at *5.
\(^20\) Id. at *6. See also Williams v. Taser Int’l, 2007 WL 1630875 (N.D. Ga. 2007). In Williams, the court ordered the parties to collaborate on a review protocol. After they failed to do so, the court issued detailed review protocol instructions, including suggested search terms.
\(^22\) Id. at 868.
\(^23\) Id. at 862.
\(^24\) Id. at 869.
\(^25\) Id.
\(^26\) Id. at 870.
\(^27\) Id.
\(^28\) For example, the default setting on Windows Vista is to automatically initiate defragmentation once weekly.
\(^29\) Roll-Kraft, 177 F. Supp. 2d at 870.
\(^30\) Id. at 916.
\(^31\) Teague v. Target Corp. d/b/a Target Stores, Inc., 2007 WL 1041191 (W.D. N.C. 2007).
\(^32\) Id. at *1.
\(^33\) Id.
\(^34\) Id. at *2.
\(^35\) Id. See Hedenburg v. Aramark Am. Food Servs., 2007 WL 162716 (W.D. Wash. 2007).
\(^36\) Id.
\(^38\) Id. at 862.
\(^39\) Id. at 869.
\(^40\) Id.
\(^41\) Id. at 870.
\(^42\) Id.

Lowest Cost Personal Injury Advances

- Cash for Personal Injury victims.
- Money for emergencies & general living expenses.
- Keep your clients happy.
- Have more time to litigate your case.
- Get the settlement you and your client deserve!
- Simple process, forms can be completed by paralegal.

Only 10% for each 6 Months* No compounding

* or portion thereof | $250 processing fee.

866-476-2029 www.presettlementfunds.com

Lowest Cost

Personal Injury Advances

Only 10% for each 6 Months* No compounding

* or portion thereof | $250 processing fee.

866-476-2029 www.presettlementfunds.com
Managing Liability Risks in Green Construction

GREEN BUILDING IS more than a trend; it is a fact. According to the U.S. Green Building Council, the value of green building products and services was more than $7 billion in 2005 and is expected to increase to $12 billion in 2007. Two billion square feet of commercial building space have been registered or certified under a rating system known as LEED (Leadership in Energy and Environmental Design).1

In residential construction, the growth of green building has been equally dramatic. A recent survey of local home builders associations indicates that more than 97,000 homes have been certified under voluntary building industry green programs nationally since the mid-1990s.2 One industry estimate states that by 2010 as much as 10 percent of residential construction activity in the United States, with a value of $38 billion, will be green, up from 2 percent and $7.4 billion.3

These green building efforts are almost exclusively voluntary. Green products and technologies have not yet been widely incorporated into local building codes for private developments. For example, California Green Builder is a voluntary, standards-driven program under which California production home builders may obtain green certification.4 Meanwhile, the U.S. Green Building Council is extending its LEED certification program to homes, with pilot standards expected in late 2007.5 The National Association of Home Builders currently is seeking comments on its National Green Building Standard for new residential construction and renovation.6 The standard is expected to be released in final form in early 2008.

Driven by increasing consumer and end user demand for environmentally conscious structures, as well as by emerging state and local climate change regulations, green building represents a major opportunity for builders to do well while doing good. But green building carries with it liability risks and litigation potential. For green builders, attention to risk management strategies can minimize those risks.

The increased liability exposure derives from two fundamental issues. First, there is as yet no universally accepted standard for what qualifies as green or sustainable building. Second, there is the risk of heightened expectations on the part of the end user. For example, buyers of new green residences may believe that “green” means “defect-free.” Likewise, they may expect that residences marketed as sustainable will require less maintenance and enjoy a longer useful life than conventionally constructed residences. Both residential and commercial end users will have expectations about energy savings, subjective comfort issues, and enhanced indoor air quality.

Buyers disappointed with their green structures will assert numerous familiar legal theories in their efforts to recover damages or other relief. The claims may include both tort and contract theories.

FRAUD

High buyer expectations, aggressive marketing of green building, and a lack of uniform green building standards create a significant danger that builders may face allegations of fraud. In an increasingly competitive housing market, more builders are seeking an advantage over competitors, including by tapping into the growing interest in green products. Some builders believe this will distinguish their homes and may justify higher prices.

Builders should consider the possible consequences of representations to buyers regarding the quality or expected performance of green building techniques or materials. Builders should also understand the developing and likely inaccurate understanding of the public regarding what “green” and “sustainable” mean with respect to construction. Consumers paying more for a green home may expect a higher standard of construction and comfort, products with longer lives and lower required maintenance, and savings on energy costs. They may therefore place higher reliance on such representations by the builder. When performance fails to meet expectations or match the builder’s representations, the buyer likely will seek recourse.

As with any other seller of real property, a builder may be liable for fraud if it misrepresents the character or condition of the property, or it conceals or fails to disclose defects of which it knew or should have known and which would have affected the buyer’s decision to purchase.7 Buyers may allege claims for negligent misrepresentation or intentional misrepresentation, including claims for deceit or fraud in the inducement.8 Allegations of fraud can also form the basis for unfair competition claims under state law.

Intentional or negligent misrepresentation with respect to marketing claims about the green character of a home may include:

• Advertising that the home is green or sustainable, or certified as such, when it is not.
• Inaccurately claiming that building components or materials are green.
• Falsely claiming that the home is “healthier.”
• Falsely claiming that the home has a smaller carbon footprint.

The lack of uniform green definitions and standards may mean that the builder is complying with some standards and not others. Builders often use terms like “green” in marketing without intending any correlation to particular green standards. On the other hand, other builders may specifically market their product before or during construction as certified under one of the various green building standards, with the danger that the certification is not eventually earned. Builders also may claim that certain elements of the home were built with green building components but be incorrect as a result of a misunderstanding of green standards.

Builders may also make inaccurate promises or forecasts regarding the expected performance of the home, such as more durable materials, energy savings, or enhanced indoor air quality. This can be dangerous, especially when the failure of the home to meet the promises is quantifiable. For example, buyers may expect, and builders may
claim, that the home will have lower utility bills due to the manner of construction. Should the home turn out to have no quantifiable energy savings, liability for misrepresentation could be the result. If the builder made these claims in marketing materials, they could also spur class action litigation. Should the builder have knowledge of and fail to disclose that its green materials or techniques have actually caused the home to be defective—such as in terms of durability—the builder may be liable to the initial buyer as well as to subsequent purchasers.

Buyers must meet a relatively high burden to succeed on their fraud claims. The plaintiff must prove misrepresentation (false representation, concealment, or nondisclosure) regarding the property, the builder’s knowledge of the falsity and intent to defraud, the plaintiff’s justifiable reliance, and resulting damage. The misrepresentation must involve the suggestion, assertion, or suppression of a fact that is material. With respect to a builder’s duty to disclose, a matter is material when it has a significant and measurable effect on the value or desirability of the property.

Courts have found materiality relating to fraud with respect to various facts about a home, its construction, its history, and its expected performance. For example, liability for fraud has been found when sellers made false statements regarding the performance and quality of the building and its construction. Courts have also found that material facts may relate to the physical condition of the property, such as known defects, building code violations, and insufficient water. Failing to disclose that a property was not built in compliance with applicable building codes may also constitute fraud. Similarly, buyers will likely argue that representations regarding the green status of their home were material facts securing their assent to the purchase contract. It should also be expected that buyers will view undisclosed added costs, such as potential increased maintenance costs, as material facts that should have been disclosed at the time of purchase.

General representations regarding the home and its performance may be defensible as harmless “puffing.” Under California law, generally fraud will not be found if a defendant’s statement was one of mere opinion. Nevertheless, claims that the home is “more livable,” “energy efficient,” “environmentally friendly,” or “weatherproof” will be argued by the buyer to be statements of fact, not opinion.

Generally, a buyer defrauded by a seller of real estate may recover the difference between the purchase price and the actual value of the property at the time of sale had the truth been known or the defects disclosed (the “out of pocket” measure of damages). The actual value of the property purchased is commonly understood to be the market value of that property at the time of the transaction, given the material defects.

Buyers also may seek loss of use damages and lost profits. Apart from damages, fraud claimants may also seek remedies such as rescission and restitution, as well as punitive damages.

Negligence
Green builders can expect future construction defect suits to include a negligence cause of action. Due to the duty of care owed to the homeowner by parties who were involved in design or construction, homeowners can bring direct negligence claims relating to the green elements of the house against the builder, the architect, and all contractors involved. Negligence claims can relate to design, workmanship, and materials defects. Green building design, materials, and construction techniques may be the subject of such actions, if their failure results in damage to the property.

Liability as to an actionable construction defect and resulting damage caused by negligence is usually established through expert testimony on the industry standard of care. One issue relating to negligence claims is that because the use of green building materials and designs is relatively new to residential construction, the applicable standard of care may be elusive. Builders unfamiliar with the new construction methods and products will be forced to rely on the knowledge of their design professionals and contractors, who themselves may be new to the field. The standard of care for green building may be difficult for builders to gauge until there is more data on the performance of the designs, methods, and products.

Builders may also face negligence per se claims, with plaintiffs arguing that the construction violates particular standards or statutes regarding green building. Under negligence per se, breach is presumed if the violation injured a plaintiff who is among a class of persons the statute was meant to protect; and if the injury resulted from an occurrence that the statute, ordinance, or regulation was designed to prevent. Expert testimony in a defect case may not be necessary if the claim is for negligence per se, as the violation of the statute or code is used to establish the defect as actionable.

No uniformity currently exists between various green building standards, statutes, and local building codes. Even if a builder believes it is meeting certain green criteria, failure to comply with locally mandated green standards creates a risk of claims of negligence per se.
viding that windows shall not allow water to pass beyond, around, or through the window or the window system.30 Similarly, the green building claim could implicate SB 800 if the claim involves a condition that causes damage (as opposed to a mere “paper defect”).31

To avoid the constraints of SB 800, claimants may allege bodily injury or fraud or pursue a class action, all of which are outside the scope of SB 800.32 To the extent SB 800 applies, traditional construction defect theories will be replaced by a claim of breach of the functionality standards.

Unfair Competition Laws
A builder’s marketing and advertising regarding green building may also subject it to claims by buyers of violations of unfair competition acts, such as Business and Professions Code Section 17200 (which prohibits unfair business practices) and Business and Professions Code Section 17500 (which prohibits false advertising). In 2004, Proposition 64 changed the rules applicable to these sections, requiring that a plaintiff show he or she suffered actual injury and lost money or property as a result of the alleged unfair competition or false advertising. Nevertheless, assuming that such standards are met, a builder can face claims under these statutes.

Business and Professions Code Section 17200 defines unfair competition as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” The Unfair Business Practices Act (Section 17200 and its subsequent sections) is considered a strict liability statute; no intent by defendants to deceive or cause damage must be proven. The “unlawful practices” the act prohibits are any forbidden by law, whether civil or criminal, federal, state, or municipal, statutory, or court made.33 Common law fraud, or running afool of emerging statutes and regulations regarding green building, could lead to allegations of unlawful practices.

The terms “unfair” and “fraudulent” are generally defined broadly. To determine if an act is unfair, California courts utilize a balancing test regarding whether the harm of the practice outweighs its benefits.34 “Fraudulent” practices under the law are broader than common law fraud. The test for what is considered fraudulent is simply that “members of the public are likely to be deceived.”35

While it is generally settled that damages are unavailable under the act, plaintiffs may seek injunctive relief preventing further unlawful conduct and restitution.36 The act gives courts broad authority to fashion remedies “as may be necessary…to prevent the use or employment by any person of any practice which constitutes unfair competition.”37 Restitution is available if the plaintiff can prove that through the unfair business practice, the defendant obtained money from the plaintiff.38

When such allegations relate to green building, buyers will argue that a portion of the builder’s profits bear a relationship to the alleged wrong. If the buyer can prove that he or she paid more for the home due to its green label, the buyer may seek to recoup those amounts from the builder. If brought as a class action, the potential damages could be significant.

Risk Mitigation
Builders can manage end users’ expectations and decrease their liability exposures by employing a wide range of operational and legal risk mitigation techniques. These include use of clear definitions and performance standards in contracts, enhanced disclosures, minimization of actionable representations, and extra diligence in the builder’s design and construction contracting procedures.

In order to maximize the probability of success for their risk management programs, builders must implement a plan that is comprehensive and integrated. The green risk management plan should be comprehensive in that it encompasses each stage in the development, beginning with design and construction contracting, and extending through the use of specialized consulting expertise, construction quality assurance observations, protective provisions in contracts, disclosures, and effective customer service for the end user. The plan must be integrated so that each of its elements supports the others. For example, information the builder learns during the design and specification process likely will translate into material facts that should be disclosed to the buyer.

Builders intending to market a structure as green must clearly define what that term means in the context of the transaction. The builder will be best served by referring to an objective standard or by promising only that the structure will be constructed according to then-applicable specific guidelines of a third-party organization, such as the U.S. Green Building Council for the LEED program, or the California Green Builder or NAHB green building programs. In all cases, the as-built condition of the structure must be compliant with the standards or guidelines.

Another approach is to avoid characterizing the structure as green and instead provide an inventory of the green components and products used in its construction, together with performance information from the manufacturers (as opposed to the builder). The more subjective and undefined the characterization of the structure, the more risks for the builder.

Disclosures can be a powerful risk mitigation tool. For example, the builder can and should disclose that “green” does not equate to defect-free construction, that “sustainable” does not mean that less maintenance is required, and that no specific level of comfort or energy efficiency has been promised or will necessarily be achieved.

Actionable representations should be minimized or preferably eliminated. For example, the builder should avoid puffing and should scrub subjectivity from its marketing materials. The builder should scrutinize its collateral materials, advertising, Web site, model units, and sales office for risky performance claims and possible misrepresentations. In its disclosures and marketing materials, the builder should be factual and objective.

In commercial construction, contractual maintenance obligations and formal written operations and maintenance manuals have long been standard. In the residential setting, construction defect litigation experience teaches that lack of maintenance by homeowners and by homeowners’ associations (HOAs) can surface later as alleged construction defects. As a result, some residential builders have adopted a model similar to that used by commercial contractors.

Most residential builders now include mandatory inspection and maintenance obligations in their consumer sales agreements and in the covenants, conditions, and restrictions (CC&Rs) of common interest subdivisions such as condominium projects. Professionally prepared homeowner and homeowners’ association maintenance manuals are becoming a best practice in the residential construction industry. These contractual inspection and maintenance requirements, as well as maintenance manuals, must be tailored to take account of green building components and features.

Additional or special maintenance requirements (and possible additional costs) should be disclosed and should be addressed in the manuals. Builders should consider having a qualified green building consultant review these contract provisions and manuals for accuracy and adequacy.

HOA governance presents at least two special issues. First, builders must be certain that the HOA operating budgets and assessments will be adequate to take account of green building inspection and maintenance costs. Second, the CC&Rs for the project should contemplate future green modifications to individual units and to common areas in order to avoid unreasonable disapprovals by the HOA or by the architectural review committee.

When undertaking a green project, the builder must candidly self-assess its ability to address the building issues as well as the capabilities of its design professionals and
subcontractors. Unless the builder has green expertise, the builder will be relying on its design professionals and subcontractors regarding green design, products, technologies, and assemblies. As a result, prequalification of these parties takes on added importance for green projects.

From a design quality perspective, many builders already engage in peer review of their plans and specifications. This process involves a third-party design professional who reviews the plans and specifications with the objectives of assuring code compliance, enhancing constructability, and identifying and deleting defects. Peer review is even more critical on green projects because of the varying levels of green experience and expertise among design professionals. This is particularly true regarding selection and specification of green products and components.

The tension between builders and design professionals regarding contractual risk transfer remains constant. Builders typically seek enhanced performance standards, broad indemnification, and adequate professional liability insurance, maintained during design and construction as well as after completion of the project. In contrast, especially on residential projects, design professionals resist meaningful contractual risk transfer.

This tension will be heightened in connection with green projects. Design professionals can be expected to seek to exculpate themselves from green design liability by narrowly defining their scope of services and performance standards, diluting indemnification provisions, limiting their professional liability insurance obligations, and attempting to include a broad limitation of liability.

In contrast, builders will expect design professionals to take responsibility for their green design elements. This responsibility may be reflected in the scope of services, in the performance standards, and even in the indemnification provisions. If the builder is seeking LEED certification, for example, it is typical for the architect to assume responsibility for assembling the documentation, performing the inspections, and handling the processing necessary to obtain the certification. Alternatively, a qualified LEED-accredited consultant may assume this role.

Green building presents contractual risk transfer and risk management issues with respect to subcontractors as well. It is critically important that builders evaluate their subcontractors’ green building experience. When appropriate, builders should invest in training for subcontractors who do not yet have demonstrated expertise.

Risk transfer modifications to the subcontract likely will be necessary. For example, the subcontract should confirm that the performance standards and compliance with laws provisions are broad enough to extend to applicable green building laws, codes, and standards. The subcontract warranty and guaranty provisions likewise should extend to green building components and products.

New or unfamiliar components or assemblies should be the subject of special training for the subcontractors. Borrowing again from the commercial construction model, residential builders should consider having mock-ups of the assemblies constructed under the observation of the manufacturer or a qualified green building consultant before undertaking actual construction.

As with any other construction, a builder should also ensure that it has adequate coverage under its commercial general liability policy. While no reported decisions have yet addressed green building liability insurance coverage issues, there is no reason to believe that the available coverage should be any different from a conventional construction defect claim or suit.

While green building offers unprecedented opportunities for builders, it has a potential dark side of increased liability exposures. But by studying and identifying these exposures, then implementing comprehensive risk mitigation strategies, builders will be positioned to succeed in the new green building environment.
defendant’s assertion is merely a statement of opinion or mere puffing, the defendant will not be held liable for its falsity); see also Haskell v. Time, Inc., 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (“Advertising that amounts to mere ‘puffery,’ which are ‘vague, highly subjective claims,’ is not actionable in false advertising and unfair business practices claim because ‘no reasonable consumer relies on puffery.’”).


21 Miller v. L.A. County Flood Control Dist., 8 Cal. 3d 689, 703 (1973).


21 Miller v. L.A. County Flood Control Dist., 8 Cal. 3d 689, 703 (1973).


21 Miller v. L.A. County Flood Control Dist., 8 Cal. 3d 689, 703 (1973).


21 Miller v. L.A. County Flood Control Dist., 8 Cal. 3d 689, 703 (1973).


21 Miller v. L.A. County Flood Control Dist., 8 Cal. 3d 689, 703 (1973).


21 Miller v. L.A. County Flood Control Dist., 8 Cal. 3d 689, 703 (1973).


21 Miller v. L.A. County Flood Control Dist., 8 Cal. 3d 689, 703 (1973).
BANKRUPTCY can promise significant relief and even new opportunities for many companies beset by financial hardship. Through the bankruptcy process, firms can achieve greater efficiencies, spin off nonproductive divisions, streamline operations, and eliminate debt. Bankruptcy also can enable a firm to liquidate its assets in an orderly fashion, yielding the highest and best possible return for creditors. Though not normally a first choice for any company, the bankruptcy process can and frequently does enable companies to maximize the value of those aspects of their business they do best, rid themselves of those components that are either unnecessary or nonproductive, and emerge with a stronger balance sheet and a new lease on life.

With news of tightening credit markets, soft employment numbers, and decreases in capital expenditures, forecasters have been predicting that an increase in commercial bankruptcy filings may be on the horizon. If they are correct, there is also an unmistakable and related trend that will arise in the coming months and years—and one for which directors and officers can and should prepare. Although sometimes overlooked in the heated period that commonly precedes a company’s filing for bankruptcy protection, or the commencement of an involuntary bankruptcy case, it must be recognized that an increase in commercial bankruptcy filings will almost certainly be accompanied by an increase in litigation targeting the directors and officers of debtor firms personally. Corporate directors and officers are wise to understand the personal risks they face.

When a bankruptcy is filed and litigation starts, some of the primary protections against personal director and officer liability—incorporation, good faith, and insurance—can all be called into question, if not seriously undermined. Indeed, directors and officers may encounter particularly unhappy surprises after a bankruptcy begins. If a trustee or other replacement management is put into place, discussions that the directors and officers believed were privileged attorney-client communications can be made available to their adversaries for use in pursuing personal claims against them and other directors and officers of the debtor. Equally disturbing is that in some cases directors and officers may learn that before the bankruptcy case was filed, they owed fiduciary or quasi-fiduciary duties to creditors—and that new and unanticipated liabilities were created by their prebankruptcy actions. Rounding out the potentially bad news is the

Eric C. Peterson is a partner practicing in the Bankruptcy Litigation Group of Rutter Hobbs & Davidoff Incorporated.
fact that when directors and officers face claims brought against them by a bankruptcy estate (through a trustee, for example), the debtor’s director and officer insurance carrier may deny them coverage, meaning neither the defense of claims nor resulting liabilities will be covered.

Before directors and officers find themselves on the receiving end of these or other unanticipated outcomes, they must look seriously at the facts leading to the need for bankruptcy protection, assess the likelihood that they will be personally subjected to litigation, and achieve clarity on the nature and extent of any insurance they need to have in place in the event the worst case scenario materializes.

The Attorney Client Privilege

As most commercial bankruptcy practitioners will confirm, there is no guarantee that once a chapter 11 reorganization is filed, the existing management will stay in control of the company or the company will be able to avoid liquidation. Bankruptcy is expensive, and creditors frequently opt at some point to discontinue their cooperation so that creditors will demand a change in the process. The longer a company remains under bankruptcy court supervision, the more likely it becomes that the company may be forced to liquidate or that creditors will demand a change in management—whether through the appointment of a trustee or some other officer responsible for turning around the ailing firm. No matter which course the change in control takes, the effect can be troubling.

Outside of bankruptcy, the power to control and to waive the attorney-client privilege rests with company management. Management must exercise the privilege in a manner consistent with its fiduciary duties to the company.1 When a solvent company merges with another firm, and new management takes control, the attorney-client privilege and the power to control it passes to the new management. Former managers lose the ability to assert or waive the privilege.2

Similarly, the filing of a bankruptcy petition creates an entity that in many respects differs from the prebankruptcy debtor.3 The entity, a bankruptcy estate, becomes the legal owner of all “property” that once belonged to the prepetition debtor.4

“Property” is a broad concept. As applied in bankruptcy, it consists of virtually all claims and rights of the prebankruptcy debtor—including, among other things, the right to assert or waive the attorney-client privilege.5 Just as prepetition debtors can demand that all files, e-mail, correspondence, memos, and other documents in the possession of their counsel be turned over to them, so too can a bankruptcy trustee.6 Because the trustee controls the privilege, he or she can and will assert or waive the privilege if doing so may result in additional funds coming into the bankruptcy estate for the benefit of creditors.7 This includes the potential waiver of the privilege if it would bolster claims that former directors and officers breached duties they owed to the company or its creditors.8

Therefore, e-mail, memos, and other items that may have been generated in the normal course of seeking legal counsel before the commencement of a bankruptcy case—including those containing strategy discussions regarding how to thwart or mollify one creditor or another, or detailed information concerning various decisions that were made prepetition—might be made available for examination by a trustee and possibly others desirous of identifying new assets to be liquidated for the benefit of creditors. Included among the potential assets are claims against former management for breach of duty and, by extension, the personal assets of directors and officers.9

Fiduciary Duties Owed to Creditors

Compounding the loss of control of the attorney-client privilege, directors and officers should be cognizant of the possibility that new classes of claims may be created as a firm heads into insolvency and, later, bankruptcy. There are no signposts along the way. The “zone of insolvency” is defined only amorphously in case law.10 Still, entry into the zone has the legal effect of altering the nature of the duties corporate directors and officers owe and affecting the class of persons for whose benefit the duties are to be exercised, thereby adding to the liabilities that may be imposed on corporate directors and officers.11 No longer are the company and its owners the exclusive beneficiaries of the fiduciary duties owed by directors and officers.12 When a company is in the zone of insolvency, creditors also may be owed duties in some form. Certainly once a company becomes insolvent, directors and officers owe additional duties to creditors.13 This means that new claims may be created in favor of the creditor class if management is regarded as having failed to properly exercise its business judgment.

To understand the change, it is important to recognize that directors and officers owe duties of loyalty and care to the company they serve.14 They generally must make informed decisions, refrain from engaging in self-dealing, and place the interests of the company above their own.

In a case that has been cited as the beginning of a trend in the law, the Court of Chancery of Delaware in Credit Lyonnais Bank of Nederland, N.V. v. Pathe Communications Corporation15 appeared to expand the class of persons to whom fiduciary duties were owed. The court observed that “[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise.”16 The corporate enterprise was described in a footnote as a “community of interests” that includes stockholders—who may prefer riskier, higher return investments—and creditors—who may prefer safer practices that are more certain to yield funds necessary to pay their claims.17

Courts are unclear as to when the zone of insolvency begins. As a general concept, once insolvency is “reasonably foreseeable,” a company is operating in the zone of insolvency.18 Decisional law is in flux regarding the nature and scope of the duties that might be owed to creditors while a company is in the vicinity of insolvency, and recent decisions indicate that claims for breach brought by creditors are derivative rather than direct.19 The risks and issues that might arise must nonetheless be recognized by directors and officers of troubled companies. To fail to account for these personal risks is to invite the possibility of personal calamity.

What is clear, however, is that once a company actually becomes insolvent, the duties owed by the directors and officers are for the benefit of the company’s creditors. Directors and officers of an insolvent company must therefore maintain acute awareness of, and sensitivity to, creditor needs. Prudent managers will assess from the creditor perspective whether decisions they make, and options they reject, serve the general interest creditors share—especially that their claims will be paid. Riskier strategies promising the potential of higher payouts may appear to serve the interests of ownership hoping for a return on investment beyond the payment of creditors. Such strategies, however, also may fail, and then creditors may complain, predictably, that had a safer path been chosen, they would have been made whole, or more nearly so. One can also predict that a trustee may try to rectify any resulting shortfall by seeking necessary recoveries from directors and officers or the insurance policies that cover them.

Denial of Insurance Coverage

The challenges for directors and officers involving the assertion or waiver of the attorney-client privilege as well as fiduciary duties are daunting. Compounding these concerns is the prospect of having to defend against claims for breach of fiduciary duty brought on behalf of creditors or others without any insurance covering either the costs of defense or the amount of the potential liabilities.

Director and officer insurance carriers may, and often do, take the position that D&O insurance policies exclude coverage in the con-
text of litigation brought on behalf of the bankruptcy estate. If they provide a defense, they almost always do so under a reservation of rights, pursuant to which they may determine at a later date that coverage should not have been made available. When this happens, carriers ultimately may add to the troubles of director and officer defendants by seeking to recoup from them amounts spent on their behalf during litigation.

A basis frequently cited for the denial of coverage is the “insured versus insured” coverage exclusion, which most all D&O liability policies contain. The language describing the exclusion will vary from policy to policy, but the general thrust of the exclusion is largely the same. The insured versus insured exclusion provides, in one form or another, that an insurer is not required to provide coverage when one insured sues another. The reason for the exclusion is a valid one. It protects carriers against being forced to cover collusive suits brought by company insiders. The rationale for denying coverage in the bankruptcy context is based on a variation on this theme.

Specifically, in bankruptcy, there is a generally well-known concept that the bankruptcy estate “steps into the shoes” of the prepetition entity. A bankruptcy estate is said to have no greater rights than those held by the prepetition entity. Consequently, carriers contend that the bankruptcy estate is subject to the same coverage limitations and defenses to coverage that were applicable to the prepetition entity. Carriers therefore have been known to argue that because the insured versus insured coverage exclusion would have applied outside of bankruptcy—say, in the context of a claim brought by the company against its directors and officers—then it should apply in bankruptcy as well, including when the bankruptcy trustee or estate representative is seeking recoveries from directors and officers personally.

The rationale forwarded by carriers has some support in case law. For instance, the Eighth Circuit Court of Appeals sided with insurance carriers in Reliance Insurance Company of Illinois v. Weis. The Eighth Circuit affirmed a lower court ruling that there is “no significant legal distinction between [the prepetition debtor] and its bankruptcy estate” for purposes of determining whether an insured versus insured coverage exclusion applies. The Eleventh Circuit in National Union Fire Insurance Company of Pittsburgh, Pa. v. Olympia Holding Corporation appears to be in accord.

However, court decisions issued after Weis and National Union create a split of authority on the issue of whether director and officer claims asserted by a third party, such as a bankruptcy trustee, activate the insured versus insured coverage exclusion. Notwithstanding Weis and National Union, a number of courts from a variety of jurisdictions have in more recent years reached the opposite conclusion, ruling, for example, that “[a] bankruptcy trustee is a legal entity separate and distinct from the debtor” for purposes of determining the applicability of the insured versus insured exclusion.

While this seems like a good trend for directors and officers, a sigh of relief may be somewhat premature. Courts ruling on the insured versus insured coverage exclusion often disagree at times on several rather fundamental issues.

For instance, the court in Terry v. Federal Insurance Company (In re R.J. Reynolds—Patrick County Memorial Hospital, Inc.) reasoned that a “pre-petition debtor is the same entity as a debtor-in-possession, but a debtor-in-possession is not the same entity as a chapter 11 trustee.” The Terry court addressed the question of whether a claim brought against directors and officers by a litigation trust established under a debtor’s confirmed chapter 11 plan triggered the insured versus insured exclusion. The confirmed plan provided for the creation of a trust, overseen by a trustee appointed under the plan. The trust property included claims asserted by a third party, such as a bankruptcy trustee, acting against its directors and officers. Eight months after plan confirmation, the trustee commenced an adversary proceeding against certain directors and officers, and the carrier was alerted to the claims. The carrier denied coverage based on the insured versus insured exclusion, arguing that the claims were “brought by or on behalf of an insured.” The court agreed, reasoning that the claims against directors and officers were acquired by the trust by a mere voluntary assignment from a debtor-in-possession rather than an assignment from a chapter 11 trustee. Therefore, the exclusion was held to be operative, and coverage was unavailable to the directors and officers.

On the other hand, the court in Federal Insurance Company v. Aniello ruled that “the debtor-in-possession is clearly not the same entity as the pre-petition [debtor]…Given the [court’s] determination that the debtor-in-possession is a separate and distinct entity from a pre-petition [debtor], the debtor-in-possession does not fall within the definition of the term ‘Insured.’ Accordingly, it is apparent that coverage…is not precluded [by an insured versus insured exclusion].” Other cases are in accord.

Courts also seem to differ regarding what degree of legal significance should be carried by the anticollusion purpose of the insured versus insured exclusion. Some courts seem to regard the anticollusion rationale for the insured versus insured exclusion as irrelevant. Others regard it as fundamental to any decision. Without opening policies up to the need for parol evidence to ascertain the intention of the contracting parties, the importance of the anticollusion rationale underlying the insured versus insured exclusion is a topic
that may continue to be a subject of debate.

There are other aspects of case law, certain state law issues, and variation in the language of given policies that also could affect the availability of coverage in the event bankruptcy litigation against directors and officers begins.31 Prudence dictates that prior to any bankruptcy filing, directors and officers should ask their counsel to review the applicable policies and governing case law interpreting language similar to what appears in their policies. This step is necessary to ascertain whether coverage is likely to be available in the event claims brought by or on behalf of a bankruptcy estate may preclude coverage.

In Pari Delicto

Taken together, the possible loss of control of the attorney-client privilege along with the creation of new claims for which insurance coverage may be denied sound a clear call for directors and officers to operate a troubled company with all necessary care. Nevertheless, these items do not define the totality of the risk that can accompany the continued operation of an insolvent firm. In some cases, defenses to claims against directors and officers also can be lost.

Coping with the financial strain of insolvency, directors and officers can—and often do—face the need to make extraordinary decisions concerning the future of the enterprise. Directors and officers often must decide whether to:

• Take new risks or wind down operations.
• Pursue claims in litigation or settle them at a discount to avoid increased legal costs.
• Challenge or accede to decisions made by governmental bodies vested with power to issue licenses, grant permits, approve applications, or make other determinations important to the success of the firm.
• Take on new or replacement debt, or make other determinations important to the success of the firm.
• Take new risks or wind down operations.
• Pursue claims in litigation or settle them at a discount to avoid increased legal costs.
• Challenge or accede to decisions made by governmental bodies vested with power to issue licenses, grant permits, approve applications, or make other determinations important to the success of the firm.
• Take on new or replacement debt, or make other determinations important to the success of the firm.
• Buy or sell assets.

Also, during this difficult period, directors and officers may be tempted to keep creditors, vendors, contracting parties, and others from learning of the full scope of a firm’s financial problems.

In the event that the decisions of directors and officers are later challenged by, for example, a bankruptcy trustee, the first reaction of directors and officers is to assert that the decisions were made for the purpose of preserving the value of the company or perhaps to turn it around. When they do so, directors and officers are effectively assertin...
In other words, a wrongdoer cannot be liable to his or her wrongdoing confederates for the bad acts they committed together. If the bankruptcy estate steps into the shoes of the debtor firm, the defense is essentially that the company engaged in the wrongs that the directors or officers carried out as the company’s agents, and thus the estate is in pari delicto with the directors and officers. Therefore, the argument goes, there can be no claim.

It is true that under the in pari delicto doctrine, an individual asserting a claim may not recover when he or she was a party to the alleged misdeeds. It is also true that there is case law indicating that this defense can be used against a bankruptcy trustee. However, directors and officers facing claims brought by a trustee may still find that the in pari delicto defense is affected by the appointment of a trustee, which happens rather immediately in the case of a chapter 7 liquidation, and can occur at a later time when a chapter 11 trustee is appointed to replace management. A trustee, receiver, or similar innocent entity that steps into the shoes of the malfeasant debtor does not do so voluntarily. Because the trustee and the estate were not parties to the original bad acts, some courts have indicated that trustee claims may not be precluded by the in pari delicto doctrine.

The trustee and the estate may be regarded as innocent and therefore bring the claims, even though the debtor could not have brought the same claims as a party to the challenged acts. Case law on the issue appears to be equivocal, and an important factor in the analysis may be whether the debtor-in-possession—an entity created voluntarily—or a trustee is acting as the plaintiff.

Bankruptcy promises significant relief by maximizing the return creditors realize on their claims as well as providing a variety of opportunities for troubled companies. Still, directors and officers are wise to engage separate counsel and seek advice regarding decisions they make under the increased pressures that accompany the approach of insolvency and any eventual bankruptcy filing, whether voluntary or involuntary. Company counsel should not be the primary source for directors and officers seeking guidance on enhancing the value of their personal interests or diminishing their exposure to liabilities. Directors and officers should remain mindful of creditor interests and potential creditor claims that may arise against them as they attempt to navigate a troubled enterprise through choppy financial waters. At a minimum, before directors and officers are surprised by claims or the unintended consequences of decisions made at the most troubled period of their company’s life, they should clarify the nature and extent of any claims that may accrue against
them and take care to maximize their immunity for personal claims.

2 Id.
5 Id.
7 Id.
9 In re Ontos, Inc., 478 F. 3d 427, 431-32 (1st Cir. 2007) (Ownership of breach claims rests with company under Delaware law and therefore passes to the bankruptcy estate upon case commencement.).
10 In re Teleglobe Communications Corp., 493 F. 3d 345, 356 (3d Cir. 2007).
12 Id., e.g., Smith v. Arthur Andersen LLP, 421 F. 3d 989, 1005 (9th Cir. 2005).
15 Id. at n.55.
18 Id.
21 See, e.g., In re HA 2003, Inc., 310 B.R. at 717-18 (policy providing coverage against claims brought in bankruptcy court by a “person…authorized under applicable law to act on behalf of a debtor” was interpreted to provide coverage even for claims brought by a debtor-in-possession.).
22 In re Senior Cottages of Am., LLC, 482 F. 3d 97 (9th Cir. 2007).
23 Id. at 1005; Niselson v. Lernout, 469 F. 3d 143, 153 (1st Cir. 2006).
25 Compare FDIC v. O’Melveny & Myers, 61 F. 3d 17, 19 (9th Cir. 1995) (“While a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on a trustee, receiver or similar innocent entity that steps into the party’s shoes pursuant to court order or operation of law.”) and In re Senior Cottages of Am., 482 F. 3d at 1005 (“This Circuit has held that the defense of a pari delicto can bar a claim by a bankruptcy trustee against a third party for pre-petition harm to a debtor when the debtor’s agents colluded in the wrongful conduct alleged.”)

WHY PAY MORE FOR LAWYER’S LIABILITY INSURANCE?
FILL OUT ONE APPLICATION AND YOU COULD SAVE UP TO 30% OFF YOUR CURRENT INSURANCE.

WHY PAY MORE?
Lawyer’s Liability Insurance is a necessary cost of doing business and you should not pay any more than you have to.

First Indemnity is the DIRECT underwriter for State National and First Mercury Insurance Companies. This insurance is not available through your local broker. By cutting out the broker, you cut out the red tape and in many cases increase your coverage.

By going directly to the source, you get the same great service, save money and generally increase your coverage.

Call 800-982-1151 to find out how to you can save money and increase your coverage.

Go to www.firstindemnity.net and download an application.

FIRST INDEMNITY
Insurance Services, Inc.

IL 10 South Riverside Plaza
Suite 1800 W Loop Center
Chicago, IL 60606
1-800-982-1151

CA 1800 Century Park East
Suite 600
Los Angeles, CA 90067
1-800-982-1151

NY 420 Lexington Ave.
Suite 300
New York, NY 10170
1-800-982-1151

TX 5956 Sherry Lane
Suite 1000
Dallas, TX 75225
1-800-982-1151

MA 41 West Street
5th Floor
Boston, MA 02111
1-800-982-1151

FL 2202 N Westshore Blvd.
Suite 200
Tampa, FL 33607
1-800-982-1151

*First Mercury Insurance Company Rated A- Excellent By AM Best and Company
*State National Insurance Company Rated A Excellent By AM Best and Company *Licensed and Admitted in all 50 States. * CA License #0C6203
The tension between health-based standards and nondegradation policies creates uncertainty for parties in groundwater litigation

California has enacted two regulatory schemes to manage and protect its waters.1 State legislators gave the Department of Health Services (DHS) the task of ensuring that the water delivered to the public is safe to consume.2 They also require the State Water Resources Control Board (SWRCB) to manage and maintain the beneficial uses of the state’s waters.3 The DHS accomplishes its task by setting numerical standards such as maximum contaminant levels (MCLs), which involve a balancing of public health concerns with technological feasibility and cost. The SWRCB, by contrast, applies a qualitative standard focused on achieving the “maximum benefit to the people of the State.” The MCLs are health-based standards. The SWRCB qualitative standards are based upon a policy of nondegradation.

The intersection of these two regulatory schemes has led to court actions and administrative proceedings, often with divergent results and conflicting rationales. The coexistence of health-based MCL standards and nondegradation policies, which are remediation-based standards, inherently creates tension and conflict over which standard will be applied in a litigation or administrative context. When different standards of responsibility or liability are applied by courts as well as various public agencies with jurisdiction over water issues, the results are problematic and costly.

Some courts have adopted MCLs as the basis for determining liability, while others have adopted the nondegradation standard

Earl L. Hagström is a partner in the San Francisco office of Sedgwick, Detert, Moran & Arnold LLP, where he is a member of the Environmental Practice Group and specializes in environmental litigation, eminent domain, hazardous waste, and water quality matters.
without specifically stating so. The MCL/non-degradation dichotomy is further exacerbated when administrative and legal actions proceed on parallel tracks—a common occurrence in matters involving water.

The ability of defendants to rely upon compliance with health-based environmental laws and regulations to forestall or insulate themselves from liability has been, until recently, a reasonable risk management strategy. Though compliance was never an inviolate safe harbor, its effectiveness was well established through a long line of decisions. That is no longer so.

Over the last few years, courts have begun to chip away the ability of defendants to rely upon regulatory standards to define the scope of liability—and a series of decisions in 2006 and 2007 have all but eviscerated that defense. Though never a sure bet, the ability to rely upon compliance with regulatory standards as a touchstone for meeting one's obligations has increasingly been eroded by legal and administrative decisions involving the presence of anthropogenic constituents in water. While this trend is relatively recent, the underlying legislation, statutes, and implementing regulations relied upon in these decisions have been on the books for decades.

Plaintiffs' attorneys, especially in the area of groundwater litigation, have found new and innovative ways of leveraging conflicting legislative policies and regulations into substantial damage awards. Reliance upon health-based regulatory standards as a shield against potential liability no longer appears to be prudent.

Courts have been grappling with applying legal definitions to scientific concepts of human health and environmental safety in both property damage and toxic tort cases for decades. If human health and environmental conditions are safe, then in theory, there should be no injury, and without injury there can be no liability. With regard to drinking water, governmental regulatory agencies—using their vast array of experienced toxicologists, scientists, and policy makers—have marshaled the best available science to determine, on a chemical-by-chemical basis, what is safe. For drinking water, “safe” is defined by the MCL.

MCLs are designed, in part, to establish uniform standards that are protective of human health and to prevent ad hoc standards from being established through litigation or administrative actions. These standards, along with those established at the federal level, are, in theory, the benchmarks against which acceptable levels of a constituent in drinking water are judged. MCLs, again in theory, should bar layperson juries, courts, or other agencies from substituting their judgment and personal bias for the reasoned and scientifically based judgment of the agencies charged with protecting public health and welfare.3 These agencies are better equipped to make a safety determination than juries or courts, neither of which have the technical and scientific background to do so. Qualitative, nonobjective standards, when applied in legal proceedings, create situations that can result in ad hoc determinations of liability or responsibility.

When parallel administrative and legal proceedings occur, the application of a qualitative standard by the administrative agency and the application of a quantitative standard by a court increases the potential for conflicting decisions. The uncertainty created in situations in which administrative and legal proceedings address the same contamination in the same aquifer and reach different determinations fosters further tension as the parties must determine which decision controls. This in turn results in additional delays and increased costs for plaintiffs and defendants.

Establishing the Standards

The DHS establishes primary drinking water standards that specify the maximum contaminant level at which a particular constituent may be present in drinking water and still be safely consumed by the public.6 The DHS also often establishes secondary drinking water standards, which specify the MCL that, in its judgment, is necessary to protect public welfare. Public water suppliers may deliver water to their customers that contains these contaminants, so long as they are below the MCL.

The SWRCB establishes cleanup or remediation standards based upon a nondegradation policy” that states that “[w]henever the existing quality of water is better than the quality established in policies...such existing high quality will be maintained.”9 There is a more ambiguous aspect of the SWRCB nondegradation policy, however. High quality waters must be maintained until “the [s]tate finds that change in water quality will be consistent with maximum benefit to the people of the [s]tate, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in policies.”9

Thus, cost considerations alone are not enough to justify allowing degradation; the discharges must match background water quality.10 If the discharger can treat water pollutants to below detectable levels, the SWRCB regulation trumps lesser federal water quality standards and requires the discharger to use “the best practical treatment.”11

In California, the SWRCB addressed the conflict between lesser drinking water standards and the high quality water nondegradation policy12 by adopting the position that the drinking water standard is considered the “least stringent” of water quality objectives.13 Therefore, if nondegradation is possible, even at great expense to the discharger, the SWRCB mandates the highest level of pollutant treatment to match existing high water quality.14

The remediation levels established by the agencies charged with enforcing these nondegradation policies are significant factors in determining when and if remediation is necessary and in proving if an injury has in fact occurred. Indeed, state and federal court decisions in 2006 and 2007, along with administrative decisions, have undermined the MCL as the standard for civil liability and remediation requirements and created situations in which remediation of a contaminant to a non-detect level in an aquifer has been required even though the contaminant level is below the MCL—the level at which drinking water could be safely provided to the public.

Parallel Proceedings

Private party litigation and agency enforcement actions often go hand in hand. In cases involving a chemical that was released into the environment and made its way into the “waters of the state,” claims for nuisance, trespass, negligence, and product liability, as well as other health-based claims, are typically brought against defendants in court by private parties, quasi-governmental agencies such as water companies, and municipalities seeking a wide range of damages. As is often the case when drinking water supplies are involved, the defendants frequently are subject to agency orders requiring them to not only remove the offending chemical but also provide an alternate source of drinking water until the cleanup has been completed. These dual-tracked actions raise an interesting issue: The agency charged with “protecting groundwater quality” can require the defendants to remediate the drinking water source to a non-detect level—and, at the same time, under the standards set by the agency charged with “protecting human health,” the defendants could provide alternate water supplies that contained the offending constituent at concentration levels greater than non-detect but less than the MCL. Taken to its logical extreme, the alternate water supply could conceivably be drawn from the very aquifer at issue in both actions if the levels were less than the MCL.

Water providers, regulatory agencies, industry, and consumers—that is, the stakeholders—are confronted with this conflict when the concentration level of an anthropogenic constituent is present in groundwater at levels below the MCL or the secondary MCL, if one has been established. In those
1. Under California law, who owns the water in the state?
   A. The state of California.
   B. Private parties.
   C. The state and private parties jointly.
   D. None of the above.

2. Maximum contaminant levels (MCLs) are:
   A. Numerical standards set by the Department of Health Services (DHS).
   B. Goals set by the State Water Resources Control Board (SWRCB).
   C. Standards set by the courts.
   D. None of the above.

3. The SWRCB’s water policies are health-based.
   True.
   False.

4. Private parties have a usufructuary right to water.
   True.
   False.

5. A party cannot be found liable for damages if the concentration level of a constituent in drinking water is less than the MCL.
   True.
   False.

6. Which agency or agencies did the legislature authorize to determine what constitutes the MCL for a constituent?
   A. SWRCB.
   B. DHS.
   C. SWRCB and DHS.
   D. None of the above.

7. The In re Groundwater Cases decision adopted the “pure and wholesome” standard for regulated water utilities.
   True.
   False.

8. In water contamination cases, product liability claims may only be brought by the consumer.
   True.
   False.

9. Public water suppliers may deliver water to the consumer if constituents in the water exceed the MCL.
   True.
   False.

10. Nondegradation policy requires existing water quality to be maintained at a level:
    A. Equal to the maximum benefit to the people.
    B. Equal to the secondary MCL.
    C. Equal to the primary MCL.
    D. Equal to municipal standards.

    True.
    False.

12. Judge Shira A. Scheindlin held that the MCL was a bright-line rule defining what constitutes a legal injury.
    True.
    False.

13. In re Groundwater Cases applied numerical standards in groundwater contamination cases involving entities regulated by the Public Utilities Commission as well as municipal water providers.
    True.
    False.

14. Under the SWRCB nondegradation policy, excessive cleanup costs alone justify allowing degradation of water quality.
    True.
    False.

15. In Massachusetts, the MCL is the level at which water is:
    A. Useable for irrigation.
    B. Useable for livestock.
    C. Useable for human drinking.
    D. All of the above.

16. The acceptable or safe level of a constituent in drinking water is determined by whether it is below the MCL.
    True.
    False.

17. The SWRCB has determined that drinking water standards are the most stringent water quality objectives.
    True.
    False.

18. Courts have adopted uniform standards for determining liability in groundwater contamination cases.
    True.
    False.

19. A regulated water provider’s legal duty is defined by the “pure and wholesome” language of the Safe Drinking Water Act.
    True.
    False.

20. The DHS MCLs are health-based standards.
    True.
    False.
cases, stakeholders are faced with the issue of whether the presence of an anthropogenic constituent, at concentrations below the MCL or secondary MCL, provides a legal basis to support a claim for damages, and whether that presence under nondegradation policies requires remediation when the health-based MCLs established by state and federal agencies charged with protecting public health and welfare have not been exceeded. The conundrum is which standard—the health-based MCLs or remediation-based nondegradation—should be applied in evaluating whether a compensable injury has in fact occurred and whether remediation is warranted. The courts have been less than uniform in their decisions, and regulatory agencies have adopted differing positions on when and how to enforce the nondegradation policies.

Plaintiffs, municipalities, and water companies often contend that the presence of an anthropogenic constituent “constitutes a public nuisance” that “threatens their water.” A finding of nuisance requires an unreasonable and substantial interference with the plaintiff’s use and enjoyment of property.

Municipalities and other water purveyors will often shut down their water wells not because the MCLs have been exceeded but because of self-imposed policies—such as not serving water with any amount of a contaminant, no matter how harmless. These self-imposed prohibitions begin the accrual, from a plaintiff’s point of view, of damages. The risk faced by defendants in these situations is that despite the black letter law that no claim of nuisance requires an unreasonable interference with the plaintiff’s use and enjoyment of property.

Cognizable Injury

Courts either incorporate regulatory standards into their analysis of common law injury or in their analysis of standing. At either stage of a proceeding the issues are essentially the same: Does meeting or not meeting the standard determine if the plaintiffs have a claim, and which standard will be applied?

Decisions of courts outside of California—both state and federal—on these issues are illustrative. For example, in Texas, the state appellate court in *Taco Cabana, Inc. v. Exxon Corporation* affirmed a verdict in favor of the former landowner by relying upon the State Water Code and implementing administrative regulations that established the appropriate cleanup standards. Because those standards dictated when corrective action was necessary, the court reasoned that they also defined when unreasonable levels of contamination were present. The levels on the plaintiffs’ property did not exceed those standards, so the plaintiffs’ trespass claim was dismissed.16

In Washington, the district court in *City of Moses Lake v. United States* dismissed the plaintiffs’ claims, finding that to the extent the city was merely concerned about possible health risks or that one of its wells at some point in the future might be contaminated, it did not establish that the defendant had a duty to address the potential liability. The court counting health-based standards and instead focusing on property rights, product liability theories, and the nondegradation standards to support claims based upon the presence of contaminants at any detectable level. Beginning in 2000 and culminating in 2006, the nondegradation standard moved to the forefront and trumped the health-based MCL standards.20 In 2000, an appellate court in Ohio held that even though “contamination levels in the water never exceeded levels considered to be safe [that] merely showed compliance with regulatory standards and did

Municipalities and other water purveyors will often shut down their water wells not because the MCLs have been exceeded but because of self-imposed policies—such as not serving water with any amount of a contaminant, no matter how harmless.
that, while the MCL may serve as “a convenient
guidepost in determining that a particular
level of contamination has likely caused
an injury, the MCL does not define whether
an injury has occurred.”

Judge Scheindlin noted that “nothing in
the decisions cited by the defendants com-
pels a holding that the applicable MCL estab-
lishes a bright-line rule defining the scope of
plaintiffs’ protected interests or what legally
constitutes an injury.” Of particular note,
the judge found that the “plaintiffs’ pro-
tected interests may be interfered with whenever contamination affects the quality of the
water from which they supply the public, or
in the case of OCWD, the groundwater it is
statutorily tasked with protecting.” Thus
Judge Scheindlin effectively discarded the
MCL and adopted nondegradation as the
standard against which harm or injury is
judged.

In reaching her decision, the judge dis-
tinguished two cases cited by the defen-
dant oil companies. These cases held that
contamination levels below the MCL cannot
constitute a legally cognizable injury. The
judge commented that the plaintiffs in these
cases were private well owners, not public
water suppliers, and therefore had no statu-
tory duty to protect or remediate ground-
water.

In 2006, the Third District California Court
of Appeal in D.J. Nelson Trust v. Superior
Court (Exxon-Mobil) reversed a lower court’s
rejection of a water utility’s products liabil-
ity claim. The utility, Fruitridge Water
Company, sought damages for contamination
of groundwater from MTBE. The court
refused to restrict a products liability claim
to the end user or consumer of the water, find-
ing that the utility had a sufficient possessory
interest in the water to maintain its claim
and that Exxon-Mobil should have reason-
ably foreseen that MTBE would leak from
its gasoline delivery systems into the plaintiff’s
“groundwater” system. The court commented
that California law does not limit potential product liability exposure only to consumers
that have a direct buy/sell relationship with
the manufacturer, finding that “state law
does not restrict liability to cases arising after
a retail sale or equivalent transaction, which
might imply a more limited class of potential,
expected uses.”

These decisions, combined with non-
deradation policies, undermine the premise
of health-based MCLs. Taken to their logical
conclusion, these decisions can be interpreted
to support remediation of an anthropogenic
constituent in groundwater to a non-detect
level—even when the constituent level is
below the health-based MCL—while at the
same time permitting the end user or con-
sumer to be provided with replacement drink-
water.
ing water containing the same constituent at a concentration level that is equal to or less than the MCL.

As 2007 comes to a close, however, this trend may be changing. On August 24, 2007, the First District California Court of Appeal in the In re Groundwater Cases decision gave strong support to adopting MCLs as the standard for determining liability. The case involved water purveyors regulated by the Public Utilities Commission (PUC). The appellate court found that the MCLs developed by the DHS were the standards by which acceptability levels of a constituent in drinking water would be judged. The court was clear in its finding that the qualitative language in the Health and Safety Code, such as “pure” or “wholesome”—which is akin to the “highest quality” and “maximum benefit” language in the SWRCB’s nondegradation policies—was not an enforceable, objective standard but instead was only a goal that was never meant to be a substitute for actual numeric standards. The court of appeal also found that municipal water providers were only liable for violations of mandatory duties, and the only standards at issue in matters involving municipal water providers, like the PUC-regulated entities, were numerical standards such as MCLs.

Moreover, the court emphatically rejected the plaintiffs’ claims that an isolated instance of water containing constituents in excess of the MCLs could trigger potential liability. The court found the plaintiffs’ position to be “inconsistent with the purpose for which MCLs were established.” The In re Groundwater Cases decision, while focused on the “regulated water provider,” makes it clear that in California MCLs are the standards by which liability is to be adjudicated. General policy statements such as those contained in SWRCB nondegradation resolutions and the “pure” and “wholesome” language of California’s Safe Drinking Water Act are only goals, not the benchmarks by which legal duty is determined.

The protection of public health by establishing MCLs and ensuring that those criteria are met is actually a matter of minimizing health risks rather than eliminating risk entirely, because practical, technical, and financial constraints make it impossible to do so. The development and adoption of MCLs takes these factors into consideration. Nevertheless, plaintiffs have been demanding, and the courts—with the exception of the court that decided In re Groundwater Cases, which is thus far applicable only to the regulated community—seem to be agreeing that water sources, drinking or otherwise, must be pure. This means the water must have no detectable level of contaminants.

The tension between the MCL and nondegradation standards will continue nationwide. The uncertainty arising from this dichotomy will likely result in extended legal and administrative battles and the expenditure of significant resources, some of which will be unnecessary and wasteful. Having two separate and at times conflicting standards raises critical and often overlooked legal, financial, and public policy issues regarding who can recover damages, whether more than one class of plaintiff can recover for the same harm under different theories, and who decides what is safe. The In re Groundwater Cases court based its decision on a human health-based standard, not vague subjective policy statements. The rational approach adopted in this decision eliminates or at least reduces the risk of ad hoc standards being applied in litigation and administrative actions.

The In re Groundwater Cases approach should be extended and applied to all cases involving groundwater contamination, not just those involving regulated utilities. Doing so will bring much needed certainty to the determination of liability and damages in the groundwater arena.

---

1 The state owns the water; all others have usufructuary rights. CAL. CONST. art. 10, §2; Water Code §102.
2 HEALTH & SAFETY CODE §§116270 et seq.
3 WATER CODE §§13001 et seq.


6 SWRCB Order No. QW 86-17, at 22 n.10.

7 State Water Resources Control Board (SWRCB) Q’s and A’s Resolution No. 68-16, at 9-10 (Feb. 16, 1995).

8 SWRCB Resolution No. 68-16.

9 SWRCB Resolution No. 68-16.

10 SWRCB Resolution No. 68-16, Decisional Chart; SWRCB Order No. QW 86-17, at 22 n.10.

11 SWRCB Resolution No. 68-16; SWRCB Order No. QW 91-10. See also In re Matter of: Marth Air Force Base, California, In the Matter of: Geor Base, California, E...


13 Id. at 10.

14 Id.


16 Taco Cabana, Inc. v. Exxon Corp., 5 S.W. 3d 773 (Tex. App. 1999); see also Hartwell Corp. v. Superior Court of Ventura County, 27 Cal. 4th 256, 276 (2002) (private damage claims preempted based on drinking water that met state water quality benchmarks).


25 Id. at *3.

26 Id. See also Plainview Water Dist. v. Exxon Mobil Corp., No. 009975-01, 2006 LEXIS 3730 (N.Y. Sup. Ct., Nov. 27, 2006) (rejecting defendants’ argument that the plaintiff must demonstrate that MtBE levels will exceed the MCL to establish actual and compensable injury).

27 The underlying rationale of Judge Scheindlin’s decision and those of other courts that have rejected adopting MCLs as the bright-line standards for determining liability has its basis in tort law. In those decisions the focus has been on the invasion of a legally protected interest—the loss of some property right—as opposed to health risks. This approach, while legally supportable in some instances, increases the risk of ad hoc standards being applied.


32 Gov’t Code § 815.6.

33 Safe Drinking Water Act, HEALTH & SAFETY CODE § 116270.
Minimize Risk with Better Calendar Management

YEARS AGO, lawyers would not even consider filing a malpractice case against their brethren. However, those days are long gone for attorneys in Los Angeles, across the state, and around the country. Today, attorneys will not hesitate to take each other to court on charges of malpractice. And there are few things more disconcerting for an attorney than being the defendant in litigation, particularly filed by a former client. Malpractice claims are filed for a variety of reasons, but the leading cause is missed court deadlines.

Missing a deadline is, as the Ninth Circuit called it in one ruling, a “lawyer’s nightmare.” That malpractice case, *Pincay v. Andrews*, was a nightmare for a litigation firm of more than 200 attorneys. A filing clerk miscalculated a court filing date, thinking the firm had 60 days to file an appeal when in reality it had only 30. The firm missed the deadline, and the client sued for malpractice. Fortunately for the firm, an en banc panel ruled that the mistake was “excusable neglect,” despite a blistering dissent from several judges on the panel. These days, many courts are not nearly as forgiving.

Despite the danger of missing or miscalculating a court deadline, it happens. In fact, what may be surprising is that it does not happen more often. Many law firms rely on paper calendars or manual court date calculations. Others lack a centralized court calendaring system and allow each attorney to use his or her own methods. All of these leave law firms vulnerable to missing court dates. Without an automated, rules-based, centralized system, court calendaring can be tedious, time-consuming, and painfully prone to errors.

The chore of tracking court dates has become somewhat easier with the advent of the Internet. Sites such as the California Rules of Court Web page (www.courtsinfo.ca.gov/rules) can be helpful for those looking for additional information about various court requirements. Nonetheless, calendaring a single court matter can still require hours of work. For a small firm that only focuses on one practice area and tries cases in one or two specific courthouses, staying abreast of relevant court rules may not be difficult. However, for litigators who have clients with business throughout a state or region, it is much more complicated.

Someone at the firm—whether a paralegal, administrator, or lawyer—must first find the initial filing date. Then, all relevant deadlines must be precisely calculated and recorded in the firm’s calendar. If attorneys have their own individual calendar, rather than a firmwide system, each calendar must be updated promptly. But court rules can change often and quickly, and those changes are not always easy to determine. Rules also vary from one jurisdiction to another. So after each date has been figured and communicated, all deadlines must be manually checked and rechecked.

Savvy firms, no matter technology budgets, do not have to be overwhelmed by manual calendaring. New technology can help to transform the manual calendars that each attorney is responsible for into one centralized, automated process. An automated calendaring system based on court rules can not only help lessen liability concerns but also save time and free staff to focus on cases and clients.

A court rules-based automated calendaring program generally features a comprehensive database of court rules, taking into account holidays and deadlines for a particular practice area, court, and jurisdiction. Sophisticated programs will also include the filing deadlines and requirements for federal and state regulatory agencies. Many of today’s docketing programs based on court rules tend to work in similar ways. An administrator or attorney enters basic information about a specific court case and then the rules and deadlines are automatically calculated. However, only high-level calendaring programs consistently check, recheck, and update court rules.

As California law firms are aware, there are many local, state, and federal rules to consider, including civil litigation rules for counties, the state of California, and appellate courts; criminal court rules for local, state, and federal courts; and federal district courts, bankruptcy courts, and the Ninth Circuit Court of Appeals. Depending on the areas of practice, there can be a number of other court and regulatory rules in California that firms must calendar, such as rules regarding asbestos litigation, the California Board of Equalization, the California Environmental Quality Act, eminent domain, family law, Government Code for claims and actions against public entities and employees, the Office of Administrative Hearings, probate court, the Public Utilities Commission, statutes of limitation, unlawful detainers, and workers’ compensation.

A thorough rules-based system will have all the relevant court rules for jurisdictions in the appropriate practice areas and make calculations automatically. Changes to court rules can be communicated immediately, and each firm calendar can be updated seamlessly. Fortunately, court rules-based calendaring is no longer limited to large firms with huge software budgets and IT staff. Now, firms can find pay-per-use systems online that require a minimum of training and financial commitment.

Online, court rules-based deadline calculation technology gives legal professionals up-to-the-minute calendaring information, greatly reducing chances of missing a date. The user enters the area of law, court location, and the date of an event such as a trial. The online service then returns a list of deadlines and corresponding authorities. Advanced online calendaring programs will notify the user by e-mail that there has been a rule change in a searched jurisdiction. Then the dates can simply be rechecked.

If concern over malpractice is not motivation enough, attorneys should talk to their malpractice insurance carriers. Many offer a discount on insurance rates for firms that use these systems and encourage or require law firms to implement automated court rules calendaring systems.

---

1 *Pincay v. Andrews*, 367 F. 3d 1087 (9th Cir. 2004).

Joseph C. Scott is an attorney and vice president/general manager of CompuLaw, LLC, and Deadlines On Demand, LLC. He can be reached at jscott@compulaw.com.
IN THE MIDDLE OF THE NIGHT IT HITS YOU—“Oh no! Did I miss a deadline?”

Relax! Just use Deadlines On Demand (“DOD”), the nationwide legal calculation service. Even at 3 AM, you can check DOD’s website to see your deadlines.

DOD is fast, inexpensive and accurate. It’s powered by CompuLaw®—the same rules-based calendar technology used by the big firms for decades.

With DOD there’s no need to buy, install and learn expensive and complex software. The DOD website is fast and easy to use, so you save countless hours of time. Simply charge your credit card for the results, and bill the minimal fee as a research charge.

You can also import the results to Outlook® or any application that supports iCalendar files.

Think about it—no more worries about calendar vs. court days, local vs. federal holidays, or counting backwards and forwards. DOD does it all for you.

Protect your clients and your firm—DOD all of your dates—and sleep better at night!

For a FREE PREVIEW: Use Promo Code LACB7
HOLIDAY GIFT IDEAS

Fujitsu Computer Products of America, Inc.
Need to protect and preserve important documents and reduce paper-based clutter? The Fujitsu ScanSnap S510 scanning solution is the perfect gift for legal professionals or law offices that have “paperless office” atop their 2008 New Year’s resolutions. Bundled with Adobe® Acrobat® 8 Standard, ScanSnap provides a fast, easy-to-use method for converting information contained on paper into authentic PDF files at the touch of a button. Using its increased file security with password protection, unwanted eyes will never gain access to your private files! Fujitsu Computer Products of America, Inc., 1255 East Arques Avenue, Sunnyvale, CA, 94085, (408) 746-7000, fax (408) 746-6914. Web site: http://www.fcpa.fujitsu.com.

Gifts In A Basket
Customized holiday gifts to acknowledge, appreciate, and thank clients, employees, family, and friends. Order Maple Ridge Farms, Taylor & Grant, Soundline Greeting Cards with CDs, or from an assortment of gift albums ranging from $25 to $750. For something one of a kind, in a sleigh, mini trunk, stained basket, or planter, order holiday gift baskets made to order. Choose from an Assorted Specialty Foods Snack Basket, a Sweets and Salty's Snack Basket, or a Pasta Basket. We ship nationwide. Call our gift order line at (877) 998-2942. Gifts In A Basket, 1440-4 South State College Blvd., #E, Anaheim, CA, 92806, (714) 999-0466, fax (714) 999-0462, e-mail: giftsbysteanne1@sbcglobal.net. Web site: www.SoCalGiftBaskets.com.

Hemancipation
Gentlemen, holidays around the corner and you don’t have time to shop? Perhaps you want to create an incredible experience for someone you love, or want a specific item delivered, but don’t know how to arrange it? You don’t have to expend costly hours trying to figure out logistics. Our Gift Concierge team is here to help you around the clock, every day of the year with anything from the simplest purchase to the most unique request. Hemancipation, 269 South Beverly Drive, #697, Beverly Hills, CA 90212, (888) 473-0876, fax (310) 531-7396, e-mail: info@hisdesigner.com, Web site: www.hemancipation.net.

Minicucci Sartorial—Custom Tailor & Shirt Maker
(818) 749-6807. A tailor made shirt or suit is the ultimate gift for the professional that has everything. Every Minicucci Sartorial suit and shirt is hand-cut and tailored using the client's individual measurements and style preferences. Our more than 500 fabrics are sourced from the finest mills in Europe and crafted with bespoke detail for a perfect fit. All measurements, cloth selection, and styling are performed in the recipient’s office or home. The gift of a tailor-made garment from Minicucci Sartorial is a remarkable way to recognize, reward, or just say “thank you.” e-mail: saill@minicuccisuits.com. See display ad on page 10.

Paintings by Ivan Lofstrom

Thibiant Beverly Hills Day Spa
Go green for the holidays! Aida Thibiant, who has been on the pulse of beauty trends and technologies for 57 years, has set the standard in beauty sophistication with the Thibiant Beverly Hills Spa treatments and products. Recognizing the importance of offering organic products and treatments to her clients, she and her skin care experts put their heads together and formulated an exceptional facial and treatment line... Thibiant style. Give the gift of organic with an organic facial gift certificate or gift set. Thibiant Beverly Hills Day Spa, 449 North Canon Drive, Beverly Hills, CA 90210, (310) 278-7565, fax (310) 278-8040, e-mail: joan@thibiantspa.com. Web site: www.thibiantspa.com.

HOLIDAY DINING & CATERING

House of Blues
The Foundation Room at House of Blues®. Give the gift of membership this holiday season! Enjoy VIP concert tickets, personal concierge, and celebrated dining in our luxurious setting. With nationwide privileges as well as access to premiere events, Foundation Room membership is an ideal gift for personal and professional entertaining. For more membership information or to schedule a tour please call (323) 948-5150. House of Blues, 8430 Sunset Boulevard, West Hollywood, CA 90069.

Promenade Ristorante
Located on the southwest corner of 1st and Hope Street in the Promenade Plaza and one block from the L.A. Superior Courthouse, Promenade Ristorante has long been a haven for gourmet Italian cuisine. Among the restaurants regulars are personnel from the Courthouse, Music Center, Philharmonic, and Los Angeles Opera. We have a wide selection of salads, pizza, pasta, and panino. There are also entrees such as hearty chicken, steak, and fresh fish in addition to daily specials. Indoor and outdoor dining in a courtyard atmosphere. Special holiday party menu. Free one hour validated parking below our restaurant. Promenade Ristorante, 719 West 1st Street, Los Angeles, CA 90012, (213) 437-4937, fax (213) 437-4940. Lunch Monday-Friday 11:30 A.M. to 2:00 P.M. Dinner Tuesday-Saturday 5:00 P.M. to 9:00 P.M. Happy Hour from 4:30 P.M. to 7:30 P.M. Tuesday-Friday.

Corporate and Executive Gifts
- Employee & Sales Incentives
- Client & Referral Appreciation Gifts
PERSONALIZED GIFT BASKETS
SELECTION OF GIFT & VACATION ALBUMS
(714) 999–0466
Corporate Accounts
NATIONWIDE SHIPPING & LOCAL DELIVERY

www.SOICALGIFTBASKETS.com
Let us make sending your gifts a pleasure.
Great gifts are just a phone call away!
Order Line 1 (877) 998–2942
Enchantment Resort

Sedona’s red-rock country is even more enjoyable with an extra night free. Stay three consecutive nights at Enchantment Resort and enjoy a fourth night free (through 2/15/08, subject to limited availability, excludes holidays). Use your extra time for hiking, biking, and exploration amidst the scenic natural vistas of Sedona. And indulge at Mii amo, ranked by Travel & Leisure as the world’s #1 destination spa. 525 Boynton Canyon Road, Sedona, AZ 86336, (800) 826-4180, e-mail: info@enchantmentresort.com. Web site: www.enchantmentresort.com. Just call reservations and ask for the Los Angeles Lawyer package.

The Lodge at Torrey Pines

Bordering the famed Torrey Pines Golf Course, site of the 2008 U.S. Open, and surrounded by sweeping ocean and fairway views, The Lodge at Torrey Pines’ setting is unmatched. The homage to California’s Arts and Crafts movement, features spacious guest rooms, two restaurants, and a world-class spa. As San Diego’s only AAA Five-Diamond resort, The Lodge provides everything with well-heeled traveler has come to expect. With its luxurious surroundings and unparalleled service, The Lodge has established itself as one of Southern California’s premier resorts. Enjoy a Bed and Breakfast package starting at $355 per night plus tax. The Lodge at Torrey Pines, 11480 North Torrey Pines Road, La Jolla, CA 92037, (888) 826-0966, fax (858) 453-0691, e-mail: res@lodgetorreypines.com. Web site: www.lodgetorreypines.com.

Lone Mountain Ranch

Montana family ranch vacations in Yellowstone Country. Lone Mountain Ranch is one of Montana’s premier guest ranches with endless recreational activities for the whole family. Guided fly fishing trips, horseback riding, hiking the backcountry, outdoor youth adventures for children 4-18, canoeing, mountain biking, and interpretive tours into Yellowstone National Park. All of the creature comforts too, with cozy log cabins, a spectacular dining lodge where guests enjoy ranch gourmet meals and on-site massage therapists for relaxing after a day outdoors. Lone Mountain Ranch, P.O. Box 160069, Big Sky, MT 59716, (800) 514-4644, fax (406) 995-4670, e-mail: LMR@Lmranch.com. Web site: www.Lmranch.com.

TRUST DEED FORECLOSURES

“Industry Specialists For Over 18 Years”

At Witkin & Eisinger we specialize in the Non-Judicial Foreclosure of obligations secured by real property or real and personal property (mixed collateral). When your client needs a foreclosure done professionally and at the lowest possible cost, please call us at: 1-800-950-6522

We have always offered free advice to all attorneys.

WITKIN & EISINGER, LLC

RICHARD G. WITKIN, ESQ. • CAROLE EISINGER

WITKIN & EISINGER, LLC

Does LACBA have your current e-mail address?

The Los Angeles County Bar Association is your resource for information delivered via e-mail on a number of subjects that impact your practice.

Update your records online at www.lacba.org/myaccount or call Member Services at 213.896.6860.
Procedure Section 425.16 in disposing of lawsuits challenging alleged settlement misconduct. Perhaps this was because of the case he cited discussing the public policy considerations of Section 47: Flatley v. Mauro, 39 Cal. 4th 299 (2006). Flatley rejected application of the anti-SLAPP statute under the unique facts of that case, which involved admitted extortion, and differentiated (although not truly convincingly) between the statutory privilege in Section 47 and First Amendment “protected activity”—the target of Section 425.16.

In an earlier California Supreme Court case, Navellier v. Sletten, 29 Cal. 4th 82 (2002), the court had held that settlement negotiations leading to subsequent litigation was protected activity under Section 425.16. That case has been followed expressly in Navarro v. IHOP Properties, Inc., 134 Cal. App. 4th 834 (2005), and sub silentio in Dowling v. Zimmerman, 85 Cal. App. 1400 (2001). So, a brief mention of Section 425.16, in my view, would have been in order.

In fact, there is one more weapon often available in the armamentarium of the settling attorney whose conduct is challenged in subsequent litigation—Civil Code Section 1714.10, which requires a plaintiff to obtain a prefiling order before the plaintiff can sue an attorney and his or her client for conspiracy.

Having drifted away from the main subject of Mr. Steinberg’s excellent article, I suppose that I am now suggesting that there is another article lurking somewhere when the bluffing negotiator gets sued.

Scott J. Tepper

Articles Solicited
To Our Readers:
Los Angeles Lawyer encourages the submission of well-written, well-researched legal articles on substantive law issues that educate and inform other lawyers about the law. Feature articles are approximately 3,000 to 5,000 words; departments are approximately 2,500 to 3,500 words. We will gladly provide samples to prospective authors.

Manuscripts and query letters should be sent to: Los Angeles Lawyer, P. O. Box 55020, Los Angeles, CA 90055. The magazine’s Style Guide is online at www.lacba.org/lalawyer.

The Los Angeles Lawyer Editorial Board carefully considers all submissions.

Samuel Lipsman
Publisher and Editor
### Appraisals and Valuations

COMMERCIAL, INDUSTRIAL, OFFICE, RESIDENTIAL, estate homes, apartments, land, eminent domain, special-use, easements, fractional interests, and expert witness. Twenty-five years of experience. All of Southern California with emphasis in Los Angeles County and Orange County areas. First Metro Appraisals, Lee Walker, MAI, (714) 744-1074. Also see Web page: www.firstmetroappraisals.com.

### Consultants and Experts


NEED AN EXPERT WITNESS, legal consultant, arbitrator, mediator, private judge, attorney who outsources, investigator, or evidence specialist? Make your job easier by visiting www.expert4law.org. Sponsored by the Los Angeles County Bar Association, expert4law—the Legal Marketplace is a comprehensive online service for you to find exactly the experts you need.

### House For Sale

CORTE BELLA COUNTRY CLUB home built in 2004 on premium golf course lot, in Sun City West, Arizona. Desirable, active adult, guard-gated community by Del Webb. 2,727 sq. ft., formal living room and dining rooms, 3 bedrooms, den, large family/kitchen area, 3-car garage, and covered patio. $68,000 in upgrades. Offered at $625,000. Price negotiable. Call (623) 215-7336 or e-mail resv460@cox.net.

### Legal Services

STROZ FRIEDBERG—This firm’s unique methodology—which brings together our technology acumen, legal background, investigative experience, and behavioral science capabilities—has made Stroz Friedberg the firm of choice in the areas of its expertise. Please contact our Los Angeles office. James M. Aquilina, Managing Director and Deputy General Counsel, 1925 Century Park East, Suite 1350, Los Angeles, CA 90067, (310) 623-3300. Web site: www.strozllc.com.

### Arabic Interpreting Services


### House For Sale

**CORTE BELLA COUNTRY CLUB**

Home built in 2004 on premium golf course lot, in Sun City West, Arizona. Desirable, active adult, guard-gated community by Del Webb. 2,727 sq. ft., formal living room and dining rooms, 3 bedrooms, den, large family/kitchen area, 3-car garage, and covered patio. $68,000 in upgrades. Offered at $625,000. Price negotiable. Call (623) 215-7336 or e-mail resv460@cox.net.

### Legal Services

**STROZ FRIEDBERG**—This firm’s unique methodology—which brings together our technology acumen, legal background, investigative experience, and behavioral science capabilities—has made Stroz Friedberg the firm of choice in the areas of its expertise. Please contact our Los Angeles office. James M. Aquilina, Managing Director and Deputy General Counsel, 1925 Century Park East, Suite 1350, Los Angeles, CA 90067; (310) 623-3300. Web site: www.strozllc.com.

---

**NORIEGA CHIROPRACTIC CLINICS**

Clinica Para Los Latinos • Serving the Latin Community for 30 years

IS PROUD TO ANNOUNCE OUR SIX LOCATIONS:

- **HUNTINGTON PARK HEALTH CENTER**
  3033 E. Florence Ave.
  Huntington Park, CA 90255
  (323) 582-8401

- **ONTARIO HEALTH SERVICES**
  602 N. Euclid. Ave., Suite B
  Ontario, CA 91764
  (909) 395-5598

- **WHITTIER HEALTH SERVICES**
  13019 Bailey Ave. Suite F
  Whittier CA 90601
  (562) 698-2411

- **SOUTH CENTRAL HEALTH CENTER**
  4721 S. Broadway
  Los Angeles, CA 90037
  (323) 234-3100

- **HIGHLAND PARK HEALTH CENTER**
  5421 N. Figueroa St. (Highland Park Plaza)
  Highland Park, CA 90042
  (323) 478-9771

- **MONTEBELLO WELLNESS CENTER**
  901 W. Whittier Blvd.
  Montebello, CA 90640
  (323) 728-8268

**1.800.624.2866**

Personal Injury and Worker’s Comp. cases accepted on lien basis.

---

Los Angeles Lawyer December 2007 45
INDEX TO ADVERTISERS

<table>
<thead>
<tr>
<th>Company</th>
<th>Page(s)</th>
<th>Tel &amp; Email Addresses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arbitration and Mediation Group</td>
<td>p. 27</td>
<td>Tel. 818-790-2951 <a href="http://www.mediationla.com">www.mediationla.com</a></td>
</tr>
<tr>
<td>Lee Jay Berman</td>
<td>p. 15</td>
<td>Tel. 213-383-0438 <a href="http://www.leejayberman.com">www.leejayberman.com</a></td>
</tr>
<tr>
<td>Coldwell Banker</td>
<td>p. 6</td>
<td>Tel. 310-442-2998 <a href="http://www.mickeykessler.com">www.mickeykessler.com</a></td>
</tr>
<tr>
<td>Commerce Escrow Company</td>
<td>p. 34</td>
<td>Tel. 213-684-8055 <a href="http://www.comescrow.com">www.comescrow.com</a></td>
</tr>
<tr>
<td>Cook Construction</td>
<td>p. 20</td>
<td>Tel. 818-438-6535 e-mail: <a href="mailto:scook16121@aol.com">scook16121@aol.com</a></td>
</tr>
<tr>
<td>Deadlines On Demand</td>
<td>p. 37</td>
<td>Tel. 888-969-5522 <a href="http://www.deadlines.com">www.deadlines.com</a></td>
</tr>
<tr>
<td>Dixon Q. Dern, P.C.</td>
<td>p. 27</td>
<td>Tel. 310-557-2244 e-mail: <a href="mailto:ddern@dixlaw.com">ddern@dixlaw.com</a></td>
</tr>
<tr>
<td>E. L. Evans &amp; Associates</td>
<td>p. 15</td>
<td>Tel. 310-559-4005</td>
</tr>
<tr>
<td>First Indemnity Insurance Services, Inc.</td>
<td>p. 28</td>
<td>Tel. 800-982-3155 <a href="http://www.firstindemnity.net">www.firstindemnity.net</a></td>
</tr>
<tr>
<td>Forensic Construction Defect &amp; Engr., Inc./Expert Witness</td>
<td>p. 26</td>
<td>Tel. 213-632-2310 e-mail: <a href="mailto:massie@massieglobal.com">massie@massieglobal.com</a></td>
</tr>
<tr>
<td>G. L. Howard CPA, Ltd.</td>
<td>p. 21</td>
<td>Tel. 310-439-9544 e-mail: <a href="mailto:gary@glhowardcpa.com">gary@glhowardcpa.com</a></td>
</tr>
<tr>
<td>Gifts in a Basket</td>
<td>p. 38</td>
<td>Tel. 877-999-2942 <a href="http://www.socalgiftbaskets.com">www.socalgiftbaskets.com</a></td>
</tr>
<tr>
<td>Steven L. Gleitman, Esq.</td>
<td>p. 4</td>
<td>Tel. 310-553-5080</td>
</tr>
<tr>
<td>Greg David Derin</td>
<td>p. 10</td>
<td>Tel. 310-552-1062 <a href="http://www.derin.com">www.derin.com</a></td>
</tr>
<tr>
<td>Guaranteed Subpoena, Inside Back Cover</td>
<td></td>
<td>Tel. 800-PROCEED (776-2377) e-mail: <a href="mailto:info@served.com">info@served.com</a></td>
</tr>
<tr>
<td>Hargis &amp; Associates, Inc.,</td>
<td>p. 33</td>
<td>Tel. 1-800-554-2744 <a href="http://www.hargis.com">www.hargis.com</a></td>
</tr>
<tr>
<td>The Holmes Law Firm</td>
<td>p. 4</td>
<td>Tel. 626-432-7222 <a href="http://www.theholmeslawfirm.com">www.theholmeslawfirm.com</a></td>
</tr>
<tr>
<td>Jack Trimarco &amp; Associates Polygraph, Inc.</td>
<td>p. 6</td>
<td>Tel. 310-247-2637 <a href="http://www.jacktrimarco.com">www.jacktrimarco.com</a></td>
</tr>
<tr>
<td>Jacqueline Ingle, Voice Enhancement</td>
<td>p. 10</td>
<td>Tel. 310-289-1157</td>
</tr>
<tr>
<td>Jeffrey Kichaven</td>
<td>p. 10</td>
<td>Tel. 213-999-8465 <a href="http://www.jeffkichaven.com">www.jeffkichaven.com</a></td>
</tr>
<tr>
<td>Lawrence W. Crispus</td>
<td>p. 5</td>
<td>Tel. 213-926-6665 e-mail: <a href="mailto:judgecrispop@earthlink.net">judgecrispop@earthlink.net</a></td>
</tr>
<tr>
<td>Lawyers’ Mutual Insurance Co., Inside Front Cover</td>
<td></td>
<td>Tel. 800-252-2045 <a href="http://www.lawyersmutual.com">www.lawyersmutual.com</a></td>
</tr>
<tr>
<td>Leahis Publishing</td>
<td>p. 1, 2</td>
<td><a href="http://www.lexis.com">www.lexis.com</a></td>
</tr>
<tr>
<td>MCLE LAWYERS.COM</td>
<td>p. 6</td>
<td>Tel. 310-552-4907 <a href="http://www.MCLElawyers.com">www.MCLElawyers.com</a></td>
</tr>
<tr>
<td>Mesriani Law Group</td>
<td>p. 15, 26</td>
<td>Tel. 310-826-6300 e-mail: <a href="mailto:info@mesriani.com">info@mesriani.com</a></td>
</tr>
<tr>
<td>Metrocities Mortgage Inc.,</td>
<td>p. 4</td>
<td>Tel. 800-644-2484 <a href="http://www.metrocities.com">www.metrocities.com</a></td>
</tr>
<tr>
<td>Minicucci Sartorial</td>
<td>p. 10</td>
<td>Tel. 818-749-6807 e-mail: <a href="mailto:sal@minicuccisuits.com">sal@minicuccisuits.com</a></td>
</tr>
<tr>
<td>Noriega Clincs</td>
<td>p. 41</td>
<td>Tel. 323-728-8268</td>
</tr>
<tr>
<td>Peachtree Pre-Settlement Funding</td>
<td>p. 16</td>
<td>Tel. 866-476-2029 <a href="http://www.presettlementfunds.com">www.presettlementfunds.com</a></td>
</tr>
<tr>
<td>Premier Business Centers</td>
<td>p. 20</td>
<td>Tel. 1-877-MYSUITE (1-877-697-8483) <a href="http://www.pbcenters.com">www.pbcenters.com</a></td>
</tr>
<tr>
<td>Stephen R. Sauer APC</td>
<td>p. 21</td>
<td>Tel. 323-933-6833 e-mail: <a href="mailto:arbitr@aol.com">arbitr@aol.com</a></td>
</tr>
<tr>
<td>Anita Rae Shapiro</td>
<td>p. 21</td>
<td>Tel. 714-579-0415 <a href="http://www.adr-shapiro.com">www.adr-shapiro.com</a></td>
</tr>
<tr>
<td>Steven Peck’s Premier Legal</td>
<td>p. 21</td>
<td>Tel. 866-999-9085 <a href="http://www.premierlegal.org">www.premierlegal.org</a></td>
</tr>
<tr>
<td>Tenrec, Inc.</td>
<td>p. 26</td>
<td>Tel. 415-543-6600 x101 e-mail: <a href="mailto:sales@tenrec.com">sales@tenrec.com</a></td>
</tr>
<tr>
<td>UCLA Extension Conferences</td>
<td>p. 35</td>
<td>Tel. 310-206-1409 <a href="http://www.uclaeextension.edu">www.uclaeextension.edu</a></td>
</tr>
<tr>
<td>UngerLaw, P.C.</td>
<td>p. 27</td>
<td>Tel. 310-772-7700 <a href="http://www.ungerlaw.com">www.ungerlaw.com</a></td>
</tr>
<tr>
<td>Vision Sciences Research Corporation</td>
<td>p. 15</td>
<td>Tel. 925-837-2083 <a href="http://www.contrastsensitivity.net">www.contrastsensitivity.net</a></td>
</tr>
<tr>
<td>West Group, Back Cover</td>
<td></td>
<td>Tel. 800-762-5272 <a href="http://www.westgroup.com">www.westgroup.com</a></td>
</tr>
<tr>
<td>Witkin &amp; Eisinger, LLC</td>
<td>p. 39</td>
<td>Tel. 310-670-0500</td>
</tr>
<tr>
<td>Wolfsdorf Immigration Law Group</td>
<td>p. 27</td>
<td>Tel. 310-570-4088 <a href="http://www.wolfsdorf.com">www.wolfsdorf.com</a></td>
</tr>
</tbody>
</table>
**Ethics 2007**

ON SATURDAY, DECEMBER 15, the Los Angeles County Bar Association and the Professional Responsibility and Ethics Committee will host a program on ethics for the criminal lawyer. Those who attend will hear speakers John W. Amberg, Charles Gessler, Evan A. Jenness, retired judge Michael D. Marcus, Joel A. Osman, Ellen A. Pansky, Jon L. Rewinski, and Toby J. Rothschild address ethical issues unique to criminal law, including conflicts of interest, civility, and a summary of new ethics opinions and case law. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal begin at 8:30 A.M., with the program continuing from 9 A.M. to 1:30 P.M. The registration code number is 009806. The prices below include the meal.

- $85—CLE+Plus members
- $110—LACBA members
- $150—all others

4 CLE hours with ethics credit

**Client Asset Protection**

ON TUESDAY, DECEMBER 11, the Los Angeles County Bar Association will host a comprehensive program covering everything attorneys need to know about protecting client assets from plaintiffs and creditors. The seminar, led by speaker Jacob Stein, will cover the law but will largely focus on practical aspects of asset protection planning—i.e., what works and what does not, based on practical experience. Most of the time will be devoted to discussing specific planning strategies and solutions, including community property, business entities, and domestic and foreign trusts. The seminar will cover how to protect specific assets: houses, bank and brokerage accounts, rental real estate, businesses, professional practices, and retirement plans. Course materials will serve as a treatise on asset protection and will constitute an exhaustive reference source.

Topics will include: practical aspects of planning contrasted with legal theories; high-risk planning; houses, rentals, bank accounts, and retirement plans; types of plaintiffs, creditors, and claims; married couples, including community property, business entities, and domestic and foreign trusts. The seminar will cover how to protect specific assets: houses, bank and brokerage accounts, rental real estate, businesses, professional practices, and retirement plans. Course materials will serve as a treatise on asset protection and will constitute an exhaustive reference source.

The seminar will cover how to protect specific assets: houses, bank and brokerage accounts, rental real estate, businesses, professional practices, and retirement plans. Course materials will serve as a treatise on asset protection and will constitute an exhaustive reference source.

- $120—CLE+Plus members
- $190—LACBA members
- $250—all others

3.5 CLE hours

**Bankruptcy Issues for Real Estate Professionals**

ON THURSDAY, DECEMBER 13, the Real Property Section and the Commercial Development and Leasing Subsection will present a quick refresher course on bankruptcy basics with an analysis of recent developments (including the 2005 Bankruptcy Code revisions) that most directly affect real estate practitioners. Speaker Bernard D. Bollinger will address transactions that real estate professionals have been involved with for the past 10 years and the impact of a bankruptcy filing on these transactions. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Parking at the Figueroa Courtyard garage costs $10 with LACBA validation. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The prices below include the meal. The registration code number is 009891.

- $15—CLE+Plus members
- $45—Real Property Section members
- $55—other LACBA members
- $65—all others

1 CLE hour

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/. For a full listing of this month’s Association programs, please consult the County Bar Update.
Putting Some Common Sense Back into Patent Enforcement

WHEN I ARRIVED IN LOS ANGELES years ago, I joined an intellectual property law firm. It struck me then that there were actually few true inventions, that what most of our clients invented were “combinations,” as my partners put it, of existing patented inventions. I simply could not understand why an elaborate system existed to protect stuff that seemed of so little significance. After a while, however, I learned that what is obvious when viewed retrospectively is frequently not so obvious viewed prospectively. Thus, in those days, true inventors mostly worked on the uncharted edges of their worlds, where innovation was still possible. Patentable innovations seldom include any technological breakthrough, so in that environment, a practitioner developed something of a jewelers eye, a heightened sensitivity about what truly is, or was, an invention.

Still, within me, there was always a lurking feeling that this was much ado about nothing.

Then, I came across a patent, yet another combination—a urinal with a bulls-eye stenciled in it. Is this what the Patent Office wastes its time on? The bubble of my suspended disbelief then burst. I thought to myself: Now is the time to rid the patent system of this marginally inventive junk that litters their files. By then I had seen holders of such patent junk use their phalanx of government-granted rights to steamroll their competition—some of whom were my clients.

Indeed, numerous industries have been characterized by the aggressive, even intimidating, enforcement by its dominant players of dozens, if not hundreds, of patents protecting their various “inventions.” Down to their last detail, the patent collection of these companies often protects shapes, sizes, patterns, and other simple and predictable configurations. Through the strategic use of International Trade Commission proceedings and patent lawsuits, dominant companies in some industries have intimidated, even terrorized, competitors from competing against them. Indeed, in those ITC proceedings, the validity of the U.S. companies patent is not even put into issue.

In federal courts around the country, patent holders have selectively sued putative infringers and obtained orders stopping them in their tracks. They have legally gone away with this for so long because many judges respected the patent system, and the sole federal appeals court for patent cases, the Federal Circuit, seemed to routinely rubber stamp patents found to be valid by lower courts, taking quite seriously the rule that a patent registration creates a presumption of validity. Successful validity challenges have been rare over the past 25 years—since the Federal Circuit was given this special jurisdiction.

However, in the last several months the patent terrain has changed. It turns out that the U.S. Supreme Court came to the same conclusion I ultimately did: that too much commerce in this country is being tied up by patents revealing limited, if any, innovation.

The patent before the Court in KSR covered a particular accelerator pedal—nothing more than the art of fixing an electronic sensor in the midst of a moving throttle control. After examining the product in detail, an unimpressed Supreme Court held, “A court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.” It went on to observe that “as progress beginning from higher levels of achievement is expected in the ordinary course, results of ordinary innovation are not the subject of exclusive rights under the patent laws.”

With these few words, the Supreme Court has now ordered the Patent Office to impose a more rigorous test on patentability than mere “innovation,” the historic predicate for approving patent applications. Mere innovation, i.e., that capturable by those with ordinary skill, is no longer sufficient to justify a registration. Presumably, inventions of similarly modest proportions, already patented, are now subject to attack as well, as nothing in the Court’s opinion suggests its new rules are only to be applied prospectively.

To further empower accused infringers, the Supreme Court and the Federal Court in two recent cases2 loosened the “where to sue” issue that has previously plagued many smaller companies. Until now, a purported patent infringer could not initiate its own suit in its own nearby court to declare a patent invalid unless the patentee threatened the alleged infringer with an infringement claim. Now, however, it is sufficient for a patentee merely to assert rights against a purported infringer of a patent, which the target believes it has the right to exploit without cost, to enable the target to initiate litigation in its own district to remedy the problem.

Taking these recent court decisions together, those victimized by the too aggressive enforcement of patents now, at last, have both a substantive and a procedural edge. The time has come for those companies that have strutted around like the cock of the walk in the barnyards of intellectual property and commerce to recognize that these days are about to end.


Too much commerce in this country is being tied up by patents revealing limited, if any, innovation.

□

Eliot G. Disner is the principal of the Los Angeles-based Disner Law Corporation. He is a trial lawyer specializing in antitrust, patent law, other intellectual property, and complex litigation.
"If we don't serve it, you don't pay"®

U.S.A. Only

SERVING A SINGLE PIECE OF PROCESS EVERY 2.2 MINUTES OF EVERY DAY, 365 DAYS A YEAR.

A DIVISION OF GUARANTEED SUBPOENA SERVICE •
est. 1965

ANY STATE • ANY NATION • ANYWHERE.
Serious leverage at depositions

LiveNote® gives your side a distinct advantage before, during and after depositions. This powerful yet easy-to-use software connects your laptop directly to the court reporter’s machine and the videographer’s camera during a deposition. So you can edit, sort and organize the testimony as it’s given, save video clips and later embed them in PowerPoint® for presentation at trial.

(LiveNote software fully complies with Microsoft® Vista.) Even better, you can send a live, realtime feed of the deposition — both video and transcript — to remote attorneys. Now that’s serious leverage.

For more information, call 1-800-762-5272 or visit livenote.com.