New Year’s Resolution No. 1: Build Muscle in All the Right Places

SINCE JANUARY 1, 2009, ARENT FOX LLP HAS WELCOMED 23 LAWYERS AND ADVISORS TO ITS RANKS, INCREASING OUR STRENGTH IN LITIGATION, TELECOMMUNICATIONS, HEALTH, BANKRUPTCY AND FINANCIAL RESTRUCTURING, INTELLECTUAL PROPERTY, SPORTS, OSHA AND GOVERNMENT RELATIONS. ARENT FOX: WE HAVE THE BRAWN AND THE BRAINS TO HELP CLIENTS SOLVE THEIR MOST INTRACTABLE BUSINESS CHALLENGES.

TOP ROW, FROM LEFT TO RIGHT: Maurice A. Bellan, Partner, Complex Commercial Litigation, DC; Ross A. Buntrock, Partner, Telecommunications, DC; Jonathan E. Canis, Partner, Telecommunications, DC; former Congressman Philip S. English, Senior Advisor, Government Relations, DC; Michael B. Hazzard, Partner, Telecommunications, DC; Thomas E. Jeffry, Jr., Partner, Health Care, LA; Aram Ordubegian, Partner, Business, LA; James M. Sullivan, Partner, Bankruptcy and Financial Restructuring, NY; former Washington, DC, Mayor Anthony A. Williams, Director of State and Municipal Practice, Government Relations, DC.

MIDDLE ROW, FROM LEFT TO RIGHT: Stephanie A. Joyce, Counsel, Telecommunications, DC; Maidie E. Oliveau, Counsel, Sports, LA; Ronni N. Arnold, Associate, Bankruptcy and Financial Restructuring, NY; Adam D. Bowser, Associate, Telecommunications, DC; Joseph P. Bowser, Associate, Telecommunications, DC; Demetria A. Buncum, Associate, Intellectual Property, DC; Steven Haskins, Associate, Litigation, LA; Jonas J. Hodges, Associate, Intellectual Property, LA; Andy Kong, Associate, Business, LA.

BOTTOM ROW, FROM LEFT TO RIGHT: Jason Koslofsky, Associate, Regulatory, DC; Marie Liu, Associate, Health Care, LA; Katherine Barker Marshall, Associate, Telecommunications, DC; Amanda S. Walker, Associate, OSHA, DC; Nolan Young, Associate, Regulatory, DC.
Law. And order.

Cases and Matters
Centrally organize contacts, notes, events, to-do’s, phone calls and other information associated with a case or matter.

Communications
Manage and track mail, email, faxes and phone calls and link communication records to a case, matter and client files. Use the BlackBerry link to access files anywhere, anytime.

Docketing, Calendaring and Scheduling
Manage your schedule and stay on top of deadlines with comprehensive calendar tools and alerts.

Documents
Produce client and court papers faster than ever before with document automation, and track changes with the version control feature.

Billing
Automate time entries for everyday activities such as phone calls, emails, research, and more. Data is stored by case, client and other information, and is available on demand.

Contacts and Clients
Manage all of your clients’ personal information with an integrated, centralized system.

Want to spend less time managing your practice and focus on practicing law? With award-winning Time Matters® software, some firms are up to 30% more productive with the same resources. Get Time Matters and bring order to your firm.

To learn more go to www.timematters.com or call 1-866-281-1801 and mention Ad Code 127598.
FEA TURES

23 Pickoff Moves
BY AASHISH Y. DESAI
Despite the ruling in Chindarah v. Pick Up Stix, class counsel may still be able to thwart efforts by employers to solicit waivers from potential class members in wage and hour disputes

Plus: Earn MCLE credit. MCLE Test No. 184 appears on page 25.

30 Where on Earth?
BY TRACY J. HASPER AND GORDON F. LULL
While courts have been lenient in approving nonconsensual use of GPS technology in criminal cases, civil law practitioners face a roadblock in California’s Penal Code

38 Jailhouse Call
BY ANTHONY V. SALERNO AND DAVID M. MURPHY
Knowledge of the basics of DUI law, bail procedures, and criminal evidence will help a civil law attorney when a client calls from jail

DEPARTMENTS

10 Barristers Tips
Applying neurolinguistics during trial
BY APRIL A. CHRISTINE

12 Practice Tips
Permanent residency for immigrants of extraordinary ability
BY JOSH EFFRON

16 Practice Tips
The impact of an adversary filing for bankruptcy during civil litigation
BY SUSAN S. DAVIS AND ALICIA N. VAZ

47 By the Book
Bad Advice
REVIEWED BY STEPHEN F. ROHDE

52 Closing Argument
A breakdown in the attorney discipline system
BY JERRY ABELES

49 Classifieds

50 Index to Advertisers

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

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

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

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

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

Crowe Horwath LLP takes pride in the relationships we have with our clients. In a recent client survey, our clients said we do a better job than our competitors of making them feel valued as a client.

By combining practices with Grobstein, Horwath & Company LLP, we have expanded our presence in the Southern California market. As one of the top 10 public accounting and consulting firms in the United States, we serve clients worldwide as a leading independent member of Crowe Horwath International, providing innovative business solutions in the areas of assurance, financial advisory, performance, risk consulting, and tax.

To learn more about our commitment to building lasting relationships, visit crowehorwath.com. Or contact Vicky Ludema at 800.599.2304 or vicky.ludema@crowehorwath.com.
An exciting group of international presenters to discuss stimulating issues and explore the new and different uses of mediation. Featuring Key Note Speaker, Professor Jacob Bercovitch, Ph.D., University of Canterbury, New Zealand who will discuss “Searching for the Elusive Criteria of Successful Mediation: An International and Interpersonal Perspective.”

**M3: THE NEXT Generation**
SATURDAY, NOVEMBER 7, 2009 • 8:00 AM–4:30 PM
Straus Institute for Dispute Resolution, Pepperdine Campus, Malibu

FRIDAY, NOVEMBER 6 • 6:00 AM–9:00 PM
The Luxe on Sunset Boulevard, with an engaging discussion hosted by Mr. Lee Jay Berman

To register, call or visit us at the web! SPECIAL DISCOUNTS FOR EARLY REGISTRATION! Call 1-877-963-3428 or visit us at www.scmediation.org
Our Past Experience is Your Best Advantage in these Turbulent Times

Experience creates knowledge.
Knowledge creates good habits.
Discipline, planning, hard work and plain old common sense — Everyday.

Good habits combined with conservative investments made on sound business principles have placed us in a strong financial position to carry forward.

We face the future with confidence and we will manage it with expertise as we have done for the past 30 years.

Lawyers’ Mutual Insurance Company

Your Best Advantage in Today’s World

Call 1.800.252.2045 or visit www.LMIC.com
They lost 2-1. But it could have been worse. In the second half, Chelsea’s Florent Malouda took a streaking shot on goal that got past Howard. In the replays, it was clear that the ball hit the top bar, bounced sharply down and glanced just over the line into the goal, and then bounced back out (crossing the line counts as a goal, even if the ball comes back out afterwards). But to the referee, it looked like it bounced short of the line, and he did not award a goal.

These types of moments happen in every sport. Viewers watching from home can see with stunning clarity that the referee has made a bad call, but the game has already moved on and the call stands. Every now and then you will hear a proposal for a goal camera or increased use of instant replay, but for the most part every major sport has persisted in using the system of human referees making the judgment calls.

For me, the billable hour plays a similar role in the legal profession as referees in sports. It is an inherently flawed method to measure value in legal work. This was illustrated perfectly in my own experience a few years ago. It was a busy time for me, and I was working right up to deadline. I had two oppositions to file and one day to write each. The first opposition was nothing but a struggle to write. My argument did not flow well, I could not find the quotes I wanted from the case law, and I labored to make even the simplest of points. I spent the entire day working on it and still felt it was not my best work. The following day I worked on the second opposition. It simply flowed out of me as if a muse were whispering the arguments into my ear. Within four hours I had cranked out a solid brief, some of the best work of my career. To any objective observer on the sidelines, the second day was indisputably my better performance—but not through the prism of the billable hour. As measured by the billable hour, the first opposition was twice as valuable as the second.

Players in the legal field have no shortage of laments about the harms visited upon them by billable hours. This standard reduces professional life to six-minute increments. Lawyers feel constant pressure to cram in more and more hours either to satisfy their superiors or to ramp up their revenue. Audits have forced lawyers to spend nearly as much time crafting their billing entries as they do crafting their briefs. There must be a better way.

But like goal cameras and computer analysis of replays, the creative alternatives rarely seem to catch on. Flat fee agreements have won some favor, as have some mixed contingency-billable arrangements, but no one has really found a viable replacement for the billable hour. People write articles criticizing the system and talking obliquely about alternatives, but I have yet to see a concrete and viable proposal. Lawyers and firms experiment here and there, but like the human referees of the sports world, the billable hour, with all its flaws, is the best system lawyers have.

Winston Churchill famously noted that “democracy is the worst form of government except all those other forms that have been tried from time to time.” Similarly, the billable hour is the worst form of valuing legal services, except for all the others. Like the referees we fans love to hate, the billable hour is an integral part of the legal game—and we lawyers must continue to learn to live with it.

David A. Schnider is general counsel for Leg Avenue, Inc., a distributor of costumes and apparel. He is the 2009-10 chair of the Los Angeles Lawyer Editorial Board.
Engineering the Resolution of the World’s Most Intractable Disputes

SUPERB
JUDICIAL TEMPERAMENT

FIERCELY
FAIR AND IMPARTIAL

ORDERLY
PARTY DRIVEN PROCESS

DEEP
SUBJECT MATTER KNOWLEDGE

— REGINALD A. HOLMES, ESQ. —
MEDIATOR - ARBITRATOR - PRIVATE JUDGE

AAA National Roster of Neutrals - Fellow, College of Commercial Arbitrators - Fellow, Association for International Arbitration - Member, California Academy of Distinguished Neutrals

DIFFICULT TIMES  DIFFICULT CONFLICTS  EXPEDITED RESOLUTIONS

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

SOUTHERN CALIFORNIA  •  ATLANTA AREA  •  CHICAGOLAND
Applying Neurolinguistics during Trial

NEUROLINGUISTICS EXPLORES HOW the human brain processes information by combining neurology and neurophysiology (the structure and function of the brain) with linguistics (the structure and function of language). People process information in different ways, often with a visual, auditory, or movement-based emphasis. A visual person uses mental pictures to understand concepts. This person needs to see it to believe it. People with an auditory frame of reference depend most on what they hear and what they think. What they hear is valid until they hear something different. Kinesthetic people accept something by how it makes them feel. They tend to be touchy-feely and like to be in the middle of things. They are often good in small groups.

Neurolinguistics can be effective in trial advocacy, particularly in a jury trial in which a lawyer must appeal to a diverse group. Whether a trial is criminal or civil, it behooves a trial lawyer to understand how people process information and to incorporate that knowledge into the presentation of evidence. An effective trial lawyer employs visual aids to engage the visual juror, including diagrams, maps, charts, photographs, videotapes, and graphics. Charts and overhead projectors, though still useful in many circumstances, can be replaced with PowerPoint slides and computer-generated graphics. A witness can describe how the accused fled the scene in a getaway car, but to the visual juror, an aerial satellite graphic with a miniature car traveling the route the accused took is much more interesting.

Pictures of crime scenes, street locations, buildings, vehicles, and other objects that cannot be transported to court assist the visual juror. Photographs are also effective for contraband and firearms, items that generally do not accompany the jury into the jury room. Flow charts and diagrams are useful in understanding the sequence and relation of relevant events. A chart depicting a complex drug trafficking operation or the relationship between organizational members aids the jury in understanding the theory of the case.

An auditory juror wants to hear the facts. To convince this juror, an effective lawyer ensures that a witness testifies smoothly, coherently, and persuasively. This can be helped by preparing the witness before trial. Explain the basics of a trial to the witness and how individual testimony fits into the overall picture. Describe the layout of the courtroom and where the witness will sit while testifying. Advise on proper courtroom decorum. Spend time reviewing the witness’s testimony, any prior statements the witness made, potential areas of cross-examination, and facts that may be used to impeach the witness’s credibility. Preparing a witness to testify does not mean telling the witness what to say. Rather, it means familiarizing the witness with the process of testifying and preempting surprises on cross-examination. Preparing the witness allows the lawyer to assess how the witness will be perceived by the jury and frame questions so that the witness understands what is being asked and can answer the questions truthfully and accurately.

To help the auditory juror during trial, ask questions that allow the witness to tell the story. Gently remind the witness to speak directly to the jury. Ask the witness to describe depictions in photographs, explain charts, and discuss the relevance of other visual aids. This method not only engages auditory and visual jurors but also helps a witness who may be nervous about testifying to focus on the facts.

Audio recordings are also effective in engaging the jury, especially when enhanced. For instance, an audio recording of a drug transaction and a transcript allow the jurors to read the words as they are being spoken, thereby appealing to auditory and visual jurors.

Kinesthetic Jurors

In a trial, the jury’s role is to passively observe events in the courtroom until the case is submitted to them for deliberation. Engaging a kinesthetic juror—who likes to be in the middle of the fray—can present a challenge. New lawyers have so many issues to consider in preparing for trial that they often overlook the importance of physical and demonstrative evidence.

Physical evidence includes clothing, contraband, firearms, and items from which fingerprints were lifted or DNA extracted. In civil trials, physical evidence includes the object in question in a product liability or patent infringement case. Anything that the kinesthetic juror can touch or at least see being handled is good.

Demonstrative evidence, such as models or replicas, can also be effective, especially when physical evidence is unavailable. Consider, for instance, an evidence kit for a demonstration of how evidence is collected and labeled, a field drug test kit to demonstrate testing controlled substances at the time of the drug transaction, or a security wand to demonstrate conducting a search at an airport checkpoint. Demonstrative evidence also includes in-court demonstrations, such as a police officer demonstrating a field sobriety test in a DUI trial, or searching a defendant’s person in a drug possession case. Demonstrations emphasizing a key fact can be incorporated into the direct examination and can be especially effective in engaging the kinesthetic juror who is good at picking up on a witness’s feelings. For instance, consider asking a witness to physically indicate distance from the accused to the victim in relation to the courtroom, demonstrate with a hand how the accused brandished a firearm, or point to where the witness was injured or touched without consent. While demonstrations depend on the discretion of the court, they should be practiced when preparing the witness to testify, and the lawyer should ensure that the nonverbal conduct is translated into words so that the court reporter preserves the record.

A savvy lawyer uses all the tools and resources at his or her disposal in presenting a case to a jury. Understanding how people process information and incorporating that knowledge into the presentation of evidence is a powerful tool.

April A. Christine is an assistant U.S. attorney for the Central District of California, where she prosecutes gang-related violent federal crimes. The views expressed in this article are the personal views of the author and do not in any way represent the views of the U.S. Department of Justice or the U.S. Attorney’s Office.
Isn’t it time your Web site caught more of what you want?

A good Web site attracts business.
Is your Web site generating the business you want?
If not, LexisNexis – the legal experts – can help.

LexisNexis builds Web sites with the needs of law firms in mind. In fact, over 20,000 firms can testify to that. We also provide smart tools, such as Search Engine Optimization. See our new Web site offerings, and then watch a few bites turn into a feeding frenzy.

See how to land more clients at lexisnexis.com/CatchBusiness or call 800-526-4902 Ext. 8877.
Permanent Residency for Immigrants of Extraordinary Ability

The Immigration Act of 1990 created a special route to lawful permanent residency for aliens of “extraordinary ability”—namely, those who have “a level of expertise indicating that [they are] among a small percentage who have risen to the very top of the field of endeavor.” While the extraordinary ability category has been in existence for less than two decades, aliens who possess extraordinary abilities have long enjoyed preferential treatment under U.S. immigration law, including after it became more restrictive to many other foreigners.

For most of the first 90 years of its existence, the United States had virtually no immigration restrictions of any kind. Because of growing anti-Chinese sentiment, the country passed its first minor immigration restrictions in 1862, in the form of a law prohibiting American ships from transporting Chinese migrants into the United States. Because Chinese immigrants continued to come into the country, the United States passed its first major immigration law, the Chinese Exclusion Act, in 1882. Nine years later, the Immigration and Naturalization Service (INS) was created in order to administer the increasingly complex immigration laws that were being enacted.

In 1921 a quota system was introduced, limiting the annual entry of immigrants from each country to no more than 3 percent of the number of people from that country who resided in the United States in 1910. Nonetheless, certain aliens were exempted from this quota system. Section 2(d) of the Immigration Law of 1921 read:

[A]liens who are professional actors, artists, lecturers, singers...aliens belonging to any recognized learned profession...may, if otherwise admissible, be admitted notwithstanding the maximum number of aliens of the same nationality admissible in the same month or fiscal year.

In passing this law, Congress allowed certain elite aliens (among others) to continue to have relatively easy access to the United States, notwithstanding the newly established national origin quota system. This national quota system remained in effect for almost four decades before being abolished in 1965, at which time regional quotas were established for the eastern and western hemispheres. In 1976, regional quotas were abolished and replaced with an annual cap on the number of immigrants from all countries.

Under current immigration law, most categories of aliens—including those with extraordinary ability—are subject to the annual worldwide quota, with a different quota for each visa category. For many categories, there is a backlog of sometimes several years, and an immigrant visa cannot be granted until the priority date (the date on which the application was filed) for that category becomes current, as determined by the State Department’s monthly Visa Bulletin.

Immigrant visa applications based on extraordinary ability are today known by the acronym EB-1 (employment-based first preference). Aliens in the EB-1 category continue to enjoy preferential treatment in that the priority date for this category is almost always current, meaning that extraordinary aliens can have their immigrant petitions processed relatively quickly; they do not have to wait several years for a priority date to become current. Also, the burdensome and time-consuming labor certification, required of most aliens applying to come to or remain in the United States as employment-based immigrants, is not required for EB-1 aliens.

In addition to the EB-1 immigrant visa category, the Immigration Law of 1990 created the O and P visa categories for artists, entertainers, and others. EB-1 is different from O and P in five principal ways: 1) O and P are nonimmigrant (temporary) statuses that must be renewed every few years, whereas EB-1 is an immigrant status; 2) a person who obtains EB-1 status (like other lawful permanent residents) may apply for U.S. citizenship after residing in

Josh Effron is an immigration attorney at Immigrant Rep, Inc. He wishes to acknowledge the invaluable contributions of Elise Diamond in the preparation of this article.
Call in the EXPERTS.
Bringing quality experts into the 21st Century.

Pro/Consul, Inc.
Technical & Medical Experts

15,000 DISTINGUISHED EXPERTS
IN MULTIPLE DISCIPLINES.

“Pro/Consul’s ability to locate appropriate
expert witnesses is unsurpassed.”

1-(800) 392-1119
Listed and recommended by the A.M. Best Company

- Rigorous standards
- Tailored service
- Prompt turnaround
- Free initial consultations
- Free resume book
- Reasonable rates

LOCAL OFFICE
Pro/Consul Inc.
1945 Palo Verde Avenue, Suite 200
Long Beach, CA 90815-3443
(562) 799-0116 • Fax (562) 799-8821
eexperts@msn.com • ExpertInfo.com

A.D.R. Division
1-877-ARBITER
Retired Judges • Attorneys
Medical Doctors • Technical Experts
the United States in this status for five years, whereas the O and P statuses do not lead to citizenship; or
3) O and P visa petitions require an offer of employment (from the petitioner-employer), whereas EB-1 applicants do not, and 5) O and P visa petitions require consultation letters from unions and/or management groups (such as the Screen Actors Guild or the U.S. Figure Skating Association), while EB-1 applications do not.

The law requires EB-1 petitioners to either demonstrate that beneficiaries (who are usually the same people as the petitioners) have a one-time achievement, such as a major, internationally recognized award (e.g., an Oscar, Emmy, or Nobel Prize), or “at least three” of the following:
1) Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
2) Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
3) Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought;
4) Evidence of the alien’s participation, either individually or on a panel, in the work of others in the same or an allied field of specialization for which classification is sought;
5) Documentation of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
6) Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media;
7) Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases;
8) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
9) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field;
10) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Despite the language of the regulation, meeting only three of these 10 requirements is very likely to result in a denial, unless the evidence is extremely strong. Petitioners should therefore always submit “comparable evidence” as possible. Even if they believe that they have met at least three of the 10 requirements with strong evidence. Since the weight of the evidence is subjective, and it is difficult to predict whether the government official who examines the petition will agree with the practitioner about the strength of the evidence, the practitioner should make every effort to gather and submit as much “comparable evidence” as possible.

It is also highly advisable to submit letters of recommendation from as many recognized experts as possible, preferably from a variety of nationalities and age groups. The letters should have the following basic format: 1) the first paragraph should introduce the letter writer and detail his or her qualifications and achievements in the field, 2) the second paragraph should explain how the letter writer knows the applicant, and 3) the third paragraph should give the letter writer’s professional or expert opinion of the applicant’s abilities in the field. It is extremely important for practitioners to inform letter writers of the high burden of proof required in an EB-1 application. Without resorting to hyperbole, the letters should reflect the extraordinary character and achievements of the applicant.

The first step in obtaining an EB-1 visa is the visa petition. Preparing the petition is generally the most difficult part of the EB-1 application process, because the petition must document the extraordinary ability of the petitioner. Once the visa petition has been approved, a person may apply for adjustment of status or consular processing. Consular processing is appropriate for a petitioner who is outside the United States. Adjustment of status, on the other hand, is appropriate for a petitioner who is inside the United States and has lawful nonimmigrant status (with the exception of foreigners who have come to the United States on the visa waiver program and are generally not permitted to change status from within the United States and must use consular processing). Once the visa petition has been approved, it is highly likely that the visa will be issued unless the beneficiary has a criminal record or a serious communicable disease.

In 2002, the regulations governing immigrant petitions were amended to allow certain employment-based immigrant petitions to be filed concurrently with adjustment of status applications, if the priority date is current. Since the priority date for EB-1 applications is almost always current, the visa petition and the adjustment of status application may be submitted concurrently (assuming that consular processing is not being used). One advantage of concurrently filing both applications is that the total processing time, from the filing of the visa petition to receipt of lawful permanent residency status, is often cut in half. Another advantage is that a visa petition submitted alone will not result in any immigration status, but an applicant for adjustment of status is considered to be in lawful status while the adjustment application is pending (so long as the adjustment of status application is submitted before the current immigration status expires). Thus, by submitting the visa petition and the adjustment application concurrently, a person whose immigration status is about to expire may get the benefit of waiting in the United States while both the visa petition and the application for adjustment of status are being processed.

However, a disadvantage of concurrent filing is that government filing fees will not be refunded if the application is denied. Practitioners may therefore consider waiting for the visa petition to be approved prior to submitting the adjustment of status application, if the client has at least one year left in nonimmigrant status.

As with most other immigrant categories, EB-1 applicants can apply for their spouses and unmarried children under 21 to become lawful permanent residents at the same time. Practitioners should always ensure that all eligible family members are included in EB-1 applications. If they fail to do so, the family members may have to wait for several years before they can obtain green cards. This also means that if an EB-1 applicant is planning to get married in the near future, the EB-1 application should, if at all possible, be submitted after the marriage has taken place so that the spouse can be included in the application.

Lastly, EB-1 visas are getting increasingly more difficult to obtain, as the government places a higher burden of proof than ever before on these petitions. In some cases, the government will issue a request for evidence (RFE) asking for any number of additional items from the beneficiary; i.e., anything from a better copy of the applicant’s birth certificate to further information about the newspaper and magazine articles submitted as part of the application. The deadlines to respond to RFEs are strictly enforced and are rarely extended. Responses must be submitted all at once; piecemeal responses are not accepted.

Also, most RFEs give the option to “[s]ubmit some or none of the evidence requested and ask for a decision based upon the record.” Practitioners should never ask for a decision based upon the record. The fact
that a RFE has been issued means that a decision based upon the record will almost certainly be negative. Practitioners should therefore respond to an RFE as thoroughly as possible, which may even necessitate further explanations about evidence already submitted.

In summary, the EB-1 or extraordinary ability visa category is an excellent option for aliens who have demonstrated extraordinary achievement and wish to remain in the United States permanently. This category has many advantages over other employment-based immigrant visa categories. It does not require a labor certification, the priority date is almost always current, and the alien can self-petition. If the adjudicating officer approves the application, the alien will be able to come to or remain in the United States permanently, and the country will benefit from that person’s talents. The alien, in turn, will be on the road to one day becoming a full U.S. citizen.

2 8 C.F.R. §204.5(b)(2).
5 United States ex rel. Deliannis v. Commissioner of Immigration, 298 F. 449, 450 (2d Cir. 1924).
8 For instance, if the current priority date for a particular visa category is August 15, 1998, visas in that category can only be granted if the applications were submitted on or before that day.
9 There are two types of visas under U.S. immigration law, immigrant and nonimmigrant. Nonimmigrant visas allow a person to come to the U.S. for a temporary stay, whether for a few months as a tourist or a few years as a temporary worker or student. Immigrant visas are for the purpose of coming to the United States permanently as a lawful permanent resident (also known as a green card holder, because the cards issued to lawful permanent residents used to be green).
10 8 U.S.C. §1153(b)(1)(A). Immigrant visas are divided into two major classifications, family based (8 U.S.C. §1153(a)) or employment based (8 U.S.C. §1153(b)). Because immigrant visas based on extraordinary ability come from 8 U.S.C. §1153(b)(1), they are known as EB-1, or “employment-based, first preference.” Similarly, immigrant visas based on investment are known as EB-5, or “employment-based, fifth preference,” because they come from 8 U.S.C. §1153(b)(5). The nomenclature of other immigrant visas follows a similar pattern.
11 The labor certification, a component of most other employment-based immigrant visa categories, requires the petitioning employer to demonstrate to the U.S. Department of Labor that there is no U.S. citizen or lawful permanent resident available to perform the job in question, before the immigrant visa petition can be filed. It is a very expensive and time-consuming process.
The Impact of an Adversary Filing for Bankruptcy during Civil Litigation

IN THE CURRENT ECONOMY, it is not unlikely that a party to an active civil action may, unexpectedly or not, find that one of the other parties is filing for bankruptcy. In the midst of litigants frantically preparing for trial—with discovery requests flying back and forth, noticed depositions canceled and rescheduled, the engagement of experts, not to mention settlement discussions—this development brings the acrimonious proceedings to a screeching halt.

The number of bankruptcy filings in the Central District of California alone increased more than 70 percent in the first four months of 2009, compared to that same period in 2008, and court watchers predict that this percentage will continue to rise. Many of the debtors filing these cases seek to stop collection efforts against them, including the continuation of pending civil litigation.

The filing of a bankruptcy petition “automatically stays” (that is, automatically stops) most actions against the debtor or the debtor’s property, including a civil lawsuit. In the short term, the impact of the automatic stay is immediate. In the long term, what will happen depends on the type of bankruptcy case being filed, whether the debtor is a plaintiff or a defendant in the pending action, the nature of the pending litigation as well as the claims asserted in the action, and whether the debtor is indispensable to it.

To understand the consequences of a bankruptcy filing by a party to civil litigation and the steps needed to navigate through those consequences, a basic understanding of bankruptcy law and procedure is helpful. Although the bankruptcy laws have undergone various permutations, amendments, and changes through the years, debtors in the United States have always had a mechanism to adjust or eliminate their debts and get a fresh start. Most recently, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and made sweeping changes to the bankruptcy laws, including adding provisions intended to reduce the amount of time that debtors have to take certain actions during the bankruptcy case and to increase the requirements that individual debtors filing for bankruptcy must satisfy to remain in bankruptcy and obtain a discharge of their debts.

Bankruptcy cases are filed in special federal courts of limited jurisdiction known as bankruptcy courts, an adjunct of the U.S. district courts. The role of the bankruptcy court is to monitor the progress of the case and resolve disputes among the debtor and creditors or other parties. Bankruptcy courts are the only courts authorized to decide those matters that fall within their core jurisdiction. They also may decide certain noncore matters related to a bankruptcy case, with the consent of the parties.

Title 11 of the U.S. Code is also known as the Bankruptcy Code. It provides for six basic types of bankruptcy cases, which are described by the chapters under which they are filed. The two most common types of bankruptcy cases filed by businesses are those filed under chapters 7 or 11 of the Bankruptcy Code. Chapter 13, another popular chapter for bankruptcy filings, may be used only by individuals with regular income who wish to develop a plan to repay all or part of their debts. Once a bankruptcy case is commenced under any chapter, an “estate” is created, and the estate becomes the temporary legal owner of all the debtor’s property as of the commencement of the case.

Chapter 7 provides for the liquidation of the debtor’s nonexempt property and the distribution of the proceeds to creditors. To qualify for relief under chapter 7 of the Bankruptcy Code, the debtor may be an individual, a partnership, or a corporation or other business entity. Certain entities, such as railroads, domestic or foreign insurance companies, banks, savings banks, cooperative banks, savings and loan associations, building and loan associations, homestead associations, and credit associations are not permitted to file a chapter 7 bankruptcy case.

Once a debtor files a chapter 7 bankruptcy case, a trustee is immediately appointed to investigate the financial affairs of the debtor and liquidate the estate. Usually the debtor’s business is shut down or sold, but the trustee may operate the business for a limited period of time to maximize the sale price for the benefit of the creditors. Under Section 726 of the Bankruptcy Code, estate property may be distributed based on six classes of claims, and the creditors in each class must be paid their pro rata share in full before the creditors in the next lower class are paid at all. Subject to certain enumerated exceptions, the debts of individual debtors in a chapter 7 case are discharged, and the debtors are released from personal liability for these debts. A discharge is not available to partnerships or corporations.

Chapter 11, on the other hand, allows the debtor to propose a plan of reorganization to keep its business alive and pay creditors over time and is usually filed by a corporation or a partnership (but also may be filed by an individual). Chapter 11 also allows the debtor to sell some or all of its assets through an auction process or through a plan of liquidation. Upon commencement of the chapter 11 case, the debtor becomes the debtor-in-possession. A debtor-in-possession is placed in the position of a fiduciary and has the same rights and duties as a trustee under other bankruptcy chapters.

In certain circumstances, a chapter 11 trustee may be appointed after a motion by a creditor or other party in interest and a noticed hearing, or the debtor-in-possession may stipulate to the trustee’s appointment. The grounds for appointment of a chapter 11 trustee include 1) fraud, dishonesty, incompetence, or gross mismanagement of the debtor’s affairs by the debtor-in-possession, or 2) the best interests of creditors. The trustee may be appointed at any time after the commencement of the case but before confirmation of a plan of reorganization. Generally, a debtor in a case filed under chapter 11 has a one-time right to convert the chapter 11 case to a case under chapter 7.

Only the debtor-in-possession may file a disclosure statement and a plan of reorganization with the bankruptcy court during the first 120 days of the case (the “exclusivity period”), or during any

Susan S. Davis is a senior counsel with Cox, Castle & Nicholson LLP, where her practice focuses on real estate and bankruptcy litigation. Alicia N. Vaz, an associate with Cox Castle, is a commercial litigator handling complex business and real estate litigation.
When the pressure is on,
GREAT LAWYERS
rise to the occasion.

This is Elizabeth Yang, Associate with Howrey LLP,
one of the largest international law firms in Los Angeles and Class of 2006 graduate.

Read Elizabeth’s story at
www.go2lavernelaw.com/elizabeth

The University of La Verne College of Law has been provisionally approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association since 2006. The Section of Legal Education may be contacted at 321 North Clark Street, Chicago, IL 60610 or by phone at (312) 988-6738.
extension of the exclusivity period, not to exceed 18 months. After the exclusivity period, any party in interest, such as individual creditors or a creditors’ committee, may file a plan of reorganization. Under certain circumstances, a plan of reorganization may be “crammed down” on objecting creditors and confirmed by the bankruptcy court despite the objections of creditors. Confirmation of a reorganization plan by the bankruptcy court generally discharges the debtor from any debt that arose before the date of confirmation. The confirmed plan creates new contractual rights, replacing or superseding pre-bankruptcy contracts, and the bankruptcy court retains jurisdiction to enforce those rights.

**Imposition of and Relief from the Automatic Stay**

When a bankruptcy case is first filed, the bankruptcy court will send out a notice of the commencement of the case to all parties listed as creditors and interested parties on the debtor’s schedules. The debtor’s counsel is required to notify other parties to pending civil litigation as well as the court in which the litigation is pending that a party to the litigation filed a bankruptcy case and the litigation is stayed. The Judicial Council has created a form to notify a California court in which a civil action is pending of the stay. If the debtor’s counsel does not notify the court, the other parties to the litigation may have a duty to do so.

The filing of a bankruptcy case by a party to pending litigation automatically and immediately stops that litigation as to the debtor and its property, whether or not the other party to the litigation has actual notice of the bankruptcy. Since the automatic stay only bars actions against the debtor, a civil action brought by the debtor (that is, when the debtor is the plaintiff) is not affected by the automatic stay. The parties against whom the debtor is the plaintiff) is not affected by the automatic stay and may proceed to judgment. The commencement of the case to all parties listed as creditors and interested parties on the debtor’s schedules. The debtor’s counsel is required to notify other parties to pending civil litigation as well as the court in which the litigation is pending that a party to the litigation filed a bankruptcy case and the litigation is stayed. The Judicial Council has created a form to notify a California court in which a civil action is pending of the stay. If the debtor’s counsel does not notify the court, the other parties to the litigation may have a duty to do so.

The parties against whom the debtor’s civil action is brought may not need relief from the automatic stay to defend that action. Among other things, the automatic stay prohibits:

- The commencement or continuation of suits against the debtor.
- Any action to create, perfect, or enforce a lien against property of the estate.
- Any action to obtain possession of, or to exert control over, property of the estate.
- Any setoff against property of the estate.
- Any action to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case.

There are, however, numerous exceptions to the automatic stay that are set forth in 11 U.S.C. Section 362(b). The 28 multipart exceptions include:

1. Civil actions to determine paternity, domestic support obligations, marital dissolution, or child custody.
2. Actions by the government related to the stockpiling of chemical weapons.
3. The exercise of certain contractual rights by commodity brokers, forward contract merchants, stockbrokers, financial institutions, financial participants, or securities clearing agencies.
4. The exercise of certain contractual rights by a repossessor or financial participant.
5. Criminal actions.
6. Tax audits.
7. Any act by the lessor under a lease of non-residential real property that terminated by the expiration of the stated term of the lease before the case was commenced or during the case to obtain possession of the real property.
8. Actions to enforce a lien in real property if the debtor is ineligible to be a debtor or if the case was filed in violation of a bankruptcy order in a prior case prohibiting the debtor from being a debtor in another case.

The automatic stay remains in effect until the property is no longer part of the estate, the case is closed or dismissed, or a party obtains relief from the stay. Generally, actions taken in violation of the automatic stay are void. Moreover, a party may be liable for sanctions for violating the automatic stay, even if the violation was inadvertent. A willful violation of a stay entitles the debtor to recover actual damages, including costs and attorney’s fees and, in appropriate circumstances, punitive damages.

As a result, a party to pending litigation must obtain relief from the automatic stay in the bankruptcy court before continuing any action against the debtor or any action that would affect property of the debtor’s estate. Although a debtor prosecuting a civil action does not need relief from the automatic stay to continue with the litigation through judgment, a debtor may need relief from the automatic stay to prosecute an appeal in which the underlying action was commenced by a non-debtor party.

To obtain relief from the automatic stay, a litigant must file a noticed motion in the bankruptcy court, present evidence in support of the motion, and participate in one or more hearings. Some bankruptcy courts, including the Central, Northern, Eastern, and Southern Districts of California, have official forms to be used in conjunction with a motion for relief from the automatic stay. The use of motion forms is mandatory in the bankruptcy courts in the Central District.

The Bankruptcy Code provides three grounds for a court to grant relief from the automatic stay or to modify the stay. First, relief from the automatic stay may be granted for cause including, but not limited to, lack
of adequate protection. Cause may also exist if the case was filed in bad faith, such as solely for delay or if fraud is involved. Second, relief may be granted if the debtor does not have any equity in the property at issue and the property is not necessary for the debtor's reorganization. The issue of an effective reorganization is a complex factual determination based upon the nature of the collateral, the nature of the debtor's business, and the debtor's prospects for a successful reorganization. Indeed, resolution of this issue can require one or more evidentiary hearings. Finally, in a “single asset real estate” case, the court should grant relief from the stay to those parties whose claims are secured by an interest in the property, unless not later than 90 days after the order for relief is entered, the debtor 1) files a plan of reorganization that has a reasonable possibility of being confirmed in a reasonable time, or 2) has commenced monthly payments at the nondefault contract rate.

The likelihood of prevailing on a motion for relief from the automatic stay to continue litigation against a bankrupt litigant depends on several factors, such as whether the litigation can proceed against other defendants without the debtor’s participation, whether the debtor filed a chapter 7 or chapter 11 case, whether the case can be effectively adjudicated by the bankruptcy court, and whether a judgment will be covered by insurance proceeds. Often, litigants seek relief from the automatic stay to proceed to judgment against the debtor but not to enforce the judgment without a further order from the bankruptcy court.

Timing also may be a significant factor. While nondebtor parties frequently want to move for relief from the automatic stay immediately upon the filing of a bankruptcy case, a bankruptcy court may be more inclined to grant relief from the automatic stay to continue litigation if the debtor has had time to realize the benefit of the “breathing room” provided by the stay—especially if the debtor has made little progress toward reorganization during that period.

**Alternatives for Nondebtor and Debtor Litigants**

Civil litigants who have filed a claim against a number of defendants, only one of whom has filed for bankruptcy, are theoretically permitted to proceed with the litigation against the nonbankrupt parties. If the non-debtor parties are officers or principals of the debtor, however, the debtor may seek to enjoin the litigation regarding these non-debtor parties. The bankruptcy court may issue an injunction to enjoin the civil lawsuit if there is evidence demonstrating that proceeding with the civil action will impede the
debtor’s efforts in the bankruptcy court pursuant to Section 105(a) of the Bankruptcy Code.41 Similarly, if the bankrupt debtor is a primary party to the civil action, a civil court may decide that the furtherance of justice mandates a stay of the entire proceeding.42

Injunctions generally are issued only in unusual circumstances in which the failure to issue an injunction will have a “substantial and adverse impact” upon the debtor’s continuing existence.43 To obtain an injunction, a debtor must demonstrate that it has a reasonable likelihood of reorganizing, the debtor will suffer irreparable injury if the relief is not granted, the relative hardships of the parties favor granting such extraordinary relief and, if applicable, public interest favors the injunction.44 This high standard helps to ensure that extending the automatic stay to non-debtors will not be granted lightly.45

Alternatively, the bankrupt debtor may seek to have the civil action “removed” from the nonbankruptcy court, other than a U.S. tax court, to the bankruptcy court.46 Procedurally, the debtor must file a notice of removal with the district court and with the state court in which the litigation is pending. Once removed, the district court will then refer the case to the bankruptcy court. In most district courts, however, an order automatically refers the matter to the bankruptcy court, and the notice of removal can be filed directly in the bankruptcy court rather than the district court.47

If a litigant opposes removal to bankruptcy court, it can file a motion to remand or abstain in the district court.48 In deciding whether to oppose the removal, civil litigants should consider its consequences. Once a civil lawsuit is removed to the bankruptcy court, it becomes an adversarial action subject to the Federal Rules of Evidence and the Federal Rules of Civil Procedure to the extent that they are incorporated by the Bankruptcy Rules of Civil Procedure. Therefore, the rules governing discovery, evidence, and dispositive motions will likely be different than if the case were pending in state court and could affect the outcome of the case.49

Assuming a jury trial is permitted, the jury pool for federal bankruptcy court will be different than the jury pool for state court.50 Trial lawyers may not be experienced with bankruptcy court litigation. Lengthy trials are less common in bankruptcy court than in state and federal district courts. Paradoxically, however, trials in bankruptcy court may take much longer to complete than those in state and federal district courts because they are often conducted on a piecemeal basis due to the bankruptcy court’s regular calendar.

Finally, civil litigants also should be aware that the time in which to appeal a bankruptcy court order or judgment is shorter
than the time allowed in federal court or California state court. Generally, appeals from bankruptcy court must be taken within 10 days after the order or judgment is entered. In most circuits, appeals from bankruptcy courts are heard by a bankruptcy appellate panel consisting of three bankruptcy judges from another district within the circuit, unless the appellant or any other party elects to have the appeal heard by the district court. In rare instances, the appeal can be taken directly to the circuit court.

Pursuing a Proof of Claim or a Settlement

If the civil case is not removed to bankruptcy court and the nondebtor litigant does not move for relief from the automatic stay, the nondebtor litigant must decide whether to file a proof of claim in the bankruptcy court. A proof of claim is used by the bankruptcy court to determine the amount owed to any given creditor. The timing and requirements for filing proofs of claim vary depending upon the type of bankruptcy case. In chapter 7 and 13 cases, a proof of claim must be filed by an unsecured creditor with the bankruptcy court within 90 days after the first date set for the meeting of creditors, subject to certain exceptions. In chapter 11 cases, the timing for filing a proof of claim is generally set by the bankruptcy court or by the local rules for the bankruptcy court. A proof of claim is required when the creditor’s claim is not listed on the debtor’s schedules or is listed as disputed, contingent, or unliquidated. Failure to timely file a proof of claim in that instance bars an unsecured creditor from proceeding on the claim or participating in a distribution.

By filing a proof of claim a litigant agrees to submit to the jurisdiction of the bankruptcy court and possibly lose its right to a jury trial. If an objection is made to the proof of claim, the bankruptcy court is entitled to have a hearing and receive evidence to determine the validity and amount of the claim. In addition, when a claim is contingent or unliquidated, the bankruptcy court is entitled to make an estimation of the amount of the claim to prevent undue delay in the administration of the case. Because the bankruptcy court’s determination of the amount of the claim can collaterally estop that determination in state court, often litigants with pending civil actions will seek relief from the automatic stay to have the civil trial court liquidate the claim.

Another option for civil litigants to consider is a settlement of the civil action while the bankruptcy action is pending. Before any settlement can be finalized, the settlement must be approved by the bankruptcy court. The other creditors must be given notice of at least 20 days to object to the settlement before it can be approved by the bankruptcy court.
court. These objections must be based on standards similar to those for good faith settlement motions in state court.\textsuperscript{57}

Advising a civil litigant on how to proceed once a bankruptcy case is filed during a pending action is complicated at best. A prudent course for litigation counsel is to consult with a bankruptcy lawyer familiar with the bankruptcy courts and their rules and procedures.


\textsuperscript{2} 11 U.S.C. §362.

\textsuperscript{3} See, e.g., Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (“[I]t gives to the honest but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”); Barnett v. Lewis, 170 Cal. App. 3d 1079, 1088 (1985) (“The purpose of 11 United States Code section 362 is to protect the assets of the debtor. ‘It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.’ (citations omitted)).


\textsuperscript{5} 28 U.S.C. §151.

\textsuperscript{6} 28 U.S.C. §157(b).

\textsuperscript{7} 28 U.S.C. §157(c).

\textsuperscript{8} 11 U.S.C. §§101(41), 109(b).

\textsuperscript{9} 11 U.S.C. §109(b).

\textsuperscript{10} 11 U.S.C. §§701, 704.

\textsuperscript{11} 11 U.S.C. §721.

\textsuperscript{12} 11 U.S.C. §726.

\textsuperscript{13} 11 U.S.C. §727.

\textsuperscript{14} 11 U.S.C. §727(a)(1).

\textsuperscript{15} 11 U.S.C. §1107(a).

\textsuperscript{16} 11 U.S.C. §1104.

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} 11 U.S.C. §1112(a).

\textsuperscript{20} 11 U.S.C. §§1112, 1125.

\textsuperscript{21} 11 U.S.C. §1128.

\textsuperscript{22} 11 U.S.C. §1129.

\textsuperscript{23} 11 U.S.C. §1141.

\textsuperscript{24} Fed. R. Bankr. P. 3020(d).

\textsuperscript{25} Cal. R. Ct. 3.650.

\textsuperscript{26} Judicial Council Form CM-180.

\textsuperscript{27} See, e.g., Cal. R. Ct. 3.650.

\textsuperscript{28} 11 U.S.C. §362.

\textsuperscript{29} In re White, 186 B.R. 700 (9th Cir. B.A.P. 1995) (“The trustee or debtor in possession is not prevented by the automatic stay from prosecuting or appearing in an action which the debtor has initiated and that is pending at time of bankruptcy.”); In re Merrick, 175 B.R. 333, 337 (9th Cir. B.A.P. 1994).

\textsuperscript{30} Merrick, 175 B.R. at 337 (“There is, in contrast, no policy of preventing persons whom the bankrupt has sued from protecting their legal rights. True, the bankrupt’s cause of action is an asset of the estate; but as the defendant in the bankrupt’s suit is not, by opposing that suit, seeking to take possession of it, subsection (a)(3) is no more applicable than (a)(1) is.”); In re Way, 229 B.R. 11, 13 (9th Cir. B.A.P. 1998).

\textsuperscript{31} 11 U.S.C. §362.

\textsuperscript{32} 11 U.S.C. §362(b).

\textsuperscript{33} 11 U.S.C. §362(c).

\textsuperscript{34} 11 U.S.C. §362(k).

\textsuperscript{35} See, e.g., Ingersoll-Rand Fin. Corp. v. Miller Mining Co., 817 F. 2d 1424, 1426 (9th Cir. 1987).

\textsuperscript{36} 11 U.S.C. §362(d).

\textsuperscript{37} Local Bankr. R. 4001-1(b)(1).

\textsuperscript{38} 11 U.S.C. §362(d)(1).

\textsuperscript{39} 11 U.S.C. §362(d)(2).

\textsuperscript{40} 11 U.S.C. §362(d)(3); 11 U.S.C. §101(51B) (defining “single asset real estate” as “a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental.”).

\textsuperscript{41} 11 U.S.C. §105.

\textsuperscript{42} See, e.g., Code Civ. Proc. §128.

\textsuperscript{43} See In re Morgan-Busby, 272 B.R. 257, 265 (9th Cir. B.A.P. 2002).

\textsuperscript{44} In re Excel Innovations, Inc., 502 F. 3d 1086, 1096 (9th Cir. 2007).

\textsuperscript{45} Id. at 1095.

\textsuperscript{46} 28 U.S.C. §1452(a); Fed. R. Bankr. P. 9027.

\textsuperscript{47} See, e.g., Central District of California, General Orders 266 and 266A, available at https://www.ca-cd.uscourts.gov/CACD/GenOrdersAndViewAllOrders/GenOrdersView/OpenView.

\textsuperscript{48} 28 U.S.C. §1452(b) (authorizing motions for removal); 28 U.S.C. §1334(c) (authorizing motions to abate).

\textsuperscript{49} Fed. R. Bankr. P. 9002. The bankruptcy judge may extend the 10-day appeal period for up to 20 days if the motion to extend is filed within the original 10 days.

\textsuperscript{50} 28 U.S.C. §158(b)(1), (5); 28 U.S.C. §158(c)(1).


\textsuperscript{53} Fed. R. Bankr. P. 3003.

\textsuperscript{54} Fed. R. Bankr. P. 3003(c)(2).

\textsuperscript{55} 11 U.S.C. §502(b).

\textsuperscript{56} 11 U.S.C. §502(c).

\textsuperscript{57} FED. R. BANKR. P. 2002(a)(3).
CLASS ACTIONS can serve as an indispensable vehicle to resolve claims for a large number of people in one fell swoop. They can provide peace for the defendant, reasonable fees for the lawyers, and equitable relief for the class members. Nevertheless, the potential for abuse looms over these advantages. This has led to rules for class action settlements that require them to conform to certain standards and be approved by the court. However, a recent case—Chindarah v. Pick Up Stix, Inc.1—has cast doubt on both the settlement process and the need for judicial approval.

Still, all is not lost for the plaintiffs’ bar. In the wake of Chindarah, a creative and practical solution exists for those able to navigate the often turbulent intersection of federal and state standards.

In Chindarah, the Fourth District of the California Court of Appeal allowed an employer to enter into private settlement and release agreements with its employees, one at a time, over various wage and hour claims despite a pending class action lawsuit over the very same issues. The plaintiffs argued that the releases were void under Labor Code Sections 206 and 206.5, which provide that an employee cannot release wage claims unless payment for the wages have been made. This right to receive full wages cannot be released or waived. Thus, the plaintiffs argued, since the class members were misclassified as exempt employees, they were due additional overtime wages that should not have been subject to release.2

The court of appeal had a different view. While the court noted that Labor Code Section 206.5 nullifies a release that an employee signs as a condition to receiving payment of earned wages, it drew a distinction for wages that may or may not be due depending upon a bona fide dispute.3 According to the court’s reasoning, wages that formed the basis of a bona fide dispute could no longer be classified as paid wages and thus did not fall within the ambit of the Labor Code statutes.4

Since the settlements were entered into before the plaintiffs moved for class certifi-

Aashish Y. Desai is a partner at Mower, Carreon & Desai, LLP, where his litigation practice is focused on class and collective actions involving wage and hour, antitrust, and consumer issues. He wrote an amicus curiae letter brief asking the California Supreme Court to grant review of Chindarah v. Pick Up Stix, Inc.
cation, there was no class to certify, and the class action was rendered moot. Despite the argument that the *Chindarah* decision was not only a profound misapplication of the law but invited a solicitation scheme involving covert, one-sided, potentially misleading communications, the California Supreme Court denied a petition for review.1

The consequences of *Chindarah* are profound. For employers, the decision provides an opportunity to “pick off” class members and thwart potentially devastating wage and hour class action suits. For employees, it may be the beginning of the end. Indeed, just weeks after the petition for review was denied, another appellate decision, *Watkins v. Wachovia Corporation*, adopted the reasoning of *Chindarah*, holding that the settlement of the plaintiff’s claims deprived her of standing to pursue the class action altogether.6 The strategy is gaining traction, but there are practical and legal problems that have yet to be addressed by courts.

The elimination of judicial review of settlements opens the door to the unfettered abuse of the rights of absent class members, who are generally without adequate knowledge of the claims in the class action. As a result, settlements can be, and often are, for substantially less than the claims are worth. To protect against these occurrences, the American Bar Association’s Model Rules of Professional Conduct require that the formal parties to the class action, or counsel for the formal parties, may not, without knowledge or consent of the court, communicate individual settlement proposals directly or indirectly by written or oral communications with the potential and actual class members.7

California has not adopted the ABA Model Rules, but the state should codify the ABA rule’s sound approach regarding communications in class action settlement proposals. In the context of a settlement, the possibility of abuse exists when the defendant desires to limit its liability. For example, in a case in Georgia,8 both defendant’s counsel and the defendant bank’s in-house counsel were involved in a telephone campaign to solicit exclusion requests from approximately 4,000 prospective class members. The court found that the solicitation activities were improper and unauthorized, thereby disqualifying counsel from further participation in the lawsuit. The court ruled the solicitation scheme was covert, one-sided, misleading, coercive, and in violation of the ABA Rules of Professional Conduct.

In California, courts recognize that to prevent fraud, collusion, or unfairness to absent class members, a class settlement requires court approval.9 Thus, *Chindarah* may turn the settlement process on its head by eliminating the approval protocol. While class representatives, who are represented by counsel, are prevented from entering into private settlement without court approval, absent class members, who are not represented by any counsel, thwart judicial scrutiny of their settlement. Approval of an “agreement” between an employer and an employee outside of the adversarial context of a lawsuit would violate the spirit of the law surrounding settlements of class actions. Indeed, regarding this issue, federal law differs from California law.

In enacting the Fair Labor Standards Act (FLSA),10 Congress recognized that “due to the unequal bargaining power” between employers and employees, mandatory legislation was necessary to prevent private contracts between employees and employers.11 In particular, the legislative history of the FLSA shows that Congress intended to protect employees from substandard wages and excessive work hours.12

**Validity of Waivers**

The U.S. Supreme Court first addressed the validity of waivers under the FLSA more than 60 years ago. In *Brooklyn Savings Bank v. O’Neil*, two employees had signed waivers of FLSA rights in exchange for payment of stipulated sums due for overtime wages. When the employees brought an action against their employer for liquidated damages and attorney’s fees, the employer argued that the employees’ waivers barred their FLSA claims.13

The Supreme Court disagreed. The Court observed that in each case, waivers of private rights guaranteed by the FLSA were void as contrary to the public policies the FLSA was intended to further. Moreover, the Court noted that the FLSA’s requirement that an employer shall not employ a worker longer than 60 years ago. In *Brooklyn Savings Bank v. O’Neil*, two employees had signed waivers of FLSA rights in exchange for payment of stipulated sums due for overtime wages. When the employees brought an action against their employer for liquidated damages and attorney’s fees, the employer argued that the employees’ waivers barred their FLSA claims.13

The Supreme Court disagreed. The Court observed that in each case, waivers of private rights guaranteed by the FLSA were void as contrary to the public policies the FLSA was intended to further. Moreover, the Court noted that the FLSA’s requirement that an employer shall not employ a worker longer than the specified time without payment of overtime compensation was mandatory—and thus an employee may not waive his or her right to overtime compensation: “Where private right is guaranteed in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.”14

Shortly after deciding *O’Neil*, the U.S. Supreme Court revisited the waiver issue. In *D.A. Schulte, Inc. v. Gange*,15 an employer disputed whether its employees were covered by the FLSA and therefore refused to pay them overtime wages. When the employees threatened legal action, the employer paid the claimed overtime wages in exchange for waivers from the employees of “any other or further obligations in connection [with the FLSA].”16 The employees later filed suit to recover liquidated damages. In its defense, the employer pleaded affirmatively that the waivers were obtained in the settlement of a bona fide dispute over the scope of the FLSA’s coverage.17

In concluding that the waivers were invalid, the Supreme Court opined that the FLSA remedies “cannot be bargained away by bona fide settlements of dispute over coverage.”18 The Court said that “the purpose of [the FLSA] which...was to secure for the lowest paid segment of the nation’s worker a sustenance wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage.” To allow such waivers would thwart the public policy underlying the FLSA.19

The employer in *Chindarah*, like the defendants before the U.S. Supreme Court, asserted that wage and hour waivers should be treated as simple contracts and thus enforced or rescinded on the same grounds as other contracts. The Supreme Court made clear that this rationale is flawed. While parties are generally allowed to voluntarily enter into binding contracts, “contracts tending to encourage violations of laws are void as contrary to public policy.”20 Moreover, according to the Court, “To permit an employer to secure release from a worker...would tend to nullify the deterrent effect which Congress plainly intended that [the FLSA] should have. Knowledge on the part of the employer that he cannot escape liability...by taking advantage of the needs of his employees tends to ensure compliance in the first place....”21

Federal law establishes the minimum level of protection for employees throughout the United States, including California.22 In determining the protection afforded employees under California law, the courts in *Chindarah* and *Watkins* implicitly determined that the California Legislature intended to grant California workers less protection than they would receive under federal law. This conclusion is not only inconsistent with federal law but also with recent California appellate decisions as well. For example, in *Armenta v. Osmose, Inc.*,23 the court of appeal concluded: “A review of our labor statutes reveals a clear legislative intent to protect the minimum wage rights of California employees to a greater extent than federally.”24

**Proposed Solutions and Consequences**

Although waivers of FLSA rights are generally invalid, the FLSA allows an employee to waive his or her wage claims through two specific methods.23 First, the FLSA allows for a judicially approved stipulated judgment in which the employee files suit directly against the employer. Second, it permits waiver when the secretary of labor supervises the payment...
1. Employers may enter into private settlements of disputes with individual employees despite a pending class action lawsuit involving the same issues.
   - True.
   - False.

2. Labor Code Section 206.5 nullifies a release that an employee signs as a condition to receiving earned wages.
   - True.
   - False.

3. Wages that form the basis of a bona fide dispute between an employer and an employee no longer qualify as earned wages under Labor Code Section 206.5.
   - True.
   - False.

4. Settlement of a class representative’s claims deprive the representative of standing to pursue the class action.
   - True.
   - False.

5. A class action settlement generally does not require court approval.
   - True.
   - False.

   - True.
   - False.

7. Private waivers under the FLSA are enforceable as long as they are not contrary to public policy.
   - True.
   - False.

8. FLSA remedies can be bargained away by bona fide settlements of disputes over coverage.
   - True.
   - False.

9. California labor law generally provides greater protection to employees than its federal counterpart.
   - True.
   - False.

10. The FLSA allows for judicially stipulated judgments to compromise a disputed wage claim.
    - True.
    - False.

11. The FLSA does not permit a waiver of a wage claim when the secretary of labor supervises the payment in full of the settlement.
    - True.
    - False.

12. Preventing communications by class counsel does not implicate First Amendment principles.
    - True.
    - False.

13. Federal courts have no authority to issue a temporary restraining order prohibiting an employer from offering settlements to its employees precertification.
    - True.
    - False.

14. Federal courts may establish precise definitions for permitted contact precertification with absent class members.
    - True.
    - False.

15. The FLSA has an opt-in requirement whereby absent class members must affirmatively agree to be part of the action.
    - True.
    - False.

16. Under Business and Professions Code Section 17200, a state law opt-out class may proceed based upon a FLSA violation.
    - True.
    - False.

17. Section 17200 not only incorporates other laws but treats violations of those laws independently.
    - True.
    - False.

18. In enacting the FLSA opt-in provision, Congress did not seek to prevent windfall payments such as liquidated damages.
    - True.
    - False.

19. The remedy under California’s Unfair Competition Law is limited to restitution.
    - True.
    - False.

20. Congress did not consider whether plaintiffs who limit their claims to restitution under the UCL should have to comply with an opt-in requirement.
    - True.
    - False.
SELECTING THE RIGHT NEU'
CALIFORNIA’S FOREMOST MEDIATOR

The Academy is pleased to recognize over 70 neutral mediators.

Michael Bayard  (213) 383-9399
Daniel Ben-Zvi  (310) 234-5677
Lee Jay Berman  (213) 383-0438
Viggo Boserup  (310) 309-6205
Christine Byrd  (310) 277-1010
Kenneth Byrum  (661) 861-6191

Greg Derin  (310) 552-1062
Michael Diliberto  (310) 201-0010
Max Factor III  (310) 456-3500
Jack Fine  (310) 553-8533
William Fitzgerald  (310) 440-9090
Linda Fritz  (619) 236-1848

Leonard Levy  (310) 201-0010
James Lingl  (805) 231-7765
Christine Masters  (818) 955-8518
Steve Mehta  (310) 657-1001
Richard Millen  (818) 501-2787
Jeffrey Palmer  (626) 795-7916

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

TRAL JUST BECAME EASIER
S & ARBITRATORS PROFILED ONLINE

eutrals across Southern California, including...

George Calkins  
(310) 309-6206

R.A. Carrington  
(805) 565-1487

Eli Chernow  
(818) 995-3584

Steven Cohen  
(310) 315-5404

Tim Corcoran  
(909) 798-4554

Lawrence Crispo  
(213) 926-6665

Paul Fritz  
(805) 963-8789

Kenneth Gibbs  
(310) 309-6205

Reginald Holmes  
(626) 432-7222

Laurel Kaufer  
(818) 888-4840

Joan Kessler  
(310) 552-9800

Louise LaMothe  
(805) 563-2800

Barry Ross  
(818) 840-0950

Deborah Rothman  
(310) 452-9891

Steve Rottman  
(310) 288-3700

Philip Saeta  
(626) 799-0226

Ivan K. Stevenson  
(310) 540-2138

Kenneth Weinman  
(310) 444-3030

To find the best neutral for your case, please visit our complete member roster at www.CaliforniaNeutrals.org
in full of a settlement reached between the employee and the employer. The scenario in *Lynn’s Food Stores, Inc. v. United States*, an Eleventh Circuit decision, is illustrative in light of the facts in *Chindarah*.

In *Lynn’s*, the Department of Labor determined that the employer had violated several FLSA provisions and was liable to its employees for back wages. After failing to arrive at a settlement with the Labor Department, the employer negotiated a settlement directly with the 14 employees. The employer offered the employees a total sum of $1,000 to be divided among them, in exchange for each employee’s waiver of all claims arising under the FLSA. The employer then sought judicial approval of the settlement.

The Eleventh Circuit refused to grant approval of the settlement because the waiver agreements fell “into neither recognized category for settlement of FLSA claims.” It determined that the waiver agreements could not be approved because they were neither supervised by the Department of Labor nor entered as a stipulated judgment in an action brought by the employees. Further, the court concluded that approval of an “agreement” between an employer and employee fell outside of the adversarial context of a lawsuit brought by the employees and therefore would be a clear violation of the letter and spirit of the FLSA.

The fear is that *Chindarah* will obviate the need for judicial review of class action settlements because employers will be able to resolve claims, one at a time, with each of their employees for pennies on the dollar.

The court usually tries to manage these communications so that the parties are able to obtain information and inquiries from class members while avoiding communications that may interfere with the conduct of the litigation itself. Because the law provides little guidance, much is left to the court’s judgment and discretion. Under the broad supervisory authority granted to them, courts may enter appropriate orders to regulate the communication directed to class members. Of course, because any prior restraint on such a ‘term, condition, or privilege’ of employment cannot, consistent with [the FLSA], be doled out in a discriminatory fashion, i.e., based upon whether or not an employee is participating in an FLSA action.

The same logic may well apply to state claims under the California Labor Code.

Another federal court set forth precise definitions for permitted contact precertification with absent class members. Specifically, the court ordered that any communication by defendants to the putative class members, on specific subjects, had to be in writing and filed with the court. One of the topics that the court was concerned about was the “settlement or other resolution of the claims and issues presented in the action.”

Since many agree that the employers’ strategy in *Chindarah* and *Watkins* to negotiate and settle with individual class members would not be permissible under the FLSA, class counsel may want to import the FLSA into their state law wage and hour actions. The most obvious reason why plaintiffs do not want to do this is the “opt-in” requirement under the FLSA. But that issue can be obviated. Under Business and Professions Code Section 17200, California’s Unfair Competition Law (UCL), a state law opt-out class may proceed based on an FLSA violation.

The best argument against this is preemption. Federal preemption of state law may be express or implied. However, absent explicit preemptive language, there are only two types of implied preemption: field and conflict preemption. Congressional intent is the “ultimate touchstone” of any preemption analysis, express or implied—and there is a presumption against implied preemption of state law in areas traditionally regulated by
the states. 41 Courts “are not to conclude that Congress legislated ouster of [a state] statute... in the absence of an unambiguous congressional mandate to that effect.” 42

California’s UCL prohibits any “unlawful, unfair or fraudulent business act or practice.” 43 Critical to this analysis, Section 17200 incorporates other laws and treats those violations independently under the state statute. 44 Almost any federal law may serve as the basis for a UCL claim. 45 Since the FLSA does not expressly preempt state law, the best argument for preemption is conflict preemption. Employers argue that the UCL stands as an obstacle to the congressional purposes embodied by the FLSA. They assert that conflict preemption should prevent plaintiffs from turning an opt-in collective action into an opt-out class action. But this difference in the two laws would result in conflict preemption only if the UCL procedures stand as an obstacle to the “accomplishment and execution of the full purposes and objectives of Congress.” 46 In enacting the opt-in provision, Congress sought to prevent “windfall payments, including liquidated damages,” which are absent in a UCL action. Under the UCL, the remedy is limited to restitution. 47 Of course, there is no legitimate reason to believe that Congress considered whether plaintiffs who limited their claims to restitution under the UCL should have to comply with an opt-in requirement. 48

Thus, class counsel can, if they are careful, circumvent the opt-in requirement altogether by basing their UCL claim on an FLSA predicate. Indeed, the UCL even doubles the statute of limitations for these wage claims. 49 This may be the key to preventing private settlements with absent class members that are neither administratively supervised nor judicially approved. For parties pressing class action claims, this solution, at the very least, may be a viable alternative to Chindarah until the California Supreme Court decides to weigh in on the issue.

2 Id. at 800-01.
3 Id. at 803.
4 Id.
5 Id., reh’g denied (Mar. 29, 2009), rev. denied (June 10, 2009).
7 See ABA MODEL RULES OF PROF’L CONDUCT R. 3.4, 4.2, 8.4; NEWBERG ON CLASS ACTIONS §11:75 (2004) (noting that the “elimination of court review can open the door to potential abuse of the rights of absent class members, who are generally without adequate knowledge of the claims in the [class] action”).
10 93 CONG. REC. 2162 (Apr. 8, 1974) (remarks of Sen. Donnell); 29 C.F.R. §790.4; see also United States v. Cook, 795 F. 2d 987, 988 (Fed. Cir. 1986).
12 Id. at 706.
13 Id. at 705-06.
14 Id.
16 Id. at 112 n.5.
17 Id. at 112.
18 Id. at 114.
19 Id. at 116.
21 Id. at 709-10.
24 Id. at 323-24.
25 Lynn’s Food Stores, Inc. v. United States, 679 F. 2d 1350, 1352-53 (11th Cir. 1982).
26 Id. at 1352.
27 Id.
28 Id. at 1353.
29 Id. at 1334.
34 Id. at 545, 549-50.
35 Id. at 549-50.
36 Id.
37 29 U.S.C. §216(b) (Class actions instituted under the FLSA are considered collective or representative actions, in which the individual employees must affirmatively opt-in to the action to garner the benefit of any settlement or verdict.).
43 BUS. & PROF. CODE §17200.
44 Chabner v. United Omaha Life Ins. Co., 225 F. 3d 1042, 1048 (9th Cir. 2000).
46 Williamson v. General Dynamics Corp., 208 F. 3d 1144, 1152 (9th Cir. 2000).
47 Tomlinson v. IndyMac Bank FSB, 359 F. Supp. 2d 898, 901 (C.D. Cal. 2005) (FLSA is not a bar to a Rule 23 opt-out class certification of UCL claims predicated upon FLSA violations. As a result, an opt-in FLSA action can become an opt-out UCL action.).
48 Id. at 901.
WHERE ON EARTH?

GPS tracking devices raise Fourth Amendment issues for civil and criminal law practitioners alike

BUCKMINSTER FULLER once said that humanity is acquiring all the right technology for all the wrong reasons. Today, dramatic advances in Global Positioning System (GPS) technology may lead attorneys to risk liability by using it for the wrong reasons.

GPS technology can track persons and property through the transmission of electronic impulses. Using GPS devices, transportation companies now track cargo via satellite. Employers can monitor the movements of employees. Ankle bracelets with GPS technology allow law enforcement personnel to surveil those convicted of domestic violence and sexual abuse as well as perpetrators of other crimes. GPS devices are used to track Alzheimer’s patients. The uses of GPS technology by civil government include the production of maps for the study of soil, agriculture, and utilities. Commercial applications include navigation, inventory control, fleet management, and perimeter security. GPS devices can not only be attached to vehicles but also placed into sneakers, embedded in plastic cards, and injected under the skin.

GPS technology has evolved so rapidly that the critical legal issues it raises are yet to be fully addressed by U.S. federal and state courts, which have developed very little case law in this area.1 Certain incidents in recent years suggest not only the wide range of GPS applications but also the inevitable legal issues that will emerge in civil and criminal courtrooms:

• A Utah man, accused of illegally trapping bobcats, was tracked as he visited trap lines in the northern part of the state.2 Game wardens attached a GPS device to his truck, tracked his movements, and then raided his home. Lawyers for the defendant claimed that the attachment of a GPS device to their client’s pickup truck was illegal.2

• A Vail, Colorado, private investigator, Dave Alan Stark, was arrested and charged with criminal tampering after he installed a GPS device on an SUV in connection with a divorce case and, by doing so, triggered a bomb scare.3

• A Southern California woman reported to a private investigative agency that a former lover was stalking her. Police had agreed to take a felony stalking report but could not promise any follow-up by overburdened detectives. The investigative agency, through careful examination of the woman’s vehicle, traced the movements of her suspect using a GPS device.3

Tracy J. Hasper, a California attorney, is a licensed private investigator and director of investigations at Batza & Associates Inc. Gordon F. Lull is a licensed private investigator at Batza.
found a GPS device hard-wired to one of the engine components. A temporary restrain- 
ing order, and prosecution for electronic stalk- 
ing, resulted.4

• In Connecticut, one car rental agency 
warned in its rental contract of a possible 
$150 fee for “excessive wear and tear” if the 
renter drove over 79 miles per hour. What was 
not so prominent in the contract was the fact 
that each vehicle was equipped with a GPS 
device. The Connecticut Supreme Court found 
the penalty fees to be a violation of the state’s 
Unfair Trade Practices Act and not, as the 
rental car company argued, simple liquidation 
of damages.5

• A Commerce, California, man was con-
icted of assault with a deadly weapon after 
Los Angeles County Sheriff’s deputies, sus-
specting him in a robbery, planted a GPS 
device in his vehicle.6

• High-profile homicide investigations in se-
veral states have included the use of tracking 
devices. The technology was partly credited, 
to cite one example, for the conviction of 
Scott Peterson in the murder of his wife and 
unborn son.7

• According to published reports, Joumana 
Kidd planted electronic devices on vehicles 
operated by her husband, NBA star Jason 
Kidd, to help prove charges of infidelity in 
their high-profile divorce case.8

Attorneys contemplating the use of GPS 
technology in any context should educate 
themselves on how the technology actually 
works, the best way it can be deployed to aid 
in resolving legal matters, and whether they 
face liability for using it. To address these 
issues effectively, attorneys learning about 
the technology must also become familiar 
with the constitutional framework within 
which future cases will be decided. They can 
do so by examining the guidance that can be 
extrapolated from the existing case law that 
emerged as courts addressed older, related 
technology. Attorneys who use, or allow their 
agents to use, GPS technology must particu-
larly weigh and consider its implications 
regarding the issues of search and seizure 
and reasonable expectations of privacy.

How GPS Devices Work
GPS technology involves global satellites and 
radio navigation.9 With breathtaking accu-
cacy, it answers the fundamental question, 
“Where on the earth am I?” It does so by 
using three components: space satellites, a 
control center, and a user device. The space 
component consists of 24 satellites, with four 
equally spaced satellites in six separate orbital 
planes. These satellites orbit the earth twice 
daily, transmitting signal information to earth.

The control component, headquartered 
at Schriever Air Force Base, Colorado, mea-
sures incoming signals from the satellites and 
then uploads precise orbital transmission 
data back to the satellites. The data may be 
sent in subsets to GPS receivers (the user 
component) in the form of radio signals.

The GPS user component consists of the 
device that receives the data and covert it 
(through triangulation) to indicators of posi-
tion and time. Basically, the receiver unit cal-
culates how far it is from three satellites by 
comparing the time a signal is sent with the 
time it is received. The time difference indi-
cates the distance of the receiver from the 
satellite. By comparing the distances of the 
three satellites, the GPS receiver can map 
precisely where the user is and display the 
location electronically. Depending upon the 
type of the receiver and its sophistication, 
GPS technology can provide a location with 
accuracy to less than three meters (just under 
10 feet).

Clearly, GPS technology can deliver pre-
cise data. It also leaves a credible, recoverable 
record of the specific movement, in time and 
space, of the object being tracked. This raises 
a tangled skein of critical issues that courts 
will have to address, including who owns the 
data.

Because GPS technology—with its capa-
bility of allowing a person to monitor some-
one else’s precise movements for weeks, or 
even months, at a time—represents a signif-
ificant departure from previous technologies, 
it raises, as never before, decisive concerns 
about threats to personal privacy. “Where on 
the earth am I?” is an acceptable question, but 
GPS technology can answer questions such as 
“When on earth is my husband?” “Where on 
earth is my employee?” or, “Where on 
earth is the person or contraband that is the 
subject of this criminal investigation?”

What the California Penal Code, the U.S. 
Constitution, and judgments in criminal mat-
ters all demonstrate is that law enforcement 
agencies, attorneys, their clients, and their 
agents should be very cautious when employ-
ing GPS devices to track people or property. 
To avoid potential liability, careful consid-
eration must be given to Fourth Amendment 
protections and to reasonable expectations of 
privacy.

In devising state and federal criminal 
statutes in this area, legislators generally have 
been guided by concerns over the privacy of 
citizens. In California, the Penal Code is clear 
regarding what is, and is not, permissible 
when installing GPS devices on automobiles 
for non-law enforcement purposes.

Section 637.7 of the California Penal Code 
states:
(a) No Person or entity in this state 
shall use an electronic tracking device 
to determine the location or move-
ment of a person. (b) This section shall 
not apply when the registered owner, 
the lessor, or lessee of a vehicle has 
consented to the use of the electronic 
tracking device with respect to that 
vehicle. (c) This section shall not apply 
to the lawful use of an electronic track-
ing device by a law enforcement 
agency. (d) As used in this section, 
“electronic tracking device” means 
any device attached to a vehicle or 
other movable thing that reveals its 
location or movement by the trans-
mision of electronic signals.

Section 637.7(f) has particular relevance 
to attorneys and the agents they hire: 
A violation of this section by a person, 
business, firm, company, association, 
partnership, or corporation licensed 
derunder Division 3...of the Business 
and Professions Code shall constitute 
grounds for revocation of the license 
issued to that person, business, firm, 
company, association, partnership, or 
corporation....

When attorneys instruct investigators 
during the course of civil litigation, they 
must be damned that when it comes to elec-
tronic tracking devices, no wiggle room exists 
regarding the specific language in the crim-
nal statute. The installation of GPS tech-
nology on a vehicle is legal only when it is 
tenanted with the permission of the vehi-
cle’s owner or with the approval of law 
enforcement.

Constitutional Implications
The protection provided by the U.S. 
Constitution’s Fourth Amendment “against unreaso-
able searches and seizures” extends to an 
individual’s property and effects as well as his 
or her person. Attorneys seeking guidance 
for conducting investigations in connection 
with civil litigation will find that case law 
involving the use of GPS devices in civil mat-
ters is virtually nonexistent. Therefore, coun-
sel must rely upon the larger analytical frame-
work provided by criminal statutes and court 
findings in criminal matters involving GPS and 
its predecessor technology.

When the U.S. Constitution was written, 
the most likely search and seizure would have 
taken place under the color of military author-
ity and upon suspicion of criminal activity. 
Those arguing that a search was warranted 
probably would have offered proof of its 
reasonableness with evidence from infor-
mants and personal observation.

Evolving technologies added more effec-
tiveness to the arsenal of law enforcement but 
also raised myriad questions regarding the 
applicability of the Fourth Amendment to the 
newer crime fighting tools. In the early 
twentieth century, authorities found their 
activities evolving from trailing a suspicious 
buggy on horseback to tracking automobiles
using a battery-powered radio transmitter or beeper. A beeper device, clandestinely attached to a suspect’s car, would periodically emit a radio signal. Although the transmission distance was limited, radio beepers allowed law enforcement to monitor the strength of the signal and judge the distance of the vehicle being monitored. The benefits of beepers as an aid to vehicle surveillance by law enforcement were clear. Even if a suspect was “lost” during surveillance, as long as the transmitter continued sending a signal, law enforcement could calculate its distance from the subject vehicle and reestablish visual observation.

A large body of case law developed over the implications of beeper technology and Fourth Amendment rights. Federal courts struggled with whether attaching a beeper to someone’s vehicle constituted a seizure, or whether monitoring a beeper could be considered a search. They grappled with defining a person’s reasonable expectation of privacy for his or her vehicle when it is parked, or when it is operating, on a public street. When courts ruled on Fourth Amendment issues regarding beeper technology, they addressed two distinctly different issues: the installation of a device, and tracking a subject vehicle. The principles extracted from these criminal law cases provide an analytical foundation for assessing how courts will apply constitutional principles to the use of GPS technology.

In 1967, in *Katz v. United States*, the U.S. Supreme Court considered the appeal of a California man who placed telephone calls from a Los Angeles public phone booth to Boston and Miami. FBI agents had placed a listening and recording device on the outside top of the booth. This device yielded information that was admitted at the defendant’s trial in the U.S. District Court for the Southern District of California, and he was convicted on charges of transmitting wagering information. The court of appeals affirmed the conviction, finding that no Fourth Amendment right had been violated because the installation of the device involved “no physical entrance” to the space occupied by the defendant.

The Supreme Court reversed the conviction, holding that government agents had violated the privacy on which the defendant relied. Further, the Court ruled that the eavesdropping activities constituted search and seizure. Noting that the Fourth Amendment covered not just the seizure of goods but of oral statements as well, the Court found that “the Fourth Amendment protects people rather than places [and] its reach cannot turn on the presence or absence of a physical intrusion into any given enclosure.” Justice Harlan’s concurring opinion in *Katz* conveys his understanding of “a two-fold requirement” in determining whether a privacy protection applies to an individual: 1) “a person [must] have exhibited an actual (subjective) expectation of privacy,” and 2) “the expectation [must] be one that society is prepared to recognize as ‘reasonable.’”

The Supreme Court directly addressed the issue of whether monitoring beeper signals constitutes illegal search and seizure in *United States v. Knotts*. In this 1983 case, Minnesota law enforcement officers, believing that a suspect was involved in the manufacture of illegal drugs, arranged for the placement of a radio transmitter in a container of chloroform that was later sold to him. Using the beeper signals transmitted by the device, police tracked the defendant to a secluded Wisconsin cabin. After several days of visual surveillance, police secured a search warrant, searched the cabin, and found a drug laboratory. The beeper, however, was installed without a warrant. The defendant was convicted in federal district court for conspiring to manufacture controlled substances, but the court of appeals reversed the conviction, finding that monitoring the beeper signal violated the Fourth Amendment.

Looking back, in part, to its findings in *Katz* in 1967, the Supreme Court held that monitoring beeper signals did not violate any legitimate privacy expectation on the part of the defendant, and therefore no search or seizure had occurred. “The beeper surveillance,” the Court found, “amounted principally to following an automobile on public streets and highways. A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements.” Furthermore, it held that “[n]othing in the Fourth Amendment prohibited the police from augmenting their sensory faculties with such enhancement as science and technology afforded them in this case.”

The next year, in *United States v. Karo*, a Drug Enforcement Administration (DEA) agent learned through a government informant that three defendants had ordered 50 gallons of ether, which they intended to use in extracting cocaine from imported garments. The DEA obtained court authorization to install a beeper in one of the containers holding the ether. When Karo, one of the defendants, picked up the containers from the informant, DEA agents, following the radio signals, pursued the vehicle back to his residence. Subsequently, the monitored container was moved to four more locations, the last of which was a locker—jointly rented by two defendants in the case—in a commercial storage facility. Ultimately, the container was taken to the home of one of the defendants, a warrant was executed, cocaine found, and the defendants arrested for a variety of offenses related to the production and sale of cocaine. The defendants filed a pretrial
motion to suppress the seized evidence as the fruit of the unauthorized installation and monitoring of beeper radio signals. The district court granted the motion to suppress, and the court of appeals affirmed the district court finding for all but one of the several defendants.

In its ruling, the Supreme Court reversed both the district and appeals courts, holding that installation of the beeper did not transpose the Fourth Amendment. Monitoring the beeper, however, did violate the defendants’ Fourth Amendment rights. The concealed beeper provided information from the defendant’s private residence that could not otherwise be obtained through visual surveillance. Nevertheless, the Court concluded that the evidence was not tainted and should not have been suppressed because ample evidence—apart from the information derived from the beeper transmissions—established probable cause to search the defendant’s dwelling.

A later case from the Ninth Circuit that was not reviewed by the Supreme Court addressed the warrantless installation of a GPS device. In United States v. McIver, the court of appeals in 1999 reviewed the convictions of Christopher McIver and Brian Eberle, who were found guilty in the U.S. District Court for the District of Montana of conspiracy to manufacture marijuana. After U.S. Forest Service officers found marijuana plants being cultivated in a remote section of the Kooenai National Forest, law enforcement authorities installed concealed, motion-activated surveillance cameras. The tapes from the cameras revealed several unidentified suspects, two of whom were later identified as McIver and Eberle.

Two law enforcement agents affixed a magnetized GPS device and a magnetized beeper to the undercarriage of McIver’s vehicle while it was parked in his driveway. The two men were later videotaped harvesting the plants and followed back to their joint residence. Agents arrested the men while they were unloading the contraband. In appealing their convictions, McIver and Eberle asserted a violation of their Fourth Amendment rights.

Citing the Supreme Court’s decision in Katz, the Ninth District found that the defendants had no reasonable expectation of privacy while cultivating their plants on public land in open view. Moreover, contrary to the defendants’ contention, the use of unmanned, motion-activated cameras did not violate their Fourth Amendment rights since, according to the court (citing Knotts), “We have never equated police efficiency with unconstitutionality, and we decline to do so now.”

More recently, in 2007, the Seventh Circuit in United States v. Garcia confronted whether the use of a concealed GPS device constitutes an illegal search. After serving prison time for methamphetamine offenses, Bernardo Garcia brought the drug to a husband and wife and indicated to them that he wanted to resume his involvement in the business of manufacturing methamphetamine. The wife reported this to police officers, who augmented their investigation with additional informant testimony and a security video of Garcia purchasing ingredients used in manufacturing methamphetamine. The officers found the vehicle that Garcia was driving and—without a warrant—affixed a GPS device under the rear bumper while the car was parked on a public street. They used the GPS device to track the vehicle to various locations, for which search warrants were obtained. At these sites they discovered materials used to manufacture methamphetamine. The defendant himself showed up during one of the searches and was arrested.

Garcia, convicted of drug offenses in the U.S. District Court for the Western District of Wisconsin, appealed to the Seventh Circuit, claiming that the attachment of the tracking device constituted a seizure of the vehicle. The court first noted that the Supreme Court in Knotts found that tracking vehicles on public streets by means of a beeper does not constitute a search. However, the Seventh Circuit observed that the higher court “left open the question whether installing the device in the vehicle converted the subsequent tracking into a search….” The Seventh Circuit, after reviewing an array of conflicting opinions from appellate courts on the issue, concluded that installing a tracking device on private property did not constitute a search.

Still, it offered a sober warning regarding the future possibility of “wholesale surveillance” by law enforcement relying on new technologies:

Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive. Whether and what kind of restrictions should, in the name of the Constitution, be placed on such surveillance when used in routine criminal enforcement are momentous issues… Should government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.

On May 7, 2009, the Wisconsin Court of Appeals, in rejecting an appeal of a conviction for aggravated stalking, issued its own stern assessment regarding the broader implications of GPS technology on Fourth Amend-
42nd Annual Securities Regulation Seminar

Friday, October 30, 2009
8:30 a.m. – 5:00 p.m.
Continental Breakfast and Luncheon Program Included

Program Registration
For phone registration with Visa, Mastercard or American Express: call (213) 896-6560, M – F 9 am – 4 pm.
All advance registration will close at noon on October 27, 2009.
You may also register by visiting our Web site at www.lacba.org/businessandcorps
No refunds after October 28, 2009

Price
$295 Early registration for all by September 11, 2009
$375 Business and Corporations Law Section Members
$1,750 Group Rate buy 5 tickets at a reduced rate, get 6th complimentary (all five tickets must be purchased together to receive this special offer).
$350 CLE+Plus Members
$395 LACBA Members
$455 All Others
$475 Payments at the door

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

Co-Sponsored by the
California Department of Corporations
State Bar of California
Business Law Section
FINRA

Topics
■ Recent Developments in Securities Laws
■ The General Counsel Perspective

BREAKOUT SESSION ONE
1. Corporation Finance Roundtable
2. The Changing Face of Securities Litigation
3. Mergers & Acquisitions—Protecting Your Clients

Luncheon Speaker: Mary L. Schapiro*

BREAKOUT SESSION TWO
4. Equity & Debt Financing Update
5. Representing Corporations During Dual Civil and Criminal Investigations and Enforcement Actions
6. Representing Boards of Directors
■ Enforcement Developments
■ Ethics and the Securities Lawyer

Program Code 010470

Program Steering Committee
John F. Hartigan
PROGRAM CHAIR
Morgan, Lewis & Bockius LLP

Rosalind R. Tyson
Regional Director, Securities and Exchange Commission

Ann Marie Bedtke
MEETING AND EVENTS PROFESSIONAL
Los Angeles County Bar Association

Ingrid A. Myers
Morgan, Lewis & Bockius LLP

Theresa Ann Leets
California Department of Corporations

David A. Greene
FINRA

Seth A. Aronson
O’Melveny & Myers LLP

Joseph J. Giunta
Skadden, Arps, Slate, Meagher & Flom LLP

Jonathan K. Layne
Gibson, Dunn & Crutcher LLP

Simon M. Lorne
Vice Chairman, Millennium Management, LLC

Brian J. McCarthy
Skadden, Arps, Slate, Meagher & Flom LLP

Jeffrey A. Noel
Skadden, Arps, Slate, Meagher & Flom LLP

John W. Spiegel
Munger, Tolles & Olson LLP

Hon. Stanley Sporkin
Rosen & Associates P.C.

Steven B. Stokdyk
Latham & Watkins LLP

Rosalind R. Tyson
Regional Director, SEC
Los Angeles Regional Office

*LUNCHEON SPEAKER: Mary L. Schapiro, Chairman, Securities and Exchange Commission

Call for special rates for government employees and law students

7.0 hours CLE credit including 1.0 hour of ethics

Los Angeles

Millennium Biltmore Hotel
506 South Grand Avenue
Los Angeles
The case involved Michael Sveum, who had been convicted in 1996 of stalking his girlfriend, Jamie Johnson, and was imprisoned until 2002. In 2003, Johnson advised police that Sveum was stalking her again. Based upon Sveum's previous stalking conviction as well as information implicating his sister in assisting him while he was in prison in stalking Johnson, police successfully sought a warrant authorizing use of a battery-powered GPS device. They fastened the device with duct tape and a magnet to the undercarriage of Sveum's vehicle while it was parked in his driveway. For five weeks police tracked the whereabouts of his vehicle, including when it was parked in his residence garage and at his place of employment. The detailed tracking information provided by the GPS device was used to obtain a warrant to search his home and vehicle. This information, along with evidence seized through the warrant, led to Sveum's conviction and a prison sentence of seven and one-half years.

In his appeal, Sveum argued that the GPS tracking information should not have been admitted due to the "overly broad" warrant. The prosecution responded that no search or seizure occurred in violation of the Fourth Amendment. Sveum conceded that monitoring his vehicle on public roadways did not implicate the Fourth Amendment; however, he argued that information regarding the location of his vehicle while it was out of public view—in his garage and his employer's garage—should have been suppressed.

The appellate court, citing Knotts and Karo, affirmed Sveum's conviction:

"The State responds that no Fourth Amendment search or seizure occurs when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view. We agree with the State. At the same time, we urge the legislature to consider regulating both police and private use of GPS tracking technology."

Relying upon Garcia, the court further stated, "We also agree with the State that the police action of attaching the GPS device to Sveum's car, either by itself or in combination with subsequent tracking, does not constitute a search or seizure."

The court underscored its larger concern regarding future uses of GPS devices:

So far as we can tell, existing law does not limit the government's use of tracking devices to investigations of legitimate criminal suspects. If there is no Fourth Amendment search and seizure, police are seemingly free to secretly track anyone's public movements with...
a GPS device....We are also concerned about the private use of GPS surveillance devices....Although there are obviously legitimate private uses, such as a trucking company monitoring the location of its trucks, there are also many private uses that most reasonable people would agree should be prohibited.20

Federal courts have redefined and arguably reduced the scope of Fourth Amendment protection with the advent of each new technological tool of law enforcement surveillance. The evolution of GPS technology and its accelerating applications ensure that competing interests will continue to collide and spill over into courtrooms. While state laws nationwide vary widely on the issue of GPS devices in dissolution matters, in California the Penal Code offers a decisive restriction: No person may be tracked or monitored via a GPS tracking device, including inside his or her vehicle, unless the owner of that vehicle has consented to the monitoring. For now, with regard to jointly owned vehicles—and with the guidance of criminal case law, since the issue has not yet been tested in civil courts—the permission of only one owner is sufficient. However, it is safe to predict that courts will soon be asked to rule whether, in the case of a joint owner installing a GPS device, the unsuspecting spouse has a reasonable expectation of privacy. Similarly, an employer who uses a GPS device to monitor the movements of an employee in his or her vehicle without notice to the employee—even if the employee does not own the vehicle—is arguably violating the employee’s reasonable expectation of privacy.

GPS technology is too valuable a tool to be ignored by attorneys advocating for their clients, who should be advised of its potential benefits as an investigative tool. They should also be educated to look for indicators that this technology is being used against them by a spouse or a business competitor. At the same time, however, attorneys need to ensure that the use of GPS devices by their clients or agents does not create liabilities under federal law or California’s criminal statutes.


2 Game Wardens Snared Utah Poacher with GPS Device, STANDARD-EXAMINER (Ogden, Utah), Mar. 14, 2009.

3 Private Eye Arrested after Vail Bomb Scare, SUMMIT DAILY NEWS (Frisco, Colo.), Mar. 7, 2008.


13 United States v. McVey, 186 F. 3d 1119 (9th Cir. 1999).

14 United States v. Garcia, 474 F. 3d 994 (7th Cir. 2007).

15 Id. at 996-97.

16 Id. 998-99.


18 Id. at 1-26.

19 Id. at 2.

20 Id. at 10.
Attorneys are viewed as persons of trust. When clients, friends, and family members suddenly find themselves arrested, they turn to the attorney they know best for help—even one who practices, for example, family law. For many civil practitioners, the steps to be taken immediately following an arrest may not be basic knowledge. Even if the civil law attorney will not be handling a criminal case through trial, a simple list of five steps can protect a client and prevent a bad situation from becoming worse.

First, upon receipt of a call from a client in custody, an attorney should tell the client to stop talking. The custodial interrogation of a suspect triggers the Fifth Amendment privilege against self-incrimination. The most important message to convey is that the client should explicitly invoke the right to remain silent. Clients should not discuss the matter with anyone, including law enforcement personnel, other inmates, friends, or family members. Nothing good will come from talking to law enforcement personnel. They are highly skilled at using coercive tactics to elicit incriminating statements from a suspect. Interrogation of this nature is permissible absent an explicit assertion of the right to remain silent.

Another reason to advise the client to stop talking is that whether an arrestee is speaking in person or on a telephone, the conversation may be overheard or recorded. While California law prohibits eavesdropping on attorney-client communications, it is typical for law enforcement to make calls for inmates and remain nearby throughout the conversation.
conversation. In addition, statements obtained in violation of a state statute may be admissible in the absence of a violation of the federal Constitution. For example, a criminal case in California state court will not be dismissed simply because of an unlawful arrest, but if the illegality surrounding the arrest constitutes a violation of the Fourth Amendment to the U.S. Constitution, the evidence obtained may be subject to suppression.

Second, bearing in mind the lack of privacy when speaking with or meeting a client in custody, an attorney should nevertheless obtain the following information: 1) the client’s full legal name, 2) date of birth, 3) immigration status, 4) booking number, 5) time and location of arrest, 6) arresting agency, 7) name and badge number of arresting officer, 8) specific charges, if known, 9) the bail amount, 10) where the client is being held, 11) any prior criminal history, 12) whether the client is currently on probation or parole, and 13) the date and location of the initial court appearance. Much of this information, if the client cannot provide it, can be obtained from the sheriff’s department Web site for the county in question. Additionally, in cases that involve or may involve driving under the influence, it is important to get the client’s driver’s license number and information regarding any blood-alcohol tests taken.

Third, after obtaining this basic information from the client, the next step is to determine law enforcement’s perception of the incident that led to the arrest. Often, speaking to the investigating officer is the most efficient way to obtain relevant information. The arresting agency should be able to provide the attorney with the officer’s name and contact information. The client’s name, booking number, or date of birth may be needed as a cross-reference. The investigating officer also will be able to tell whether the case has been, or is about to be, presented to the prosecuting agency for filing. This is important because, if the case has not yet been filed, there may be time to persuade the prosecuting agency to file lesser charges or no charges at all.

The attorney may think of the investigating officer as the enemy of the client, but it is important to be courteous and respectful. The investigating officer is under no obligation to provide the attorney with any information. He or she can either help a great deal or make the situation much more difficult. In the early stages of a criminal case, defense counsel often will have more contact with the investigating officer than with the prosecuting agency that ultimately handles the case. Furthermore, in the course of the initial conversation with the investigating officer, it is very important to emphasize that no further interrogation or communication with the client is to occur outside the presence of counsel.

Fourth, after the investigating officer has been reached and the details of the incident have been obtained, the next step is to arrange a visit with the client. Housing information is available on the sheriff’s department Web site for the county in which the client is being detained. Before going to visit the client, it is a good idea to contact the facility where the client is held to confirm the client is present and ensure there are no security issues preventing visitation.

An attorney has a right to visit a client in custody. In fact, it is a misdemeanor for law enforcement personnel to prohibit or obstruct an arrested person’s attorney from visiting him or her in custody. Under most circumstances, the attorney should be able to have a face-to-face, private, in-person conversation with the client without wire, windows, or the use of a phone for communication. However, in the case of inmates who are viewed as particularly dangerous, this may not be possible without first obtaining a court order. Keep in mind that there is always a possibility that interview rooms could contain some sort of listening device.

In an interview with a client, the attorney should consider explaining a point or two of criminal law, when appropriate. For example, California courts generally recognize both types of spousal privilege—1) the privilege preventing one spouse from being called to testify against the other spouse, and 2) the privilege preventing one spouse from being called by an adverse party without the consent of the other spouse. Nonetheless, spousal privileges will not apply when one spouse is charged with specified crimes against the person or property of his or her spouse or the relatives of the spouse. Additionally, spousal privileges will not apply when the charges involve crimes against the person or property of a third party in the course of the commission of a crime against the person or property of one’s spouse. This is of particular concern in domestic violence cases, and the client should be advised of this issue to avoid any potential problems later.

The client may also need to be advised that in California, a DUI case is unlike most other criminal cases because it is really two cases: 1) the criminal case, and 2) the Department of Motor Vehicles hearing, commonly known as the administrative per se hearing. A DUI conviction not only carries the criminal penalties that the court imposes but also penalties from the DMV that are separate and apart from any court-imposed penalties. The DMV administrative action will result in an automatic suspension of the client’s driver’s license if the DMV is not contacted within 10 days of the arrest. In order to avoid the automatic suspension,
the client or an attorney acting on behalf of the client must contact the DMV within 10 days of the arrest and request an administrative hearing and a stay of license suspension. If this is not done the client’s right to a hearing with the DMV is waived. Waiver will result in an automatic driver’s license suspension on the 31st day after the arrest. While the suspension period varies depending upon the circumstances of the particular case, it will be no less than 30 days.

The hearing request can be made via telephone, in writing, or in person. Regardless of which method is used to communicate the request, it must contain the following information: 1) the licensee’s name, 2) driver’s license number, 3) date of service of the order, and 4) name, address, and telephone number of counsel, or, if none has been retained, the licensee. In all likelihood, the DMV will also require information regarding the type and results of any blood-alcohol tests taken; the arresting officer’s name, badge number, and agency; and the client’s booking number. Counsel should confirm that the license suspension will be stayed and make a demand for discovery in conjunction with the hearing request.

Bail

The fifth step is what the client may want first—bail. For most people, the first priority following an arrest is to get out of jail. In California state courts, bail is a matter of right unless the offense is punishable by death or a public safety exception is established. The public safety exceptions that negate the presumption in favor of bail include various sexual and violent offenses. Also, if the client is on probation or parole, or is not a U.S. citizen, bail can be denied if the court or the sheriff’s department becomes aware of the client’s status. Furthermore, it is important to note that if the client is arrested for a probation or parole violation, there is no right to bail.

The amount of bail is determined according to the particular charges. Following a determination of the specific charges, the attorney should consult the bail schedule of the county in which the conduct occurred to determine what the bail amount should be. The bail schedule for most counties is available online. While the bail schedule sets standard amounts for particular charges, the prosecuting attorney and defense counsel are free to request deviations from the standard bail amounts, and judges are permitted to deviate from the bail schedule. The court’s focus in determining the amount of bail is primarily on public safety. This, however, is not the only factor. The court will also consider a defendant’s criminal history, the seriousness of the offense, and whether the defendant is a flight risk. In considering these criteria, the court is to look at them in the context of the individual defendant, not as they apply to the average person charged with similar offenses.

Regardless of the amount required, there are typically four options concerning bail: 1) the client can post cash bail, 2) the client can contact a bail bondsman who will post a bond for the bail amount, 3) if eligible, the client may be released on his or her own recognition (known as O.R. release), or 4) the client can post a property bond. While O.R. release is generally the most desirable, it is not always an option.

If the court deems that O.R. release is appropriate, the client will be released based on a promise to appear in court without having to post any money. This is common in DUI cases and in misdemeanor cases in which the court does not find that the defendant poses a flight risk or a threat to public safety. O.R. release is often granted without an adversarial hearing; however, this procedure is not available if the client is charged with a variety of violent offenses or a domestic violence offense. In support of a request for O.R. release, it is helpful if the client has strong ties to the community (family connections, stable job, owns property) and no prior criminal history. The court is obligated to consider O.R. release even in the absence of a detailed report, which is important because the O.R. report provided by the probation department can take up to two court days in Los Angeles County. If eligible for O.R. release, the client will be required to sign a release agreement specifying the terms of release.

In determining whether O.R. release is appropriate, the court must consider factors that relate to the particular defendant. The failure of other persons accused of similar crimes to appear for trial is not a valid reason to deny O.R. release. The court can add conditions of release, such as random drug testing and consent to allow warrantless searches; however, in federal cases, the Ninth Circuit has ruled that a U.S. district court cannot condition O.R. release on a defendant’s waiver of rights guaranteed by the Fourth Amendment.

When O.R. release is not an option, whether or not the client can get out of jail prior to the initial court appearance depends primarily upon his or her financial situation—in other words, whether he or she can post bail. If the client is able to bail out, the attorney should wait to discuss the details of the incident until after the client is released. If the client is unable to bail out, a visit with the client should be arranged as soon as possible.

If the client elects to post cash bail, someone acting on behalf of the client will have to...
WE SERVE ANYTHING, ANYWHERE
STATEWIDE · NATIONWIDE · WORLDWIDE
1-800 PROCESS

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

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

INTERNATIONAL
Call for cost · 1-800-PROCESS
ANY STATE · ANY NATION · ANYWHERE.
deposit the full bail amount with either the court or the jail. The full bail amount will be held until the case is resolved, at which point it will be returned to the payer, regardless of the outcome.

If the client elects to use the services of a bail bondsman, the bail bondsman will need to get a variety of information from the client in order to do the necessary paperwork. In exchange for posting the bond, the client will be required to pay a premium of no more than 10 percent of the bail amount to the bail bondsman. This amount is nonrefundable and is the fee charged by the bail bondsman for posting the bond for the full amount of bail. If the charges are more serious, and the bail is therefore higher, the bail bondsmen may require a cosigner to post collateral in addition to the premium. This collateral could be in the form of real estate, a savings account, or stock certificates, for example. If the client elects to utilize the services of a bail bondsman, the premium is not refunded at the conclusion of the case. However, the collateral will be returned when the case is completed.

No one wants to stay in jail any longer than necessary. The client may also run the risk of losing his or her job if unable to attend work. From a criminal defense attorney’s perspective, the most compelling reason for the client to bail out of jail immediately is to delay the arraignment. If the client bails out prior to the arraignment, which will occur at the first court appearance, the formal filing of charges could be delayed by roughly a month. This provides a defense attorney with the opportunity to submit a thorough package to both the investigating officer and the prosecuting agency in order to persuade them to file lesser charges or, in some cases, no charges at all. The time in which to do this is extremely limited and, in most cases, defense counsel will only have one opportunity, so it is important that the client be cooperative in gathering statements and supplying all relevant information.

It would appear—perhaps especially to the client—that bailing out immediately is the best option, but this is not necessarily true. By not bailing out immediately, the client will be entitled to go before a magistrate within 48 hours, at which point defense counsel will be able to seek a deviation from the amount specified in the bail schedule. By statute, in the case of new felony or misdemeanor arrests, if the client does not bail out immediately, he or she “shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays.” If, however, the client does bail out in advance of the first court appearance, the arraignment need not occur within the 48 hours following the ini-
DMV HEARINGS
Physical and Mental Conditions
ROCK O. KENDALL
ATTORNEY AT LAW

Serving all California
28202 Cabot, Suite 300, Laguna Niguel
CROWN CABOT FINANCIAL CENTER
(949) 388-0524
www.dmv-law.pro

Do You Need a Forensic Accountant
or Fraud Examiner?

MAYBE YOU NEED BOTH AND MORE—NOT ALL FRAUD EXAMINERS AND FORENSIC ACCOUNTANTS ARE THE SAME!

BUSINESS/PERSOAL • ESTATES/TRUSTS • FINANCIAL ELDER ABUSE

• FRAUD INVESTIGATIONS
• FORENSIC ACCOUNTING
• INVESTMENT FRAUD
• PONZI SCHEMES
• EMBEZZLEMENT
• MONEY LAUNDERING
• KICKBACKS
• ASSET PROFILES AND NET WORTH ANALYSIS

ALL WE DO IS FRAUD
Private Investigators, CPA, Certified Fraud Examiner and Certified Forensic Accountant on staff

Copas & Copas, Inc. has experienced and highly trained professionals giving you a significant advantage over hiring traditional accounting or private investigation firms. We specialize in financial investigations to uncover financial fraud schemes other firms may miss.

LET US “FOLLOW THE MONEY” SO YOU CAN FOCUS ON THE LEGAL ISSUES.

Copas & Copas, Inc. CCI FINANCIAL INVESTIGATIONS CA PI#25429
851.654.9400 www.copas-inc.com

Serving Central and Southern California for Civil and Criminal Cases
method is preferable in cases in which there is little concern that the client will fail to appear, as it does not require any cash payment. In order for a particular piece of property to be used in connection with a property bond, there cannot be any liens on the property, and the fair market value of the property needs to be at least twice the bail amount.

If the client is unable to satisfy the requirements that the court initially imposes, it is possible to seek a reduction of bail. The first opportunity to do so occurs at the court appearance before the magistrate. At that time, the magistrate will likely set the bail in accordance with the bail schedule for the particular county; however, a magistrate can set bail at any amount deemed adequate to guarantee that the client will be present at future court appearances. If the client is unable to make bail under the terms set forth by the magistrate at the initial appearance, he or she can seek review of the magistrate’s bail order.

At a bail hearing, the traditional rules of evidence are not applicable. The courts rely upon a more relaxed standard of admissibility in order to permit the introduction of evidence bearing upon the factors to be considered in setting bail. Either side can introduce a wide variety of evidence. In addition to showing that the client is not a threat to public safety or a flight risk, it is very important to establish that the client has strong ties to the community, in the form of family, friends, employment, and proof of residence. As always, if the client has no prior criminal history, emphasis should be placed on that fact. At the bail hearing, it is very important to present some sort of new evidence, because the reviewing judge can only change the amount of bail upon a showing of good cause.

In addition to the monetary requirement of bail, other conditions may be imposed when the court deems them necessary. For instance, when a client is facing charges relating to drugs or alcohol, there is a distinct possibility that the court will impose specific bail conditions related to substance abuse. The client may be required to attend a specified number of Alcoholics Anonymous or Narcotics Anonymous meetings and show proof of attendance. Even if the court does not impose these conditions, it is often a good idea to advise the client to begin attendance, as it will likely be required as part of any negotiated plea. Furthermore, a proactive approach and recognition of a potential problem will be viewed favorably by the prosecuting agency, providing defense counsel with leverage for plea negotiations.

**Federal Courts**

The bail process in the federal court system differs from that of the state courts. In fed-
eral courts, bail is governed by the Bail Reform Act of 1984, which sets forth the procedures that magistrate judges and district court judges are to follow in determining whether to release or detain a defendant. It is presumed that pretrial release is appropriate, and, furthermore, that the defendant should be released on his or her own recognizance or on an unsecured personal appearance bond unless it is determined that the defendant poses a flight risk or a threat to the safety of the community.

In advance of the initial appearance, most likely immediately following the client’s arrest, an officer from pretrial services will interview the client and prepare a detailed report, which is provided to both parties and the court immediately preceding the initial appearance. This report makes a recommendation as to the client’s suitability for pretrial release. In determining what conditions, if any, are necessary, the court is not bound by the recommendations contained in the report. It is possible that defense counsel will not be permitted to remove the report from the courtroom, so it is advisable to arrive early enough to have an opportunity to fully review the report and make notes for future reference.

If the court determines that the defendant poses either a flight risk or a threat to the safety of the community, it can impose conditions of release, but those conditions must be the least restrictive means possible to alleviate concerns regarding flight and community safety. While the court has wide latitude in determining what conditions are appropriate, any conditions imposed must be relevant to the goals of assuring the defendant’s appearance and protecting the public safety.

After the initial stress of an arrest, a civil attorney can help a client and prevent harm in a pending criminal case, even if the attorney is not going to take the criminal case to trial. Basic knowledge of the steps to be taken at the outset of a criminal case can be of great assistance to a client. After these steps are taken, it is highly advisable for a civil attorney to consult a criminal defense attorney before the case proceeds.

1 U.S. Const. amend. V.
2 Penal Code §137.
3 Penal Code §636. It should be noted that the prohibition on eavesdropping under Penal Code §636 can be avoided if a court order has been obtained. Penal Code §§629.30-629.98.
7 Penal Code §825(b).
8 Evid. Code §5970-971.
9 Evid. Code §972.
10 Veh. Code §13558(b).
13 Penal Code §292.
15 Penal Code §1269b(b).
16 Penal Code §1275(a).
17 Penal Code §1270(a); Cal. Const., art. I, §12.
18 Penal Code §1270(a).
19 Penal Code §1270.1.
20 Penal Code §1318(a).
23 United States v. Scott, 450 F. 3d 863 (9th Cir. 2006).
24 Penal Code §825(a)(1).
25 Id.
28 Penal Code §§978, 978.5(a), 979.
29 Penal Code §1289.
30 18 U.S.C. §3141 et seq.
32 See 18 U.S.C. §3142(c)(1)(B) for an extensive but nonexhaustive list of permissible conditions of release.
Bad Advice

In William Shakespeare’s historical drama, King Henry V asks his trusted advisers, including the Archbishop of Canterbury, whether “with right and conscience” he may make a claim to the crown of France. In their response, the king receives the advice he needs, instead of the advice he wants, and his ensuing invasion of France leads at first to victory but in the end to great tragedy.

Harold Bruff, author of a new and engrossing book Bad Advice: Bush’s Lawyers in the War on Terror, uses the test of “right and conscience” to judge the wisdom and ethics of the lawyers who advised President George W. Bush. Did John Ashcroft, Alberto Gonzales, John Yoo, David Addington, Jay Bybee, and others at the Justice Department and in the White House meet the fundamental standard of the American Bar Association to “exercise independent professional judgment and render candid advice”? Based on his sober and comprehensive study, Bruff convincingly concludes that to a man, “[i]gnoring the need for detachment and lacking a willingness to consider constitutional claims of the other branches, President Bush’s lawyers manipulated the law for political ends.”

After tracing the history of the relationship between presidents and their lawyers from George Washington to the present, with particular emphasis on critical episodes when national security was at stake, Bruff, who himself served as a senior attorney-adviser to the Office of Legal Counsel (OLC) at the Justice Department from 1979 to 1981, focuses on key decisions made by the Bush administration since September 11, 2001.

After the terrorist attack, Bush ominously set the stage by saying that he had to demonstrate “the resolve of a commander in chief that was going to do whatever it took to win. No yielding. No equivocation. No lawyering this thing to death.” The hostility to the rule of law permeated the administration. According to Bruff, Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, Addington, and Yoo “counted existing law among the threats to national security.”

Within weeks after September 11, Yoo began composing a series of legal memos that Bruff analyzes in detail. The first memo, justifying an expansive scope of presidential power, laid the groundwork for Al Qaeda and Taliban prisoners. Even as this memo was being drafted, State Department Legal Adviser William Howard Taft IV, in a 40-page response, objected that “the most important factual assumptions on which your draft is based and its legal analysis [are] seriously flawed” and “contrary to the official position of the United States, the United Nations, and all other states that have considered the issue.” According to Bruff, Yoo’s memo “failed in the duty imposed by conscience to take an independent and candid look at the issues” and instead “furnished a thinly based, misleading brief for a particular policy position.”

The Torture Memo

On August 2, 2002, Assistant Attorney General Jay Bybee, now a judge on the Ninth Circuit Court of Appeals, issued the now infamous memo written by Yoo, with considerable input from Addington, authorizing abusive interrogation techniques, including waterboarding, which have been characterized as torture and cruel, inhumane, and degrading treatment. Bruff concludes that the memo “runs counter to the formidable bodies of law that attempt to eliminate torture and cruelty” and that the “definitions of physical and mental suffering were probably crafted to avoid condemning what the CIA was already doing.”

This memo offers advice to any CIA agents later accused of violating the Convention Against Torture (CAT), boldly declaring that the defense of “necessity” could be “successfully maintained,” but without mentioning, let alone discussing, that CAT’s ban on torture is unconditional: “No exceptional circumstances whatsoever, whether state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

Stephen F. Rohde, a constitutional lawyer and chair of the ACLU Foundation of Southern California, is author of American Words of Freedom and Freedom of Assembly and coauthor of Foundations of Freedom.
Former Yale School Dean and OLC veteran Harold Koh called what has become known as the torture memo “perhaps the most clearly erroneous legal opinion I have ever read,” with an “absurdly narrow” definition of torture, which “flies in the face of the plain meaning of the term.” By failing to even mention, let alone distinguish, the U.S. Supreme Court’s ruling on presidential power in Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952), Koh calls the Sawyer, in Supreme Court’s ruling on presidential power even mention, let alone distinguish, the U.S. inition of torture, which “flies in the face of ever read,” with an “absurdly narrow” def- eran Harold Koh called what has become memo a “stunning failure of lawyerly craft.” Indeed the torture memo was such a failure that in late 2004, the Bush administration itself withdrew the opinion, citing “ques- tionable statutory interpretations” and an its authorization.

Citing the horrific Abu Ghraib photogra- photographs, Bruff points out that “President Bush’s lawyers generated advice that led, through some foreseeable intermediate steps, to abuses of this kind” and hence “they should share in the blame, whether or not the law ever calls them to account.” He concludes that the legal advisers are “culpable” because “they ignored the voices of experience and the coun- sel of caution and arrogantly propelled overbroad theories of executive power that provided fertile ground for scandal.” Bruff concludes that Gonzales, Yoo, and Addington should be disciplined for breach of their professional ethics. However, despite the fact that he agrees that “an attorney who gives advice intended to assist or provide a ‘road map’ for the client in violating or cir- cumventing the law may be held complicit in the client's criminal conduct,” and that there is a clear chain of cause and effect between the nature of OLC’s legal advice and some of the abuses that ensued,” because “[a]utho- rizing action, after all, was the purpose of the advice,” Bruff concludes that he “would prefer to avoid both criminal and civil liability for the president’s lawyers in the war on terror- orism.”

Bruff offers this surprising opinion in a single paragraph after 294 pages of carefully rea- soned analysis that would lead most readers to the opposite conclusion—namely, that Bush’s lawyers are guilty of criminal acts. Last June, after Bruff’s book was published, U.S. District Judge Jeffrey S. White, a Bush appointee, denied Yoo’s motion to dismiss a civil lawsuit filed by Jose Padilla, who alleges that Yoo is liable for the abuse Padilla suffered during his years of detention at the hands of the Bush administration.

Judge White pointed out that like other government officials, “government lawyers are responsible for the foreseeable conse- quences of their conduct.” The court cited Lippoldt v. Cole, 468 F. 3d 1204 (10th Cir. 2006), in which an assistant city attorney was found liable after he researched the law and drafted a letter denying a protest group’s application for a parade permit based on the content of their speech, and Anoushiravani v. Fishel, 3:2004 CV 00212 (D. Ore. July 19, 2004), denying a motion to dismiss by two Department of Homeland Security attorneys who advised customs agents that they could constitutionally refuse to release seized propri- ety. In Anoushiravani, the court held that the attorneys could be liable for their personal participation in the deprivation of constitutional rights, because the seizures were a foreseeable result of their legal advice. The Anoushiravani court cited United States Securities and Exchange Commission v. Fehn, 97 F. 3d 1276 (9th Cir. 1996), which found that a lawyer may be liable for substantially assisting in a violation of the law by issuing advice in violation of the law.

It remains to be seen whether President Barack Obama will uphold his lofty rhetoric that no one is above the law and seek crimi- nal prosecution of members of the Bush administration. Bad Advice provides a lucid and compelling legal indictment against Yoo and the others who regretfully gave their leader the advice he wanted instead of the advice he needed.
EXPERIENCE YOU CAN COUNT ON

NORIEGA CHIROPRACTIC

CLINICA PARA LOS LATINOS
SERVING THE LATIN COMMUNITY FOR 50 YEARS

MONTEBELLO WELLNESS CENTER
901 W. Whittier Boulevard, Montebello CA 90640
323.728.8268

POMONA HEALTH CENTER
1184 E. Holt Avenue, Pomona CA 91767
909.865.1945

1.800.624.2866
PERSONAL INJURY CASES ACCEPTED ON LIEN BASIS
Why Hire Chapman Lawyers?

☑ Practical Experience & Training
In 2008-09, Chapman launched three new clinical programs, augmenting its already impressive list of legal clinics. Under the guidance of attorney clinical directors, Chapman students now advise or work up cases for actual clients in the areas of tax law, elder law, military justice, domestic violence, constitutional law, entertainment law, immigration law, and much more. Others hone their litigation skills on Chapman’s award-winning competition teams, holding their own against some of the nation’s best law schools in mock trials, appellate hearings, and ADR tournaments.

☑ Excellent Bar Pass Rates
Chapman has committed significant resources into the development of academic achievement programs designed to maximize the number of graduates who will pass the California Bar Examination. As a result, Chapman’s pass rate for first-time takers has risen more than 30% since 2005, in a steady upward trend. In July 2008, Chapman graduates in the top half of the class passed at a 99% rate, while nine of ten graduates in the top 75% passed on their first attempt. With solid numbers like these, employers can rest assured that Chapman hires will be ready to hit the ground running when Bar results are released each fall.

☑ Premier Faculty & Education
Chapman has always put an emphasis on the hiring of premier faculty. With a “Who’s Who” of marquee names that include Dean John Eastman, Nobel laureate Vernon Smith, constitutional and ethics scholar Ronald Rotunda, and former United States Congressman Tom Campbell, Chapman professors are on par with those at the nation’s best law schools. Chapman also nurtures its “Rising Scholars,” an energized group of young professors committed to advancing areas such as public interest, civil rights, and environmental law, while blazing trails with scholarship in top law journals. It is no wonder that Princeton Review’s Best 174 Law Schools (2009) ranked Chapman in four Top 10 lists: “Best Classroom Experience,” “Professors Rock (Legally Speaking),” “Quality of Life,” and “Most Diverse Faculty.”

Call 714-628-2517 to Participate in Chapman’s On-Campus Interview Program or to Learn About Chapman’s Other Free Employer Services

Recent Bar Pass Data

| Top 25% of Class | 2008: 98% | 2007: 95% |
| Top 50% of Class | 2008: 99% | 2007: 91% |
| Top 75% of Class | 2008: 91% | 2007: 85% |

Law Review Members
2008: 100%
2007: 91%

Overall (Full Class)
2008: 77%
2007: 72%

Data based on first-time takers of the July California Bar Examination

One University Drive, Orange, CA 92866
1-877-CHAPLAW www.chapman.edu/law
**Immigration Law Training Course**

ON THURSDAY AND FRIDAY, SEPTEMBER 17 AND 18, the Immigration Legal Assistance Project will host a two-day training course designed for attorneys who are new to the field of immigration law or have been practicing in the field for less than one year. Speakers Frederick B. Benson, Ally Bolour, Kerry J. Dockstader, Stuart I. Folinsky, Carlos R. Juelle, Mary L. Mucha, Linda M. Nakamura, Warren M. Winston, and Judith Leslie Wood will focus on immigration concepts, procedures, and policies in Los Angeles. The course will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking at 1055 West 7th costs $8 for those who arrive before 9:30 A.M. Nearby parking includes Macy’s at 920 Seventh Street for $7, the Medici at 722 South Bixel Street for $5, Ingraham Street outdoor parking for $5, and 1100 Wilshire Boulevard for $5. On-site registration and breakfast will be available at 8 A.M. on both days, with lunch from 12:30 to 1:30 P.M. The program will take place from 8:30 A.M. to 4:30 P.M. on both days. The registration code number is 010441. The price below includes meals.

$350—all attendees except verified nonprofit providers

13 CLE hours

**2009 Commercial Law and Bankruptcy Legislative Update and Law Student Award Luncheon**

The Commercial Law and Bankruptcy Section will present its sixth annual law student excellence awards on Thursday, September 17. The section will be awarding 2008-09 student excellence awards in commercial and bankruptcy law. Presenting awards and a legislative update on pending or recent enactments will be Judge Barry Russell, Steve O. Weise, and Scott C. Clarkson. The luncheon will take place at the Omni Los Angeles Hotel, 251 South Olive Street, Downtown. Parking costs $12. On-site registration will begin at noon, with the luncheon continuing from 12:30 to 2 P.M. The registration code number is 010515. The prices below include the meal. Award recipients attend for free.

$35—CLE+PLUS members and awardee guests

$50—government employees

$60—Commercial Law and Bankruptcy Section members

$75—all others

$550—firm tables of 10

.5 CLE hour

**Entertainment Industry Taxation**

ON THURSDAY, SEPTEMBER 17, the Taxation and the Entertainment Law and Intellectual Property Sections will host a program featuring speakers Nicole Ameln, Alan Epstein, Robin C. Giden, Gina G. McLeod, Jean M. Prewitt, and Barbara L. Rosenfeld, who will update attorneys, accountants, other professionals, and executives interested in current developments affecting the taxation—domestically and when working abroad—of those in the entertainment industry. Topics will include an update on the response of Congress to runaway production (Section 199 and Section 181), California’s response to runaway production, deferred compensation and Section 409A, international tax planning for talent (including the impact of the new “service PE” rules), and updates from New Zealand and Australia. The program will take place at the Olympic Collection, 11301 Olympic Boulevard in Los Angeles. Parking costs $7. On-site registration and the meal will begin at 8 A.M., with the program continuing from 9 to 10:30 A.M. The registration code number is 010438. The prices below include the meal.

$25—law student members

$35—CLE+PLUS members

$75—LACBA members

$65—Business and Corporations, Entertainment Law and Intellectual Property, and Taxation Law Section members

$85—all others

$95—at-the-door registrants

1.5 CLE hours
THE CALIFORNIA BAR JOURNAL’S MONTHLY LIST of disciplined attorneys suggests that the surest ways to be disbarred, suspended, or otherwise disciplined are to take client trust funds or cut off contact with a client. But why are there so few discipline reports about attorneys who abuse their license not vis-à-vis their clients, but as to their fellow attorneys? Why are attorneys who lie to courts and make physical threats to other attorneys not subject to the same discipline as are their equally unethical counterparts who steal from their clients? Just how uncivil does an attorney’s conduct have to be before the State Bar will act?

We have all dealt with obstreperous and rude attorneys and have generally come to tolerate a level of offensive conduct from some practitioners. But when attorney conduct goes beyond “vigorous representation” and becomes criminal, shouldn’t the State Bar act?

These are not just academic questions. Practicing among us is at least one attorney, let’s call her Attorney X, who has directed physical threats toward members of my family. Now, if this behavior only affected me, I would not be airing the matter publicly. But she has repeated this behavior toward multiple attorneys and their families, two of whom (myself included) had to obtain restraining orders. She also has a documented record of lying to both trial and appellate courts. At least two judges have reported her to the State Bar.

The Bar’s response: nothing. Not even a private reproval, the mildest form of discipline available, one step above a nasty finger wag. Here are some documented examples of her conduct:

In a March 2009 decision, an appellate panel condemned Attorney X’s lies to the court, twice saying that she “blatantly” misrepresented what happened at trial in violation of Business and Professions Code Section 6068(d). The same panel expressed “dismay” by Attorney X’s conduct in a second decision, in May 2009, twice condemning her “lack of candor” and “blatant factual omission,” and saying she “misstated the record in flagrant and egregious violation of her duty to the court.” How often is an attorney singled out for such conduct, much less four times in less than two months, without consequences?

Perhaps the Bar can justify overlooking misstatements of a record, since no one was hurt. But what about threats of physical harm? In January 2008, a Los Angeles judge issued two temporary restraining orders against Attorney X based in part on a posting she made on a bar association Web site. In the posting, she accused two attorneys, her opposing counsel in two different cases, of breaking the law, and threatened to “bypass the step of following those lil fux for a few days and get to the payback.” All replies were to be made “off line.” This particular situation hit close to home, since it was my son that she was seeking for her “payback.” The judge who issued the restraining orders reported Attorney X’s conduct to the State Bar twice, but the Bar has taken no action.

These were not Attorney X’s only threatening posts on this bar association’s Web site. In 2007, she identified an attorney—again her opposing counsel—in a posting and said, “I intend to take him down.” In another posting about the same attorney and his wife, when asked what they had done to her, her response was, “What did they do? They breathe [sic]. Everyone should not have that right.” This, too, was reported to the State Bar in February 2008, but it has refused to act.

Attorney X has a propensity for macabre death threats. In a letter to an attorney and his paralegal, Attorney X warned, “Now answer those belated discovery responses…or I will request that the court compel such response with heavy sanctions and have you each decapitated and force your children to take your decapitated head to school as part of show and tell.” (Emphasis removed.) I understand that the judge hearing the case in which this letter was sent reported the threats to the Bar, but again no disciplinary action was taken.

This year, the New Jersey Supreme Court disciplined an attorney who issued the following threat to another attorney: “I’m going to cut you up into bits and pieces, put you into a box and send you to India and your parents won’t recognize you.” The California State Bar, though, has refused to act when faced with equally offensive threats of physical harm.

While attorneys who walk on the edge of propriety typically do not cross the line for fear of repercussions, Attorney X has no such fears, writing in a posting, “State Bar investigators are WUSSES.” This conclusion is likely based on the fact that she suffered no penalty in connection with a complaint filed with the State Bar by her own grandparents. They complained that Attorney X settled a case on their behalf, yet held onto the settlement proceeds and would not return their calls. While taking client money and failing to communicate are typical red flags for discipline, the State Bar attorney who reviewed that matter called it “a regrettable, hotly contested family dispute.” The lack of action by the Bar merely emboldened Attorney X.

If we do not press the State Bar to discipline such abhorrent conduct, then we as lawyers have no one but ourselves to blame for our negative public image.

Jerry Abeles is a business litigation partner in the Los Angeles office of Arent Fox LLP.
ADVISORS TO THE LEGAL PROFESSION
Over 55 Years of Combined Legal Ethics Consultation Experience

PANSKY MARKLE HAM LLP

ELLEN A. PANSKY
- Former Trial Counsel and Assistant General Counsel for the State Bar
- Past President, Association of Professional Responsibility Lawyers
- Former Chair, Los Angeles County Bar Association Professional Responsibility and Ethics Committee
- Former Editorial Board Member, ABA/BNA Lawyer’s Manual on Professional Conduct
- Trustee, Los Angeles County Bar Association
- Member, ABA Center for Professional Responsibility

JAMES I. HAM
- Current and Former Chair, Los Angeles County Bar Association Professional Responsibility and Ethics Committee
- Former Member, California State Bar Standing Committee on Professional Responsibility and Conduct
- Trustee, Los Angeles County Bar Association
- Lecturer at Law in Legal Professions (Ethics), University of Southern California Gould School of Law
- Member, ABA Center for Professional Responsibility

WHEN THE STATE BAR CALLS
- Attorney Discipline
- Attorney Admissions
- Moral Character Application Advice
- Reinstatements

REPRESENTATION OF ATTORNEYS
- Legal Malpractice
- Breach of Fiduciary Duty
- Conflicts of Interest and Conflict Waivers
- Motions to Disqualify

ATTORNEY FEES
- Attorney Fee Disputes
- Partnership Disputes

CONSULTATIONS AND EXPERT OPINIONS
- Expert Testimony
- Certified In-House MCLE Programming

CLASS ACTIONS
- Class Action Ethical Issues
- Trust Account Issues
- Law Firm Formation and Dissolution
- Lateral Hires and Attorney Departures
- Advertising Compliance

Pansky Markle Ham, LLP
1010 Sycamore Avenue, Suite 308, South Pasadena, California 91030
Telephone 213.626.7300 Facsimile 213.626.7330 Web site www.panskymarkle.com
Ellen A. Pansky epansky@panskymarkle.com James I. Ham jham@panskymarkle.com
WESTLAW HELPS YOU GET MORE DONE IN LESS TIME.

Some things are designed for maximum efficiency. Take Westlaw® for example. It offers comprehensive legal content, including the largest online collection of court documents; tools to help you find it faster, like the West Key Number System®; the master classification system of American law; and trusted accuracy, with unsurpassed editorial processes that make over 100,000 opinion corrections every year. In today’s environment, Westlaw efficiency delivers the productivity you need.

For more information, go to west.thomson.com/westlaw or call 1-800-977-WEST (9378).