Los Angeles lawyers Brian S. Kabateck (right) and Artin Gholian advocate a new approach to combating Internet advertising click fraud.

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Chapman University School of Law in coordination with Chapman University’s Schmid College of Science is pleased to present Beyond Copenhagen, a three-day conference that will explore the challenges and opportunities resulting from climate change, including mitigation, adaptation and sustainability.

The conference will showcase leading national and international experts in the fields of science, public policy, business and law. Highlights include:

**WEDNESDAY, APRIL 21**

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**THURSDAY, APRIL 22**

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**FRIDAY, APRIL 23**

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When deciding whether to admit statements of domestic violence victims, courts distinguish between testimonial and nontestimonial statements.

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By Jeffrey D. Wolf

By Allison B. Margolin

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didn’t think the jokes were funny, and the non-lawyers didn’t know they were jokes.”

I’m sure every one of us has been treated to our share of lawyer jokes. Few are truly funny, but they seem to have common themes, including lying and thievery.

Gallup does an annual poll asking respondents to rate the honesty and ethical standards for people in different professions. In 2009, 40 percent indicated that they consider lawyers’ ethical standards to be low or very low. Only 13 percent said lawyers have high standards. We still rate higher than bankers these days, but not by much.

What surprises me as one who deals with lawyers and nonlawyers in a business setting is that lawyers, for the most part, seem to be the most concerned about ethics and fairness. Indeed, lawyers have codified ethical standards that govern our daily practice. We are one of the few groups of U.S. citizens whose livelihoods can be taken away for violating ethical rules. Moreover, at least in California, lawyers are required to take continuing ethics training. We are likely to be more law abiding than the average citizen, if only because we are more conscious of the laws.

There seems to be a double standard when it comes to lawyers. In February of this year, the coach of England’s national soccer team removed John Terry as team captain after revelations that Terry cheated on his wife (with whom he has two young children) with the former girlfriend of one of his teammates. Despite losing his captaincy, Terry will continue to play for his team, will be cheered on by millions of fans, and will continue to sell thousands of jerseys. Yet attorneys who fulfill their legal duty to provide the best defense available to their clients are publicly reviled.

Walter Olson, a senior fellow at the Manhattan Institute, has an idea about this dichotomy. He calls it the “bartender theory.” When you want a drink, you choose to patronize the bartender who pours the stiffest ones, not those that are best for your health. Similarly, when hiring a lawyer, most people seek out warriors with attributes that are not always the most admirable. Clients want counsel who will scorch the earth and make the other side suffer. Olson provides an illuminating example: “Alan Dershowitz, when criticized for some of his stratagems in criminal defense—things like telling the client on first meeting, ‘Don’t tell me whether you’re guilty or not; it would tie my hands to know; leave me free to come up with the best defense’—has defended himself by saying, ‘Look, if your kid were arrested and charged with something, you’d want a lawyer just like me.’”

Olson suggests that lawyers may be despised not so much for a lack of ethics but for the disproportionate power we wield to complicate people’s lives. As he points out, “In no other major democracy can a freebooting lawyer show up, dump a pile of papers on your front lawn, tie you up for years, inflict untold damage to your business and reputation, and then walk away with hardly any consequences if he is proven wrong.” Perhaps what we see as carefully adhering to ethical rules—zealously representing our clients, using legal procedures to the fullest extent permitted, guarding client confidences even when that means safeguarding evil—is exactly what makes us villains to so many others.

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.
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Applying Corporate Privilege to PMQs during Depositions

LITIGATORS FREQUENTLY RECEIVE notices of deposition seeking to depose a corporate client’s person most qualified. In some cases, the PMQ will be a lower-level employee. To prepare for the deposition, the attorney must speak with the employee. Is that conversation privileged? In California, not necessarily.

Although a PMQ may be an employee of the corporation, and a communication may be directly related to the subject matter of the case, the employee is not a client simply by virtue of employment with the corporation that the attorney represents. Consequently, opposing counsel can contact the employee directly and freely discuss the subject matter of the litigation with the employee, according to Rule 2-100 of the California Rules of Professional Conduct and Snider v. Superior Court.

The ABA Model Rules of Professional Conduct articulate guidelines regarding the representation of a corporation. Rule 4.2 states: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” Comment [7] of Rule 4.2 states:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

This group of constituents is typically referred to as the control group. However, in 1981 the U.S. Supreme Court ruled in Upjohn Company v. United States that the corporate attorney-client privilege extends not only to communications between corporate counsel and members of the control group but also to communications with middle- and low-level corporate employees. Seven years later, however, drafters of the California Rules of Professional Conduct adopted Rule 2-100 concerning communications with employees of organizations represented by counsel. It states:

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a “party” includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Rule 2-100 appears virtually identical to its ABA Model Rule counterpart, but this is misleading. The drafters of Rule 2-100, according to the court in Snider, expressly rejected Upjohn’s holding: “[t]he original draft of proposed rule 2-100 provided for a ‘blanket’ rule against ex parte contact with any current employees of the represented organization.” Instead of including all employees, the drafters adopted the control group test for paragraph (B) of Rule 2-100.

Under Snider, the history behind the adoption of Rule 2-100 supports a narrow reading of the term “managing agent.” California maintains a narrow interpretation of which employees of a corporation are actually represented by counsel when the corporation is the party. Additionally, the category in paragraph (B)(2) restricts the employees to high-ranking executives and those with the authority to speak on behalf of the organization. Provisions of the California Rules of Professional Conduct prohibiting ex parte contacts with represented parties exist in order to preserve the attorney-client relationship and the proper functioning of the administration of justice.

Yet, rules of professional conduct prohibiting state bar members from communicating about the subject of representation with a party known to be represented by counsel should be given reasonable, common-sense interpretation and should not be given broad or liberal interpretation, which would stretch the rule to cover situations that were not contemplated by the rule.

Craig A. Roeb is a partner and Aneta B. Dubow is a senior associate with the Los Angeles office of Chapman, Glucksman, Dean, Roeb & Barger, where they practice business and employment law. The authors wish to thank law clerk David Napper for his assistance in writing this article.
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According to the Snider court’s interpretation of Rule 2-100, ex parte communication with lower-level employees who may have critical information is not prohibited and would not be grounds for disqualification. Similarly, the court’s interpretation in Snider leads to questions about a lawyer’s duty regarding the person most knowledgeable in the corporation, when that person is not in the control group. Conversely, if opposing counsel engages in improper communication with a represented party, disqualification is proper. This disqualification is justified when the misconduct will have a continuing effect on judicial proceedings.

Lawyers must therefore tread carefully when representing or opposing a corporation. Here are some good practice tips for attorneys on both sides of the table:
- When representing a corporation, be aware that communications outside the control group are not always privileged.
- Inform employees of the organization whether they are or are not represented in the matter. If their depositions are set, discuss representing them for purposes of the deposition.
- Inform employees that if they are contacted by an opposing attorney, they should communicate nothing except to tell that attorney to contact counsel for the employer.
- In order to avoid potential violations of the attorney-client privilege or bar rules, an attorney contacting an employee of a represented organization should question the employee before discussing substantive matters about the employee’s status at that organization, whether the employee is represented by counsel, and whether the employee has spoken to the organization’s counsel concerning the matter at issue.

Whether an attorney represents the plaintiff or the defendant in an action in which a corporation or similar organization is a party, it is critical to confirm who has knowledge of the facts of the dispute, as they will likely be deposed and possibly called to testify at trial. Before this occurs, counsel representing the corporate party must confirm with all persons with knowledge of the issue who are still employed with the organization whether they agree to be represented in the litigation. An attorney for a corporation or similar entity must take active steps to ensure that opposing counsel sends telephone calls, e-mail, letters, or other communications to the attorney rather than an employee.

KEYNOTE ADDRESS

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Business Columnist
Los Angeles Times

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The Scope of Rule 30(b)(6) in the Examination of Corporate Deponents

IF THE EXAMINING COUNSEL during a deposition of a corporate-designated deponent presses forward on a line of questions outside the scope of a deposition notice issued under Rule 30(b)(6) of the Federal Rules of Civil Procedure—and continues with the examination even in the face of objections—defending counsel must make a decision. Some may choose to walk out with the designated person in tow, confident they will be vindicated by the court if the examining counsel makes an issue of the terminated deposition. Indeed, defending counsel may claim that terminating the deposition was a reasonable response to an unreasonably expansive interrogation. But this may not be a good move by defending counsel—particularly if the deposition occurred in a proceeding pending in a federal court in California.

Rule 30(b)(6), titled “Notice of Subpoena Directed to an Organization,” permits a party to issue a deposition notice or subpoena naming a public or private corporation or other entity as the deponent.1 California litigators may view the topics listed in the deposition notice as defining the outer boundaries of permissible examination at a Rule 30(b)(6) deposition. However, numerous decisions by federal courts in California have ruled otherwise. Clarifying the permissible parameters of examination at depositions of corporate designees under Rule 30(b)(6), several courts have concluded that the examination of a corporate deponent may extend to matters beyond the scope of the deposition notice. In reaching this surprising (at least to some California practitioners) conclusion, these decisions reject previous case law holding that the scope of the examination is limited to the topics listed in the deposition notice.

Rule 30(b)(6) requires the party issuing the notice to “describe with reasonable particularity the matters for examination.” 2 The named corporation must then designate as deponents one or more persons, who may include officers, directors, managing agents, or “other persons.” Designated persons must be able to testify “about information known or reasonably available to the organization.”3 Indeed, the corporation “must designate a knowledgeable person to fully prepare and ‘unequivocally answer questions about the designated subject matter.’”4 If the notice lists more than one subject—and notices usually do—the corporation may specify more than one person to testify.5

In designating its deponent for a specific subject, the corporation generally will be bound by the deponent’s testimony on that topic.6 This crucial implication—always an important factor for all parties to consider—supplies the backdrop for the differing opinions concerning the scope of examination at a Rule 30(b)(6) deposition. The binding nature of a corporate deponent’s testimony about a designated topic has led some courts to determine that other matters, including subjects outside the scope of the one listed in the notice, are off-limits in a deposition of a corporate designee. Moreover, courts and commentators outside California have endorsed this more restrictive approach.7

The leading decision limiting the scope of depositions under Rule 30(b)(6) is Paparelli v. Prudential Insurance Company of America.8 In Paparelli, the U.S. District Court for the District of Massachusetts held that deposition questions must be limited to topics expressly identified in the Rule 30(b)(6) deposition notice. Specifically, the Paparelli court held that “if a party opts to employ the procedures of Rule 30(b)(6)…to depose the representative of a corporation, that party must confine the examination to the matters stated ‘with reasonable particularity’ which are contained in the Notice of Deposition.”9

The Paparelli court reasoned that the language of Rule 30(b)(6) as well as the advisory committee’s note implies that the purpose of the rule was to allow an examining party to obtain specific information by identifying a particular person with that knowledge. According to

Michael S. Cryan, a partner at Arent Fox LLP in Los Angeles, was counsel for the defendant and examining party, SSL Americas, Inc., in FCC v. Mizuho Medy Company, Ltd. He thanks summer associates Jennifer Tung of the University of Southern California School of Law and Ali Tehrani of UCLA School of Law for their assistance in the preparation of this article.
Paparelli, requiring a deponent to answer questions about topics not listed in the notice would defeat the purpose of Rule 30(b)(6)’s requirement that a corporation designate a person to answer questions for the corporation about specified matters. Moreover, corporations would face increased difficulty in identifying a proper corporate deponent if they did not know with specificity what topics would be covered, and what information would be sought, at the deposition.

The Paparelli court found that the phrase “with reasonable particularity” in Rule 30(b)(6) would be rendered superfluous if the rule was not intended to limit the scope of deposition questioning: “if a party were free to ask any questions, even if ‘relevant’ to the lawsuit, which were completely outside the scope of the matters on which the examination is requested,’ the requirement that the matters be listed ‘with reasonable particularity’ would make no sense.” As a result, the Paparelli court ruled that a designated witness should testify only about the matters listed “with reasonable particularity” in the deposition notice and only to the extent the information sought was “known to the organization or reasonably available to it.” Papa relli therefore establishes an interpretation of Rule 30(b)(6) that the topics identified in a Rule 30(b)(6) notice define the outer boundaries of permissible inquiry at the deposition of a corporate designee.

Rejecting Paparelli

Numerous federal district courts in California and elsewhere, however, have rejected the Paparelli decision resoundingly. In the Northern District of California, for example, the court in Detoy v. City and County of San Francisco concluded that once a Rule 30(b)(6) witness satisfied the minimum standard by answering questions about topics listed in the deposition notice, the scope of the deposition would be determined by the broad relevance standard of Rule 26 of the Federal Rules of Civil Procedure. Similarly, in the Southern District, the court in FCC v. Mizubo Medy Company Ltd. held that the examining party had a right to cross-examine a Rule 30(b)(6) deponent on matters outside the scope of the deposition notice. While the Central and Eastern Districts have not been asked to address this issue specifically, a recent decision from the Central District refused to exclude testimony on the grounds that the answers provided exceeded the scope of the designated Rule 30(b)(6) topics.

Federal courts in California have held that Rule 30(b)(6) establishes a de minimus standard for the testimony of a corporate designee. According to Detoy, the designated subject matter listed in the deposition notice delineates “the minimum about which the witness must be prepared to testify, not the maximum.”

Courts allowing examination beyond the topics stated in the deposition notice have cited at least four rationales for rejecting Paparelli. First, federal courts in California have applied the more expansive standard of discovery in Rule 26(b)(1)—a rule addressing “Discovery Scope and Limits” in all types of federal depositions—as the touchstone for rejecting Paparelli’s more restrictive approach. For example, the Detoy court states that “the decision in Paparelli appears to ignore the liberal discovery requirements of Rule 26(b)(1),” Rule 26(b)(1) provides:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter....Relevant information need not be admissible at the trial if the discovery appears rea sonably calculated to lead to the discovery of admissible evidence.

The Detoy court reasoned that confining the scope of the deposition frustrates the objectives of broad discovery under the federal rules. Further, the court noted that strictly limiting the examination deprives the examining party from exploring previously undisclosed subjects and from observing the deponent’s demeanor in the face of unexpected questioning.

Second, confining a deposition to topics listed in a Rule 30(b)(6) deposition notice confers unfair procedural advantages to a party defending a deposition. Preventing a deposition from exploring topics outside the scope of a deposition notice would force the examining party to choose between asking relevant questions or reopening a deposition at a later date. The restrictive approach causes the examining party to face two procedural disadvantages if forced to reopen a deposition: Rule 30(a)(2)(A)(i) limits each side to 10 depositions, without a local rule or court order extending the allowable number, while Rule 30(a)(2)(A)(ii) requires a party to obtain leave of court to reopen the deposition of a witness. The court in Detoy found that the Paparelli rule’s two significant procedural hurdles are “artificial and wasteful of both the parties’ resources and the witness’s time.”

Forcing parties to jump through additional procedural hoops, according to the court, “would encourage defending counsel to take a hard line and force an opponent to expend its deposition allotment.”

Instead, California federal courts have relied on the 1970 advisory committee’s note to Rule 30, which states that the liberal discovery standards of Rule 26 govern deposition questions that fall outside the scope of a Rule 30(b)(6) notice, and any questions, so long as they are relevant under Rule 26, are proper. The advisory committee’s note further provides that the Rule 30(b)(6) procedure is meant not as an obstacle but to supplement existing practice “as an added facility for discovery.”

Third, interpreting Rule 30(b)(6) as a limitation on discovery conflicts with the purpose of the rule, because the rule seeks to enhance the available means of discovery. It does so by requiring a party to specify persons to be present at a deposition rather than providing greater notice or protections to corporate deponents. Federal courts in California, adopting the reasoning of a decision by the U.S. District Court for the Southern District of Florida, have held that Rule 30(b)(6) cannot be used to limit what is asked of a corporate deponent. Restricting the areas of inquiry would hamper discovery by using a rule that was not meant “to confer some special privilege on a corporate deponent.”

Federal case law in California cites the advisory committee’s note in reasoning that the purpose of the Rule 30(b)(6) procedure was to facilitate the identification of a proper witness and not to shield corporations from discovery. As the advisory committee’s note states:

[Rule 30(b)(6)] will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a “managing agent.” (Citations omitted.) It will curb the “handyman” by which officers or managing agents of a corporation are deposed in turn but each discloses knowledge of facts that are clearly known to persons in the organization and thereby to it. (Citations omitted.) The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.

In light of the advisory committee’s note, courts have held that Rule 30(b)(6) is “not one of limitation but rather of specification within the broad parameters of the discovery rules.” Relying on the advisory committee’s note, the Detoy court observed that Rule 30(b)(6) was intended to assist a corporation in identifying an individual with specific knowledge about specified topics.

Fourth, the language of Rule 30(b)(6) supports the less restrictive interpretation.
November 24, 2009

Jack Trimarco
Jack Trimarco & Assoc.
9454 Wilshire Blvd., 6th Floor
Beverly Hills, CA 90212

Dear Jack:

I am writing this letter to express my gratitude for your tremendous and outstanding expertise in assisting in a date rape by drug investigation which focused on my client (a former NBA player).

Your testing of my client and preparing him for the investigation and interview by the Huntington Beach Police Department led to the police department declining to even proceed to the District Attorney’s Office with the case. Your testing, procedures, and reputation led the Huntington Beach Police Department to conclude that the “victim” was lying and your conclusion that the “defendant” was telling the truth was correct. The cost of your test, literally saved my client thousands of dollars in attorney fees and months, if not, a year or so of aggravation.

On behalf of my client, and my office I want to thank you for your assistance in the matter.

Yours truly,

Andrew M. Stein
The *Detoy* court rejected *Paparelli’s* more restrictive construction of the “describe with reasonable particularity” language on the ground that the rule imposes an obligation on the corporation to provide witnesses with knowledge of the specified topics but does not limit what may be asked at a deposition.32

**Practical Implications**

California’s interpretation of Rule 30(b)(6) has many practical implications for both the examining and defending parties. Even though an examining party in California will be allowed to ask questions outside the scope of a Rule 30(b)(6) deposition notice, counsel should craft adequate deposition notices, because if the corporate deponent does not know the answer to questions outside the scope of matters described in the notice, “then that is the examining party’s problem.”33 Answers to questions outside the scope of the Rule 30(b)(6) notice may be taken subject to objection.34

Defending parties in California, however, are not left without recourse or protection. Counsel defending a Rule 30(b)(6) deposition should object to questions outside the scope of the deposition notice.35 By stating timely and proper objections, counsel ensures that the deponent’s answers do not bind the corporation.36 However, counsel should only terminate a deposition or instruct a witness to object to questions beyond the scope of the notice when the examining party is taking bad faith or is annoying, embarrassing, or oppressing the deponent. Even if the deposition is conducted in this way, the deponent’s counsel must comply with proper procedure by immediately seeking a protective order.

Failure to immediately seek a protective order after terminating a deposition is a violation of the Federal Rules of Civil Procedure and may lead to sanctions, such as the sanctions awarded in *FCC* court in resolving a dispute regarding a Rule 30(b)(6) deposition.45 In light of *FCC*, unless the objecting party actually proceeds under Rule 30(d)(3) and immediately files a motion for a protective order, courts will find the termination of the deposition improper and possibly worthy of sanctions. For federal court practitioners in California, relying on a restrictive reading of the scope of corporate depositions runs counter to the weight of authority.

While case law continues to develop in this area, federal courts in California have steadily interpreted a Rule 30(b)(6) notice as establishing the minimum amount of information a corporate deponent must provide at a deposition. California decisions have clarified that the *Paparelli* rule will not be followed regarding depositions of a corporate deponent. Instead, Rule 26 and its liberal discovery standards will govern any questions that fall outside the scope of the deposition notice.

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1. *FED. R. CIV. P. 30(b)(6); compare CODE CIV. PROC. §§2025.010, 2025.210 (state rule for depositions of corporations).*
2. *FED. R. CIV. P. 30(b)(6).*
5. *FED. R. CIV. P. 30(c)(2).*
6. *FED. R. CIV. P. 30(d)(3).*
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practice tips

The Statute of Limitations for Equitable Accounting Claims

SHOULD AN ATTORNEY BE CONCERNED about a letter from a former client indicating that the client has filed a complaint for accounting regarding services that ceased years earlier? The lawyer may think the complaint is obviously time barred. In the equitable world of accounting claims, however, nothing is obvious, particularly in attorney-client relationships. Under current law, as complicated by various streams of case law, it is possible for overzealous plaintiffs’ attorneys to craft a complaint that survives demurrer and probably even summary judgment and assert a stale, frivolous contract claim under the guise of an accounting action.

The rule for pleading an accounting claim is simple enough: 1) the fiduciary relationship or other circumstances appropriate to the remedy must be established, and 2) a balance must be due from the defendant to the plaintiff that can only be ascertained by an accounting.1 The “other circumstances appropriate to the remedy” of an accounting include nonfiduciary contractual relationships requiring payment by one party to another of profits or moneys received.2 This right can be derived simply from the implied covenant of good faith and fair dealing inherent in every contract in cases in which it can be said that, without an accounting, there may be no way by which a party entitled to a share in profits or specified funds could determine whether there were any profits or amounts due.3

A fiduciary relationship can arise between a trustee and a beneficiary,4 a principal and agent,5 among partners in a partnership, and joint venturers in a joint venture.6 Illustrative of agency cases is McRaven v. Dameron,7 a case involving a suit by former clients for an accounting against their former attorney.

In McRaven, the clients brought an action against their former attorney to recover money that was received by the attorney while acting in a fiduciary capacity but that he failed to deliver or account for to the plaintiffs. The clients alleged that, after the attorney was paid to handle two lawsuits that were later dismissed, “upon information and belief…[the attorney] received about $8,000 “on account of said dismissals.” The trial court entered judgment in favor of the plaintiffs, and the California Supreme Court affirmed. The court held that although “[t]he complaint may not be as specific with regard to the contract as it might be…it is sufficient according to a number of decisions of the court.” The court concluded that the complaint sufficiently pleaded and the clients sufficiently proved that 1) the action was to recover money received by the attorney while acting in the fiduciary capacity under a contract between the attorney and client, 2) the attorney received as the fruit of his representation certain moneys owed to the plaintiffs, and 3) the attorney failed to deliver or account for the funds to the clients. In the opinion, there is no mention that the clients sued other than “for an accounting of moneys” of which “plaintiffs were not informed…until within two years before the commencement of the action.” At trial, “it was expressly stipulated that the two year statute of limitations did not” bar maintenance of the suit.8

To file an accounting claim against a former attorney, a plaintiff needs to state that 1) a former attorney-client relationship exists, which creates an agency and fiduciary relationship, and 2) an unknown balance is due from the former attorney. One way that a plaintiff could fail to properly plead is to allege facts that show that the sum being sued for can be made certain by calculation.9 Although this mistake is unlikely, if it were made the case would be subject to demurrer, since a complaint does not state a cause of action for an accounting when it shows that none is necessary.10

After the pleading stage, however, facts may show that the plaintiff has sufficient information so that no accounting is necessary. This was the situation in Caldwell v. Caldwell,11 in which the court held that the evidence fell short of “proving this [accounting] cause of action.”

The plaintiff at all times had full and free access to his own money, through bank accounts in his name and with full access to and control over the books and records concerning the accounts in his name and with full access to and control over the books and records concerning the receipts and expenditures of the property.12

Statute of Limitations

Whether the value of a claim can only be ascertained by an accounting is one element of an accounting claim. Another is the statute of limitations, which may vary. In an action for an accounting, “the nature of the right sued upon, not the form of action or relief demanded, determines the applicability of the statute of limitations.”13 The applicable statute of limitations will be the four-year period provided in Code of Civil Procedure Section 343, the catch-all limitations period, unless a different statute is warranted by the specific form of action.14 For example, if the primary purpose of the action is to recover money under an oral contract, then the two-year limit under Code of Civil Procedure Section 339(1) may apply.15

An attorney defendant can defeat a former client’s accounting claim by presenting evidence that no money or property is owed to the client. If the lawsuit requests an accounting based on the accounting relationship—that is, a relationship whereby one party clearly has the duty to handle, safeguard, and keep track of another’s moneys—without more, it should fail on the authority of Union Bank v. Superior Court (Demetry).16

As the court in Union Bank made clear, “No California decision holds that the existence of a complicated accounting relationship between parties by itself permits the maintenance of a lawsuit between them when no money is owed or property must be returned.”17 In Union Bank, the plaintiff fatally admitted that the defendant took no inappropriate role in connection with the accounting relationship arising out of the defendant’s administration of loan collections and repossession of office equipment. The defendant was thus able to estab-

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lish on summary judgment that it engaged in no misconduct, because the plaintiff was never deprived of moneys or profit, thereby precluding a right to an accounting.18

One complicating fact pattern arises when, as is often the case, the attorney-client relationship begins with a written agreement to provide specific services but the relationship expands beyond them. In one common scenario, an attorney agrees to prosecute a lawsuit, is later asked to perform postjudgment collection work without an additional written agreement, and receives garnishment checks as part of the collection work. It is unclear whether the oral or written contract statute of limitations should apply when a portion of the legal services is provided pursuant to a written agreement and a subsequent portion is provided under an oral contract.

The applicable statute of limitations will often depend on the specific allegations in a complaint. For example, a complaint may state that the alleged wrongdoing is that certain moneys received during the attorney-client relationship were not accounted for, placing at issue the reasonable value of the services provided by the attorney. With this allegation, the plaintiff may argue that a balance is due from the defendant to the plaintiff that can only be ascertained by an accounting. Questions will arise as to the time of breach, which will determine when the accounting action accrued and whether the written or oral agreement was in force at the time of the breach. Since the statute of limitations generally begins to run at the time of the breach, facts are necessary to determine whether a claim for breach of oral or written contract is time barred.19

Another complication occurs if the plaintiff claims that the attorney mistakenly or intentionally took a garnishment check during the collections phase of the litigation. In this context includes actions for constructive fraud or mistake, which exists when conduct, though not actually fraudulent, has the same consequences and effects of actual fraud.20 This rule has been applied in at least one action to obtain an accounting.21 In such a case, the accounting action would be time barred if filed more than three years after the alleged wrongful breach of duty.22

Date of Accrual

This analysis becomes more complex when the diverse accrual rules are considered. The key question is when each underlying breach of contract accrued. For a service contract, the date of accrual is ordinarily when the defendant received the money.23 Application of this rule could warrant a finding that there is no triable issue of fact regarding a defendant’s contention that the suit is time barred. A defendant many times can indisputably establish when he or she received money from the plaintiff. If the date of receipt of funds is more than four years prior to the date the attorney ceased to work for and communicate with the client, and if the breach and related limitations period are based on a written contract, the defendant may be able to establish that the claim is time barred. In addition, courts have held that when services are rendered intermittently, the court may consider each service performed to be complete and independent of the others, thereby leading to the conclusion that the statute runs from the date each service is rendered.24 This date-of-service rule could apply when all services under a written agreement have been completed, but collections work outside the contract is later undertaken. In such a case, the date of accrual for a suit for an accounting of moneys that the attorney collected would be the date that the attorney rendered the collections work.

Other accrual rules might apply depending on the circumstances. When a contract fixes the time for performance, the statute of limitations does not begin to run until the expiration of that specific time.25 In contrast, if no time is specified in the contract, the statute begins to run after the expiration of a reasonable period.26

Alternatively, if the oral agreement to perform collections work is for an indefinite period, the statute of limitations does not begin to run until the services end.27 A plaintiff’s claim may thus be time barred if the last invoices demonstrate that the most recent collection work was more than two years before the filing of the complaint. Under these circumstances, the plaintiff is unable to rely on contacts with the attorney that occurred after the collection work was completed.

An action for an accounting is equitable. A suit may be brought to require the defendant to account for missing money or property received or held by the defendant. However, if the accounting results in a finding that an overpayment of a certain sum of money was made by the client to the attorney, can the court award damages in that amount against the attorney, effectively converting the case to a breach of contract case at law, even after the suit was tried in equity in a bench trial?

Historically, courts have held that due process requires notice to the defendant of the degree of financial liability faced in a legal action.28 It would seem that no damages could be awarded in a suit in equity—such as a claim for an accounting—if the complaint has failed to allege a suit at law.
An attorney wishing to limit exposure to an equitable accounting claim should clearly delineate the services to be provided to the client through a written agreement. If subsequent work is to be performed, a separate written agreement should be created that specifically identifies the additional work and makes clear that the new work is distinct from any prior work performed for the client. Finally, at the conclusion of each scope of work covered by a written agreement with the client, the attorney should send the client a letter confirming that all services pursuant to the agreement have been performed and that the attorney-client relationship has ended. The letter should also include a detailed accounting of all moneys received and expended during the engagement, and request the client’s prompt response if the client has any questions.

3 Id.
5 McRaven v. Dameron, 82 Cal. 57, 62 (1889).
7 McRaven, 82 Cal. at 62.
8 Id.
12 Id.
14 People v. Taliaferro, 149 Cal. App. 2d 822, 825 (1957), disapproved on other ground (to extent case implies that four-year statute always applies to accounting claim); Jefferson, 54 Cal. 2d at 719.
15 See Estate of Peebles, 27 Cal. App. 3d 163, 166 (1972) (quoting and restating the rule in Jefferson, 54 Cal. 2d at 718).
17 Id. at 594.
18 Id.
20 Day v. Greene, 59 Cal. 2d 404, 406 (1963) (if constructive fraud is the gravamen of an action, the fact that a breach of contract is involved is not decisive.).
23 Tabata v. Murane, 24 Cal. 2d 221, 223 (1944).
26 Brennan v. Ford, 46 Cal. 7, 9 (1873).
AS MORE AND MORE ADVERTISING dollars are moving from traditional media, including television and print, to the Internet, online advertisers and sellers such as Google, MSN, and Yahoo must contend with click fraud—arguably the most pronounced obstacle to the integrity of advertising on the Web. The term “click fraud” refers to clicking on a Web link without any intention to purchase, browse, or gain information from the Web site being visited. Click fraud generally encompasses any click made in bad faith.

Click fraud schemes target online advertising by generating fraudulent traffic to Web sites. According to the Interactive Advertising Bureau, online advertising spending for the first six months of 2009 totaled $10.9 billion. The online advertising industry is on the verge of exceeding advertising spent on radio and perhaps even television, yet 10 percent to 20 percent of Internet traffic generated from online advertising comes from click fraud.

A new chapter opened in the battle against Internet click fraud schemes last summer when Microsoft filed a civil action in the Western District of Washington against a small group of individuals suspected of defrauding Microsoft’s advertisers through click fraud. Even though the click fraud problem is almost as old as the Internet itself, the Microsoft case is one of very few claims brought by a seller of advertising space, as opposed to the advertiser, and the first one that relies on provisions of the Computer Fraud and Abuse Act.

Enacted in 1984, the CFAA was created to “provide a clear statement of proscribed activity concerning computers to the law enforcement community, those who own and operate computers, and those tempted to commit crimes by unauthorized access to computers.” Sections (a)(4) and (a)(5) of the CFAA make it a crime to access computers with the intent to defraud or cause damage or loss. Section (g) provides for a civil action by anyone who suffers damage or loss due to a CFAA violation. Complainants may seek compensatory damages, an injunction, or other equitable relief. Still, not until the

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Microsoft civil suit has anyone alleged violations of the CFAA in litigation centered on click fraud.

Indeed, despite its purpose, the CFAA has been excluded from two recent click fraud criminal indictments and several recent click fraud-related civil lawsuits. Instead, plaintiffs have used noncomputer-specific statutes, such as those prohibiting mail fraud, to pursue click fraud schemes. While this approach is effective in prosecuting some types of click fraud, mail fraud statutes can fall short of preventing many other types of click fraud schemes. Moreover, other noncomputer-specific statutes, such as those relating to wire fraud, are deficient when applied to click fraud. The CFAA may represent the future in effective click fraud deterrence.

A variety of reasons have been proffered to explain why the CFAA has not been used previously in click fraud-related litigation. Perhaps advertising sellers were hoping that the market would correct itself because of the substantial revenues at stake—and this has happened to some extent. The market has produced several reactions to the growing risks that click fraud poses, including civil suits by online advertisers alleging common law fraud and breach of contract. Click fraud protection software and new online advertising business models have been introduced. Legal commentators have suggested that computer crimes are really garden variety crimes carried out with new technologies. In this view, existing statutes are sufficient to address click fraud. Indeed, some believe that computer-specific laws are not only redundant but ultimately ineffective.

The CFAA, however, is actually the better tool to use against click fraud schemes because it is designed to target computer crimes and computer-specific fraud. Civil lawsuits claiming violations of noncomputer-specific statutes as well as market responses may fall short of addressing the fraudulent behavior, but the CFAA can punish and prevent the fraudulent conduct and delete the problem altogether.

**How Click Fraud Schemes Work**

Click fraud is fueled by the way Internet traffic is monetized—the buying and selling of clicks. Pay-per-click programs allow advertisers to pay a fee to advertising sellers like Microsoft and affiliate Web site networks each time a user clicks on the advertisers’ ads. The two most common schemes involve affiliate click fraud and competitor click fraud.

Affiliate click fraud occurs in a revenue-sharing program. Google, Yahoo, MSN, or other advertising sellers provide ad space to advertisers on a “cost per click” basis and display the ads throughout their affiliate network of Web sites. One such program is Google’s AdSense. Advertising sellers like Google get a portion of the ad revenue generated each time an online consumer clicks on an ad displayed on the affiliate sites. For example, an advertiser selling laptops will be best served if its ads are displayed on computer-related sites rather than other sites containing random or irrelevant content. Computers.com, for example, will be more desirable than, say, shoes.com. Google, as the advertising seller, acts as the traffic broker between the advertiser selling laptops and the computer-related Web site in its affiliate network. Whenever an affiliate’s site generates clicks for an advertiser, Google charges the advertiser, at a predetermined per-click rate, and shares the revenue with the affiliate.

Once this type of advertising program was introduced, affiliates did not take long initiating schemes and methods to fraudulently increase their click-through rates, which in turn raised their revenues. Since advertisers are paying for the number of clicks an ad receives, affiliates (and, correspondingly, advertising sellers) generate more revenue when clicks are fraudulently generated. They do so with “clickbots”—programs designed to move throughout the Internet to generate clicks for the purpose of driving up click-through rates—as well as “pay to read” programs—click fraud rings composed of participants paid to click on ads.

The 2004 criminal prosecution against Michael Bradley is one example of the attempts to thwart clickbot schemes. Bradley, who was indicted on mail fraud charges, designed a clickbot to exploit Google’s AdSense program. The software generated clicks on the AdSense program that “mimic[ed] a surfer,” “look[ed] like real traffic,” and “hid[]” the true origin of the clicks. According to the criminal complaint allegations, Bradley professed that advertisers would not be able to tell whether the paid-for clicks were legitimate or fraudulent. Ultimately, the charges against Bradley were dropped, amid suggestions that Google had been unwilling to cooperate with the prosecution to protect Google’s click fraud detection and prevention methods.

Competitor click fraud is a scheme in which fraudulent clicks are generated to compromise a competing advertiser’s online ad display. In programs such as Yahoo’s Overture, Google’s Adwords, or Microsoft’s adCenter, advertisers have the opportunity to purchase advertising links that are displayed on the margins of search engine results based on the keywords used by those conducting the searches. For example, if a user visits Microsoft’s search engine Live Search and types “laptops” in the search field, several ad displays for laptops will appear at the top and on the left margin of the search results page. When the user clicks on any of these sponsored sites, the advertiser is charged per click. Click fraud occurs when an advertiser’s rival, who is also paying for ad space on the search page, repeatedly clicks on an ad simply to drive up costs to the advertiser and exhaust that advertiser’s ad budget.

For example, the owners of an online karaoke company were targeted by a competing business when the competitor instructed its employees to repeatedly click on its rival’s ads and drain their ad budget. By doing so, the rival’s ad would no longer appear on the margins of the search display page—and this, in turn, would increase the click-through rate of the perpetrator by having one less ad displayed on the results page.

The Microsoft complaint presents similar allegations against the defendants. Microsoft sells online advertising through its Microsoft adCenter platform, which enables advertisers to tie the placement of their ads to a keyword used on Live Search. Advertisers purchase certain keywords connected to their target market, and when a user types in those keywords, the search results display the advertiser’s site as one of the sponsored sites. In March 2008, Microsoft noticed dramatic spikes in the searches of certain keywords connected to the auto insurance industry and WoW (the World of Warcraft online game). Microsoft concluded that the spike was due to click fraud attacks from a single source and traced the fraudulent clicks back to the defendants—active users of Microsoft adCenter and owners of several Web sites relating to auto insurance and World of Warcraft.

The defendants’ Web sites were only marginally affected by the click fraud attack, while their competitors’ Web sites were hit with thousands of clicks on several occasions simultaneously. As a result, the competitors’ advertising budgets were exhausted while the defendants’ budgets went unaffected, allowing their sponsored sites to assume higher rankings and gain increased traffic. To lessen the adverse impact this attack had on advertisers, Microsoft issued advertising credits worth $1.5 million to those who were affected. Then it sued the suspected perpetrators for damages.

**Falling Short**

The online advertising community has responded to the click fraud problem, but so far its actions are problematic. Civil litigation centering upon breach of contract claims, questioning the number of clicks for which advertisers must pay, and developing click fraud detection and protection mechanisms all have their place. New business models such as Bing.com’s Cash Back program are billed as an alternative to pay-per-click mod-
els. But each of these defenses against click fraud has its drawbacks. Allowing the market to self-regulate falls short of deterring click fraud perpetrators.

Civil suits involving click fraud have not fully addressed the fraudulent conduct necessary to perpetrate a click fraud scheme. Advertising sellers are often torn between pursuing legal action against affiliates running click fraud schemes—which also generate a significant revenue stream—and simply ignoring the behavior. Google has only launched one lawsuit against an affiliate for using click fraud to drive up revenue, and even the current action brought by Microsoft is a novelty. Although class action lawsuits have been filed against advertising sellers including Google and Yahoo, they are ineffective, because advertising sellers act simply as facilitators and do not materially contribute to the fraudulent behavior.

The threat of click fraud has triggered several companies to develop software programs that “scrub” traffic for fraudulent activities. One of these programs is ClickShield, which monitors traffic in real time by comparing fraudulent activities against typical user behavior patterns. Google, among other advertising sellers, is incorporating technology that analyzes clicks to determine whether they fit a pattern of fraudulent use intended to artificially drive up an advertiser’s clicks or a publisher’s earnings. But ultimately, while click fraud protection software can help guard against click fraud, these products do little to deter and discourage the actual behavior. In its case, Microsoft alleges that the defendants managed to bypass the security measures implemented by the company on several occasions. Thus lingering doubts remain about the effectiveness of these tools. Moreover, click fraud protection software can be categorized as merely a secondary market capitalizing on the economic waste that click fraud creates.

Making pay-per-click advertising models obsolete seems a promising avenue against click fraud. The cost per action or CPA concept is one model not based on sharing revenue when a visitor clicks on an ad but rather when an action has occurred, such as filling out a form or buying a product or service. Bing.com, for example, shares its ad revenue with the consumer when the consumer purchases a product from one of its advertisers through the Cash Back program. Because only a purchase results in billing for the traffic and the resulting sale, click fraud perpetrators seemingly have no incentive to deploy their schemes.

Nevertheless, even though new advertising models could eliminate for now the profits derived from click fraud schemes, these models still do not address the root problem. As long as click fraud perpetrators are free to configure and adapt new schemes, the integrity of online advertising diminishes. The innovative click fraud perpetrators need only adjust their fraudulent strategies and tactics to these new models to continue exploiting and fleecing online advertisers.

Noncomputer-specific statutes are being deployed to halt click fraud, but the results are mixed and do not bode well for the ultimate eradication of the problem. The Bradley criminal prosecution and the 2006 prosecution of a defendant in an affiliate click fraud scheme both involved the mail fraud statute. But the statute only became applicable when checks resulting from fraudulent click revenue were mailed to the defendants. If either defendant had implemented a competitor click fraud scheme that did not generate a check moving through the U.S. mail, the mail fraud statute would not apply. In fact, for a competitor click fraud scheme, like the one in the Microsoft case, U.S. mail services are unnecessary to execute the scheme and, thus, the mail fraud statute cannot combat it.

Similarly, the wire fraud statute may also present problems when applied to click fraud schemes. Although it seems plausible to utilize the wire fraud statute in prosecuting a click fraud scheme, in its current form the statute may not cover wireless Internet connections. Moreover, the statute may fall short regardless of whether the transmission occurs wirelessly. In United States v. Phillips, the Massachusetts district court held that the wire fraud statute requires that the transmission must be “in interstate or foreign commerce,” and that the government must prove beyond a reasonable doubt that the pertinent wire transmissions actually crossed state lines. Use of the mechanisms of interstate commerce is not enough for conviction under out the most efficient path, which could likely be between computer routers within the same state. This, of course, leaves open the possibility that the transmissions at issue never crossed state lines.

**Combating Click Fraud with CFAA Litigation**

The pending Microsoft case may provide a beacon for future prosecutions of click fraud. If CFAA Sections (a)(4) and (a)(5) can be applied successfully to affiliate and competitor click fraud schemes, these provisions will be the most effective deterrent of click fraud behavior. It is a crime under Section (a)(4) to knowingly and, with the intent to defraud, access a protected computer, or exceed authorized access, and obtain anything of value. Section (a)(5) provides for civil liability for intentionally accessing protected computers without authorization and causing damage or loss as a result of that conduct. Microsoft claims that through the click fraud schemes, the defendants, operating out of the United States and Canada and within the scope of the CFAA, knowingly caused the transmission of a command or information (in the form of clicks), exceeded authorized access, and caused damage to a protected computer by impairing the integrity of data in adCenter.

The Microsoft complaint alleges that the adCenter system is the required “protected computer.” Under Section (e)(2)(B), a protected computer is any computer “used in interstate or foreign commerce or communication;
including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.” Every time an online ad link receives a click, whether manually or through the use of a clickbot, the server in which the link resides is accessed and so too the router, which forwards the resulting click to the next destination. Thus the server and the router are protected computers.

Microsoft’s damages arise from the unwanted clicks, which violate its terms of service. Advertisers participate in pay-per-click advertising programs to pay for clicks that might result in an economic benefit. Certainly advertisers do not authorize advertising sellers to bill them for clicks other than those derived from a Web user interested in the ad. Advertising sellers operate under standard terms and conditions with affiliate network participants, and these generally prohibit affiliate Web sites from authorizing or encouraging third parties to generate fraudulent clicks on any ad, link, search result, or display. Microsoft’s terms and conditions contractually prohibit adCenter participants from “generat[ing] automated or fraudulent impressions or clicks on sponsored sites on the Microsoft Network.”

Google similarly prohibits the participants of its Adworks program from authorizing any party to “generate automated, fraudulent or otherwise invalid impressions or clicks.” Therefore, any click fraud scheme that misrepresents a click from a legitimate Web surfer—whether the click is manual or automated—exceeds the access authorized by the standard terms and conditions of the various advertising programs.

Microsoft’s position may hold water. The court in In re America Online, Inc. v. National Health Care Discount, Inc. held that the defendants violated the unauthorized access provisions of the CFAA when their agents sent bulk e-mails to the plaintiff’s customers in violation of AOL’s terms of service. In EF Cultural Travel v. Explorica, the court concluded that a competitor’s use of a computer program to systematically and rapidly copy prices from the plaintiff’s Web site to allow systematic undercutting of those prices “exceeded authorized access” within the meaning of the CFAA. This was because the computer program was contrary to the agreement’s prohibition against “use [of] such...information for [the] employee’s own benefit or for the benefit of any other person or business entity.” The Bradley criminal complaint asserts that the use of clickbots constitutes unauthorized access of routers because once a clickbot is active it uses computer routers to “tunnel” the http requests to advertising sellers like Google and conceal their true source, compromising computer routers without authorization.

To satisfy the knowledge requirement of Section (a)(4), prosecutors must prove that the click fraud perpetrator knew that the conduct of generating illegitimate clicks furthered the scheme and exceeded authorized access. In In re Intuit Privacy Litigation, the court held that the defendant’s conduct of placing “cookies” (an electronic file that online companies such as Intuit implant upon computer users’ hard drives when those users visit Internet Web sites) on the plaintiffs’ computers for the purpose of monitoring Web activity satisfied the element of scienter. Therefore, the action of clicking on a link to further a click fraud scheme is sufficient conduct to satisfy the scienter element of the CFAA. The defendants’ use of clickbots or their establishment of so-called click farms for this purpose, as the Microsoft complaint alleges, leaves little doubt about the purposeful nature of the defendants’ conduct.

Increasing revenues by fraudulently generating clicks clearly falls within the definition of “obtaining a thing of value” under Section (a)(4). However, value obtained through a competitor click fraud scheme is more nuanced. The plaintiffs in In re America Online, Inc.—Internet subscribers as well as Internet Service Providers—alleged violations of Section (a)(4) when AOL provided online software that blocked any non-AOL communications software and services used by consumers. AOL sought to dismiss the claims against it filed by other ISPs, contending that by distributing its program it did not obtain anything of value proscribed by Section (a)(4). Disagreeing, the court held that “although the typical item of value in CFAA cases is usually data, in other areas of the law, customers have been found to be a thing of value.” Accordingly, the court rejected AOL’s motion to dismiss, finding that AOL’s actions interfered with the relationships of other ISPs with existing customers and potential subscribers and, therefore, AOL obtained something of value within the meaning of Section (a)(4).

The Microsoft complaint may benefit from the AOL decision. For advertisers in the Microsoft adCenter program to obtain certain keywords, they are required to bid on the keywords in a process similar to an auction. As a result, popular keywords can potentially fetch hundreds of dollars per click. Moreover, the amount an advertiser is willing to pay for a keyword affects the ranking of the displayed Web site. High bidders will have their Web sites listed higher in the rankings and thus can increase their chances of attracting customers. Once a high bidder’s ad budget is exhausted, the sponsored site will no longer appear when the keyword is searched, thus enabling low-cost sites to assume higher positions in the rankings and increase their traffic. By their conduct in ensuring the depletion of their competitors’ ad budgets, the defendants’ Web sites assumed higher rankings in the adCenter program and increased their traffic at a much lower cost than they could have accomplished otherwise. The increased traffic and the higher rankings are potentially important enough to be considered by a court as things of value. The defendants not only obtained more valuable service—that is, higher rankings—than what they paid for but also potentially captured more customers.

CFAA Section (a)(4) provides for unspecified fines or imprisonment (or both) for no more than five years for first offenses and for no more than 10 years for subsequent offenses. However, the effectiveness of Section (a)(4) requires the bringing of prosecutions. David Goldstone, a trial attorney for the Department of Justice Computer Crime and Intellectual Property Division, noted that prosecutions under the CFAA should provide a substantial deterrent. In discussing the prosecution of intellectual property crimes, such as copying protected music on the Internet, Goldstone writes that prosecutions play a vital role in establishing public expectations of right and wrong. Similarly, an online advertising research firm observed that “if more aggressive measures are not put in place to validate clicks, fraud could undermine the entire business model of Internet search engines by causing advertisers to lose confidence.” Through its current complaint, Microsoft is clearly trying to send a message to all click fraud perpetrators. A decision in favor of Microsoft, or even public awareness of the existence and details of the claims at issue, can have the sought-after effect of supporting the viability of online advertising. Click fraud perpetrators are on notice that they run the risk of defending a civil lawsuit.

Online advertisers paying for fraudulent clicks are analogous to consumers adversely affected by insider trading or monopolistic practices. Just as investors rely on the integrity of brokers dealing fairly and honestly and the government to enable fair competition, online advertisers depend on the integrity and legitimacy of the clicks they purchase from traffic brokers. In fact, advertisers contemplating moving a greater percentage of their advertising budgets online must be confident that effective measures are in place to ensure that deceptive practices like click fraud schemes are adequately deterred. The less likely a click results from fraud, the greater demand and value clicks will earn when sold by Internet traffic brokers.

The CFAA must become the primary tool for stopping click fraud. The high risk and probability of prosecutions or civil lawsuits will counterbalance any temptations for easy
money to which those with digital savvy may succumb. Even foreign click fraud perpetrators will feel the heat of the CFAA. While they may be beyond the jurisdictional reach of the CFAA, a successful CFAA action may significantly reduce the benefits they may be deriving from a click fraud scheme. Indeed, the defendants in the Microsoft case include foreign citizens and the domestic entities they control.

The existence of a problem provides a concurrent opportunity. If the CFAA proves a powerful deterrent to click fraud, companies like Google, Yahoo, and MSN can attract advertisers currently spending their advertising dollars with their global competition. International advertisers disillusioned by a government’s lack of action against click fraud are likely to reposition their advertising strategies toward countries where effective recourse against fraudulent click fraud practices are in place. China’s search engine, Baidu, which is responsible for 58 percent of the Chinese online search market, is experiencing dwindling advertiser confidence due to its staggering 34 percent click fraud rate since 2007. At present, Google only has 17 percent of China’s search market.

A successful use of the CFAA in the Microsoft case will send a message that the statute is no longer just theoretically capable of protecting advertisers against click fraud. The CFAA will be a proven tool for ensuring the credibility and confidence of the online market. By relying on the CFAA and demonstrating zero tolerance for click fraud, American companies can capture market share by offering higher quality traffic and a marketplace clear of cheats and scammers.

7 Bradley, No. 504059, Complaint at ¶25.
8 Elgin, supra note 3.
9 Tim Engstrom, ‘Click Fraud’ Worries Retailers, NEWS-PRESS (Fort Meyers), Oct. 13, 2006, at 1D.
13 Id. at 8 (“No reference is made in the text to mere ‘use’ of the mechanisms of interstate commerce, as is the case with other statutes. The transmission itself must be ‘in interstate or foreign commerce.’”).
15 EF Cultural Travel BV v. Explorica, Inc., 274 F. 3d 577, 581 (1st Cir. 2001).
19 Id. at 4.
Failure to cooperate with the State Bar Enforcement Division can transform a minor complaint into a major disciplinary matter

The California Supreme Court has long held that the purpose of a disciplinary proceeding is not to punish the attorney but to protect the public, preserve public confidence in the legal profession, and ensure the highest professional standards for attorneys. The supreme court’s power to discipline licensed attorneys in California is inherent and expressly reserved. Business and Professions Code Section 6087 authorizes the supreme court to delegate this function to the State Bar—as long as any actions by the State Bar are reviewable by the court—and the supreme court has done so for much of the discipline process.

The State Bar of California, a nonprofit public corporation, acts as the administrative arm of the California Supreme Court in matters involving the admission, regulation, and discipline of attorneys. The Office of the Chief Trial Counsel (OCTC) is the enforcement entity of the State Bar, responsible for prosecuting cases of attorney misconduct before the State Bar Court.

Attorneys come to the attention of the Enforcement Division of the State Bar in various ways. The majority of cases involve a complaint from a former client. Complaints also can come from opposing counsel or parties and judges. Banks are required to report attorneys if they bounce a check on their account.

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client trust account. Other enforcement actions emerge from an attorney being held in contempt or having a modification or reversal of a judgment based on misconduct, incompetent representation, or willful misrepresentation. A lawyer’s criminal conviction sets in motion a process leading to a determination whether the crime involves moral turpitude or other misconduct warranting discipline, and a hearing to decide what, if any, discipline, is warranted.

The OCTC’s Intake Unit receives a complaint regarding an attorney and proceeds to conduct an initial analysis of its viability. This is followed by a preliminary investigation and attempts to resolve the matter. If the complaint survives the intake review, it proceeds to a State Bar investigator for further handling. Statistically, the chances are remote that a complaint or other inquiry will result in either the filing of a formal charge, in the form of a Notice of Disciplinary Charges (NDC), or a prenotice disciplinary disposition. Indeed, only 20 to 25 percent of all complaints remain viable beyond the Intake Unit. In 2008, for example, of the 13,647 inquiries that were made, 10,845 were closed at the intake level, leaving only 2,802 inquiries for further investigation.

If Intake sends the complaint to an investigator, the attorney being complained about—referred to as the respondent—will be contacted at the address maintained in the State Bar’s membership files for that attorney. The initial contact is via correspondence, colloquially known as a TR (“to respondent”) letter. The TR letter will state that the State Bar has received a complaint and will identify the complainant, give a brief synopsis of the complaint, request a written response, and seek documentation from the attorney.

The TR letter’s use of the word “request” for a response is misleading. While respondents are not required to waive any statutory or constitutional privileges, they are required to cooperate with the State Bar investigation as a legal and ethical duty. Courts have held that an attorney’s failure to participate in the State Bar’s investigation of misconduct is a breach of that duty. A respondent’s failure to cooperate with the State Bar’s investigation of his or her misconduct is a substantive violation of Business and Professions Code Section 6068(i), which requires cooperation, and is not merely an aggravating factor.

Failure to cooperate can transform a minor complaint that could have been handled without a disciplinary disposition into a full-blown disciplinary matter. Approximately 65 to 80 percent of all matters referred for investigation end with a resolution other than discipline or the filing of a NDC. Thus a fear of confronting the State Bar can ultimately lead precisely to the dreaded confrontation as a direct result of the respondent’s failure to participate.

It is not unusual to find State Bar prosecutors who are former assistant district attorneys. Others have criminal and civil litigation backgrounds from diverse practice areas. Many serve as prosecutors for more than 10 years, and they quickly gain experience in attorney discipline cases by focusing exclusively on them. They not only have the home field advantage but also develop expertise dealing with a wide spectrum of practitioners. Respondents practice in a variety of substantive areas and are diverse geographically, ethnically, educationally, generationally, and temperamentally.

Prosecutors know the rules, and respondents find it hard to play the game when they are not as knowledgeable. For respondents, being a solid criminal or civil court practitioner is not enough if they are unfamiliar with the State Bar Act, ignorant of the Rules of Procedure of the State Bar of California, or unaware of the Rules of Practice of the State Bar Court.

The State Bar operates under a specialized set of procedural rules. Its attorney disciplinary proceedings have been described as adversarial and quasi-criminal, evoking a sense of being simultaneously criminal and civil. The irony is that the proceedings are neither civil nor criminal. They are administrative and are not governed by either civil or criminal procedural rules. Moreover, criminal procedural safeguards do not apply in disciplinary proceedings. The criminal exclusionary rule does not apply in attorney discipline cases, and neither does the prohibition against double jeopardy. The

Just because a respondent does not like a prosecutor’s settlement position does not mean it is unreasonable. If the respondent has to conjure up a novel legal theory to present a defense or do other legal gymnastics to explain away the obvious, the chances of a successful defense are pretty slim. Respondents may request an Early Neutral Evaluation conference with a State Bar judge, and this may be helpful in determining the merits of the matter.
possible whether to settle a disciplinary matter—a determination that usually involves a cost-benefit analysis. Generally, the best offer comes early in the process. If the respondent is able to resolve the problem before the proceedings become full blown, he or she may not receive public discipline, or any discipline at all. Delay in deciding whether to settle frequently means that public discipline becomes more of a possibility. This is so particularly when discipline would not have been warranted but for the respondent’s lack of cooperation with the investigation.

Prosecutors formulate disciplinary offers based upon several factors, including the State Bar’s Standards for Attorney Sanctions for Professional Misconduct as well as the alleged misconduct, and any mitigating or aggravating factors. The State Bar’s standards set forth the baseline for disciplinary dispositions and “shall apply to the fixing of a final disciplinary sanction....”31 They provide for a broad range of sanctions depending upon the nature and gravity of the offense and the resulting harm to clients.32 However, the standards “do not mandate a specific discipline.”33 They define the factors that the court may consider as either aggravation or mitigation.34

Ever since the California Supreme Court in In re Silverton35 affirmed that the State Bar’s standards must be afforded great weight in disciplinary recommendations, the OCTC’s willingness to deviate from the standards became minimal. Further, a prosecutor’s formulation of a settlement position is refined by other supreme court decisions as well as Review Department opinions.

When a respondent finds the prosecutor’s best offer unacceptable, he or she should proceed carefully. A respondent who steadfastly believes that no discipline is warranted should not stipulate to discipline for fear of going to trial. However, the respondent’s belief should be based upon a reasonable expectation of doing better at trial. Just because a respondent does not like a prosecutor’s settlement position does not mean it is unreasonable. If the respondent has to conjure up a novel legal theory to present a defense or do other legal gymnastics to explain away the obvious, the chances of a successful defense are pretty slim. Respondents may request an Early Neutral Evaluation conference with a State Bar judge, and this may be helpful in determining the merits of the matter.36

The respondent pays the costs of any proceeding that results in public discipline.37 and those costs increase as the resolution of the process takes longer to conclude. According to a formula approved by the Board of Governors pursuant to the Business and Professions Code, the cost of a disciplinary proceeding presently ranges from $1,983 to $11,107, not including other allowable associated costs of litigating the case or the costs of seeking review. If a respondent chooses to go to trial and is exonerated of all charges, the respondent can move for reimbursement of costs authorized under the Business and Professions Code, as interpreted through the State Bar’s rules of procedure.38

**Going to Trial**

Respondents should not rely on the State Bar’s pretrial statement and exhibits as their reminder to file their own pretrial statement. Rule 211 of the Rules of Procedure of the State Bar of California requires the parties to attempt to file a joint pretrial statement. If they are unable to do so after a good faith effort, the parties must file separate statements. Rule 1221 of the Rules of Practice of the State Bar Court specifies that the parties must meet in person or telephonically to comply with Rule 211. Nevertheless, despite these rules, it is not infrequent that a respondent fails to timely file a pretrial statement.

Without a joint statement, the State Bar prosecutor will send the respondent a pretrial statement, a set of marked and paginated documents representing the State Bar’s exhibits, and a witness list of those scheduled to testify at the trial. This is accomplished 20 days prior to the pretrial conference or at another time specified by the court.39 When this happens, the respondent risks discovering that it may be too late to prepare an adequate defense. Trying to conjure up a defense at the last minute is like having an architect draw up plans for a fortified castle after the siege has begun and the opposing army is ready with sharpened swords.

The failure to file any type of pretrial statement can lead to the respondent becoming a silent spectator at his or her own disciplinary hearing. As Rule 211(f) states, “Failure to file a pretrial statement in compliance with this rule may constitute grounds for such orders as the Court deems proper, including but not limited to the exclusion of evidence or witnesses.” In Matter of Heiner, the Review Department recognized that pretrial statements are an effective tool for the efficient conduct of State Bar trials.40 The court warned that “[i]nexcusable failure to comply with an order requiring a pretrial statement...should not be treated lightly.”41 Furthermore, the failure to comply with pretrial procedures may be considered a serious aggravating circumstance.42 Failing to file a pretrial statement can have a negative effect on the disciplinary recommendation if the respondent is found culpable of misconduct.

The burden of proof for State Bar prosecutors is clear and convincing evidence.43 The respondent bears the same burden of proof for mitigating circumstances.44 Further, at the evidentiary hearing, the respondent has a duty to present all evidence that he or she deems favorable.45

No rule or standard holds that respondents must prove affirmative defenses by clear and convincing evidence. Evidence Code Section 500 provides that a party has the burden of proof for the facts underlying a claim or defense. Rule 214 of the State Bar rules of procedure incorporates Evidence Code Section 500. Although not implicating the burden of proof, the Review Department, in the Matter of Wolff, indicated that the rule of limitations in State Bar proceedings must be pled as an affirmative defense—and the respondent bears the burden when making this pleading.46 In the Matter of Respondent B, the Review Department held that “the standard of clear and convincing evidence is so basic to State Bar proceedings that any deviation from this standard is ordinarily spelled out in the State Bar Act or the Transitional Rules of Procedure.”47

**Ineffective Trial Defenses**

Some attorneys believe that the best defense is to go on offense. Their instinct is to lash out in the hope that adversaries will back down. However, State Bar prosecutors are not intimidated by aggressive attorneys. Insults, threats, and other forms of intimidation tactics may be taken as indications that the respondent has no legitimate defense to the charged conduct.

For example, in Matter of Steven G. Hanson, the respondent repeatedly threatened the prosecutor and the trial judge.48 In his pleadings he wrote, “So far in this case, both the court and the prosecutors, are ignoring law and procedure thereby subjecting themselves ultimately to personal liability in a Federal Court action both through RICO and civil rights claims.” Respondents are not going to intimidate anyone in the State Bar disciplinary process into dropping charges or believing the absurd. Ultimately, the respondent defaulted at trial and was disciplined. Interestingly, the State Bar Court did not find Hanson’s behavior to be aggravating under Standard 1.2(b)(vi).

Nevertheless, the Review Department did find that overly hostile litigation tactics were an aggravating factor in a recent unpublished decision. The Matter of Richard Isaac Fine is notable for the proposition that aggression is a poor litigation tactic in State Bar proceedings.49 The respondent had engaged in a pattern of misconduct in which he repeatedly misused Code of Civil Procedure Section 170.3—a provision for challenging judicial officers due to bias or prejudice—against a superior court commissioner who had ruled against him. The respondent continued to attempt to coerce and intimidate the judicial
1. The primary purpose of the State Bar of California’s disciplinary system is to punish errant attorneys. 
   True. False.

2. The State Bar is a separate and independent agency, with the inherent authority to discipline attorneys. 
   True. False.

3. In State Bar disciplinary proceedings, the State Bar has to prove its case by what standard of proof? 
   A. Beyond a reasonable doubt. 
   B. Preponderance of the evidence. 
   C. Clear and convincing. 
   True. False.

4. In State Bar disciplinary proceedings, the respondent bears the burden of proving mitigating circumstances by what standard of proof? 
   A. Clear and convincing. 
   B. Preponderance of the evidence. 
   C. Beyond a reasonable doubt. 
   True. False.

5. An attorney has a duty to cooperate and participate in a State Bar disciplinary investigation. 
   True. False.

6. The State Bar’s Standards for Attorney Sanctions for Professional Misconduct provide for a broad range of sanctions. 
   True. False.

7. The State Bar’s standards are given minimal weight by the State Bar Court in determining disciplinary dispositions. 
   True. False.

8. State Bar disciplinary proceedings are civil proceedings that are governed exclusively by California’s Code of Civil Procedure. 
   True. False.

9. An attorney can mitigate exposure to disciplinary actions by delegating responsibility for handling client funds to a designated employee. 
   True. False.

10. The Rules of Procedure of the State Bar of California require that the parties attempt to stipulate to some or all issues prior to trial. 
    True. False.

11. Rule 211 of the State Bar’s rules of procedure requires the parties to attempt to file a joint pretrial statement. 
    True. False.

12. Banks are required to report attorneys if they bounce a check on their client trust account. 
    True. False.

13. According to statistics for 2004 to 2008, the vast majority of complaints against attorneys received by the State Bar result in no disciplinary disposition. 
    True. False.

14. State Bar disciplinary proceedings are quasi-criminal, and therefore attorneys who cannot afford representation have a right to court-appointed counsel. 
    True. False.

15. Attorneys in State Bar proceedings can invoke their right to remain silent. 
    True. False.

16. An attorney can be found culpable of moral turpitude if his or her gross negligence allowed trust funds to be misappropriated, even without the attorney’s knowledge. 
    True. False.

17. The Review Department of the State Bar Court has held that the mitigating value of character evidence is undermined if the witness is not aware of the full extent of the respondent’s misconduct. 
    True. False.

18. The State Bar uses its own rules of evidence, completely separate and apart from either criminal or civil evidence rules. 
    True. False.

19. Prior to going to trial, an attorney may request an Early Neutral Evaluation conference with a State Bar judge to evaluate the attorney’s case. 
    True. False.

20. If an attorney is found culpable of any of the charged allegations and receives a public disciplinary sanction, the attorney will be responsible for paying the costs of the proceeding. 
    True. False.
officer during the disciplinary proceeding before the State Bar Hearing Department, while the matter was under review by the Review Department, and even after his disbarment.

Some respondents bring to disciplinary proceedings a firm belief that they are being wronged. Respondents should keep in mind that in all likelihood, they are the only ones involved in the matter who see themselves as the victim. If a respondent’s trial strategy is to mount a martyr defense, the respondent should be prepared for the prosecutor to present a former client whose case the respondent bungled, whose telephone calls the respondent ignored, and whose money the respondent has not returned.

One variation of the “respondent as victim” defense is the “evil secretary” defense. Respondents use this defense primarily when trust funds turn up missing. This defense is an attempt to shift responsibility to a subordinate. Nevertheless, even if an attorney is the victim of duplicitous staff, the respondent may still be culpable. Attorneys can delegate authority but not responsibility—and courts appear reasonable, articulate, and prepared to communicate with a client. Thus the defense—and the respondent has a special relationship with each document. The respondent may admit declarations from character witnesses to establish the foundation of an exhibit. Furthermore, respondents often assume, incorrectly, that courts will invariably admit all prosecutorial evidence.

For example, in Matter of Rubens, the Review Department held that an attorney violated Business and Professions Code Section 6106 by abdicating responsibility for a case to support staff. Respondents have a “personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds.” Moreover, “Trust account deficiencies are attributable to attorneys—not their employees.” Responsibility for trust fund management and oversight cannot be delegated. The Review Department also held a respondent culpable of moral turpitude based upon gross negligence because the respondent’s slippshod procedures allowed entrusted funds to be misappropriated without his knowledge.

Another variant of the “respondent as victim” defense is the “crazy client” defense. This is used when respondents fail to communicate with or have abandoned a client. Respondents using this defense claim that “my client incessantly called, was unreasonable, harassed me, ranted, had mental issues.” Just by using the crazy client defense, respondents are tacitly admitting that they were avoiding their client. The respondents are providing evidence of their failure to communicate with a client. Thus the defense often backfires—and if the client at court appears reasonable, articulate, and aggrieved, the judge may turn the crazy client defense into a “respondent lacks credibility” determination.

Respondents should not stipulate to evidence just because they are afraid of going to trial or because they want to cut the trial short. Rule 130 of the State Bar rules of procedure requires that the parties attempt to stipulate to some or all issues prior to trial. However, since the State Bar has the burden of proving its case by clear and convincing evidence, reasonable doubts regarding a charge of professional misconduct must be resolved in favor of the accused attorney. The job of respondents is to hold prosecutors responsible for meeting their burden. Likewise, stipulating to adverse evidence as a strategem for introducing positive evidence is almost never worth the bargain. Respondents are mistaken if they think that the only benefit of the bargain for the prosecutor is to make the trial more efficient or shorter or to not require the presence of a witness to establish the foundation of an exhibit. Furthermore, respondents often assume, incorrectly, that courts will invariably admit all prosecutorial evidence.

The vagaries of trial make stipulating to evidence a gamble for respondents. A prosecutor’s willingness to stipulate may indicate that the prosecutor would rather be spared the trouble of having to lay a foundation for exhibits or calling foundational witnesses. On the other hand, the eagerness of prosecutors to stipulate may also indicate that the case is falling apart and the prosecutors are scrambling at the last minute to prove an element of the charged misconduct.

For prosecutors, stipulating to evidence is a win-win situation. With a stipulation, they shorten the trial and may ensure the admission of evidence that may not have come in but for the stipulation. Prosecutors face no downside when they stipulate to the admission of evidence because almost all documents in a State Bar trial involve the underlying representation for which the respondent has been accused of professional misconduct—and the respondent has a special relationship with each document. The respondent either wrote the document, received it, or otherwise will be able to get it admitted through the respondent’s own testimony. The respondent will almost certainly see the admission of all of his or her evidence unless it does not directly relate to the case. If a respondent is unable to get the evidence admitted, it is likely that the evidence is tangential and of limited value to the defense.

For example, respondents often want prosecutors to stipulate to allowing affidavits of character witnesses in lieu of having the witnesses testify. Standard 1.2(e)(iv) allows consideration of “an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities who are aware of the full extent of the member’s misconduct.” If the prosecutor makes no objection, the respondent may admit declarations from character witnesses without the necessity of those witnesses making an appearance in court.

Still, in practice, there is only so much that a prosecutor can elicit in cross-examining a character witness. The prosecutor will cross-examine the witness about the length of the relationship with the respondent, the context in which the witness formed the opinion provided by the witness, what the respondent or respondent’s counsel told the witness prior to testifying, what documents the witness reviewed, and what the witness knows about the charged misconduct. Indeed, what the witness knows about the charged misconduct is the most common source of prosecutorial cross-examination. The Review Department has held that the mitigating value of character evidence is undermined if the witness is not aware of the full extent of a respondent’s misconduct. If the witness is aware of the extent of the alleged misconduct, the prosecutor typically asks, “If the allegations were true, would that change your opinion about the respondent’s reputation for truthfulness?” Prosecutors are not going to gain much from that question or even the cross-examination in its entirety.

Indeed, the prosecutor’s case will suffer very little harm if the prosecutor agrees to stipulate to allowing a declaration from the respondent’s spouse telling the court what a wonderful person the respondent is. Nevertheless, respondents will sometimes stipulate to one or all of the prosecution’s exhibits in exchange for the admission of the most innocuous piece of evidence.

Determining how respondents will fare in the State Bar’s disciplinary process can be gleaning from the 2008 Report on the State Bar of California Discipline System for 2004 through 2008. During those years, the chances of a case receiving a dismissal or a nondisciplinary disposition ranged between 8.9 percent to 12 percent. Using those statistics as a guide, a respondent who goes to trial has about a 90 percent chance of being found culpable of some misconduct and receiving a disciplinary disposition.

Therefore, all attorneys should be familiar with the State Bar’s disciplinary process, including the rules by which the system is governed and the pitfalls that may arise for the defense. For a respondent to be successful, he or she must perform an honest inventory of the conduct at issue in the case, know the adversary, and create the circumstances necessary for engaging prosecutors on favorable terms. Respondents are responsible for presenting their best defense. Indeed, their careers depend on doing so.

1 Transcript of State Bar Public Hearing on Admission, Competence and Discipline Pursuant to Business and
Professions Section 6095(a), at 102.
4 BUS. & PROF. CODE $6087.
5 Id.; Emslie v. State Bar, 49 Cal. 3d 210 (1974); Saleby v. State Bar, 39 Cal. 3d 547, 557 (1985); see also BUS. & PROF. CODE $6077.
7 BUS. & PROF. CODE $6091.1.
8 BUS. & PROF. CODE §§6086.7, 6086.8.
9 BUS. & PROF. CODE §§6101, 6102.
11 BUS. & PROF. CODE §6068(i).
13 Peterson, 3 Cal. State Bar Ct. Rptr. 73.
16 Giddens v. State Bar, 28 Cal. 3d 730, 734 (1981); (citing In re Russo, 390 U.S. 544, 551 (1968)).
19 Id. at 226.
21 Emslie, 11 Cal. 3d at 226-30.
22 In re Crooks, 51 Cal. 3d 1090, 1100 (1990).
24 EVID. CODE §776(a).
26 Id. at 1116; Ainsworth v. State Bar, 46 Cal. 3d 1218 (1988).
27 BUS. & PROF. CODE §6085; see Ainsworth, 46 Cal. 3d at 1229.
28 Walker, 49 Cal. 3d at 1116; Matter of Acuna, 3 Cal. State Bar Ct. Rptr. 495 (Review Dept. 1996).
31 STATE BAR R. PROC. tit. IV, STANDARDS FOR ATTORNEY SANCTIONS FOR PROF'L MISCONDUCT l.2.
33 Cooper v. State Bar, 43 Cal. 3d 1016, 1025 (1997).
35 STATE BAR R. PROC. tit. IV, STANDARDS FOR ATTORNEY SANCTIONS FOR PROF'L MISCONDUCT l.2.
36 In re Silverton, 36 Cal. 4th 81, 89-92 (2005).
37 STATE BAR R. PROC. 75.
38 BUS. & PROF. CODE §6068.10.
39 STATE BAR R. PROC. 283; BUS. & PROF. CODE §6086.10(d); see Matter of Wu, 4 Cal. State Bar Ct. Rptr. 263 (Review Dept. 2001).
40 STATE BAR R. PROC. 211.
43 STATE BAR R. PROC. 213.
44 STATE BAR R. PROC. tit. IV, STANDARDS FOR ATTORNEY SANCTIONS FOR PROF'L MISCONDUCT 1.2(e).
45 Warner v. State Bar, 34 Cal. 3d 36 (1983); (citing Yokozevski v. State Bar, 11 Cal. 3d 436, 447 (1974)); (holding that members of the bar have a duty to prevent any evidence they deem favorable to themselves, and a failure to do so may justify a denial of a motion for a rehearing for the purpose of presenting additional evidence).
48 Matter of Steven G. Hanson, State Bar case no. 01-O-04659.
52 Id.
53 To ensure that attorneys and applicants are treated fairly and afforded due process in discipline, admissions and regulatory proceedings conducted by the State Bar of California;
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55 To ensure the quality of advocacy by defense counsel before the State Bar and State Bar Court;
56 To work with the State Bar, local bar associations, and others to address the root causes of attorney misconduct.
Spontaneous utterances made in a domestic violence incident may still be admissible evidence even after *Crawford*

**DOMESTIC CONFRONTATION**

by Shaun Dabby Jacobs

**OFTEN IN DOMESTIC VIOLENCE TRIALS** the strongest evidence is the victim’s statements. However, due to the nature of the crime, many times the victim does not appear to testify at trial. While it is possible for prosecutors to proceed without the victim’s testimony, the U.S. Supreme Court’s 2004 ruling in *Crawford v. Washington*,¹ which is based on the confrontation clause of the U.S. Constitution,² as well as two recent California cases, make that task difficult. However, even when the victim does not appear or testify at trial, it is still possible to get the victim’s statements admitted into evidence. For example, if the statements are otherwise admissible under Evidence Code Section 1240 (which is titled Spontaneous, Contemporaneous, and Dying Declarations)—such as statements the victim made to a 911 operator, the police, or healthcare providers—courts will often admit them.

Shaun Dabby Jacobs is a deputy city attorney in the Los Angeles City Attorney’s office. She has tried 30 misdemeanor criminal cases to verdict, including 12 domestic violence trials.
HELP ME!

She is bleeding!

I saw them together!

It was her.

She had a gun.

He threatened to kill me...

Mom is screaming...

Please send someone!

HE IS ATTACKING ME!
To be admitted, the primary reason for the statements must have been to assist the victim with an ongoing emergency and not to prepare for trial. If the victim made the statements to preserve and provide testimony for trial but does not appear, they are inadmissible hearsay and violate the defendant’s Sixth Amendment right to confront his or her accuser. As a result, the admissibility of domestic violence testimony often depends on who—the defense or the prosecution—does a better job of characterizing the victim’s statements in light of Crawford.

The facts in Crawford are simple. The defendant, Crawford, confronted and stabbed a man named Lee who allegedly had tried to rape Crawford’s wife. Crawford was charged with assault and attempted murder. Subsequently, Crawford claimed he had acted in self-defense because he believed Lee had a weapon. However, Crawford’s wife gave a tape-recorded statement to police during a station house interview specifying that his husband’s self-defense claim by stating that Lee did not have a weapon, and that she had led Crawford to Lee’s apartment and facilitated the assault. Over defense objection, the prosecution played this tape-recorded statement at trial and argued it was “damning evidence” that refuted Crawford’s self-defense claim. Crawford could not cross-examine his wife at trial because Washington’s marital privilege barred his wife from testifying without Crawford’s consent. The privilege, however, did not extend to a spouse’s out-of-court statements that were admissible under a hearsay exception. Therefore, the trial court admitted the tape-recorded statements as statements against penal interest. The jury convicted Crawford of assault.

The Court granted review. Justice Antonin Scalia asked whether the procedure used by the trial court in Crawford complied with the Sixth Amendment’s guarantee that an accused shall enjoy the right to confront the witnesses against him or her. In a lengthy opinion tracing the history of the confrontation clause, the Court noted, under civil law, justices of the peace and other officials examined and took statements of suspects and witnesses prior to trial. These statements were later read into evidence in lieu of trial testimony. The Court held the admission of the wife’s statements violated Crawford’s Sixth Amendment right to confront and cross-examine his accuser. Significantly, however, the Court also stated that not all hearsay implicates the Sixth Amendment’s core concerns. An accuser who makes a formal statement to a government officer bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The confrontation clause applies to witnesses against the accused or those who bear testimony. What is testimony? The Court went on to distinguish between out-of-court statements wherein a witness may bear testimony, “testimonial” statements, and statements in which the witness did not supply testimony, also known as nontestimonial statements. Essentially, “testimonial” is typically “[a] solemn declaration or affirmation made for the purpose of establishing or providing some fact.” There have been various formulations for the definition of testimonial statements. For example, prior testimony at a preliminary hearing and before a grand jury is testimonial. Statements made during “police interrogations” are also testimonial. More formal out-of-court statements, such as depositions and affidavits, are also testimonial.

Since the Supreme Court decided Crawford, California courts have heard and examined many cases to determine whether a particular statement is testimonial and requires the presence of the speaker at trial. If the statement would otherwise be admissible under an exception to the hearsay rule—such as an excited utterance or spontaneous statement under Evidence Code Section 1240, or a statement to a medical professional—courts will often admit the statement. The question is: what is the victim’s purpose in making the statement? Is the victim making the statement because there is an ongoing emergency and he or she needs help, or has the emergency passed? If it is an ongoing emergency, or the incident just happened and the person is still under the stress and excitement of the incident or situation, courts often find the statements are not testimonial and admit them into evidence. If significant time has passed, or the victim is in a place of safety and the suspect is already in custody, the defendant is likely to be more successful in claiming that the victim made his or her statements in response to police interrogation and that the statements are testimonial and inadmissible without live testimony.

In examining specific cases, courts often admit calls to 911 emergency dispatchers and paramedics responding to the scene because it is clear the purpose of the call is to get help, not to create testimony in preparation for a court hearing or a trial. For example, in People v. Corrella, a police officer, in response to a 911 emergency call, went to a motel where the defendant lived with the victim, his wife. The officer saw the victim in the parking lot. The victim, who was crying, distraught, and in apparent pain, complained that the defendant assaulted and punched her. The officers felt a bump on her head. The victim made similar statements to the 911 dispatcher and the paramedic who arrived at the scene. The victim did not testify at trial, but the court admitted the 911 call and the victim’s statements to the officers regarding the assault. The Corrella court upheld the defendant’s conviction. The victim’s statements did not constitute a police interrogation because they were not “knowingly given in response to structured police questioning, and bear no indicia common to the official and formal quality of the statements deemed testimonial by Crawford.”

In 2006, in Davis v. Washington, the U.S. Supreme Court affirmed that 911 emergency calls are not testimonial but are otherwise admissible under exceptions to the hearsay rule. In Davis, the victim called 911 and said her boyfriend, Davis, was attacking her. The Court noted, “[S]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” In a footnote, the opinion added: “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.” In a companion opinion the Court made it clear that statements made at the scene to police officers are not necessarily testimonial. Even statements to 911 operators or police officers at the scene shortly after the event occurred are admissible if the person is still under the stress and excitement of the emergency.

In contrast, in Hammon v. Indiana, the Court found statements that a domestic violence victim made to officers were testimonial because the victim made the statements after the defendant and the victim were separated. The Court went on to define “testimonial.” Statements “are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or provide past events potentially relevant to later criminal prosecution.”

Further, in California, statements given in response to “nonsuggestive police inquiries would not bar application of the spontaneous utterance hearsay exception.” Therefore, the mere fact that police asked the victim what happened does not make the responses nonsensational or inadmissible.

California Cases

In the years after the Supreme Court decided Crawford and Davis, California courts took a narrow view of what constituted a testimonial statement and an expansive view of what constituted a nontestimonial statement. For example, in People v. Saracoglu, the victim came to the police station about a half hour after her boyfriend had assaulted her. When she arrived at the station, she was “nervous, crying, and shaking.” The victim described her boyfriend’s attack and his threats to kill her to the police. The officer taking the report...
were spontaneous statements pursuant to the 911 operator and the responding officers. The appellate court held the statements by the victim to both the officers about the stabbing. The appellate court did not testify at trial, but the court admitted the statements to the 911 operator, as well as testimony from the responding officers regarding the statements the victim made to the officers about the stabbing. The appellate court held the statements by the victim to both the 911 operator and the responding officers were spontaneous statements pursuant to Evidence Code Section 1240 and did not violate the defendant’s confrontation clause right.

The appellate court affirmed the trial court’s ruling on appeal, holding that the statements constituted an excited utterance because the victim was distraught, crying, shaking, and fearful. The appellate court also held that the officer’s testimony did not violate the defendant’s right to confront and cross-examine witnesses. The court found that the conversation between the victim and the officer was for the purpose of dealing with an ongoing emergency “rather than to produce evidence about past events for possible use at a criminal trial.”

Similarly, in People v. Brem, the victim of a stabbing called 911, and officers responded to the scene shortly thereafter. The stabbing victim did not testify at trial, but the court admitted the statements the victim made to the 911 operator, as well as testimony from the responding officers regarding the statements the victim made to the officers about the stabbing. The appellate court held the statements by the victim to both the 911 operator and the responding officers were spontaneous statements pursuant to Evidence Code Section 1240 and did not violate the defendant’s confrontation clause right.

The court in People v. Johnson also held the trial court properly admitted an absent crime victim’s statements to an officer that the defendant punched her in the face. The court found the victim made the statements spontaneously and to get help in an emergency. Since the officer questioned the victim to assess the situation, the trial court properly admitted the victim’s statements at trial.

Finally, in People v. Osorio, the court found the trial court properly admitted the victim’s statements to the 911 operator, the paramedics, and the police at trial even though the victim did not testify at trial. She made the statements to paramedics not for the purpose of assisting with a crime investigation but to treat her injuries. The court further held the trial court properly admitted statements the victim made to the officers who arrived at the scene shortly after it occurred because “[p]reliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an interrogation. Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in Crawford.”

Melendez-Diaz, Vargas
Perhaps in response to continuing efforts to expand the reach of post-Crawford rulings, the U.S. Supreme Court recently decided a defendant’s right to confrontation also extends to witnesses testifying about scientific matters. In Melendez-Diaz v. Massachusetts, a criminologist tested powder to determine if it contained illegal drugs but did not testify. Instead, the supervisor reviewed the criminologist’s laboratory report and testified. The Court held the supervisor’s testimony violated the defendant’s Sixth Amendment right to confrontation because the criminologist conducted his work and prepared the subsequent report for the sole purpose of aiding the prosecution and preparing the case for trial.

Since the Court issued its opinion in Melendez-Diaz, California courts have revisited what constitutes testimonial statements. For example, in People v. Vargas, the California Court of Appeal recently held that a rape victim’s statements to healthcare practitioners who perform a sexual assault examination are testimonial, and those healthcare practitioners are acting as agents of law enforcement when they perform the sexual assault examination. The court found the primary purpose of the sexual assault examination was “to establish or prove some past fact for possible use in a criminal trial.” That the rape victim may have made the statements to seek treatment of a medical problem as well did not negate the fact that the primary purpose of the examination was for “documenting the nature of the sexual assault and gathering evidence for transmittal to the police and for possible later use in court.”

Thus, since the victim did not testify at trial, the appellate court held the trial court violated the defendant’s right of confrontation by admitting the statements to the nurse performing the sexual assault examination.

The record does not say whether the rape victim went to the hospital on her own or in response to her crime report. If the victim went to the hospital on her own and told a healthcare practitioner she was raped and gave some details, arguably the statements the victim made to the healthcare practitioner before the commencement of the sexual assault examination would be admissible, because the victim’s purpose at that point is to seek medical treatment. The healthcare practitioner’s purpose is also to render medical aid. Until the sexual assault examination begins, the purpose of neither the victim nor the healthcare practitioner is to assist with an ongoing criminal investigation or to assist in the preparation of the case for trial. Thus, when prosecutors analyze their cases, they should determine whether the victim made any statements about the violence before the formal sexual assault examination begins. Defense counsel’s focus will be to exclude statements the victim made to medical personnel because when the medical examination switches from treating the injuries to determining the cause of injuries in preparation for trial, the statements by the victim are testimonial.

Banos
In a domestic violence case, the application of general principles to specific fact patterns, as in the cases above, can result in highly specific analyses. This is exemplified in People v. Banos. The defendant killed his ex-girlfriend after numerous acts of domestic violence and violations of restraining orders. At trial, the prosecution introduced multiple statements by the victim to police officers from the various days on which the instances of violence and restraining order violations occurred. In the first instance of violence, which occurred on June
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7, 2003, the defendant attacked the victim at a laundromat and in a taxi. When an officer arrived at the victim’s apartment, she was excited and upset, and the victim described the defendant’s violence that day. The defendant was not at the victim’s residence when the officer arrived. A few minutes after the officer left, the victim called 911 because the defendant returned to the residence to restart the violence. The prosecutor introduced the 911 call, which the defendant did not challenge on appeal. During the 911 call, the victim asked the defendant why he was hitting her, and the defendant responded he was going to kill her. The defendant also asked the victim numerous times whether she was going to shut up or the defendant would kill her. The police officer entered the apartment toward the end of the 911 call and arrested the defendant. A court subsequently issued a criminal protective order.32

On December 30, 2003, the victim called 911 to report a violation of a protective order. When officers arrived, the defendant was walking out of the victim’s apartment. The officer described the victim as “frightened, very nervous.” The officers arrested the defendant. After the officers took the defendant into custody, they spoke to the victim about what happened. On March 27, 2004, the victim called 911 from a 7-11 and reported that the defendant was at her apartment, which was a violation of the restraining order. After an officer verified the existence of the order, he went to the victim’s apartment and found the defendant inside. The officer then arrested the defendant again.31

One month later, the defendant called the victim at her apartment, and the victim’s new boyfriend answered the phone and handed the phone to the victim. After the victim spoke to the defendant, she told her new boyfriend the defendant had threatened to kill her. Later that night, the defendant came to the victim’s apartment and climbed through a window. When the police arrived, they heard moaning sounds of a woman from inside the victim’s apartment and through an open door saw the defendant wearing black gloves and kneeling beside the victim. The officer identified himself as a police officer, and the defendant slammed the door shut. When the officer went into the apartment, he found the victim lying on the floor covered in blood. At trial, the defendant admitted to hitting her with a hammer and killing her.34

The trial court admitted all the victim’s statements about the defendant into evidence. The court of appeal held that the statements the victim made to officers on June 7, 2003, and on December 30, 2003, were testimonial. With respect to the June 7, 2003, statements, the court held they were testimonial because the “defendant had left, and [the victim] was in a place of ostensible safety—her home.”35

In addition, the officer did not interrupt an ongoing emergency. Although the officer described the victim as “excited” and “upset” he did not describe her as “distraught,” as did the officer in describing the victim in Saracoglu. With respect to the statements the victim made when the officer returned the second time that evening, the court found because the defendant was already in custody, the ongoing emergency ended.36 This represents a narrowing of the holding in Saracoglu because the victim in Banos was excited and upset, which, until this opinion, was sufficient for purposes of Evidence Code Section 1240. In addition, the victim’s home clearly was not a place of safety as evident from the fact that the defendant returned to the victim’s apartment shortly after the victim called 911 the first time on June 7, 2003, and he continued to return in later months. It is difficult to see how a statement made to police in the victim’s home, when the defendant was still at large, was testimonial, while a similar statement made at a police station, where the victim was ostensibly safer, would not be viewed as testimonial. The danger to the victim was equal in both locations because the defendant knew where the victim lived and could easily seek her out later. (Ultimately, under the forfeiture by wrongdoing doctrine, the court admitted even the testimonial statements.)

The court found the statements the victim made to officers on March 27, 2004, in the call to 911 and to the responding police officer were not testimonial. The court found these statements similar to those of Saracoglu because in both cases, the victim left her home to gain police protection. In Banos the court found the victim’s statements to the officer while she was at the 7-11 were also not testimonial because the officer was questioning the victim “to ascertain what was happening in order to resolve a dangerous situation: defendant was at [the victim’s] apartment and she was afraid to go home.”37

It is clear from the recent cases that courts still struggle with what constitutes testimonial statements as opposed to Evidence Code Section 1240 statements and statements made to law enforcement to obtain assistance in an ongoing emergency. It is a very fact-intensive process. Prosecutors seeking to introduce evidence should fully interview all police and medical witnesses to determine the extent and nature of the conversation with the victim.

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at large, courts are more likely to admit the statements even if the victim does not testify at trial. When the primary purpose of the officer or healthcare practitioner’s interaction with the victim is to assist with an ongoing emergency, courts should admit the statement. If statements are made for the purpose of preparing the police report and the case for trial, they will be deemed testimonial and, absent some other exception, will not be admitted if the victim does not testify at trial. Both the defense and the prosecution must be ready with arguments regarding the admissibility of the victim’s statements and should consider questions to the police and other medical providers and responders in light of the cases establishing whether the statements are admissible.

2 See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him....”)
3 Crawford, 541 U.S. at 38.
4 Id. at 39.
5 Id. at 40.
6 Id. at 41.
7 Id. at 43.
8 Id. at 52.
9 Id.
11 Id.
12 Id. at 468.
14 Id. at 822.
15 Id., n.1.
17 Id. at 822.
18 People v. Saracoglu, 152 Cal. App. 4th 1584, 1590 (2007). See also People v. Morrison, 34 Cal. 4th 698, 719 (2004) (Shooting victim’s response to officer’s question “who did it?” was admissible); People v. Alvarez, 14 Cal. 4th 155, 186 (1996) [Replying to questions do not necessarily negate spontaneity]; People v. Poggi, 45 Cal. 3d 306, 319-20 (1988) [*Fact that the statements were delivered in response to questioning does not render them nonspontaneous...."].
19 Saracoglu, 152 Cal. App. 4th 1584.
20 Id. at 1587.
21 Id. at 1597.
25 Id. (quoting Brenn, 152 Cal. App. 4th 178); see also People v. Romero, 44 Cal. 4th 386, 422 (2008) (Victim’s statements to police responding to emergency call were nontestimonial and admissible because statements were made to assist with an ongoing emergency.).
27 Id. at 2543.
29 Id. at 657 (quoting People v. Cage, 40 Cal. 4th 965, 984 (2007)).
30 Id. at 662.
32 Id. at 486-88.
33 Id. at 488.
34 Id. at 488-90.
35 Id. at 497.
36 Id.
37 Id. at 488.
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Mark. Mr. Mark has had in excess of 30 matters as an
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20 Sunnyside Avenue, Suite A-321, Mill Valley, CA 94949, (415) 381-3133, fax (415) 381-3131, e-mail: jsrutchik@neoma.com, Web site: www.neoma.com. Jonathan S. Rutrich, MD, MPH is a physician who board certified in both Neurology and Occupational and Environmental Medicine. He provides clinical evaluations and treatment, including electromyography, of individuals and populations with suspected neurological illness secondary to workplace injuries or chemical exposure. Services include medical record and utilization review and consulting to industrial, legal, government, pharmaceutical, and academic institutions on topics such as metals and solvents, lead, asbestos, Paraquat, Gulf War syndrome, musicians’ injuries, and others. See display ad on page 62.

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Plain, Honest Men

In the wake of the American Revolution, most Americans believed that a strong central government posed the greatest threat to the liberty they had just obtained. The Confederation government was formed in that vein, allowing the states to retain their sovereignty and creating a government with little authority, no power to tax, and no chief executive. As a result, the government was in a state of collapse less than 10 years after the new nation won its independence.

The failure of the Confederation became unmistakable during an insurgency in Massachusetts in 1786. Farmers took to arms after being threatened with foreclosure of their property. Unable to find any assistance from the Continental Congress, the Massachusetts governor was forced to turn to private donors to raise the funds to form a private militia to quell the revolt because the Continental Congress found itself with no money to pay federal troops to stop the farmers. The fledgling nation was unable to secure the peace at home.

In Plain, Honest Men: The Making of the American Constitution, Richard Beeman tells how a small group of men caused a peaceful revolution in America in the summer of 1787 and formed a new, stronger, more lasting government. Charged with the task of amending the Articles of Confederation to render the Confederation “adequate to the exigencies of the Union,” they instead created a new government. Choosing not to defy the drafters of our Constitution, Beeman takes his title from a statement that Constitutional Convention delegate Gouverneur Morris made. Reflecting upon the Constitution, Morris noted, “While some have boasted it as a work from Heaven, others have given it a less righteous origin. I have many reasons to believe that it is the work of plain, honest men.”

Through Plain, Honest Men, we come to understand that even a happenstance delay of the commencement of the convention would have a profound effect on the course of the proceedings. George Washington and James Madison, along with only a few other delegates, were the only delegates to appear at the Pennsylvania State House on May 14, 1787, the day the convention was scheduled to begin. The delay that ensued allowed Madison to build support among his fellow Virginia delegates, Edmund Randolph and George Mason. Madison’s framework, later known as the Virginia Plan, would establish a new, centralized, national government.

During this interim the Virginia delegates met at Benjamin Franklin’s house for dinner with Pennsylvania delegates Robert Morris, Gouverneur Morris, and James Wilson on several evenings before the other delegates arrived. The delegates from Virginia and Pennsylvania took the opportunity in this informal setting to discuss how they might form a stronger central government. Mason wrote to his son that the dinners allowed the delegates to “form a proper correspondence of sentiments.”

As Beeman explains, the delegates who did arrive at the convention were not all party elders; many of the more revered political leaders of the day believed that the scope of the convention would be limited to amending the Articles of Confederation. For example, the young James Madison from Virginia attended in place of the more senior Patrick Henry. Those who did attend were generally wealthy individuals, well educated, and students of the law. Significantly, 24 of the 55 delegates were also slave owners.

As the convention opened, Virginia Governor Edmund Randolph introduced Madison’s Virginia Plan as a resolution for a strong national government. The plan called for a national legislature with two houses, an executive to be elected by the Congress, and a judiciary. It also proposed a Counsel of Revision, composed of the executive and some of the judiciary, that would have the authority to veto laws enacted by Congress or the state legislatures.

Beeman explains that the convention “rejected the principle of Federalism in which the American republic had been founded and endorsed in its place the notion of a supreme national government.” The delegates endorsed this principle because of the collapse of the Confederation government. Foreign debts were overdue, Confederation paper money was worthless, and the Confederation was unable to raise revenue. Madison describes the urgency in the preamble to the Virginia roster of delegates—“the crisis is arrived.” Prominent Americans who did not attend the convention—such as Thomas Jefferson, Samuel Adams, and Patrick Henry, who were advocates of state sovereignty—did not learn of the true extent of this revolutionary document until it was put into final form. The convention might have ended early and in failure if it had not operated under a strict rule of secrecy.

In Plain, Honest Men, the reader learns of the internal struggle of many of the delegates. They had a rational understanding of the imminent collapse of the Confederation. Yet, they also had a visceral fear...
following the Revolutionary War that a strong national government would lead to despotism like that of the British monarchy. It was this same fear of concentrated power that led many delegates to have a “profound distrust of executive power.” Only because General Washington served as president of the convention and was expected to be the first holder of the executive position did the delegates agree that the executive should consist of a single person. Still, a majority of the delegates believed that ordinary citizens were too ignorant to be responsible for electing the executive directly. Madison’s Virginia Plan called for Congress to elect the president.

Beeman delves into the compromises of the delegates, which allowed the formation of a government that encompassed separation of powers and federalism. However, he also explores how this compromise created the single greatest failing of the Constitution—“the recognition and legitimization of slavery.” The delegates agreed to proportional representation for the lower house of Congress that set forth that a slave would count as three-fifths of a person for purposes of apportioning representation.

In *Plain, Honest Men*, Beeman takes a close look at how the Founders created the Constitution. Unlike the Declaration of Independence, this was not a philosophical document. The delegates were looking for a solution to a practical problem: the weak Confederation government could not govern. Consequently, the delegates needed to form a government with the power to tax and to execute the laws it passed.

The practical solution that Madison and others envisioned—with concentrated power and a strong national government, even if separated by several branches of government—raised concerns that the Constitution would create a form of elected monarchy. Beeman deftly illustrates how the delegates struggled, compromised, and ultimately agreed upon a government that was radically different from the Confederation.

The debate over the proper amount of power to be exerted by the national government would arise later during the Civil War, and the debate continues to this day. Under President George W. Bush’s administration, the measures taken by the government to combat terrorism led to criticism that the president had exceeded his constitutional powers. Under President Barack Obama’s administration, the role that government should take in affording healthcare to all Americans has also been debated with reference to the Constitution. This struggle between the philosophical desire for state sovereignty and the practical need for a centralized government dates back to 1787 and the Pennsylvania statehouse.
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24th Annual Environmental Law Super Symposium

ON FRIDAY, APRIL 16, the Environmental Law Section will present its annual symposium offering a full day of presentations and discussions regarding the latest developments in environmental law. The symposium will explore how environmental law is being reshaped by forces such as politics, media, and economics, and cross-currents within the environmental movement. The keynote speaker will be Dr. Barry R. Wallerstein, executive officer of the South Coast Air Quality Management District. Sessions will cover politics and law of climate change, how lawyers can handle interactions with journalists, wind and solar power, small group deliberation, water, green tech, alternative and renewable energy, the influence of the California fiscal crisis on environmental protection, and the shifting chemical regulatory paradigm. The symposium will take place at the Omni Los Angeles Hotel, 251 South Olive Street, Downtown. Hotel valet parking costs $14. On-site registration and breakfast will begin at 8 A.M., with the program continuing from 8:30 A.M. to 4:10 P.M. The registration code number is 010700. The prices below include the meal.

$50—Government/Public Interest Attorney (Section member)
$80—Government/Public Interest Attorney (non-Section member)
$150—CLE+ PLUS member
$295—Environmental Law Section member
$350—LACBA member
$650—exhibitor
$6 CLE hours

Fraud Prevention

ON WEDNESDAY, APRIL 21, the Los Angeles County Bar Association and the Small and Solo Division will host a program on fraud prevention. Beginning with a historical perspective of regulatory change in dealing with fraud, speaker Ilan Haimoff will cover such topics as internal controls, the elements of fraud, a case study of the worst private embezzlement in Massachusetts, and training and monitoring for fraud prevention. This event may be attended in person or via Webinar. Registration for the Webinar closes on Monday, April 19. The live program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration and lunch will begin at 11:30 A.M., with the program continuing from 12:15 to 1:15 P.M. The registration code number is 010804. The prices below include the meal.

$20—CLE+PLUS member
$35—Small and Solo Division member
$55—LACBA member
$75—all others
$65 to $85—live Web viewer
1 CLE hour

Early Case Assessment

ON WEDNESDAY, APRIL 28, the Los Angeles County Bar Association and the Small and Solo Division will present a Webcast featuring Alexander H. Lubarsky on one of the fastest-growing areas of law practice management—early case assessment (ECA). Modern ECA technologies and best practices assist attorneys and clients in answering key questions before a lawsuit begins, including the value of the lawsuit, potential exposure to the client, the costs of a successful resolution, and the time it will likely take to review the discovery. ECA can help determine whether a case should proceed directly to mediation or settlement and how many people will be required to meet discovery deadlines. Understanding the true requirements to achieve success with any given case is critical, and new ECA best practices and tools will enable the practitioner to take on a new matter with his or her eyes wide open and the client’s expectations properly set. The registration code number is 010708. Login information will be forwarded to each registrant 24 hours before the event, so a correct e-mail address must be provided. To receive full CLE credit for viewing the Webinar, registrants must log in individually.

$45—CLE+PLUS member
$75—Small and Solo Division member
$90—LACBA member
$125—all others
1 CLE hour

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/where you will find a full listing of this month’s Association programs.
Does Anyone Really Understand the Medical Marijuana Laws?

MARIJUANA HAS TAKEN OVER LOS ANGELES and, some may argue, the state of California. The plant is, by some estimates, the state’s (and the nation’s) number one cash crop, and California, along with 13 other states, has decriminalized many aspects of the marijuana industry. Moreover, this past October, the Justice Department announced that it would give a low priority to the federal prosecution of medical marijuana distributors who are in clear compliance with state law. Los Angeles County is now home to an estimated 800 to 1,000 medical marijuana dispensaries. This proliferation, together with the federal government’s new policy, have given Californians a false sense that the state is a free-for-all for large-scale cultivation and distribution of the drug.

As an attorney whose practice consists of about half marijuana cases, I am sad to say that perception and reality are out of sync. The result is that people who in the past have been discreet about their marijuana use are operating conspicuously. And they are getting arrested and charged with felonies. According to the Marijuana Policy Project, between 1990 and 2008 the rate of Californians arrested for possession rose 127 percent.

What the law actually is and what activity it immunizes elude not only much of the public but the legal community too. Here are the basics: In 1996, voters passed the Compassionate Use Act, which immunized personal cultivation and possession of marijuana by those who obtained a recommendation from a doctor and by those patients’ primary caregivers. This referendum did not allow for medical marijuana dispensaries or for sales of marijuana. The referendum and the case law that emerged from it did allow caregivers to receive reasonable compensation for providing marijuana to patients. However, the courts interpreted the concept of caregiver narrowly, ultimately deciding that a caregiver had to consistently provide for the health, safety, or welfare of the marijuana patient antecedent to the provision of medical marijuana.

In 2003, the legislature passed the Medical Marijuana Program Act. This act gave patients and caregivers immunity from various Health and Safety Code violations not previously immunized by the original referendum, including sales, possession for sale, and transportation. The MMPA also established a voluntary system whereby patients and caregivers could receive a state identification card that provided immunity from arrest if patients possessed less than six mature plants, twelve immature plants, or eight ounces, unless their doctor recommended more.

Very few cases have addressed the possession limits of the MMPA, but it is clear that storefront dispensaries may put on an affirmative defense if they can show that they are a collective of patients and caregivers. Although the Los Angeles district attorney claims that sales are still illegal, the California Supreme Court in People v. Urziceanu indicated that the law “contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana.”

Although the statute is silent as to whether collectives must operate on a nonprofit basis, the court of appeals has indicated, at least in dicta, that they must do so.

Just recently, the California Supreme Court mixed the pot further in People v. Kelly, in which the court struck down the section of the MMPA that capped the number of plants and dried weight a patient or caregiver could possess. The law, after Kelly, seems to suggest that immunity from arrest still applies if patients or caregivers are within the guidelines and possess a state-issued identification card. However,

Jurors who are confused about the law are loath to convict people who clearly have no criminal intent.

for purposes of determining whether a patient is acting legally, the guidelines are no longer relevant.

The state of the law regarding quantities is now that individuals may possess an amount of marijuana that is reasonably consistent with their medical needs. This standard creates much confusion for a variety of reasons. First, while it is clear from case law that a defendant has the burden to create a reasonable doubt based on his or her medical status, no case has addressed whether that defendant also has to make a showing that the amount is reasonable. Though the CALCRIM instructions seem to suggest that the defendant bears this burden, my perspective is that this conclusion is not supported by law. Case law indicates that once the defendant demonstrates his or her status as a qualified patient or caregiver, the burden shifts to the prosecution to show beyond a reasonable doubt not that the amount was unreasonable but that the purpose for which the marijuana was possessed was illegal, such as for illegal sale.

The silver lining in all these developments is that once these cases start going to trial the district attorney’s office will begin to realize that the vagueness of the law benefits the defendant, because jurors who are confused about the law are loath to convict people who clearly have no criminal intent. But this can only happen if lawyers who take these cases verse themselves well enough in the case law to realize that pleading defendants, who are often in the system for the first time, is in many instances, no answer.

3 People v. Kelly, 47 Cal. 4th 1008 (2010).

Allison B. Margolin is a Los Angeles attorney who practices state and federal criminal defense.
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