Los Angeles lawyers (l. to r.) Robert C. Brandt, Geoffrey Murry, and Howard S. Klein examine undue influence claims in family law and probate matters page 30

PLUS

Materiality in Arbitration Clauses page 12
Preparing Records for Appeal page 19
Jurisdiction in Internet Litigation page 24
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
We Pay Attention—to the Global Future
Stonefield Josephson—Accountants for Your World

We recognize that we are part of a vibrant, global professional community. Whether local, national or international, we empower clients by creating meaningful, sustainable and successful working relationships.

Call for a complimentary meeting. Allow us to show how our high level of quality and service can address your needs.

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

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

Endorsed Protection

AHERN INSURANCE BROKERAGE
LAW FIRM INSURANCE SPECIALISTS

LOS ANGELES COUNTY BAR ASSOCIATION

ENDORSED PROFESSIONAL LIABILITY INSURANCE BROKER

- 2,000+ LAW FIRM CLIENTS
- ACCESS TO OVER 25 PROFESSIONAL LIABILITY PROVIDERS
- ON-LINE APPLICATIONS FOR EASY COMPLETION

Call 1-800-282-9786 today to speak to a specialist.

T: 1.800.282.9786
F: 858.571.9010
LICENSE # 0C04825
WWW.AHERNINSURANCE.COM
30 Under the Influence
BY HOWARD S. KLEIN, ROBERT C. BRANDT, AND GEOFFREY MURRY
Lawyers may come under special scrutiny when they become the beneficiaries of a client’s testamentary instrument.

39 Life after 64
BY BENJAMIN M. WEISS AND MICHAEL A. GEIBELSON
To achieve standing in a post-Prop. 64 unfair competition claim, plaintiffs must prove they have suffered both actual injury and significant loss.

Plus: Earn MCLE credit. MCLE Test No. 173 appears on page 41.

FEATURES

DEPARTMENTS

10 Barristers Tips
The professional benefits available to first-year attorneys
BY THU N. BURGESS

12 Practice Tips
Using effective contract language in arbitration agreements
BY LAUREN E. GODSHALL

19 Practice Tips
Appendices, exhibits, and e-briefs in the court of appeal
BY JOSEPH LANE, LAURA GEFFEN, AND ROBIN MEADOW

24 Practice Tips
Jurisdictional issues in Internet litigation
BY JEFFREY P. MILLER

52 Closing Argument
Caught between the branches
BY JUDGE TERRY B. FRIEDMAN

50 Index to Advertisers

51 Classifieds
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

Got Clients? Thinking of retiring, but don’t know how your clients’ legal needs will be met?
Successful, results-oriented, AV-rated Westside law firm, specializing in litigation and transactional matters—business, corporate, partnership, real estate, trademark and copyright would like to acquire your practice or clients in return for your receiving a future income stream.

To discuss confidentially, please call 310.826.2627, ask for Ken Linzer, or fax your interest to 310.820.3687, or email to youcanretrirefromlaw@gmail.com.

All inquiries will be held in the strictest confidence.
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

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.

Steven L. Gleitman, Esq.
310-553-5080
Biography available at lawyers.com or by request.

DepoSums

Deposition Summaries

➤ Experienced summarizers
➤ 3-step proof-reading process
➤ E-mailed direct to your computer

Los Angeles’ Finest Digesting Service
FOR MORE INFORMATION:
800.789.DEPO • www.deposums.biz

LOS ANGELES LAWYER IS THE OFFICIAL PUBLICATION OF THE LOS ANGELES COUNTY BAR ASSOCIATION
261 S. Figueroa St., Suite 300, Los Angeles, CA 90012-1881
Telephone 213.627.2727 / www.lacba.org

ASSOCIATION OFFICERS
President
DANETTE E. MEYERS
President-Elect
DON MIKE ANTHONY
Senior Vice President
ALAN K. STEINBRECHER
Vice President
ERIC A. WEBBER
Treasurer
LINDA L. CURTIS
Assistant Vice President
PATRICIA EGAN DAEHNKE
Assistant Vice President
ANTHONY PAUL DIAZ
Assistant Vice President
MARGARET P. STEVENS
Assistant Vice President
JULIE K. XANDERS
Immediate Past President
GRETCHEN M. NELSON
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 ASHOUR
SUE M. BENDAVID-ARBIV
GEORGE F. BIRD JR.
KIMBERLY H. CLANCY
DUNCAN W. CRABTREE-IRELAND
JEFFERY J. DARR
THOMAS J. DALY
TANJA J. DARROW
BEATRIZ D. DIERINGER
DANA M. DOUGLAS
PAMELA E. DUNN
CAMILLA M. ENG
IRA M. FRIEDMAN
ALEXANDER S. GAREEB
JACQUELINE J. HARDING
LAURIE R. HARROLD
BRIAN D. HUBEN
K. ANNE INOUE
LAWRENCE H. JACOBSON
HELEN B. KIM
RICHARD A. LEWIS
ELAINE W. MANOEL
ELLEN A. PANSKY
ANN L. PARK
THOMAS H. PETERS
LAURA S. SHIN
DAVID W. SWIFT
LUCY VARPETIAN
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
NORTHWEST BAR ASSOCIATION
PASADENA BAR ASSOCIATION
SAN FERNANDO VALLEY BAR ASSOCIATION
SAN GABRIEL VALLEY BAR ASSOCIATION
SANTA CLARITA BAR ASSOCIATION
SANTA MONICA BAR ASSOCIATION
SOUTHEAST DISTRICT BAR ASSOCIATION
SOUTHERN CALIFORNIA CHINESE LAWYERS ASSOCIATION
WHITTIER BAR ASSOCIATION
WOMEN LAWYERS ASSOCIATION OF LOS ANGELES
Predictability — predict’a-bil’i-ty, noun

1.) An alternative for Confidence. ie — Lawyers’ Mutual Insurance Company (LMIC)

2.) The extent to which future states of a system may be predicted based knowledge of current and past states of the system. ie — LMIC

3.) Measured by the variability in achieving cost, performance objectives and the quality of being predictable. — syn: LMIC

Stability — sta’bil’i-ty, noun

1.) A stable order. ie — Lawyers’ Mutual Insurance Company (LMIC)

2.) The quality of being enduring and free from change or variation. — syn: LMIC

LMIC . . .
the very definition.

Lawyers’ Mutual Insurance Company
Professional Liability Insurance

Celebrating 30 years

Congratulations

Dividend Just Declared!
13th Straight Year!

call 1.800.252.2045 or visit www.LMIC.com
On March 29, 2007, during an otherwise ordinary court recess, a Los Angeles sheriff’s deputy was attacked and knocked unconscious by an inmate he sought to return to the courthouse’s lockup facility. Within moments, the perpetrator had access to the officer’s firearm and the courthouse keys. In an act of extraordinary bravery, a court clerk who happened on the scene restrained the attacker, thereby preventing what likely would have been a horrific event in one of our most important public places.

As it happened, the March 2007 incident was not an isolated one. Only one year earlier, a woman had driven herself to a Los Angeles courthouse in order to testify at the sentencing hearing of someone who had severely injured her family member while murdering another victim. As the witness waited to park her car, a gunshot blew out her back windshield, leaving a bullet mark on her steering wheel. According to the Los Angeles Superior Court’s 2007 Annual Report, nearly every courthouse in the county accumulates a surprisingly large number of knives, brass knuckles, and homemade slashing devices from people who seek entry, resulting in the seizure of just under 200,000 such items in the preceding year.

About 60 miles east of the Los Angeles Civic Center, Riverside County litigants seeking their day in court prompted the trustees of the Desert Bar Association to adopt a formal, unanimous resolution urging the State Senate to fund additional judicial positions. According to the bar association, the acute lack of judicial officers has contributed to a recent, near exclusive emphasis on criminal matters in the Riverside courts. Civil cases of every kind—including significant business and financial disputes and many matters involving severe injury and personal hardship—are utterly backlogged and unable to proceed. Often, matters are not sent to trial until the five-year trial statute is set to elapse. Even after such delays, many cases are ultimately sent to courtrooms in other counties, resulting in considerable added burdens for the parties.

The common thread connecting the attacked sheriff’s deputy in Los Angeles, the litigants seeking access to justice in Riverside, and the multiple California courthouses out of compliance with current seismic and ADA standards is money—or, more precisely, the lack of it. The state’s budget shortfalls have more than once forced the judicial branch to absorb cuts, and this year’s enormous deficit has resulted in a $246 million budget reduction for the judiciary. Even though court security has always been a top priority, the cuts have inevitably affected courthouse safety and made optimal security measures simply impossible within current financial constraints. (In the case of the attacked sheriff’s deputy, for example, the presence of backup security personnel during the inmate transport would have made the incident far less likely.)

As Judge Terry B. Friedman writes in this month’s Closing Argument, communication with the legislature to ensure that the current budget cuts are not made permanent is critically important, as is advocacy for other resources essential to threshold levels of courthouse functioning. The state’s bar leaders and many judicial officers have long been active in these efforts. But, as Judge Friedman also reminds us, many more practitioners have direct relationships with legislators. Support from these attorneys could be invaluable.

The California judiciary has a national reputation for the caliber of its jurists as well as its commitment to public access. Now more than ever, there is an opportunity to participate in ensuring the continued excellence of the branch of government in which all of us—as lawyers and citizens—should recognize how much is at stake.
West Case Notebook™ helps you manage your cases with far greater speed and efficiency. This case management tool is accessible from your computer, easy to use, and keeps your trial team on the same page through every stage of litigation.

**Streamline the entire trial preparation process.**
Case Notebook contains all your case-related documents, transcripts, pleadings, legal research and more. You can search, share and organize the facts of your case by your set of criteria – key words, issues, key players, concepts.

- Access, annotate and search all essential documents – pleadings, evidence, exhibits, transcripts
- Access deposition transcripts – no more paper printouts!
  Case Notebook uses LiveNote™ technology so you have a real time, electronic version of the transcript
- Capture, organize and annotate legal research directly from Westlaw®

Get a demo and see how much easier it is to manage your next case. Call 1-800-762-5272.

Better results faster.

© 2008 West, a Thomson Reuters business W-3059367-08
The Professional Benefits Available to First-Year Attorneys

IN ADDITION TO BASKING in the glow of recently achieving lawyer-hood, first-year attorneys can enjoy certain advantages over their more experienced colleagues. Whether practicing in a firm, working as a contract attorney, or hanging a shingle, first-year lawyers enjoy free or discounted memberships in bar associations, committees, and sections. Similar bargains are available for journals, newspapers, and other tools for researching, networking, and staying ahead of the game. While many of the free and discounted opportunities are marketing gimmicks, they should not all be dismissed.

For example, joining a bar association is essential regardless of how many years an attorney has practiced. If the recent graduate is thirsting for more information and wants to stay competitive, bar association memberships provide networking opportunities, books, CLE courses, journals, newspapers, listservs, and access to a wealth of otherwise unavailable experience.

Annual bar association memberships can get expensive. However, for the first-year attorney, many bar associations reduce their membership fees. City, regional, county, and community bar associations, including the Los Angeles County Bar Association (LACBA), offer a full year of free membership. The American Bar Association’s membership can be as much as $400, but is free to first-year lawyers. Other bar organizations—such as the Santa Monica Bar Association and the Orange County Bar Association—offer membership to young lawyers at discounted rates.

Within each association, attorneys pay to join sections, divisions, or committees focused on practice areas. LACBA gives a new attorney free membership in up to three sections. While not all associations offer free section memberships (as LACBA does), some give deep discounts to first-year attorneys. For example, the State Bar of California’s Taxation Committee reduces its membership from $75 to $15 for new admittees. For solo or contract attorneys, the Solo and Small Firm Division of the State Bar also offers first-year membership for $15. Section and committee members have access to listservs, where new, young, and seasoned attorneys exchange questions, ideas, and information. What better way is there to get the inside track on the hottest topics in any particular practice area?

Additionally, most associations have barristers or young lawyers groups. Membership in LACBA’s Barristers Section is free, while the Orange County Bar charges $10 for membership in its young lawyers division. Membership in the ABA’s young lawyer group is free. Whether they are called sections, divisions, or committees, these groups focus on a young lawyer’s experience and needs. For example, LACBA offers a host of publications to members of its Barristers Section, including an e-newsletter and a “Your First” electronic publication series. The ABA gives its young lawyer members a 101 Practice Series publication, providing valuable how-to information on such practical matters as filing an appeal or appearing at a deposition.

The professional benefit that these programs and publications offer is immeasurable. Even at large firms, first-year associates may not receive reimbursement for all the memberships that are available. This unfortunately may restrict a green lawyer from exploring all available options and experiencing the benefits of each organization. However, the new admittee can take advantage of inexpensive memberships, pay for them personally, and stay competitive and competent among more experienced colleagues.

Publications

Most bar associations keep members updated via electronic and print publications. For example, LACBA sends the Daily EBriefs, which provide up-to-date case law summaries. While seasoned lawyers pay high prices to have bar journals, newspapers, and newsletters scattered about their libraries, desks, and reception areas, first-year attorneys get free subscriptions to journals such as Los Angeles Lawyer, the ABA Journal, and California Lawyer. Also adorning attorneys’ bookshelves are annotated codes, treatises, manuals, and other bound books. Instead of paying hefty prices for these lifesaving bibles, bar association members can get discounts of as much as 35 percent.

For solo or contract attorneys, malpractice insurance can break the bank. However, many insurance companies offer comprehensive yet inexpensive annual premiums for new attorneys. For example, LACBA’s preferred professional liability insurance broker, Ahern, is well versed in obtaining deals for new attorneys. More likely than not, those in their first year have clean records and are given future discounted premium incentives to keep those records clean.

The State Bar’s Continuing Education of the Bar offers the first-year attorney a number of advantages. Many lawyers and firms pay high prices to organizations such as the CEB to satisfy MCLE requirements. Fortunately, new attorneys get $200 off any CEB program or passport, which offers additional savings for CLE courses. Imagine the money saved and the respect a first-year associate will get for saving the firm some cash.

The CEB also provides a full one-year free subscription to OnLaw to new admittees, compared to the regular 14-day trial period offered to other attorneys. This subscription gives attorneys full access to almost all of the CEB’s publications, including action guides, practice books, and reporters in multiple areas of practice. During the first three years of a thriving attorney’s journey, CEB also offers 50 percent discounts on books and CDs. LACBA, in turn, offers first-year attorneys a discount on books and CDs. The Association also offers CLE+PLUS, which allows members free or discounted access to its CLE programs.

As we all know, knowledge is expensive. For many new attorneys, law school debt is proof. For this reason, new attorneys should take advantage of the free and money-saving options that they are offered. No first-year lawyer should miss these opportunities to capitalize on a new career.

Thu N. Burgess is a solo practitioner in Pasadena practicing probate, estates, business, and real estate law.
You deserve expert financial representation.

You have the right to a bank that understands the complex financial needs of attorneys and law firms. A financial ally to guide your banking with a personal touch. Whether it’s establishing IOLTAs and client trust accounts, arranging a line of credit to smooth cash flow between cases, or managing employee benefits, you deserve a bank that gives you the proper financial representation.

Call 1-888-818-6060 to schedule a meeting with a Business Banking Specialist.

Invest in you®

unionbank.com/attorneys

This is not a commitment to lend. Financing subject to credit and any applicable collateral approval. Other restrictions may apply. Financing available to businesses located in California, Oregon, and Washington. Terms and conditions subject to change.
practice tips

Using Effective Contract Language in Arbitration Agreements

THE MAJORITY OF ATTORNEYS may get through three years of law school and complete the bar exam without ever having encountered the term “arbitration,” but the fact is that arbitration is almost inevitably going to be encountered in any legal practice. Mandatory binding arbitration clauses appear in almost every type of contract, from joint venture agreements between business partners to cell phone contracts. Except in the very rare instance in which the arbitration provision in a contract, or the entire contract, can be found unenforceable due to its basic unconscionability, an arbitration provision is mandatory, and a court will enforce it.1

In addition to being mandatory, the typical arbitration provision leads to a result that is more or less unreviewable by a court. This immediate finality is commonly perceived as one of the great benefits to arbitration, as that litigation and appeals are completely avoided. The question still remains, however, how unreviewable the decision of an arbitrator actually is. This is important for business attorneys drafting contracts that incorporate a mandatory binding arbitration provision because they need to ensure that the benefits of arbitration that they seek are actually realized. Likewise, a litigator faced with an arbitration decision that the client insists was erroneous and unjustified also needs to be able to explain to that client whether an appeal of that decision to a court of law would be a worthwhile exercise or a waste of time and money.

It is well known and often repeated in case law that an arbitrator is free to be wrong. A merely erroneous decision on the facts of the matter will not be reversed by a court.2 The chance that an arbitrator may simply just get it wrong is a risk inherent in the arbitration process, and the reason why time and effort is well spent by attorneys in choosing their arbitrator or arbitration panel.3 But it is also essential to remember that arbitration is itself a contract.4 While an arbitrator is free to decide the matter presented, however rightly or wrongly, the arbitrator must not stray outside the limitations of the arbitration contract. A court will look only to the language of the arbitration agreement and will use that language to make all determinations about the propriety and reviewability of the outcome.

Because the outcome of an arbitration is unreviewable, lawyers must craft their agreements to arbitrate to limit or control the outcome so that review becomes unnecessary. This is easily accomplished—and can only be accomplished—in the language of the arbitration contract. Parties can limit the powers or arbitrators to specific questions or require the application of specific law.5 For example, a franchise agreement may require submission of any dispute to binding arbitration, require the application of the American Arbitration Association’s commercial arbitration rules, and limit the arbitrator’s discretion by specifically proving “in no event may the material provisions of this agreement be modified or changed by the arbitrator at any arbitration hearing.”

This was the issue in the franchise agreement litigation presented in Gueyffier v. Ann Summers, Ltd., an opinion of the California Supreme Court.6 This case demonstrates that even when arbitrators seem to go beyond the limits of their authority as defined by the contract, their decision is still likely to be found unreviewable.

In Gueyffier, the arbitrator was bound to apply the provisions of the contract to the dispute in question and was expressly prohibited from modifying or changing any element of the contractual requirements. The arbitrator, however, found that compliance with the contractual provisions was excused and therefore the mandatory provisions did not need to be applied to the dispute. The losing party immediately took the arbitration decision to court, insisting that this was a violation of the arbitrator’s powers. The supreme court disagreed and made the important distinction that excuse of a contractual term is not the same as a modification of a contractual term.

The Franchise Contract

The Gueyffier opinion concerned a dispute over a franchise agreement between Celine Gueyffier and Ann Summers, Ltd., a British company that franchised lingerie and adult novelty stores throughout the United Kingdom. Ann Summers entered into the franchise agreement with Gueyffier in an attempt to open the first American Ann Summers store. Ann Summers and Gueyffier signed a franchise agreement under which Gueyffier was to open an Ann Summers location in Beverly Hills. Ultimately, Gueyffier opened her store, but the opening was a total failure, as the store was greeted with open hostility. Gueyffier was quickly forced to close the store.

Disputes almost immediately arose regarding whether each party had performed its obligations under the contract. Gueyffier claimed that Ann Summers had violated the franchise agreement by failing to properly provide training and support as it was obliged to do under...
Scheduling A Complex Arbitration Shouldn’t Be So Complex

Bypass the bureaucracy and bring your case to JAMS where we provide:

1) Unparalleled flexibility and an experienced local case manager who will assist you throughout the entire arbitration process

2) Unrestricted access to our national roster of more than 200 full-time arbitrators, listed with their bios at www.jamsadr.com

3) The option of using JAMS’ custom arbitration rules and procedures or those of another provider

It’s simple. Just pick up the phone and call JAMS.

1.800.352.JAMS

www.jamsadr.com • Resolution Centers Nationwide
the contract. Ann Summers countered that the contract had a notice-and-cure provision that would have required Gueyffier to first provide notice of the problem to Ann Summers and give the company a 60-day opportunity to cure this problem prior to closure of the store and declaration of breach. Ann Summers claimed that Gueyffier should have immediately notified the company when she realized that it was not fulfilling its training and support obligations. Because Gueyffier failed to give this notice, Ann Summers alleged that Gueyffier was, in fact, the party in breach.

The franchise agreement contained an arbitration clause providing for mandatory arbitration in the event of a dispute between the parties. It specifically limited the arbitrator’s discretion, explicitly stating: “In no event may the material provisions of this Agreement...be modified or changed by the arbitrator at any arbitration hearing.”

The dispute accordingly went to arbitration. The arbitrator ultimately found that the breach by Ann Summers in failing to provide the necessary training and support for Gueyffier was incurable. Because the breach was incurable, the notice-and-cure provision was necessarily mooted due to impossibility. Therefore, the arbitrator concluded, Gueyffier’s breach of the notice-and-cure provision was excused by Ann Summers’s own breach of that same contract.

On appeal to the trial court, the question became: Was the equitable principle of excuse within the arbitrator’s powers to grant? After all, under the terms of the contract, the arbitrator was limited by the contract from modifying or changing any provision. By excusing Gueyffier’s failure to comply with one of the provisions, was the arbitrator in fact changing that provision and adding an “impossibility of cure” defense?

The arbitrator did not provide a lengthy written justification for the award. Under the contract to arbitrate, this was perfectly acceptable. A reasoned decision by the arbitrator was neither required under the arbitration provision nor requested by the parties. This was not an unusual situation. Due to the usually unreviewable nature of arbitration decisions, there is little need to require something akin to a trial court order and reasons for judgment. Litigators should know, however, that if clients see arbitration as merely a first step toward eventual litigation, written decisions should be required and requested. Otherwise, the arbitrator’s reasons for reaching the decision that he or she did are inscrutable and are extremely unlikely to be reversed.

The Gueyffier arbitrator did write a final award in which he expressly stated that he found that the notice-and-cure provision of the contract had been rendered moot by Ann

Real Estate Experts are only as good as their “real world” experience.

I have 36 years of it -- as an entitlement specialist, developer, builder, broker and contractor.

Areas of expertise include:
- Joint venture and partnership disputes
- Due diligence evaluation
- Land acquisition analysis
- Entitlement issues
- Broker and homebuilder disputes
- Profit/price participation disputes
- Development constraint issues
- Development risk analysis
- Highest-and-best use analysis
- Tentative and final map issues
- Standard of care issues
- Real estate dispute resolution services
- Industry customs and practices

Real Estate Expert Witness Services

www.castleyons.net or contact
Michael K. Ryan, President, at 619.787.5988
Summers’s actions. Gueyffier was awarded over $650,000 in damages. Ann Summers immediately appealed to the trial court, which in due course affirmed the arbitrator’s award. Ann Summers then appealed further to the California Court of Appeal, which surprised many by reversing the trial court and finding that the arbitrator had in fact exceeded his authority.8

Simply put, the appellate court decided that the “no modification or change” provision in the arbitration agreement prevented the arbitrator from finding that a contractual obligation did not have to be complied with. In making this finding, the appellate court relied heavily on O’Flaherty v. Belgum.9 In O’Flaherty, the court of appeal also reversed an arbitration award by concluding that an arbitrator exceeded his powers under the contract. In that case, the contract limited the arbitrator in his choice of remedies (he was only allowed to award remedies available either under the terms of the contract itself or in a court of law). The O’Flaherty court decided that the arbitrator’s decision was not supported by either the terms of the contract or California case law and, therefore, the award represented an act that fell outside the arbitrator’s power.

The problem was that the O’Flaherty and Gueyffier appellate court opinions both appear to contradict or at least severely constrain the supreme court’s prior rulings, including Moshonov v. Walsh, that deferred to the decisions and interpretations of arbitrators about the scope of their powers under the arbitration agreement. In the Moshonov opinion, for example, the supreme court affirmed an arbitrator’s decision not to award attorney’s fees to the prevailing party. The contract in question called for an award of attorney’s fees to the prevailing party. The arbitrator, however, determined that this provision did not apply to the award in question, and accordingly refused to award attorney’s fees. The supreme court upheld this decision, noting: “Interpretation of the contract underlying this dispute being within the matter submitted to arbitration, such an interpretation could amount, at most, to an error of law on a submitted issue, which we have held is not in excess of the arbitrator’s powers…”10

This raises a question: Is an arbitrator able to employ equitable principles when determining whether otherwise controlling contractual provisions apply to the facts at hand? Moshonov suggests the answer is yes, but O’Flaherty and the court of appeal’s Gueyffier opinion indicate that no, this is not an option.

Seeking resolution of this issue, Gueyffier appealed to the state supreme court, which sided with the arbitrator and the trial court and reversed the court of appeal. The supreme court found that the excuse of a contractual
obligation is inherently different from a change in that obligation. The no-modification clause did not work to bar the arbitrator from deciding that the notice-and-cure provision was simply inapplicable on the facts of the case as he found them. “The arbitrator was empowered to interpret and apply the parties’ agreement to the facts he found to exist; included therein was the power to decide when particular clauses of the contract applied.”11 The supreme court insisted that an actual change in a clause by the arbitrator would have been erroneous. For example, they noted that if the notice-and-cure requirement had been changed by the arbitrator from 60 days to 30 days, this would constitute a change of a term. But excusing the entire notice-and-cure provision altogether was not actually a change.

According to this opinion, a change or modification of contract terms only transpires if express, definite terms of the contract are altered to read something else. Arbitrators must apply the terms of the contract as they are presented, no matter how bizarre or egregiously one-sided those terms may prove to be. As the Gueyffier opinion recognizes, arbitrators are not merely fact finders. This, in fact, is likely what the court of appeal in Gueyffier and in O’Flaherty got wrong. These opinions suggest that there is no room in arbitration for an arbitrator to do anything other than apply the facts to the terms of the contract. This is an oversimplification of an arbitrator’s role. The supreme court in Gueyffier recognized that simple application of factual scenarios to contract terms is not the only thing that arbitrators are faced with. There will be instances in which a contract cannot or should not be applied as written.12 In those situations, unless the arbitration provision expressly prohibits it, an arbitrator is automatically granted a reasonable amount of discretion and equitable power. Of course, parties can contract to limit or eliminate even that, but unless such limitation is specifically mentioned in the arbitration agreement, the courts will allow a decision based on that discretion or equitable remedy to stand.

As the supreme court itself noted, this entire debacle could have been avoided had the arbitration provision simply limited the scope of the arbitrator’s powers so that he could not base his decision on an excuse of any contractual term. When parties fail to make an explicit limitation of the equitable powers of arbitrators, the supreme court has directed that the arbitrator can and will move beyond simple application of the facts in dispute to the terms of the contract.

Careful Drafting

Gueyffier is a lesson in careful writing of the arbitration agreement. The supreme court in
Engineering the Resolution of the World’s Most Intractable Disputes

Superb Judicial Temperament
Fiercely Fair and Impartial
Deep Subject Matter Knowledge

★★★ AWESOME RESULTS ★★★

Intellectual Property • Entertainment • International • Employment

REGINALD A. HOLMES, ESQ.
MEDIATOR - ARBITRATOR - PRIVATE JUDGE
AAA National Roster of Neutrals • Fellow, College of Commercial Arbitrators
Fellow, Association for International Arbitration • Member, California Academy of Distinguished Neutrals

THE HOLMES LAW FIRM
TEL 1.877.FAIR-ADR (1.877.324.7237) • FAX 626.432.7223
E-MAIL Rholmes@theholmeslawfirm.com

www.TheHolmesLawFirm.com
SOUTHERN CALIFORNIA • SAN FRANCISCO BAY AREA • CHICAGO • ATLANTA
fact made a lesson out of Gueyffier, noting that the entire dispute could have been avoided had the arbitration provision included one more clause. That is, instead of simply limiting the arbitrator from modifying or changing any term of the contract, the parties could have agreed in advance to prevent the arbitrator from “modifying, changing, or excusing performance” of any material term of that contract. With those two additional words in the contract, the outcome of the matter would have been entirely different.

The Gueyffier arbitrator was able to use his own judgment as a sort of on-off switch that he alone controlled. “The arbitrator was empowered to interpret and apply the parties’ agreement to the facts he found to exist; included therein was the power to decide when particular clauses of the contract applied.” In essence, once the contract was switched on, all of its provisions and demands had to be met. However, if the relevant contract provision was turned off, the parties’ compliance with or breach of this provision was irrelevant to the arbitrator’s decision. And the arbitrator was holding the switch.

Gueyffier offers clear insight on how courts will treat arbitration decisions as well as how important it is to craft an arbitration agreement. At the onset of a dispute, courts may allow parties to avoid arbitration, but once arbitration is invoked, courts are extremely loathe to reverse or even scrutinize the decisions of arbitrators. If there is any way for an arbitrator to have reached his or her decision while somehow complying with the limitations of authority as set forth in the arbitration agreement, the court will defer to this decision and will not reverse it for either factual misunderstandings or clear legal error.

Construction of an arbitration provision is vitally important. If, for example, parties to a contract must absolutely depend on the fulfillment of certain obligations, an arbitration provision must not allow for the excuse of such provisions, in any situation, even in those where equity would normally excuse performance. On the other hand, if clients hope to protect themselves from bizarre or unforeseen circumstances that make fulfillment of contractual obligations impossible, the ability of an arbitrator to turn to equitable principles should be incorporated into the arbitration provision that sets out the scope and limits of the arbitrator’s authority.

Little can be done in litigation once an arbitration decision is rendered. The decisive steps occur when the arbitration provision is drafted and when the arbitrators are chosen. Unlike litigation, which to a certain extent is always under the control of the higher courts, arbitration can really only be effectively directed from the ground up. Parties who agree to binding arbitration are ceding their constitutional rights to a jury trial and appeal. Once attorneys have to begin to search for a means to overturn an arbitration decision, the battle may already have been lost.

4 Code Civ. Proc. §§1281, 1281.2(b).
7 Id. at 1183.
10 See Moshonov v. Walsh, 22 Cal. 4th 771, 779 (2000).
11 Gueyffier, 43 Cal. 4th at 1185.
13 Gueyffier, 43 Cal. 4th at 1185.
Appendixes, Exhibits, and E-Briefs in the Court of Appeal

Fifteen Years Ago, appendixes were a relatively new tool for practitioners in the California Court of Appeal. Back then, trial courts did not routinely return exhibits to counsel at the end of a trial. Online access to trial court dockets and filings was unheard of. And there were no such things as electronic records and briefs. These changes present both challenges and opportunities for lawyers representing clients in the court of appeal.

One very important aspect of preparing an appendix for the court of appeal has not changed: the need to think about the reader. The big advantage of a party-prepared appendix over a court-prepared Clerk's Transcript is the ability to control the presentation to make it user-friendly. “User” in this context means several different persons:

• The opinion authors—a court of appeal justice working with a judicial attorney—who will read the entire record, coordinate it with the briefs, and work with it in drafting the opinion.

• The other justices assigned to the case, who may need to look at relevant parts of the record as part of their decision-making process.

• The cite checker, who will need to verify quotes from the record and check all dates, numbers, and other details to prepare the final draft of the opinion for filing.

The record must be easy for all of them to use.

Sound obvious? It should. But a recent survey of judicial attorneys in the Second District indicates that many lawyers fail to recognize these basic principles. Although a number of judicial attorneys said they preferred Clerk's Transcripts, their problem generally was not with appendixes as such but rather with inadequately prepared appendices. They almost always prefer a well-prepared appendix to a Clerk's Transcript.

Another aspect of the record that has not changed is the benefit of collaborating with opposing counsel in the preparation of an appendix, so that the court can have a single set of volumes. The rules encourage this commonsense approach. It should not be all that hard for counsel to agree on the vast majority, if not all, of the documents needed for the appeal. Adversarial posturing in this area accomplishes nothing.

To determine what to include in the appendix, start with Rule 8.124(b) of the California Rules of Court, which in turn incorporates Rule 8.122(b). The latter rule lists the items required for a Clerk's Transcript; Rule 8.124(b)(1) adds the notice of election to proceed with an appendix and the parties' stipulation designating the contents of a joint appendix.

In addition to these required materials, the appendix should always include copies of both the original complaint and the operative complaint. Intervening versions are unnecessary unless they relate to some appellate issue. In an appeal following a trial, it is also a good idea to include all minute orders filed during the course of the trial, in addition to any others that are relevant to the appeal. These provide benchmarks of the trial’s progress as well as a quick reference for the status of exhibits offered in evidence and the court’s rulings on significant matters.

Equally important are the rules governing what not to include in the appendix. A joint appendix “must not” include materials “that are unnecessary for proper consideration of the issues,” including “portions of documents.” The most obvious application of this rule is to duplicative materials, such as a 50-page contract that is attached to the complaint and to a series of subsequent motions. The appendix only needs to contain a single copy. The rule also applies to voluminous materials that are irrelevant to the issues on appeal, such as time records submitted in support of a motion for attorney's fees when the only appellate issue is the prevailing party's entitlement to, rather than the amount of, attorney's fees. The rules do not say this, but it is a good practice to note any omissions in the index or on an explanatory page inserted where the document is missing (e.g., “attorneys’ time detail intentionally omitted” or “see Exhibit 11 (sales contract) at JA 82-85”). Counsel should include a general explanation of the omissions in a footnote to the first citation to the appendix—for example, “The omission of any materials from the appendix pursuant to Rule 8.124(b)(2) of the California Rules of Court is noted in the index to the appendix and at the point where the omission occurs.”

Mechanical Requirements for the Appendix

The starting point for the look and feel of an appendix is Rule 8.144. It specifies the mechanical requirements for a Clerk's Transcript and, under Rule 8.124(d)(1), also governs appendixes. Beyond Rule 8.144's requirements, there are many other things counsel can do to make the appendix easier to use.

Indexes. Include chronological and alphabetical indexes in every volume, instead of just the first volume, and be sure the indexes clearly note volume changes. It is helpful to index the items within a particular filing, such as declarations and exhibits.

Labels. If the binding method permits (typically VeloBinding or tape-and-paste binding), indicate the volume number and page range on the spine of each volume. Neatly written pen-and-ink numbers are better than labels, which can come off. Whether or not the spine is labeled, it is helpful to use large lettering for volume numbers on the cover.

Pagination. The appendix must be sequentially paginated from beginning to end. But documents often already have multiple numbers on them, such as production numbers, deposition exhibit numbers, and trial exhibit numbers. Use a distinctive typeface, preferably a large one, so that the appendix's page numbering is clear—and make sure the numbers are legible. It is easiest to print the numbers during the duplication process. Most modern office equipment does this, as can any copy service. Do not put numbered stickers on each page, at least not on the copy that goes to the court; the corner of the volume with the stickers will swell to double the size of the rest.
of the volume.

Filing dates. The filing date must appear on certain items. The rules are permissive as to other documents, but including the date is better practice. Court-conformed copies are best, but getting them from the other side or the court can be difficult. It is fine to write the date by hand on the document. Dates must be legible. Remember that the cite checker will have to verify every filing date referred to in the opinion.

Transcripts. Although trial testimony can never appear in an appendix, motions frequently include transcripts of depositions or court proceedings. If at all possible, do not present these in the four-on-a-page or “four-up” format that lawyers sometimes use to cut down the number of pages. This format can be extremely hard to read, even illegible. If the transcripts were presented four-up in the trial court, the appendix should include those pages, but it can also include full-sized copies. If so, there should be an explanatory note somewhere. While technically the result will rarely breaks, and volumes can lie flat.

Spiral binding is actually the most user-friendly binding. It is secure, the volumes lie flat, and it is pretty hard to rip out a page. Spiral binding has limitations, however. For one thing, there is no way to write volume and page numbers on the spine. And not every court welcomes them—in fact, the Fourth District, Division Three, will reject them. So while the Second District is enthusiastic about spiral bindings, check with any other court in advance before trying to file this kind of appendix.

Nor should the limitations of VeloBinding mean that lawyers should abandon that technique. VeloBinding is mainly a problem for large volumes, because it is not sturdy enough. It works well enough for shorter volumes, from 200 to 250 pages.

Tabs. With few exceptions, judicial attorneys are very enthusiastic about tabs. Indeed, the availability of tabs is one of the reasons that some judicial attorneys prefer an appendix, assuming it is otherwise well prepared. The basic approach is to have a sequentially numbered tab for each separate trial-court filing, and to number the documents in the index to correspond with the tabs. The tabs make individual documents easy to find and refer back to.

Tabs appear at the bottom in trial-court filings because documents are bound at the top. Court of appeal volumes are bound at the left and are shelved like books, so put the tabs on the right. Otherwise, they are inconvenient to use, will interfere with shelving the documents, and may well end up being destroyed.

In addition, consider using colored paper dividers within individual filings that have multiple parts, such as declarations and exhibits. There is no quick way to find a declaration or exhibit or deposition excerpt in the hundreds of pages of undifferentiated documents filed in support of a motion. To make the appendix even easier to use, list these subparts in the index. (Do not use tabs for the subparts, however; the resulting forest of tabs would do more harm than good.)

It is a judgment call whether to include tab numbers in record citations. Some judicial attorneys find this useful, others do not. Since there is no way to know who will be reading the appendix, it is probably best to include the tab numbers. What matters most is user-friendliness, so the citation should be easily understandable. (In any event, citations must include both the volume and page numbers.) If the brief is relatively short, spell out the full citation: “Volume 3, Tab 32, p. 575.” For a brief near the word limit, consider something more concise: “3 AA 32/575.” Explain any citation conventions that are not obvious in a footnote to the first appendix citation—for example, “3 AA 32/575 means volume 3, tab 32, page 575.” (Citing line numbers is optional; those judicial attorneys who commented on the practice said they did not find it particularly useful.) And never forget that the single most important aspect of record citations is not their form but their accuracy.

Exhibits

The survey of judicial attorneys revealed that trial exhibits are a particular problem area in appellate records. All exhibits admitted, refused, or lodged are deemed part of the record on appeal. But exhibits do not magically appear at the court of appeal. Too frequently the court has already set oral argument for a case and is preparing a calendar memorandum when it learns that it does not have the exhibits cited in the briefs. Hence, the call from the clerk’s office directing counsel to deliver exhibits to the court “by noon tomorrow.” No one is well served by this scenario.

It is now the general practice for trial courts to return exhibits to the parties at the conclusion of proceedings. Thus, in compiling the appellate record, counsel must first locate the exhibits that will bear on the appeal. If the appellant does not have them, appellate counsel may need to obtain them from trial counsel or from other parties. When the parties are using a Clerk’s Transcript and exhibits have been returned to a party, “the party in possession of the exhibit must promptly deliver it to the superior court clerk on receipt of the designation.”

This creates an opportunity for the exhibits to be lost. It is better to control the process by using an appendix.

Rule 8.124(c) sets out procedures to obtain copies of exhibits in the possession of another party for use in an appendix. Here, too, the rules express an expectation of good behavior between counsel: “All parties should reasonably cooperate with such requests.” If the exhibits cannot be located, counsel should attempt to reach a stipulation to use copies, including a verification of the copies’ accuracy.

Make sure the copies are legible. It may be impossible to read the fine print in a fourth-generation copy of an insurance contract. If an exhibit is difficult to read, consider providing an additional, magnified copy for the court’s convenience. And if an exhibit is oversized, such as a photographic blow-up, consider including a letter-sized copy for ease of use. As with full-sized copies of transcripts, explain what has been done so there is no
We are experts in damages, accounting and valuation. Don’t settle for less.

White Zuckerman Warsavsky Luna Wolf Hunt LLP

Expert witnesses and litigation consultants for complex litigation involving analyses of lost profits, lost earnings and lost value of business, forensic accounting and fraud investigation

Other areas include marital dissolution, accounting and tax

Excellent communicators with extensive testimony experience

Offices in Los Angeles and Orange County

Call us today. With our litigation consulting, extensive experience and expert testimony, you can focus your efforts where they are needed most.

818-981-4226 or 949-219-9816 www.wzwlw.com expert@wzwlw.com
Exhibits should always show the trial court’s identifying number. This generally is not a problem with the originals or copies of the originals, except when the exhibit sticker is on the back of the exhibit. In that case, be sure to copy the back of the page.

If there are only a few exhibits, it may be convenient to include them in the appendix. Parties typically place them at the end of the appendix, but they could also appear chronologically when they were identified at trial, or at some other logical point that will be helpful to the court. When there are numerous exhibits relevant to the issues on appeal, put them in separate volumes, organized by exhibit number. An index listing each exhibit by number should be included in every volume; adding a brief description of each exhibit will further aid the court’s review. It may be helpful to include additional exhibits that provide necessary context, even though they are not directly relevant to the issues on appeal. For original exhibits, use a binder with clear plastic pocket pages to hold the exhibits.

Tabs (on the side of the page, not the bottom) marked with the exhibit numbers may make the exhibit volumes easier to handle. It is also helpful to include a sheet before each exhibit that specifies the exhibit number, identifies the exhibit, and states the pages in the reporter’s transcript where the exhibit was offered and where it was received or refused.

Rule 8.224 governs the procedure if the appendix does not contain copies of the exhibits, or if for any reason the court might need original exhibits. Although that rule contemplates a process for obtaining the exhibits that begins with the filing of the last respondent’s brief and involves the superior court, it is better to try to cooperate with opposing counsel to lodge the exhibits with the court at the time the respondent’s brief is due. Otherwise, delays in the formal process may mean that the court does not have the exhibits when it is working up the case. Be aware of the court’s storage limitations. If there are boxes of exhibits, or oversized exhibits, do not deliver them until they are due—but do not forget to have them delivered!

Finally, note that counsel are responsible for retrieving any lodged exhibits once the appeal is complete. The clerk’s office will notify counsel to pick up the exhibits; otherwise they will be discarded.

Electronic Briefs and Records

In a case with a large record—say, anything more than 10 volumes total—consider filing an electronic brief, or e-brief. This is a collection of digital files, typically submitted on a CD-ROM, that includes fully searchable...
electronic copies of the briefs, the record, and all cited authorities, with each document hyperlinked to the others. Justices and judicial attorneys who have had the opportunity to use e-briefs are uniformly enthusiastic about them. The cost of preparing e-briefs has declined to a point where their benefits make the cost easily justifiable in any substantial case. There are specific protocols for filing e-briefs in the Second District and the First and Third Divisions of the Fourth District, and these instructions appear on those courts’ Web sites along with lists of vendors who prepare e-briefs.13 (Note, however, that the courts disclaim any endorsement of these vendors.)

If an e-brief seems like overkill or is too expensive, consider something simpler: separate electronic copies of the briefs and/or record, without hyperlinking. Also, be aware that courts sometimes ask the parties to submit electronic copies of briefs and record materials. The protocols of the Second District and of the Fourth District, Division One, already contemplate these filings.

Careful attention to appendixes and exhibits can make readers’ lives much easier. That is part of the job of an appellate advocate. Use these tips to ease the way.


2 In a written survey, the authors asked appellate judicial attorneys at the Second District Court of Appeal their views on “the best (and worst) ways in which a party can prepare the record on appeal.” The survey topics ranged from physical features of the appendix to inclusion of exhibits and the use of electronic records. The responses are not available to the public.

3 “The parties may prepare separate appendixes, but are encouraged to stipulate to a joint appendix.” Cal. R. Ct. 8.124(a)(3).

4 For administrative proceedings, the California Rules of Court now provide explicitly for the delivery of the administrative record directly to the court of appeal. Thus the record is not included in the appendix. Cal. R. Ct. 8.123.

5 Cal. R. Ct. 8.124(b)(2).

6 Cal. R. Ct. 8.124(a)(1)(D).

7 Cal. R. Ct. 8.122(b)(2).

8 Advisory Committee cmt., Cal. R. Ct. 8.124(d).


10 Spiral binding should not be confused with metal comb binding. Spiral binding is a single piece of metal screwed through a series of holes. Metal comb binding is similar to plastic comb binding, except that it is sturdier. However, it is not as secure as spiral binding.

11 Cal. R. Ct. 8.204(a)(1)(C).

12 Cal. R. Ct. 8.122(a)(3) (Clerk’s Transcript); Cal. R. Ct 8.124(b)(3) (appendix).

13 Cal. R. Ct. 8.122(a)(3).

14 Cal. R. Ct. 8.124(c)(1).

Jurisdictional Issues in Internet Litigation

**Businesses Are No Longer Limited** by geography. For example, they no longer have to pay for local advertising in many communities to broaden the customer base. The Internet provides the opportunity for even the smallest business to reach potential customers worldwide, not just in a local area. Larger businesses almost by necessity must have a presence on the Internet to reach existing and potential customer bases and to avoid being perceived as being behind the times. For these reasons, few businesses are without an incentive to have a Web page.

A business has a number of strategic options when designing its Web page. It may create a passive Web site that posts information about products, services, and how to contact the business offline. A page of this type is sometimes referred to as an electronic billboard. Other businesses use highly interactive Web sites that allow users to purchase products through the Web site as well as create, store, and manage customer account information; place information on the business's servers; and interact with other customers. A growing number of small businesses use their own or third-party sites, such as eBay, to consummate sales nationwide.

Use of the Internet, however, may subject a business to the jurisdiction of courts in states and countries that are far from the physical location of the business. Many businesses probably do not consider that by conducting commerce on the Internet they may be sued in a court in a distant state where a customer resides. Businesses may have to retain defense counsel licensed in distant states, if only for a jurisdictional challenge.

Whether a court has personal jurisdiction over a defendant individual or entity depends on whether the defendant has sufficient “minimum contacts” with the forum state for purposes of general or specific jurisdiction. When a suit neither arises from nor relates to a defendant’s activities within the state where the suit has been filed, the court is limited to exercising general jurisdiction over the out-of-state defendant. General jurisdiction exists when a defendant’s contacts with the state are “substantial” or “continuous and systematic” enough that the defendant can be sued in that state in any action, even if the action is unrelated to those contacts. The standard for establishing general jurisdiction is fairly high and requires that the defendant’s contact be the sort that approximates physical presence. The factors that courts take into consideration are whether the defendant makes sales, solicits, or engages in business in the state; serves the state’s markets; designates an agent for service of process; holds a license with the state; or is incorporated there.

Many courts use a sliding scale to determine whether Internet activity permits general jurisdiction. At one end of the scale, a Web site may support a finding of personal jurisdiction when a defendant clearly does business over the Internet (perhaps by entering into contracts and repeatedly trading computer files) in the forum state. At the other end, personal jurisdiction cannot be exercised over a defendant that merely passively posts information on the Internet. Courts evaluate contacts in the middle of this sliding scale based on the level of interactivity and the commercial nature of the exchange of information.

Thus, large retailers conducting business over the Internet—such as Amazon or Apple’s iTunes—are likely to be subject to general jurisdiction in many states, regardless of whether the retailers have a physical presence in those states. These companies can also be subject to multiple jurisdictions even when facing claims that are unrelated to the Internet. Conversely, smaller businesses may not be subject to the general jurisdiction of a state when their Internet contacts and sales with the state are less frequent or insubstantial. A business that makes only a few sales, sales calls, or advertising in a state may not be subject to general jurisdiction for claims unrelated to its activities in the state.

**The Ninth Circuit’s Test**

However, even if general jurisdiction based on a party’s unrelated Internet activity or other activities in the state does not apply, a court may still exercise personal jurisdiction if the case arises out of certain forum-related acts. In the Ninth Circuit, this “specific jurisdiction” exists if 1) the defendant has performed some act or consumed some transaction within the forum or otherwise purposefully availed itself of the privileges of conducting activities in the forum, 2) the claim arises or results from the defendant’s forum-related activities, and 3) the exercise of jurisdiction is reasonable. A number of cases have interpreted this standard in the context of activities conducted over the Internet.

The Ninth Circuit, as well as the majority of jurisdictions, has rejected the argument that merely posting information on an otherwise passive Web site is sufficient to assert jurisdiction over a defendant. The Ninth Circuit stated that “something more” is required than merely posting information on a Web site, and that the mere presence of a passive Web site is not enough to subject the defendant to personal jurisdiction in the forum where the Web site may be accessed.

Instead, the Ninth Circuit adopted the Third Circuit’s sliding scale analysis as a way to judge whether a defendant can be held to jurisdiction in a foreign state for contacts that occurred over the Internet. The Third Circuit’s rule focuses on the level of interactivity a defendant employs on its Web site to determine whether the exercise of personal jurisdiction is appropriate. The Ninth Circuit stated the “likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and the quality of commercial activity that an entity conducts over the Internet.”

Therefore, if a defendant merely posts information on a passive Web site—one on which information is simply made available to those interested in accessing it—the exercise of jurisdiction is not proper. A defendant who merely operates a site that can be accessed from anywhere, without more, be said to be deliberately directing its mer...
WE SERVE ANYTHING, ANYWHERE
STATEWIDE • NATIONWIDE • WORLDWIDE
1-800 PROCESS

"If we don't serve it, you don't pay"
U.S.A. Only

(800) 672-1952 • Fax: (800) 236-2092
www.served.com/email: info@served.com

INTERNATIONAL
Call for cost • 1-800-PROCESS
ANY STATE • ANY NATION • ANYWHERE
SELECTING THE RIGHT NEUTRAL
California’s Foremost Mediators

The Academy is pleased to recognize over 70 neutrals.

Eleanor Barr
(310) 201-0010

Michael Bayard
(213) 383-9399

Lee Jay Berman
(213) 383-0438

Viggo Boserup
(310) 829-0099

Christine Byrd
(310) 203-7039

George Calkins
(310) 277-4222

Michael Diliberto
(310) 201-0010

Max Factor III
(310) 456-3500

Jack Fine
(310) 553-8533

Linda Fritz
(619) 236-1848

Paul Fritz
(805) 963-8789

Kenneth Gibbs
(310) 309-6205

Steve Mehta
(310) 657-1001

Richard Millen
(818) 501-2787

Jeffrey Palmer
(626) 795-7916

Deborah Rothman
(310) 452-9891

Steve Rottman
(310) 288-3700

Judith Rubenstein
(805) 569-2747

At www.CaliforniaNeutrals.org you can search by subject matter expertise, location and preferred ADR service in just seconds. You can also determine availability by viewing many members’ online calendars, finding the ideal neutral for your case in a way that saves both time and money.
The California Academy of Distinguished Neutrals is a statewide association of mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes and who have been recognized for their accomplishments through the Academy’s peer nomination and extensive review process. Membership is limited to individuals who devote substantially all of their professional efforts to service as a neutral, and is awarded regardless of provider affiliation.

TRIAL JUST BECAME EASIER

Neutrals & Arbitrators Profiled Online

 neutrals across Southern California, including...

- R.A. Carrington
  (805) 565-1487
- Steve Cerveris
  (818) 760-1047
- Eli Chernow
  (818) 995-3584
- Tim Corcoran
  (909) 798-4554
- Lawrence Crispo
  (213) 926-6665
- Greg Derin
  (310) 552-1062
- Laurel Kaufer
  (818) 888-4840
- Louise LaMothe
  (805) 563-2800
- Leonard Levy
  (818) 981-4556
- James Lingl
  (805) 482-1903
- Stefan Mason
  (310) 286-7671
- William McTaggart
  (213) 810-4269
- Philip Saeta
  (626) 799-0226
- Myer Sankary
  (818) 231-2965
- Ivan Stevenson
  (310) 540-2138
- John Leo Wagner
  (714) 834-1340
- Kenneth Weinman
  (310) 444-3030
- Leonard Wolf
  (310) 822-3600

To find the best neutral for your case, please visit our complete member roster at www.CaliforniaNeutrals.org
chandising toward a particular forum. In 2002 in Pavlovich v. Superior Court, the California Supreme Court also adopted the sliding scale rule.

In the Ninth Circuit's initial decision on the subject, the plaintiff and defendant used the same name (Cybersell) on the Internet. The plaintiff sued the defendant, a Florida corporation, in Arizona for trademark infringement. The district court granted the defendant's motion to dismiss for lack of jurisdiction. The Ninth Circuit affirmed, finding that the use of the name was passive and the defendant had conducted no commercial activity in Arizona. The defendant's contacts with Arizona were insufficient to constitute purposeful availment of Arizona. The court held that to show purposeful availment, "something more" is required than merely posting information on a site.

Since first addressing the issue in 1997, a number of courts also have held that merely posting information on a site does not qualify as purposeful activity that invokes the benefits and protections of a foreign state. As an example, the Sixth Circuit found that a plaintiff failed to prove that an out-of-state defendant accused of posting defamatory information on a site purposefully availed itself of the benefits of the forum state. Specifically, there was no evidence the defendant had any contacts with the forum besides the postings on the site, which could be accessed by anyone, and no evidence to suggest any outreach to the forum any more than to persons residing elsewhere. The court held "the mere fact that the [site] contained defamatory information concerning the plaintiff does not, absent some supporting evidence, mean that the defendant possessed the intent to target residents of the forum."13

Later, the District Court of Nevada addressed the issue when a plaintiff alleged that the defendants were "Internet bashers" who posted defamatory statements about the plaintiff on a Web site. The statements allegedly led to the devaluation of the plaintiff corporation's stock. The court found that, under the sliding scale analysis for personal jurisdiction, there was no evidence that the alleged basher did any business with anyone in Nevada or that he directed his allegedly defamatory comments to Nevada. These decisions show that counsel should not only recommend that a client not post defamatory information on a site but also advise that under the sliding scale test the client may be sued in a distant forum if material on a client's site targets residents of an out-of-state forum.

**The Effects Test**

A number of courts in the Ninth Circuit also have analyzed the application of specific jurisdiction by the effects test, as promulgated by the U.S. Supreme Court. The effects test is another means by which purposeful availment can be measured in the context of tortious conduct over the Internet. To meet the effects test, the defendant must have 1) committed an intentional act, that was 2) expressly aimed at the forum, and 3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state.

The Ninth Circuit analyzed the effects test and found that a passive site with no commercial activity does not satisfy the effects test. Significantly, the court stated that the effects test applies with even less force when the plaintiff is a corporation "because a corporation 'does not suffer harm in a particular geographic location in the same sense that an individual does.'" More recently, the Ninth Circuit cautioned that the term "effects test" can cause too much focus on the test's third prong, which is the effects prong. The court recognized that "something more" is needed in addition to a mere foreseeable effect. In that decision, a British bed and breakfast operator with the name Pebble Beach advertised its services on a noninteractive site that described its accommodations and restaurant (no golf course was included). The Pebble Beach golf course and resort in California sued the bed and breakfast operator for infringement and dilution of its trademark. The district court dismissed the complaint for lack of personal jurisdiction over the defendant, and the Ninth Circuit affirmed. Applying the effects test, the court stated that something more than a foreseeable effect is required, and the defendant's site must constitute "express aiming" at the forum state. The court found that the only acts identified as being directed at California were the site and the use of the term "Pebble Beach" in the domain name. The court concluded that the bed and breakfast's name was not targeting California any more than the United States in general, so the acts were not expressly aimed at California.

In contrast, other courts have found specific jurisdiction applying the effects test. In a 2000 decision, a small California company that sold networking products brought an action against a Georgia entity, Augusta National, Inc. (ANI), after the latter claimed that the plaintiff had infringed on its trademarks relating to the golf tournament. The plaintiff claimed that ANI was subject to the jurisdiction of a court in California because ANI sent a cease and desist letter to the California company requiring the company to sue or lose its rights to use its trademark in its domain name. The Ninth Circuit found that ANI had purposefully availed itself of California jurisdiction. The court held that the letter was expressly aimed at California because it individually targeted the plaintiff, a California corporation doing business almost exclusively in California, and the effect of the letter would be primarily felt in California because it would require the corporation to relinquish its right to use the trademark in its domain name or sue ANI.

Likewise, the Ninth Circuit also held that an Alabama resident could be sued in a California court on the basis of one fraudulent letter she sent to an insurance company reporting that she was entitled to an insurance payment actually belonging to a California resident. The critical factor in that decision was that in sending the letter, the defendant was purposefully defrauding the plaintiff in California rather than in its New York headquarters.

**Cybersquatting**

In another decision, the Ninth Circuit applied the effects doctrine and determined that purposeful availment existed. In that case, the defendant, Dennis Toeppen, registered over 100 domain names (a practice generally known as cybersquatting), including panavision.com. When the plaintiff, Panavision, learned that its trademark was being used as a domain name for what appeared to be a purposeless Internet site, it notified Toeppen of the alleged trademark infringement. In response, Toeppen offered to sell the domain name to Panavision for $13,000. After Panavision ignored his demands, Toeppen put up a second site using another one of Panavision's trademarks. The court concluded Toeppen's acts were tortious because he registered the domain names for the purpose of extorting money from Panavision. Applying the effects test, the court determined that the purposeful availment requirement was satisfied because the brunt of the harm suffered by Panavision was in the state where it maintained its principal business, California.

Finally, even if the first two requirements for specific jurisdiction are met, the exercise of jurisdiction must still be reasonable. The courts require the party challenging jurisdiction to present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. This is a difficult burden to meet.

The Ninth Circuit applies seven factors when addressing reasonableness: 1) the extent of the defendant's purposeful interjection into the forum state, 2) the burden on the defendant in defending in the forum, 3) the extent of the conflict with the sovereignty of the defendant's state, 4) the forum state's interest in adjudicating the dispute, 5) the most efficient judicial resolution of the controversy, 6) the importance of the forum to the plaintiff's interest in convenient and effec-
tive relief, and 7) the existence of an alternative forum.\textsuperscript{26} Since no one factor is dispositive, the court must balance the application of all seven.\textsuperscript{27}

Nearly all courts that have found that either the sliding scale or the effects test have been satisfied to support jurisdiction have likewise found that exercising jurisdiction over a nonresident is not unreasonable. This is largely because courts require a compelling case of unreasonableness. This is a high standard if a nonresident has already been found to have conducted commercial activity or an intentional act causing harm in the jurisdiction.

Small and medium-sized businesses may not appreciate that their marketing and business activities over the Internet may subject them to the jurisdiction of distant courts. However, the ease of the use of the Internet to conduct business over great distances can create a lack of appreciation of the businesses’ conduct in distant forums. Businesses may mistakenly believe that they can only be sued in the jurisdiction where their offices and facilities are located. To the contrary, a business may be subject to the jurisdiction of a distant court even when the business conducts small or discrete business transactions in that jurisdiction.

Counsel can assist a client by reviewing their online activities to evaluate whether the client, knowingly or not, is purposefully availing itself of distant forums that may assert jurisdiction over the client.

Counsel can also evaluate the types of claims that may be asserted based on the activities of the client. The client can then make an informed decision about whether its online and other activities with the forum in question justify the risk of having to defend itself in a distant forum. At a minimum, the client will better appreciate the potential consequences of its current or anticipated online activity.

\textsuperscript{1}International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945).
\textsuperscript{3}See Hirsch v. Blue Cross, Blue Shield of Kansas City, 800 F. 2d 1474, 1478 (9th Cir. 1986).
\textsuperscript{5}See Burger King v. Rudzewicz, 471 U.S. 462, 472-73, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985); Ballard v. Savage, 67 F. 3d 1495, 1498 (9th Cir. 1995).
\textsuperscript{6}Cybersell, Inc. v. Cybersell, Inc., 130 F. 3d 414, 418 (9th Cir. 1997).
\textsuperscript{9}Cybersell, 130 F. 3d at 419.
THE PHENOMENON OF UNDUE INFLUENCE—which finds its most basic and broad definition in California Civil Code Section 15751—appears in probate and family law matters in contrasting guises. For claims of undue influence, courts must use methods that address the specific circumstances giving rise to the claims. Indeed, the disposition of property is handled differently when it occurs upon death as opposed to divorce. In the former, donative intent—if it existed—must be interpreted from documents present after the passing of the decedent. In the latter, either force of law or an agreement between two living parties serves to form the determination of what happens to property—and an agreement, at the very least, must be given cursory approval by a court.

Still, regardless of the differences between probate and family law dispositions, the law recognizes the potential for parties to gain an unfair advantage over spouses or co-beneficiaries. This unfair advantage is of special concern in family law and probate matters because of the confidential or fiduciary relationships formed through marriage and domestic partnership or as a result of the compromised position of testators due to mental or physical illness or incapacity.

Howard S. Klein is a partner and head of the Probate Department at Feinberg, Mindel, Brandt & Klein, LLP (FMBK). He is a certified specialist in estate planning, trust, and probate law. Robert C. Brandt is a partner and head of the Family Law Department at FMBK. He is a certified family law specialist and a fellow of the American Academy of Matrimonial Attorneys. Geoffrey Murry is a litigation attorney in practice in Los Angeles County.
In probate, an attorney must be very cautious regarding his or her role when the attorney is made a beneficiary in the estate plan of a friend, relative, or client. Probate Code Section 21350 makes invalid any donative transfer benefiting the person who drafted the testamentary instrument (as well as that person’s spouse, relative, cohabitant, or partner or employee in a law partnership). Section 21351, however, provides that donative transfers that fall under the rubric of Section 21350 can be made valid either by court order or after independent counsel meets with the transferor and determines that the transfer at issue is in fact not a product of undue influence.

In family law matters, counsel must ensure that any agreement between the parties—whether premarital or postmarital, a settlement, or an interspousal transfer of assets—is entered into willingly and voluntarily, with full disclosures by both parties, and most preferably with each party represented by independent counsel.

**Probate Proceedings**

One of the most common stratagems of parties who wish to set aside a will or living trust is to assert that the document does not express the true intent of its maker but rather the intent of the benefited person. This is achieved through a claim of undue influence, and Probate Code Section 6104 ensures that those proven to have taken unfair advantage in this way will not profit from their actions. That section reads in its entirety: “The execution or revocation of a will or a part of a will is ineffective to the extent the execution was procured by duress, menace, fraud or undue influence.” There is no corresponding definition of unfair advantage in the Probate Code, but courts have defined it at times as the subjugation of one person’s will to that of another, the subversion of one’s independent free will, and the imposition of pressure that is so great that the mind gives way.

As the court noted in *Keithley v. Civil Service Board*, “[D]irect evidence of undue influence is rarely obtainable and, thus the court is normally relegated to determination by inference from the totality of facts and circumstances.” Several reported cases in the area of testamentary instruments point to various indicia of undue influence, including: • Provisions in the instruments that are unnatural, such as those that cut off the natural object of the decedent’s bounty. • Dispositions that are at variance with the decedent’s intentions as expressed before and after the execution of the documents. • Relations existing between the principal beneficiaries and the decedent that afford those beneficiaries an opportunity to control the testamentary act. • A decedent whose mental or physical condition allowed the possibility of the decedent’s free will to be subverted. • The fact that a chief beneficiary under the testamentary instrument was active in procuring the execution of the instrument.

Further, undue susceptibility combined with excessive pressure may result in a finding of undue influence sufficient to warrant rescission of a contract or conveyance.

The most powerful tool at the disposal of the contestant in undue influence litigation involving testamentary documents is the shifting of the burden of proof. With wills and living trusts, initially the contestant has the burden of proving lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. However, the landmark decision of *Estate of Sarabia* held that the contestant can shift the burden of proof to the proponent if the contestant can show the presence of three factors: 1) The existence of a confidential relationship between the testator or settlor and the person alleged to have exerted undue influence. 2) The alleged undue influencer’s active participation in procuring the instrument. 3) Undue profit received by the alleged influencer.

Attorneys assisting in the drafting of instruments should know that serving as attorney for a testator and assisting in the procurement of the instrument act as two strikes against a beneficiary. Any disposition for the benefit of an attorney donee will attract suspicion in a will contest. The burden of proof will shift to the attorney proponent of the will to demonstrate that the provision benefiting the attorney was in fact the product of the testator’s free agency. Furthermore, to successfully rebut the presumption, the attorney beneficiary must do more than merely demonstrate that the contestant has presented insufficient evidence. The lawyer must show that the instrument is the outcome of the testator’s free will.

Attorneys are not the only potential beneficiaries against whom the law raises a presumption of undue influence. Probate Code Section 21350 provides a list of persons who are disqualified as beneficiaries, including those who drafted the instrument and their relatives as well as “care custodians” of an adult transferor. This presumption can be overcome in any one of the ways established in Probate Code Section 21351, including proof that the prohibited beneficiary is related by blood or marriage, cohabits with the transferor, or is a domestic partner of the transferor. Moreover, the presumption can be successfully rebutted by clear and convincing evidence to the contrary. Further, the presumption can be countered by evidence that the instrument was reviewed by an attorney who provided counsel to the transferor regarding the nature of the specific disposition. The reviewing attorney must sign a certification to that effect.

Normally undue influence is established by inferences derived from circumstantial evidence. Typically the transaction occurred behind closed doors; the testator or settlor is deceased or is otherwise unavailable to testify or has no clear memory of what occurred; and there are no other percipient witnesses.

Although evidence that the person charged with undue influence did not actually benefit as a result of the testamentary instrument does tend to refute the charge, the claim of undue influence may stand if the undue influence comes from one who is an agent or representative of the beneficiary. This includes undue influence brought to bear on a testator in order to make a disposition in favor of the influencer’s spouse.

A challenge to a provision in an estate plan based upon the asserted exercise of undue influence on the testator or settlor may bring into play a no contest clause in the will or trust. No contest clauses comprise a constantly evolving area of the law—and one that is confusing at best. However, there are some guidelines to assist the practitioner. A “contest” means any action identified in a no contest clause as a violation of the clause. No contest clauses are not to be extended beyond the testator’s plain intent: “Such clauses must be strictly construed, and no wider scope is to be given to their language than is plainly required.” Only where an act comes strictly within the express terms of the forfeiture clause may a breach of the clause be declared. In fact, by statute, “[i]n determining the intent of the transferor, a no contest clause shall be strictly construed.”

The challenger’s ability to evade the scope of a no contest clause may well depend upon the nature of the challenge, the execution date of the testamentary instrument, and the wording of that instrument’s no contest clause. A “direct contest” means a pleading in a court proceeding alleging the invalidity of an instrument or any of its terms based upon any of 10 stated grounds, one of which is undue influence. A direct contest would appear to place the challenger squarely within the ambit of the forfeiture provision of the no contest clause. By contrast, a different section of the Probate Code—expressly affecting only instruments executed on or after January 1, 2001, and not affecting instruments executed prior to that date—provides in part that an action or proceeding to determine the character, title, or ownership of property, or a challenge to the validity of an instrument, contract, agreement, beneficiary des-
any inter-spoolal relationship as tantamount to a “super fiduciary” relationship. In marriage—unlike, for instance, the attorney-client relationship—both parties are bound by mutual duties. This has been recognized in California courts for well over a hundred years.29

In the past this confidential relationship was considered to survive until the actual entry of a judgment of dissolution—that is, when the parties were no longer spouses.30 In 1984, however, the California Court of Appeal found that parties who have taken steps toward dissolution—such as separation or the filing of a petition for dissolution—have ended their confidential relationship and are at that point dealing with each other at arm’s length.31 But Family Code Section 1100 may explicitly contradict this ruling by imposing on spouses the fiduciary duties contained in Family Code Section 721 “until such time as the assets and liabilities have been divided by the parties or by a court.”32

Vital to a court’s analysis of the presence of undue influence is the actual nature of the transaction giving rise to the claim, especially with regard to who benefited from the transaction and upon what circumstances. The relationship between spouses is not held to the same standard as that of trustee and beneficiary, under which any transaction that benefits the trustee is presumed to be a violation of the trustee’s fiduciary duties.33

Overcoming the presumption of undue influence requires the advantaged spouse to prove by a preponderance of the evidence that the parties entered into the transaction “freely and voluntarily” and “with full knowledge of all the facts, and with the complete understanding of the effects of the transfer.”34 A finding that the advantaged spouse made a “full and fair disclosure of all that the other spouse should know for his or her benefit and protection concerning the nature and effect of the transaction” will overcome the presumption, as will a finding that the spouse “deal[ed] with the other spouse at arm’s length, giving him or her the opportunity of independent advice.”35

A number of relatively recent family law cases have addressed undue influence in the context of divorce. For example, an extensive and authoritative opinion by the Second District Court of Appeal addressed undue influence claims brought by a wife against her former husband in In re Marriage of Burkle.36 The court found no undue influence in the actions of the husband with regard to disclosures prior to the parties’ execution of a postmarital agreement. The agreement, entered into by the parties during a period of reconciliation following separation, was by most measures extremely lucrative for the wife, who would upon dissolution be awarded over $30 million as her share of community assets alone as well as $1 million every year.
The court engaged in a careful analysis of the undue influence doctrine and particularly of what constitutes an “unfair advantage” as contemplated by the doctrine. The court reached the conclusion that not all advantages arising from intraspousal transactions are necessarily unfair and that unfairness giving rise to a detriment to the other spouse is a necessary component of a successful claim of undue influence:42 “[A] spouse is presumed to have induced a transaction through undue influence only if he or she, in the words of Family Code §721, has obtained an ‘unfair advantage’ from the transaction.”43 In the court’s opinion, undue influence and unfair advantage are raised by a presumption supporting the transaction between the spouses:44 “[P]roperty transfers without consideration[ ] necessarily raise a presumption of undue influence, because one spouse obtains a benefit at the expense of the other, who receives nothing in return.”45

The trial court ruled that both parties to the agreement in Burkle received an advantage as a result. The court of appeal agreed.46 A presumption of undue influence cannot logically be applied in a case where benefits are obtained by both spouses, where the spouses are represented by sophisticated counsel, and where the spouses expressly acknowledge that neither has obtained an unfair advantage as a result of the agreement. The trial court did err in concluding that no presumption of undue influence arose, and that Ms. Burkle therefore had the burden of proving, by a preponderance of the evidence, that the post-marital agreement was invalid.47

Even if the presumption of undue influence had arisen, the trial court and the court of appeal agreed that Mr. Burkle presented “substantial evidence”48 sufficient to rebut the presumption.49

The court in In re Marriage of Kieturakis50 addressed a wife’s claims of undue influence by her husband in her execution of a marital settlement agreement that was reached via mediation with a third-party neutral. The court of appeal upheld the trial court’s denial of her motion to set aside the agreement. The court made this decision on three grounds. First, it found that “the presumption of undue influence cannot be applied to marital settlement agreements reached through mediation.” To rule otherwise could “undermine the practice of mediating such agreements. Application of the presumption would turn the shield of mediation confidentiality into a sword by which any unequal agreement could be invalidated.”51

Second, the court found that “the presumption of undue influence should not apply...where the influence is alleged with respect to a judgment that has long been final.” Within the first six months after entry of judgment, a party can seek a set-aside under either Civil Code Section 473 or Family Code Section 2122.52 After that period, however, a set-aside under the Family Code section is the only option, and that statute requires, among other things, actual fraud, perjury, duress, or mental incapacity. More importantly, in Kieturakis, the court held that when a party moves to set aside a judgment under Section 2122, “the burden of proof would rest where it has always rested, with the moving party...In that event, there would be no ‘transaction’ that could give rise to a burden-shifting presumption of undue influence.”53

California law imposes upon each spouse an obligation to deal with the other fairly, openly, and without clandestine motives or intentions. This understanding remains in place not only at the advent of the marriage but throughout the marriage or at least until settlement, trial, or specific orders are imposed.

Family Code Section 1101 provides, in pertinent part, for various remedies. In the event of a breach by one spouse of the fiduciary duties under Sections 721 or 1100, the court may make “an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney’s fees and court costs.”54 If by virtue of the breach the spouse is found to be guilty of oppression, fraud, or malice,55 the award by the court “shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.”56

Public policy in California requires both spouses to avoid conduct that may cause or give rise to undue influence. The Fourth District Court of Appeal in In re Marriage of Feldman57 recently held that a trial court in a dissolution proceeding properly ordered a husband to pay $250,000 in sanctions and $140,000 in attorney’s fees to his wife as a result of his nondisclosure of financial information regarding a million-dollar bond purchase, the existence of a 401k account, a multimillion-dollar home purchase, and the existence of several privately held companies. The Feldman court made reference to pertinent Family Code statutes concerning disclosure and, in particular, held that sanctions may be imposed on a spouse who breaches his or her fiduciary duties regardless of whether harm resulting from the breach has been established. Feldman requires litigants and lawyers to be especially cognizant of the sanction of full and clear disclosure and avoidance of bad faith conduct.

**Interspousal Undue Influence in Testamentary Instruments**

As comfort and mate, spouses are certainly obligated to provide counsel to each other in all matters of life, including testamentary dispositions. But despite—or perhaps because of—the law’s respect for that unique relationship, it is possible for one spouse to exercise undue influence over the testamentary intent of the other.58

Mere opportunity to exert undue influence, however, does not raise a presumption that the spouse in fact did so.59 As with a testamentary disposition that benefits a fiduciary, the court must determine whether the presence of such a relationship is combined with unduly profiting by the will, and [the will’s] being unnatural, and activity on the part of the proponent in procuring its execution “sufficient to rise to the level of undue influence.”60 Only in the event that the court makes findings to that extent will the presumption of undue influence be raised.

Indeed, assistance in procurement or preparation of the will is vital to the raising of the presumption of undue influence by a spouse on a testator.61 Merely contacting an attorney on behalf of a spouse to make a will has been held insufficient to support this element of the analysis.62 Likewise the requirement of undue profit must be proved before the presumption is raised. Estate of Sarabia,63 although not a case involving intraspousal undue influence, is highly instructive regarding how courts should determine whether profit is undue when the beneficiary was in a confidential relationship with the testator. The court of appeal upheld a decision by the judge to instruct the jury that the term “unduly” meant “unwarranted, excessive, inappropriate, unjustifiable or improper.”64 The contestant objected to the instruction, believing the term “unduly” to be a solely quantitative concept and claiming that the trier of fact’s analysis must be limited to the terms of the will itself.65

On appeal, however, the court reasoned that for the jury to determine the undue profit on a quantitative basis would “assume the amount of that entitlement [to the contestant] is somehow self-evident; only by knowing what has been shifted from the contestant to the proponent can it be determined whether the proponent is taking ‘substantially more’ than he or she would take in the absence of the will.” According to the court, “The implicit premise [of the contestant’s position] is that the omitted heir has some entitlement to the decedent’s bounty that is superior to the beneficiary designated by the testator.” The court called this stan-
Thursday, October 30, 2008
8:30 a.m. – 5:00 p.m.
Continental Breakfast and Luncheon Program Included

Millennium Biltmore Hotel
506 South Grand Avenue
Los Angeles

7.0 hours CLE credit including 1.0 hour of ethics

Price
$295 Early Bird Rate (available until September 12, 2008)
$375 Business and Corporations Law Section Members
$1,750 Group Rate buy 5 tickets at a reduced rate, get 6th complimentary (all five tickets must be purchased together to receive this special offer).

Call for special rates for government employees & law students

Sponsored by the
Los Angeles County Bar Association
Business & Corporations Law Section and U.S. Securities and Exchange Commission

Co-Sponsored by the
California Department of Corporations
State Bar of California
Business Law Section
North American Securities Administrators Association, Inc.
FINRA

Program Registration
For phone registration with Visa, Mastercard or American Express:
call (213) 896-6560, M – F 9 am – 4 p.m.
All registration will close at noon on October 27, 2008.
You may also register by visiting our Web site at
http://www.lacba.org

No refunds after October 27, 2008

Topics
• Recent Developments in Securities Laws
• Trends in Securities Regulation

Breakout Session One
• Corporation Finance Roundtable
• Avoiding Liability: Tips for Transaction Lawyers and General Counsel
• Securities Litigation Update

Breakout Session Two
• Mergers & Acquisitions In A Changing Environment
• Raising Capital & Debt Financing
• Representing Boards of Directors and Committees During Corporate Crises

• Enforcement Developments
• Ethics and the Securities Lawyer

Program Code 010080

LUNCHEON SPEAKER: Elisse B. Walter, Commissioner, Securities and Exchange Commission

Speakers Include:
Seth Aronson
O’Melveny & Myers LLP
Brian G. Cartwright
General Counsel, Securities and Exchange Commission
Linda Chatman Thomsen
Director, SEC Division of Enforcement
Patrick J. Coughlin
Coughlin Stoia Geller Rudman & Robbins LLP
Preston DuFaucourd
Commissioner, California Department of Corporations
Martin P. Dunn
O’Melveny & Myers LLP
Robert C. Friese
Shartsis Friese LLP
John F. Hartigan
Morgan, Lewis & Bockius LLP
Mary Ellen Kanoff
Latham & Watkins LLP
Michael C. Kelley
Sidley Austin LLP
William H. Kimball
Morgan, Lewis & Bockius LLP
Robert B. Knauss
Munger Tolles & Olson LLP
Randall R. Lee
Wilmer Cutler Pickering Hale & Dorr LLP
Jeffrey A. LeSage
Gilson, Dunn & Crutcher, LLP
Simon M. Lorne
Millennium Management LLC
Brian J. McCarthy
Skadden, Arps, Slate, Meagher & Flom LLP
Gregg A. Noel
Skadden, Arps, Slate, Meagher & Flom LLP
Thomas P. O’Brien
U.S. Attorney, Central District of California
Aulana L. Peters
Former Commissioner, Securities and Exchange Commission
Andrew G. Petillon
Associate Director, SEC Los Angeles Regional Office
Wendy C. Shiba
General Counsel, KB Home
John W. Spiegel
Munger, Tolles & Olson LLP
Hon. Stanley Sporkin
Niron Stabinsky
Managing Director, Deutsche Bank
Steven B. Stokdyk
Latham & Watkins LLP
Rosalind R. Tyson
Regional Director, SEC Los Angeles Regional Office
John W. White
Director, SEC Division of Corporation Finance
Debra Wong Yang
Gilson, Dunn & Crutcher LLP

Program Steering Committee
John F. Hartigan
PROGRAM CHAIR
Morgan, Lewis & Bockius LLP
David Greene
FINRA
Ann Marie Bedtke
SECTION ADMINISTRATOR
Los Angeles County Bar Association
Theresa Leets
California Department of Corporations
Ingrid A. Myers
Morgan, Lewis & Bockius LLP
Rosalind Tyson
Regional Director, Securities and Exchange Commission

Call for special rates for government employees & law students

Program Code 010080

LUNCHEON SPEAKER: Elisse B. Walter, Commissioner, Securities and Exchange Commission

Speakers Include:
Seth Aronson
O’Melveny & Myers LLP
Brian G. Cartwright
General Counsel, Securities and Exchange Commission
Linda Chatman Thomsen
Director, SEC Division of Enforcement
Patrick J. Coughlin
Coughlin Stoia Geller Rudman & Robbins LLP
Preston DuFaucourd
Commissioner, California Department of Corporations
Martin P. Dunn
O’Melveny & Myers LLP
Robert C. Friese
Shartsis Friese LLP
John F. Hartigan
Morgan, Lewis & Bockius LLP
Mary Ellen Kanoff
Latham & Watkins LLP
Michael C. Kelley
Sidley Austin LLP
William H. Kimball
Morgan, Lewis & Bockius LLP
Robert B. Knauss
Munger Tolles & Olson LLP
Randall R. Lee
Wilmer Cutler Pickering Hale & Dorr LLP
Jeffrey A. LeSage
Gilson, Dunn & Crutcher, LLP
Simon M. Lorne
Millennium Management LLC
Brian J. McCarthy
Skadden, Arps, Slate, Meagher & Flom LLP
Gregg A. Noel
Skadden, Arps, Slate, Meagher & Flom LLP
Thomas P. O’Brien
U.S. Attorney, Central District of California
Aulana L. Peters
Former Commissioner, Securities and Exchange Commission
Andrew G. Petillon
Associate Director, SEC Los Angeles Regional Office
Wendy C. Shiba
General Counsel, KB Home
John W. Spiegel
Munger, Tolles & Olson LLP
Hon. Stanley Sporkin
Niron Stabinsky
Managing Director, Deutsche Bank
Steven B. Stokdyk
Latham & Watkins LLP
Rosalind R. Tyson
Regional Director, SEC Los Angeles Regional Office
John W. White
Director, SEC Division of Corporation Finance
Debra Wong Yang
Gilson, Dunn & Crutcher LLP
The types of relationships—and the attendant duties—between parties to divorce proceedings and beneficiaries and testators in probate proceedings can vary considerably. The confidential relationship between two married persons brings with it the reciprocity of duties between the two. Spouses share the duty of the highest good faith and fair dealing—the same as between business partners. The law does not recognize a duty on the part of one spouse that it does not demand of the other. Indeed, the only person who can raise a claim of undue influence is the other spouse.

In probate proceedings, however, the court is concerned with duties that run only in one direction. The testator owes no duty to anyone. It is his or her will that is preeminent. The focus is on the one-way duties owed by lawyers to their clients and anyone with what could be considered “special” access to the testator, such as caregivers or persons in a confidential relationship with the testator who were active in procuring the testamentary instrument and received an “undue” profit by virtue of that instrument. Furthermore, a probate contest can theoretically be initiated by “any interested person.”

Burden of proof also operates differently in family law than in probate. In family law, the disadvantaged spouse bears the initial burden of showing the court that the advantage gained by the other spouse was somehow unjust or otherwise without reciprocal benefit. As in Burke, that fact that one spouse has a clear advantage in the division of property does not always justify a finding by the court that the benefit to the advantaged spouse was unjust. But once the court is satisfied that the interspousal transfer was not supported by adequate consideration, the burden shifts to the advantaged spouse to show that both parties made a knowing and informed decision in the transfer of title to property.

In probate, parties contesting testamentary dispositions carry the initial burden of proof to establish “unnatural dispositions”—including those that are at variance with the testator’s previously stated wishes, made when opportunities existed for beneficiaries to exercise undue influence, or involve testators whose mental or physical condition made them susceptible to undue influence. This is not an easy burden for a contestant to carry. However, the contestant can shift the burden of proof by showing that the beneficiary (1) was in a confidential relationship with the settlor, (2) was active in procuring the instrument, and (3) as a result received an undue profit. Although by no means an easy hurdle to clear, especially regarding what constitutes undue profit, the establishment of these three factors is often easier than the fact finding associated with the contestant’s initial burden of proof.

Despite the differences, however, the overall goal in family law and probate proceedings is the same: to determine whether a spouse or a beneficiary has in some way benefited unjustly and at the expense of another. Furthermore, in both circumstances, even the strongest showing of undue influence by the person challenging the transfer of property can be overcome with an even stronger showing by the benefited party.

In the context of a divorce, this means a showing that the benefit received was not unjust or that the disadvantaged spouse made an informed and well-counseled decision to transfer the property. In probate, the beneficiary must show that the testator’s actual intent is represented by the challenged disposition. A higher standard, however, will apply if the beneficiary falls within the rubric of Probate Code Section 21350; that is, a court issues an order finding the transfer was not the product of undue influence, or an independent examining attorney offers a signed certification that the disposition represents the true will of the testator.

Probate and family law demand that practitioners emesh themselves in the very private affairs of nuclear and extended families as well as other close but nonfamilial relationships and the relationships of former or current business partners. To the untutored, determinations of undue influence can seem subjective and open to interpretation. With proper and informed awareness, however, anyone practicing in probate or family law can learn to recognize undue influence when they encounter it and thereafter work to rectify situations that could later give rise to costly and unnecessary litigation.  

According to Civil Code §1573:
Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another’s weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another’s necessities or distress.

2 See Estate of Richards, 160 Cal. 467, 480 (1911); see also Rice v. Clark, 28 Cal. 4th 89, 96 (2002).
4 See Estate of Anderson, 185 Cal. 700, 707 (1921).
California’s Boutique Eminent Domain Law Firm

Trusted by California’s legal community to obtain maximum just compensation for their business and property owner clients.

A.J. Hazarabedian
Glenn L. Block
Artin N. Shaverdian
Dan F. Oakes
(818) 957-0477
(818) 957-3477 (fax)
info@caledlaw.com
3429 Ocean View Blvd., Suite L
Glendale, California 91208
www.caledlaw.com

the right fit and experience won’t be easy to find. where do we start?

THAT’S WHAT WE DO, EVERY DAY. Managing a growing firm with a mounting case load is a challenge. Hiring or replacing qualified attorneys to keep pace shouldn’t be. You need Special Counsel, the nation’s leading provider of legal staffing services. We source attorneys at all experience levels, proven in all areas of legal work and in virtually every practice area... from securities to real estate law, intellectual property to litigation. The demands of a successful practice can be difficult, but hiring the right fit won’t be. Call us today.

©2008 Special Counsel, Inc. All rights reserved.

A Member of the MPS Group

SPECIAL COUNSEL

(213) 620-6620
(800) 737-3436
specialcounsel.com

Dan F. Oakes

PROB. CODE §8252(a).


11 Id. at 313.

12 For further parsing of the term “care custodian,” see Bernard v. Foley, 39 Cal. 4th 794 (2006).

13 PROB. CODE §21351(d).

14 Probate Code §21351 provides:
Section 21350 does not apply if...[t]he instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter....

16 In cases involving contracts, no statute expressly establishes who has the burden of proof.

17 In re Ventura’s Estate, 217 Cal. App. 2d 50 (1963) (holding that an executor, who was left no specific bequest but who was given the right to choose which orphans’ home would receive a bequest, did not personally benefit).


19 PROB. CODE §21300(a).


21 PROB. CODE §21304.

22 PROB. CODE §21300(b).

23 PROB. CODE §21305(a).

24 The term “marriage” here and later indicates both the institution defined in Family Code §300 and domestic partnerships as defined in §297.

The California Supreme Court’s In re Marriage Cases decision recently opened state-sanctioned civil marriage in California to same-sex couples. In re Marriage Cases, 43 Cal. 4th 757 (May 15, 2008). The court’s decision also explicitly ruled as unconstitutional Proposition 22, the Knight Initiative, which was passed by California voters in March 2000. Proposition 22 added §308.5 to the Family Code: “Only marriage between a man and a woman is valid or recognized in California.”

California’s domestic partnership scheme remains intact despite the recognition by the supreme court that the right to marriage extends to same-sex couples. Many consider it in the best interests of California same-sex couples who are considering marriage to also register as domestic partners. One reason is the possibility that Proposition 8, on the November 2008 ballot, may win the approval of California voters. This proposition seeks to amend the California Constitution in an identical fashion as Proposition 22 amended the Family Code. If it passes, the marriages between same-sex couples would be considered nullities. Proposition 8 will do nothing, however, to alter the grant of rights and responsibilities under the domestic partnership scheme. A remaining issue is whether the legislature or the courts will extend domestic partnership rights to opposite-sex couples in which both members are younger than 63—a segment of the population currently excluded from domestic partnerships.

26 The statute references Corporations Code §§16403, 16404, and 16504 regarding the duties between two nonmarried business partners.

27 See In re Marriage of Bonds, 24 Cal. 4th 1, 27 (2000); see also In re Marriage of Delaney, 111 Cal. App. 4th 991, 996 (2003).


29 See Dimond v. Sanderson, 103 Cal. 97, 101 (1894); see also In re Marriage of Burkley, 139 Cal. App. 4th 277, 280 (2005).
A Legacy From Your Client Can Help Us Find The Cure.

In 1964, 3 percent of children with acute lymphocytic leukemia lived five years. Today, more than 87 percent survive.

Many research programs that made this possible were funded by people who included the Society in their estate plan.

For information about bequests, contact us at 888.773.9958 or llspallengiving@lls.org.

Rachel Payeur-Narine
Leukemia Survivor

32 The automatic mutual temporary restraining orders—or ATROs—that follow a filing of a petition for dissolution serve to enforce these fiduciary duties during the liminal period between separation and the divorce decree. See Fam. Code §§231-235, 2040(a).
31 See Prob. Code §16004.
Life after

Two cases under review by the California Supreme Court will determine the contours of future litigation under the UCL

The California Supreme Court’s decision in Californians for Disability Rights v. Mervyn’s, LLC, is often quoted for its observation that Proposition 64:

[L]eft entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover. Now, as before, no one may recover damages under the UCL...and now, as before, a private person may recover restitution only of those profits that the defendant has unfairly obtained from such person or in which such person has an ownership interest.

Despite this declaratory language, however, the quotation actually marks a line where the absence of change in the wake of Proposition 64 stops and post-Proposition 64 practice under the Unfair Competition Law begins. As the California Court of Appeal noted recently in Medina v. Safe-Guard Products, International, Inc., Proposition 64 most definitely created a standing requirement as well as required plaintiffs to prove injury and loss.

Although the UCL’s name and origins are rooted in antitrust law, a cause of action for a violation of the UCL (often referred to as 17200 or B&P 17200) is commonly pled in claims that the UCL drafters could not likely have imagined. The explosion of UCL cases may owe, in part, to the notoriety the law received for the abuses that ultimately led to the passage of Proposition 64. Nevertheless, the ubiquity of UCL claims may also be due to the fear instilled in lawyers that if they do not plead a UCL violation they may fail to extend the statute of limitations on a variety of other claims.

Proposition 64—approved by California’s voters on November 2, 2004—requires private plaintiffs to prove they have suffered “an injury in fact and [have] lost money or property as a result of such unfair competition.” Proposition 64 also amended Business and Professions Code Section 17203 so that private plaintiffs who bring representative actions must comply with the requirements of Code of Civil Procedure Section 382, California’s

Benjamin M. Weiss and Michael A. Geibelson are with the Los Angeles office of Robins, Kaplan, Miller & Ciresi L.L.P, where they handle unfair competition and class action cases.
class action statute. While Proposition 64 may have clarified the voters’ intent with respect to the use (and abuse) of the UCL, the drafters of Proposition 64 (and the voters) left several questions unanswered:

• Must UCL plaintiffs present proof of their reliance on the unfair, fraudulent, or unlawful act or practice as well as proof of causation?
• How “substantial” must a plaintiff’s injury and loss of money or property be in order to have standing to sue under the UCL?
• How do the answers to the preceding two questions affect a UCL plaintiff’s ability to obtain certification of a class action?

Since the passage of Proposition 64, courts have addressed some of these questions. Answers are also evolving by analogy to other areas, particularly in the context of class actions. Given the omnipresence of Section 17200 in complex business litigation and class actions, these issues will undoubtedly receive increasing attention in the coming years.

**The Reliance-Causation Continuum**

In *In re Tobacco II Cases*, the California Supreme Court was faced with the possibility of determining whether every member of a proposed class was required to show injury in fact and reliance on the manufacturer’s representations or whether it was enough to show only the class representative’s injury and reliance. The supreme court did not decide the issue, ruling instead that the claim was preempted. Two other cases now pending before the California Supreme Court present very similar issues to those not resolved by *Tobacco II*: *McAdams v. Monier* and *Pfizer, Inc. v. Superior Court (Galfano)*.

Briefing was deferred in both cases pending into the transactions at issue, the plaintiffs failed to establish that their injuries were caused by the allegedly false and misleading advertisements. According to the court:

The language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is required as to each representative plaintiff....Because Plaintiffs fail to allege they actually relied on false or misleading advertisements, they fail to adequately allege causation as required by Proposition 64. Thus...Plaintiffs lack standing to bring their UCL and [false advertising] claims.

Similarly, in *Cattie v. Wal-Mart Stores, Inc.*, the district court concluded that omitting a reliance requirement for standing to bring a UCL claim would “undermine Proposition 64’s reform purposes.” The *Cattie* court looked at one of the purposes of Proposition 64—foreclosing the ability of an “unafflicted plaintiff,” which was often the sham creation of attorneys, “to bring frivolous lawsuits with no public benefit or accountability to the public. The court stated, “An attorney who became aware of false advertising but who had no client who was harmed by it could easily ‘create’ a client with standing to sue by directing a willing party who was not deceived by the advertising to make a purchase. Thus, omitting a ‘reliance’ requirement would blunt Proposition 64’s intended reforms.” The *Cattie* court dismissed the UCL claim at issue because the plaintiff could not allege reliance or causation.

Although *Cattie* and *Laster* were both federal cases, recently the California Court of Appeal in *Hall v. Time, Inc.*, agreed with and followed those cases. The *Hall* court
1. The California Supreme Court’s decision in Californians for Disability Rights v. Mervyn’s, LLC, changed the substantive rules governing competitive conduct among businesses.
   True.  False.

2. Under the Unfair Competition Law, a private plaintiff may recover restitution only of those profits that the defendant has unfairly obtained from the plaintiff and in which the plaintiff has an ownership interest.
   True.  False.

3. Lawyers have been sued for malpractice for not considering the pleading of a UCL cause of action in a wage-and-hour class action.
   True.  False.

4. Proposition 64 was approved by California’s voters on November 2, 2000.
   True.  False.

5. Proposition 64 requires a private plaintiff bringing a UCL claim to have:
   A. Suffered injury in fact.
   B. Lost money or property as a result of the alleged unfair competition.
   C. A or B.
   D. A and B.

6. Proposition 64 also requires a private plaintiff to:
   A. Satisfy the requirements of California’s class action statute.
   B. Prove illegal acts were committed to violate Business and Professions Code Section 17200.
   C. Serve notice prior to the suit.
   D. Verify that the plaintiff has never violated Civil Code Section 17207.

7. In its In re Tobacco II Cases decision, the California Supreme Court resolved the question of whether every member of a proposed class was required to have relied on a manufacturer’s representations.
   True.  False.

8. Even before a single plaintiff has standing to sue under the UCL after Proposition 64, the plaintiff must demonstrate that the defendant’s alleged act caused the injury that is the subject of the plaintiff’s complaint.
   True.  False.

9. The plaintiff in Hall v. Time, Inc., complained that Time sent invoices for its books:
   A. Before a customer actually asked for a book in order to induce an order.
   B. Before the free trial period ended to obtain immediate payment.

10. The court in Anunziato v. eMachines, Inc., was not concerned about hypothetical situations in which a causation requirement would foreclose UCL actions.
    True.

11. The court of appeal in Pfizer, Inc. v. Superior Court agreed with Anunziato that to satisfy Proposition 64’s injury-in-fact requirement in a false advertising case under the UCL, the representative plaintiff and each putative class member must plead and prove that he or she saw, read, and relied upon the advertising at issue in purchasing the defendant’s product.
    True.  False.

12. A plaintiff cannot create standing under the UCL by buying a product solely for purposes of litigation.
    True.  False.

13. To what authority may California courts look for guidance in determining what is unfair under the UCL?
    A. The federal Truth in Lending Act.
    C. Securities and Exchange Commission rules and regulations.
    D. The Class Action Fairness Act.

14. The type of evidence required by appellate courts to support a verdict is:
    A. Substantial.
    B. Sufficient.
    C. Clear and convincing.
    D. Scintillating.

15. In some types of non-UCL cases, nominal damages may be awarded when a cause of action is proved but no substantial damage is shown.
    True.  False.

16. Despite the name, nominal damages may range from $1 to $1,000.
    True.  False.

17. Class actions cannot be used to alter substantive rights.
    True.  False.

18. Subgroups of putative class members have suffered no injury and have no standing, courts have found class definitions to be impermissibly overbroad and denied certification.
    True.  False.

19. The Truth in Lending Act caps damages at the lesser of $500,000 or 5 percent of the defendant’s net worth.
    True.  False.

20. Under what authority have courts increasingly found class certification improper when the imposition of statutorily mandated civil penalties would be disproportionate to the harm suffered?
    A. The Truth in Lending Act.
    B. The Fair and Accurate Credit Transactions Act.
    C. The Racketeer Influenced and Corrupt Organizations Act.
    D. A and B.
be plaintiffs who actually suffered an injury.\textsuperscript{19} The decision in \emph{Anunziato} has been under attack ever since its issuance.\textsuperscript{4}

Hall distinguishes \emph{Anunziato} on other grounds, but the court of appeal in Pfizer took aim squarely at \emph{Anunziato}'s central premise. The Pfizer court held that to satisfy Proposition 64's injury-in-fact requirement in a false advertising case under the UCL or the False Advertising Law,\textsuperscript{20} the representative plaintiff and each putative class member must plead and prove that he or she saw, read, and relied upon the advertising at issue in purchasing the defendant's product, Listerine.\textsuperscript{21} The Pfizer court observed that the \emph{Anunziato} court improperly "substituted its judgment for that of the voters and based its decision on the perceived ill effects of a 'reliance' requirement would have in hypothetical fact situations."\textsuperscript{22}

By contrast, McAdams held that an inference of reliance can support class certification, although each class member would later need to show that they were exposed to the allegedly false or deceptive representation. The review by the supreme court of Pfizer and McAdams is being closely watched because the cases do not involve the preemption issue in Tobacco II.

The causation requirement has also been the death knell for UCL claims when the plaintiff attempted to manufacture standing, and, despite the plaintiff's ruse, a legally cognizable injury was absent. For example, in Buckland v. Threshold Enterprises, LTD, the plaintiff—the putative class representative—purchased a skin cream "soley to facilitate her litigation...."\textsuperscript{23} Although couched in the language of injury, the court effectively concluded that the purchase was not caused by the defendant's deception. Instead, the plaintiff was forced to claim that the purchase was an injury because it constituted a litigation cost. Still, the court rejected the theory, holding that the litigation cost of her purchase "did not constitute the requisite injury in fact; to hold otherwise would gut the 'injury in fact requirement' [of Proposition 64]."\textsuperscript{24}

The court of appeal in Medina confirmed the centrality of causation but did so nominally in the language of injury. Medina brought a UCL action seeking a return of the amount he paid for a vehicle service contract; he alleged that the contract was void because the contract was in reality an insurance contract, and the defendant was not licensed to sell insurance in California. However, Safe-Guard never denied any claim made by Medina under the contract or gave him inferior products or service.\textsuperscript{25} Despite the plaintiff's desire to void the contract and obtain a return of the fees initially paid for it, the Medina court concluded that "there is no statutory basis, at least in terms of the Proposition 64 amendment, to differentiate UCL actions based on the subjective motivation of the plaintiff; the differentiation is between instances where there is actual loss of property versus no such loss."\textsuperscript{26} The court concluded that because there was no allegation that Medina got less than he was entitled to under the contract, "[h]e hasn't suffered any loss because of Safe-Guard's unlicensed status."\textsuperscript{27}

In addition to the reasons explained in Buckland and Medina, due care in identifying the injury and analyzing causation is also necessary because of the UCL's "safe harbor." If the specific conduct causing the identified injury is permitted by express law, it cannot be unlawful, deceptive, or unfair under the UCL as a matter of law; compliance with express law provides immunity, or a safe harbor, from UCL liability.\textsuperscript{28}

\section*{Actual and Substantial Injury}

The language of Section 17204 requires a person who brings a UCL action to identify an injury and a loss. In many instances, the loss of money or property may also constitute an injury; in others, it may not. But because both must be shown, and as the plaintiffs in Buckland and Medina learned, the nature of the claimed injury takes on increasing importance.

The California Supreme Court suggested in \emph{Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company} that "we may turn for guidance to the jurisprudence arising under Section 5 of the Federal Trade Commission Act in determining what is unfair under the UCL. The court of appeal in \emph{Camacho v. Automobile Club of Southern California} pointed to this language in \emph{Cel-Tech} when it reiterated that for a practice to be unfair, the injury must be shown to be "substantial."\textsuperscript{29} The substantial injury requirement is not necessarily grafted on to the injury requirement for purposes of standing under Section 17204.\textsuperscript{30} However, a practice that is only "theoretically unfair" because it does not cause injury cannot provide the basis for a UCL action.\textsuperscript{31}

The distinction between an actual injury and a theoretical one is always driven by the facts of the case at issue. In \emph{Daugherty v. American Honda Motor Company, Inc.},\textsuperscript{32} for example, the court held that a "failure to disclose a defect that might, or might not, shorten the effective life span of an automobile part that functions precisely as warranted throughout the term of its express warranty cannot be characterized as causing a substantial injury to consumers," and so is not actionable under the UCL.\textsuperscript{33}

Distinguishing between actual and theoretical injury most commonly arises in the context of class certification, when courts make their decisions regarding whether the commonality of class members' claimed injuries is sufficient. For example, in \emph{Feinstein v. Firestone Tire and Rubber Company}, the court recognized that if a significant portion of the putative class members have no legally recognizable claim, the action necessarily metastasizes into millions of individual claims. That metastasis is fatal to a showing of predominance of common questions.\textsuperscript{34} The Feinstein court found that "[t]hose class members whose tires had performed as warranted would have to be identified and eliminated from the action. Myriad questions would confront the survivors, including the manner in which the alleged breach of warranty manifested itself, and other possible causes of the problem encountered. This situation simply does not lend itself to class treatment."\textsuperscript{35} In another analogous case, class treatment was refused because individual determinations were needed to assess whether misrepresentations or omissions about the health benefits of a dog treat actually injured the class members' dogs.\textsuperscript{36}

Unfortunately, but perhaps not surprisingly, the courts have not clearly defined "substantial injury" as it relates to claims brought under the UCL. Some glimpse into its meaning may be derived, however, by looking at the term in three other contexts: 1) substantial factor causation, 2) substantial evidence, and 3) in contrast to "nominal" damages.

The tried and true standard of "but for" causation is adequate for most situations, "but it fails where liability would be avoided because a defendant's act or omission coincurred with another cause and either cause alone would have been sufficient to bring about the injurious event."\textsuperscript{37} In those situations, causation will be adequately shown when the defendant's conduct is a material element and a substantial factor in bringing about the result.\textsuperscript{38}

For example, in asbestos-related personal injury actions, the standard for substantial factor causation is relatively broad. A wide range of factors can be considered to assess whether the inhalation of fibers from a particular product should be deemed a substantial factor in causing cancer.\textsuperscript{39} To be substantial in this context, the cause must be more than negligible or theoretical.

Applied to the UCL, as long as a plaintiff actually lost money or property, the injury is not theoretical. Depending on the amount of the alleged loss in relation to the cost or value of the product or service, the act or practice that caused the loss may nevertheless be negligible, or immaterial, and thus insubstantial. Reading the statute in this manner likely satisfies the purpose of Proposition 64 and fulfills the reformatory intent of
Similarly, when a judgment is challenged for lack of sufficient evidence supporting the verdict, an appellate court is charged with reviewing the appellee record as a whole to determine if “substantial evidence” exists to support the judgment. Substantial evidence is evidence that “is reasonable, credible, and of solid value.” Applying the standard of substantial evidence to the UCL may be difficult to assess in terms of dollars or loss of property, but the process actually is easier than it may appear at first, because the UCL provides only equitable remedial. Thus, parties must ask several questions: Is equity served by engaging in the litigation to right the claimed injury? Is doing so reasonable? Is the remedy sought of solid value?

Damages are not available in a UCL action. However, in some other types of cases, nominal damages may be awarded when “a cause of action is proved but no substantial damage is shown.” When nominal damages are awarded, the amount must be trivial, such as $0.01 or $1. If nominal is the opposite of substantial, presumably the amount that would have been recoverable as actual damages—for which nominal damages take the place—must be even less.

Guidance is also provided by considering the difference between an actual injury and its opposite. That is, a plaintiff must show that he or she has suffered an actual injury in order to show that it is a substantial one. The California Supreme Court has taken several opportunities to characterize the concept of an actual injury in legal malpractice cases, but it has not yet done so under Section 17200.

In Adams v. Paul, the supreme court reiterated its statement from decades earlier in Budd v. Nixen that the mere breach of a duty causing “only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice.” The claimed injury must be “manifest and palpable” and result in an actual loss or substantial impairment of a right or remedy. In reaching these conclusions, the Adams court cited Walker v. Pacific Indemnity Company, an insurance case involving a broker who negligently procured a $15,000 policy (instead of one for $50,000) for an insured on the losing side of a $100,000 judgment arising from an automobile accident. On appeal, the court held that the statute of limitations did not begin to run when the policy was negligently procured nor when the accident occurred. At that point, the insured had “no recoverable loss,” as he “merely suffered an exposure to liability beyond his insurance coverage” but no actual injury.

Rather, the injury occurred when the judgment issued in excess of the amount of the policy actually but negligently procured.

On appeal, the Unumprovident Corporation argued that the statute of limitations had not begun to run when the accident occurred. The court in Impress Communications v. Unumprovident Corporation similarly held, in the insurance context, that injury did not occur until benefits had been denied. This analysis replicates the conclusion of Medina, in which the court of appeal held that for the purposes of the UCL, no injury had been suffered because the plaintiff had never had a claim denied or received inferior products or services under his service contract.

The California Legislature also has defined an “actual injury” in several statutes—some more illuminating for UCL analysis than others. For example, in criminalizing air pollution under the Health and Safety Code, an actual injury is one that “in the opinion of a licensed physician and surgeon, requires medical treatment involving more than a physical examination.” The term is more commonly used when an actual injury need not be shown, such as to obtain injunctive relief. When the term is used for this purpose in the Business and Professions Code, the legislature has consistently distinguished between injury and damage, and it has distinguished between actual injury and “the threat thereof.”

Under common principles of statutory

---

**It’s what you learn after you know it all that counts.”** — John Wooden

**Study with UCLA Extension**

**Real Estate and Legal Programs**

Whether you’re seeking professional development, a career change, or a better understanding of the legal world, we have the learning experience for you.

**OUR ACADEMIC AND PROFESSIONAL OFFERINGS INCLUDE:**

- ABA Approved Paralegal Program [uclaextension.edu/LAL1](http://uclaextension.edu/LAL1)
- Certificate Program in Real Estate with Specializations in Appraisal, Finance, Investment, or Marketing [uclaextension.edu/LAL2](http://uclaextension.edu/LAL2)
- Continuing education courses for paralegals and attorneys in areas such as legal courses for the general public, employment law, workers compensation, and immigration law [uclaextension.edu/LAL3](http://uclaextension.edu/LAL3)
- Mediation Training [uclaextension.edu/LAL4](http://uclaextension.edu/LAL4)
- Training for legal secretaries [uclaextension.edu/LAL5](http://uclaextension.edu/LAL5)
- Professional development and MCLE credit for attorneys and legal professionals in areas such as alternative dispute resolution, business, community property, labor and employment, intellectual property, and family law [uclaextension.edu/LAL3](http://uclaextension.edu/LAL3)

For more information call (310) 206-1409.
construction, the term “actual injury” most assuredly must mean something more than a threat of future injury. This interpretation is also necessary in a UCL analysis because plaintiffs who refuse to subject themselves to the allegedly unfair act or practice (for example, refusing to pay improper charges) cannot recover them as restitution.56 When claimants acquire all to which they are entitled, nothing is taken from them that the UCL might help to restore.57

Read together, a “substantial injury” under the Business and Professions Code appears to be an actual (as opposed to threatened) and substantial (as opposed to nominal) impairment or loss of a right or remedy diminished) and substantial (as opposed to nominal) appears to be an actual (as opposed to threat-

**Class Action Fairness and the UCL**

Increasingly, although with much debate, class actions with aggregated claims exceeding $5 million are being removed to federal court under the Class Action Fairness Act of 2005.58 Long before the passage of Proposition 64, considerations of standing, in light of the Proposition 64 priority, predominance, and typicality.59 These considerations, in light of the Proposition 64 injury and causation requirements, have taken on a new dimension.

In assessing the superiority and manageability of a class action, a plaintiff “bears the burden of demonstrating ‘a suitable and realistic plan for trial of the class claims.’”60 Even if it constitutes the superior alternative, a class action cannot be used to alter substantive rights.53 As a result, the burden of proof must be satisfied with regard to each class member's claim as to liability and damages on an individual basis.62 While the class mechanism provides a means to do so through common proof, that procedure does not supplant the need to prove that each putative class member must also have suffered an injury. Nor do subclasses evade this issue. Because “[s]tanding is a threshold matter central to [the court’s] subject matter jurisdiction,” when subgroups of putative class members have suffered no injury and have no standing, courts have found class definitions impermissibly overbroad and denied certification.63 This is so even when a class action is superior, common issues exist or predominate, or the named plaintiff is typical of the class. Thus, in many cases, common causation and injury can be easily shown; in others, they cannot.

Identification of the injury and the mechanism of causation is also important because individual issues will likely predominate when the fact of injury (as opposed to the individual amount of the injury) cannot be established for every class member through common proof.64 Before reaching the issue of individual amounts, “the putative class must first demonstrate economic loss on a common basis.”65 This is because “[e]ach class member must have standing to bring the suit in his own right.”66 As the court in Windham v. American Brands, Inc., explained:

[In cases where the fact of injury and damage breaks down in what may be characterized as virtually a mechanical task, capable of mathematical or formula calculation, the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability. On the other hand, where the issue of damages and impact does not lend itself to such a mechanical calculation, but requires separate mini-trial[s] of an overwhelming[ly] large number of individual claims, courts have found that the staggering problems of logistics thus created make the damage aspect of [the] case predominate, and render the case unmanageable as a class action.67]

The superiority and manageability of a class action under the UCL will also depend greatly upon whether reliance must be proven.
on an individual basis or whether it can be inferred. If the California Supreme Court permits an inference of reliance and causation, greater scrutiny regarding the other hurdles to class certification is inevitable. This is also true for resolving trial issues to avoid a violation of due process. Indeed, fundamental fairness prohibits a trial of the claims of thousands (or hundreds of thousands) based upon the facts of just one or several. As the U.S. Court of Appeals explained in Broussard v. Meineke Discount Muffler Shops, Inc., “It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of claims of class members.”

California law prohibits that result under other circumstances as well. Civil Code Section 3343(a) does not permit windfalls, and Civil Code Section 3358 prohibits them. Moreover, “the amount of restitution awarded under the False Advertising and Unfair Competition Laws...must be supported by substantial evidence. Although a trial court has broad discretion under those statutes to grant equitable relief, that discretion is not ‘unlimited’ and does not extend beyond the boundaries of the parties’ evidentiary showing.”

Thus federal “courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk...of a composite case being much stronger than any plaintiff’s individual action would be.” Under federal law, the federal courts may nevertheless require individualized showings in accord with Pfizer, even if the supreme court ultimately permits an inference of reliance in accord with McAdams.

Inferred classwide reliance and causation also create an issue of superiority when the claimed injury is not substantial, or perhaps different in its substance among class members. In a growing line of cases brought under the Truth in Lending Act (TILA) and the Fair and Accurate Credit Transactions Act (FACTA), courts have increasingly found certification of class actions improper when the imposition of the civil penalties created by those statutes would be disproportionate to the harm suffered by the putative class members.

The Ninth Circuit, for example, in Kline v. Coldwell Banker and Company, cited Ratner v. Chemical Bank New York Trust Company with approval for the proposition that “the allowance of thousands of minimum recoveries like plaintiff’s would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement” of TILA. More recently, the district court in Soulian v. International Coffee and Tea LLC held that “[w]here massive damage awards would be disproportionate to any actual damage caused by the alleged violations, class
action is not the superior method of adjudicating class members’ claims.” Unlike TILA, which caps statutory penalties at the lesser of $500,000 or 1 percent of the defendant’s net worth,80 other consumer protection statutes do not cap damages.81 These penalties violate due process if, in their total amount, they are “so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.”82 Without regard to due process, courts have similarly denied class certification when the defendant’s liability “would be enormous and completely out of proportion to any harm suffered by the [p]laintiff,” characterizing such a result as “ad absurdum.”83

In the case of the UCL, neither damages nor penalties are available. However, the specter of recoveries by class members who have suffered no actual injuries, much less substantial ones, contravenes the purposes of Proposition 64. Thus, if the reasoning in the TILA and FACTA decisions continues and broadens, the injuries claimed in UCL class actions will have to increasingly be tethered to the acts and practices that caused them. Despite the language in Mervyn’s that the decision “left entirely unchanged the substantive rules governing business and competitive conduct,” Proposition 64 has created a sea change regarding who can sue on behalf of the general public and what parties must show to succeed with their claims. The decisions applying the Proposition 64 amendments have increasingly required the proof offered by UCL plaintiffs to migrate toward the traditional elements of common law fraud to prevail. The impending decisions in cases before the California Supreme Court as well as upcoming decisions on motions for class certification in the federal courts will help determine whether, and when, that migration is complete.

3 BUS. & PROF. CODE §§17200 et seq.
5 BUS. & PROF. CODE §17204.
6 BUS. & PROF. CODE §17203; Mervyn’s, 39 Cal. 4th at 228-29.
7 In re Tobacco II Cases, 41 Cal. 4th 1257 (2007).

Quality law firms demand dependable Professional Liability coverage.

The CNA Lawyers Professional Liability Program has served attorneys since 1961. We’re the nation’s largest provider of legal liability protection and part of an insurance organization with over $60 billion in assets and an “A” rating from A.M. Best.

See how we can protect your firm by contacting Mitchell & Mitchell, Insurance Agency, Inc. at 800-247-1403.

Mitchell & Mitchell, the exclusive broker for firms with up to 35 attorneys, has been handling the insurance needs of professionals here in California for 50 years.

www.mitchellandmitchell.com / www.lawyersinsurance.com

CNA is a service mark and trade name registered with the U.S. Patent and trademark Office. The program referenced herein is underwritten by one of more the CNA companies.
that Listerine replaced flossing). The court of appeal’s decision in Pfizer was issued 13 days before the supreme court’s decision in Mervyn’s. The Pfizer decision has been criticized as contradicting Mervyn’s conclusion that Proposition 64 “left entirely unchanged the substantive rules governing business and competitive conduct.” However, in Mervyn’s the paragraph that follows states that Proposition 64 did change the standing requirements for a UCL action. That is, while Proposition 64 did nothing to affect what a business may or may not legally do, it did affect who could sue to redress UCL violations.

122. Id. at 1194.
124. Id. at 949.
126. Id.
128. Id. at 1138.
129. Id. at 1137.
130. BUS. & PROF. CODE §§17500 et seq.
132. Id. at 307-08.
134. Id. at 816. Litigation costs have been identified as an indicator of the occurrence of actual injury in the legal malpractice context. See Laird v. Blacker, 2 Cal. 4th 606, 614-15 (1992). The majority of circuits that have addressed the issue in other situations, such as the Buckland court, hold that litigation costs do not constitute an injury. See, e.g., Walker v. City of Lakewood, 272 F. 3d 1114, 1124, n.3 (9th Cir. 2001).
136. Id. at n.10.
137. Id. at pt. III.
139. Cel-Tech, 20 Cal. 4th at 185.
141. Id.
142. Id. at 1406.
146. Id.
4th 1098 (2002) (Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff’s or decedent’s exposure to defendant’s asbestos-containing product was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer).

41 People v. Johnson, 26 Cal. 3d 557, 578 (1980).

42 Id. at 578. See also People v. Oyaas, 173 Cal. App. 3d 663, 668 (1985) (following Johnson).


44 6 WITKIN, SUMMARY OF CALIFORNIA LAW §1545 (10th ed. 2005) (citing CIV. CODE §3360; Scofield v. Critical Air Medicine, 45 Cal. App. 4th 990, 1007 (1996); RESTATEMENT (SECOND) OF TORTS §907 (1979)).

45 Maher v. Wilson, 139 Cal. 514, 520 (1903); Broads v. Mead & Cook, 159 Cal. 765, 769 (1911); Price v. McComish, 22 Cal. App. 2d 92, 100 (1937).


48 Adams, 11 Cal. 4th at 586, 589-90. See also Laird v. Blacker, 2 Cal. 4th 606, 615 (1992). Laird is in accord with Adams and Budd on this point in holding that the plaintiff sustained actual injury when the trial court dismissed her underlying action, regardless of the amount of damage.


51 Walker, 183 Cal. App. 2d at 519.

52 Impress Communications v. UnumProvident Corp., 335 F. Supp. 2d 1053, 1059 (C.D. Cal. 2003) (For plaintiffs complaining of the diminished value of particular insurance policies they had purchased from the defendant, “any injury was necessarily predicated on the anticipated denial of future benefits. Such injury was purely speculative and insufficient to confer standing under Article III. Plaintiffs here cannot allege that they have been provided with less—coverage than they contracted for…. Plaintiffs have suffered no injury and thus have no standing.”). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (standing requires “injury in fact” that is “actual or imminent,” not “conjectural” or “hypothetical,” and caused by the conduct complained of).

53 HEALTH & SAFETY CODE §42400(d).

54 BUS. & PROF. CODE §14494 (injunctive relief to prevent improper use of name in business).

55 BUS. & PROF. CODE §17082 (loss leader sales), §4381(c) (resale of prescription drugs), §21309 (the unauthorized use of the insignias of lodges, orders, societies, associations, and unions).


59 See, e.g., London v. Wal-Mart Stores, Inc., 340 F. 3d 1246, 1255 n.5 (11th Cir. 2003) (absence of economic harm as potential basis for denial of class certification on superiority ground); La Mar v. H & B Novelty & Loan Co., 489 F. 2d 461 (9th Cir. 1973) (reversing class certification for absence of injury as to all but one of the defendants, and superiority in proceeding).


61 Amchem Prod. Inc. v. Windsor, 521 U.S. 591, 556-63 (1995) (standing requires “injury in fact” that is “actual or imminent,” not “conjectural” or “hypothetical,” and caused by the conduct complained of).
See Bates v. United Postal Serv., Inc., 511 F. 3d 974, 985 (9th Cir. 2007).
Bell Atlantic Corp. v. AT&T Corp., 339 F. 3d 294, 302-03 (5th Cir. 2003).

Broussard, 155 F. 3d 331. See 28 U.S.C. §2072(b) (Federal rules “shall not abridge, enlarge or modify any substantive right.”).

See also Las Palmas Assocs. v. Las Palmas Ctr. Assocs., 235 Cal. App. 3d 1220, 1252 (1991) (“A damage award for fraud will be reversed where the injury is not related to the misrepresentation.”)

Broussard, 155 F. 3d at 345.

Id. at 414.
See, e.g., CV: Cont. §1747.08 (damages for first violation up to $250, up to $1,000 for every violation thereafter).
INDEX TO ADVERTISERS
Arabic Interpreting Services


Contract Attorney

CONTRACT ATTORNEY—KILLER RESULTS! Stellar pleadings including: 1) complaints, answers, motions, oppositions, 2) discovery—interrogatories, requests for admission, document demands, and all discovery motions, 3) post-trial proceedings, 4) appeals, and 5) judgment collection. Over 20 years of experience. Loyola Grad. When you want to win call (323) 804-4392.

DON’T HAVE TIME TO HIRE AND TRAIN ASSOCIATES TO HELP WITH WORKLOAD? Have a project Need Now?! We will deliver effective and efficient results, fast, to California attorneys seeking help with their legal needs. Gersten Law Group, comprised of licensed attorneys. Areas include legal research, litigation documents, IP, document review, and transactional. Call (619) 330-5663 24 hr number, e-mail: egersten@rpost.com. Gersten Law Group, 3528 Adams Ave, San Diego, CA 92116.

Family Law

PROFESSIONAL MONITORED VISITATIONS. Offering a family friendly approach to high-conflict custody situations. FCMS, over 20 years of experience. Available hourly or extended basis, and will travel. Immediate response. Family Law & Dependency Court, referrals accepted. Serving: San Fernando Valley, Santa Clarita, and all of Los Angeles County and immediate surrounding areas. (800) 526-5179 or (818) 968-8586, www.fcmonitoring.com.

Office Space for Lease


Ready to Retire?

WE ARE A LONG ESTABLISHED, boutique estate planning, trust administration, and tax planning firm looking to grow its business through relationship with a Pasadena or other So. Cal. Estate Planning practitioner who is looking to downsize or retire. E-mail: joann@jfmillerlaw.com or call Jo Ann (626) 792-2910.

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.

MISSION APPRAISAL, INC. Fast, friendly, and competent! Charles and Anne Cochran, residential real estate appraisers with 20 years experience appraising for attorneys practicing estate planning, taxes, trusts, bankruptcy, divorce, family law, real estate, etc. in Los Angeles, Ventura, Orange, San Bernardino and Riverside counties. (818) 438-1395, ccochran@scal.rr.com, mission2appraise.com. CA license AR009756.

Dr. J. R. Noriega / Allen Bui

— TWO CLINICS TO SERVE YOU —

Allen Bui, D. C. Chiropractic
1184 E. Holt Avenue
Pomona, CA 91767
909-865-1945

Montebello Wellness Center
Dr. J. R. Noriega
901 W. Whittier Blvd.
Montebello, CA 90640
323-728-8268/800-624-2866

BAIL BONDS
All Jails • 24 Hour Service
626-369-2666
Noriega Bail Bonds
Lic. #BA0350923
201 1st Street, La Puente, CA 91744

BAIL BONDS
Can’t Remember the Number?

JUST DIAL...

323 323 263 2663
Caught between the Branches

EVERY DAY, STATE JUDICIAL OFFICERS determine the fate of thousands of Californians. Will a daughter be removed from her parents? Will a first-time drug offender be incarcerated? Who will control the assets of a disputed corporation? May gays marry? Despite the awesome power wielded by judges, the judicial branch itself does not control its own destiny. Crucial issues like the creation of desperately needed new judgeships; repair of dilapidated, dangerous, physically inaccessible courthouses; equal access to the courts; and branch funding are decided by the legislature and the governor.

This year has been particularly challenging for the judiciary, as for all Californians. An enormous budget deficit forced the judicial branch to absorb a crushing $246 million reduction, which will unavoidably undermine the administration of justice and public access to the courts. Unfortunately, economic indicators point to continuing budget deficits for several years. This means that vital public interests are in serious peril. It is up to those who work in the courts to ensure that Californians who rely on courts for justice are safe in court and enjoy their right to access our courthouses. The judicial branch united this year to press for a $5 billion revenue bond to fund construction of new courthouses and upgrade the most rundown, unsafe courts, some of which do not comply with the Americans with Disabilities Act and most of which do not meet basic seismic standards. Yet even the success of this measure would merely begin to meet the need for new and upgraded courthouses.

The political environment in which the legislature’s decisions are made is highly competitive, as vital interests vie for funding. Healthcare for the indigent, public education, upgrade of roads, law enforcement, and protection of open space are critical interests. There are many others. Legislators and the governor must make hard decisions that require them to say no to numerous worthy causes.

To meet our constitutional responsibility to serve the public, those who care about our courts must engage in the political process. For years, the courts (through the leadership of the chief justice and the Judicial Council) along with the California Judges Association, and the State Bar (through its president and the board of governors) have worked together in the Capitol to further mutual judicial branch and public objectives. These efforts are complimented by the Bench-Bar Coalition of the Administrative Office of the Courts, which involves teams of bar leaders and judicial officers in Sacramento lobbying. These organized efforts are critical, but more is needed. Individual judges and lawyers must participate too.

Nothing is more important in the political process than personal relationships. While legislators rely on lobbyists to inform them about issues, they know these advocates are hired guns. The most effective way to compliment (or neutralize) the paid advocacy of Sacramento insiders is for respected individuals who know legislators personally to contact them on issues of concern. The college friend, the fellow church or synagogue member, the parent of a daughter’s soccer teammate—legislators listen to these people because they have credibility. All it takes is a brief telephone call at the right time. An effective campaign to protect court funding or to approve new judgeships can be built on these relationships.

One need not be a bar leader to participate. Among the Los Angeles County Bar Association’s 25,000 members and, indeed, the State Bar’s 240,000 members, how many have a personal connection to a legislator? Enough to make a difference. Individuals can start by informing LACBA or their local or specialty bar which legislators they know and would be able to contact directly when an important issue arises. In turn, these associations should form legislative outreach committees charged to keep track of the judiciary’s legislative agenda, maintain communications with judicial branch leaders, and ensure the involvement of those with ties to legislators.

At the same time that the judiciary faces unprecedented funding reductions, threats to judicial impartiality loom on the California horizon. Special interest money increasingly dominates judicial elections in many states. The resulting judicial races resemble rough political campaigns rather than restrained electoral contests more appropriate to the judicial branch. In anticipation that this trend could take hold in California, Chief Justice Ronald George has formed a Commission on Impartial Courts to make recommendations for reform of the way judges are selected and retained, how judicial elections are conducted and funded, and to better inform the public about the process. Participating on the commission are judicial and bar leaders. Active support from lawyers will be crucial in winning legislative approval of the anticipated reform recommendations.

Judges and lawyers must assume leadership to assure that California’s outstanding judiciary is properly funded with adequate, safe courthouses and sufficient judicial officers insulated from improper political pressure. Much progress has been achieved in recent years to secure legislation creating 100 new judgeships, to transfer control of courthouses to the judicial branch, and more. A well-organized branchwide coalition of active judges and attorneys can maintain the positive momentum, even in difficult times. Indeed, the challenge we face today offers individual lawyers a great opportunity to get involved and make a lasting contribution to the system we hold dear.

Los Angeles Superior Court Judge Terry B. Friedman is a member of the Judicial Council and past president of the California Judges Association.
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-approved* 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-approved* 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 has been provisionally approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association since February 13, 2006. The Section of Legal Education may be contacted at 321 North Clark Street, Chicago, IL 60610 or by phone at (312) 988-6738.
A new Witkin for a new generation.

The new California Procedure, 5th is completely up to date! New attorneys – even attorneys who favor computer research – will find:

■ It’s the fastest way to access useful information.
■ It’s easy to read. Nothing is buried in a footnote. Everything is woven into the main discussion.
■ It’s complete. It covers every topic of procedure plus subjects that are both substantive and procedural in nature.
■ It gives weight to arguments. Witkin treatises have been cited more than 20,000 times by the California Supreme Court and Court of Appeal.

For more information, call your local West representative at 1-800-762-5272.