Peter A. Davidson outlines the increasing role of receiverships in nontraditional settings

Wise Receivers

PLUS

Suspension of Drivers’ Licenses page 10
Requesting a Trial Continuance page 12
Trade Secrets in the Digital Age page 18
Q: What’s the best surfing spot for a California lawyer?

A: California Forms of Pleading and Practice.

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

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

With so much more than just forms, it provides today’s critical analysis from the most authoritative practitioners in their fields. You’ll find checklists, forms, legal background and research guides all integrated into one convenient source. With more updates than the competition, you’ll not only know your facts cold, but get better coverage of new topics.

Also experience the confidence of relying on the California Official Reports, from LexisNexis®, the Official Publisher.
www.lexisnexis.com/carightsolution
THE NEXT GENERATION
of
GREAT LAWYERS
is coming.

They’re smart. They’re talented. They’re coming from University of La Verne College of Law.

As the only ABA-accredited law school in Inland Southern California, the University of La Verne College of Law is recognized as a progressive school, teaching legal theory, advocacy and practical skills necessary for success in public law, private practice and business. With a well-respected, practice-proven faculty and a prominent and supportive alumni network, the College of Law provides a unique environment for its students.

The University of La Verne College of Law serves Inland Southern California as:

- The only ABA-accredited law school in Inland Southern California
- A great source of legal talent for internships and clerkships
- Support for legal professionals seeking to further their professional education
- A local campus where our brightest legal minds can study law on a full- or part-time basis

To find out more, visit us online at http://law.ulv.edu or call (877) 858-4529.

The University of La Verne College of Law is provisionally accredited by the American Bar Association.
The Los Angeles County Bar Association (LACBA) is pleased to announce the selection of Ahern Insurance Brokerage (AIB) as the newly endorsed insurance broker to represent the interests of LACBA members related to securing Professional Liability Insurance.

AIB is one of the largest and most respected independent insurance brokers in the country specializing in Professional Liability Insurance for law firms. With over 15 years experience in this line of coverage, the agency has developed strong market relationships with 25 quality insurance providers and over 1,700 law firm clients. To learn how Ahern Insurance Brokerage can help your firm realize maximum value and protection, please contact W. Brian Ahern at bahern@aherninsurance.com or 858-514-7101.

NEW LACBA PROFESSIONAL LIABILITY PROGRAM

FOR ADDITIONAL INFORMATION PLEASE CALL 1-800-282-9786 TO SPEAK WITH A SPECIALIST
24 Wise Receivers
BY PETER A. DAVIDSON
Receiverships are now being used with increased frequency in criminal and other cases in which they traditionally have not played a role.

31 2007 Ethics Roundup
BY JOHN W. AMBERG AND JON L. REWINSKI
In 2007, issues of conflict of interest, disqualification, client payment, and client files continued to be subjects of concern in legal ethics.

Plus: Earn MCLE legal ethics credit.
MCLE Test No. 168 appears on page 33.

10 Barristers Tips
Consequences of driving on a suspended license
BY ROBERT SONG

12 Practice Tips
Maximizing your chances of gaining a trial continuance
BY JUDGE MICHAEL L. STERN

18 Practice Tips
Protecting trade secrets in a digital workplace
BY EDWARD D. VAISBORT AND SURISA LANGBELL

44 Closing Argument
High crimes and misdemeanors
BY STEPHEN ROHDE

41 Classifieds

42 Index to Advertisers

43 CLE Preview
From beginning to end, I offer my full spectrum of real estate-related services specifically designed to serve the family law and probate/trust practices. Moreover, these no-cost support services are offered without obligation.

**How Can I Help You?**

Real Estate for the Family Home
- references available upon request –
www.mickeykessler.com/familylaw.html

---

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

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

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

**Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.**

---

**Los Angeles Lawyer**

VISIT US ON THE INTERNET AT www.lacba.org/lalawyer
E-MAIL CAN BE SENT TO lalawyer@lacba.org

**EDITORIAL BOARD**

Chair
CHAD C. COOMBS

Articles Coordinator
ANGELA J. DAUG

JEROld ABEL

DANIEL L. ALEXANDER

HONEY KESSLER AMADO

ETHEL W. BENNETT

R. J. COMER

KERRY A. DOLAN

GORDON ENG

ERNESTINE FORREST

STUART R. FRAENKEL

MICHAEL A. GEIBELSON

TED HANDEL

JEFFREY A. HARTWICK

STEFAN HECHT

LAWRENCE J. IMEL

MERIDITH KARASCH

JOHN P. LECROINE

KAREN LUDING

PAUL MARKS

DEAN A. MARTOCCHIA

ELIZABETH MUNISOGLU

RICHARD H. NAKAMURA JR.

DENNIS PEREZ

GARY RASKIN

JACQUELINE M. REAL-SALAS

DAVID SCHINDLER

HEATHER STERN

GRETCHEL D. STOCKDALE

TIMOTHY M. STUART

KENNETH W. SWENSON

CARMELA TAN

BRUCE TEPPER

PATRIC VERRONE

**STAFF**

Publisher and Editor
SAMUEL LIPSMAN

Senior Editor
LAUREN MILICOV

Senior Editor
ERIC HOWARD

Art Director
LES SECHLER

Director of Design and Production
PATRICE HUGHES

Advertising Director
WILMA TRACY NADEAU

Account Executive
MATTY JALLOW BABY

The opinions and positions stated in signed material are those of the authors and not by the fact of publication necessarily those of the Association or its members. All manuscripts are carefully considered by the Editorial Board. Letters to the editor are subject to editing.
At Stonefield Josephson, we see the big picture while never losing sight of the person sitting across the table—you.

Our full-service certified public accounting firm serves public and privately held clients throughout the United States and internationally. We promise our thoughtful attention to your needs—call us for a complimentary meeting to discuss your situation.

Assurance/accounting  Technology
Business consulting  Service firms
Executive search  Startups and emerging companies
Public companies services  Manufacturing/distribution
Tax services  Apparel
Valuation, litigation support  Health care
and forensic services  Retail
Nonprofits and foundations
Financial services

STONEFIELD
JOSEPHSON, Inc.
Certified Public Accountants
Business Advisors
www.sjaccounting.com
866-225-4511 toll free

Los Angeles  Orange County  San Francisco  East Bay  Silicon Valley  Hong Kong

©2008 Stonefield Josephson, Inc.
Photography ©2008 John Livery
Why do we get most of our work from other attorneys?

At Huron law group, referrals matter to us. We do what it takes to win and never, never give up.

We handle business, real estate and entertainment litigation.

Huron Law Group

9454 Wilshire Blvd.
Sixth Floor
Beverly Hills, CA 90212

TEL 310.247.2637
FAX 805.984.7042
email: jtrimarco@aol.com
www.jacktrimarco.com

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

Member Society of Former Special Agents
Federal Bureau of Investigation

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

LOS ANGELES LAWYER is the official publication of THE LOS ANGELES COUNTY BAR ASSOCIATION 265 S. Figueroa St., Suite 300, Los Angeles, CA 90017-1881 Telephone 213.627.2727 / www.lacba.org

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

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

AFFILIATED BAR ASSOCIATIONS
BEVERLY HILLS BAR ASSOCIATION
BLACK WOMEN LAWYERS ASSOCIATION OF LOS ANGELES, INC.
CENTURY CITY BAR ASSOCIATION
CONSUMER ATTORNEYS ASSOCIATION OF LOS ANGELES
CULVER-MARINA BAR ASSOCIATION
EASTERN BAR ASSOCIATION
GLENDALE BAR ASSOCIATION
IRANIAN AMERICAN LAWYERS ASSOCIATION
ITALIAN AMERICAN LAWYERS ASSOCIATION
JAPANESE AMERICAN BAR ASSOCIATION OF GREATER LOS ANGELES
JOHN M. LANGSTON BAR ASSOCIATION
JUVENILE COURTS BAR ASSOCIATION
KOREAN AMERICAN BAR ASSOCIATION OF SOUTHERN CALIFORNIA
LAWYERS' CLUB OF LOS ANGELES COUNTY
LESBIAN AND GAY LAWYERS ASSOCIATION OF LOS ANGELES
LONG BEACH BAR ASSOCIATION
MEXICAN AMERICAN BAR ASSOCIATION
PASADENA BAR ASSOCIATION
SAN FERNANDO VALLEY BAR ASSOCIATION
SAN GABRIEL VALLEY BAR ASSOCIATION
SANTA MONICA BAR ASSOCIATION
SOUTHWESTERN LAWYERS ASSOCIATION OF SOUTHERN CALIFORNIA
SOUTHERN CALIFORNIA CHINESE LAWYERS ASSOCIATION
WHITTIER BAR ASSOCIATION
WOMEN LAWYERS ASSOCIATION OF LOS ANGELES
To All Concerned California Lawyers

Greetings,

Over 30 years ago, the State Bar of California was faced with a legal malpractice insurance crisis of the first magnitude. Carriers were abruptly abandoning the market and their policyholders. Legal malpractice claims were burgeoning. A responsible legal malpractice carrier capable of weathering any storm was desperately needed. Out of this pressing need, Lawyers’ Mutual was born. We created a mutual company where member/policyholders could invest and benefit from the company’s financial stability. Now, nearly 30 years later, LMIC remains committed to its policyholders and the market.

LMIC’s reputation is one of its greatest strengths. Its service and high ethical standards are the cornerstones of that reputation. Our reputation is based on the honesty and integrity that we have demonstrated over a period of three decades. This public viewpoint is due to the employees and producers solving the policyholders’ problems and satisfying their needs. LMIC operates entirely through the people it employs and producers it recognizes. The responsibility for LMIC’s success and longevity rests with those individuals. This group of professionals has contributed to the high ethical standards of LMIC and continues to enhance its reputation in the legal and insurance communities.

We thank our employees, policyholders and producers for their unfailing support and dedication. With this continued support, LMIC enters into its 30th year of business in the legal community with great expectations.

We look forward to another thirty years of unparalleled success. We invite you to visit your newly enhanced website at LMIC.com and see our “new” look for the future.

Sincerely,

Thomas H. Ault
President, CEO
LAWYERS’ MUTUAL INSURANCE COMPANY

For all the right reasons . . . we made history!
qualities can also make e-mails dangerous. We tend to write more casually compared to the memorandums that were once the main mode of lawyer communication. When crafting an e-mail, lawyers should always keep the following cautionary notes in mind—especially when an e-mail is drafted in a hurry.

First, never write an e-mail that you don’t want the whole world to read. We have all seen e-mails forwarded unexpectedly to others whom they were never intended to reach. When I started my career as a bank loan officer, I was taught never to put anything into a file that you would not want introduced in court. While sending an e-mail to a colleague or client may feel like an informal communication, it is possible that the e-mail could find its way into the wrong hands and, in this day of e-discovery, even become evidence in litigation. So never let down your guard.

Second, never write an e-mail when angry. People who are upset or under a lot of stress can write things in an e-mail that they would never write otherwise. If you find yourself angry and eager to fire off an e-mail, take a few minutes to calm down before composing the message—and pause again to reread it before hitting the send key. On the other hand, if you receive an angry e-mail, you may want to skip sending a reply and either call the other person or talk to him or her directly. When you do, I suggest you use a technique I also learned as a loan officer—“hooking the adult.” This involves remaining calm and speaking with the other person as a mature adult instead of reacting to his or her anger and frustration. You will often find that you can get the other person to also act like an adult and resolve the situation.

Third, always be courteous and send an e-mail expressing thanks to someone from whom you sought help, even if the person was not able to provide you with what you were seeking. When we are busy, we can easily forget that typing a simple “thanks” and clicking the send key can make a huge difference. It is very disconcerting to respond to a flowery—or demanding—e-mail request for assistance and then never receive an acknowledgement, especially when a great deal of time and effort was expended in trying to comply with the request. My reaction to the next request is probably the same as yours would be.

These steps can have a significant impact on a firm. I have always been intrigued by the difference in firm cultures. The tone is generally set at the top—that is, by the senior partners of the firm. If they routinely send out harsh e-mails—or fail to put a stop to those who do—they send a message that such behavior is not only acceptable but also should be emulated. Once this type of conduct becomes commonplace, it can be extremely difficult to return to a more civil and productive environment. Senior management should therefore set an example for the rest of the firm and always keep their e-mails professional, signaling that nothing less will be tolerated.

Ultimately, we all want to work in an environment in which we show respect for each other. But since we are all human, we will, on occasion, forget to treat others as we want to be treated. If that happens, we should be prepared to forgive and forget. Sending a friendly e-mail might be a good start.  

---

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.
Want to reach more prospective clients?

Use lawyers.com®
From the expert in legal marketing, Martindale-Hubbell®

The lawyers.com service is a leading resource that helps you attract and land the right consumers and small businesses to increase your firm’s profitability.

- Our visitors are serious about finding legal counsel: 7 out of 10 people searching for a lawyer on lawyers.com plan to contact one they found on the site.*

- Potential clients gain more insight into what you do with new law firm videos, side-by-side comparisons, Martindale-Hubbell® Peer Review Ratings™ and the new Client Review Service.

- You can drive even more potential clients to your profile or Web site with attention-grabbing sponsorship opportunities.

Call 800.526.4902 ext. 5095 for more information, or go to:
www.lawyers.com/walkthrough

Consequences of Driving on a Suspended License

CITATIONS FOR DRIVING ON A SUSPENDED LICENSE account for a large percentage of misdemeanor cases in California. Though they are technically moving violations, they are misdemeanors punishable by up to six months in county jail. They also fall into the category of misdemeanor Vehicle Code violations that are priorable offenses, which means that subsequent violations can carry a mandatory minimum of up to one year in county jail.

All physically able persons who have a social security number and can provide documentation of their true name and birth date can receive a driver’s license. Any person who can also provide proof of liability insurance can drive. It is important to note that the privilege to drive can be suspended, while the driver’s license is not. So, technically, even if the driver has no California driver’s license, that person’s privilege to drive may still be suspended. If the driver does not have a California license, the Department of Motor Vehicles assigns what are known as x-ray numbers to track persons who have lost their privilege to drive. These numbers are so named because the assigned number starts with an “x.”

The most common way to lose the privilege to drive is to fail to appear in court after signing a promise to do so.¹ In most of these cases, a citation is issued and a date given to appear in court or pay a fine. Failing to do either can lead to the suspension. Another common way is to be arrested or be convicted of driving under the influence of alcohol. In the case of an arrest for driving under the influence, if a chemical test shows that the driver has an excessive blood alcohol level (.08 percent or greater),² or if the driver refuses to submit to a chemical test,³ then the DMV will—prior to trial—suspend the privilege to drive. Suspension will also result (or, in many cases, remain in effect) once a driver is convicted of driving under the influence.

If a person is charged with driving under the influence of alcohol, the process of seeing the case to either dismissal or conviction can be a long one. To address that reality, the DMV created the restricted license. Upon an arrest for driving under the influence, the suspect driver will be informed of his or her suspended driving privilege (referred to as an admin per se suspension). The admin per se document also serves as a temporary license, which expires after 30 days. After 30 days, the suspension goes into effect.

A restricted license can be issued to the driver after the 30-day period.⁴ In order to have a restricted license issued, the driver must enroll in and participate in the mandated alcohol program. The driver must also be over the age of 21. The restricted license is valid for up to five months and allows the driver to drive to and from the alcohol program as well as to and from work.

The restricted license is precisely that, however: restricted. It means that the driver’s privilege to drive extends to certain conditions only. Driving outside of these restrictions can lead to the driver’s arrest for a charge of driving on a suspended license. Furthermore, the court may insist on other conditions, such as the installation of an ignition interlock device (IID). Specifically, if a driver is convicted of driving on a suspended license pursuant to Section 14601.2 of the Vehicle Code, the IID is a mandatory condition of probation. For example, Vehicle Code Section 14602.6 allows for a car to be impounded for 30 days for driving on a suspended license without an IID.

In addition to failing to appear on traffic or misdemeanor citations, the DMV may also suspend a driving privilege for too many moving violations. The department assigns points for classes of violations. For example, violations for excessive speed⁵ carry one point. If a driver collects four or more points within a 12-month period, the department may suspend the driving privilege. Persons under the age of 21 may lose their driving privilege for certain violations. A person who is convicted of a vandalism offense can lose his or her license for up to two years.⁶ Also, persons under the age of 21 can lose their license for any alcohol or drug-related conviction.⁷

Diversion pursuant to Penal Code Section 1000 may be available to persons under the age of 21 for certain classes of drug- or alcohol-related offenses. Successful participation in diversion may preserve the driving privilege. Parents who fail to pay child support may also lose their privilege to drive. The DMV may issue the parent a temporary license (which expires no later than 150 days after issuance) if the parent makes a good faith attempt to pay.⁸

Driving is an unavoidable fact of life in California. The volume of suspended driving privilege cases speaks to that. There are real costs to these cases; no one can get automobile insurance without a valid license to drive. And drivers carrying only the mandated liability insurance may be without transportation after getting into an accident with drivers with suspended driving privileges. Driving when a privilege to drive is suspended is a priorable misdemeanor, so the faster a driver can regain his or her driving privilege, the better for the public.

The most common way to lose the privilege to drive is to fail to appear in court after signing a promise to do so.

¹ VEH. CODE §13365.2.
² VEH. CODE §13353.2.
³ VEH. CODE §§13353, 13353.1.
⁴ VEH. CODE §13353.7.
⁵ VEH. CODE §22350.
⁶ VEH. CODE §13202.6.
⁷ VEH. CODE §13202.5.
⁸ FAM. CODE §17520; WELF. & INST. CODE §11350.6.

Robert Song is a deputy district attorney for Los Angeles County.
Not only our name is new.

West Court Reporting Services, formerly LiveNote™ World Service™ is a whole new breed. It combines our high-tech court reporting experience with West’s legacy of excellence. Together we deliver a whole new level of sophistication in deposition services. You still get our best-in-class court reporting services, but now they are backed by the world’s leading provider of legal information.

To schedule a deposition, call 1-800-548-3668 option 1.
SUCCESSFULLY OBTAINING A TRIAL CONTINUANCE requires planning and precision. The granting or denial of an application to continue trial can directly affect counsel’s ability to adequately prepare for trial or resolve a case. A continuance may be the necessary ingredient for victory. A denial may spell disaster.

The typical reasons for seeking trial continuances include the death, illness, or unavailability of counsel, a party or key witness; trial conflicts or recent substitution of counsel; newly revealed evidence or parties; pending mediation or settlement discussions; discovery issues; or simply the admission by counsel that they are just not ready for trial. Depending on the circumstances, some reasons are more impressive and convincing to courts than others.

Requests for continuances of trial tend to come late in the game, often shortly before the pretrial final status conference or the date for the start of trial. Counsel have been known to scurry ex parte into court at the last moment without considering whether or not the court has set out the welcome mat for them. Some attorneys not only fail to appreciate that most trial courts have busy calendars but also behave as if their urgent request for a continuance is a “life or death” matter that should be the court’s highest priority. Such attitudes are a mistake. Depending upon the daily docket and the nature of the request, a judge may treat a trial continuance application as a matter of great moment or as a nonessential distraction. Counsel who understand not only when but also how to present a continuance request will greatly improve their chances of achieving a new trial date.

Counsel should never charge into court without knowing the hearing judge’s practices and procedures. Learning what a particular judge wants to see in a request for a continuance can make all the difference. Each judge has his or her own procedures for ruling on a variety of matters, including requests for trial continuances. Wise counsel are those who know the importance of speaking with court personnel before making a request to determine the judge’s preferences regarding continuances and the best method for seeking one. Court personnel can instruct counsel on the court’s hours of operation, the time when requests for continuances are heard, notice requirements, the supporting evidence that should accompany a request, and particularly how the court views oral applications.

Knowing the Rule

It is surprising how many applications for trial continuances are filed by counsel who appear to be unfamiliar with Rule 3.1332 (Motion or Application for Continuance of Trial) of the California Rules of Court. The latest revision of this rule—which became effective January 1, 2007—enumerates the grounds for continuances as well as the factors to be considered by courts. The rule should be read very carefully before counsel even considers a strategy for filing a continuance request. Citation to the court’s “equitable powers,” old case law, or former incarnations of the rule will not do—particularly given the explicit requirements set forth in the revised rule.

Rule 3.1332(c) cautiously discourages trial continuances:

Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance.

The rule recites seven specific situations that constitute “good cause” for a continuance, including:

- Unavailability of a witness, party, or counsel due to death, illness, or other excusable circumstances.
- Substitution of trial counsel on an affirmative showing in the interests of justice.
- An addition of a party under certain conditions.
- A party’s excused inability to obtain essential discovery despite diligent efforts.
- A “significant, unanticipated change in the status of the case as a result of which the case is not ready for trial.”

Michael L. Stern is a Los Angeles Superior Court judge.
AGENDA

MORNING
Breakfast Session: Marketing Strategies for Lawyers • Opening Remarks by Governor Arnold Schwarzenegger (invited) • Navigating Through the Crisis: Capital Markets & Real Estate • The Silver Lining in the Housing Storm: Planning for Development • New Market Realities of Commercial Finance • Global Warming & Real Estate • The Tightening Office Leasing Market

AFTERNOON
Three Specialized Programming Tracks: Finance, Development, Changing Times • Luncheon Keynote by Joel Kotkin • Restructuring Loans • Building Green: LEED • Dealing with Valuation & Financing in Flux • Default, Workout & Bankruptcy • Contractor & Architect Agreements: AIA Forms • Surviving the Downturn in Retail Development • Exploiting & Surviving the Winds of Change • Investment in Ethnic Communities

CLOSING
“Meet the Speakers” Wine Tasting Reception

NATIONALLY KNOWN SPEAKERS INCLUDE:
Mark Finerman, RBS Greenwich Capital
Eric Garcetti, Los Angeles City Council President
Joel Kotkin, author and real estate commentator
Stan Ross, USC Lusk Center for Real Estate
Arnold Schwarzenegger, California Governor (invited)
Jerry Snyder, J.H. Snyder Company

THANKS TO OUR SUPPORTERS:
AIG SunAmerica Affordable Housing Partners, Inc. • Akin Gump Strauss Hauer & Feld LLP • Allen Matkins Leck Gamble Mallory & Natsis LLP • Brown Winfield Canzoneri Abram Inc. • California Real Estate Journal • Chicago Title Company • Cox, Castle & Nicholson LLP • Cushman & Wakefield of California, Inc. • DLA Piper • First American Title Company • Gibson, Dunn & Crutcher LLP • Goodwin Procter LLP • Greenberg Traurig, LLP • Hill, Farrer & Burrill LLP • Holland & Knight LLP • Hunt Ortmann Palffy Nieves Lubka Darling & Mah, Inc. • Irell & Manella LLP • Kennerly Lamishaw & Rossi LLP • Latham & Watkins, LLP • Legg Mason Real Estate Investors, Inc. • Manatt, Phelps & Phillips, LLP • Morris Polich & Purdy LLP • Morrison & Foerster LLP • Munger, Tolles & Olson LLP • O’Melveny & Myers LLP • Pachulski Stang Ziehl Jones LLP • Pacific Coast Capital Partners, LLC • PaulHastings • Pircher, Nichols & Meeks • Playa Vista • Proskaier Rose LLP • RBS Greenwich Capital • Real Estate Media • R.W. Selby & Company, Inc. • Sidley Austin LLP • Sonnenschein Nath & Rosenthal LLP • Thomas Properties Group, Inc. • Urban Land Institute, Los Angeles (Co-Sponsor) • USC Lusk Center for Real Estate (Co-Sponsor)

This is the one real estate law and business conference you can’t miss.

Earn CLE/DRE/CPE Credits!
Special discount for LACBA Members!

For detailed information on topics, and to register, exhibit or sponsor, please visit our website: http://law.usc.edu/cle/realestate.
These indicia of good cause are tempered by the rule’s reference to several other relevant factors that courts should consider when ruling on a request for a trial continuance:

- The proximity of the trial date.
- Prior continuances.
- The length of the requested continuance.
- Alternative methods for addressing the immediate problem.
- Prejudice to a party or witness.
- The calendars of the trial court or counsel.
- Any stipulations by other parties.
- The interests of justice or conditions for a continuance.
- Other “relevant” facts or circumstances.\(^2\)

To the extent that the reasons stated by counsel requesting a trial continuance do not fall within these general factors and situations, the odds that a court will grant a continuance grow longer and longer. For example, when a request to continue is filed on the eve of trial, a judge’s first thought may be, “Why wasn’t this brought earlier?” If pretrial discovery has slowed almost to a halt and “necessary” responses or depositions are not forthcoming, the court may react by inquiring what counsel was doing during the breakdown of the discovery process. The court may also demand to know why, under the circumstances, counsel had not come forward earlier with the continuance request. Likewise, courts can be unsympathetic to the plight of attorneys who are seeking a trial delay just to file motions for summary judgment or conduct more discovery—unless new, unforeseen, or genuinely surprising revelations have just surfaced.

**Meet and Confer**

The extent to which counsel have seriously met and conferred regarding the advisability of a trial continuance can be a factor that tips the court to favorably consider a request for a trial continuance. Counsel should start the process far enough in advance to ensure the availability of adequate time to evaluate the situation with their opponents. A polite telephone call, fax, or e-mail explaining the necessity of a continuance and the relevant factors under Rule 3.1332 will garner better results than a terse notification from one side to the other that an application for a continuance will be heard the following morning in the trial department.

Counsel seeking a continuance may find that his or her opponent is playing hard to get and avoiding efforts to meet and confer. It is still important for the practitioner seeking to continue the trial to make an extra effort to find opposing counsel and discuss the matter with him or her. Going beyond mere notice is always advantageous. With the outcome of a hearing on a continuance so critical to the ultimate resolution of the case, all parties must be informed and have an adequate opportunity to state their views regarding the continuance. Moreover, an application for a continuance must be accompanied by the notice to counsel of the hearing, and the court most likely will inquire about the positions of any parties not represented at the hearing.

In the meet-and-confer process, counsel should discuss the specific reasons why a continuance is necessary, the objectives to be achieved—such as mechanisms and time lines for settlement discussions, additional discovery, or the taking of expert depositions—and an identified date for a continued trial. Making a proposal for an arbitrary 30- or 60-day continuance is insufficient. Counsel should look closely at their calendars and ensure that there are no attorney or witness conflicts.

The best approach is for all counsel to sign a written stipulation to continue trial and agree to a proposed order. Applications for trial continuances are harder to deny when they arrive with a signed stipulation containing specific reasons for the continuance and a firm continuance date. Indeed, while there are no guarantees, the court may be more easily persuaded to join counsel in ordering a continuance if everyone is on board.

**Drafting the Notice of Motion**

The importance of perfecting the form and contents of a request to continue trial cannot be overemphasized. In fact, seasoned counsel believe that victory or defeat may rest on the court’s initial glance at the notice of motion. Since continuance applications frequently represent unanticipated work for the court, there may be some merit in this contention. Crafting a concise, straightforward notice of motion is essential. Two short paragraphs should be adequate.

First, counsel should set the stage with the standard introductory paragraph that begins any motion. The form remains constant; only the facts change:

Notice is hereby given that on April 1, 2008, at 8:30 A.M., or as soon thereafter as the matter may be heard, in Department 1 of the above-entitled Court, located at 100 Erwin Street, Griswold, California, defendant [Party] will apply ex parte to the Court pursuant to California Rule of Court 3.1332[subsection] to continue the trial, presently scheduled for May 1, 2008, to June 1, 2008, because [briefly state the reason]. Notice of this hearing was served on [Opposing Party’s Counsel] by [Applying Attorney] on March 29, 2008, at 11:00 A.M. See Declaration of [Applying Party’s Counsel] attached hereto at pars. 2-3.

This short but informative opening paragraph accomplishes a lot. For starters, it is conceivable that the court will not have time to read any further. Initial impressions are important and may sway the court’s decision. So counsel should squarely grab the court’s attention with concise and declaratory reasons why a continuance is reasonable and should be granted.

Moreover, counsel can help themselves while assisting the judge in getting to the heart of the matter. When counsel tell the whole story concisely, they aid judges in getting past any reluctance or hesitation. Providing the essentials up front without forcing the court to forage for information in a disorganized or jumbled application increases the chances of the desired result. This includes stating the dates when the trial and the pretrial or final status conference will be rescheduled, the length of time requested for a continued trial, the authority for the continuance, the specific reasons why extraordinary relief is sought, and citation to an applicable Rule 3.1332 subsection.

Counsel should avoid giving the court vague time periods for a continuance, such as a 30- or 60-day request that is not tied to accomplishing specific litigation tasks while trial is continued. If counsel have done their homework by meeting and conferring with opposing attorneys and truly calculated the necessity for a continuance based on real exigencies—such as calendar conflicts, availability of witnesses, or the necessity for more time to complete defined pretrial activities—the time requested for a continuance and the authority under Rule 3.1332 will be like pieces of a puzzle that simply and easily fall into place in a granted request.

The final or “cleanup” paragraph of the notice should support and fortify the reasons for a continuance:

This application is based on this notice, the records and files in this action, the attached memorandum of points and authorities [stating the necessity of a brief continuance], and the attached declaration [and stipulation] of [Applying Party’s Attorney] explaining the reasons for this application.

An informative, straightforward notice will save a lot of effort by the busy judicial officer who will review the application
County Bar Update Goes Electronic in March

LACBA’s official newsletter goes completely electronic this month, as LACBA members receive their copies via e-mail.

- **Do we have your correct e-mail address?**

  All Los Angeles County Bar Association members who have provided their e-mail address will receive the electronic Update. You may unsubscribe at any time by following the directions at the top of the e-mail.

- **Convenient features in the electronic Update include:**

  ✔ Update calendar listings with clickable links to detailed program descriptions and online registration.

  ✔ Article summaries grouped by category that are clickable for more details.

  ✔ Links to current and past issues of Los Angeles Lawyer magazine.

  ✔ Items of interest that can be printed out easily for future reference.

  And you can always view the electronic Update on LACBA’s Web site by visiting www.lacba.org/update where current and past issues will be archived.

To supply or change your e-mail address, LACBA members can update their membership record online. First, register at www.lacba.org/register. Then go to www.lacba.org/myaccount. If you prefer, call LACBA’s Member Service Department at (213) 896-6560.
and increase the likelihood that the request will be granted.

Memorandum of Points and Authorities

Equally important is the memorandum of points and authorities in support of the application, which should not contain anything but the essentials. A brief introductory overview summarizing the factual and procedural background of the case in a few short sentences will advise the court generally about the matter at hand. Filling the memorandum with long and involved factual recitations or background statements, complaints about opposing counsel’s bad conduct or refusals to meet and confer, or statements imploring the court to feel sorry for the frequently self-created plight of procrastinating counsel is usually unproductive.

The memorandum should get right to the point. It should clearly and directly explain the reasons why a continuance of a specific length of time is reasonable under the circumstances. Counsel should inform the court why the request 1) is justified, 2) makes practical sense, 3) is not brought to prejudice, harass, or inconvenience other parties or for dilatory or other strategic reasons, 4) will not cause significant financial hardship, 5) does not run afoul of the Trial Court Delay Reduction Act,3 and 6) comes within the specifications of Rule 3.1332.

Not much more is necessary. Above all, counsel should dispel any notion that the application for a continuance is an attempt to unfairly surprise an opponent.

Practitioners should bear in mind that a motion for a continuance is addressed to the sound discretion of the trial court.4 A refusal to grant a trial continuance that denies a party a fair hearing to present a case on the merits may be reversible error.5 But a trial court’s exercise of discretion will be upheld if it is based on reasoned judgment and complies with the legal principles and policies appropriate to the particular matter at issue.6

So if counsel’s application for a continuance and supporting memorandum emphasize the practical effects of a continuance, coupled with a plea that the extra time sought will ensure a fair hearing for all concerned, a deciding trial judge—ever-cognizant of the court of appeal looking over his or her shoulder—will be more likely to grant the request. Moreover, straying from these fundamentals may allow an opposing party room to argue that a continuance is unfairly prejudicial or burdensome, flies in the face of judicial policies favoring prompt and diligent disposition of cases, or flouts the letter and purposes of Rule 3.1332.

In most instances, counsel will find it
counterproductive to try to impress the court with page after page of legal discussion or citations beyond the basics. While an applying attorney may be preoccupied with gaining more time for trial preparation or garnering a settlement if a continuance reprieve is granted, the trial judge may be more concerned about the imperatives of fast track rules, the effect of a continuance on the court calendar, or potential prejudice to a party.

**Supporting the Application**

Presenting an attached stipulation with specific agreed-to elements that is executed by all counsel often is the most forceful argument for a trial continuance. But this does not eliminate the need for an attached declaration by counsel. Just because the attorneys want a continuance is not a sufficient reason for most judges to sign off on an unsubstantiated request. Indeed, many stipulations for continuances are not accepted by courts for the simple reason that counsel have not provided a declaration or memorandum explaining the exigencies underlying their agreement. While a stipulation is extremely helpful to the court, it is not a guarantee that the court will grant the requested relief.

Thus, strong declarations with compelling factual reasons and authorities supporting a continuance may be determinative. For example, the medical condition of a party or central witness that makes the party or witness unable to appear is frequently the subject of trial continuance requests. In such instances, a declaration or letter from a treating physician or a person unable to attend trial is highly preferable to an attorney declaration. While courts usually trust counsel’s representations, there is no reason to present attorney hearsay that allows an opening for an opponent’s skeptical parries.

It also is wise to fax or e-mail the application to opposing counsel at least the day before the hearing and provide a courtesy copy to the court on the afternoon before (if the court will take it). This will assist in minimizing any contention that there has not been an adequate opportunity for opposing counsel to respond or consult with their client. In addition, counsel moving for a continuance should prepare a proposed order to be lodged with the court and served with the application.

The preparation for an oral presentation of an application for a continuance requires great care. Counsel should be clear that the time for argument will be short. Sometimes a bench officer is so pressed for time—and perhaps worrying about a jury pacing the hallway outside the courtroom—that he or she may be forced into a hurried reading of the application. In this circumstance, it is not unusual for the court to request counsel to orally summarize the application in a few sentences. Counsel should be ready for questions aimed at discerning the reasonableness of the request, particularly if counsel for the other party oppose the continuance. Above all, if counsel have done their homework, they will be able to emphasize that a continuance will cause little or no prejudice to any party and will best serve the interests of justice and judicial economy.

In most cases, counsel will have only one chance to obtain a trial continuance. They can achieve success by presenting a thoughtful and well-planned application.

---

1 CAL. R. CT. 3.1332(c)(1)-(7).
2 CAL. R. CT. 3.1332(d)(1)-(11).
3 The Trial Court Delay Reduction Act, GOV’T CODE §§68600 et seq.
Protecting Trade Secrets in a Digital Workplace

COMPANIES ARE FINDING that the challenge of protecting trade secrets continues to grow with the use of handheld technology. As smaller and better electronic devices—such as personal data assistants and smart phones (cell phones with extensive data storage and transfer capabilities)—become more affordable, they appear more often in the workplace. In fact, recent consumer reports show that smart phones have been steadily taking over the handheld device market since 2006.¹ As more employees gain the capability to take their employer’s confidential data, trade secrets litigation may see its biggest jump since the 1984 enactment of the Uniform Trade Secrets Act (UTSA), broadening the definition of trade secrets in California.

A recent survey found a growing concern about the theft of sensitive company information. Sixty percent of organizations surveyed reported an increase in concern over data security and the use of mobile devices over the last year.² The same survey revealed that although the majority of companies give their employees remote access to company data, at least 58 percent of companies surveyed did not provide their employees any additional training to address the importance of protecting sensitive data.

California’s trade secrets law specifically prohibits employees from taking an employer’s protected data, and the law provides remedies to an employer prior to actual dissemination or misuse of its data. In 1984, California adopted the UTSA,³ preempting California common law claims for misappropriation of trade secrets.⁴ Before its adoption, California (and many other states) enforced trade secrets law under common law theories and imposed a stricter and narrower definition of trade secrets. For example, prior to the UTSA, trade secrets included only information continuously used by a business, a limitation no longer recognized.⁵ Still, earlier courts, applying common law principles, did not limit trade secrets protection based on the form of an employer’s valuable information. As early as 1948, California courts recognized that a list built from “ingenuity, time, labor and expense” over a period of many years is property of the employer, “a part of the good will of his business and, in some instances, his entire business. Knowledge of such a list, acquired by an employee by reason of his employment, may not be used by the employee as his own property or to his employer’s prejudice.”⁶

The UTSA expands on the common law definitions of “trade secrets.” For example, under common law a business could not protect data unless the data was consistently used to its advantage. Today, information that a business has not been able to use may be protected under the act. The UTSA would protect as a trade secret data that concerns means and methods relating to a company’s business that have, after expenditure of time and resources, been found not to work and to which its competitors are not privy. The UTSA expands on common law by permitting companies to protect a wide variety of information.

The UTSA prohibits employees from wrongfully taking or disclosing certain data obtained from their employers. Before a court extends protection, however, it must first determine that 1) the information that an employer seeks to protect falls within the definition of “trade secrets,” and 2) the employee had either threatened or actually committed “misappropriation,” as defined by the UTSA.⁷

A “trade secret” under the act is defined as “a formula, pattern, compilation, program, device, method, technique, or process that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”⁸

Client lists are considered trade secrets if an employer has 1) expended time and effort identifying customers with particular needs or characteristics, and 2) made reasonable efforts to maintain the secrecy of their identity.⁹ The more difficult information is to obtain (as is usually reflected by the time and resources expended by an employer to gather it) the more likely a court will find such information constitutes a trade secret.¹⁰ A customer list has independent economic value when it has been developed over a number of years, contains particular information about certain customers not generally known, and has become a main asset to the company.¹¹

In a leading case, the California Court of Appeal found that a company took reasonable steps to protect its customer list from disclosure. The court in its decision noted that the company’s “president recognized the importance of the customer information to the company referring to it as its ‘main asset’ [and that] ‘Without it, there’s no business.’”¹² The court further explained that the company demonstrated its intention to keep the list a secret by storing it on a computer with restricted access, including a confidentiality provision expressly referring to its customer names and telephone numbers in its employment contract, and providing an explicit statement in its employment handbook that employees shall not use or disclose the company’s secrets or confidential information subsequent to their employment, including “lists of present and future customers.”¹³

Another important point for employers to understand regarding whether a customer list amounts to trade secrets is that under California law, “information can be a trade secret even though it is readily ascertainable, so long as it has not yet been ascertained by others in the industry.”¹⁴ In one case, the court of appeal found that the company’s customer lists were trade secrets even though they were readily ascertainable based in part on the president’s testimony “that one of the most difficult parts of [the company’s] job is to determine which companies, of all the businesses in the United States, need rubber rollers….Customers are not readily recognizable or identifiable, and the process which brings to light the names of potential customers is…expensive and time consuming.”¹⁵ The president further testified

Edward D. Vaisbort is a partner with Litchfield Cavo LLP in Glendale who practices complex commercial litigation involving trade secrets and employment, and Surisa Langbell is an associate with the firm who practices in the area of general commercial litigation.
WE SERVE ANYTHING, ANYWHERE

STATEWIDE • NATIONWIDE • WORLDWIDE

1-800 PROCESS

1 800 process.com

"If we don't serve it, you don't pay"

U.S.A. Only

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

• A DIVISION OF GUARANTEED SUBPOENA SERVICE •

est. 1965

ANY STATE • ANY NATION • ANYWHERE.
Seeking an Experienced Arbitrator/Mediator?

**STEVEN RICHARD SAUER, ESQ.**

COUNSELOR AT LAW • SINCE 1974

“He is truly a master in his art.”

6,000
Settled over 5,000 Federal & State Litigated Cases

323.933.6833 TELEPHONE
arbitr@aol.com E-MAIL

4929 WILSHIRE BOULEVARD, SUITE 740
LOS ANGELES, CALIFORNIA 90010

---

**EXPERT WITNESS – CONSTRUCTION**

**40 YEARS CONSTRUCTION EXPERIENCE**

SPECIALTIES:

CIVIL EXPERIENCE:
Construction defect cases for insurance companies and attorneys since 1992

**COOK CONSTRUCTION COMPANY**

STEPHEN M. COOK
General Contractors License B431852
Graduate study in Construction
L.A. Business College, 1972

Tel: 818-438-4535 Fax: 818-595-0028
Email: scook16121@aol.com

7131 Owensmouth Ave., Canoga Park, CA 91303

---

that the customer’s list at issue was “a winnowing down from a generalized list of companies...to a valuable and discrete listing of a more limited number of existing and potential customers” and that such lists were an “enormously valuable resource” to his company and its competitors.16

Based on the above criteria, employers can demonstrate to a court that it took reasonable steps to protect the information from disclosure with evidence that the employer stored the information securely, restricted access to the information to those at the company specifically designated to use the data, and used confidentiality provisions in employment contracts or handbooks that obligated employees not to use or disclose the information. As an initial step, employers should identify customer lists or sensitive data that could be protected under the UTSA to ensure data will be protected in the event litigation becomes necessary. That is, employers need to identify their most valuable data assets, compiled as a result of time and resources and not readily accessible to the general public or within the industry. Completing this initial step is necessary before an employer can take the additional steps necessary to convince a court that its confidential data should be afforded trade secrets protection.

Having identified its sensitive data, an employer should then inform its employees about data it considers secret while emphasizing which data it considers its main assets. This data should be specifically identified as confidential within a confidentiality agreement and any employee handbook. When at all possible, confidentiality agreements should be updated as employees’ responsibilities change or as the confidential data itself changes. Although nondisclosure agreements are not essential for an employer to obtain judicial relief under the act, having employees sign confidentiality or nondisclosure agreements may demonstrate to a court an employer’s intention to protect its confidential data.

Employers should provide employee training that includes a discussion on the importance of keeping data confidential. Additionally, the employer should vary employee access to confidential information based on particular job responsibilities. Taking all of the above steps does not require significant time or resources, but failing to do so can mean failing to convince a court that the employer took reasonable steps towards protecting its confidential information.

**Encryption**

For employers willing to invest in technology to protect confidential information, encryption is highly recommended. Doing so protects confidential data in the event it gets into the wrong hands while showing an employer’s

---

Brownstein | Hyatt Farber | Schreck

Brownstein Hyatt Farber Schreck is pleased to announce our new Shareholders:

<table>
<thead>
<tr>
<th>Richard B. Benenson</th>
<th>Andrew L. Meyers</th>
<th>Albuquerque</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate &amp; Business</td>
<td>Real Estate</td>
<td>Aspen</td>
</tr>
<tr>
<td>Denver</td>
<td></td>
<td>Denver</td>
</tr>
<tr>
<td>Diane C. De Felice</td>
<td>Michelle L. Pickett</td>
<td>Lake Tahoe</td>
</tr>
<tr>
<td>Land Use</td>
<td>Corporate &amp; Business</td>
<td>Las Vegas</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>Santa Barbara</td>
<td>Los Angeles</td>
</tr>
<tr>
<td>Eduardo A. Duffy</td>
<td>Lauren E. Schmidt</td>
<td>Orange County</td>
</tr>
<tr>
<td>Corporate &amp; Business</td>
<td>Natural Resources</td>
<td>Sacramento</td>
</tr>
<tr>
<td>Albuquerque</td>
<td></td>
<td>San Diego</td>
</tr>
<tr>
<td>James R. Friedhofer</td>
<td>Lawrence J. Semenza</td>
<td>Santa Barbara</td>
</tr>
<tr>
<td>Litigation</td>
<td></td>
<td>Santa Fe</td>
</tr>
<tr>
<td>San Diego</td>
<td></td>
<td>Washington, DC</td>
</tr>
</tbody>
</table>

Brownstein Hyatt Farber Schreck, LLP bhfs.com

20 Los Angeles Lawyer March 2008
intention to protect its data. Employers should be aware that simply protecting files with passwords is not sufficient, as determined hackers can crack passwords. Investment in reasonably priced, off-the-shelf encryption software is a must. Companies can encrypt e-mail sent inside and outside the organization with software that integrates with e-mail clients such as Microsoft’s Outlook. This software provides users with one-button access to encryption, encrypting messages and allowing administrators to set policies regarding what types of messages should be encrypted and what unencrypted messages should be allowed.

Employers should also manage and restrict the use of universal serial bus (USB) storage devices (such as memory sticks) on a company’s systems. Although restricting the use of USB ports is admittedly inconvenient, administrators should consider whether to simply shut down computer ports so that employees are not able to plug in a USB memory device and take valuable data. Policies can be implemented, however, that simply limit USB device access to company computers, requiring approval from an IT administrator prior to using such devices. Employers should also implement technologies designed to provide detail about network conduct and data-flow patterns to allow companies to know when any data is improperly acquired. Such evidence could be essential in a trade secrets case in which an employee denies that confidential data was improperly taken.

Employers following these guidelines should be able to meet the first part of the UTSA requiring data to be protected. As to the second part, employers may meet obstacles in convincing a court that an employee either misappropriated or threatened to misappropriate its protected data. Although the UTSA does not require an employer to show that the protected data has been already used to its detriment by the former employee, based on traditional views of injunctive relief in employment cases, some courts may determine that such relief is only warranted against those employees who actually misused protected data to directly compete with their former employer or to cause financial harm.

Therefore, when asking a court for an injunction, it is important to emphasize to the court that the UTSA defines “misappropriation” as both the misuse of a trade secret or the mere acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.17 “Misuse” of a trade secret is defined as: “Disclosure or use of a trade secret of another without express or implied consent by a person who... [used improper means to acquire knowledge...].”
of the trade secret...or...[b]efore a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake." 18 A court of appeal has recognized that the UTSA defines “misappropriation” in general as the improper acquisition of a trade secret or its nonconsensual use or disclosure. 19 "Improper means" is defined as “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.” 20 However, it should be noted that California law prohibits the improper taking of trade secrets even by an employee’s memorization. 21 That is, misappropriation may occur whether the employee downloads protected information on a device, takes a collection of business cards, or merely commits secret data to memory. Employers may act to prevent even memorized trade secret data from being used to their detriment.

**Injunctive Relief**

A court is authorized under the UTSA to order an employee to return any information improperly obtained and prohibit the employee from using such information to the employer's detriment. An employer is provided relief under the act prior to having its valuable information used against it. Courts may order injunctive relief. California's Labor Code provides: “Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.” 22 Before the UTSA, courts of appeal upheld injunctions against employees for wrongful takings of employer secrets cited to accepted legal principles, including Labor Code Section 2860. These courts interpreted this section of the Labor Code as codifying the accepted principle that employees were prohibited from taking information that was essential to their former employer’s business. 23

Accordingly, an employee does not have the right to take company property when leaving the company’s employment, and an injunction may issue to compel return of the property. 24 For example, a court of appeal upheld a trial court’s injunction against a firm representing a former attorney employee ordering the return of documents taken by the former employee before his termination. 25 Although the former employee was not using (and could not have used) the documents to compete against the employer law firm, the
documents contained information that could have supported the former employee in his lawsuit against the employer.

Moreover, the court held that injunctive relief in this case was not dependent on a finding of trade secrets violations. Rather, the court upheld the preliminary injunction based on the trial court’s authority pursuant to Code of Civil Procedure Section 526 and the court’s inherent authority to administer the resolution of disputes. Comparing this case to other cases in which trade secrets violations were not present, the court stated: “Similarly, in this case one of the bases for relief was statutory replevin as provided by Code of Civil Procedure sections 511.010 through 516.050.” This case is helpful as it gives the court added authority to issue injunctive relief against an employee who has taken confidential information from an employer without first using the information towards the employer’s detriment. Additionally, employers may seek contractual remedies against an employee who has signed a nondisclosure agreement as well as a claim under the UTSA. It should be noted, however, that common law claims for conversion, unjust enrichment, and negligence may be preempted in cases in which an employer plaintiff bases its claims on the same factual allegations as its UTSA claim.

The California UTSA may also preempt causes of action for unfair competition under Business and Professions Code Section 17200 if the claim is based on the same factual allegations alleged in the trade secrets misappropriation claim. Despite the prominence of high-tech companies in California’s economy, California employers have long strides to make in fully appreciating and protecting their digital assets. By implementing and following basic procedures, they help reduce the harm associated with trade secrets violations.

1 See IDC’s Worldwide Handheld Qview, found at http://www.idc.com; see also http://www.internetnews.com/wireless/article.php/3711256.
2 The survey was commissioned by CompTIA to conduct the fifth installment of the Trends in Information Security: Analysis of IT Security and the Workforce survey. See http://www.cio.com/article/151851/Study_Mobile_Workforce_Represents_Security_Threat_in_Due_to_Lack_of_Training_Awareness.
3 CIV. CODE §§3426 et seq.
5 Before the UTSA, many states used the narrower definition of trade secrets found in Restatement of Torts §757 cmt. B (1939).
7 CIV. CODE §§3426 et seq.
8 Id.
10 See, e.g., Santa Monica Ice & Cold Storage Co. v. Rossier, 42 Cal. App. 2d 467, 470 (1944); see also Riess v. Sanford, 47 Cal. App. 2d 244, 247 (1944).
12 Id. at 1279.
13 Id.
14 CIV. CODE §3426.7.

An expansive outlook:

What the legal community expects from a law school devoted to the big picture.

Vibrant, engaging graduates with perspectives for today’s legal landscape.

www.CaliforniaWestern.edu

CALIFORNIA WESTERN
SCHOOL OF LAW | San Diego

What law school ought to be.”
the proper circumstances, the appointment of a receiver can lead to desirable results that are otherwise hard to achieve. Even the filing of a motion for a receiver can often spur serious settlement discussions and the resolution of disputes. In recent years, the use of receivers has expanded into ever-increasing areas of the law. Counsel should consider the receivership option when the appropriate situations arise.

Receiverships were created in the chancery courts in England as early as the reign of Queen Elizabeth I to preserve property or a fund at issue in litigation pending the outcome of the action.1 Traditionally, the appointment of a receiver was an equitable procedure that was used when ordinary legal remedies, such as a money judgment, were inadequate. The receiver was not the agent or representative of any party to the litigation but was regarded as an officer of the court, exercising powers for the common benefit of all parties in interest. As a result of this role, receivers were and still are frequently referred to as the “hand of the court.” They were regarded as the executive officers of the court of chancery much the same way that sheriffs were executive officers of the court of law.2

In California, the powers, functions, and usages of receivers were codified in the original Field Code in 1872 and remained basically unchanged until recent years. The demonstrable advantages of appointing an independent third party as an interim or permanent remedy has triggered an expansion of the types of cases in which receivers are appointed, despite the perception of some judges that receivers are “legal luxuries.”3

Traditional Receiverships

Code of Civil Procedure Section 564 lists many of the traditional types of cases in which receivers may be appointed. They

While receiverships are often viewed as a luxury, they can achieve the purpose of preserving assets in a wide variety of disputes
include those involving:
• The preservation of a common fund or property in dispute and in danger of injury or dissipation.4
• The preservation of real property during judicial or nonjudicial foreclosure when it appears the property is in danger of being lost, removed, or materially injured.5
• The enforcement of a judgment.6
• The disposition of property according to a judgment or the preservation of property pending appeal.7
• The windup of a dissolved corporation.8
• An unlawful detainer action.9
• A corporation that is insolvent or in danger of insolvency, or the corporation has forfeited its corporate rights.10

Traditional receiverships are also available “in all other cases where necessary to preserve the property or rights of any party.”11

The most common type of receiver appointed by the courts in California was not specifically covered by Section 564 until it was amended in 1995.12 This most frequently used receivership is a “rents, issues, and profits” receivership, in which a receiver is appointed by the court to collect rents generated from income-producing property while a secured lender forecloses on the property. The receiver is appointed as a result of the contract entered into between the borrower and the lender according to the deed of trust executed by the borrower in the lender’s favor. Almost all deeds of trust in California contain this contractual provision in the small print in the deed of trust.13

Section 564 has been amended several times in recent years to add appropriate circumstances for receiverships to these more traditional classes of cases in which receivers have been authorized. Nontraditional bases for using a receiver include allowing a secured lender to obtain the appointment of a receiver to enter and inspect real property to determine the existence, location, nature, and magnitude of any hazardous substance “into, onto, beneath or from the real property security.”14

Criminal Receiverships

Like the appointment of a receiver to enter property to determine whether hazardous substances exist, many other nontraditional uses of a receiver have been codified in recent years or have developed to preserve property or the rights of parties.15 One example is criminal receiverships.

Two different statutes authorize the appointment of a receiver in criminal cases. Penal Code Section 186.11, sometimes called the Freeze and Seize Law,16 provides for the appointment of a receiver, at the request of a prosecuting agency, when a complaint or indictment charges a person with committing two or more felonies in which a material element is fraud or embezzlement involving a pattern of related felony conduct. This pattern must encompass the taking of more than $100,000 (known as the “aggregated white collar crime enhancement”), and the receivership is necessary to preserve property or assets for the payment of restitution to victims or fines imposed by the section.17 The petition for the appointment of the receiver must allege that the defendant has been charged with two or more qualifying felonies and is subject to the aggregated white collar crime enhancement. It also needs to identify the criminal proceeding as well as the assets and property that will be affected by the order.

According to the statute, unlike state and federal drug asset forfeiture laws, the assets that will ultimately wind up in the possession of the receiver do not have to be connected with criminal activity. The prosecution only needs to show that the defendant controls the assets, “because a defendant’s obligation to pay restitution is a general obligation not one limited to the value of assets and property connected with crime.”18

Another unusual requirement for criminal receiverships involves the notice of the petition to appoint the receiver, which must be served by personal service or registered mail on every person who may have an interest in the property specified in the petition. In addition, the notice of the petition must be published for three successive weeks in a newspaper of general circulation. The receiver appointed under this section can file a motion to sell the property that the receiver will possess as a result of his or her appointment. The statute also provides the manner in which the assets taken into possession by the receiver must be distributed.

Penal Code Section 186.6, the other section that authorizes the appointment of a receiver in criminal cases, provides for a receiver to take possession of, care for, manage, and operate assets and property if the assets and property are subject to forfeiture due to “criminal profiteering activities,” as defined in Penal Code Sections 186 et seq. Among the notice requirements of Section 186.6 is the necessity to provide notice to interested parties.

Although these statutes were enacted more than 10 years ago, case law interpreting them was practically nonexistent until recently. In 2005, the court of appeal addressed the statutes in People v. Stark,19 which focused on the receiver’s sale of assets in a criminal receivership case. The Stark court noted that little case law has developed under the criminal statutes, and the law governing sales by receivers in civil actions should govern sales by receivers in criminal actions. Last year, the California Supreme Court issued its first opinion concerning the statutes in People v. Semaan.20

The facts in both Semaan and Stark illustrate the usefulness of the appointment of a receiver in criminal cases. In Semaan the defendants were engaged in a credit card “bust-out” scheme, in which the defendants used fraudulently obtained credit cards to purchase goods that the defendants would then sell and pocket the proceeds. When the defendants were arrested, they had a variety of assets, including a house, a car, and retail gift cards with a value of $83,800 from commercial establishments that included Nordstrom’s, Ralph’s, and Benihana’s.21 The receiver sold the house through a broker, sold the car, and liquidated the gift cards by either returning them to the merchants when that was possible or selling them on Ebay to obtain funds for the payment of restitution.

In Stark the defendant was operating a car dealership. The receiver liquidated the dealership and sold the franchises. These type of activities are best handled by an experienced receiver rather than prosecutors. Receivers with expertise can devote the necessary time and skill to maximizing the value of the assets placed under their control.

Receivers have an unusual right in these cases vis-à-vis secured creditors. Assets liquidated by the receiver must be used first to pay all the receiver’s expenses—ahead of the interests of secured creditors with valid liens or security interests in the property sold.22

Receivers in Aid of Execution

Code of Civil Procedure Section 708.620 provides the circumstances in which a receiver in aid of execution may be appointed.23 Many judges are reluctant to appoint receivers to enforce judgments because of the perceived costs as well as the unfortunate language used by the state legislature in amending the statute in 1982. Ironically, the 1982 amendment was intended to make the appointment of postjudgment receivers easier to achieve, but it appears to have had the opposite effect.

The 1982 amendment eliminated a prerequisite for appointing a receiver in aid of execution. Under the prior law, those seeking the appointment of a receiver in aid of execution had to show that a writ of execution had been returned unsatisfied or that the judgment creditor refused to apply property in satisfaction of the judgment. When the statute was amended, the legislature added the language that the court should consider the “interests of both the judgment creditor and the judgment debtor.”24

The strongest argument to use in seeking the appointment of a receiver in aid of execution is that the judgment debtor has assets that could be liquidated to satisfy the judgment, in whole or in part, but those assets can-
not be reached by a writ of execution.25 Prime examples of circumstances ripe for this type of receiver include those involving an alcoholic beverage license, because Code of Civil Procedure Section 708.630 provides that the appointment of a receiver is the only method to apply a judgment debtor’s interests in such a license to the satisfaction of a judgment.26 Other examples include cases involving intellectual property—such as patents, trademarks, copyrights, and Web sites and domain names. This is because no method of levy exists for general intangibles such as intellectual property.27

These assets, which some may describe as exotic, are not the only ones for which no collection procedure exists other than the use of a receiver. In Sheridan v. Sheridan,28 a court had ordered the defendant to pay child support, but the defendant failed to do so. The plaintiff, who was to deposit the checks and pay the child support, could not move to execute upon the defendant’s wages because the defendant was employed by the federal government. The court, at the plaintiff’s request, appointed a receiver to collect the judgment debtor’s interest in the defendant’s wages—an action that was prohibited. The court disagreed, holding that since the federal government was not being required to take any action, the procedure was acceptable.29

A receiver can also be used to collect certain other types of postjudgment payments. Code of Civil Procedure Section 708.510(a) authorizes the court to order a judgment debtor to assign to a receiver in aid of execution all or part of a right to payments—whether due at the time of assignment or at a later date—including rents, commissions, royalties, payments due from a patent or copyright, the loan value of an insurance policy, or wages due from the federal government that are not subject to income withholding orders. The receiver may find it advantageous to have a receiver appointed to collect the income and apply it to the judgment while pursuing an execution sale of the underlying property or as an alternative to such a sale.

The appointment of a postjudgment receiver may also be useful regarding partnership interests. To reach a debtor’s partnership interests, the judgment creditor must obtain a court order charging the partnership interest with the amount of the judgment.30 The court may appoint a receiver as part of the charging order to aid in the collection of the interest.31

A receiver in aid of execution is vested with the same powers as the judgment creditor to collect the judgment. The receiver can conduct examinations of the judgment debtor as well as third parties, subpoena records, serve postjudgment discovery, garnish wages, and execute on the judgment.

A postjudgment receiver has the ability to maximize efforts to collect on the judgment—particularly when an experienced receiver is dealing with an ongoing business. Nevertheless, the greatest advantage of a postjudgment receiver is the fact that the cost of the receiver collecting the judgment is added to the judgment.32 Thus a judgment debtor must pay for the receiver and collection costs. If an attorney is used for collection purposes instead of a receiver, the cost of collection is paid by the judgment creditor.33

**Family Law, Regulatory, and Other Receiverships**

Under the Family Code, a receiver may be appointed to enforce any family law order or judgment.34 The most typical cases for the involvement of receivers include those in which a party is seeking to enforce spousal support orders or to preserve, manage, or safeguard community property pending a property division order. The appointment can be prejudgment pending a final order or postjudgment to enforce a final order or judgment. Cases in which the appointment of a receiver are most effective include those in which the community owns a closely held family business, such as a restaurant, bar, or retail store. These businesses have assets, such as cash receipts, that can be hidden, diverted, or dissipated by one spouse. Also, the spouses may give countermanding instructions to employees concerning management of the business. Often the heated disputes over community assets and their management can be brought under control with the appointment of a receiver to manage and safeguard the assets. Receivers can also be appointed to marshal property when there have been violations or threatened violations of property division orders.35

Receiverships can also be appointed in regulatory cases. To protect the public, various statutes authorize the court to appoint a general equity receiver. The function of this type of receiver is to take control of the defendant’s assets or business and sometimes, if the defendant is a corporation or partnership, the court itself. One of the more sweeping statutes authorizes the attorney general to obtain the appointment of a receiver when the attorney general has a reasonable probability of establishing that a defendant’s real or personal property was acquired by unlawful means and the appointment would facilitate the maintenance, preservation, operation, or recovery of property for the purposes of restitution. Receivers in these cases not only have the normal powers given receivers, which are explicitly set forth in the statute, such as the right to sue and take possession, manage, and transfer property. They
also are given expanded powers that receivers in other types of cases do not have. The more important of these powers is the right to avoid fraudulent transfers and to set aside certain types of preferences. The statute also automatically stays the filing of actions, enforcement of liens, or the issuance of any summons, subpoena, attachment, or writ against the receiver or any property subject to the receivership without prior order of the court.

A parallel statute authorizes the appointment of a receiver in actions brought by the California commissioner of corporations when enforcing the state securities law, the personal property broker’s law, and laws regulating health maintenance organizations. Similarly, the California commissioner of real estate can seek the appointment of a receiver when the commissioner believes a person has violated or is about to violate an order, license, decision, or requirement—and the funds or property of others in the custody or under the control of the person are jeopardized.

Equity receivers also are often appointed by federal courts in cases brought by regulatory agencies such as the Securities and Exchange Commission or the Federal Trade Commission. Receivers who are appointed in these cases are not specifically authorized by statute, as they are in state court. Instead, the appointments are based on the equitable powers of the federal district court to fashion appropriate remedies. Equity receivers appointed by federal courts usually are charged with locating, marshaling, and safeguarding assets for ultimate distribution to investors or consumers and determining whether the business for which the receiver is appointed can be operated legally and profitably. If not, the receiver generally will obtain court permission to shut the business down and liquidate its assets.

Other nontraditional uses of receivers can be found in the codes and in case law. Receivers have been appointed in partition actions and fraudulent transfer actions. The Business and Professions Code authorizes the appointment of a receiver in unfair competition cases to prevent the use of any practice that constitutes unfair competition or to help restore money or property acquired by means of unfair competition. The code provides the same for unfair or misleading advertising cases. The Health and Safety Code authorizes the appointment of a receiver to temporarily operate a long-term healthcare facility and when the provisions of the Knox Keen Health Care Services Plan Act have been violated. Receivers can also be appointed in substandard housing cases to remedy unsafe conditions that pose a danger to the health and safety of residents or the public.

Elder Law & Nursing Home Abuse & Neglect

Law Offices of Steven Peck is seeking association or referrals for:

1) Nursing Home Abuse & Neglect (Dehydration, Bedsores, Falls, Death)
2) Financial Abuse (Real Estate, Theft, Undue Influence)
3) Trust & Probate Litigation (Will Contests, Trusts, Beneficiaries)
4) Catastrophic Injury (Brain, Spinal Cord, Aviation, Auto, etc.)

26 years experience

TOLL FREE 866.999.9085 LOCAL 818.908.0509

www.californiaeldercarelaw.com • www.premierlegal.org • info@premierlegal.org

WE PAY REFERRAL FEES PURSUANT TO THE RULES OF THE STATE BAR OF CALIFORNIA
A common perception of receiverships as a remedy is that they are too expensive—and even draconian. However, the use of receivers has evolved in recent years to encompass many more types of cases beyond the ones in which receivers have traditionally played a role. Receivers in criminal cases and regulatory cases not only frequently achieve results that are difficult to realize by alternative methods but in addition do so more quickly and cheaply than other available remedies. Indeed, there are certain situations in which a receiver is the best or only remedy and should be pursued to protect and advance a client’s interest—whether that involves protecting assets prejudgment or collecting assets in which a receiver is the best or only remedy has evolved in recent years to encompass many more types of cases beyond the ones in which receivers have traditionally played a role. Receivers in criminal cases and regulatory cases not only frequently achieve results that are difficult to realize by alternative methods but in addition do so more quickly and cheaply than other available remedies. Indeed, there are certain situations in which a receiver is the best or only remedy and should be pursued to protect and advance a client’s interest—whether that involves protecting assets prejudgment or collecting assets

1 This type of appointment is often referred to as pendente lite—Latin for pending litigation.
2 Pacific Indem. Co. v. Workmen’s Comp. Appeals Bd., 258 Cal. App. 2d 35 (1968) (“A receiver is a ministerial officer, agent, creature, hand, or arm of, and a temporary occupant and caretaker of the property for the court, and he represents the court appointing him, and he is the medium through which the court acts.”).
3 Elson v. Nyhan, 45 Cal. App. 2d 1, 5 (1941). Courts often consider cost as a factor in deciding whether to appoint a receiver. Morand v. Superior Court, 38 Cal. App. 3d 347, 351 (1974); Hoover v. Galbraith, 7 Cal. 3d 519, 528 (1972). Receivers can, but need not be, attorneys. Some receivers are accountants, bankers, or property managers. While the court appoints the receiver, any party to the litigation can nominate a person to act as the receiver. Receivers generally charge an hourly rate for their services.
4 CODE CIV. PROC. §564(b)(1).
5 CODE CIV. PROC. §564(b)(2).
6 CODE CIV. PROC. §564(b)(3).
7 CODE CIV. PROC. §564(b)(4).
8 CODE CIV. PROC. §564(b)(5).
9 CODE CIV. PROC. §564(b)(7).
10 CODE CIV. PROC. §564(b)(6).
11 CODE CIV. PROC. §564(b)(9). This language was added in 2001 to replace “where receivers have heretofore been appointed by the usages of courts of equity,” because it was considered to be “more readily understandable.” Law Revision Commission cmts. to CODE CIV. PROC. §564.
12 While Code of Civil Procedure §564 was enacted in 1872, it was not until its 1995 amendment that a specific provision was added codifying the longstanding practice that the court could appoint a receiver for specific performance of the assignment-of-rents provision in a deed of trust. The provision also was intended to clarify that a receiver’s appointment could continue after the entry of judgment for specific performance of the assignment-of-rents provision.
13 For example, First American Title Insurance Company incorporates into its short-form deed of trust the provisions of a fictitious deed of trust recorded in each California county. Paragraph B5 of the fictitious deed of trust provides in part:

Upon any such default, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in his own name sue for or otherwise collect such rents, issues, and prof-
its, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney’s fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

14 CODE CIV. PROC. §564(g).
15 The general powers of a receiver are codified in Code of Civil Procedure §568. A receiver has no powers beyond those conferred by statute, by the order appointing him or her, or by orders subsequently made by the court. Morand v. Superior Court, 38 Cal. App. 3d 347, 351 (1974).
17 The section “implements the state Constitution’s declaration ‘that all persons who suffer losses as a result of criminal activity shall have the right of restoration from the persons convicted of the crimes for losses they suffer.’”(Cal. Const., Art. I, §28, sub.(b).)...
18 Semaan, 42 Cal. 4th at 86.
20 Semaan, 42 Cal. 4th 79.
21 The defendants were charged with 24 counts of grand theft and 75 counts of fraudulently drawing checks without sufficient funds. Defendant Yousef Semaan was ultimately sentenced to 14 years in state prison.
22 PENAL CODE §186.11(j).
23 According to Code of Civil Procedure §708.620, “The court may appoint a receiver to enforce the judgment where the judgment creditor shows that, considering the interests of both the judgment creditor and the judgment debtor, the appointment of the receiver is a reasonable method to obtain a fair and orderly satisfaction of the judgment.”
24 This is often a difficult showing to make. One has to wonder what the legislators were thinking. When would it ever be in the judgment debtor’s interests to have a receiver appointed to help collect a judgment that the judgment debtor refused to pay? The concept is so odd that Rutter’s California Practice Guide: Enforcing Judgments and Debts simply leaves this requirement out of its discussion of the statute, focusing instead on the requirement that the appointment is a “reasonable method to obtain the fair and orderly satisfaction of the judgment”. AHART, CALIFORNIA PRACTICE GUIDE: ENFORCING JUDGMENTS & DEBTS ¶6:1458 (2007).
25 Indeed, the Legislature Committee Comments to Code of Civil Procedure §708.620 state: “A receiver may be appointed where a writ of execution would not reach certain property and other remedies appear inadequate.”
26 Similarly, a franchise granted by a public entity is not subject to execution. CODE CIV. PROC. §699.720. Code of Civil Procedure §708.920, however, provides a procedure for the application of such a franchise to satisfy a judgment—including the appointment of a receiver.
27 The order appointing a receiver to sell intellectual property should provide that the intellectual property—specified as a patent, trademark, domain name, or the like—is vested in the receiver, who is authorized and directed to take control of and sell the intellectual property to satisfy the judgment.
29 Id. at 921-22.
30 CORP. CODE §15522(1).
31 See also CODE CIV. PROC. §§708.310, 708.320; §708.310 authorizes the issuance of a charging order, and §708.320 provides that service of a notice of motion for a charging order on the judgment debtor and the other partners of the partnership creates a lien on the judgment debtor’s interest in the partnership.
32 CODE CIV. PROC. §685.070.
33 CODE CIV. PROC. §685.040.
34 41 GOV’T CODE §12527(d)(3).
35 BUS. & PROF. CODE §12527.
36 Health & Safety Code, the cost and time to abate the condition, and whether the receivership estate has the funds and/or unsafe conditions as defined in the Health & Safety Code, the cost and time to abate the conditions, and whether the receivership estate has the funds to do so. Health & Safety Code §17980.1 authorizes the appointment of a receiver for buildings that pose a hazard as a result of an earthquake.
Legal ethics experienced another busy year in 2007. The State Bar of California’s Board of Governors adopted the California Attorney Guidelines of Civility and Professionalism which, though advisory, were widely predicted to lead to new sanctions against lawyers. Whether this punishment would fall on the truly deserving was less certain. The Civility Guidelines were adopted despite unexpected criticism by the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee (PREC), which found them unnecessarily duplicative of existing law, and by the State Bar’s Committee on Professional Responsibility and Conduct (COPRAC), which saw the guidelines’ admonition against disrespectful comments about judges as a heavy-handed restriction on lawyers’ free speech. The State Bar Board of Governors was unable to reach agreement on another controversial measure that would have required all California lawyers to advise their clients whether they carried malpractice insurance, but the board vowed to revisit the issue in 2008.

Cases involving legal ethics caught the attention of the legal and mainstream media. In the Qualcomm-Broadcom patent litigation, Qualcomm’s lawyers argued they should be permitted to defend themselves against charges of withholding evidence by using privileged communications, without a waiver by their client, but a federal magistrate judge ruled that a self-defense exception to the attorney-client privilege did not apply to third-party claims.

Capping a long investigation into his former firm Milberg Weiss, securities class action lawyer William S. Lerach pleaded guilty to conspiracy to obstruct justice and to making false statements under oath and will pay an $8 million fine and be sentenced to more than one year in prison. Civil rights lawyer Stephen Yagman, who achieved notoriety by suing the Los Angeles Police Department and lambasting federal judges, was convicted of income tax evasion, bankruptcy fraud, and money laundering. Troy Ellerman—an attorney for the Bay Area Laboratory Cooperative (BALCO), the company at the center of an investigation regarding the use of perform-

by John W. Amberg and Jon L. Rewinski
mance-enhancing drugs in sports—was convicted of obstructing justice by leaking grand jury testimony to journalists about the investigation and was sentenced to two years in prison and community service in the form of 10 ethics talks to law students.6

As lawyers in Pakistan demonstrated for judicial independence, here in the United States Attorney General Alberto Gonzales resigned amid charges of politically motivated prosecutions, Department of Justice purges involving U.S. attorneys in San Diego and San Francisco, and perjured congressional testimony.7 A Pentagon lawyer was condemned by the American Bar Association and resigned after he suggested corporate clients should boycott law firms providing pro bono legal services to Guantanamo prisoners.8 A survey found that 90 percent of in-house counsel believe the attorney-client privilege in government investigations is nonexistent or severely damaged. Bills were introduced in Congress to bar the DOJ from pressuring companies for waivers.9

Conflicts of Interest

Paramount among a lawyer’s ethical duties is the duty to avoid the representation of clients with adverse interests.10 Lawyers owe current clients a duty of undivided loyalty and owe former clients a duty of loyalty regarding matters in which the lawyers previously represented them. Lawyers owe all clients a continuing duty of confidentiality.11 A violation of these duties may lead to disqualification.

Because disqualification has a drastic effect on both the lawyer and client, it is “generally disfavored” and should only be imposed “when absolutely necessary.”12 One commentator, Richard E. Flamm, suggests that “[c]ourts have begun to register growing dissatisfaction with the use of disqualification as a remedy for ethical misconduct” and recommends that courts “take a ‘functional approach,’ pursuant to which disqualifications are evaluated with a keen sense of practicality.”13 Whether courts are doing so is unclear.

The usual concern in cases addressing successive representations and a lawyer adverse to a former client is the duty of confidentiality. However, in Knight v. Ferguson,14 the Second District Court of Appeal affirmed an order disqualifying a lawyer based on the duty of loyalty. The plaintiff moved to disqualify a lawyer representing certain defendants because prior to the lawsuit, the lawyer had given the plaintiff legal advice regarding the business that was the subject of the new dispute. The defendants argued that they had been present at all meetings between the lawyer and the plaintiff and, therefore, none of the advice was confidential. The appellate court found a substantial relationship between the former advice and the new dispute. Without citing the California Rules of Professional Conduct or the State Bar Act, the court held that the lawyer’s duty of loyalty precluded him from doing anything that would injure his former client, at least with respect to the same matter.15

In Med-Trans Corporation, Inc. v. City of California City,16 the Fifth District Court of Appeal reversed an order disqualifying a lawyer who had an initial consultation with a potential client but was not retained. According to the court, when a preliminary conversation does not result in professional employment, no presumption exists that confidential information had passed to the lawyer, even though the current and prior matters had a substantial similarity of issues. The burden is on the party seeking disqualification to show that the lawyer acquired confidential information.17 Because the city failed to meet this burden, the lawyer should not have been disqualified.18

Conflicts of interest often arise when lawyers move from one law firm to another. Nevertheless, disqualification is not always required when lawyers switch firms. In Ochoa v. Fordel, Inc.,19 the Fifth District Court of Appeal refused to disqualify the plaintiffs’ law firm after it hired attorney Shelley Bryant from the defendants’ law firm. Bryant had not worked on the defendants’ matters at his prior firm. Although Bryant had access to the defendants’ files, the plaintiffs satisfied their burden of demonstrating that Bryant did not have knowledge of the defendants’ confidential information.20 Access alone was not enough to warrant disqualification.

By contrast, in Lucent Technologies, Inc. v. Gateway, Inc.,21 a San Diego federal court disqualified Gibson, Dunn & Crutcher from representing a defendant after the firm hired a lawyer from the plaintiff’s law firm, Kirkland & Ellis. The ex-Kirkland lawyer had worked on the plaintiffs’ legal team for three years, billing about 2,300 hours. Gibson’s conflict-checking system failed to detect the conflict. The court concluded that Gibson’s disqualification was automatic, even though the side-switching associate worked in a different office and was not part of the team Gibson put together to represent the defendant.22

In several appeals by the Children’s Law Center of Los Angeles, the Second District Court of Appeal considered whether the center could represent children with conflicting interests in concurrent or successive proceedings by erecting ethical screens. The center has three units of lawyers and staffs, each with a separate administrator responsible for all legal representation provided by the lawyers in his or her unit. Each unit maintains separate files and lacks access to the case files of the other units. The center has corporate officers and directors, including an executive director, who handle strictly administrative matters and do not participate in the representation of individuals. With this ethical screening, the center attempts to provide legal representation to siblings in concurrent and successive dependency proceedings, even if the siblings have conflicting interests.

Litigants in several proceedings moved to disqualify the Children’s Law Center based on evidence that the ethical wall had been breached. The Second District issued three published opinions, all reversing disqualification orders: In re Jasmine S.,23 In re Charlisse C.,24 and In re Zamer G.25 In the first, In re Jasmine S., two siblings in a single dependency proceeding sought placement with the same maternal aunt. The appellate court concluded that the trial court erred in ordering disqualification of two of the center’s units concurrently representing the two siblings because there was no evidence of an actual conflict. The court concluded that an appearance of impropriety alone resulting from the breach of the ethical wall was insufficient to warrant disqualification in the absence of an actual conflict. In the latter two cases, the Second District reversed disqualification orders notwithstanding some evidence of an actual conflict. By granting review in both In re Charlisse C. and In re Zamer G., the California Supreme Court will have the opportunity to provide additional guidance on ethical screening.

Disqualification on Other Grounds

Litigants also seek to disqualify an opponent’s lawyer as a way of punishing or deterring lawyer misconduct. For example, in Rico v. Mitsubishi Motors Corporation,26 the California Supreme Court expressed no hesitation in disqualifying the plaintiffs’ lawyer for improperly retaining and using opposing counsel’s notes describing an expert meeting. In the process, the court reconciled two conflicting lines of authority: one based on the 1993 decision in Aerojet-General Corporation v. Transport Indemnity Insurance,27 the other stemming from the 1999 decision in State Compensation Insurance Fund v. WPS, Inc. (State Fund).28 In Aerojet, the First District, citing a lawyer’s ethical duty to represent his or her client zealously, held that a lawyer could use an internal memorandum written by opposing counsel identifying witnesses that was inadvertently produced in discovery. In State Fund, the Second District concluded that the defendant’s lawyer was not ethically permitted to use the opposing party’s confidential civil litigation claims summaries that were inadvertently produced.

Distinguishing Aerojet because the underlying information (witnesses’ names and
MCLE Test No. 168

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

1. A lawyer may use a privileged document inadvertently produced by opposing counsel because of the lawyer’s ethical duty to represent his or her client zealously.
   True.
   False.

2. A lawyer receiving a privileged document inadvertently produced by opposing counsel should refrain from reviewing the document any more than is necessary to ascertain that the document may be privileged and immediately notify the sender that the lawyer possesses a document that appears to be privileged.
   True.
   False.

3. A lawyer has an ethical obligation to preserve the secrets of his or her client at every peril to himself or herself.
   True.
   False.

4. Lawyers are permitted to disclose a client’s confidential information to the extent necessary to defend themselves against a third-party claim.
   True.
   False.

5. A lawyer is permitted to disclose a client’s confidential information to the extent the lawyer reasonably believes is necessary to prevent any criminal act.
   True.
   False.

6. The privilege afforded to attorney work product may be set aside when evidence shows that the client is committing a crime or fraud.
   True.
   False.

7. If a current client accuses his or her law firm of an ethical breach, the law firm must turn over to the client the firm’s internal memoranda analyzing whether the firm complied with its ethical duties.
   True.
   False.

8. If a current client accuses his or her law firm of an ethical breach, the law firm must turn over to the client the firm’s internal memoranda analyzing whether the law firm complied with its ethical duties.
   True.
   False.

9. Based on third-party beneficiary and implied contract theories, a law firm hired by an insurer to represent its insured also owes a duty of care to a reinsurer with which the law firm regularly communicates.
   True.
   False.

10. A contingency fee agreement must be in writing.
    True.
    False.

11. A contingency fee agreement is valid if it substantially complies with the requirements of Business and Professions Code Section 6147.
    True.
    False.

12. Lawyer referral services must be licensed with the State Bar.
    True.
    False.

13. A lawyer may ethically accept payment by credit card for earned and unearned fees.
    True.
    False.

14. A lawyer may ethically accept payment by credit card for costs and expenses already incurred.
    True.
    False.

15. A lawyer may ethically accept payment by credit card for advances for costs and expenses.
    True.
    False.

16. After the termination of an engagement and upon the client’s request, a lawyer is ethically required to send the client all client papers and property, including some electronic documents, even if the client has refused to pay the lawyer’s fees.
    True.
    False.

17. A legal malpractice claim is tolled while the lawyer continues to represent the client regarding the subject matter in which the alleged wrongful act or omission occurred.
    True.
    False.

18. A lawyer owes current clients a duty of undivided loyalty and owes former clients a duty of loyalty regarding those matters in which the lawyer previously represented them.
    True.
    False.

19. A litigant who is seeking to disqualify opposing counsel for speaking independently with the litigant’s expert about the matter in dispute bears the burden of proving that confidential information imparted to the expert by the litigant’s lawyer was transmitted to opposing counsel.
    True.
    False.

20. In the corporate context, the attorney-client privilege is limited to communications in which an in-house or outside lawyer participates.
    True.
    False.

MCLE Answer Sheet #168

2007 ETHICS ROUNDUP

Name _____________________________
Law Firm/Organization _____________________________
Address _____________________________
City _____________________________ State/Zip _____________________________
E-mail _____________________________ Phone _____________________________
State Bar # _____________________________

INSTRUCTIONS FOR OBTAINING MCLE CREDITS
1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the $15 testing fee ($20 for non-LACBA members) to:
   Los Angeles Lawyer
   MCLE Test
   P.O. Box 55020
   Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.
4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
5. For future reference, please retain the MCLE test materials returned to you.

ANSWERS
Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. □ True □ False
2. □ True □ False
3. □ True □ False
4. □ True □ False
5. □ True □ False
6. □ True □ False
7. □ True □ False
8. □ True □ False
9. □ True □ False
10. □ True □ False
11. □ True □ False
12. □ True □ False
13. □ True □ False
14. □ True □ False
15. □ True □ False
16. □ True □ False
17. □ True □ False
18. □ True □ False
19. □ True □ False
20. □ True □ False
When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.

This approach, the court reasoned, protects attorney work product, avoids imposing additional burdens on mass document productions, and acknowledges a lawyer’s need “to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.” The court did not mention the ethical duty of zealous representation relied on in Aerojet

The court also provided little discussion on the appropriate remedy for a violation. Citing State Fund, the court noted that mere exposure to an adversary’s confidences is insufficient on its own to warrant disqualification. On the other hand, “disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification.”

Citing the “unmitigable damage caused by [the plaintiffs’ lawyer’s] dissemination and use of the document,” the court affirmed the disqualification of the plaintiffs’ lawyers and experts. Other than this terse reference to unmitigable damage, the court did not identify what other factors compel disqualification. Nor did the court analyze alternative remedies short of disqualification, such as monetary or evidentiary sanctions.

Lawyers also can become ensnared when experts forget which side they work for. In Shandralina G. v. Homonchuk, the Fourth District Court of Appeal, in a thoughtful opinion, reviewed the legal test applicable when both sides unknowingly speak with a potential expert witness, and attorney work product is disclosed. A minor, Shandralina G., sued Dr. Homonchuk for medical malpractice and the wrongful death of her mother. In February 2005, Dr. Landers was retained by Dr. Homonchuk as a defense expert, and the expert reviewed medical records and discussed his opinions on medical and legal issues and confidential defense strategies with counsel. In May 2005, as he was boarding a plane, Dr. Landers received a call from the plaintiff’s counsel, who asked for his help on the case. The expert testified he did not recognize Dr. Homonchuk’s name or the facts and agreed to review the records. On August 9, the plaintiff designated Dr. Landers as her expert. The defendant’s counsel immediately wrote to Dr. Landers, demanding he cease contact with the plaintiff, and moved to disqualify Dr. Landers and the plaintiff’s counsel. The defendant’s counsel, citing Shadow Traffic Network v. Superior Court, based the disqualification request on the ground that Shandralina G.’s lawyer had improperly obtained the defendant’s confidential information from the expert.

The court of appeal refused to presume that the plaintiff’s lawyer had received confidential information from the expert. Unlike the facts in Shadow Traffic, Dr. Landers remained under the control of the defense, and there was no legal impediment to the defendant’s ability to obtain his evidence by declaration or deposition. Citing Collins v. State of California, the court held that the burden remained with the defendant to show that the confidential information imparted by his lawyers to the expert was transmitted to the plaintiff’s lawyer. The defendant failed to meet this burden, so the court reversed the disqualification of the plaintiff’s lawyer.

Client Secrets and Lawyer Work Product

Business and Professions Code Section 6068(e)(1) provides that a lawyer has an ethical obligation to preserve the secrets of his or her client “at every peril to himself or herself.” This ethical obligation is reiterated in Rule 3-100 of the Rules of Professional Conduct. Unlike the evidentiary protection afforded to attorney-client communications and attorney work product, the ethical rule of confidentiality has only a single exception—one that permits, but does not require, a lawyer to reveal confidential information to the extent the lawyer reasonably believes is necessary to prevent a criminal act likely to result in death or substantial bodily harm. Highlighting the narrow scope of this exception, the County Bar’s PPREC opined last year that in defending against third-party claims, a lawyer may not disclose confidential information relating to the representation of a client without the client’s consent.

In PPREC’s Formal Opinion 519, a corporate lawyer assisted her client in preparing a private placement memorandum that was distributed to purchasers of the client’s notes. After the client experienced financial difficulty, a class action on behalf of the note purchasers was filed naming the client, several of its officers and directors, and the lawyer. The lawyer asked PPREC whether she was ethically permitted to disclose the client’s confidential information to defend the claims asserted against her. PPREC concluded that she could not do so without the client’s consent. Neither Business and Professions Code Section 6068(e)(1) nor Rule 3-100 include a self-defense exception. And although Evidence Code Section 958 permits disclosure of client information in a dispute with a client, it is not applicable to third-party disputes. PPREC further opined that the lawyer should advise her client in writing about the existence and nature of any actual or potential conflict with respect to the disclosure, the reasonably foreseeable adverse consequences of the client’s consent, and the client’s right to seek independent legal advice concerning the consent. Although Section 6068(e)(1) and Rule 3-100, and not the Evidence Code, set forth a lawyer’s ethical obligation to preserve client secrets, the evidentiary protections afforded to attorney-client communications and attorney work product often have ethical implications. Evidence Code Section 954 codifies the attorney-client privilege, providing that “the client...has a privilege to refuse to disclose, and to prevent from disclosing, a confidential communication between client and lawyer if the privilege is claimed by...the holder of the privilege.” In Zurich American Insurance Company v. Superior Court, the Second District Court of Appeal analyzed the scope of the privilege when the client is an entity.

The Zurich court issued a writ and concluded that the discovery referee and lower court improperly limited application of the privilege to communications in which a lawyer participated. Noting that “[i]t is neither practical nor efficient to require that every corporate employee charged with implementing legal advice given by counsel for the corporation must directly meet with counsel or see verbatim excerpts of the legal advice given,” the court reasoned that Evidence Code Section 952, which defines “confidential communication” for purposes of the privilege, contemplates that such communications may be shared with persons “to whom disclosure is reasonably necessary for the transmission of the information” for “the accomplishment of the purpose for which the lawyer is consulted.” The court articulated a two-part test. First, does the document contain a discussion of legal advice or strategy? If so, has the holder waived the privilege by disclosing the information to unnecessary third persons? The work product doctrine, codified in
Any circumstances.”43 Other work product research or theories is not discoverable under "impressions, conclusions, opinions, or legal research, and theories is absolute.45 Thus, no one may seek discovery of absolutely privileged work product in state court civil proceedings by relying on the crime-fraud exception. The result may be different in federal court because under federal common law, the crime-fraud exception does apply to attorney work product.46

In Thelen Reid & Priest LLP v. Marland,47 U.S. District Court Judge Vaughn Walker of the Northern District addressed whether a law firm could refuse to produce to its client certain internal firm memoranda on the basis of the attorney-client or work product privileges. The client, dissatisfied with the $19 million payment he received for serving as the relator in a False Claims Act case, commenced an arbitration proceeding in New York against his lawyers, the Thelen firm. The client alleged that during the engagement, Thelen coerced him through misrepresentations into modifying the original engagement letter, thereby reducing his share of the recovery. Thelen responded by filing a lawsuit in district court seeking to enjoin the client from pursuing the arbitration and enforce the modification of the engagement letter. Citing the attorney-client and work product privileges, Thelen refused to produce certain internal memoranda and e-mails created when the firm was negotiating the modification to the engagement letter with the client—that is, during the firm’s representation of the client. These communications analyzed Thelen’s ethical and legal duties to the client as well as the firm’s options.

Judge Walker recognized that the disclosure of these communications “would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations.”48 Nevertheless, he ordered production of the documents: “Thelen must produce any communications discussing known conflicts in its representation of [the client] or other circumstances that triggered Thelen’s duty to advise [the client] and obtain [the client’s] consent.”49

The judge’s order is, without question, a harsh result. He reasoned that once the law firm learned that its client might have a claim against it, the firm had a conflict requiring client consent if it wished to continue representing the client. To obtain the client’s informed consent, the firm was required to describe the nature of the conflict, including the firm’s own analysis of any claims that the client might have against it.50 The court suggested that Thelen could have avoided this problem by terminating the client relationship or retaining an outside lawyer to analyze the firm’s ethical duties.51

**Duties**

To whom does a lawyer owe a duty, and when? In Zenith Insurance Company v. Cozen O’Connor,52 the law firm Cozen O’Connor was hired by an insurer to represent its insured. After the case concluded, the law firm was sued for legal malpractice by the insurer’s reinsurer, Zenith Insurance Company. Zenith contended that it was owed a duty of care by the firm because it had discussed the underlying litigation with the lawyers, the firm knew the reinsurer was 100 percent liable for the loss, and the reinsurer had “reasonably relied” on the firm to protect its interests. Finally, Zenith argued, the law firm had never said it was not representing the reinsurer. The Second District Court of Appeal disagreed. Rejecting Zenith’s theories of third-party beneficiary and implied contract, the court held that there was no attorney-client relationship between the law firm and Zenith, and the lawyers owed no duty of care to the reinsurer. Mere knowledge that the reinsurer would benefit by the performance of the lawyers was insufficient.

In PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro LLP,53 the Second District Court of Appeal held that a law partnership was vicariously liable for the alleged wrongful acts of a partner acting in the ordinary course of the partnership. Robert Shapiro, a named but nonequity partner in the Christensen law firm, was the attorney for David Laing, who was convicted of engaging in fraudulent activities through PCO, Inc. The receiver for PCO sued Shapiro and the Christensen law firm, alleging that Shapiro directed persons to remove 12 duffel bags from Laing’s Palm Springs home—with each bag containing $500,000 in cash belonging to PCO—and used the cash to post bail for Laing and pay the lawyers’ fees.
The superior court granted the law firm’s motion for summary judgment, based on Shapiro’s declaration that 1) he represented Laing in his “private” capacity, 2) his criminal practice was separate from the firm, and 3) he deposited the monies in his personal account.

The appellate court reversed, concluding that a jury could find that Shapiro had removed the money from Laing’s residence to help a client of the Christensen firm post bail and to ensure that the firm’s fees were paid. Shapiro’s acts were “typical or broadly incidental” to the firm’s white collar criminal defense practice and within the scope of a law partner’s authority. The court held that the Christensen firm could be vicariously liable for a partner’s acts, even if those acts were willful, malicious, and criminal.

Getting Paid

State and federal courts, as well as COPRAC, published opinions in 2007 analyzing a lawyer’s ability to collect fees. Business and Professions Code Sections 6146 et seq. set forth requirements for various types of fee agreements. Section 6147 applies to most contingency fee agreements. Among other requirements, a contingency fee agreement must be in writing and include several items:

1) The agreed-upon contingency rate.
2) A statement on how disbursements and costs will affect the contingency.
3) A statement as to what extent, if any, the client could be required to pay any compensation to the lawyer “for related matters.”
4) A statement that the contingency percentage was not set by law but was negotiable (unless Section 6146 applies, which sets maximum contingency percentages for claims against a healthcare provider).
5) If Section 6146 applies, a statement that the client and lawyer may negotiate a rate below the maximum.

According to Section 6147(b), “Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall thereupon be entitled to collect a reasonable fee.” In *Alioto v. Hoiles,* the U.S. District Court for the District of Colorado confirmed that strict, rather than substantial, compliance with Section 6147(a) is required. The court refused to allow a lawyer to enforce a contingent fee agreement because his retaining agreement failed to include a statement about “related matters,” as required by Section 6247(a)(3)—even though the lawyer had no such “related matters” to discuss with the client. Fortunately, the court permitted the lawyer to pursue a quantum meruit claim. But the invalid agreement’s contingent fee could not be considered in awarding quantum meruit damages.

To further a lawyer’s interest in getting paid, can the lawyer include an enforceable, binding arbitration clause in an engagement letter and, if so, what is the impact of the Mandatory Fee Arbitration Act (MFAA) on the operation of the clause? This issue was addressed by the Second and Fourth District Courts of Appeal during 2007. Under the MFAA, a client has a statutory right to force a lawyer’s claim for fees and/or costs to nonbinding arbitration administered through the state or local bar. After the conclusion of the MFAA arbitration, subject to certain restrictions, either the client or lawyer may seek a trial de novo. The purpose of the MFAA is to provide an “effective, inexpensive remedy to a client which does not necessitate the hiring of a second attorney.”

In 2004, California Supreme Court Justice Ming Chin, in his concurring opinion in *Aguilar v. Lerner,* noted that “California case law is presently in a state of confusion over the interaction of the MFAA with private arbitration clauses in attorney-client engagement agreements.” Clearly, the confusion continued last year. The Second District Court of Appeal concluded in *Ervin, Cohen & Jessup, LLP v. Kassel* that because the client waived his right to MFAA arbitration, a pre-dispute binding arbitration clause in an engagement letter was enforceable. The Second District reversed the superior court’s order denying the law firm’s petition to compel arbitration before the American Arbitration Association (AAA) in accordance with the engagement letter. The court noted that “[the client] could have forced [the law firm] to go to nonbinding arbitration before a local bar association under the MFAA. Had he done so, there is no doubt he would have been entitled to a trial after arbitration.”

Around the same time as the *Ervin, Cohen* decision, the Fourth District Court of Appeal in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* affirmed an order denying a law firm’s motion to compel binding arbitration before the AAA pursuant to the engagement letter. The law firm brought the motion following nonbinding arbitration under the MFAA. The Fourth District reasoned that the MFAA invalidates every pre-dispute arbitration clause in an engagement letter. The California Supreme Court, however, subsequently granted the law firm’s petition for review. Thus, the interaction of the MFAA with binding arbitration clauses remains in a state of confusion, but the supreme court hopefully will provide further guidance when it decides *Schatz.*

The Ninth Circuit commented on various billing issues in reviewing a fee application by a party prevailing on her claim under the Employee Retirement Income Security Act of 1974 (ERISA). In *Welch v. Metropolitan Life Insurance Company,* the plaintiff requested $39,112 in fees, based on her lawyer’s stated hourly rates of $375 and $400. The district court awarded only $10,762, after cutting the hourly rate to $250, imposing one 20 percent across-the-board reduction for block billing, imposing a second 20 percent across-the-board reduction for billing in quarter-hour intervals, and finding certain activities (such as internal meetings) unnecessary. The Ninth Circuit affirmed in part, reversed in part, and remanded the decision for reconsideration by the trial court.

The Ninth Circuit concluded that the district court clearly erred in cutting the lawyer’s hourly rate to $250 because the plaintiff had submitted ample evidence, including declarations from other ERISA lawyers, that $375 to $400 an hour was “in line with the prevailing market rate.” The Ninth Circuit noted, however, that on remand, the district court may reduce the requested rates if the court finds that the plaintiff’s lawyer performed below the level of expertise that would command those rates or considers other evidence undermining the reasonableness of the requested rate. According to the Ninth Circuit, it was reasonable for the district court to reduce the requested fees due to block billing “because block billing makes it more difficult to determine how much time was spent on particular activities.” However, the appellate court held that the district court clearly erred in its across-the-board 20 percent cut for block billing, because not all time entries included multiple tasks. But the Ninth Circuit affirmed the district court’s 20 percent across-the-board reduction for billing in 15-minute increments, a practice that resulted in a request for excessive hours.

In *Hyon v. Selten,* the Second District Court of Appeal analyzed the restrictions imposed by Business and Professions Code Section 6155 on lawyer referral services, which charge fees for referring clients to lawyers. The plaintiff and his business partner hired the nonlawyer defendants to find a lawyer to represent the plaintiff and his partner in business litigation. The defendants, who were not licensed with the State Bar as required by Section 6155, agreed to receive 12 percent of any recovery in the litigation. The superior court found the referral agreement unlawful under Section 6155 and dismissed the defendants’ cross-complaint to recover 12 percent of the settlement the plaintiff ultimately received in the litigation. The appellate court agreed that the referral agreement was unlawful but concluded that the defendants could pursue a quantum meruit recovery for the reasonable value of any lawful services rendered.

In Formal Opinion 2007-172, the State
Bar’s COPRAC analyzed whether a lawyer may ethically accept client payments by credit card in view of Rule 4-100 of the Rules of Professional Conduct, which requires lawyers to hold funds received from clients for the benefit of clients in identifiable trust accounts. COPRAC concluded that a lawyer may ethically accept payment by credit card of earned and unearned fees and for costs and expenses already incurred but not for advances for costs and expenses—at least to the extent that funds received via credit card were subject to a “chargeback” by the merchant bank servicing the lawyer’s credit card transactions.

Under Rule 4-100, a lawyer is ethically required to 1) deposit advances for costs and expenses into a client trust account and 2) protect the funds deposited into those accounts. In a credit card transaction, a merchant bank is commonly empowered to invade deposited funds when, for example, a credit card holder disputes a charge. Therefore, if a client advances costs or expenses by credit card, the funds are not under the lawyer’s exclusive control, and the lawyer cannot satisfy his or her ethical obligation under Rule 4-100. Credit card payments for earned and unearned fees and reimbursements for costs and expenses already incurred are different, because Rule 4-100 does not require these items to be deposited into a client trust account.

Client Files

In Formal Opinion 2007-174, COPRAC addressed a lawyer’s ethical duties regarding the release of electronic documents in the client’s file at the conclusion of the attorney-client engagement. Rule 3-700(D) of the Rules of Professional Conduct provides that “an attorney whose employment has terminated shall…promptly release to the client, at the request of the client, all the client papers and property.” The rule defines “client papers and property” to include “correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert’s reports, and other items reasonably necessary to the client’s representation….” It notes that the attorney must release these items whether the client has paid for them or not. In Formal Opinion 2007-174, COPRAC concluded that Rule 3-700 requires the release of electronic versions of the documents identified in the rule as well as electronic versions of any other documents “reasonably necessary” to the client’s representation.

The committee added, however, that the lawyer is not obligated to release electronic documents in any application (such as Word and WordPerfect) other than the one in which the lawyer possesses them, because the obligation is to release items, not to create them or change the application. Also, COPRAC

GQ suggests it’s the path to reversing the signs and symptoms of aging. It’s also gotten the attention of Today, 60 Minutes, Nightline and Vogue.

Find out more about the Cenegenics program, a unique and balanced combination of nutrition, exercise and hormone optimization.

**BENEFITS MAY INCLUDE:**

- **Improved Muscle Tone**
- **Decreased Body Fat**
- **Increased Energy**
- **Increased Sex Drive/Libido**
- **Sharper Thinking**
- **Improved Outlook On Life**

At Cenegenics®, patients are successful business people and professionals. In fact, more than 1,500 of their 15,000 patients worldwide are physicians and their families. **Call today to speak with our Los Angeles physician affiliate, Dr. Allen Peters.**

**Strictly confidential, no obligation.**

**Register online to receive the GQ article and The Complete Guide to Healthy Aging.**

Call Allen Peters, MD  
310.373.7830  
Register www.cenegenics-lalaw.com  
No Insurance and No Medicare Accepted

Los Angeles Lawyer March 2008 37
advised lawyers, pursuant to their duty of confidentiality under Business and Professions Code Section 6068(e)(1), to take reasonable steps to strip any metadata from the electronic documents that might reflect confidential information belonging to other clients.

**Legal Malpractice**

In *Beal Bank SSB v. Arter & Hadden LLP*, the California Supreme Court resolved a split in decisions by courts of appeal regarding the interpretation of Code of Civil Procedure Section 340.6(a)(2), which tolls legal malpractice claims as long as “[t]he attorney continues to represent the [client] regarding the subject matter in which the alleged wrongful act or omission occurred.” Arter & Hadden represented Beal Bank until a lawyer left the Arter firm, formed his own firm, and transferred the Beal Bank matter to his new firm. More than a year later, Beal Bank sued Arter & Hadden and others for legal malpractice based on conduct that in part occurred during the Arter firm’s representation. The bank argued that its malpractice claim was tolled under Section 340.6(a)(2) because the lawyer who left Arter continued to do legal work for the bank.

The supreme court considered the text of the statute and its legislative history, in which the legislature had sought to protect lawyers from escalating malpractice insurance premiums by making the limitations period more certain. It held that when a lawyer leaves a law firm and takes a client with him or her, the firm’s representation ceases, and the statute for a claim against the firm is no longer tolled.

In a coda to *Beal Bank*, the Second District Court of Appeal in *Nielsen v. Beck* construed the “continuous representation” clause in Section 340.6 and reversed summary judgment in favor of a law firm. By doing so, the court reinstated a malpractice claim. Attorney Paul Beck defended Robert and William Nielsen against a claim for unpaid rent until the Nielsens became unhappy with the lawyer’s services and substituted in new counsel. After Beck turned over his files to the new lawyer and signed the substitution-of-attorney form in August 2004, Robert Nielsen telephoned Beck for advice on three occasions in September 2004, and the lawyer billed him for the conversations. On September 2, 2005, Nielsen sued Beck for malpractice, and the lawyer moved for summary judgment on the ground the lawsuit was barred by the one-year statute of limitations, based on his execution of the substitution-of-attorney form. The lawyer explained that he did not consider himself to be acting as Nielsen’s lawyer after he substituted out—but “professional courtesy” required him to take the former client’s calls.

The appellate court held there were triable
issues of fact concerning whether the professional relationship continued after the substitution-of-attorney form was signed, tolling the statute of limitations.72 Although Beck claimed he was merely being cordial when he discussed the pending suit with Nielsen, he nevertheless billed for his advice, and the court concluded that a jury could find a continuing relationship.73

Revision of the Rules of Professional Conduct

The Commission on the Revision of the Rules of Professional Conduct continued its multi-year effort to revise California’s ethics rules. It considered the public comments received in response to its initial drafts and prepared new draft rules for publication and comment.74

8 In-House Counsel Believe Privilege Is “Severely Damaged” Survey Finds, 23 ABA/BNA LAWYERS MANUAL OF PROFESSIONAL CONDUCT 391 (July 25, 2007).
9 CAL. RULES OF PROF’L CONDUCT R. 3-310(C).
10 BUS. & PROF. CODE §6068(e)(1); CAL. RULES OF PROF’L CONDUCT R. 3-310(E).
14 Id. at 1215-16.
16 Id. at 659.
18 Id. at 907-08.
20 Id. at *4.
29 Rico, 42 Cal. 4th at 817 (quoting State Fund, 70 Cal. App. 4th at 636-57).
30 Id. at 817-18 (quoting Kirsch v. Duryea, 21 Cal. 3d 303, 309 (1978)).
31 Id. at 819.
32 Id.
33 Id. at 819-20.
35 BUS. & PROF. CODE §6068(e)(2); see also CAL. RULES OF PROF'L CONDUCT R. 3-100(B) & (C).
39 Bus. & Prof. Code §6068(e)(2); see also CAL. RULES OF PROF'L CONDUCT R. 3-100(B) & (C).
41 Bus. & Prof. Code §6068(e)(2); see also CAL. RULES OF PROF'L CONDUCT R. 3-100(B) & (C).
42 See, e.g., Thelen Reid, 2007 WL 578989, at *6 (citing in re Grand Jury Subpoena, 357 F. 3d 900, 907 (9th Cir. 2004)).
43 CODE CIV. PROC. §2018.030(a).
44 CODE CIV. PROC. §2018.030(b).
46 See, e.g., In re Green Grand Jury Proceedings, 492 F. 3d 976, 979-80 (8th Cir. 2007).
48 Id. at *7.
49 Id. at *8.
50 Id.
51 See id.
53 CODE CIV. PROC. §2018.030(a).
54 CODE CIV. PROC. §2018.030(b).
55 See id.
56 See id.
57 BUS. & PROF. CODE §§6068 et seq.
60 Id. at 992.
62 Id. at 828.
64 Welch v. Metropolitan Life Ins. Co., 480 F. 3d 942 (9th Cir. 2007).
65 Id. at 948.
69 Id. at 509-10.
70 Id. at 1052.
71 See, e.g., In re Green Grand Jury Proceedings, 492 F. 3d 976, 979-80 (8th Cir. 2007).
72 Bus. & Prof. Code §6068(e)(2); see also CAL. RULES OF PROF'L CONDUCT R. 3-100(B) & (C).
73 See, e.g., In re Green Grand Jury Proceedings, 492 F. 3d 976, 979-80 (8th Cir. 2007).
74 Does LACBA have your current e-mail address?

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

Update your records online at www.lacba.org/myaccount or call Member Services at 213.896.6560.
Arabic Interpreting Services


Appraisals and Valuations

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

Bankruptcy Law


Consultants and Experts

MEXICAN LAW EXPERT. Attorney and former law professor testifying for over 10 years in cases filed in U.S. involving Mexican law issues—Mexican claims and defenses, personal injury, moral damages, forum non conveniens, and Mexican contract law. Coauthor, leading treatise in field. Plaintiffs/defendants. State/federal courts. David Lopez (210) 222-9494, e-mail: dlopez@pulmanlaw.com

For Lease

LAWYERS: PARADISE LOCATION! 3800 Sq. ft. for lease. Frontage at 11 East Huntington Drive, Arcadia. Near Santa Anita race track and shopping mall on restaurant row. Newly decorated and equipped for many lawyers' private offices. Two tiled bathrooms, computer room, kitchen, and conference room. Excellent free parking. Must see property! $8,000.00 month. Call (626) 254-0761 or (626) 576-0817.

Position: Corporate Counsel

IN HOUSE COUNSEL TO DRAFT, negotiate contracts, advise on intellectual property rights, employment, and regulatory issues. Coordinate with external counsel in litigation and foreign jurisdictional matters. Law degree, 40 hrs/wk, 2yrs experience. Send resume to: Western Filter Corporation, 26235 Technology Drive, Valencia, CA 91355.

QDRO Drafting & Support

QDRO DRAFTING & SUPPORT: Reduce your malpractice liability by consulting with me prior to the resolution of your divorce case. Flat rate. Quick turnaround. Call Raymond S. Dietrich, Esq. at (602) 252-7227 or visit www.qdrottrack.net.

For Lease

Corporate Counsel

IN HOUSE COUNSEL TO DRAFT, negotiate contracts, advise on intellectual property rights, employment, and regulatory issues. Coordinate with external counsel in litigation and foreign jurisdictional matters. Law degree, 40 hrs/wk, 2yrs experience. Send resume to: Western Filter Corporation, 26235 Technology Drive, Valencia, CA 91355.

QDRO Drafting & Support

QDRO DRAFTING & SUPPORT: Reduce your malpractice liability by consulting with me prior to the resolution of your divorce case. Flat rate. Quick turnaround. Call Raymond S. Dietrich, Esq. at (602) 252-7227 or visit www.qdrottrack.net.

1.800.624.2866

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

Established in 1996, expert4law–The Legal Marketplace is the best on-line directory for finding expert witnesses, legal consultants, litigation support, lawyer-to-lawyer networking, dispute resolution service providers, law office technology, and research and publishing.

This comprehensive directory is the one-stop site for your legal support needs.

AVAILABLE 24 HOURS A DAY!
ON MONDAY, MARCH 31, Trial Advocacy and the Litigation Section will present a deposition skills workshop. This course provides introductory and intermediate instruction on how to take and defend depositions in California state court actions. The first part of this program is lecture with question and answer, covering the rules relating to oral depositions, how to pin down the deponent, how to defend a deposition, the use of deposition testimony in trial, and developing a deposition strategy. The second part is a workshop in which participants practice taking and defending the deposition of a plaintiff in a civil action for negligence and receive constructive feedback on their performance.

Participants receive an outline that they can use to take and defend a deposition. The outline organizes the deposition process into a user-friendly format. The workshop will take place at the LACBA/Executive Presentations Mock Courtroom, 281 South Figueroa Street, Downtown. Preregistration is recommended for this program. The registration code number is 009856. The meal and reception begin at 8 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The prices below include the meal.

$250—LACBA members
$350—all others
3.75 CLE hours

TAP Witness Examination

ALSO ON MONDAY, MARCH 31, Trial Advocacy and the Litigation Section will present the witness examination workshop. This workshop will provide introductory and advanced level instruction on how to examine a witness under oath. The first part of the program is lecture covering how to create a formula for direct examination, lay the foundation for demonstrative evidence, create a strategy for cross-examination, control the witness, and employ techniques such as leading by prior question and anticipatory rebuttal. The second part of the program is a workshop in which participants conduct direct examination and cross-examination of witnesses. Participants receive constructive feedback on their performance. The workshop will take place at the LACBA/Executive Presentations Mock Courtroom, 281 South Figueroa Street, Downtown. Preregistration is recommended for this program. The registration code number is 009857. The prices below include the meal.

$250—LACBA members
$350—all others
3.75 CLE hours

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

ON THE LAST DAY OF 2007, the New York Times published an editorial titled “Looking at America,” which began with regrets that there are “too many moments these days when we cannot recognize our country.” Recalling recent reports of “how men in some of the most trusted posts in the nation plotted to cover up the torture of prisoners by Central Intelligence Agency interrogators by destroying videotapes of their sickness behavior,” The Times declared that it was “impossible to see the founding principles of the greatest democracy in the contempt these men and their bosses showed for the Constitution, the rule of law and human decency.” After September 11, the Times wrote, “The White House used the fear of terrorism and the sense of national unity to ram laws through Congress that gave law-enforcement agencies far more power than they truly needed to respond to the threat—and at the same time fulfilled the imperial fantasies of Vice President Richard Cheney and others determined to use the tragedy of 9/11 to arrogate as much power as they could.”

After cataloguing the abuses of Guantanamo, extraordinary rendition, torture, and “kangaroo courts,” the Times wrote that these “are not the only shocking abuses of President Bush’s two terms in office, made in the name of fighting terrorism. There is much more—so much that the next president will have a full agenda simply discovering all the wrongs that have been done and then Righting them.”

I was grateful to see this great newspaper speak out so forcefully—and not for the first time. But I was appalled that the Times stopped short of calling for the impeachment and removal of Bush and Cheney from office. James Madison warned that the Constitution would be stopped “in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.”

And Ann Coulter in her book High Crimes and Misdemeanors wrote that the “criminal law is for personal punishment; impeachment is for keeping statesmen virtuous.” (Incidentally, her book, written in 1998, was subtitled The Case against Bill Clinton.)

Today, former Congresswoman Elizabeth Holtzman, coauthor of The Impeachment of George W. Bush, who voted to impeach Nixon while serving on the House Judiciary Committee, writes that “President Bush has committed a great many grave and dangerous offenses, and subverted the Constitution.” The evidence is clear and strong. Congress cannot shrink its responsibility to protect the nation from tyranny. She recently estimated that impeachment proceedings could be finished within six months.

We will long mourn how far our country has strayed from its founding principles if we fail to convene impeachment hearings and, if warranted, remove from office leaders who have abused their powers, flaunted their duty to “take care that the laws be faithfully executed,” and willfully violated their oath to “preserve, protect and defend the Constitution of the United States.”

Stephen Rohde, a constitutional lawyer, is a former president of the Beverly Hills Bar Association and the ACLU of Southern California.
You've Invested A Lot in Your Law Practice.

First-Rate Professional Liability Protection Is A Must!

** COVERAGE FEATURES **

**AUTOMATIC:**
- ✔ Vicarious Liability Protection
- ✔ Claims Made Coverage
- ✔ Duty to Defend
- ✔ Consent to Settle
- ✔ Personal Injury (Broad Form)
- ✔ Defendants Reimbursement $10,000 Per Claim
- ✔ No Deductible
- ✔ Disciplinary Proceeding $10,000 per Policy Period No Deductible
- ✔ Prior Law Firm Coverage
- ✔ Unlimited Extended Reporting Periods Available
- ✔ Provisions for Death Disability and Retirement
- ✔ Rule 11 Sanctions $10,000
- ✔ 50% Reduction of Deductible for the Use of Mediation or Arbitration to Resolve Claim

**OPTIONAL:**
- ✔ First Dollar Defense
- ✔ Additional Limit for Claims Expense
- ✔ Aggregate Deductible

No Other Company Gives You This Much Coverage At A Premium You Can Afford

This Program Can Not Be Accessed By Your Local Broker. You Must Apply Directly To:

FIRST INDEMNITY INSURANCE AGENCY INC.
CA License #OC60203

www.firstindemnity.net • abiggio@firstindemnity.net

<table>
<thead>
<tr>
<th>BOSTON</th>
<th>LOS ANGELES</th>
<th>DALLAS</th>
</tr>
</thead>
<tbody>
<tr>
<td>41 West Street 5th Floor Boston, MA 02111 Phone (617) 426-4500 Fax (617) 426-6656</td>
<td>1800 Century Park East Suite 600 Los Angeles, CA 90076 Phone (800) 982-1151 Fax (800) 797-1897</td>
<td>5956 Sherry Lane Suite 1000 Dallas, TX 75225 Phone (800) 982-1151 Fax (800) 797-1897</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NEW YORK</th>
<th>CHICAGO</th>
<th>TAMPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>420 Lexington Ave. Suite 300 New York, NY 10170 Phone (800) 982-1151 Fax (800) 797-1897</td>
<td>10 South Riverside Plaza Suite 1800 Chicago, IL 60606 Phone (800) 982-1151 Fax (800) 797-1897</td>
<td>2202 N Westshore Blvd. Suite 200 Tampa, FL 33607 Phone (800) 982-1151 Fax (800) 797-1897</td>
</tr>
</tbody>
</table>

*State National Insurance Company is a licensed admitted carrier in the state of California. 
*Licensed and Admitted in all 50 States
Productivity breakthrough: Westlaw Legal Calendaring

Westlaw® Legal Calendaring automatically calculates your litigation deadlines based on the applicable federal, state and local court rules – then adds the information directly to your Microsoft® Outlook® calendar. As dates change, you can recalculate accordingly – and repopulate your calendar with the updates. In many jurisdictions, docket information can also be tracked and captured.

Know with confidence you’ll never miss key dates again – no matter how often they change. Even link directly to the relevant court rule governing any of the events on your calendar. Westlaw Legal Calendaring: a powerful tool for managing your cases, your time and your priorities. For more information, call our Reference Attorneys at 1-800-733-2889 (REF-ATTY).