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April 6, 2009, will mark the 15-year anniversary of the deaths of Presidents Habyarimana of Rwanda and Ntaryamira of Burundi, whose downed plane ignited a raging genocidal campaign that left 800,000 dead—a great many of them women and children—in less than a month.

Four years later, President Bill Clinton would tell the Rwandan people: “All over the world there were people like me sitting in offices who did not fully appreciate the depth and the speed with which you were being engulfed by this unimaginable terror.”

In 2004, historians and international observers came together to mark the 10-year anniversary of the Rwandan genocide. As they did, many remarked on the haunting parallels between what happened in 1994 and what was then unfolding in Darfur, a region of Sudan roughly the size of Texas, where a brutal cycle of ethnic cleansing had already claimed the lives of 200,000 and made over 1 million refugees. In July 2004, the U.S. Congress—in an extraordinary act of bipartisanship for an election year—concluded unanimously that “genocide” accurately described what was happening in Darfur. By November 2004, both President George Bush and Senator John Kerry likewise had expressed that view.

By 2007, attacks on humanitarian workers reached extraordinary levels, while devastating malnutrition and catastrophic mortality rates for children under five became particularly grim signals of the enormity of the Darfur crisis. Firsthand reports of the genocide evoked the worst of the twentieth century: sadistic extremes of violence, unspeakable horrors inflicted on women and girls, and brazen interference with relief efforts. The statistics have continued to leap forward: As many as 450,000 have perished, and over 2 million displaced.

Without question, attorneys across the country now face a full array of stresses and uncertainties, both within and beyond our practices. At the same time, the reality of the twenty-first century’s first recognized genocide marks a unique moral imperative. This is all the more so because a number of grass roots organizations—as well as twenty-first century technology—have made it particularly easy for us to participate in efforts to halt the genocide. Those with very little time can make a toll-free telephone call to 1-800-GENOCIDE. The antigenocide hotline, brilliantly conceived by the Genocide Intervention Network, connects callers to their elected officials and provides updated information and talking points. In a similar vein, the Save Darfur Coalition has mounted a postcard and e-mail campaign aimed at urging the new administration to work with the international community to ensure an end to the killings and the safe and swift delivery of desperately needed humanitarian aid.

Bar associations, law firms, and public officials can go a step further. Hosting discussions or meetings with Sudanese survivors, aid workers, and antigenocide leaders; promoting genocide education and awareness; and supporting nonpartisan efforts to deliver relief to the victims are just a few of the ways in which we can go beyond “sitting in offices.”

Genocide is, after all, not only a humanitarian crisis but also the civilized world’s worst known crime. The late Senator Paul Simon famously noted that if each member of Congress had just received 100 letters from home, the Rwandan genocide might have been stopped. While the information age may have altered the formula, all of us—as attorneys and citizens who recognize the broader meaning of “justice”—should participate in efforts to end the genocide in Darfur.

Angela J. Davis is an assistant U.S. attorney and the 2008-09 chair of the Los Angeles Lawyer Editorial Board. Her views do not necessarily reflect those of the U.S. Department of Justice.
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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

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How Malpractice Insurance ERPs Apply to LLP Partners

THE PROFESSIONAL BUSINESS STATUS of a limited liability partnership (LLP) has existed in California since the adoption of the Uniform Partnership Act in 1996. Lawyers can take advantage of this hybrid business form, gaining the benefits of running an informal practice between partners without the concern of personal liability for the negligence or wrongful acts of the other partners. Of course, there is a price to pay for this corporate veil. Recent revisions to Section 16956 of the Corporations Code governing LLPs contain an ambiguity that can trap the unwary at the worst possible time—after dissolution. All California attorneys, especially those just beginning their practice in California as a member of an LLP, should be aware of the ambiguity and take necessary precautions.

LLPs have flourished over the past 12 years; there are now over 1,900 law firm LLPs in this state. In fact, many LLPs have been formed strictly as a means of sharing costs. Some attorneys barely know their fellow partners, and they are not concerned about the ability of their other partners to practice law. They believe they are isolated from liability for a partner’s incompetence.

Section 16956 of the Corporations Code, relating to security for claims against the LLP and effective January 1, 2008, mandates that LLPs must meet either a financial security threshold or purchase malpractice insurance. If the partners elect the securitization option in lieu of purchasing malpractice insurance, subdivision (b) applies, and it prescribes the amount and types of security.

The responsible insurance carrier is required to extend the period of time to report claims after the policy has expired or been canceled. If an ERP is not purchased, the insurer cannot report claims to the insurer. Some insurers will not allow an ERP to be purchased if the insurance is canceled for nonpayment of premium. If the dissolving partnership finds the cost of the ERP unreasonably expensive, does the prohibitive cost mean the endorsement is not “reasonably available from the insurer” to afford the benefit of the LLP status? If the LLP does not purchase the ERP, the negligent attorney is exposed to a claim—and an innocent partner likely will now also be exposed on a vicarious liability theory if the LLP does not purchase the three-year ERP. When contemplating formation of an LLP, partners should be sure their professional liability policy offers at least a three-year ERP—many do not—and that the limits of liability are reinstated upon the purchase of the ERP.

Again, under the provisions of many policies, the limits available are less any monies paid out in claims during the last policy period. It is possible that if these requirements are not met, an attorney will be financially exposed to the negligent acts of any partner. For example, if an LLP dissolves on December 31, 2008, and a client of one attorney sues the other attorneys in the LLP, those other attorneys could be financially responsible for any damages that the client’s attorney cannot satisfy if the proper ERP was not in place.

The statutory language “maintain or obtain an extended reporting period endorsement...if reasonably available from the insurer” is an extremely ambiguous way of affording protection to the partnership’s former clients and allowing the isolated exposure benefit to limited partners. This gray area creates a business decision for the partners. The partners can continue gaining the protection of the LLP status by purchasing a minimum three-year ERP with the required limits, or, if they find the cost unreasonably high, the partners may elect to lose the LLP protection. The California Legislature may soon address the ambiguity in the phrase “if reasonably available from the insurer” and increase the minimum per-claim limit. Any potential changes to these requirements will be posted at the California Assembly’s Judiciary Committee Web site (http://www.assembly.ca.gov/acs/newcomframeset.asp?committee=15).

Reasonably Available

The ambiguity in the statute is how to interpret “if reasonably available from the insurer.” The extended reporting period endorsement (ERP), or tail coverage, is an additional premium paid to the insurer to extend the period of time to report claims after the policies has expired or been canceled. If an ERP is not purchased, the insured cannot report claims to the insurer. Some insurers will not allow an ERP to be purchased if the insurance is canceled for nonpayment of premium. If the dissolving partnership finds the cost of the ERP unreasonably expensive, does the prohibitive cost mean the endorsement is not “reasonably available from the insurer” to afford the benefit of the LLP status? If the LLP does not purchase the ERP, the negligent attorney is exposed to a claim—and an innocent partner likely will now also be exposed on a vicarious liability theory if the LLP does not purchase the three-year ERP. When contemplating formation of an LLP, partners should be sure their professional liability policy offers at least a three-year ERP—many do not—and that the limits of liability are reinstated upon the purchase of the ERP.

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1 See CORP. CODE §§16100, 16951 et seq.

Dan McKenna heads Mitchell & Mitchell’s Professional Liability Program in Novato, California.
Recent Amendments to Federal Law Increase Protection for the Disabled

IN AN EFFORT TO BROADEN THE PROTECTION afforded to individuals with disabilities in the workplace, President George W. Bush signed the ADA Amendments Act of 2008 (ADA Amendments) in September 2008. This new legislation went into effect January 1, 2009. However, California employers should be aware that in certain significant areas of the law, the California Fair Employment and Housing Act (FEHA) provides a broader scope of protection than even the amended ADA for individuals with disabilities in the workplace. The FEHA dictates that the broader definitions will prevail. California employers and their counsel nevertheless should be aware of the new provisions in the federal law.

The new legislation responds to and specifically rejects a series of U.S. Supreme Court cases that, in favor of employers, narrowed the definition of “disability” and the scope of individuals protected under the ADA. The ADA Amendments instruct courts that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” Specifically, the new legislation rejects the standard announced by the U.S. Supreme Court in Sutton v. United Air Lines, Inc., which required that the determination of whether an impairment substantially limits a major life activity be balanced against the “ameliorative effects of mitigation measures,” such as medication or medical devices.

The ADA Amendments also reject the standards set forth by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, which held that 1) the terms “substantially limited” and “major life activities” must be strictly construed when determining the existence of a qualifying disability and 2) an individual must show that the disability prevents or severely restricts him or her from “doing activities that are of central importance to most people’s lives.” The rejection of these decisions calls into question numerous court decisions that have denied protection for various conditions—including diabetes, epilepsy, heart disease, mental disabilities, and cancer. Changing the definitions of the ADA fundamentally alters the understanding of and policies regarding accommodation of disabilities in the workplace.

The ADA Amendments will broaden the federal definition of “disability.” Under the revisions, an individual has a “disability” if he or she: 1) has a physical or mental impairment that substantially limits one or more major life activities, 2) has a record of such an impairment, or 3) is regarded as having such an impairment. In order to be considered a disability, an impairment only needs to limit one major life activity. The definition includes impairments that are episodic or in remission if they would substantially limit a major life activity when active.

The amendments, however, do not specifically define “substantially limits.” Instead, Congress has authorized the Equal Employment Opportunity Commission, the attorney general, and the secretary of transportation to issue regulations defining this term and further defining “disability” in accordance with the purposes of the ADA Amendments. Presently, the EEOC Web site states the agency is in the process of “evaluating the impact of these changes on its enforcement guidelines and other publications addressing the ADA.”

Until regulations are issued, it is unknown how “substantially limits” will ultimately be defined and whether the new provisions of the ADA will afford more or less protection to employees than what is currently provided by the FEHA. At this point, it is unclear what impact, if any, the ADA Amendments will have on California employers with respect to the extent to which an impairment or condition must restrict a major life activity.

Under the ADA Amendments, certain activities and major bodily functions are designated as “major life activities.” A nonexclusive list of activities that qualify as a major life activity includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major bodily functions include, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The most significant change under the ADA Amendments is the

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elimination of the restrictions on “working” as a major life activity. Currently, the ADA requires that an individual’s ability to perform a class of jobs or a broad range of positions be significantly restricted in order to be considered substantially limited in the major life activity of working. However, the new language of the ADA Amendments will bring the ADA in line with the FEHA, in which the inability to perform one’s present job is enough to limit the major life activity of working.

The ADA Amendments specify that in order to be regarded as having an impairment, an individual only needs to prove that he or she was subjected to an action that is prohibited because of an actual or perceived physical or mental impairment, regardless of whether that physical or mental impairment limits or is perceived to limit a major life activity.9 The ADA Amendments, however, will prevent the ADA’s protection from extending to minor illnesses, such as a common cold or flu. An individual with an impairment that is transitory and minor, with an actual or expected duration of six months or less, will not be regarded as having a disability.10

In addition, the ADA Amendments eliminate the consideration of mitigating measures in determining whether an individual’s impairment substantially limits a major life activity, with the exception of “ordinary glasses and contact lenses.” Under the language of the ADA Amendments, the mitigating measures that are not to be considered include medication; medical supplies, equipment, or appliances; low-vision devices; prosthetics; hearing aids and implanted hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.11 To ensure compliance with the newly enacted ADA Amendments, California employers will need to continue to adhere to the protection afforded by the FEHA to individuals with disabilities in the workplace. If the FEHA provides a broader scope of protection than the ADA, the FEHA will take precedence.

Under the FEHA, an individual has a disability if he or she: 1) has a physical or mental disability that limits one or more major life activities, 2) has a history or record of such an impairment that is known to the employer, 3) is regarded or treated as having or having had such an impairment that limits a major life activity, or 4) is regarded or treated as having or having had an impairment that has no present disabling effect but may become a physical disability in the future.12

The FEHA indicates that a disability limits a major life activity “if it makes the achievement of the major life activity difficult.”13 An
individual only needs to show that his or her impairment makes a major life activity more difficult than it is for an average person without the impairment. The FEHA broadly defines “major life activity” to include physical, mental, and social activities, as well as working.14 The FEHA regards employees as having a disability if their employers treat them as though they have, or have had, a health condition or impairment that limits a major life activity.15 Even if an impairment or condition presently has no disabling effect, if it could become a disability limiting a major life activity in the future, an individual will be regarded as having a disability that is subject to protection. In addition, the FEHA's definition of disability places no minimum duration of an impairment or condition for it to be considered a disability that has protection. By protecting future disabilities and not restricting impairments to a certain minimum duration, the FEHA appears to have a more expansive scope than the ADA regarding who may be regarded as having a disability.

The ADA Amendments require employers to show that use of a qualification standard, employment test, or other selection criteria that is based upon an individual's uncorrected vision is related to the job or a business necessity. This change will have no effect on California employers, however, since the FEHA provides a greater scope of protection than will be provided by the new provisions of the ADA. Under the FEHA, California employers are prohibited from considering mitigating measures or devices in determining whether a condition limits a major life activity unless a mitigating measure or device itself limits a major life activity.16 Unlike the ADA Amendments, no exception exists under the FEHA for ordinary eyeglasses or contact lenses.

Coverage of which individuals will be regarded as having a disability, subject to protection under the FEHA, may be slightly expanded under the ADA Amendments. If an employer takes a prohibited action against an employee because of an actual or perceived physical or mental impairment—whether or not that impairment actually limits or is actually perceived to limit a major life activity—the employee will be regarded as having a disability under the ADA.

For the most part, until regulations are issued to provide guidance on the definition of “substantially limits,” the FEHA will continue to provide broader protection to individuals with disabilities in the workplace than the new federal provisions under the ADA Amendments. For now, California employers should review their policies and ensure that they are in strict compliance with the FEHA. California employers should also continue to engage in an interactive process with employees who have disabilities, as defined by state law, and ensure that they are provided with the reasonable and necessary accommodations required to perform their job functions.

However, as regulations defining “substantially limits” and further defining the definition of “disability” under the ADA are promulgated, the protection provided by the ADA may become broader than what is granted under California law. In such a case, the FEHA holds that the more expansive protection prevails.17

1 Gov't Code §§12900 et seq.
12 Gov't Code §12926.
15 Gov't Code §12926(k)(4).
16 Gov't Code §12926(k)(1)(B).
17 Gov't Code §12926(k)(1)(A).
CALIFORNIA LAW recognizes that elder and dependent adults should receive special protection as members of a group particularly vulnerable to crime. Crimes against elder and dependent adults run the gamut, including neglect, theft, and murder. These adults fall victim to crimes that are also perpetrated against younger and healthier people, but elder and dependent adults are often less able to protect themselves, recover from being victimized, and participate in the legal process of reporting and pursuing those who committed the crimes.

Penal Code Section 368 is California’s elder abuse statute, the starting point for all criminal cases involving abuse against elder and dependent adults. The three categories of crimes that are prosecuted most frequently under Section 368 are theft, neglect by others, and physical abuse.

Section 368 contains critical definitions. It provides that an elder is “any person who is 65 years of age or older.” A “dependent adult” is “any person who is between the ages of 18 and 64 who has physical or mental limitations, which restrict his or her ability to carry out normal activities or to protect his or her rights,” including, but is not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age. The disabilities can be permanent or temporary.

These definitions apply to all prosecutions pursuant to Penal Code Section 368. However, for specified sex crimes prosecutions, the age distinction becomes moot. A senior victim must fit within the definition of a dependent adult in order to prove the elements of the crime.

Analyzing a theft case for possible prosecution under the elder abuse statute requires consideration of the wide variety of ways in which an elder can be victimized. This process helps prosecutors focus on the type of evidence required to prove the crime. One category of theft involves the taking of property, including money or other valuable items, without the victim’s permission. A common scenario involves seniors who park and lock their car in their driveway, only to return later to find the car gone, without having given anyone permission to take the car. In a case like this, the theft victim will be required...
to go to court and testify. With seniors and disabled adults, time is critical. They must come to court and sometimes submit to a conditional examination, which may be necessary to preserve their testimony.

Another category of theft involves apparent consent, which is consent obtained through trickery or deceit. Thieves may induce an elder or dependent adult to give them property or money based on a fraud. For instance, in *People v. Cleaver*, the defendant convinced a dozen seniors to invest their life savings in an annuity that the defendant was marketing. In fact, the annuity was a sham. All the money that the seniors invested—in excess of $1 million—was stolen by the defendant to fund her lavish lifestyle and a lawsuit that she was pursuing against her former employer. None of the seniors would have agreed to give her any money if they had known that the annuity in which they were investing did not exist. The victims came to court and testified to the details of the scam. The defendant was convicted of multiple counts of elder abuse, sentenced to five years in state prison, and ordered to pay restitution to all her victims.

Theft can also involve the exercise of undue influence to induce a senior to give consent and relinquish property. This occurs when a victim’s will is overcome by another person’s actions. An agreement under such circumstances is not consensual. Consent must be voluntary, knowing, and intelligently obtained from the person who is seemingly agreeing to part with his or her property. These victims must come to court and testify regarding their experiences.

Another form of theft involves elders who cannot consent to a financial transaction because they are too cognitively impaired to understand it. Prosecuting these cases requires the use of expert testimony from geriatricians and neuropsychologists regarding the victim’s dementia or delirium. Prosecutors need the expert to render an opinion that the victim was incapable of consenting to the transaction because of his or her cognitive impairment. In these cases, the victim usually does not testify. These cases can be very challenging to prove and require extensive documentation.

*People v. Cooper*, one of the few published cases in the elder abuse area, involved a cognitively impaired elder victim. The victim was unable to testify during the criminal proceedings but was interviewed twice before the case was filed by the police and case workers from Adult Protective Services and the Department of Mental Health. Videotapes of these interviews were provided to the prosecution’s neuropsychologist, who relied upon them in forming an opinion that the victim could not consent to the financial transactions at issue in the case.

The court ruled that the videotaped evidence did not violate the confrontation clause and was admissible but subject to Evidence Code Section 352. The court also cited Evidence Code Sections 801 and 802, which allow experts to testify regarding the sources on which they base their opinions, including hearsay reasonably relied upon by professionals in their field. The neuropsychologist could testify regarding the contents of the tape recordings and be cross-examined on the subject. The defendant was eventually convicted of elder abuse and ordered to pay restitution to the estate of the victim.

When the victim of a theft is 65 years of age or older, prosecutors can charge the crime under the elder abuse statute regardless of the type of thievery. To prove criminal elder theft, the prosecution must establish that the defendant knew, or reasonably should have known, that the victim was an elder or dependent adult or that the defendant was a caretaker for the elder or dependent adult victim. This must be proven in addition to the underlying act of thievery.

Most perpetrators of theft crimes against elders are aware of the victim’s age because they personally know the victim, or they have had face-to-face dealings with the elder and can ascertain the victim’s approximate age. Many of those suspected of theft are caretakers of elders or dependent adults. The statute defines “caretaker” as “any person who has the care, custody or control of, or who stands in a position of trust with, an elder or dependent adult.”

**Neglect and Physical Abuse**

Neglect of seniors and dependent adults is a serious and growing problem. There are two basic types of neglect: self-neglect and neglect by others. Self-neglect is the failure of an individual to provide for his or her basic needs. This is a significant societal problem, but it is not a crime. Social service providers such as Adult Protective Services and the Department of Mental Health provide service to those seniors who cannot take care of themselves.

Neglect by others is a crime. Unlike children, there is no person who is designated by law to be a caretaker for an elderly or dependent adult. Children of elders are not obligated to care for their parents or grandparents, but once they assume those responsibilities, whether on a paid or unpaid basis, they have a responsibility to do a reasonable job. They have a duty to provide for necessities of life such as food, clothing, shelter, medical care, and hygiene.

Many neglect cases involve catastrophic injuries and death to the victims, who fail to receive appropriate medical care or adequate nutrition. They are often found dead or near death, lying in their own urine and feces and most commonly covered in pressure sores. These sores can worsen to the point of becoming gaping holes that go through skin and muscle and reach all the way to the bone. They are portals for infection that can result in sepsis and cause organ failure and death.

In *People v. Hong*, the defendant brought her aunt to the United States from China to work as a nanny for her family. The defendant was physically abusive to her aunt, who as a result became increasingly incapacitated. Eventually her condition worsened so that she could not protect herself or provide for her own needs. Moreover, the defendant failed to provide nutrition and medical care for her aunt. The defendant eventually deposited her aunt at LAC+USC Medical Center, where she succumbed to her
wounds. In this case, the defendant had assumed responsibility for her aunt and therefore was required to care for her needs. After the coroner and an expert geriatrician testified that the aunt had died from neglect, the defendant was convicted of elder abuse causing death and of involuntary manslaughter.

Physical abuse against elders is another crime on the rise in Los Angeles County. Sometimes an elder is targeted simply for being an elder; sometimes attacks are completely random.

The decision to prosecute physical abuse and neglect cases involves first considering whether the conduct at issue took place under circumstances likely to cause great bodily injury or death. If the abuse or neglect was committed in such a manner, the case can be prosecuted as a felony. If not, a misdemeanor prosecution is appropriate. In evaluating the conduct of an abuser for prosecution, another factor to consider is whether the same level of force exerted against an 80-year-old and a 20-year-old would result in the same or a different outcome. In People v. Bulajic, the defendant attacked her elder landlord by slamming a door in the victim’s face and then pushing the victim in the chest. This assault caused the senior to fall and fracture her hip, and the victim required hip replacement surgery.

The sentencing range for felony prosecution under Penal Code Section 368 is from two to four years in state prison. The maximum possible sentence for a misdemeanor prosecution under this section is one year in county jail and a fine of $2,000. The value of the loss in a theft case must exceed $400 for a felony prosecution. The statute contains enhancements that cause a defendant to serve additional time in custody if the value of the theft is in excess of $65,000, $200,000, $1.3 million, and $3.2 million. The enhancements range from one to four years of additional time in state prison beyond the amount of time received on the underlying charge.

Defendants also face sentencing enhancements if their crime involves causing great bodily injury and death to an elder or dependent adult. These range from three to seven additional years in state prison beyond the amount of time received on the underlying charge. Further, Probate Code Sections 250 and 259 prevent those convicted of elder or dependent adult abuse under Penal Code Section 368 from receiving an inheritance from their victims.

Sexual Abuse and Murder

Sexual crimes perpetrated against elders and dependent adults are handled much the same as those prosecuted against any member of society. However, lawmakers have crafted sections of the Penal Code that delineate two
crimes specifically aimed at protecting the disabled from sexual abuse by a caregiver. These laws have been drawn as part of a statute prohibiting child molestation. Under Penal Code Section 288(b)(2), “any person who is a caretaker and commits an act described in subdivision (a) upon a dependent person by use of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person” is guilty of a crime. 

23 Under Penal Code Section 288(c)(2), “any person who is a caretaker and commits an act described in subdivision (a) upon a dependent person” is guilty of a crime. 

24 Section 288(a) prescribes Lewd or lascivious acts committed with the “intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires” of the perpetrator or the victim.

The language of subdivision (a) from the child molestation statute is expressly referenced in the code section proscribing sexual abuse of the disabled. There is no specific provision for elders, but they are included within the subdivision of Penal Code Section 288 dealing with the disabled. Penal Code Section 288(f)(3) defines a disabled person as “any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age.” It also includes “any person who is admitted as an inpatient to a 24-hour health facility.”

In People v. Incion, the defendant was a caretaker for a senior who was wheelchair bound and had previously suffered an incapacitating stroke. The defendant touched the victim on her chest and took her hand and placed it on his genitals. Not only did the victim not consent to any of the touching, she also was scared and told her family about the incident later that day. The defendant was convicted of violating Penal Code Section 288(c)(2). The defendant was the victim’s caretaker, the victim was disabled, and the touching was done for the defendant’s sexual gratification.

Finally, the law also addresses the prosecution of those who murder elder and disabled adults. Frequently the most extreme cases of neglect are filed as homicides. These cases are being prosecuted under an implied malice theory: The caretaker exercised a conscious disregard for human life.

A significant number of elder abuse cases involve mentally ill adult offspring committing crimes against their aged parents. The worst of these cases result in the death of the senior. Many of these elders never wanted to institutionalize their sons or daughters. As the parents and their children age, and the parents become unable to provide care and stability for their adult dependents, it is hard to discern who are the caregivers—the parents or the adult dependents. The worst possible scenario occurred in People v. Rock, in which the defendant, who suffers from schizophrenia, killed his mother by beating her head into a wall. Following the killing, he moved his mother’s body from inside the home onto the front porch. He confessed his crimes to the neighbors, several children who walked by his home, and law enforcement. He believed that his mother was the devil. Prosecution and defense psychiatrists all believed that the defendant was legally insane at the time of the killing. The defendant pleaded guilty to murder, after which the court found that he was not guilty by reason of insanity.

Elder and dependent adults often require a team of professionals working together to deal with the challenges that their cases present. These professionals are aided by the fact that laws prohibiting abuse have been augmented to provide additional protections to the elder and dependent adults who are increasingly becoming victims of crime.

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1 Penal Code §368(g).
2 Penal Code §368(h).
3 Id.
4 Penal Code §288(f)(3).
7 Id. at 746; see also Evid. Code §352.
8 Cooper, 148 Cal. App. 4th at 746; see also Evid. Code §§801-802.
10 Penal Code §368(d).
11 Id.
12 Penal Code §368(i).
14 Penal Code §368(b)(1).
16 Penal Code §368(b)(1), (d), (e), (f).
17 Penal Code §368(c).
18 Penal Code §368(d)-(e).
19 Penal Code §12022.6.
20 Id.
21 Penal Code §368(b)(2)-(b)(3).
23 Penal Code §288(b)(2).
24 Penal Code §288(c)(2).
25 Penal Code §288(a).
26 Penal Code §288(f)(3).
27 Id.
29 Penal Code §288(c)(2).
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In the 2003 film *Runaway Jury*, Rankin Fitch, a ruthless trial consultant played by Gene Hackman, strikes a cynical note about jurors: “You think your average juror is King Solomon? No, he’s a roofer with a mortgage. He wants to go home and sit in his Barcalounger and let the cable TV wash over him. And this man doesn’t give a single, solitary droplet...about truth, justice or your American way.” As a contrast, consider the banner prominently displayed at several Los Angeles County courthouses: “To Our Jurors...Embodying Justice, Serving the Community. Thank You For Your Service.”

As much as we may all want to believe in the ideal proclaimed by the banner, litigators in high stakes trials often see a different reality. Some jurors, far from “embodying justice,” embrace prejudice. Some, emboldened by jargon gleaned from daytime television, believe they bring a wealth of legal wisdom to their jury service. Other jurors harbor deep biases. How does a trial attorney separate the good jurors from the bad, the jurors that will judge his or her case fairly from those that will wreak havoc?

In recent years, attorneys have begun to tap a growing body of experts, consultants, and litigation support providers to assist them in finding fair jurors. These experts provide an array of services, such as focus groups, mock trials, online juror testing, body language analysis, and draft questions for voir dire.

One increasingly controversial trend is

by Tracy J. Hasper and Gordon F. Lull

**THE PRIVATE LIVES OF Jurors**

Litigators must be cautious when employing private investigators to look into the background of jurors

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the use of licensed private investigators to assist in sharpening the focus on jurors—before and after trial. The time-honored and vital role that investigators generally have played for lawyers includes locating missing witnesses, obtaining relevant public records, serving process, and finding assets. Now, in the ever-changing Internet age, investigators also access public and proprietary databases. This traditional use of private investigators usually draws little if any attention. However, recent investigative excesses have become headline news, putting the investigative industry on the defensive, attorneys on the fence, and judges in a rage. Consider these examples:

• During 2006, defense attorneys—including Kenneth W. Starr, the dean of Pepperdine Law School and former special prosecutor in the impeachment investigation of President Bill Clinton—attempted to gain clemency for Michael Morales, convicted of the January 8, 1981, rape and murder of 17-year-old Terri Winchell, a Lodi, California, high school student. The defense team hired investigator Kathleen Culhane to follow up with jurors in the criminal trial. Culhane proceeded to draft false declarations for five of the jurors. The declarations were submitted in a clemency filing, only to be withdrawn after the forgeries were discovered. Culhane was later convicted on perjury and forgery charges and is currently serving a five-year prison sentence.

• During 2005, Hewlett-Packard faced a series of embarrassing leaks to the media from its board meetings. The company’s chair of the board, Patricia Dunn, hired a Massachusetts-based private detective agency to identify who was responsible for passing along the sensitive information. The detective contracted with five investigators nationwide, each of whom utilized a form of subterfuge, referred to as pretext, with telephone company employees to obtain the telephone records of board members, HP employees, and journalists. The exposure of this caper triggered state and federal probes. The Federal Trade Commission brought suit against Bryan Wagner and Cassandra Selvage, the owners of Eye in the Sky Investigations, Inc. FTC fines levied against the couple totaled $338,762, and they faced federal charges in connection with the scandal. Meanwhile, HP settled the spying charges brought against it by agreeing to pay $14.5 million to the State of California. In her testimony before a congressional committee, ousted chair Dunn remarked, “I never doubted...that what they [the investigators] were doing was legal.”

• During December 2007, 10 private investigators in five states were indicted on charges of identity theft. The investigators obtained personal financial, tax, and medical information of more than 12,000 people through the use of pretexting. According to published reports, the ultimate clients in the use investigators at all?

Generally, investigators find and report information for their clients. Investigators glean this information from three broad categories of sources: public records, interviews, and on-site observation (often documented through photography or videography).

Public records can yield a wealth of information regarding jurors. During trial, with frequent, imminent deadlines, investigators can offer the most efficient means by which to generate solid information quickly. Public records routinely accessed by private investigators include property transaction records, mortgages, assignments, substitutions, releases, notices, agreements, affidavits, tax liens, judgments, civil and small claims records, traffic records, local ordinance violation records, probate cases, criminal matters, federal court records (civil, criminal, and bankruptcy), vital records (birth, marriage, and death), corporate and partnership records, fictitious business names, records of political affiliation and contributions, licenses, and certifications.

Other records are available, although they are not technically public because they cannot be certified as authentic by a government agency. These include media accounts (print and electronic), business records, city street directories, records available at college and university libraries, and information in local history archives.

In addition, the Internet has spawned myriad new sources of information that can be used to develop a profile of jurors or to assess the veracity of answers to juror questionnaires. Investigators can profitably mine dozens of popular social networking Web sites, such as Facebook and MySpace, for critical information. During the recent Miami federal trial of accused terrorist Jose Padilla, for example, defense lawyers performed searches on their laptops for all jurors and determined that one female juror, who had claimed no experience in the criminal court system, was being investigated for malfeasance. She was summarily dismissed.

As part of the effort to profile jurors, some litigators hire investigators to perform what is sometimes called a drive-by. This involves a visit to, and careful observation of, a juror’s residence and neighborhood. While an investigator cannot directly contact a juror or a juror’s family members or interview a juror’s neighbors or acquaintances, a drive-by is permissible and can sometimes yield valuable information regarding the juror’s economic, cultural, and social environment. One investigator, for example, performed a drive-by of a juror in a high-profile tobacco industry case and observed a vehicle parked in the driveway of the juror’s home bearing a bumper sticker that read, “Cigarettes Kill!”

Investigators can profitably mine dozens of popular social networking Web sites, such as Facebook and MySpace, for critical information.
6. The definition of “private investigator” is set forth in the California Rules of Professional Conduct. 
   True. 
   False. 

7. Driving by a juror’s home is considered to be “contact” with the juror and therefore is unacceptable. 
   True. 
   False. 

8. Attorneys do not have a fiduciary duty to their clients to conduct due diligence regarding the hiring of a private investigator as long as the investigator is licensed. 
   True. 
   False. 

9. In 2005, investigators who utilized subterfuge during the course of an investigation for Hewlett-Packard were considered to be acting legally. 
   True. 
   False. 

10. Applicants for an investigative license may be denied licensure if their previous partners had their investigative licenses suspended. 
    True. 
    False. 

11. A lawyer who knowingly engages a nonexempt, unlicensed investigator is guilty of a misdemeanor and may receive a fine of $5,000 and/or imprisonment. 
    True. 
    False. 

12. The Private Investigator Act provides an exhaustive list of guidelines to investigators and attorneys on the type of conduct that is not permissible. 
    True. 
    False. 

13. Investigators hired by attorneys are not required to comply with the same ethical rules that govern attorneys but are bound solely by the Business and Professions Code. 
    True. 
    False. 

14. The Rules of Professional Conduct prohibit an attorney from communicating with a juror except in official proceedings. 
    True. 
    False. 

15. An attorney who learns of improper conduct by a juror toward another juror is not required to disclose this information. 
    True. 
    False. 

16. Rule 5-320(E)-(F) of the Rules of Professional Conduct prohibits an attorney from conducting an investigation of a juror in a manner that will influence the state of mind of that juror regarding present or future jury service. 
    True. 
    False. 

17. In Noble v. Sears, Roebuck & Company, the court held that utilizing a pretext to gain admittance to a hospital room was a violation of the right to privacy. 
    True. 
    False. 

18. In California, an attorney who hires a private investigator for an investigation may be liable for the intentional torts committed by the investigator (or the employees of the investigator) in the course of the investigation. 
    True. 
    False. 

19. Evidence obtained by an investigator as a result of a feigned friendship can be used in trial. 
    True. 
    False. 

20. An attorney and an investigator should formulate a written agreement to ensure compliance with the Rules of Professional Conduct. 
    True. 
    False.
The range of tasks that can be assigned to investigators is substantial. If an attorney is knowledgeable about the rules that govern the conduct of private investigators as well as the applicable rules of professional responsibility, the risks of investigator excess can be minimized.

**Business and Professions Code**

An attorney has a fiduciary obligation to his or her client to exercise caution in hiring outside parties who act as the attorney’s agents at trial. Regarding private investigators, the foundation of due diligence by the attorney is to confirm that the investigator is a licensed private investigator.

The licensing and regulatory authority for private investigators in California is the Bureau of Security and Investigative Services (BSIS), which operates as a division within the state’s Bureau of Consumer Affairs. The status of an investigator’s license can be confirmed with the BSIS.

Additionally, understanding the rules governing an investigator’s conduct is critical for attorneys who hire private investigators. The regulations with which investigators must comply are set forth in Business and Professions Code Sections 7512 through 7573, which are generally referred to as the Private Investigator Act (PIA). The PIA cites Chapter 1, Division 5, of the California Insurance Code for its definition of a “private investigator,” and makes it clear that “no person shall engage in the business of private investigator…unless that person has applied for and received a license…..”

Significantly, the next section of the PIA states, “Any person…who knowingly engages a nonexempt unlicensed person is guilty of a misdemeanor,” subject to a fine of $5,000, imprisonment for one year, or both.

Applicants for an investigative license may be denied licensure on one or more of seven different grounds: 1) an act that would constitute a basis for suspension or revocation, 2) “any act constituting dishonesty or fraud,” 3) acts or crimes involving weapons “as a runner or caper for any attorney”; and committing “any act in the course of the licensee’s business constituting dishonesty or fraud.”

According to the PIA, the reference to “dishonesty or fraud” includes 1) knowingly making a false statement relating to evidence or information obtained in the course of employment, or knowingly publishing a slander or a libel in the course of business, 2) using illegal means in the collection or attempted collection of a debt or obligation, 3) manufacturing evidence, and 4) accepting employment that is adverse to a client or former client “relating to a matter with respect to which the licensee has obtained confidential information by reason of or in the course of his or her employment by the client or former client.”

An appellate court applied the PIA in **Wayne v. Bureau of Private Investigators and Adjustors**, in which a licensed private investigator misled interviewees regarding his representation in a case. The investigator knew that if he told the interviewee that he represented an adverse party he would likely not obtain any information. So he introduced himself as an investigator “checking out the accident” and omitted any further disclosure.

Based on these facts, the appellate court upheld the suspension of the investigator’s license. The court adopted a broad interpretation of the phrase “dishonesty or fraud” in the PIA, concluding, “There was a disposition to deceive, betray, and mislead the interviewees. In other words, there was a lack of complete integrity.”

The PIA provides some guidelines to investigators and attorneys regarding the type of conduct that is not permissible. However, the PIA’s provisions are not exhaustive. All agents of an attorney, including investigators, are also obligated to maintain the same rigorous standards with which lawyers themselves are tasked in California’s Rules of Professional Conduct. This includes the proscriptions in the rules regarding contact with jurors and the need for juror privacy.

**Rules of Professional Conduct**

Thus when an attorney hires investigators or consultants to act on his or her behalf, by extension those agents are bound to comply with the same ethical rules that govern the attorney: the Rules of Professional Conduct. In fact, the rules obligate an attorney to carefully monitor the work of all employees, including investigators and other agents, to ensure compliance with Rule 3-110 regarding professional competency: “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”

The Discussion section of this rule states: “The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.”

Accordingly, attorneys cannot simply state the task to the investigator and stand back. Investigators must be carefully instructed and monitored. This is particularly critical when investigators are hired to work in connection with jurors. Several specific principles must be followed.

Rule 5-320 of the Rules of Professional Conduct is devoted to the conduct of attorneys (and their agents) regarding jurors. The rule prohibits communication with, or otherwise attempting to influence, any member of a panel from which a jury will be chosen. Specifically, an attorney cannot communicate directly or indirectly with a juror except in official proceedings, cannot ask questions designed to embarrass or harass a discharged member of a jury, and must promptly reveal to the court “improper conduct” by a juror toward another juror or another juror’s family member.

Regarding any effect or influence an investigation during a trial may have, Rule 5-320(E)-(F) is clear: “A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such
person in connection with present or future jury service. All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.”13 Thus a lawyer is obligated to ensure that the agents that he or she hires maintain this principle of no contact with any jury member or the juror’s family members, and not engage in any undertakings that will cause contact to be made or cause a juror to be in any way influenced because of the investigator’s activity.

**Tort Liability**

The requisite professional codes and rules clarify the standards with which attorneys and investigators must comply. Case law further buttresses the general notion that attorneys can be held legally responsible for the torts committed by the investigators they hire.

In *Noble v. Sears, Roebuck & Company*, the attorneys for Sears, Roebuck retained a private investigator in connection with a personal injury lawsuit. In an attempt to locate the address of a witness in the case, an employee of the investigator “gained admittance to a hospital room” and, utilizing a pretext, “secured the address.” The plaintiff brought suit against Sears, its attorneys, and the private investigator for invasion of privacy and negligent entrustment of agents. The trial court sustained demurrers to the plaintiff’s claims, and the plaintiff appealed. The court of appeal reversed, finding that “an unreasonably intrusive investigation may violate a plaintiff’s right to privacy.”14 Additionally, the appellate court found that “in California the hirer of a detective agency for either a single investigation or for the protection of property, may be liable for the intentional torts of employees of the private detective agency committed in the course of employment.”15

Additionally, if an attorney uses an investigator to obtain evidence in a “deceitful” manner, the attorney risks a finding that the evidence cannot be used at trial. In *Redner v. Workmen’s Compensation Appeals Board*, an insurance company orchestrated a “sting” in which its retained investigator hired a man to befriend an allegedly injured worker. The supposed friend then invited the worker to his ranch, offered the worker alcohol, and convinced him to go horseback riding. The investigator documented these activities on film, including the actions of the worker that were inconsistent with the claimed injury. At a hearing on the worker’s claim for workers’ compensation, the insurance company sought to introduce a medical report from a doctor that had viewed the film and relied upon it in rendering his opinion. The hearing referee refused to admit the evidence, and the insurance company appealed.

The California Supreme Court found that the hearing referee “should have refused to rely upon [the evidence] because the carrier obtained it by fraudulent inducement.”16 Elaborating on this concept, the supreme court declared that “the carrier should not profit from its own deceitful conduct. The investigators feigned friendship and concealed their employer’s identity in bringing about [the] applicant’s inebriation and effectuating his horseback ride….[Accordingly,] the board may not rely upon evidence obtained, as in the present case, by deceitful inducement of an applicant to engage in activities which he would not otherwise have undertaken.”17

**Recommendations**

**Runaway Jury’s Rankin Fitch observes,** “Gentlemen, trials are too important to be left up to juries.” Litigators involved in high stakes trials may at least agree that trials are too important to be left in the hands of unexamined jurors. Based upon case law as well as statutes and rules regulating the conduct of attorneys and the investigators they hire, some recommendations may be gathered regarding how an appropriate juror examination should take place.

Given the nature of their business and training, private investigators can be used, to great benefit, in profiling jurors. However, as important as the assessment of potential jurors may be, it is important to understand that information gathered by ethically or legally questionable means will invite consequences such as potential tort liability, discipline under the Rules of Professional Conduct, and exclusion of the evidence at trial. The value of using private investigators to profile jurors is directly related to the diligence with which the investigators are selected and managed.

Attorneys have an obligation to their clients to choose their investigators with great care. BSIS licensing is a necessary but far from sufficient qualification. Litigators should formulate a written agreement with the investigators they hire that commits investigators to fully comply not only with the PIA but also, because they are agents, with the Rules of Professional Conduct. This agreement should ensure that the objective of the engagement and its intended outcome are clear and agreed to by the attorney and the investigator. It should contain a promise by the investigator to fully educate his or her entire staff on the agreement’s provisions and an acknowledgment that the achievement of trial goals cannot include activities that violate any laws or the Rules of Professional Conduct under which they must operate. The agreement also should be provided to the client.

Additionally, attorneys should maintain ongoing communication with and management of investigators. In trial settings, it is critically important that attorneys scrutinize the activities of their investigators to avoid not only obvious violations of law but also any signs of aggressiveness that may be technically permissible but might create the appearance of misconduct for some judges. Management of investigators should be guided by key considerations in the requisite laws and rules governing investigators and attorneys as well as evolving principles from case law.

When case law is silent, attorneys and their investigators should err on the side of caution. Common sense is always a safe harbor. Attorneys should make this simple principle clear to the investigators they retain. By following this and the guidelines established by the appropriate laws and rules, attorneys can represent their clients vigorously by obtaining critical information about jurors while minimizing potential liability for investigative excesses.

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7. BUS. & PROOF. CODE §7532(a).
8. BUS. & PROOF. CODE §7532(b).
9. BUS. & PROOF. CODE §7518.
10. BUS. & PROOF. CODE §7561.
12. CAL. RULES OF PROF’. CONDUCT R. 3-110A.
13. CAL. RULES OF PROF’. CONDUCT R. 5-320(E)-F.
15. Id. at 661.
17. Id. at 94-95.
As “guardians of the rights of absentee class members,” trial courts must determine whether proposed class action settlements are “fair, adequate and reasonable” to the class at large. In the wake of the federal Class Action Fairness Act of 2005 (CAFA) and recent federal and state court decisions, no other type of settlement has drawn greater scrutiny by trial courts conducting fairness hearings than so-called coupon settlements. This is the result of what CAFA’s proponents claimed were abusive settlement practices that resulted in little value to class members but significant fee awards to class counsel.

Yet what exactly constitutes a coupon settlement remains unsettled, particularly in the absence of a statutory definition in CAFA. These settlements can take various forms, including coupons, discounts, other in-kind compensation, or a combination of these elements. Indeed, some courts have distinguished between “pure coupon settlements” and “variant[s] of the coupon settlement[s]” based on whether class members receive discounts that require them to make new purchases. Ultimately, any settlement with some provision for nonmonetary compensation may be regarded as a coupon settlement.

Coupon settlements create tough issues for courts to resolve when their actual value is difficult for the parties and the court to ascertain. Unlike cash settlements, coupon settlements typically involve offers for discounted goods or services whose actual value may differ significantly from their face value. As a result, ascertaining fairness often requires a more complex economic analysis than other types of settlements, and in some cases expert testimony is crucial.

Additionally, state and federal courts treat coupon settlements differently. While federal courts strictly scrutinize these settlements under CAFA, California has no analogous legislation, and California state courts have rejected the notion that coupon settlements are inherently suspect or improper.

Court approval of coupon settlements hinges on how the settlement is structured, how its value to the class is determined, and the venue in which the dispute is being resolved. Approval also depends upon the breadth of information litigants provide the court to enable it to properly assess the settlement’s fairness. Only after these matters are considered,
addressed, and supported by appropriate evidence can parties ensure that the settlement will be approved at the fairness hearing.

**Coupon Settlements under CAFA**

In addition to significantly expanding federal jurisdiction over class actions, several CAFA provisions require special scrutiny of coupon settlements in class actions pending in federal courts. These provisions are applicable for cases originally filed in federal court and for those removed from state court.

For example, prior to approving a coupon settlement, federal courts must hold a hearing and make specific findings that the settlement is fair, reasonable, and adequate, and that the class's interests are adequately represented. This determination involves a consideration of numerous factors:

1) The strength of the plaintiff's case.
2) The risk, expense, complexity, and duration of further litigation.
3) The risk of maintaining class action status.
4) The amount offered in settlement.
5) The extent of the discovery that has been completed.
6) The experience of counsel.
7) The presence of a governmental participant.
8) The reaction of class members to the proposed settlement.

Courts have noted that the “fair, reasonable and adequate” standard under CAFA is identical to the standard that has been in place under Rule 23(e) of the Federal Rules of Civil Procedure. Under this standard the court usually presents its fairness determination in a writing after conducting the fairness hearing. Nevertheless, CAFA has been invariably construed to require “the application of a higher level of scrutiny to the...criteria that existed pre-CAFA.”

Courts applying this higher standard rely on CAFA's legislative intent. Further, they note that coupon settlements “have been severely criticized by commentators in the field” and “are strongly disfavored by the Attorneys General of most of the states.”

Prior to the enactment of CAFA's coupon settlement provisions, the Ninth Circuit Court of Appeals held that fees may be based on the value “of the entire common fund created for the class, even if some [class] members make no claims against the fund so that money remains in it that otherwise would be returned to the defendants.” This standard remains applicable for settlements that do not include coupon components.

However, CAFA regulates attorney's fees in coupon settlements by providing that any portion of fees attributable to the award of the coupons “shall be based on the value to class members of the coupons that are redeemed” rather than the theoretical value...
of the coupons available for redemption. Redemption rates can be affected by various factors, including the eligibility and use restrictions associated with the coupons and the transaction costs involved in redeeming them. Further, because valuation can be complex, CAFA provides that the court “may receive expert testimony...on the actual value to the class members of the coupons that are redeemed.”

Substantial creative energy has been spent crafting settlements that resolve class actions and provide class members with a benefit that the parties believe a court will approve as fair, adequate, and reasonable. Several post-CAFA cases include parameters for how courts should define and value coupon settlements and illustrate the types of settlements that are likely to receive court approval. Some of these cases reflect an inherent bias against coupon settlements and their derivatives.

In Synfuel Technologies, Inc. v. DHL Express, for example, the trial court approved a settlement that offered up to four prepaid DHL shipping envelopes or $30 cash in addition to injunctive relief. Noting that the trial court’s role in reviewing a settlement agreement is “akin to the high duty of care that the law requires of fiduciaries,” the Seventh Circuit reversed because “the trial court did not attempt to quantify the value of [the] plaintiffs’ case or even the overall value of the settlement offer to class members.”

The court also criticized the “in-kind compensation” component of the settlement, noting that it was akin to coupons. While the DHL shipping envelopes were not “identical to coupons” because they represented an “entire product, not just a discount on a proposed purchase,” they nevertheless shared some characteristics of coupons because some percentage of the prepaid envelopes would not be used and thus would not constitute a cost to the defendant. Like coupons, the envelopes also forced class members to continue doing business with the defendants. Given these similarities, the court stated that, even if CAFA was not theoretically applicable, the “in-kind compensation” component of the settlement was subject to higher scrutiny by the trial court.

In some circumstances, giving class members a complete, and free, product might prove valuable and acceptable because it does not create a continuing business relationship between the class members and the defendant. Yeagley v. Wells Fargo & Company illustrates the point. In Yeagley, the parties reached a settlement agreement in which each class member was eligible to receive two free credit reports and a $50 discount on a new mortgage. Noting the absence of a statutory definition of “coupons” under CAFA, the Northern District of California reasoned that the settlement “arguably provided the class with a ‘coupon’ for a free...credit report.”

The court suggested that “a free credit report is unlike a coupon in that it does not require a class member to do business with Wells Fargo, and it entitles the member to a whole product...rather than merely a discount.” Even if the credit report did not fall under CAFA’s coupon provisions, the court concluded, CAFA was nevertheless “instructive.”

Then the court analyzed the value of the settlement—to determine whether it was fair and adequate, and to calculate the fee award. It valued the settlement by multiplying the number of redemptions (less than 1 percent) by the price that Wells Fargo paid for each report, rather than the actual cost of the report to the public at large. The court reasoned that the second credit report presented no value to the class because the likelihood of redemption was negligible, and the $50 discount was merely a marketing opportunity for Wells Fargo that provided no benefit to the class. Despite these findings, the court nevertheless concluded the settlement was fair and adequate because the plaintiffs’ prospects for prevailing in the litigation were “so bleak as to render this a ‘good value’ for a relatively weak case.”

Credit reports were also at issue in Acosta v. Trans Union, LLC, in which the Central District of California evaluated a settlement that provided free credit reports to the class and a cash component to certain class members. Although the court did not characterize the credit reports as coupons, it closely scrutinized the settlement and concluded that the reports provided little or no value to the class because consumers were already entitled to one free credit report, which most consumers did not redeem. The court also noted that few class members would qualify for the cash component and that class counsel had conducted very limited discovery and did not even consult any experts until the settlement was finalized. Therefore, the court rejected the settlement, noting in particular that “the economic value of the Settlement pales in comparison to [the] Plaintiffs’ potential recovery through litigation.” The court was particularly critical in light of finding that the proposed attorney’s fees of roughly $5.5 million was “so grossly out of proportion to the class members’ probable aggregate recovery as to suggest a strong possibility of impropriety.”

Coupons that create a continuing business relationship may be approved, but their terms must demonstrate value to the class. In Figueroa v. Sharper Image, the settlement provided class members with $19 coupons for use at the defendant’s stores plus a guard to protect against emissions of allegedly defective air purifiers. After the parties received considerable objection to the original settlement agreement, they retained a “nation-wide expert on coupon settlements” to improve the settlement and cure the objections. The third draft of the agreement enlarged the redemption period, provided for the transferability and aggregation of the coupons, allowed their use against any product, and included a provision for cy-pres distribution to certain charities.

Applying a “greater level of scrutiny,” the Southern District of Florida rejected the settlement, reasoning that it was not the product of an informed, arm’s-length negotiation. The parties failed to provide the court with sufficient information regarding the potential value of the litigation and the range of possible outcomes. Thus “the issue of whether the $19 is sufficient [had] still not been answered.” The court also rejected the use restriction improvements suggested by the parties’ expert, noting that “enhancements to what is nothing more than a coupon settlement” did not make it “fair, adequate or reasonable.”

Other federal decisions show greater favor for agreements that include variants of a coupon settlement. In Henley v. Richemont North America, Inc., the Northern District of California reasoned that “it is the settlement, taken as a whole, rather than the individual component parts, that must be examined for overall fairness.” The court approved a settlement of an antitrust class action brought by two classes of watchmakers and consumers alleging that the defendant’s illegal tying arrangement precluded independent watchmakers from repairing Cartier watches. The settlement called for the defendant to, inter alia, expand its network of authorized repair workshops, pay certain watchmakers the costs for Cartier-specific tooling, and issue $100 transferable credit vouchers to the consumer subclass. The court found that “the settlement value, although not great, [was] not without any worth” and was “appropriate in light of the significant litigation risks attendant to [the] Plaintiffs’ case.”

In Young v. Polo Retail, LLC, the same court approved a proposed class settlement for $1 million in cash and $500,000 in gift cards to class members. While noting that “the primary downside of the proposed settlement is the use of product vouchers,” the court reasoned that the vouchers did not have product restrictions and were fully transferable. Presumably because the gift cards did not constitute coupons, the court did not decide the case under CAFA, and thus did not limit attorney’s fees based on the number of actual redemptions.

Another Northern District decision offers a way to distinguish settlements providing for free goods from those providing only coupons. The court in Browning v. Yahoo!
Inc. approved two class action settlements providing class members with either a free credit score or two months of free credit monitoring. The court determined that “the in-kind relief offered in this case is not a ‘coupon settlement’ because it does not require class members to spend money in order to realize the settlement benefit.” It concluded that the settlement, “although modest, is appropriate and valuable” and recognized that “settlement, as a product of compromise, typically offers less than a full recovery.”

**California’s Presumption of Fairness**

California state courts generally give coupon settlements greater deference than their federal counterparts. State courts are not bound by CAFA and “have never adopted Rule 23 as a procedural straitjacket.” To the contrary, “trial courts [are] urged to exercise pragmatism and flexibility in dealing with class actions” and must give “due regard...to what is otherwise a private consensus agreement between the parties.”

While state courts generally follow a similar analytical framework as federal courts in assessing fairness, a state court settlement is presumed fair if:

1. The settlement is reached through arm’s-length bargaining.
2. Investigatory and discovery are sufficient to allow counsel and the court to act intelligently; counsel is experienced in similar litigation; and the percentage of objectors is small.

This presumption applies with equal force to coupon settlements, which are neither per se improper nor subject to heightened scrutiny. Moreover, the California Court of Appeal recently distinguished between “pure coupon settlements” and “variant[s] of coupon settlements,” suggesting that the latter should receive more deference.

In *Chavez v. Netflix, Inc.*, the court approved a class action settlement that provided one month of free DVD rental services or membership upgrades. One objector appealed, claiming that CAFA regarded coupon settlements as “highly suspicious” and “inherently suspect” and therefore required greater scrutiny under state law. The objector further argued that the settlement was an improper coupon settlement because it provided a free service of nominal value while giving the defendant a promotional opportunity.

The *Chavez* court upheld the judgment, noting that the objector had failed to challenge any of the factors establishing a presumption of fairness. Moreover, the court concluded that the settlement was not a “pure coupon settlement,” explaining that:

In a pure coupon settlement, the class members would receive a coupon, voucher, or discount that would partly defray the cost of making a new purchase of goods or services from the defendant. In many cases, the coupon might induce the member to make a purchase he or she would not otherwise have made, which may actually produce a net benefit for the defendant. In contrast, the *DVD subscription* at issue in *Chavez* was “a variant of the coupon settlement” because class members were not necessarily required to make a purchase, and the potential benefit to the defendant was reduced, limited, or altogether absent.

The court of appeal’s affirmance of the trial court’s ruling was based squarely on the factors establishing a presumption of fairness. It noted that the agreement resulted from arm’s-length bargaining during mediation with a respected magistrate judge, the parties had engaged in extensive discovery, the attorneys possessed substantial experience in class action litigation, and the percentage of objectors to the settlement was small.

*Chavez* follows a line of California cases approving coupon settlements based on evidence establishing a presumption of fairness. In *Dunk v. Ford Motor Company*, a 1996 pre-CAFA case, the court approved a settlement in which class members received coupons for $400 off the price of a new vehicle. The court established and applied the four-factor test and found the settlement presumptively fair, noting in particular that the parties conducted extensive discovery, the number of objectors was small, and the settlement coupons represented at least two-thirds of the highest noted damages to class members.

More recently, in *Wershba v. Apple Computer, Inc.*, the court of appeal approved a class settlement that provided class members with either a $35 reimbursement or $50 coupon toward any purchase over $99. The court noted this settlement was “much more attractive” than the deal in *Dunk* because the coupons were transferable (although they could not be aggregated), and some class members were eligible for cash reimbursements. Furthermore, “[i]n the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances.”

The approach of California courts has changed little since CAFA’s enactment. In *In re Microsoft I-V*, the trial court approved a settlement providing vouchers ranging from $5 to $29. The settlement also included a cy-pres remedy in which a portion of unclaimed vouchers was redistributed to California schools to provide indirect compensation to the class and ensure disgorgement by the defendant. The settlement thus provided “a fair and reasonable residual distribution” that was “as near as possible” to accomplishing the overarching purposes of the litigation.

At least three unpublished, post-CAFA, state court decisions have also upheld coupon settlements based on evidence establishing a presumption of fairness. For example, in *Intervention, Inc. v. AstraZeneca Pharmaceuticals*, the court approved a settlement that provided 50 million vouchers to class members and $1 million in cold sore research grants. The court observed that while class members received a nominal $3 discount, the grant funds provided a significant benefit to the entire class, particularly given the difficulty in locating class members.

In *Vroegh v. Eastman Kodak Company*, the court approved a settlement providing a 5 percent refund or 10 percent discount on future purchases of flash memory drives. In *Campbell v. Airtouch Cellular*, the court approved a settlement providing two vouchers for a service credit, six months of text messaging, a phone accessory, long distance minutes, and/or a hands-free device.

While giving coupon settlements more deference, California state courts arguably place less emphasis on an analysis of the underlying action’s merits or the valuation of the settlement. Thus “the merits of the underlying class claims are not a basis for upsetting the settlement of a class action,” and “the proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had [the] plaintiffs prevailed at trial.” The trial court’s fairness analysis is ultimately “nothing more than an amalgam of delicate balancing, gross approximations and rough justice.” Thus, coupon settlements under California state law may not require the more nuanced economic analyses often used, and sometimes required, under CAFA.

**Structuring a Coupon Settlement**

Whether a case is pending in state or federal court, properly structuring a coupon settlement is crucial to obtaining final approval from the trial court. Courts are more likely to approve coupon settlements that impose no use restrictions, or only very limited ones, on the coupons. For example, coupons that are freely transferable and do not have aggregation limits provide more value to the class members, as do coupons that have longer redemption periods and are not limited to par-
ticular products or services. Coupon settlements that avoid restrictions on use and transferability or that include enhancements, in-kind compensation, and/or cash components are also less likely to draw opt-outs and objectors. This will in turn facilitate the trial court’s decision to approve the settlement. A hybrid settlement that includes a cash component or a variant of the coupon settlement that provides in-kind compensation is also likely to receive greater deference.

To be successful, a motion for final approval of the settlement must also include sufficient information to enable the trial court to make an informed analysis of the fairness factors under state or federal law. At a minimum, the motion must provide an appropriate level of detail regarding the discovery efforts and settlement negotiations of the parties. If the settlement was reached through mediation, the parties should inform the court of the mediator’s endorsement of the settlement. Depending on the complexity of the coupon settlement, the parties should also consider retaining an expert to assess its value.

Litigants should remind the trial court of the policies in state and federal court favoring the settlement of disputes. Those policies are furthered by approving the settlement of particularly weak—and particularly strong—cases early. Thus, in order to put the settlement in proper perspective, the parties should provide the trial court with a cogent analysis of the strengths and weaknesses of the claims and defenses. Only in view of the facts and law applicable to the case can the court properly assess whether the settlement is fair, adequate, and reasonable.

5 See Yeagley v. Wells Fargo & Co., 2008 U.S. Dist. LEXIS 5040, at *24 (N.D. Cal. Jan. 18, 2008) (reasoning that even if credit report did not qualify as “coupon,” CAFA was nevertheless instructive). See generally Synfuel Techs., Inc. v. DHL Express, 463 F. 3d 646 (7th Cir. 2006) (prepaid shipping envelopes similar to coupons); Acosta, 243 F.R.D. at 377 (credit reports compared to coupons); Young v. Polo Retail, LLC, 2007 U.S. Dist. LEXIS 27269 (N.D. Cal. Mar. 28, 2007) (gift cards); In re Microsoft I-V, 135 Cal. App. 4th 706 (2006) (vouchers); Chavez, 162 Cal. App. 4th at 46 (DVD subscription).
7 Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1712(a), (b), (c).
8 See generally Chavez, 162 Cal. App. 4th at 424.
9 Federal courts now have original jurisdiction to hear class actions in which: 1) the aggregated damages claim exceeds $5 million; 2) there are at least 100 class members; and 3) at least one plaintiff and one defendant are citizens of different states. See 28 U.S.C. § 1332(d)(2).
15 Id. Criticism of coupon settlements predates CAFA. See, e.g., Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 696 (D. Minn. 1994), amended by 858 F. Supp. 944 (proposed coupon settlement rejected after court found that coupon redemption rates in similar cases were so low that the certificates in this case offered no real value to the class).
16 Id. at 1321.
17 Williams v. MGM-Pathe Commc’n Co., 129 F. 3d 1026, 1027 (9th Cir. 1997) (securities fraud class action that settled for a $4.5 million common fund) (citing Boeing Co. v. Van Gemert, 444 U.S. 472, 480-81 (1980)).
19 28 U.S.C. §1712(a) (emphasis added).
21 Synfuel Techs., Inc. v. DHL Express, 463 F. 3d 646, 648 (7th Cir. 2006).
22 Id. at 652-53 (citations omitted).
23 Id. at 654.
24 Id.
26 Id. at *24.
27 Id.
28 Id. at *8.
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Let us help you win your next trial!
In some ways, texting is a relatively private form of communication. Unlike e-mail, text messages are not stored on servers. An e-mail sent to a client may be saved on backup media for years. By contrast, text messages never pass through either. Most text messaging services do go through a central hub controlled by the service provider, but most service providers do not save copies of those messages for any extended period (though there are some exceptions, such as SkyTel). Because most people carry their cell phones with them, there is not much risk of a communication falling into a third party’s hands or being retrieved from a dumpster. However, clients may leave their cell phones lying around or allow others to read messages on their phones. Before sending confidential information by text, consider the recipients and make sure they are aware that they need to protect the attorney-client privilege.

Attorneys who are concerned for their personal privacy should know that text messages automatically include the cell phone number from which they are sent. Attorneys who generally do not give their cell phone numbers to clients should take note. Some service providers, however, allow users to send text messages from a Web site so that the user’s cell phone number is not included. There are also Web sites that allow texting without a cell phone, including www.hooya.com or www.quios.com. But these more anonymous methods largely defeat

David Schnider is general counsel for Leg Avenue, Inc., a leading distributor of costumes and apparel.
the purpose of being able to communicate quickly. Another consideration when communicating with clients by texting is that there is no printed record of the communication. When an attorney sends or receives an e-mail, it can be printed and filed. Even if the attorney forgets to do that, there is at least a copy on a server that can be retrieved. Because text messages are sent by wireless devices and do not go through firm computers, there is no convenient means to print them. On some devices it may be possible to forward messages to yourself as an e-mail, which may be printed. But otherwise, text messages are lost in the ether. So if a client is late to court, texting may be a good way to find out when he or she expects to arrive. But to alert a client that a statute of limitation is running, it is more prudent to use e-mail or regular mail, both of which leave a paper trail.

The flip side of messages that leave a record is that they also create evidence. Most lawyers, at some time, come across an occasion when they would prefer to have a discussion with a client that is entirely off the record. When dealing with such sensitive issues, it is generally best to speak with a client by phone or in person. While a text message is less likely to leave a discoverable record, it is not entirely secure. The service provider keeps a copy for some amount of time, and there is no way to know how long that may be. Some services may keep messages longer, and it is possible for employers to have data maintained even for text messages. At least one court dealing with the issue has found that employees have an expectation of privacy in their text messages, but as they become more prevalent employers are more likely to specify that text messages are not private, and courts may be more inclined to subject them to disclosure. Further, a text message is a written communication, and there is no way to prevent a client from forwarding it as an e-mail and printing it, thereby creating a written record. Text messaging is more discreet than e-mail, but its ephemeral quality should not mislead users into thinking that it is entirely secure and confidential.

Nearly all current generation cell phones are capable of sending text messages, and most service providers offer plans. However, these cute missives come at a price. If texting is not included in a plan, service providers will generally charge a fee per message, usually in the range of 10 to 20 cents. That does not sound like much, but imagine being charged that amount every time something is said in a conversation. It adds up quickly. Attorneys who are going to send text messages at all should sign up on a plan. The offerings vary. Verizon’s nationwide business plans all include unlimited texting, but the most basic plan charges 20 cents per message. AT&T’s wireless plans generally do not include texting, but it can be added for an additional charge. Boost Mobile offers a plan with unlimited texting for one dollar a day. These plans change regularly, however. Usually, texting plans are included with a service or are a relatively inexpensive add-on, so it is worth contacting a service provider.

There are some additional features to consider. Most but not all plans will include media messaging service (MMS), which is basically texting for pictures. This service can come in very handy. For example, an attorney with MMS inspects the scene where a client had a car accident. A question about where the client was driving arises, and rather than try to describe it, the attorney can take a picture and message it to the client, who can see what the attorney is seeing and answer based on the picture rather than memory. It also comes in handy if you want to ask your spouse which brand of mustard you should be picking up at the market. As a practical matter, text messaging remains more a plaything for young adults than a powerful asset in the legal arsenal. But its popularity is undeniably spreading quickly, and more and more clients will come to appreciate an attorney’s ability to use this form of communication. Used appropriately, with a clear understanding of its benefits and limitations, text messaging can be a valuable tool for communicating with clients.
The Buffalo Creek Disaster

One early Saturday morning in February 1972, 130 million gallons of black water and waste overflowed a massive dam in West Virginia and descended upon the valley below. Although reminiscent of the flooding that befell New Orleans and the Gulf Coast several years ago, the devastating tidal wave in 1972 that engulfed Buffalo Creek Valley sprung from a coal company’s refuse pile. Nevertheless, the Pittston Coal Company, owner of the refuse pile, quickly proclaimed that “the break in the dam was caused by flooding—an Act of God.”

The Pittston statement was intended as an argument to escape liability for the devastation, but it also succeeded in emboldening the survivors—religious individuals outraged at the accusation that God had brought this upon them. Rather than accept the small settlements proposed by Pittston, many survivors hired counsel and instituted a lawsuit against the company. In The Buffalo Creek Disaster: How the Survivors of One of the Worst Disasters in Coal-Mining History Brought Suit against the Coal Company—and Won, author Gerald Stern writes about the legal battle the survivors waged, with him as their attorney, against Pittston.

Although the book focuses on the lawsuit that followed the devastation, Stern’s accounts of the victim’s stories are poignant. The black sludge reached a speed of 30 miles per hour as it swept into the 16 coal mining towns in the valley. The sludge engulfed the townspeople before they recognized what had happened. Parents struggled to hold onto children and husbands grasped for their wives as they searched for something to hold. One such husband, whose wife, in parting moments, told him to take care of their baby, survived the flood but explained later, “Somewhere along there I lost that boy of mine. I don’t know where.” Ultimately, 125 people died, thousands others were injured, and numerous homes were destroyed.

Unsurprisingly, the survivors of this tragedy suffered severe psychological effects. Experts diagnosed the survivors with a then cutting-edge diagnosis of “psychic impairment,” which later would become known as post traumatic stress disorder. PTSD is now a recognized psychiatric diagnosis, but at the time of the flood in Buffalo Creek, the condition was not well understood, and Pittston attorneys wrote off the claims of psychic impairment as “mere puff and blow.”

In The Buffalo Creek Disaster, Stern moves beyond the tragedy and focuses on the legal process. The reader learns that Pittston filed a motion to dismiss the weakest psychic impairment claims, those brought by individuals who suffered loss but were not themselves present at the time of the flood. Stern’s concern at the time was that following a ruling on the absentee plaintiff’s motion, Pittston would then file a motion to dismiss claims brought by those who were present for the flood but did not suffer physical injury. In this way, Pittston would attempt to “slice up our case bit by bit.” Pittston’s counsel personally served the motion to limit the amount of time for an opposition, but the judge granted the plaintiffs’ request for an extension. This extension gave the plaintiffs sufficient time to provide a thoughtful opposition and prevented Pittston’s efforts at a piecemeal attack on the psychic impairment claims.

Stern also delves into the realities and practicalities of litigation. Stern and his colleagues decided to postpone the psychological examinations of their clients due to the excessive cost of the testing. Ultimately, however, the testing had to be conducted, because the court set a date for an exchange of the medical reports. The plaintiffs brought in teams of psychiatrists to conduct the testing, who found that a vast majority of the victims were suffering from severe psychological effects of the disaster.

Pittston also had the plaintiffs examined by a doctor of its own choosing. The Pittston doctor confirmed the victims’ suffering but characterized it as a transient disturbance. However, many of the plaintiffs were still suffering from symptoms well over a year after the flood. The Pittston doctor concocted an explanation: The individuals who continued to suffer from psychological effects from the trauma must have suffered from a preexisting vulnerability.

In addition to describing the positions taken by both sides during the litigation, Stern also recounts the strategic considerations underlying many of the actions that the parties took. Strategy decisions had to be made from the initial filing of suit in federal court to the settlement discussions, which finally resolved the matter. Concerned that his Washington-based firm would have difficulty with local state judges in Logan County, Stern filed suit in federal court and overcame Pittston’s unsuccessful challenge to diversity jurisdiction. Nevertheless, the hometown prejudice raised its head in an unexpected fashion. The local bar committee decided to investigate Stern’s firm for ambulance chasing.

Strategy, too, was critical to the settlement discussions between the townspeople and Pittston. As with most litigation, the most productive settlement talks only occurred after the court set a firm trial date. Stern and his cocounsel had to convey to Pittston that they had faith in their case but were still flexible. The posturing even included bringing defense counsel through Stern’s law offices to show the extent to which they were preparing for trial.

Jeffrey D. Wolf is a trial attorney and a partner at Pocrass, Heimanson & Wolf, representing individuals injured in severe personal injury, product liability, aviation, and medical malpractice cases.
Stern describes the practical hurdles he encountered during the settlement discussions. He represented numerous plaintiffs, and he knew that Pittston’s counsel would insist that he have authority to negotiate a settlement on behalf of all of his clients. Although the townspeople gave him authority to settle, ethical considerations precluded him from entering into a binding settlement on behalf of multiple plaintiffs without first telling them how much each plaintiff would receive. Stern resolved the problem by obtaining permission to conduct the discussions and provide recommendations for a split.

With such close attention to detail about the legal process, it is not surprising that often the book has been required reading for law students. However, *The Buffalo Creek Disaster* goes well beyond providing some valuable lessons about the litigation process. The book shows how our court system can be a great equalizer, placing large multimillion-dollar corporations on even footing with people who have no economic or political clout.

Through the litigation and more specifically the discovery process, Pittston became answerable to the people of the town. Depositions of key Pittston personnel revealed that Pittston knew that it was exposing the people to significant risk of the flood. With the revelation of this information, Pittston faced true exposure to punitive damages and, consequently, power shifted to the townspeople. Thereafter, Pittston settled the claims and finally compensated the victims for their loss.

Beyond that, the settlement served as a check on Pittston, deterring it from constructing another faulty dam. The threat of this type of litigation forces large corporations like Pittston to rethink business decisions that place the public in harm’s way.

Yet, even after we read *The Buffalo Creek Disaster* and celebrate the triumph of the townspeople in the wake of the flood that destroyed their town over 35 years ago, we are faced with news of another, similar failure. In December 2008, the Tennessee Valley Authority’s Kingston Fossil Plant in Harriman, Tennessee, experienced a failure of a dike wall. The broken earthen wall released approximately 1 billion gallons of slurried ash from a coal-ash containment pond. Fortunately, no one was killed, but the spill destroyed homes and continues to pose environmental threats as the result of the release of barium, lead, manganese, and arsenic compounds. Cenospheres, which are spherical particles of silica, polluted the local lake.

The Tennessee Valley Authority has reported that the cenospheres can cause watering of the eyes, sneezing, or coughing but do not pose a health threat. At least it has not yet attributed the spill to an act of God.
ON TUESDAY, FEBRUARY 24, the Senior Lawyers Division and the Barristers Section will host an interactive round table mentoring session. Those who participate will have the chance to select preferred table topics and interact with Hugh I. Biele, Judge Richard P. Byrne, Ernestine Fields, Harry L. Hathaway, Charles E. Michaels, David J. Pasternak, Patricia Phillips, Jill Switzer, and William L. Tan. This event is an opportunity to share best practices, new ideas, and expert advice. Each table will have a judge or senior lawyer as the moderator who will briefly introduce the topic and lead a discussion. This new event will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration will begin at 5 P.M., with the program continuing from 5:30 to 7:30 and dinner from 6:20 to 6:50. The registration code number is 010270. The prices below include the meal.

$35—CLE+Plus members
$45—LACBA members
$80—all others
1 CLE hour

ON THURSDAY, FEBRUARY 19, the Los Angeles County Bar Association and the Small and Solo Division will host a program on the wise use of investigators. Good investigators are the secret weapon of any successful lawyer. Speaker Mohamad Khatibloo will discuss how to work with investigators to obtain admissible facts and vet witnesses in order to win in an adversarial setting. In this program, attorneys will learn about what to do before sending an investigator out in the field. The seminar will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal will begin at 4:30 P.M., with the program continuing from 5 to 8:30 P.M. The registration code number is 010121. The prices below include the meal.

$165—CLE+Plus members
$215—Small and Solo Division members
$235—LACBA members
$295—all others
3.25 CLE hours

ON TUESDAY, FEBRUARY 24, the International Law Section, the Corporate Law Department Section, and the Business and Corporate Law Section will host a seminar designed for lawyers, other professionals, and businesspeople who are interested in international transactions. Speakers James D. Cigler, Jeffery J. Daar, Mark T. Hiraide, Ann M. Longmore, Roger D. Loomis Jr, and Michael R. Newman will lead a discussion on how the increasing globalization of industry and finance results in the need for lawyers, other professionals, and businesspeople to know the basics of structuring an international transaction. Those who attend will learn the relevant issues involved in representing a party or being a participant in an international transaction. The seminar will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration will begin at 11:30 A.M. and lunch at noon, with the program continuing from 12:30 to 2:30 P.M. The registration code number is 010305. The prices below include the meal.

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2 CLE hours
The New Pet Trust Statute Is Certain to Dog the Judiciary

A NEW PET TRUST STATUTE, which took effect on January 1, 2009, replaces former Probate Code Section 15212 and makes it clear that pet trusts are now enforceable in California. That is welcome relief to those clients who care a lot more about taking care of their pets after their incapacity or death than they do their ungrateful children. However, the California Legislature is quite possibly the only legislative body in the nation that could take a simple concept embodied in the Uniform Probate Code—that a pet trust should be enforceable—and turn it into quagmire designed to promote such organizations as the special interest that sponsored it (the San Francisco Society for the Prevention of Cruelty to Animals). The result is certain to further clog already overburdened probate courts with litigation.

While there are myriad problems with the new statute, two stand out. First, among those authorized to enforce a pet trust in new Probate Code Section 15212(c) is “any person interested in the welfare of the animal or any nonprofit charitable organization that has as its principal activity the care of animals.” Section 15212(f) gives a trust’s named enforcer and these nonprofit charitable animal care corporations the right to “inspect the animal, the premises where the animal is maintained, or the books and records of the trust.”

The rights of an animal care corporation to inspect not only the animal but also the premises on which it is maintained are seemingly unlimited. For example, there is no statutory basis to limit the right of inspection to particular areas that specifically are maintained to house the animal. Instead, the inspection right seems to extend to a caretaker’s entire home. Does that mean that “enforcers” can inspect bedrooms, whether or not the pet spends most of its time in a backyard? Can enforcers inspect closets? A safe room? Can they ask if the caretaker maintains rat poison or firearms on the premises? Do they need to give reasonable notice before they come to inspect? If the caretaker does not like what the enforcers do when they inspect a property, can they be sued?

What if the animal bites the inspector from the animal care organization? Is it proper for the pet trust to pay for an increased premium on the caregiver’s homeowner’s policy? Can the trust defend and indemnify a caretaker if his or her carrier refuses to cover the pet? Or was the inspector assuming the risk? Nor does it appear that an enterprising contingent beneficiary who wants to get his or her hands on the inheritance would be prevented from using an animal care organization to exercise its rights under the statute to harass the caretaker of the pet to the point that the caretaker refuses to keep the pet. In short, if a caretaker has to let strangers from an animal care organization—or 50 animal care organizations—inspect every nook and cranny of his or her house, who is going to agree to care for a deceased friend’s animals?

Subdivision (f) is even more startling when one considers that there are no similar private (or public) inspection or enforcement mechanisms to ensure that guardians of minor children are doing their job properly. Subdivision (e) of the statute provides animal care organizations, among others, with the right to obtain the trust accountings required under Probate Code Section 16062. While accountings are waived for pet trusts that have assets worth less than $40,000, it will not be out of the ordinary to find pet trusts that have millions of dollars of assets. If a horse owner wants his or her horses to live out their lives on the

If a caretaker has to let strangers from an animal care organization—or 50 animal care organizations—inspect every nook and cranny of his or her house, who is going to agree to care for a deceased friend’s animals?

family ranch, or a dog owner wants the pet to live out its life in the Beverly Hills house that is the only home the dog has ever known, far more than $40,000 is going to be required.

To prevent an animal care organization from getting an accounting of the trust that owns or maintains property housing the animal, the pet trust could be designed as a stand-alone trust—something that estate planners should consider as an alternative to a pet subtrust of a living trust. Even then, the organization could initiate litigation to demand that the trust improve the living conditions of the animals and may be able to intrude into the finances of related trusts through such litigation. (Of course, if the trustee offers to donate a tidy sum like $100,000 to the animal care organization, maybe it will drop the whole thing.)

It is little comfort that the road to hell may be paved with good intentions. It still takes you where you do not want to go. Hopefully, the probate bar or judiciary can work with the legislature to fix the problems with the new pet trust law before the problems get out of hand. Until then, estate planners can give their clients the good news that pet trusts are now enforceable in California—and enterprising attorneys will work with animal care organizations to leverage settlements from those trusts.

Kenneth W. Kossoff is a Certified State Bar of California Specialist in estate planning and probate and trust law and a member of Panitz & Kossoff, LLP, in Westlake Village, California.
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