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Recently, I visited my high school for the first time since I was a student, even though it is located here. The campus looked much the same, except for the presence of security screens (in lieu of bars, I imagine) on all the windows and vending machines. It made the school look more like a prison than a campus, and this saddened me. It was like a scene out of *Back to the Future*. In the same week, while in the San Francisco Bay Area, I decided to visit my old college, California State University, Hayward (now California State University, East Bay). I was encouraged by this visit. The campus, located in the Hayward Hills, is still very impressive, with its panoramic views of the San Francisco Bay.

When we visit the schools we attended, no matter what our reaction, we inevitably reflect on our hopes and expectations at the time we were students. Most of us could never have predicted the paths our careers would take. Like many lawyers, I did not start my career in law. Rather, after earning my undergraduate degree in accounting, I received an MBA from the University of Washington and worked for a bank as a commercial loan officer. After finding my opportunities somewhat limiting, I returned to school, this time to USC for my law degree. I practiced bankruptcy law, which was a booming area of practice at the time. When bankruptcy work subsided, I earned a master’s degree in business taxation at night—again at USC—and practiced tax law. After a stint in public accounting and becoming a CPA, I returned to the practice of law.

Much has been said about how many lawyers are dissatisfied with the practice of law. Not me. Having explored other fields, I take great joy in being a lawyer. But the path has not been easy. I seemed to have had a knack for graduating in recessions, making it difficult to find work. When the economy changed, I sought further education to retool—and just stay employed. But I know that I am not alone. For new lawyers, the first job often depends on the state of the economy and what practice area is hot at the time of graduation.

Most lawyers do not stay with their first firm to become partners. Many of us have seen practice areas go from hot to cold and vice versa within a matter of a few years, with departments within law firms—and in some cases the law firms themselves—ceasing to exist. We have struggled through slow periods to re-create ourselves and our practices. This is why it is important for most of us to gain experience in more than one practice area—focusing especially on areas with economic cycles that run counter to each other.

Many people ask me whether they should attend business or law school. This is a very personal decision, and usually I try to help people making the inquiry to find the answer from within themselves. I believe either direction can generate the source of pride and opportunity we all look for in life. Ultimately, no one can tell you what life has in store for you. But no matter what direction people choose, they should not expect a steady rise to the top. Most of us hit roadblocks and have setbacks, many of which are beyond our control. It is how one deals with—and prepares for—the hard times that will determine whether one’s goals are realized.

Even though visiting my old schools reminded me of how much time has passed (and yes, how much older I am), I didn’t mind, because I am very grateful for having become a lawyer and persevered. And in retrospect, the fact that it has not been easy has made my professional journey even more satisfying.

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.
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The Importance of Evidentiary Rulings in Summary Judgment

AS PART OF A SUMMARY JUDGMENT MOTION containing objections to evidence, counsel must serve and file the objections separately from the other papers, as prescribed by Rule 3.1354 of the California Rules of Court. Counsel must also ensure that these objections are served timely. Under this rule, counsel must submit (unless otherwise excused by the court on a showing of good cause) all written objections to evidence in support of or in opposition to a motion for summary judgment or summary adjudication when the objecting party’s opposition or reply papers are served and filed.1 Further, Rule 3.1354 now requires counsel to file and serve evidentiary objections to a motion for summary judgment in the following manner:

All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence may be referenced by the objection or reply to a motion, but the objections must not be restated or reargued in the separate statement. Each written objection must be numbered consecutively and must:

1. Identify the name of the document in which the specific material objected to is located;
2. State the exhibit, title, page, and line number of the material objected to;
3. Quote or set forth the objectionable statement; and
4. State the ground for each objection to that statement or material.2

Finally, parties submitting written objections to evidence must submit a proposed order with the objections. The proposed order must include places for the court to indicate whether it has sustained or overruled each objection. It must also include a place for the signature of the judge.3

The summary judgment motion and the supporting documents have been filed. The court is about to issue a ruling on the motion. But, no matter how one presents his or her evidentiary objections to the motion—whether at the beginning, or integrated throughout the course of oral argument, make sure that the court rules on those objections. Counsel must request a ruling from the court on its evidentiary objections in the summary judgment context, or the objections will be deemed waived on appeal.4

In 1990, the court of appeal in Biljac Associates v. First Interstate Bank provided a procedure for handling evidentiary objections at a summary judgment hearing. The court decided that because appellate review of a summary judgment is de novo, a trial judge need not rule on each evidentiary objection but may preserve the record by stating: “I am going to disregard all those portions of the evidence that I considered to be incompetent and inadmissible.”5

Biljac, however, has not escaped criticism. The court of appeal’s recent decision in Demps v. San Francisco Housing Authority goes so far as to argue that the procedure approved in Biljac is wrong.6 In view of these differing opinions, what effect does the trial court’s failure to rule on the evidentiary objections at a summary judgment hearing have on the rights of a party to address the objections on appeal? Moreover, what must counsel do to preserve its rights on appeal concerning the trial court’s ruling on evidentiary objections at a summary judgment hearing?

To answer these questions, the Demps court examined criticisms of Biljac by first examining the California Supreme Court’s decision in Ann M. v. Pacific Plaza Shopping Center.7 In Ann M., which like Demps and Biljac was an appeal from summary judgment, the trial court did not rule on a series of defense objections to evidence submitted by Ann M. in opposition to the summary judgment motion. Although Biljac was not referenced in Ann M., the court reached a different conclusion than the one reached in Biljac, holding that because the trial court did not rule on the defendant’s objections, and because counsel did not request a ruling on the objections, their objections were waived and not preserved on appeal.8 The court also stated that for purposes of appeal, the objectionable evidence is deemed admitted and is therefore part of the record. The supreme court later reaffirmed this principle in Sharon P. v. Arman, Ltd.9

Additionally, beginning in 1998, various courts of appeal published cases on this issue, disagreeing with the Biljac procedure and holding instead that a trial judge’s failure to rule on the evidentiary objections must be treated as though the objections were impliedly overruled and the evidence made part of the record for purposes of appellate review.9 Further, Code of Civil Procedure Section 437(c)(d) requires that counsel make any objections to the motion at the actual hearing and have the court rule on those objections; otherwise, they are deemed waived.10

This rule, however, is inapplicable when counsel repeatedly requests a ruling on evidentiary objections at a summary judgment hearing.

Ugochi L. Anaebere is a staff attorney with the Housing and Consumer Advocacy Group of Neighborhood Legal Services. She would like to thank attorneys Irwin S. Evans and Maral I. Gasparian for providing editorial comments in the preparation of this article.
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1. CAL. RULES OF COURT R. 3.1354(a).
2. CAL. RULES OF COURT R. 3.1354(b).
3. CAL. RULES OF COURT R. 3.1354(c).
8. Sharon P. v. Arman, Ltd., 21 Cal. 4th 1181 (1999); see also id.
10. See CODE CIV. PROC. §437(c)(d); see also Vineyard Spring Estates v. Superior Court, 120 Cal. App. 4th 633, 642 (2004).
12. Id.
FOR MOST OF THE LAST 25 YEARS, Congress and the Internal Revenue Service have been relatively quiet concerning the rules for deferred compensation. Then, in 2004, in the wake of perceived executive compensation abuses uncovered in such high-profile cases as the Enron and Worldcom collapses, Congress enacted Internal Revenue Code Section 409A as part of the American Jobs Creation Act of 2004. Politically, Section 409A represents Congress’s attempt to swing the pendulum back towards limited deferred compensation arrangements. For practitioners, it represents a dramatic change in the rules governing deferred compensation, one that has rendered obsolete much of the conventional wisdom on the subject.

In the months, weeks, and even days leading up to the Enron and Worldcom collapses, executives in the two companies resigned their positions and took their agreed-upon severance packages. These executives received, in some cases, millions of dollars in severance compensation from companies that were on the verge of bankruptcy. When the companies did, in fact, declare bankruptcy, it left shareholders, many of whom were employees of these companies, with worthless stock, which, for many of the employees, represented significant portions of their retirement planning, including their 401(k) accounts. Many likened the behavior of some of these executives to that of insider trading, with the executives jumping ship right before it sank. These scandals led to the growing perception that some companies, as well as their executives, were benefiting from large deferred compensation arrangements well beyond the extent Congress intended, all to the detriment of both the employees of their companies and the American people, in general, in the form of lost tax revenues. Now, under Section 409A, if certain requirements are not satisfied, employees may have to include their deferred compensation in current income, subject to additional taxes and potential penalties.

Section 409A applies only to nonqualified deferred compensation. Nonqualified deferred compensation stands in contrast to qualified deferred compensation, which typically takes the form of such well-known qualified benefit plans as 401(k) plans, IRAs, most healthcare and disability plans, incentive-based stock awards, or similar arrangements. These plans are “qualified” under the Internal Revenue Code. Broadly defined, nonqualified deferred compensation is all other income, be it cash or in-kind, that has been earned by a service provider (employee or independent contractor), but which will be received by the service provider in a subsequent year. Section 409A details how nonqualified deferred compensation may be deferred, and once deferred, when and how it may be paid. The failure to comply with or be exempt from Section 409A can result in significant additional taxes on these amounts, in addition to applicable penalties and interest.

Compliance with Section 409A is governed by the requirements of Section 409A(a)(2), (3), and (4). A nonqualified deferred compensation plan complies with Section 409A(a)(2) if the deferred compensation may not be distributed earlier than: 1) an employee’s separation from service, 2) the date the plan participant becomes disabled, 3) death, 4) a specified time or pursuant to a fixed schedule that must be specified at the time of the deferral of the compensation, 5) change in ownership, effective control, or assets of the employer corporation, or 6) the occurrence of an unforeseeable emergency. Section 409A(a)(3) provides that a nonqualified deferred compensation plan or arrangement must not allow for the acceleration of the time or schedule of any payment, unless it is pursuant to a specific exception provided in the regulations. Section 409A(a)(4) requires that the employee make the initial deferral election and any permissible changes in accordance with the regulations.

The failure of a plan or deferred compensation arrangement to either comply with or be exempt from Section 409A will result in substantial taxation. First, the deferred compensation itself will be included in the employee’s income in the year in which the compensation is no longer subject to a substantial risk of forfeiture, a term newly defined by Section 409A. More onerous is a 20 percent tax imposed on compensation included in income due to noncompliance with Section 409A. In addition to this 20 percent tax, if an employee fails to include the noncomplying deferred compensation in income in the correct year, Section 409A imposes interest on all unpaid taxes due.

Shawn Richter is an associate whose practice includes tax law, business practices, and estate planning in the Scottsdale, Arizona, office of Buchalter Nemer.
that should have been paid at the underpayment rate, plus 1 percent. Thus, failure to comply with or be exempt from Section 409A results in the immediate taxation of the deferred income, plus an additional 20 percent tax, and interest at the underpayment rate plus 1 percent on all unpaid Section 409A taxes. Moreover, some states, including California, impose their own additional 20 percent tax, which could result in an aggregate marginal tax rate exceeding 80 percent of the income.

One of Section 409A's most important changes is the new definition of “substantial risk of forfeiture.” Section 409A provides that unless nonqualified deferred compensation either complies with or satisfies one of the limited exceptions to Section 409A, amounts deferred are currently includable in gross income to the extent they are not subject to a substantial risk of forfeiture and not previously included in gross income, rather than when the compensation is actually or constructively received as under prior law. While many practitioners may be familiar with the traditional IRC Section 83 definition of substantial risk of forfeiture, Section 409A does not adopt the Section 83 definition. The final regulations provide that compensation is subject to substantial risk of forfeiture if the amount is conditioned on the performance of substantial future services or the occurrence of a condition related to a purpose of the compensation, and the possibility of forfeiture is substantial.

**Notice 2007-78**

Though many practitioners have never heard of Section 409A, most are familiar with the issue of stock option backdating, which has been of particular concern to many Silicon Valley companies and which raises a number of questions involving the application of Section 409A. An increasing number of lawmakers have come to view discounted stock options in a negative light because they provide the employee (often an executive) with stock option plans, foreign plans, and private equity deferral arrangements. Section 409A affects rank and file employees as well as executives and members of management.

Final regulations to Section 409A provide that, “a plan generally provides for a deferral of compensation if, under the terms of the plan and relevant facts and circumstances, the service provider has a legally binding right during a taxable year to compensation that, pursuant to the terms of the plan, is or may be payable to (or on behalf of) the service provider in a later taxable year.” Recognizing that there are many compensation arrangements that cause compensation to be paid in the year following the year in which the right to compensation was earned, the IRS provided a limited “short term deferral” exception for compensation that, according to the plan or agreement, may not be paid later than two months and 15 days following the later of the employer’s or employee’s taxable year in which the compensation is earned. Thus, for a calendar-year employer and employee, income that is not payable later than March 15 of the year following the year in which it is earned (no longer subject to a substantial risk of forfeiture) is exempt from Section 409A.

Section 409A became effective on January 1, 2005. The result of this effective date is that any deferred compensation that was no longer subject to substantial risk of forfeiture as of December 31, 2004 (for example, because it had vested), is not subject to taxation under Section 409A. For nonqualified deferred compensation that vests or vested after December 31, 2004, the IRS has provided temporary relief from some of the provisions under Section 409A. Under Notice 2005-1,12 relief was provided until December 31, 2005, and most of the relief was subsequently extended until December 31, 2006. The final regulations further extended many of the relief provisions until December 31, 2007, and Notice 2007-78, which was issued on September 10, 2007, has again extended many of the relief provisions until December 31, 2008.

This most recent extension, however, was in reaction to the requests of many practitioners, given the short time frame to digest and implement the 397 pages of final regulations. Given these factors, it is unlikely that the IRS will further extend the temporary relief provisions. Thus, it is recommended that companies take action to bring their plans either into compliance with, or under one of the limited exceptions to, Section 409A before December 31, 2008.

Notice 2007-78 provides limited transitional relief to the application of IRC Section 409A. The primary principle of this transition relief is that, generally, a plan or agreement will not violate the requirements of Section 409A on or before December 31, 2008, provided that the plan is operated in accordance with the requirements of Section 409A and the associated guidance, and that the written document of the plan is amended on or before December 31, 2008, to “comply with the guidance retroactively to January 1, 2008.”

Significantly, Notice 2007-78 does not extend the deadline for designation of time and form of payment. Thus, by December 31, 2007, the timing and form of payment, such as payment upon separation from service, or pursuant to a fixed schedule, must be designated and may not be altered unless done so in compliance with the final regulations. However, the definitions of the time and form of payment may be amended until December 31, 2008, provided that as of January 1, 2008, the plan is operated in compliance with all Section 409A guidance. Notice 2007-78 provides additional guidance and it is important for all practitioners to carefully examine Notice 2007-78 as soon as possible in order to determine the extent to which agreements and plans must be amended prior to January 1, 2008.

**Other Provisions**

**Separation from service.** Treasury Regulations Section 1.409A-1(h) provides that an employee is presumed to have separated from service when, based on the facts and circumstances, the employee and employer reasonably anticipate that the employee will perform 20 percent or less of the average level of service performed by the employee during the immediately preceding 36 months. In contrast, when the employee's level of service continues at the rate of 50 percent or more, it will be presumed that no separation from service has occurred. No presumption applies where the decrease is to more than 20 percent but less than 50 percent. When an employee, based on the facts and circumstances, reasonably anticipates providing more than 20 percent, but less than 50 percent, of the prior average level of service, the employee will be considered to have a separation of service if a reasonable good faith amount of anticipated services to be performed by employee is detailed in writing and such amount is no more than 50 percent of the services provided by the employee over the prior 36 months.

**Specified employees.** Generally Section 409A permits compensation to be payable upon an employee's separation from service, however, specified employees (generally the 50
highest paid employees) at a company whose stock is publicly traded are subject to additional burdens under Section 409A. In particular, compensation payable in connection with separation from service generally must be deferred for six months following termination of employment. Disability. An employee is considered disabled if an employee is not able to engage in any substantial gainful activity because of physical or mental impairment that is expected to last for a period of not less than 12 months or is expected to result in the employee's death. An employee will be considered disabled if the employee is determined to be totally disabled by the Social Security Administration or in accordance with the employer's disability insurance program, as long as the definition used under the disability insurance program complies with Treasury Regulation Section 1.409A-3(i)(4).

Specified time or fixed schedule. Compensation is considered to be made payable at a specified time, or pursuant to a fixed schedule, if the amount of compensation to be paid is objectively determinable and, at the time the amount is deferred, the date or dates that payments are to be made are both nondiscretionary and objectively determinable. The rules surrounding the determination of a specified time or a fixed schedule are complex. If a practitioner intends to structure distributions at a specified time or on a fixed payment schedule, careful examination of the rules is advised.

Change in ownership or effective control or change in ownership of assets. The rules governing change in ownership or control or change in ownership of a substantial portion of the assets of a corporation are found in Treasury Regulation Section 1.409A-3(i)(5). These rules are also vast and complex, and practitioners are cautioned that when a change-of-control acceleration of compensation is included in a plan or agreement (as is frequently the case) careful adherence to the rules contained in these regulations is advised.

Stock options. A preferred method of many companies to attract and keep employees has been the use of generous discounted stock option grants. A discounted stock option is, for Section 409A purposes, an option to purchase stock with an exercise price that is less than the fair market value of the stock on the grant date. Section 409A provides that the award of discounted stock options are considered nonqualified deferred compensation. As a result, Section 409A causes the spread (the value of the stock when it is no longer subject to a substantial risk of forfeiture less the exercise price) to be included in gross income subject to the Section 409A 20 percent additional tax, interest, and applicable penalties in the year it is no longer subject to a substantial risk of forfeiture. Additionally, if in subsequent years, the value of the stock further increases, the new spread (current value of stock less previously taxed value of stock) is again includable in current income under Section 409A and subject to all applicable Section 409A taxes, interest, and penalties. All this may occur before the employee even exercises the stock option, and thus the employee may be responsible for taxes for stock options that may not be exercised for years to come, if ever.

Along with other forms of deferred compensation, the IRS has provided limited relief until December 31, 2008, to correct the exercise price of any stock options already awarded to equal what would have been the fair market value of the stock on the original grant date. This relief was only available until December 31, 2005, for certain highly compensated executives of public companies. As with other rules, the rules surrounding stock options under Section 409A are complex and require a careful reading of the final regulations and other guidance.

Stock appreciation rights. A stock appreciation right is the grant to a service provider of a right to receive as compensation (generally as a bonus) an amount equal to the appreciation in an employer's stock over a specified period of time. The treatment of stock appreciation rights under 409A is similar to the treatment of stock options. A stock appreciation right will not be considered to violate Section 409A if the right to the appreciation in the value of the stock is limited to the increase in value of the stock from the grant date to the exercise date, and the increase will be based on the fair market value of the stock. Put simply, as long as the stock appreciation right is not a discounted stock appreciation right, and all other aspects of the exception are met, the compensation received on the stock appreciation right will not be taxable under Section 409A. As with stock options, a correction fixing stock appreciation rights that may be subject to Section 409A is generally possible, provided it is completed on or before December 31, 2008.

Restricted stock awards. A restricted stock award is the grant of stock to a service provider with conditions that at the time of grant have yet to be met, and if not met will result in the forfeiture of the stock award. Generally, these restrictions are based either on time or performance. For example, the award might be conditioned upon the requirement that an employee be employed by the employer for a set period of time or the attainment of certain sales or production goals. Restricted stock awards are generally not taxable under Section 409A, largely because upon the lapse of the restrictions, they are immediately taxable (or they were previ-
Occurrence of an unforeseeable emergency. An “unforeseeable emergency” under Regulation Section 1.409A-3(i)(3) is a financial hardship to the employee resulting from illness or accident to the service provider, spouse, or dependents; the loss of the employee’s property due to casualty; or similar extraordinary and unforeseeable circumstances “arising as a result of events beyond the control” of the employee. Distributions are limited in the case of an unforeseeable emergency to amounts reasonably necessary to satisfy the need, including amounts necessary to pay taxes and penalties attributable to the distribution.

Next Steps
Given the broad definition of deferred compensation under Section 409A, employers, employees, and their counsel need to review all arrangements and plans that may provide for deferred compensation. The following is a nonexhaustive list of compensation arrangements that should be reviewed and amended before December 31, 2007, or December 31, 2008, when applicable:

- Elective deferral arrangements.
- Excess defined benefit plans.
- Incentive plans.
- Performance-based arrangements.
- Stock options (stock options that do not have a discount exercise prices, as determined on the date of grant, are generally exempt from Section 409A).
- Stock appreciation rights.
- Employee stock purchase plans (other than those qualifying under IRC Section 423).
- Director and highly compensated employee a) compensation arrangements, b) equity awards, and c) other benefits and deferred arrangements.
- Severance plans.
- Separation arrangements.
- Fringe benefit arrangements.
- Taxable reimbursement arrangements.
- Life insurance arrangements.
- Earn-out arrangements.
- Retirement arrangements (other than those qualifying under IRC Section 401).
- Change of control agreements.

Many, if not all, of these deferred compensation arrangements and plans can be brought into Section 409A compliance, or made to fall within one of the limited exceptions to Section 409A, but all necessary modifications must be finalized before the end of 2008.

Though the additional taxation and potential interest and penalties under Section 409A are imposed on the employee rather than the employer, a sound employee-retention policy would ensure that, when possible, the effects...
of Section 409A are minimized or eliminated. Moreover, Section 409A imposes reporting and withholding requirements on employers. To this end, it is important for employers and their attorneys to examine all arrangements and plans that may contain deferred compensation features and ensure that these plans and arrangements will not be subject to taxation under Section 409A. Specifically, companies and their counsel should, by December 31, 2007, examine all written arrangements to ensure that they comply with Section 409A's time and form of payment requirements. Additionally, all deferred compensation arrangements must be in operational compliance with Section 409A by January 1, 2008. Although the IRS has extended the window of opportunity for correcting some Section 409A documentary deficiencies, correcting deferred compensation agreements can be a lengthy process, especially for publicly traded companies.

Given the limited time remaining to make corrections for Section 409A, and given that many companies and their executives are often slow to heed the warnings of their counsel, it is advisable that persistent efforts be made in order to ensure that the necessary corrections are made in a timely manner. Practitioners should assist their clients in examining all existing deferred compensation arrangements—before the end of the year if possible. Lastly, it is incumbent upon the practitioner to be vigilant that all new arrangements and plans are drafted and operated in a manner that either complies with, or is exempt from, Section 409A.

1 I.R.C. §409A uses the terms “service provider” and “service recipient” in order to avoid limiting its application to employees and employers. Thus, independent contractors (such as members of boards of directors) are covered. Also, partners and partnerships are covered under Section 409A; however, the final regulations reserve discussion of this subject. For current guidance on the treatment of partners and partnerships see I.R.S. Notice 2005-1, question and answer 7.
3 I.R.C. §409A(a)(2)(i) through (vi).
5 Rev. & Tax. Code §17501.
6 I.R.C. §83(c)(1).
13 I.R.S. Notice 2007-78.
15 Id.
17 Id.
18 Treas. Reg. §1.409A-3(c)(4)(i).
19 Treas. Reg. §1.409A-3(i)(1).
22 I.R.C. §83(b).
Providing Spouses with the Power to Make Healthcare Decisions

THE RIGHT TO MAKE HEALTHCARE DECISIONS is a protected individual right held solely by the patient.1 Recently, federal law2 and state law3 expanded the scope of exclusivity of this right to the privacy realm by limiting the sharing of patient information and records. Thus a patient’s spouse, domestic partner, and other family members face increasing obstacles when they seek information from the patient’s records—even though some healthcare providers, perhaps motivated by compassion, are disregarding the legal restrictions.

Nevertheless, spouses, in particular, should be very clear about their ability to make healthcare decisions on behalf of their partners. Spouses often assume that when their husband or wife becomes incapacitated and unable to make medical decisions, they have an automatic right to step into the shoes of their spouse. A patient’s incapacity—his or her inability to understand the nature and consequences of a decision or communicate a decision—may be temporary or permanent. Under either circumstance, the patient’s spouse is not statutorily authorized to be first in line to assume the power to make healthcare decisions for the incapacitated patient.

Indeed, the Probate Code statutes applicable to medical decisions5 grant no such power to spouses. The code only places a spouse inside the category or class of “family members,”6 with no priority expressly stated for the spouse. Though many healthcare facilities and providers may create a hierarchy within the class of family members and place the spouse at the top, there is no exclusive legal right for a spouse to make healthcare decisions for his or her incapacitated spouse.

It is well-established in case law that marital status alone does not create agency between the spouses.7 Nevertheless, spouses are fiduciaries under the law8 and owe a duty to one another. Still, this duty is not accompanied by a spouse’s authority to act as an agent in making healthcare decisions on behalf of his or her spouse.

Since a spouse has no express successor right to a patient’s right to make his or her own medical decisions, all family members have equal standing in the choice of treatment. A family member may challenge a spouse’s choices as not being in the best interest of the patient. It is even possible that a family member other than the one challenging the spouse may be given the right to make healthcare decisions on behalf of the patient. To further complicate matters, when a patient becomes incapacitated and a spouse’s decisions are challenged by a family member, or family members cannot reach a unanimous decision, or the choices made by the spouse or family members are not deemed by healthcare providers to be in the best interest of the patient,9 the healthcare providers may ultimately make those decisions. The power may not only shift away from the patient’s spouse but also from the patient’s entire family.

In an emergency, these issues too often lead to a crisis. All parties are frequently unprepared. A spouse facing an unanticipated need to make serious medical decisions for his or her spouse faces an overwhelming burden. The chaotic atmosphere can lead to the healthcare providers assuming the power to make the necessary decisions. By contrast, a patient facing a scheduled surgery has the time not only to consider the issue of future healthcare decisions but also to choose to relinquish decision-making power, should the need arise, through a written or oral assignment to an agent or surrogate. It is an option that many clients should consider long before any medical care is required or contemplated.

AHCDS, Surrogacy, and Conservatorship

Spouses who seek to ensure their ability to make healthcare decisions for one another can make their wishes known in an Advance Health Care Directive (AHCD), a form of protection provided under the Probate Code.10 AHCDs have replaced the Durable Power of Attorney for Health Care, the former statutory device for this purpose. While AHCD forms may be obtained from healthcare providers and online sources, estate planning attorneys may prepare AHCDs as well, tailoring each directive to fit the circumstances of individual clients. An AHCD is often included in an estate-planning package with other estate documents such as a trust or a will.

Spouses can use an AHCD to express their carefully considered choices about future medical treatment and end-of-life issues. These choices may be modified from time to time with an updated AHCD. Among the topics that may be addressed in an AHCD include organ donation, the decision to allow or forbid an autopsy, pain management, and the use of life-sustaining equipment, among others. With an AHCD, a patient who becomes incapacitated temporarily or permanently will still be able to communicate his or her wishes through this writing, which can be legally relied upon by the patient’s designated agent and the healthcare providers.

The AHCD is the means by which a spouse can assert the authority, granted by his or her spouse, to make healthcare decisions on behalf of his or her incapacitated spouse. If the spouse is named as the sole agent in the AHCD, the spouse holds the exclusive right to assume this authority. If the spouse is named as a co-agent, the spouse will work with the other designated co-agent or agents in making the necessary decisions on behalf of the patient. In some cases, individuals do not want to name a spouse as an agent and will designate someone else. There are many reasons why this may be an individual’s choice. If there is no spouse, the individual will appoint whomever he or she deems appropriate.

The agent or co-agents must follow the patient’s directives. These decisions have been expressed in writing by the patient, who has given his or her agents the power to make sure the patient’s wishes are honored by the healthcare providers in the event the patient is incapacitated. No agent may ignore the expressed intent of the patient.

Another way a spouse can gain exclusive authority to make healthcare decisions on behalf of a husband or wife is through the patient’s oral appointment of surrogacy that is communicated to the healthcare providers.11 Absent an AHCD—the existence of which is

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Cozette Vergari, of Vergari & Associates in Los Angeles, focuses her practice on estate planning and family law.

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often queried by a healthcare provider or facility during the patient intake or admissions process so that the document, if it exists, can be placed in the patient’s records—a patient may orally communicate his or her choice of a surrogate to act on behalf of the patient. This oral appointment, along with the patient’s specific medical wishes regarding treatment, should be noted in the patient’s records by the healthcare provider. The patient may name a spouse to act as the surrogate who will assume the healthcare decision-making power if the patient becomes incapacitated. The medical wishes of the patient, as recorded by the healthcare provider, must be followed and implemented under the authority of the surrogate spouse. The patient may name anyone as a surrogate to act on his or her behalf.

A surrogate, however, might not have the same expansive authority as an agent named in an AHCD. The patient may not have expressed his or her wishes regarding the full range of circumstances that could emerge during a period of incapacity. A decision by the surrogate that lacks a foundation of evidence of the patient’s intent may be disregarded by healthcare providers who deem the decision to not be in the best interests of the patient. An AHCD provides firmer ground for the spouse acting on behalf of his or her incapacitated spouse. A spouse acting as the patient’s agent under an AHCD has the power to implement the patient’s wishes, which have been expressly stated in a writing. This writing constitutes clear and convincing evidence of the patient’s intent.

A spouse appointed as a surrogate may be absolutely certain of what the patient’s philosophical or spiritual choices would be regarding treatment. However, in the absence of specific evidence of intent in the patient’s medical file, the surrogate is powerless. This is true not only when the patient does not address an issue in the oral communication of surrogacy but also when the oral communication is not properly recorded by the healthcare provider.

The least desirable option available for obtaining the right to make medical decisions on behalf of one’s spouse is a petition to the court for a conservatorship. A spouse or other interested party may request to be appointed as a conservator of the patient. This appointment is subject to objections from other parties. Through proper notice, the patient’s due process rights must be considered, along with those of extended family members. The court may decide to appoint an independent legal representative for the potential conservatee and may also choose to limit the scope of the conservator’s authority. This process can be untimely, cumbersome, and expensive. Conservatorship is a highly scrutinized area of the law and requires expertise.

The execution of an AHCD can avoid the need for a conservatorship. However, if the need for an appointment of a conservator arises, even when an AHCD exists, the good news is that the nomination of a conservator by the patient usually is embodied in the AHCD. Therefore, if a petition to the court is necessary, there will be no controversy regarding the appointee. The AHCD is clear and convincing evidence of the individual’s intent and choice of conservator.

Nonspousal Healthcare Authority
Everyone possesses the precious right to relinquish authority for his or her healthcare decisions, when incapacity arises, to a trusted family member, domestic partner, or friend, as well as a spouse. To do so requires express evidence of intent. The Probate Code generally protects the class of family members, but with no specificity. Domestic partners, if registered with the California secretary of state, are given status equivalent to that of a spouse under the Probate Code and the Family Code. Unregistered domestic partners and friends have no standing under state statutes.

Many middle-aged adults are caring for and assisting their elderly parents. An adult child might presume that he or she has the right to make medical decisions on behalf of the elderly parent when that parent lacks the capacity to do so. Under statutory law, however, no power for this purpose is granted specifically to the adult child. The adult child is only one in a class of family members. All family members have equal standing in the healthcare decisions involving the parent, unless the adult child has been authorized to make decisions on behalf of the patient through an AHCD, surrogacy, or a conservatorship.

ASSUMPTIONS AND FACTS

The following questions should be categorized as FAQs, or frequently asked questions. Unfortunately, they are questions far too infrequently asked. Most people assume they have the right to make medical decisions on behalf of their spouses or other loved ones with whom they share their lives. And since the questions are not asked, some very important precautionary measures are not taken—and the need for them is discovered only when a crisis arises.

QUESTION: Who has the right to make healthcare decisions for a patient?
ANSWER: The patient. When an individual reaches 18 years of age, the right to make healthcare decisions becomes his or her exclusive right. Only under very specific circumstances can that right be relinquished or taken away.

QUESTION: What if the patient is incapacitated and unable to make a decision? Doesn’t the patient’s spouse acquire that right?
ANSWER: Not necessarily. There is no statutory right for a spouse to become the main decision maker for healthcare issues concerning his or her incapacitated spouse. In fact, absent the legal status of agent, surrogate, or conservator, a spouse falls into a general category of “family members.” This category stands at the end of the line after the patient’s agent, surrogate, and conservator.

QUESTION: What standing does a domestic partner—opposite sex or same sex—have when the other partner is incapacitated and unable to make a medical decision?
ANSWER: The same as a spouse with the same limitations, but only if the domestic partners have formally established a domestic partnership with the California secretary of state. Absent a properly registered domestic partnership, the partner of an incapacitated patient is at the end of the line—and possibly without any standing at all.

QUESTION: Does an opposite-sex domestic partner have more or less standing than a same-sex domestic partner regarding the ability to make decisions on behalf of a partner who is incapacitated and unable to make a personal medical decision?
ANSWER: Same-sex and opposite-sex domestic partners are treated the same. For registered domestic partners, each partner has the same standing as a spouse. If the domestic partnership is not registered with the state, neither partner has a statutory right to make medical decisions on behalf of the other.

QUESTION: What are a parent’s rights when his or her 20-year-old child is incapacitated and unable to make a medical decision?
ANSWER: Under state statutes, a parent falls into the broad class of family members and stands in equal position with all other family members. A parent is given no priority standing.

QUESTION: Are spousal entitlement to each other’s medical information?
ANSWER: No. In fact, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits healthcare providers from sharing any kind of medical information with anyone other than the patient, except under prescribed circumstances.

QUESTION: Do registered domestic partners have the same standing as spouses in requesting medical information about their partners?
ANSWER: Yes, with the same limitations. —C.V.

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1 Prob. Code §§3901(a), 4670.
3 Fam. Code §§297-299.6.
Many couples choose to cohabit and not marry. Moreover, same-sex couples are unable to create a legal marital relationship, though they may gain marital rights if they register as same-sex domestic partners. Opposite-sex couples also may register a domestic partnership if one or both of the partners are over the age of 62.

No matter how parties ultimately weigh the pros and the cons of establishing a legal domestic partnership, an AHCD provides a role for a domestic partner, whether registered or unregistered, in making medical decisions on behalf of his or her incapacitated partner. Further, for opposite-sex unmarried couples, an AHCD can establish their rights to make healthcare decisions for one another even as they choose to abstain from the legal entanglements of marriage.

Another relationship to consider is the parent seeking the authority to make medical decisions for an adult child. A parent is part of the class of family members, in which no one family member has any more power, under statutory law, than another. Further, many of the issues regarding a spouse’s limitations—absent the status of agent (under an AHCD), surrogate, or conservator—will also apply to the parent of an adult child if the adult child is incapacitated.

Once a child attains the age of 18, the right to make personal medical decisions becomes an exclusive right of that adult child. Even if the child is still attending high school, he or she gains this exclusive right at 18, and a parent does not automatically possess sole decision-making power when, for example, the child becomes unconscious due to injuries sustained in an automobile accident. Parents too often presume that the power to make medical decisions for their adult children is their right. Absent an AHCD, parents fall into the class of family members with no more legal standing than another adult family member. Many hospitals create a hierarchy of decision makers and are likely to place the parents of unmarried young adults at the top of the list. However, there are no guarantees under statutory law. Even if the healthcare providers are listening to the parents, should they deem the parents’ decision to be not in the best interests of the patient, they are not obligated to implement the parents’ choices without an AHCD.

Generally, the most efficient way for an individual to protect his or her intent regarding healthcare in the event of incapacity is the execution of an AHCD. A well-constructed AHCD expresses medical choices clearly, appoints an agent or co-agents, appoints alternate agents, and nominates a conservator if needed. In this document, a person is able to direct and instruct his or her agent, who is not only authorized but obligated to carry out the person’s directives. The agent is
empowered to speak—and the healthcare providers must listen.

One last consideration are the restrictions mandated by two laws: the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) and California’s Patient Access to Medical Records Act. The major goal of these laws is to ensure the protection of an individual patient’s health information while balancing the need to provide quality healthcare. The violation of these statutes could result in substantial fines for a healthcare provider or facility.

While the laws have resulted in their intended effect of providing more protection for patient privacy, they have also led to more limited accessibility by a patient’s family members to the patient’s medical records. These records are strictly protected from disclosure to anyone other than the patient. To overcome this obstacle, a patient may execute a written authorization for use and disclosure of his or her information, enabling the patient’s agent to obtain needed information. This written authorization should accompany an AHCD. Estate-planning attorneys should make sure they execute the necessary instrument when they draft an AHCD.

With the execution of an AHCD and an accompanying HIPAA authorization, attorneys will help to empower a spouse, a domestic partner, or other family members to make medical decisions on behalf of an incapacitated loved one. The story of Terri Schiavo, which gained national media attention, was a grim illustration of what can happen to a family without a patient’s expressly written intentions regarding medical treatment. For nearly 16 years, Schiavo existed in a vegetative state while her parents and her spouse battled in court over her end-of-life care. Had Schiavo executed a document like an AHCD, this long nightmare could have been avoided. An AHCD will speak for the patient and will enable the designated agent to carry out the patient’s express wishes.

[Notes and references]

1. PROB. CODE §§3901(a), 4670.
4. PROB. CODE §§810, 4609.
5. PROB. CODE §§4600-4806.
6. PROB. CODE §4717.
8. FAM. CODE §4300.
9. PROB. CODE §§4714, 4734, 4735.
10. PROB. CODE §4701. A Durable Power of Attorney for Health Care is still enforceable if it meets the requirements of Probate Code §§4665 and 4673.
CONDOMINIUM CONVERSIONS are one of the fastest growing housing trends in Southern California. To meet rising consumer demand for housing in an environment in which undeveloped or vacant land is scarce, the condominium conversion is a California developer’s logical alternative to traditional new construction of multiunit housing. Developers are also attracted to conversions due to the high rate of return on investment, quick turnaround time, and low-risk profile.

The conversion phenomenon also has created a new gray area in consumer protection from construction defects. Converting an existing apartment property to condominiums often requires mere cosmetic upgrades and nothing more. In fact, a developer can convert an apartment building into a condominium without doing any work on the property. If a construction defect is discovered, the converter can shift blame to the original apartment builder—and the builder is often shielded from liability by statutes of repose applicable to defect claims.

Several questions have emerged regarding converter liability. Is it fair for condominium converters to escape liability for construction defects when converters place into the stream of commerce a distinctively new product? Should converters not have the same degree of accountability as developers of new construction? Are converters able to completely evade the warranties afforded purchasers of new construction?

Unfortunately, neither the legislature nor the courts have clearly defined a converter’s liability for construction defects. Answers to these
and other perplexing questions may depend upon such factors as: 1) the amount of work that is actually done to the property, 2) specific county or city conversion requirements, and 3) the terms of the sales documents.

A condominium conversion involves the transformation of existing rental property, most often an apartment building, into individual condominium units for sale to the public. The term “conversion” is defined in the Government Code as “a change of a residential dwelling...to a condominium, cooperative, or similar form of ownership.”

The conversion process is governed by the Subdivision Map Act, which regulates the design, improvement, and sale of subdivisions and authorizes conditions for approval of subdivision maps. Condominium converters also must comply with the Davis-Stirling Common Interest Development Act, which establishes a uniform set of laws applicable to common interest developments. In addition, the sale of five or more condominiums requires a public report from the Department of Real Estate (DRE) pursuant to the Subdivided Lands Act. Finally, local governments are vested with considerable control over the design and improvement of land subdivision in California.

Like virtually all civil litigation claims, construction defect actions must be brought within a specific time period mandated by statute. Different statutes of repose apply depending on whether the defects in question are considered “patent”—those that are apparent by reasonable inspection—or “latent”—those that do not present themselves until after the completion of construction. Code of Civil Procedure Section 337.1 applies to actions for patent construction defects and limits the filing of suit to a four-year period after substantial completion of the construction. Code of Civil Procedure Section 337.15, in contrast, provides for a 10-year statute of repose commencing from the time of substantial completion of construction for lawsuits arising from latent construction defects. Both Sections 337.1 and 337.15 apply to actions brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision, observation of construction, or construction of an improvement to real property. This description of who may be sued presumably encompasses a condominium converter—but recent legislation makes the issue problematic.

The statutory framework for construction defect litigation, including the statutes of repose of Sections 337.1 and 337.15, was completely overhauled in 2002 with the passage of Senate Bill 800, codified in Civil Code Sections 896 et seq. This law applies only to residential conversions and “does not supersede any other statutory or common law.”

Negligence and Negligence Per Se

In the absence of clear authority making converters liable for construction defects, several alternative legal theories could make converters liable. One legal theory has two parts: negligence and negligence per se. Developers and contractors are liable for their own acts and omissions and the acts and omissions of those they hire or supervise. Condominium converters are no different. The converter is held to a standard of care in the conversion process and a breach of this standard, causing damage, is actionable.

In Orange Grove Terrace Owners Association v. Bryant Properties, Inc., the California Court of Appeal considered the viability of an action for negligence by a homeowner’s association against the converter of the structure. The association, composed of 29 units, sued the converter on several theories, including negligence, for damages caused by faulty repairs made in the course of converting previously existing apartments into condominiums.

The converter argued that since the repairs to the apartments were substantially completed before the association was organized and before it took control of the common areas, the association had no standing to sue for damages. The court rejected this argument, concluding that the timing of the association’s organization was a matter wholly within the control of the converter. According to the court, the converter could readily foresee that the association—which was obligated by the covenants and conditions promulgated by the converter to maintain and repair the common areas—would be damaged by an injury to the common areas caused by the converter’s negligence in undertaking repairs in the course of the condominium conversion.

The Orange Grove court deemed it appropriate that: [I]f the defendants undertook to repair roofs, and in doing so negligently determined that patching, rather than replacement would suffice, the jury could reasonably determine that the roof repairs were negligently performed. Similarly, if the defendants negligently used copper pipe in repairing the common area galvanized piping, and thereby proximately caused damage to the galvanized piping, necessitating additional repair or replacement in the common areas, the defendants’ conduct would support an award of damages for negligently performed plumbing repairs.

Converters undertaking repairs to a structure are therefore held to the standard of care applicable to a developer of newly constructed condominiums. Whether a converter has met that standard of care is a question of fact for the jury to decide.

But what if the converter makes no physical improvements to the structure? At the very least, Civil Code Section 1134(a) obligates the converter to deliver to a prospective purchaser a written statement listing all substantial defects or malfunctions in the major systems of the property, or provide a written statement disclaiming knowledge of any substantial defects or malfunctions. The disclaimer may be delivered only after the converter conducts a reasonable inspection of the property and does not find a substantial defect or malfunction. If the converter is negligent in discharging this duty by either failing to adequately disclose defects in the property or by failing to conduct a reasonable inspection to support the disclaimer exemption, the converter may be responsible for damages caused by the later discovered construction defect. This code section is not designed to abridge or limit any other disclosure obligation created by law to avoid fraud, deceit, or misrepresentation in the transaction.

Local county or municipal codes may impose upon the converter an affirmative obligation to bring the converted property in conformance with various building codes. Thus, a converter may be negligent per se if the converter violates these local county or municipal ordinances.

Strict Liability and Implied Warranty

Strict liability and breach of implied warranty are two additional theories of recovery against a builder for construction deficiencies. Strict liability differs from negligence in that breach of duty need not be proven to establish liability. Instead, a plaintiff must only establish that a defective item was mass-produced and that the defect proxi-
implied warranty regarding defective construction to the sellers of new construction. In Pollard v. Saxe & Yolles Development Company, the court ruled that builders and sellers of new construction should be held to what is impliedly represented—namely, that the completed structure was designed and constructed in a reasonably workmanlike manner.

California courts have yet to find a condominium converter liable for preexisting construction defects in a converted building under the doctrines of strict liability or implied warranty. At least one court refused to impose strict liability or breach of implied warranty on a seller that purchased a newly constructed building from its original builder but took no part in the construction of the structure. In East Hilton Drive Homeowners’ Association v. Western Real Estate Exchange, Inc., the original builder of eight condominiums lost his investment to a bank foreclosure. The condominiums were purchased from the bank four years later by the appellant and, after repair and rehabilitation, the units were sold to the respondents. The structure then sustained water damage. The court held that, as the successor in interest to the original developer, the appellant was not liable under the doctrines of strict liability and implied warranty regarding defective construction. The court concluded that only the sellers of new construction could be held accountable under these theories of liability.

However, an argument can be fashioned that the doctrine of strict liability should apply to a converter for defective refurbishment of a particular system that was the direct cause of property damage. In Peterson v. Superior Court of Riverside County, the court considered the merits of an action for strict liability against a hotel owner for injuries sustained by the plaintiff in a hotel bathtub. The court rejected the application of strict products liability to a residential landlord or a hotel proprietor who was not part of the manufacturing process. The court likened the two to a seller of used machinery who is not strictly liable in tort. However, the court carved out an exception to this general rule. When the seller rebuilds or reconditions the used product, the seller assumes the role of a manufacturer and will be held strictly liable in tort. By analogy, a condominium converter is nothing more than a seller of a reconditioned product—

and, arguably, the converter therefore should have the same status as a manufacturer and thus be held strictly liable in tort.

As with strict liability, thus far the courts have refused to extend the theory of implied warranty to a condominium converter. However, the appellate court in East Hilton did suggest the possibility that even though Pollard extended implied warranty only to sellers of new construction, if a home could be considered new construction when acquired, the doctrine of implied warranty would apply: ‘If [the homes] could be considered new construction when appellant acquired them, then the Pollard case would impose an implied warranty on that sale. But appellant who had no part in building or financing the building of these homes, cannot be considered a seller of new construction whether it occupied the homes or not.’

The East Hilton court proceeded to discuss the rationale of the Pollard decision:

Pollard extended the warranty because builders and sellers of new construction are in a better position than buyers of new construction to know of defects. There is no reason to extend this warranty to appellant simply because the homes had lain vacant for a number of years.

Under the Pollard rationale, a converter may be considered a seller of new construction if the converter engages in the refurbishment of the structure. Moreover, the converter is in a better position than the buyer to know of possible defects. It may simply be a matter of time before the courts extend the doctrine of implied warranty to a seller of converted units.

Fraud and Other Theories

It is well established that a seller of real property is obligated to disclose all material facts affecting the value or desirability of the property if these facts are known or accessible only to the seller, and the seller knows that these facts are not known to, or within the reach of, the diligent attention and observation of the buyer. The failure of a seller to fulfill this duty of disclosure constitutes actual fraud and, under these circumstances, the seller is liable for any damage suffered by the buyer. An “as-is” provision typically used in real estate sales documents does not relieve the seller of liability for the seller’s affirmative misrepresentations or material omissions of fact.

The condominium converter, as a seller of real property, is under the same duty of disclosure—particularly since the converter, and not the buyer, is in a position to know material factors such as the age of the building, the nature and extent of any refurbishment, and the
current condition of the structure.

In addition to the duty of all sellers to disclose material facts to prospective buyers, distinct disclosure obligations apply to the condominium converter. Under most circumstances, for example, the DRE requires a converter to submit a DRE Form 639 along with an application for a public report. DRE Form 639 requires the aspiring converter to disclose such information as the age of the property and the history of improvements to the units and to the major components of the common areas, including the dates of all renovations. The form also asks the converter to submit inspection reports from qualified engineers or contractors on major systems of the structure such as the foundation, plumbing, structural, electrical, roofing, and mechanical components. Should the converter elect not to submit one or more reports, the DRE may include in the public report a special note warning the consumer of the seriousness of this lack of information.

Finally, the converter is required by Civil Code Section 1134 to deliver to the prospective buyer a written statement. It must either list all substantial defects or malfunctions in the major systems of the units and common areas, or disclaim knowledge of these types of defects or malfunctions.

Two other possible theories of liability may apply to a condominium converter. As a marketing tool or otherwise, a converter may choose to expressly warrant the condition of the condominium. An express warranty is an affirmation of fact made by the seller to the buyer regarding the items sold.34 Express warranties are made in the sales documents—typically the purchase agreement and/or escrow instructions. A converter who breaches express warranties contained in the purchase documents is strictly liable for related damages.35

Another theory is breach of fiduciary duty. One of the initial steps in the condominium conversion process is the creation of an association, typically a nonprofit mutual benefit corporation. The association is governed by its board of directors and its officers. The duties and obligations of these association representatives are governed by, among other things, a set of covenants, conditions, and restrictions (CC&Rs) that are submitted to the DRE for approval and later recorded with the appropriate county recorder’s office. The converter or the converter’s agent often comprises the first board of directors for the association. As an association director, the converter owes a fiduciary duty to the association and its members that requires the converter to manage association affairs honestly and in good faith.36 Once the homeowner association is established as an independent legal entity and a majority of units have been sold, the converter typically transfers all the converter’s rights and interests in the project to a newly elected board.

While serving as a board member, the converter is required to, among other things, properly determine an operating budget and also fund and maintain an adequate reserve account. Both functions are critical for the maintenance of common areas and to ensure the availability of funds for capital improvements.

A leading California case in the area of fiduciary obligations owed by a director to an association is Raven’s Cove Townhomes, Inc. v. Knuppe Development Company, Inc.37 In Raven’s Cove, an association of condominium owners brought suit against the project developer for defects in common area landscaping and the exterior walls of individual units. The defendants, former association directors, were the developers of the complex and in control of the association in its early planning stages. The developer-directors neither established a reserve or operating fund as required by the association documents nor adequately maintained the premises, which resulted in defects to the common areas. The association alleged that the developer-directors breached their fiduciary duty by failing to properly determine operating costs and fund a maintenance reserve account.

The court of appeal concluded that the board owed a duty of undicated loyalty when it considered matters such as maintenance and repair contracts and the creation of reserve and operating accounts. Further, the court held that it was improper for the directors to make decisions for the association that were beneficial to the directors’ interest at the expense of the association and its members.38

In an effort to increase profitability, a condominium converter could be tempted to manage the project in a manner that is under budget or under reserve, which would constitute a breach of a director’s fiduciary duty to act in good faith and without conflict of interest. Under these circumstances, an association with construction deficiencies would have a cause of action for breach of fiduciary duty against the converter.

Insuring Condominium Converters

The conversion craze also has created some concerns for the insurance industry. In general, underwriters view condominium conversions as a greater insurance risk than completely new construction, in part due to the age of converted structures and the mistaken perception of buyers that converted structures are either brand new or completely renovated. Nevertheless, insurance underwriters are issuing insurance policies on these projects. These policies either identify the converter as the named insured or are issued as an endorsement, through a contractor or subcontractor, that names the converter as an additional insured.

The most common type of liability insurance available to the condominium converter is the Commercial General Liability Policy, which affords the converter indemnity and defense against claims for third-party bodily injury or property damage. This policy can be purchased in two forms: an “occurrence” policy or a “claims-made” policy. Most construction-risk CGL policies are purchased on an occurrence basis, which means that the policy applies to injury or damage sustained during the policy period, even though the policy may have expired. The occurrence policy is favored by converters because, theoretically, it offers prospective coverage through the expiration of applicable statutes of repose for construction defect claims.

The second form of insurance coverage available to the converter, the “claims made” policy, limits coverage to claims made against the insured while the policy is in effect. This form of policy is less popular to the converter because, to achieve maximum risk protection, the converter is required to maintain the policy, sometimes at great cost, well after the units have been sold.

A CGL policy issued to the converter—whether as a named insured or by virtue of a contractor’s endorsement—does not necessarily guarantee protection from the risk of construction defect damage claims. Standard CGL policies are replete with coverage exclusions that, depending upon the facts and circumstances surrounding the construction and the nature of the damage claimed, may eliminate the converter’s immunity from personal risk.41

Converters are well advised to take certain steps to lower their personal exposure and risk to construction defect claims and to maximize their underwriting profile:42

- **Carefully select the project.** Converters should avoid converting a structure that is old and in extreme disrepair unless they are prepared to 1) undertake a thorough investigation of the structure, including possible destructive testing, to determine the existence and the extent of any defects, and 2) thereafter implement significant repairs.
- **Require indemnity provisions from sellers.** A converter should include an indemnity provision in the purchase agreement requiring the seller of the structure to indemnify and defend the converter for construction defect claims brought against the converter after the sale of the structure.
- **Ensure that the structure receives a thorough, professional inspection.** A thorough, third-party professional inspection will assist converters in making their decision to purchase and convert a property.
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A positive report from a construction professional will also enhance a converter’s chances of procuring the appropriate insurance for the project.

- **Disclose, disclose, disclose.** Full disclosures should be made by converters not only to the DRE but also to unit purchasers. The disclosures should include the age of the property, inspections and reports undertaken by construction professionals, and an explanation of repairs and renovations to common areas and individual units.

A condominium converter’s liability for construction defects will remain a legal quandary until the courts or the legislature define a condominium conversion as either new or old construction. In the meantime, converters will continue to seek protection from risk while trial courts decide, on an ad hoc basis, whether to apply traditional legal liability theories to a nontraditional creation.

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1 GoV’t Code §65590(G)(l).
2 Subdivision Map Act, GOV’T CODE §§11000-11200.
3 Davis-Stirling Common Interest Development Act, BUS. & PROF. CODE §§11000-11200.
4 Subdivided Lands Act, BUS. & PROF. CODE §§11000-11200.
6 Code Civ. Proc. §337.15(a); see also Code Civ. Proc. §337.15(g) (defining substantial completion of an improvement as being not later than the date of one of the following, whichever occurs first: 1) the date of final inspection by the applicable public agency, 2) the date of recordation of a valid notice of completion, 3) the date of use or occupation of the improvement, or 4) one year after termination or cessation of work on the improvement).
7 Code of Civil Procedure §337.15(g) adds the words “who develops real property” to the class of persons protected by the statute.
8 CIV. CODE §938.
9 CIV. CODE §896.
10 CIV. CODE §911(a).
13 Id. at 1223.
14 Id. at 1223-24.
15 “Major systems” are defined to include, among other things, the roof, walls, floors, heating, air conditioning, plumbing, and electrical systems. CIV. CODE §1134(c)(l).
16 CIV. CODE §1134(a).
17 CIV. CODE §1134(g).
21 East Hilton Drive Homeowners’ Ass’n v. Western Real Estate Exch., Inc., 136 Cal. 3d 630 (1982).
22 Id. at 632-33.
23 Id.
24 Peterson v. Superior Court of Riverside County, 10 Cal. 4th 1185 (1995).
25 Id. at 1188-89.
26 Id. at 1200-01.
27 Id.
29 Id. at 633.
31 COM. CODE §1572(3); see also Lingsch, 213 Cal. App. 2d at 736.
32 CIV. CODE §1710.
33 Lingsch, 213 Cal. App. 2d at 740-41.
34 COM. CODE §2313(1)(a).
36 CIV. CODE §309.
38 Id. at 799.
39 Another type of insurance available for construction risk is the Architects and Engineers Professional Liability Policy, which covers the services of design professionals. This policy is commonly known as an errors and omissions policy.
40 In 1986, the name of the policy was changed from Comprehensive Commercial Liability Policy to Commercial General Liability Policy.
41 The standard CGL policy was initially created by the Insurance Services Office, Inc. (ISO), an independent service agency for the liability industry. The form has been revised several times since its creation in 1940. See Scott Turner, INSURANCE COVERAGE OF CONSTRUCTION DEFECTS 10 (2d ed. 2007). The ISO forms contain certain relevant exclusions, including those commonly referred to as the work product, premises alienated, earth movement, and contractual liability exclusions.
42 See CONSTRUCTION INDUSTRY UPDATE, Jan. 2005 (steps suggested by the insurance industry).
Bluffing is at the heart of any competitive activity involving limited information, such as a negotiation. Advocates during a negotiation often seek to mislead their adversaries. They want their opponents to reach conclusions that may be contrary to the truth. The purpose of the bluff is to undermine an adversary’s confidence in his or her case. Relying on a misunderstanding, an adversary may concede ground and unnecessarily increase or reduce its offer. Negotiators, like poker players, count the results they achieved through a well-played bluff as among their greatest victories.

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Attorneys must consider the applicable laws and ethical rules when they seek to employ the tactic of bluffing in their negotiations. California law treats litigation and nonlitigation negotiations differently. Persons involved in litigation are broadly protected by statute from tort liability—even for fraud and perjury—but no similar immunity applies in a nonlitigation context.

Civil Code Section 47(b)(2), the litigation privilege, protects parties in litigation from subsequent tort liability for any statements made during litigation except those that give rise to a claim of malicious prosecution. According to the court in *Flatley v. Mauro*:

Robert A. Steinberg is a lawyer and full-time mediator exclusively with ADR Services, Inc.
The principal purpose of [Civil Code Section 47(b)] is to afford litigants and witnesses...the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.” Additionally, the privilege promotes effective judicial proceedings by encouraging “open channels of communication and the presentation of evidence” without the external threat of liability...and “by encouraging attorneys to zealously protect their clients’ interests...Finally, in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding the unending roundelay of litigation, an evil far worse than an occasional unfair result.”

Using the authority of the litigation privilege, courts have denied parties the right to bring a derivative tort action when:

- A witness committed perjury or perjury was suborned.
- An attorney misrepresented his client’s insurance policy limits to reduce the settlement amount.
- Parties forged a will and submitted it for probate.
- Parties converted a will and submitted it for probate.
- An attorney with a conflict of interest allegedly defamed one client to enhance the settlement prospects of another client.
- A bank wrongfully reported suspicious activity to the police.

These cases underscore the absolute nature of the privilege, which bars all tort recovery for statements made during the litigation except for claims of malicious prosecution. The privilege even applies to “statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit.”

The Section 47(b) privilege applies only to “communicative acts” and not to “noncommunicative conduct.” In Kimmel v. Goland, the court upheld an action for the illegal recording of confidential telephone conversations during a lawsuit:

Implicit in the Ribas v. Clark decision was the distinction between injury alleged arising from communicative acts, i.e., the attorney’s testimony, and injury resulting from noncommunicative conduct, i.e., the invasion of privacy resulting from the attorney’s eavesdropping. This distinction has traditionally served as a threshold issue in determining the applicability of section 47(b)(2).

Only one case has imposed liability for statements made during litigation. Shafer v. Berger Kahn, Shafton, Moss, Figler, Simon & Gladstone arose from a claim against a construction contractor for fraud and negligence. The contractor’s carrier reserved its rights because of the allegations of intentional and willful conduct. When the contractor sought independent counsel, the carrier withdrew its reservation so the contractor would not need its own counsel. The arbitration panel in the underlying case found the insured contractor liable for fraud, but the carrier refused to fully indemnify. The carrier instead contended, through its coverage counsel, that the finding of fraud precluded full indemnity for the claimants under the policy. When the claimants discovered they were entitled to full indemnity by reason of the withdrawal of the carrier’s reservation, they sued the carrier and the law firm that misrepresented the carrier’s position to them.

The Shafer court concluded that “the litigation privilege does not shield [the defendant attorney] from liability for fraud because his alleged misrepresentations were made to a party standing in the shoes of an insured, and the application of the litigation privilege in this case would be inconsistent with the purpose of [Insurance Code] section 11580.” That statute states that when a claimant obtains a judgment against an insured for, among other things, property damage, then the claimant may sue the insurer directly on the policy to recover on the judgment.

In finding this exception to the litigation privilege, the Shafer court stands alone. The court first reasoned that lawyers may be liable for fraud to third parties. But each of the California cases it discussed involved business negotiations, not settlement negotiations, and thus were unprotected by the litigation privilege. To repair this deficiency, the court relied on the Restatement (Third) of the Law Governing Lawyers, an Iowa Supreme Court case, and a case from the U.S. Court of Appeals for the Second Circuit that applied New York law.

The court then concluded that Insurance Code Section 11580 supersedes the litigation privilege:

Counsel retained by an insurer has an obligation to be truthful in describing insurance coverage to a third party beneficiary. The litigation privilege is not a license to deceive an injured party who steps into the shoes of the insured....Section 11580 grants an injured party the right to file suit in order to recover under the insurance policy. Coverage counsel may not commit fraud in an attempt to defeat that right. And to the extent there is a conflict between an injured party’s rights under section 11580 and coverage counsel’s reliance on the litigation privilege (Civ. Code, §47, subd. (b)), the rights of the injured party prevail as they arise under the more specific of the two statutes.

Thus, the Shafer holding, even if adopted by other courts, probably has no application outside the specific context of Insurance Code Section 11580 or a similar statute.

Mediated settlement negotiations enjoy additional protection. According to the mediation confidentiality provisions of the California Evidence Code, “No evidence of anything said...in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery....”

Courts have upheld mediation confidentiality as inviolate. For example, in Foxgate Homeowners’ Association v. Bramalea California, Inc., the court held “that there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator’s reports. Neither a mediator nor a party may reveal communications made during mediation.”

Notwithstanding this broad language, the court in Simmons v. Ghaderi found an exception. It did so for testimony about an oral settlement agreement purportedly reached at mediation on which the defendant tried to renege. Because the defendant and her attorney litigated the efficacy of the purported agreement for 15 months—and they described in declaration testimony and stipulations what happened at the mediation—the court carved out what it felt was a narrow but appropriate exception: “We simply hold that once a party voluntarily declares certain facts to be true, stipulates that she does not dispute them and extensively litigates the legal effect of such facts, she is estopped to later claim that the court must disregard those facts based upon a belated assertion of mediation confidentiality.”

This case was granted review in December 2006. That same month, the California Supreme Court reaffirmed its “disappro[v]al” of “judicially crafted exception[s]” to the mediation confidentiality statutes, with specific mention of its decisions in Foxgate and Rojas. The supreme court has yet to resolve whether conduct establishing estoppel can create an exception to the statutes.

When a lawyer’s activities fall outside the litigation arena and the protection of the litigation privilege, California law permits tort recovery for wrongful advocate conduct. As the court of appeal noted in Cicone v. URS Corporation:

In California it is well established that an attorney may not, with impunity, either conspire with a client to defraud.
MCLE Test No. 164

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

1. The litigation privilege does not protect parties and their advocates from civil liability for:
   A. Perjury.
   B. Fraud.
   C. Eavesdropping.
   D. Submission of a forged will to probate.

2. The litigation privilege applies only to pending litigation.
   True.
   False.

3. Under California law, lawyers in negotiation owe no duty to an opposing party represented by counsel.
   True.
   False.

4. The California Supreme Court has stated that malicious prosecution is the sole exception to the litigation privilege.
   True.
   False.

5. Which of the following is not a policy in support of the litigation privilege?
   A. The opportunity to reveal truth through discovery.
   B. Preventing lawyers from suing each other.
   C. Encouraging lawyers to protect their clients’ interests.
   D. Protecting parties from multiple damage suits.

6. California adopts the majority rule regarding what advocates may say to the other side in settlement negotiations.
   True.
   False.

7. Under California case law, the duty an insurance carrier owes to its insured supersedes the litigation privilege.
   True.
   False.

8. The California Supreme Court has affirmed that there are no exceptions to mediation confidentiality.
   True.
   False.

   True.
   False.

10. Which of the following is not expressly considered an unprofessional negotiating tactic by the California Attorney Guidelines of Civility and Professionalism?
    A. Setting an arbitrary deadline.
    B. Taking advantage of a superior bargaining position.
    C. Taking a negotiating position that is not in good faith.
    D. Arguing with an opposing party even with its counsel present.

11. Which of the following negotiating tactics is prohibited by the ABA Model Rules of Professional Conduct?
    A. Affirmatively misrepresenting insurance policy limits.
    B. Exaggerating one’s bargaining power.
    C. Voluntary nondisclosure of the existence of an insurance policy.
    D. A false estimate of price or value.

12. The ABA Model Rules of Professional Conduct prohibit “false statements of material fact” even when made unintentionally.
    True.
    False.

    True.
    False.

14. The ABA Model Rules of Professional Conduct impose no obligation on a lawyer to inform the other side that the statute of limitations has run.
    True.
    False.

15. A lawyer cannot conceal the death of his or her client in a pending personal injury claim.
    True.
    False.

16. In a nonlitigation context, a lawyer may affirmatively misrepresent insurance policy limits.
    True.
    False.

17. The litigation privilege does not preclude recovery for contract damages against a party.
    True.
    False.

18. The ABA Model Rules of Professional Conduct oblige a lawyer to clarify the other side’s factual misunderstanding even when the lawyer and his or her client did not create the misunderstanding.
    True.
    False.

19. The ABA Model Rules of Professional Conduct require a party’s statements regarding its negotiating goals to be truthful.
    True.
    False.

20. The California Attorney Guidelines of Civility and Professionalism impose additional obligations on lawyers when they are conducting negotiations.
    True.
    False.
or engage in intentional tortious conduct toward a third person....

Thus, the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm’s length.26 As for jurisdictions other than California, the Shafer court observed that “‘cases from twenty-eight states hold’ that ‘[a]n attorney can be liable to a nonclient, even an adversary in litigation, for fraud or deceit.’”27 That is also the rule of the Restatement (Third) of the Law Governing Lawyers: “[I]n general, a lawyer who makes a fraudulent misrepresentation is subject to liability to the injured person when the other elements of the tort are established....”28 This rule “applies equally to statements made to a sophisticated person, as such to a lawyer representing another client, as well as to an unsophisticated person.”29 Moreover, according to the Restatement, “Misrepresentation is not part of proper legal assistance; vigorous argument often is. Thus, lawyers are civilly liable to clients and nonclients for fraudulent misrepresentation, but are not liable for such conduct as using legally innocuous hyperbole or proper argument in negotiations....”30

Of course, what distinguishes “fraudulent misrepresentation” from “legally innocuous hyperbole” is not always clear. The American Bar Association, in its Formal Opinion 06-439 adopted in 2006, attempts to answer this question. Nevertheless, advocates in California should shield themselves whenever possible under the litigation privilege by documenting some connection between their negotiations and pending or anticipated litigation.

**Ethical Parameters**

The California Rules of Professional Conduct generally do not address the ethics of negotiation behavior in either a litigation or non-litigation setting.31 However, this year the State Bar promulgated its California Attorney Guidelines on Civil Procedure and Professionalism,32 which address the topic directly. According to Rule 18(c) of the guidelines:

**An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client’s wishes or previous oral agreements.33**

The California Attorney Guidelines are voluntary and aspirational. They fail to define what an “abusive” or “not...in good faith” or “untrue” negotiating tactic is—all the more surprising given the purposes of negotiating tactics. In the poker game that is negotiation, advocates have two kinds of chips: substantive chips, based on the merits of their position, and procedural chips. Negotiation tactics are procedural chips; they involve one side extracting from the other side a price or a concession regardless of the merits of the case.

As one example, an advocate may schedule a negotiation in the late afternoon, knowing the parties are unlikely to reach a conclusion before the end of the day. Is this practice the setting of an “arbitrary deadline?”

Negotiating tactics that “are not true” raise different questions. Must the advocate know a statement is false? What if the falsehood applies only to immaterial matters? And what constitutes an “unfair advantage?” The guidelines, by not answering these questions, are unhelpful.

ABA ethics opinions and the ABA Model Rules of Professional Conduct offer some direction on the subject of ethics in negotiations. California lawyers may look to both for direction and analysis when state law and ethics rules lack guidance. The ABA materials cannot be cited as controlling authority, but they are illuminating.

ABA Formal Opinion 06-439 in particular addresses what may or may not be said in negotiations. The opinion addresses the “Lawyer’s Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caused Mediation.” It reviews cases from many jurisdictions as well as the ABA Model Rules of Professional Conduct33 and prior ABA formal opinions to conclude that “a lawyer representing a client may not make a false statement of material fact to a third person” in any negotiation, including what the opinion refers to as a caused mediation.34

ABA Formal Opinion 06-439 interprets ABA Model Rule 4.1(a). According to Model Rule 4.1, Truthfulness in Statements to Others:

- In the course of representing a client a lawyer shall not knowingly:
  - (a) make a false statement of material fact or law to a third person; or
  - (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The opinion states that Model Rule 4.1(a) “does not cover false statements made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.”35 Also, the opinion expressly notes that it does not apply to mere posturing or exaggeration: “Statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation ‘puffing,’ ordinarily are not considered ‘false statements of material fact’ within the meaning of the Model Rules.”36

The opinion identifies specific statements that do not constitute a false statement of material fact:

- **Underscoring one’s willingness to make concessions regarding the elements of a settlement or its dollar amount, or to gain leverage over the other side.**
- **Exaggerating one’s strengths and minimizing weaknesses.**
- **Making estimates of price or value.**
- **Declaring one’s intentions regarding an acceptable settlement.**
- **Not disclosing the existence of a principal (except when nondisclosure would constitute fraud).**
- **Nondisclosure by a lawyer of the existence of an insurance policy—unless the disclosure is required by law.**
- **Failure of a lawyer to correct the other party’s misunderstanding, based on information from third parties, of the finances of the lawyer’s client.**

The opinion notes that it is consonant with the Restatement (Third) of the Law Governing Lawyers, which describes the specific statements as “nonactionable hyperbole” or merely a “reflection of the state of mind of the speaker.”42 The opinion also concludes that these statements “are generally not considered material facts subject to Rule 4.1,”43 provided that these statements do not violate other Model Rules “if made in bad faith and without any intention to seek a compromise [citing Model Rules 3.2 and 4.4(a)].”44

The opinion cites prior ABA formal opinions to conclude that:

- A party’s actual bottom line and an agent’s actual settlement authority are material facts.45
- A lawyer has no obligation to inform the other side that the statute of limitations has run but cannot affirmatively misrepresent the facts regarding the claim.46
- In a pending personal injury claim, a lawyer cannot misrepresent the fact of the plaintiff’s death (“a material fact”), but must disclose it “promptly” to the court and the opposing party.47

The opinion cites some non-California cases that sanctioned lawyers, or overturned settlements, or afforded grounds for an action against the lawyers.48 Courts took these actions when the lawyers made a false statement of material fact or an implicit misrepresentation by failing to be truthful. The situations in which these actions took place were varied:

- A lawyer affirmatively misrepresented insur-
In the poker game that is negotiation, advocates have two kinds of chips: substantive chips, based on the merits of their position, and procedural chips. Negotiation tactics are procedural chips; they involve one side extracting from the other side a price or a concession regardless of the merits of the case.

- A buyer’s fraudulent misrepresentation claim was sustained against seller’s counsel for misrepresenting facts during a real estate negotiation. 
- A lawyer settled a personal injury case without disclosing to the other side that the client had died.

The opinion explicitly applies to negotiations conducted in mediation. In observing the peculiarities of mediated negotiations, the opinion observes that sometimes counsel may need to exercise a greater degree of truthfulness than the opinion itself requires to help the mediator achieve settlement: “[I]n extreme cases, a failure to be forthcoming, even though not in violation of Rule 4.1(a), could constitute a violation of the lawyer’s duty to provide competent representation under Model Rule 1.1.”

While the opinion provides reasonable guidance in the situations it enumerates, it concludes with a caveat that leaves room for lawyers to avoid its strictures: “[W]hether in direct negotiations or a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client’s position, which otherwise would not be considered statements “of fact,” are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client’s Board of Directors has authorized a higher settlement figure, a lawyer may state in the negotiation that the client does not wish to settle for more than $50. With this language, ABA Formal Opinion 06-439 provides advocates with the room they need to achieve their negotiating goals without violating the ethical rules propounded by the opinion.

Negotiating Tactics

Many competitive negotiating tactics involve bluffing. Competitive tactics are designed to undermine an adversary’s confidence through intimidation, distraction, and diversion. Most settlement negotiations begin with competitive tactics as each side seeks to bludgeon the other into making concessions. Deliberately misleading the other side through bluffing is an integral part of the process.

ABA Formal Opinion 06-439 instructs attorneys to phrase their bluff to avoid making a “false statement of material fact.” Using that direction as a foundation for conducting a negotiation, attorneys can consider using a variety of tactics employing bluffing:

Alternatives to settlement. An attorney may inform his or her adversaries that the attorney’s client has better choices than settlement. The side that cares more about settling starts with a weaker negotiation position. The attorney who is nonchalant about settling may bait the other side into concessions to keep the attorney at the bargaining table.

The attorney with the better BATNA (Best Alternative to a Negotiated Agreement) will have more chips with which to negotiate. But bluffing may be used if the situation is unclear, or one side has an objectively weaker position.

The March 2006 Blackberry settlement Office invalidate NTP’s patents. Invalidation would have defeated NTP’s lawsuit—an alternative to settlement. Second, as another alternative, RIM claimed to have designed a “work around” that would not have required the use of the allegedly infringing patents.

Each of these alternatives reduced the settlement value of NTP’s case. But there was a bluffing element to them, since it was unclear whether RIM’s pursuit of either would be successful. Neither raised an ethical question, however, because both parties knew of the uncertainties.

Hypothetically, if RIM was certain its work around was technologically unfeasible, yet persisted in negotiations by relying on the work around as a viable alternative, RIM would have crossed the line established by ABA Formal Opinion 06-439. RIM would have had no real alternative despite its claims to the contrary—a knowing misstatement of a material fact.

ABA Formal Opinion 06-439 itself anticipates this situation. It states that a party acts ethically when it continues to negotiate for a license of technology even though it has already designed a new product without the allegedly infringing patents.

Anything but that. An attorney may find his or her adversary’s offer acceptable, but the attorney wants more and responds that the offer is insufficient. The attorney hopes his or her adversary will increase (or decrease) the offer or otherwise grant further concessions before the attorney wrests an agreement from the adversary. An attorney who employs the “anything but that” tactic can gain concessions.
sions each time he or she refuses the adversary’s offer.

Ethically, this tactic presents little problem. The attorney employing the tactic is not making any factual statements at all, so there is no issue of truthfulness or falsity. This tactic thus falls within the opinion’s caveats about “posturing,” willingness to compromise, and statements about one’s negotiating position.

**Done deal.** A party may take some action and present it to the other side as a “done deal.” An example is when a plaintiff in a multiparty litigation opens the negotiation by unexpectedly stating that a codefendant has already settled on confidential terms to which the other defendant is not entitled.

If this statement is true, there is no problem. But what if a settlement has not been finalized, or the plaintiff misstates the scope of the settlement (such as, “It’s in the seven figures, but I can’t tell you how much because of confidentiality”)? The first statement may not be considered material, since defense counsel should not have relied on it without first checking with the allegedly settling codefendant. The second statement may be unethical if false and intentionally stated to mislead defense counsel into settling for an amount suggested by the statement.

**Irrational behavior.** Sometimes an attorney decides to act irrationally not only to distress and unnerve but also to undermine his or her adversary’s confidence. Attorneys generally prefer rational approaches to negotiation. Irrational behavior can unsettle even an experienced negotiator.

History provides an example. In 1960, when Nikita Khrushchev was the head of the Soviet Union, he appeared at the United Nations General Assembly and repeatedly caused disruptions by shouting from his seat. He even took off his shoe and began banging it on the table. When the Cuban missile crisis developed the next year, Khrushchev’s seemingly irrational behavior magnified President John F. Kennedy’s sense of risk when he ordered the naval blockade of Cuba.

Bullying or tantrum-throwing may fall within the California Attorney Guidelines suggestion to avoid “abusive” negotiation tactics. Engaging in these actions is certainly neither “civil” nor “professional.” However, there appear to be no legal or ethical proscriptions against this behavior.

**Limited authority.** An attorney may claim to lack authority to settle at a specified amount and ask his or her adversary to reduce the offer to the attorney’s authorized limits. Parties typically use this tactic after a tentative settlement has been reached. An attorney may call his or her principal to “confirm” the deal only to “discover” that the attorney cannot settle at the agreed amount. The attorney then requests his or her adversary to reduce the settlement amount to one that corresponds to the limits authorized by the principal.

Claiming an authority that is in fact nonexistent may fall within the ABA Formal Opinion 06-439’s proscription if doing so would constitute fraud. It would also violate California law if the statement occurs in a business negotiation. But agreeing to a settlement subject to a principal’s approval is ethical, since an attorney who does this is not making false representations about his or her authority.

In practice, parties often move higher (or lower) in their offers than they anticipated at the commencement of the negotiations. As long as attorneys do not claim a false limit to their authority, they should encounter no ethical problem.

**Limited time.** Parties sometimes seek to artificially constrain the time limits of the negotiation. Their aim is to make the opposing side move at a quicker pace than they are comfortable with, and this in turn may induce negotiating mistakes. Thus, a party may schedule the negotiation late in the day when everyone wants to go home.

Attorneys do not need a reason to limit the duration of a negotiation (“my daughter’s birthday,” “I have a hearing,” “I have to catch a plane”). But what if an attorney does state a reason, especially one that is false? It seems unlikely that this type of statement would be deemed material for purposes of ABA Formal Opinion 06-439, even if it is a knowingly false statement of fact. Thus, in most instances, use of the “limited time” tactic would not be deemed unethical by the opinion.

However, the California Attorney Guidelines specifically identify this tactic as unacceptable. Each advocate must make his or her own choice whether to comply.

**Poor me.** Some negotiators act like they have no background or training in negotiation and ask the other side for help. They seek sympathy and hope their adversary will be more reasonable than he or she intended. This tactic can be especially effective when the adversary is younger and apparently less experienced than the negotiator seeking assistance. The bluff here is the misrepresentation regarding the negotiator’s actual level of experience. However, even if this bluff constitutes a misstatement of fact (assuming one’s experience is a fact), it does not appear to be material and is the type of tactic one expects to find in negotiation.

Advocates often ask mediators to recommend their next offer. Sometimes they use this tactic to lessen pressure on themselves and to learn about the other side’s position. The mediator can never be sure whether the advocate is bluffing about his or her need for the mediator’s opinion. But the “poor me” tactic most likely does not cross the ethical line.

**Straw man.** This tactic involves an attorney demanding an agreement on Issue 1, which the attorney’s adversary cares about the most. The attorney then creates a deadlock but “reluctantly” concedes Issue 1 to gain agreement on Issue 2—the one the attorney cares about most—and maybe Issues 3 and 4 as well.

The “straw man” tactic can be effective, as the following example, loosely based on an actual mediation, demonstrates. The plaintiffs in a shareholder derivative suit claimed that the defendant, the corporate chairman and majority shareholder, siphoned $3 million from the corporation by creating shell subsidiaries that paid director fees to the defendant. The plaintiffs concluded that they most wanted the defendant to relinquish his shares and resign all his positions. They wanted this result more than they wanted money damages, which the corporation could easily obtain.

But the plaintiffs started their negotiation by asking for a large amount of money—and reasonably so given the real threat of punitive damages. Only when the parties deadlocked over money did the plaintiffs raise a buyout option. The defendant, faced with paying money or relinquishing his shares, left the corporation.

This tactic raises no legal or ethical issues. The California Attorney Guidelines might consider this tactic “abusive” or one that takes “unfair advantage” of a “superior bargaining position.” Again, given the voluntary nature of the guidelines, these determinations are ones that each advocate must make.

**Use of power.** Parties may not only threaten to use their power but also sometimes actually use it. Many risk management strategies suggest that a show of toughness produces a higher settlement rate but at lower amounts. Parties should proceed with caution, because a threat is more dangerous than its execution. The threat creates doubt and, hence, concessions—but once implemented, the attorney wielding the threat has limited the choices of his or her adversary, making it easier for the adversary to respond.

For example, in an unfair competition case, the defendant may threaten to change product features that the plaintiff claims the defendant stole from the plaintiff. The defendant would then have a lawful product selling for less than the plaintiff’s. In this situation, the plaintiff usually will settle rather than risk the threat’s execution and receive nothing. This tactic may possibly run afoul of the California Attorney Guidelines but raises no other legal or ethical issues.

California law protects negotiation advo-
icates from tort liability for all types of fraudulent, misleading, and even perjurious statements made while negotiating a settlement in pending or anticipated litigation. Outside the litigation context, however, California law does not protect negotiation advocates from liability for their statements. Most other states will impose liability on advocates for their fraudulent statements without distinguishing between statements made in a litigation or nonlitigation setting.

The ABA Model Rules, as analyzed in formal opinions, conclude that negotiation advocates have the duty not to make “false statements of material fact.” Puffing, posturing, and misleading the other side on such matters as a party’s settlement intentions or estimates of value do not fall within this prescription.

As an ethical guide, the ABA formulation is a good one for negotiators to follow. But for California attorneys whose behavior falls outside the ABA rule, there likely will be little consequence.

1 In poker, a player deprived of knowledge of his or her opponent’s hand relies on behavior for information and is thus susceptible to a well-played bluff. By contrast, in chess, both players have full knowledge of the board and the placement of the pieces. Chess players calculate the future consequences of their moves, but they cannot bluff.


3 There may be one possible exception involving Insurance Code §11580. See text, infra.


9 Hagberg, 32 Cal. 4th 350. The case focused on Civil Code §47(b) generally, not the litigation privilege of §47(b)(2) specifically.

10 Id. at 360.

11 Id. at 361. The court further explained:

We have noted the application of the privilege to communications with “some relation to a proceeding that is…under serious considera-
tion;” to “potential court actions;” and to “preliminary conversations and interviews related to contemplated action,” and we also have determined that the privilege applies to communications made prior to the filing of a complaint, by a person “meeting and discussing” with potential parties the “merits of the proposed…lawsuit.”

Id. (citing Rubin v. Green, 4 Cal. 4th 1187, 1194 (1993)).


13 Id. at 211 (citing Kibas v. Clark, 38 Cal. 3d 355, 364 (1985)).


15 Id. at 78.

16 INS. CODE §11580(b)(2).


18 Id. at 72-74.

19 Id. at 81.

20 The Shafer court emphasized the contractual rights of the claimants third-party beneficiaries of the policy under Insurance Code §11580(b)(2). Since the litigation privilege protects only against subsequent tort recovery, contractual recovery remains available. That would explain why the defendant insurance carrier had potential liability. But this analysis does not explain why the law firm would have potential liability for fraud, which the court held it did, even as the carrier’s agent.

21 EVID. CODE §1119(a).


24 Id. at 422.

25 Fair, 40 Cal. 4th 189, 194 (fully executed “term sheet” ruled inadmissible under Evidence Code §1119(b) because statement that any disputes would be subject to arbitration did not make the term sheet enforceable under Evidence Code §1123(b)).

26 Cicone v. URS Corp., 183 Cal. App. 3d 194, 201-02 (1986) (attorney whose client fraudulently denied oral modification of indemnity provision in business acquisition agreement held subject to liability); see also Goodman v. Kennedy, 18 Cal. 3d 335, 346 (1976); and Fawcett v. Sanducci, 85 Cal. App. 4th 382 (2000) (attorney with a conflict of interest who favored one set of clients over another was subject to suit for intentionally misleading his injured clients).


28 RESTATEMENT (THIRD ) OF THE LAW GOVERNING LAWYERS §98, cmt. g, at 61.

29 Id. at cmt. b, at 59.

30 Id. at §56, cmt. f, at 418.

31 CAL. RULES OF PROF’L CONDUCT R. 5-100(A); “A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.” Such statements may well constitute extortion as well. See, e.g., Flatley v. Mauro, 39 Cal. 4th 299 (2006). In addition, Rule 5-200 states, “In presenting a matter to a tribunal, a member…(B) Shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law….” This rule, akin to Model Rule 3.3 of the American Bar Association’s Model Rules of Professional Conduct, seems to encompass misleading statements to judges who act as settlement officers in voluntary and manda-

32 California Attorney Guidelines of Civility and Professionalism, at 3 (adopted by the State Bar Board of Governors on July 20, 2007) (“These voluntary guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct….”).

33 Id. at 13.


36 See note 34, supra.

37 Id. at 13.

38 Id. at 1.

39 Id. at 1.

40 Id. at 1.

41 Id.

42 Id. at n.3.

43 Id. at 6.

44 Id. at n.18.

45 ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-370 (A lawyer may not lie or misrepresent these facts to the judge under Model Rules 3.3, 4.1, and 8.4(c)). Formal Op. 06-439 concludes it would be improper for a judge to “insist” on these disclosures, and a lawyer should simply decline to answer.


48 See note 34, supra, at 5-6.


53 In re Warner, 851 So. 2d 1029, 1031 (La. 2003); Kentucky Bar Ass’n v. Geisler, 938 S.W. 2d 578, 579-80 (1997); Toledo Bar Ass’n v. Fell, 364 N.E. 2d 872, 874 (1977).

54 See note 34, supra, at 8.

55 Id.


57 See note 34, supra, at 1.


59 Materiality issues are raised if the plaintiff states that the settlement was in the “low” seven figures, when in fact the settlement was in the high six figures—and defense counsel agrees to settle in the high six figures.

60 See note 39, supra.


63 Id. at 3.
WHEN CONFRONTED with a purported class action complaint brought in California state court, defendants’ counsel must initially assess the substantive legal sufficiency of the claim as well as the potential for class certification. State courts have wide latitude under the California Rules of Court and local rules in managing class actions, and although the ordinary course requires parties to address class certification issues prior to any ruling on the merits, in some situations the case may appear ripe for an early attack on the merits. The California Supreme Court’s recent decision in *Fireside Bank v. Superior Court (Gonzalez)* may cause defense counsel to reappraise this tactic. Under the “one-way” intervention rule in California, plaintiffs are prohibited from seeking merit-based rulings in different courts prior to class certification (i.e., “pecking a defendant to death”) in search of a favorable forum to bring a class action. While the supreme court discussed (and ultimately restricted) a trial court’s ability to depart from the preferred practice of resolving class issues (i.e., class certification, proper notice, or decertification) prior to entering a dispositive order on the merits of the case, the court also set forth the warning that a defendant could waive the benefit of this protection if it seeks a merit-based ruling on its own or fails to object to a plaintiff’s effort to seek a ruling on the merits.

While *Fireside Bank* clarifies the rule for one-way intervention, it has not closed the door on all merits-based rulings prior to certification. Indeed, the threshold question for permitting precertification merits-based rulings—whether “substantial justification” exists—will likely be the battleground in cases in which plaintiffs contend that injunctive relief is necessary.

Before class certification, the only party that is bound by any substantive rulings is the named plaintiff. If a named plaintiff seeks and obtains a determination on the substantive merits prior to a ruling on class certification, the defendant may subject itself to a dynamic
described as one-way intervention. After a ruling favoring the plaintiff, other potential class members intervene in the action. If the court issues an unfavorable ruling prior to one on class certification, an unnamed class member may seek a different forum for a better result.2 The prospect of one-way intervention led to a heated debate because many found it unfair to allow a member to benefit from a class judgment after a favorable decision but avoid the binding effect of an unfavorable judgment because of lack of notice.

The concept of one-way intervention originated in California in the two *Home Savings* cases—*Home Savings & Loan Association v. Superior Court (Deutsch)* in 1974 (Home Savings I)3 and *Home Savings & Loan Association v. Superior Court (Deutsch)* in 1976 (Home Savings II).4 The *Home Savings* cases prevented courts from making substantive rulings in a case until after resolution of class issues.5 Both cases sparked the “prompt and early” class certification determination to avoid potential injury to a defendant’s legal posture following a decision on the merits but subsequent to a class certification ruling.6 In addition, local rules (such as Local Rule 23-1 of the Central District) require a plaintiff to file a motion for class certification within 90 days of service of the complaint, unless the court orders otherwise.

The California Supreme Court granted review in *Fireside Bank*7 to “address the ongoing validity, scope, and application of the rule against one-way intervention,”8 which the court explained:

As originally adopted, the class action device included no rules governing when to resolve merits and class issues....One resulting potential injustice was the possibility for one-way intervention, a consequence of “actions for damages in which a decision for or against one member of the class did not inevitably entail the same result for all. One party could style the case a ‘class action,’ but the missing parties would not be bound. A victory by the plaintiff would be followed by an opportunity for other members of the class to intervene and claim the spoils; a loss by the plaintiff would not bind other members of the class. (It would not be in their interest to intervene in a lost cause, and they could not be bound by a judgment to which they were not parties....) So the defendant could win only against the named plaintiff and might face additional suits by other members of the class, but it could lose against all members of the class. This came to be known as ‘one-way intervention,’ which had few supporters....” One-way intervention left a defendant open to “being pecked to death by ducks. One plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success. This sort of sequence, too, would waste resources; it also could make the minority (and therefore presumptively inaccurate) result the binding one.”9

Before the *Home Savings* cases, there was no incentive for potential class members to opt out of the class once they became privy to a favorable ruling on their behalf. In contrast, if the named plaintiff lost a motion on a critical merits issue early on, potential class members would be less inclined to join the class and could choose to initiate their own action against a defendant. “Such a consequence is prejudicial to the defendant in that, while an adverse ruling on the merits would bind the defendant under collateral estoppel principles, the defendant would not necessarily gain a reciprocal benefit if he prevailed, since the ruling in his favor would not be binding on class members who had no notice of the proceedings.”10 The rule against one-way intervention provided a means for defendants to reasonably assess and/or limit their liability in a class action suit.

**Changed Circumstances**

In *Green v. Obledo* in 1981, the California Supreme Court ironed out the validity and scope of the rule against one-way intervention in a private class action.11 The court confirmed that “procedural class-action issues—including the composition of the class—must ordinarily be resolved before a decision on the merits is reached.”12 The court also moved to extend the rule to protect plaintiffs from a belated motion for decertification by a defendant following an unfavorable merits ruling.13 Most notably, the court created an exception to the one-way intervention rule to permit the issuance of postmerit certification or decertification when there is a clear showing of “changed circumstances.”14 This notion of the trial courts’ flexibility to circumvent the one-way intervention rule pursuant to changed circumstances opened the door to a difference of opinion in the lower courts and led to the ruling in *Fireside Bank*.

In that case, Sandra Gonzalez purchased a used van under a conditional sales contract that obligated her to make monthly payments to Fireside Bank.15 The bank eventually repossessed the van when payments became overdue and sent a notice for immediate payment to Gonzalez with an itemized list of the outstanding debt and applicable credits. The notice, however, overstated the amount owed to Fireside Bank, the result of a computer error that ultimately affected close to 3,000 other borrowers.16

Fireside Bank filed a complaint against Gonzalez to recover its actual losses, but Gonzalez answered promptly and asserted a slew of affirmative defenses that potentially barred Fireside Bank’s recovery for failure to comply with multiple consumer protection statutes and unfair competition laws. Gonzalez then filed a motion for judgment on the pleadings on her cross-complaint.17 *Fireside Bank* opposed the motion on the merits and procedurally, because Gonzalez’s counsel insinuated they might file a class action suit. After Gonzalez formally amended her complaint to add a class claim, Fireside Bank objected vehemently to a potential ruling on the motion until certification issues were resolved. At a subsequent hearing on the motion and class certification issues, the trial court acknowledged Fireside Bank’s objection and Gonzalez’s counsel’s concurrence that the trial court should table the motion until the class issues were decided and notice requirements met.18 The trial court went so far as to state on the record that it was “not going to rule” on the motion for judgment on the pleadings “until I decide the issue of certification.”19 Nevertheless, the trial court rendered its ruling on the substantive merits, (granting Gonzalez’s motion for judgment on the pleadings against Fireside Bank’s complaint) concurrent with its decision to grant class certification.20

The California Court of Appeal denied Fireside Bank’s request for writ relief,21 relying heavily on the exception to the one-way intervention rule adopted in *Green*.22 The supreme court summarized the court of appeal’s conclusions from other cases as follows: “(1) any support for a rule against one-way intervention was tenuous at best, and the trial court retained broad discretion to issue merits rulings before deciding class issues; (2) even if such rule existed, it did not apply to rulings on a class defendant’s claims against the class representative; and (3) in any event, Fireside Bank had not demonstrated that it was prejudiced by the trial court’s rulings.”23

Thus, the supreme court set forth three rules governing the orderly conduct of putative class action cases. First, a defendant must actively and timely object to any court ruling requesting a resolution of the merits before class certification to preserve its protection against one-way intervention. The supreme court reiterated its previous holding that a defendant assumes the risk of one-way intervention if it fails to object to a premature ruling on the merits.24 In *Civil Service Employees Insurance v. Superior Court (Slichting)*, the California Supreme Court found the rule against one-way intervention inapplicable on appeal, because the defendant had failed to
The supreme court indicated that a defendant should always raise its objection to a ruling on the merits before class certification and notice issues, absent class members had been notified of the action. The supreme court did, however, offer one example that would likely merit a deviation from the rule against one-way intervention. In Gonzalez v. Fireside Bank, the court ruled that a plaintiff should seek certification before moving for any resolution of the merits. If a plaintiff seeks resolution of the merits before certification and in the absence of a defense waiver, he or she must demonstrate changed circumstances or other good cause justifying the belated motion. If a defendant initiates a resolution of the merits before certification, it may have waived its right to object to one-way intervention.

Second, the Fireside Bank court ruled that a plaintiff should seek certification before moving for any resolution of the merits. If a plaintiff seeks resolution of the merits before certification and in the absence of a defense waiver, he or she must demonstrate changed circumstances or other good cause justifying the belated motion. If a defendant initiates a resolution of the merits before certification, it may have waived its right to object to one-way intervention.

Third, in the absence of a defense waiver, it is an abuse of discretion for a trial court to resolve the merits in a putative class action before class certification and notice issues, absent a finding of compelling justification. The court narrowed the Green exception by allowing deviation from the rule against one-way intervention for compelling justifications only. Still, reluctant to define “compelling justifications,” the court once again left it up to the trial courts to “retain sufficient discretion to avoid inequitable outcomes in a given case.” The court did, however, offer one example that would likely merit a departure from the rule: “[I]f a defendant intentionally withholding information on class size timely sought by the plaintiff, it risks the belated revelation of information establishing numerosity constituting changed circumstances that would support a late motion for class certification.” With the adoption of the new and narrower parameters in place, the court provided the rule against one-way intervention with some teeth. The supreme court deemed the scope of the rule would most often encompass motions that may affect the claims of the class as a whole, such as motions to interpret statutory language, motions to determine liability, or motions to determine the availability of certain types of relief. The rule’s ultimate applicability will rest on whether the motion forces the lower court to determine a princi-

Potential Effect

The court’s decision in Fireside Bank affirmed the rule against one-way intervention but in many ways broadened its effect. Fireside Bank not only applied the rule against one-way intervention claims brought by plaintiff but also expanded the rule to apply to any claims between the parties (e.g., a defendant’s cross-claims against the class representative) that could affect the merits to create a risk of one-way intervention. The effect, if any, that Fireside Bank will have on “short fuse” cases is unclear. For instance, plaintiffs sometimes seek a temporary restraining order and/or a preliminary injunction to enjoin a merger or other corporate transactions by alleging state law breaches of fiduciary duty. Because of the short time frame between when the lawsuit is filed and the closing of the transaction at issue, the TRO and preliminary injunction are often heard on an expedited basis. Therefore, class certification issues are often never even addressed, because the case will rest on the determination of the preliminary injunction hearing. If a defendant invokes a Fireside Bank objection to a plaintiff’s attempt to schedule a preliminary injunction hearing, the burden shifts to the plaintiff to make a showing that he or she can satisfy Fireside Bank’s “compelling justification” requirement for an early merits determination. This requirement may force a plaintiff to provide a preview of the basis for his or her preliminary injunction motion prior to the court setting a hearing and would remove a plaintiff’s leverage to threaten a preliminary injunction motion without a legitimate legal basis. Another area Fireside Bank leaves unaddressed is its applicability in cases that could have significant public health or safety consequences. For example, if a potential class plaintiff seeks to enjoin a pet food manufacturer from selling a new product, he or she could run the risk of having a request for a TRO denied because it would precipitate a ruling on a substantive issue in the case (the
likelihood of success given the individual circumstances at issue in the case). Once again, the plaintiff, faced with an objection, would need to satisfy the "compelling justification" requirement.

From a defendant's perspective, the danger of waiving the right for a merits-based determination by bringing an affirmative dispositive motion, whether by demurrer or motion for summary judgment, should not deter such a practice in every case. The limited danger of an implied waiver of objections notwithstanding, challenging the legal sufficiency of a deficiently pled complaint is not only an effective tactic to dispose of unsound theories at the outset (before entering into expensive class discovery), the downside of such a tactic is often minimal. If a demurrer is denied, then the case is merely at the same stage it would have been had the party answered. Moreover, challenging the claims of the named plaintiffs on a motion for summary judgment can leave the class headless of the named plaintiffs on a motion for summary judgment. In the federal courts, this problem was provisionally resolved by amending Rule 23 of the Federal Rules of Civil Procedure to prohibit one-way intervention by requiring that class action issues be resolved "as soon as practicable after the commencement of an action brought as a class action." See Fed. Rules Civ. Proc. R. 23, Advisory Comm. note on 1966 amendments.

Fireside Bank is an important decision in that it reinforced the efficacy of the rule against one-way intervention and disabused any notion that trial courts have an unfettered ability to sidestep the rule to determine the proper order of their proceedings. In addition, the court broadened the reach of the rule to promote further the rationale and protections discussed in its previous ruling.

1. Fireside Bank v. Superior Court (Gonzalez), 40 Cal. 4th 1069, 56 Cal. Rptr. 3d 861 (2007).
5. Id.
7. Fireside Bank v. Superior Court (Gonzalez), 40 Cal. 4th 1069, 56 Cal. Rptr. 3d 861 (2007).
8. Id. at 1077.
9. Id. at 1078 (citations omitted).
12. Id. at 1075.
13. Id. at 1075-76.
14. Fireside Bank, 40 Cal. 4th 1081-82 [quoting Green, 29 Cal. 3d at 148] ("We also decline[d] to fashion an iron-clad standard removing all jurisdiction from a trial court to decertify a class or part thereof after such a decision on the merits [to provide trial courts] enough flexibility to justify manage the class action.").
15. Id. at 1075.
16. Id. at 1075-76.
17. Id. at 1076.
18. Id.
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ing, manuals, safety, security, injury, operating standards, and P&L damages. Former VP/Partner IHOP, director to USA chains, author, arbitrator, and expert witness.

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years as a Human Resources Compliance Consultant in California. Specializations include sexual harassment, 
ADA/disability discrimination, other Title VII and FEHA dis-
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safety, and wrongful termination. Courtroom testimony and 
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soundness, for comparison to prevailing practices, and for 
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plaints and effectiveness of employer investigations. Assist 
counsel via preliminary case analysis, discovery strategy, ex-
amination of documents, and expert testimony.

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See display ad on page 53.

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10061 Riverside Drive, #536, Toluca Lake, CA 91602, (818) 762-7676, fax (818) 762-8003, e-mail: yanow@equilaw.com. Web site: www.equilaw.com. Contact Julie B Yanow, principal. Over two decades of employment and labor law experience. EquiLaw assists clients with workplace investigations of harassment, discrimination, retaliation/other misconduct, workplace training in harassment/discrimination prevention, HR practices, management skills, and executive coaching. EquiLaw also offers expert consulting/testimony regarding the prevention, investigation, elimination of unlawful workplace harassment, discrimination, retaliation, wrongful termination, and management issues. See display ad on page 65.

HAIGHT CONSULTING

1726 Palisades Drive, Pacific Palisades, CA 90272, (310) 454-2988, fax (310) 454-4516. Contact Marcia Haight, SPHR. Human resources expert knowledgeable in both federal and California law. Twenty-five years’ corporate human resources management experience plus over 18 years as a Human Resources Compliance Consultant in California. Specializations include sexual harassment, ADA/disability discrimination, other Title VII and FEHA discrimination and harassment, retaliation, FMLA/CFRA, safety, and wrongful termination. Courtroom testimony and deposition experience. Retained 60 percent by defense, 40 percent by plaintiff. Audit employer’s actions in preventing and resolving discrimination, harassment, and retaliation issues. Assess human resources policies and practices for soundness, for comparison to prevailing practices, and for compliance. Evaluate employer responsiveness to complaints and effectiveness of employer investigations. Assist counsel via preliminary case analysis, discovery strategy, examination of documents, and expert testimony.

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Los Angeles office: 609 Deep Valley Drive, Suite 200, Rolling Hills Estates, CA 90274; Newport Beach office: 620 Newport Center Drive, Suite 1100, Newport Beach, CA 92660, (310) 378-7172, fax (310) 541-9308, e-mail: dmrodd@cox.net. Web site: www.psych-expert.com. Contact Nina T. Rodd, PhD. Comprehensive psychological/psychodiagnostic testing and evaluation, medical and records review, expert witness testimony, and consulting.

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9777 Wilshire Boulevard. Suite 805, Beverly Hills, CA 90212, (310) 278-6080, fax (310) 278-4855, e-mail: ehk@taxdisputes.com. Web site: www.taxdisputes.com. Contact Elliott H. Kajan. The firm’s practice is devoted to representation of taxpayers before the Internal Revenue Service, Franchise Tax Board, State Board of Equalization, and California Employment Development Department, involving tax audits, administration appeals proceedings, tax collection matters, complex tax litigation, and criminal tax investigations and trials. The firm also represents and advises accountants and attorneys regarding tax penalties and professional responsibility matters.
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NEED AN EXPERT WITNESS, legal consultant, arbitrator, mediator, private judge, attorney who out sources, 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.

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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 $675,000. Price negotiable. Call (623) 215-7336 or e-mail resv460@aol.com.

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- ONTARIO HEALTH SERVICES
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  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

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THE LOS ANGELES COUNTY BAR FOUNDATION’S 2006-2007 FUND DRIVE raised approximately $337,000 from corporations, foundations, individuals, law firms, and others. Direct contributions from law firms totaled $531,500; individuals contributed $106,493; and corporations, foundations, and others contributed $24,001. In addition to these direct contributions, approximately $75,000 was contributed to the Foundation by individuals, corporations, and law firms by means of the Association’s annual dues statement voluntary contribution. The Foundation wishes to express sincere thanks to all who contributed during the 2006-2007 campaign. As part of the procedures required in connection with its annual audit, the Foundation hereby lists all individuals who made contributions of $200 or more, and all law firms, corporations, foundations, and other organizations that contributed $1,000 or more during the period beginning July 1, 2006, and ending June 30, 2007. If you are not listed below, and you made a contribution to the Foundation fitting any of the above criteria, please contact the Foundation’s independent certified public accountants, Green, Hasson & Janks LLP, by calling Tom Barry directly at (310) 873-1647. (Note: The Foundation records gifts made by check on the date of receipt, not the date written on the check.) The Foundation regrets that space limitations prevent the listing of the names of all contributors.

INDIVIDUAL CONTRIBUTIONS

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William E. Thomson
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John J. Quinn

CONTRIBUTIONS required in connection with its annual audit, the Foundation hereby lists to the Foundation by individuals, corporations, and law firms by means corporations, foundations, and others contributed $24,001. In addition of receipt, not the date written on the check.) 1647. (Note: The Foundation records gifts made by check on the date contact the Foundation’s independent certified public accountants, participation in various pledge programs (as of 6/30/07) reflects a firm commitment to the Foundation’s goals: HONOR ROLL
Participants have contributed, or pledged to contribute, the amounts shown for each category in annual minimum installments of at least $5,000. (List includes participants as of 6/30/07.)

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The Foundation would also like to give special recognition to the following individuals whose participation in various pledge programs reflects a firm commitment to the Foundation’s goals:
Fundraising for the current fiscal year (7/1/2007-6/30/2008) is now underway. The Foundation makes grants to law-related projects serving Los Angeles County. Visit the LACBF Web page at www.lacba.org/foundation to learn more about the Foundation and to see a list of its 2007 grant recipients. You may also contact the Foundation’s administrator, Linda Stude, at (213) 896-6409 or e-mail her at lstude@lacba.org. To lend your support, send a tax-deductible contribution to: Los Angeles County Bar Foundation, P.O. Box 52020, Los Angeles, CA 90055. Donations may also be made on-line at www.lacba.org/foundation by clicking on the DONATE NOW button.

Los Angeles Lawyer November 2007 77
### Power Point for Litigators

ON THURSDAY, NOVEMBER 29, the Los Angeles County Bar Association will host a lecture on Power Point. In today’s courtroom, the use of technology as part of a trial presentation is essential. It is important for attorneys to understand the tools available to them, and Microsoft Office 2003’s Power Point is one of the most useful. Russell Jackman will teach attorneys how to get the most out of Power Point by showing how it can be used to organize a case visually. Attorneys will also learn about and discuss strategies that work best in litigation. Attorneys are urged to bring along their laptops so that they can follow along with some of the skills shown during the session. Microsoft Office Power Point 2003 required. Power access will be given on a first-come, first-served basis.

Topics will include: slides, premade slides, and blank slides; text boxes, fill, text effects, shadow and 3-D effects, and bullets and numbering; pictures, borders, and labeling; auto shapes and callouts, line drawing and edit points; ordering, adding, and deleting slides; animation and video or audio; and saving and exporting files. The lecture will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Reduced rate parking is available for $10 with LACBA validation. On-site registration begins at 5:30 P.M., with the program continuing from 6 to 9:45 P.M. The registration code number is 009743. The prices below include the meal.

<table>
<thead>
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<th></th>
<th>CLE+Plus with meal</th>
<th>LACBA members</th>
<th>All others</th>
<th>Litigation, Barristers, and Small Firm and Sole Practitioner Section members</th>
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<td>$175</td>
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3.5 hours of CLE credit

### Commanding Presence

ON FRIDAY, NOVEMBER 30, the Los Angeles County Bar Association will host a presentation on establishing a commanding presence. In this one-day seminar, speaker John Plank will show how to achieve a substantial and permanent improvement in confidence and speaking ability. Participants will improve each element of their communication skills, from strategy and text preparation to voice quality, body language, establishing rapport, and speaking under pressure. Attorneys will learn how to speak with more confidence and authority in business and social environments; quickly prepare memorable, persuasive text; deliver concise and eloquently to questions and inquiries in meetings, on the telephone, and in presentations; establish rapport with different personality types; persuade and influence with integrity; develop your own individual and natural speaking style; manage personal stress; and communicate effectively under pressure. The presentation will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard parking costs $10 with LACBA validation. On-site registration begins at 8:30 A.M., with the program continuing from 9 A.M. to 5 P.M., with one hour for lunch. The registration code number is 009813. The prices below include the meal.

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6.5 hours of CLE credit

### Law in the Muslim American Community

ON WEDNESDAY, NOVEMBER 14, the Los Angeles County Bar Association will host a lecture on Law in the Muslim American Community. The course will cover the American Muslim community in the context of legal history and comparative analysis to similarities of the U.S. history of religion and law. Attention is given to legal cases with the American Muslim community and to legal cases with the American Muslim community in the context of witnesses, victims, dissolution cases, Civil Rights cases, hate crime, and other areas. Sharia law is historically presented with both substantive and procedural overviews, with an overview and hypothetical case study of crowd control issues in the context of legal public demonstrations, and a deeper look into the logical fallacies of Islamic extremism, the use of formal logic to create the terrorist mind, and case studies of interrogation techniques to counter and obtain crucial investigative information. The course will take place at the LACBA Conference Center, 281 South Figueroa Street, Los Angeles. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration, meal, and reception will begin at 8 A.M., with the program continuing from 8:30 A.M. to 12:45 P.M. The registration code number is 009780. The prices below include the meal.

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<th>CLE+Plus members</th>
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4 hours of CLE credit

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The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at [http://calendar.lacba.org/](http://calendar.lacba.org/). For a full listing of this month’s Association programs, please consult the [County Bar Update](http://calendar.lacba.org/).
The Dilemma Posed by an Opposing Party with Diminished Capacity

Most litigators have dealt with situations in which the opposing attorney is—there’s no other way to put it—a jerk, who seems to be acting solely to promote his or her own interests rather than those of the client. These situations often require the parties themselves to find a way to deal with each other directly. Such cases come with the territory, and experienced litigators have learned how to address the often-competing interests that diverse personalities and difficult opposing counsel bring to legal disputes.

But what can you do when the client of the unprofessional litigator appears to lack the capacity to understand the nature of the proceedings in which he or she is involved, and the litigator seems to be taking advantage of the situation? What happens, for example, if during a deposition, the plaintiff testifies that he or she is unaware that a lawsuit was filed on his or her behalf? Put another way, what obligations, if any, do you have if the opposing party seems obviously confused? How can you raise an opposing party’s lack of mental capacity with the court? Will raising the issue be improper, since it could adversely affect your own client’s interests? Is it appropriate to bring the information to the attention of the State Bar for the purpose of requesting discipline against the opposing party’s attorney?

Unfortunately, there are no rules and regulations that provide any guidance in such situations. As an initial matter, one may be tempted to look only at the duty that we owe to promote and advance zealously our own client’s interests and thereby take advantage of the opposing party’s inability to understand the proceedings. As tempting as this “solution” might appear, we also have a competing mandate, specified by statute, to “maintain the respect due to the courts of justice and judicial officers.” There can simply be no judicious outcome if one of the parties lacks the capacity to understand the proceedings, and his or her attorney refuses to provide the required clarity—for personal gain or otherwise.

When a party clearly lacks an understanding of the proceedings in which he or she is involved, it is ultimately the party’s attorney’s responsibility to rectify the situation. However, if the attorney is furthering interests that are not necessarily those of the client, the court needs to be involved, and the opposing attorney may be the only person able to bring the issue to the court’s attention.

While there are no guidelines for how to raise this issue, perhaps the most expeditious procedure is a formal motion for an order appointing a guardian or conservator for the opposing party. This motion will certainly not earn you the gratitude of opposing counsel, so it should not be made lightly. Indeed, until there is legislative guidance on how to handle this delicate situation, you should approach this motion with the same import and burden as a motion for summary judgment, that is, supported by evidence akin to “undisputed material facts” that demonstrate the opposing party’s incapacity. Deposition transcripts are a bare minimum, with videotaped testimony that shows a party’s confusion and incapacity more convincing. It is unlikely that in this situation opposing counsel would voluntarily present the client to the court, so the motion should include a request that the party be present for examination by the court.

Depending on the stage of a case, it may be appropriate to raise the issue of competence in a case management conference statement to gauge the court’s interest in hearing the issue. The court may take the initiative to determine if a guardian or conservator is needed, thus freeing you from the task of preparing a detailed motion, but is unlikely to do so until evidence of incompetence exists. Again, the supporting evidence should be readily available and presented to the court. Otherwise, you may do a grave disservice to the interests of your client by antagonizing your opponent and the judge. For those occasions in which a cordial relationship exists between you and the opposing attorney (not likely in this scenario), you may try to raise the issue with opposing counsel to inquire how the attorney plans to deal with the client’s obvious lack of competence. You may learn that a petition to appoint a guardian or conservator is already being prepared.

In the absence of legislative direction, you may want to report the situation to the State Bar, since an attorney who blatantly puts his or her interests ahead of those of the client, especially a client who lacks the capacity to direct the litigation, is subject to discipline. However, be aware that the State Bar is accustomed to attorneys reporting each other in the midst of contentious litigation, so you will have the burden of convincing the skeptical agency that the dispute is not merely a personal matter but involves the integrity of the adversarial process. Be prepared to offer credible, convincing evidence of improper conduct by the attorney.

While we hope that situations of client incompetence are rare, California needs to put formal procedures into place that guide how attorneys, opposing counsel, and the court deal with these issues. Without regulatory guidance, attorneys will be left with limited options—and no direction—for how to raise such matters with the court to ensure justice.

1. **Bus. & Prof. Code §6068(b).**
2. **Code Civ. Proc., §372.**
3. **Code Civ. Proc., §373(c).**

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