He needs an attorney now. He’s looking online.

And there are millions more like him at Lawyers.com:

With 24 million visitors each year, Lawyers.com is a one stop source that provides consumers and business professionals with the information they need to learn about the law, understand their legal options and connect with the right attorney to meet their needs.

Have a legal issue? Go to www.lawyers.com for all your answers.

Lawyers.com®

Every Legal Issue. One Legal Source.
CHAPMAN UNIVERSITY
SCHOOL OF LAW
PROUDLY ANNOUNCES OUR RANKING AMONG
THE TOP 100
OF
U.S. News & World Report
BEST LAW SCHOOLS 2011

ONE UNIVERSITY DRIVE, ORANGE, CA 92866
www.chapman.edu/law
Endorsed Protection

AHERN INSURANCE BROKERAGE
LAW FIRM INSURANCE SPECIALISTS

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

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

SAN DIEGO    ORANGE COUNTY    LOS ANGELES    SAN FRANCISCO

T: 1.800.282.9786
F: 858.571.9010
LICENSE # 0C94825
WWW.AHERNINSURANCE.COM
## CONTENTS

### FEATURES

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>26</td>
<td>Strength of Character</td>
<td>Michael D. Schwartz and Phillip R. Maltin</td>
</tr>
<tr>
<td>34</td>
<td>Parting of the Ways</td>
<td>Howard S. Klein</td>
</tr>
<tr>
<td>40</td>
<td>Screen Grabbing</td>
<td>Kevin D. Hughes and David E. Rosen</td>
</tr>
</tbody>
</table>

**Plus:** Earn MCLE credit. MCLE Test No. 193 appears on page 43.

### SPECIAL SECTION

- 47 Special Section
- 2010 Lawyer-to-Lawyer Referral Guide

### DEPARTMENTS

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>Barristers Tips</td>
<td>Alison M. Pear</td>
</tr>
<tr>
<td>12</td>
<td>Practice Tips</td>
<td>Zac Locke</td>
</tr>
<tr>
<td>16</td>
<td>Practice Tips</td>
<td>Kira Masteller</td>
</tr>
<tr>
<td>21</td>
<td>Practice Tips</td>
<td>Hernaldo J. Baltodano and David Martinez</td>
</tr>
<tr>
<td>60</td>
<td>Closing Argument</td>
<td>Heather E. Stern</td>
</tr>
<tr>
<td>57</td>
<td>Classifieds</td>
<td></td>
</tr>
<tr>
<td>58</td>
<td>Index to Advertisers</td>
<td></td>
</tr>
<tr>
<td>59</td>
<td>CLE Preview</td>
<td></td>
</tr>
</tbody>
</table>

---

Los Angeles Lawyer
the magazine of
the Los Angeles County
Bar Association
June 2010
Volume 33, No. 4

COVER PHOTO: TOM KELLER
There is no substitute for experience.

- Daily Journal Top Neutral 2008 & 2009
- Over 1,400 successful mediations
- 16 years as a full-time mediator
- Director, Pepperdine’s “Mediating the Litigated Case” program 2002-2009

LEE JAY BERMAN, Mediator

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

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

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

STEFAN L. GLEITMAN, ESQ.
310-553-5080

Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.
Could you benefit from a wealth specialist who understands the legal landscape? Our Legal Specialty Group is dedicated to advising law firms, partners and associates.

Robert Sheedy, Senior Vice President, Regional Director, 213-236-7736
David Jochim, Senior Vice President, Regional Director, 949-553-2520
to the last detail… CPA Forensic Accountant

Over 20 years experience!

Expert witness with ability to communicate

Longevity Support Family Law
Valuations Insurance Loss Recovery
Insolvency Inheritance / Loss of Income
Fraud Investigation and Asset Recovery
Refers: 730 Accounting, Mediator, Arbitrator

Eric R. Steinwald, CPA, CFF
eric.steinwald@erscpa.com
1212 W. Green St., Suite 501
Los Angeles, CA 90025
323.607.5900 (phone)
2172 Elkins Drive, Suite 3
Irvine, CA 92612
949.588.8263 (phone)

800.782.2570

Judge Michael D. Marcus (Ret.)

Mediator • Arbitrator • Discovery Referee
EXPERIENCED • PERSUASIVE • EFFECTIVE

Daily Journal Top 50 Neutral 2009
Daily Journal Top 40 Neutral 2007

• Employment • Legal Malpractice
• Business • Real Property
• Personal Injury • Intellectual Property

Century City • Downtown Los Angeles • Orange County
tel: 310.201.0010 • www.marcusmediation.com
Available exclusively at

Judge Michael D. Marcus (Ret.)

Mediator • Arbitrator • Discovery Referee
EXPERIENCED • PERSUASIVE • EFFECTIVE

Daily Journal Top 50 Neutral 2009
Daily Journal Top 40 Neutral 2007

• Employment • Legal Malpractice
• Business • Real Property
• Personal Injury • Intellectual Property

Century City • Downtown Los Angeles • Orange County
tel: 310.201.0010 • www.marcusmediation.com
Available exclusively at

Los Angeles Lawyer June 2010
Even More Benefits at LMIC.com

Dividends
Easy Renewal Process
Preferred Policyholder Discounts
Longevity Credits
Free One-on-One Loss Prevention Hotline
50+ Hours “Free” Online MCE
Expertise
A.M. Best “Excellent”
Financial Stability

found excellent
measured...

INSURANCE COMPANY
LAWYERS’ MUTUAL
I have a dirty little secret. Before I joined the *Los Angeles Lawyer* Editorial Board, I never really read the magazine. At the time, I thought a year or two on the board would be a good way to get a few friends published and might add some polish to my resume. Of course, to edit articles, I had to read some first to see what the magazine was all about. Once I began paying attention to the content of the magazine, I found articles on a regular basis that I actually wanted to read. It was not long before an issue came up in practice that I realized had been covered by *Los Angeles Lawyer*. Half the research I needed was available in an organized presentation right there in the magazine’s pages.

I suspect that those of you bothering to read this From the Chair column already know what I learned—that *Los Angeles Lawyer* is an incredible resource. One of the goals of the magazine’s Editorial Board is to develop and publish a significant breadth of content. Our guiding principle is that every subscriber should be able to find at least one article of interest in every issue. Being based in a large metropolis gives us an advantage, because we can draw from a diverse pool of lawyers and practices. As a result, we are able to cover a wide variety of subjects every year.

Thanks to the hard work of lawyers from our community who volunteer for the Editorial Board, this magazine not only achieves breadth but also depth. Every article is reviewed first by a lawyer to ensure that the analysis is not superficial and contains salient details that will have value to the readers. When an article addresses an area in which I practice, it is such a high-quality resource that I will save it to a file and refer back to it when giving legal advice. I am not alone in this practice. *Los Angeles Lawyer* is one of the few bar publications that is actually referred to in published court opinions.

The magazine provides a unique venue for members of our legal community to garner exposure for their expertise. Its online archives are a rich store of legal analysis and an excellent first step for any legal research. Its special issues bring attention to topics of particular concern to Southern Californians.

Despite those remarkable qualities, *Los Angeles Lawyer* carries out its mission during trying times for all publications. Newspapers have shrunk as the Internet has eaten into their profits. Scores of magazines have folded or moved solely to online distribution. People’s attitudes and interests are changing. Soccer is even becoming a popular sport in this country!

Yet this magazine remains one of the most popular benefits of County Bar membershp. The articles we publish every month are an unparalleled resource that continues to provide value to lawyers in their daily practices. I am honored to have been given the opportunity to chair the Editorial Board, whose members work diligently to regularly present practical, cutting-edge articles for our readers.

This month’s issue is my last as chair of the Editorial Board. I am thankful for the very small part I have been able to play in helping the bar leadership, the staff of the magazine, the volunteers on our Editorial Board, and, most importantly, the authors who produced this past year’s articles.

Next month, Michael Geibelson will take over as the new chair of the Editorial Board. I have known Michael for a number of years and can attest that he will be a very capable and dynamic leader. I wish him luck and look forward to seeing what articles the coming bar year has in store for us.

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.
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
Performance of Due Diligence in Transactions

**DUE DILIGENCE IS A PHASE OF EVERY TRANSACTION**, from a bank loan to a corporate merger. It is how the parties determine if and how they should proceed. The process typically involves reviewing a company's documents and in some instances visiting a company’s facilities or interviewing employees.

Perhaps because it is time-consuming, due diligence is often unappreciated, but wrongly so—no one wants to purchase a company only to discover that it is in substantial debt or about to be sued by a former employee with several well-documented reasons to be disgruntled. Despite the critical role of due diligence, it is not always well understood, especially by new associates, who often are the ones assigned primary responsibility. It is therefore crucial that transactional attorney understand the purpose of diligence and how it relates to the particular deal.

Due diligence generally falls into two overlapping categories: business and legal. Business diligence focuses on a company’s financial situation, operations, and prospects. This is often handled by the involved businesses themselves or their financial advisers rather than their legal representatives.

Diligence should be a cooperative process. It should be undertaken by the reviewed entity’s own counsel as well as the counsel for the other side. Both sides have the same goal of getting the transaction completed, and they need to work together in order to address any issues that may come to light. Unfortunately, many companies and their counsel become defensive when subject to due diligence review.

Generally, diligence begins with delivery of a due diligence checklist, which requests the documents and information that the attorney needs to review. Diligence lists, modified as appropriate for the transaction at hand, will often request documents showing corporate organization, management, capitalization, financial statements, tax information, regulatory licensing, intellectual property, employees, and material contracts.

Diligence requests usually involve several rounds of back and forth with requests for additional documentation and clarification as the reviewing party becomes more familiar with the subject company. For example, if initial diligence reveals that there are a number of regulatory licenses involved in a business, that will be an area of focus, and more documentation may be required. In other instances, the disclosed documentation may be incomplete. For example, an amendment to but not the original agreement may be provided in response to a request, so another request needs to be sent asking for the original. Other lines of inquiry may be appropriately abandoned. For example, a company may respond to a set of document requests about real property ownership by indicating it does not own any real property.

In most scenarios, diligence requests will result in the disclosure of significant amounts of documentation, and the reviewer must determine how the submitted disclosures relate to the purposes of diligence in the particular transaction, if at all. Legal diligence can generally be described as serving three purposes.

First, diligence helps identify what needs to be done. Lawyers need to inform clients what actions must be taken before the transaction can be completed. A common hurdle involves change-in-control provisions in material contracts. If a company is about to undergo a merger, its contracts need to be examined for a provision that a merger will be considered a breach of contract. If an important contract forbids the company from entering into a merger, consent from the contract party must be obtained. Other examples include the need for shareholder consent to the transaction or government approval to transfer a license.

Second, lawyers need to know what must be disclosed in a transaction. Most agreements contain representations and warranties—statements in which the party represents that certain facts are true. For example, a company will need to represent that it has been duly organized and that it has the power to enter into the proposed transaction. It also may represent that it is in compliance with all relevant environmental laws and has paid its taxes. A company that makes a false representation may be in breach of the transactional agreements and could be subject to future liability. However, if any problems with disclosures are identified before the completion of the transaction, the parties can work together to modify the representations to disclose the pertinent facts and avoid the breach.

Third, lawyers need to identify legal issues that may affect a client’s business decisions and advise the client regarding potential resolutions to these issues. For example, if diligence reveals an exclusive license agreement that would conflict with the client’s current or future business plans, the client should be made aware of this issue and what the options may be.

Keeping these purposes in mind will help the reviewer focus on what is important in the transaction and process the plethora of information received into something useful that will guide how the transaction may proceed.

---

Alison M. Pear is a transactional attorney specializing in securities and mergers and acquisitions at TroyGould PC in Century City.
June 23-24, 2010

LEGALTECH®

THE MOST IMPORTANT LEGAL TECHNOLOGY EVENT ON THE WEST COAST!

Los Angeles Convention Center - Los Angeles, CA

WEDNESDAY | JUNE 23 | 9am
Privacy, Security Breaches and Accountability
Defend your corporation from security breaches and their potential massive fallout

David Lazarus
Business Columnist
Los Angeles Times

THURSDAY | JUNE 24 | 9am
Breakthrough Collaboration and Cost Savings: Unified Communications in the Legal Industry

Erich Andersen
Vice President and Deputy General Counsel
Microsoft Legal and Corporate Affairs Department

2 DAYS OF...

- Keynotes that will keep you talking even after they are over
- Exploring an exhibit hall designed to expand your expertise in the latest technological advances
- CLE accredited educational sessions to update you on new developments in the ever changing legal industry
- Opportunities to make priceless connections

Take advantage of our discount packages to attend the following CLE accredited educational tracks:

- E-Discovery
- Corporate Law Department
- Advanced IT
- Comprehensive Recordkeeping
- Practice Management for Solo, Small and Mid-sized firms
- Advanced Legal Technology...

And More

Visit www.legaltechshow.com for more information or call 212-457-7905

For sponsorship opportunities please contact Henry P. Dicker at 212-457-7902 / hdicker@alm.com

When registering use priority code: LAL
The Diminishing Power of California’s Rights of Privacy and Publicity

PAMELA ANDERSON AND CHRISTIAN BALE have at least one thing in common: they are celebrities whose private moments were recorded and disseminated to the public. Anderson recorded a sex tape for private use, which was later widely distributed to the public without her consent. Bale made a furious, profanity-laden, and threatening rant during filming of Terminator Salvation when the film’s director of photography, Shane Hurlbut, walked across Bale’s sight line during a scene.1  Soon thereafter, an audio recording of the rant was available on the Internet for everyone to hear.2

Unauthorized disseminations of recordings may lead to a lawsuit, like the one filed by Anderson,3 or a public apology, such as Bale’s.4 California has a specific statute—Civil Code Section 3344—and existing common law purporting to protect privacy rights as well as the name, image, voice, likeness, and signature of individuals from unauthorized use. Nevertheless, recent court decisions have curtailed the application of the statute and common law significantly, especially when defendants invoke competing First Amendment rights. As a result, celebrities and noncelebrities alike are limited in their efforts to prohibit the unauthorized dissemination of video, photographs, or audio recordings of their personal lives.

The two most common causes of action against distributors of unauthorized recorded material involve asserting the right of publicity and protection from invasion of privacy. In rare instances, when plaintiffs filing suit to protect their rights are also the creators of the recording at issue, the claims include copyright infringement.

California recognizes both a common law and a statutory right of publicity. U.S. Second Circuit Judge Jerome Frank coined the term “right of publicity” in 1953 when he found that a claim for invasion of privacy was not sufficient to cover individuals requiring an exclusive right to exploit their likenesses to maintain their economic value.5 California courts proceeded to adopt protections for rights of publicity.6 with the California Legislature providing statutory protection in 1971. Civil Code Section 3344 states the elements of a claim as: 1) a knowing use of someone’s “name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, goods or services” 3) without consent, and 4) with resulting injury.7 According to the statute, the use of a likeness in a commercial medium does not automatically require consent. Instead, a commercial use gives rise to a question of fact whether the use “was so directly connected with the commercial sponsorship” that it required consent.8

Invasion of privacy generally comprises four separate torts: (1) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.9 Civil Code Section 3344 is the statutory complement to the fourth category of invasion of privacy—appropriation of name or likeness—with the additional requirements of a knowing use and, for commercial uses, a direct connection between use and purpose.

Most Common Defense

The most common defense asserted against claims for right of publicity and invasion of privacy is the “newsworthiness” defense, also called the “public affairs” or “public interest” defense.10 This defense is based upon the First Amendment and “the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guarantees of freedom of speech and of the press.”11

To fall within the newsworthiness exception, the information does not have to be “news” in the strict sense of the word; indeed, “entertainment features receive the same constitutional protection as factual news reports.”12 Nor does the information require presentation in a not-for-profit context to receive First Amendment protection.13 However, if the use is commercial in nature, a claim can be stated under Section 3344 if the nonconsensual use is “directly connected with the commercial sponsorship.”14

Courts have held that newsworthy matters encompass almost anything, including “the accomplishments, everyday lives, and romantic involvements of famous people.”15 The only limitations are “[w]here the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake,”16 or when defamatory statements are published “either with knowledge of their falsity or with reckless disregard for the truth.”17 These limitations, however, provide little protection, as it is almost impossible for a plaintiff to prove that the unwilling dissemination of truthful personal information meets either standard.

Pamela Anderson’s case, among others, illustrates how a First Amendment defense is difficult to overcome. In Michaels v. Internet Entertainment Group, Bret Michaels and Anderson claimed that Internet Entertainment Group (IEG), which distributed a sex tape recorded by the two plaintiffs, violated their rights of publicity and privacy.18 They also asserted claims against the television program Hard Copy and its affiliate companies for reporting that IEG planned—to fall within the newsworthiness exception, the information—what happened to their sex tape. Courts held that defendants are protected by the First Amendment if the information is “newsworthy.”19

Zac Locke is an attorney in Beverly Hills, where he represents talent, producers, and companies in film, music, and other entertainment-related transactions. He thanks Duke Law School graduate Risa Weaver and attorney Natalie Locke for their assistance with this article.
You told us there are currently 127 unnecessary steps from email to research.

Introducing Lexis® for Microsoft® Office. Focus on delivering work for your clients, not switching between programs. Now, when you’re creating a Word document or working in Outlook®, you can pull content directly from Lexis® with intuitive simplicity. We’ve teamed with Microsoft® to bring this innovation to our customers’ existing workflow processes. It’s just one example of how listening to our customers helps us design tools that enable better outcomes. After all, LexisNexis® is created for legal minds, by legal minds.

LexisNexis®

For more information, go to www.lexisnexis.com/office
to release the videotape on the Internet on a specific date and for showing excerpts from the tape on the program. Regarding Anderson's right of publicity claim, the court granted the motion for summary judgment filed by Hard Copy and its affiliate companies that was based on a First Amendment defense of newsworthiness. According to the court, the report of the tape's distribution fits within the scope of information that is given “to the public for purposes of education, amusement or enlightenment” and thus was newsworthy.19 The court also ruled that the distribution was not “commercial sponsorship.”

In its holding, the Michaels court focused on an important nuance to the commercial sponsorship analysis of the right of publicity. Previous California decisions provided that if a commercial use was connected with commercial sponsorship, consent of the featured individual was required.20 However, the court found that Anderson's consent was not necessary because no facts were submitted to suggest that Hard Copy attempted to use its report to advertise the tape. Although Hard Copy was a commercial endeavor—and its report on the tape, which included the likenesses of Anderson and Michaels, was intended to attract viewers and advertisers—the court held that the “commercial purpose of promoting the news outlet does not preclude the newsworthiness privilege.”21 Thus the promotion of Hard Copy was incidental to the reporting of the news story.

Similarly, the First Amendment newsworthiness defense barred Anderson's claim that Hard Copy invaded her privacy by disclosing private facts about her. The court made this ruling after considering three factors: “(1) the social value of the facts published; (2) whether the plaintiff voluntarily became involved in public life; and (3) whether a substantial relationship or nexus existed between the matters published and matters of legitimate public concern.”22 Although the social value of a report about a sex tape may have been limited, the court found that summary judgment should be granted because Michaels and Anderson were voluntary public figures, and the report of distribution of the tape and the dispute surrounding its distribution “bores a substantial nexus to a matter of public interest.”23 The court also held that because images of Anderson engaged in sex were already widely available, Hard Copy's use of brief images of Anderson during its report were less intrusive.

Another court came to a similar decision in Dora v. Frontline Video,24 a less scandalous case that involved the use of a person's name and likeness in a surfing documentary. In Dora, the California Court of Appeal ruled that use of footage of the plaintiff surfing and the use of an audio interview he had given in a documentary was constitutionally protected, even though the footage was used not only without the plaintiff's permission but also over his stated objections.25 The court based its decision on the rationale that surfing, as “a lifestyle that has become world-famous and celebrated in popular culture,” was a newsworthy subject of public interest. The court also held that the famous surfer who had given the interview could not assert a claim for right of publicity because public interest attaches to “people who by their accomplishments or mode of living create a bona fide attention to their activities,” and the plaintiff had attained that status.26

**Expansion of Public Interest**

The effect of this case is significant. Although producers of television news and documentary programs usually procure general releases from anyone even remotely appearing in any footage taken during the preparation of the programs, that practice may be unnecessary to avoid liability. According to the Dora holding, if the subject of the production is a matter of public interest, even the unauthorized use of the individual's name and likeness will not be actionable. Further, Michaels and Dora underscore that California courts are providing an expansive definition of “public interest.” Thus it is questionable whether producers must continue to follow their usual practice of obtaining releases for the use of a person's name, image, or likeness in a documentary or news-related audiovisual work.

Dora has further implications for filmmakers who desire to dramatize the life of a historic figure, whether famous or not. The common practice of filmmakers seeking to create these biographical dramas or biopics is to attempt to acquire the rights to the stories either firsthand from the person or estate or from a secondary source. However, this can take years and may not bear fruit. Under current California law, acquiring these rights may not matter since filmmakers may rely on the newsworthiness exception.27 While the best protection for producers remains the acquisition of rights before commencing their projects, Dora's application of the newsworthiness protection suggests that in many cases, unauthorized biopics on topics of public interest may survive claims that they violate the right of publicity or constitute invasion of privacy under California law.

Dora is also important for its almost circular definition of “social value” as that term applies to invasion of privacy. The court held that because surfing was a topic of public interest, it automatically had social value.28 Because public interest comprises anything in which the public is interested (unless fantastically morbid or offensive), anything in which the public has interest therefore has social value. This gives the complaining individual, especially a public one, a steep hill to climb to prove intrusion into private affairs.

Even people other than Tiger Woods, with low profiles and high golf handicaps, still may not be protected from wide public distribution of recordings of their private lives. In Daly v. Viacom, Inc., the court expressly held that noncelebrities are treated no differently than celebrities in the adjudication of claims for misappropriation of name and likeness.29 The case also extends the protection against misappropriation claims far beyond factual reports to “any expressive work, whether factual or fictional.”30

In Daly, a relatively unknown female reality TV participant was recorded on video kissing a man in the bathroom of a nightclub. That recording was played on the show Bands on the Run and used in advertisements to promote the program. The plaintiff asserted claims for right of publicity and invasion of privacy against the show and its corporate parent. In ruling on the right of publicity claim, the court held that the First Amendment extended to any entertainment program as an “expressive work.”31 Moreover, the court's analysis of the commercial sponsorship issue took it a step further by holding that the use of the plaintiff's likeness in promotions of the show was an adjunct to the protected use itself and, thus, permitted. The court reasoned that a restriction on the use of a likeness in advertisements would restrict the public's access to the permitted speech. Since the permitted speech carried more weight than a person's right to protect his or her likeness, the advertisement for the permitted speech also outweighed the asserted personal protections.32

Thus, the Daly court determined that a party may use a person's likeness without consent in an advertisement for an expressive work, provided the advertisement does not falsely claim that the person endorses the program. Although the court did not elaborate on the issue, apparently it believed that the public would not think the plaintiff—recorded in a bathroom stall kissing a budding rock star—endorsed the show.

In ruling on the invasion of privacy claim, the court held that because the plaintiff previously had disclosed publicly that she had kissed the rock star, she did not have a privacy right regarding a similar event. In addition, the court noted that the event in the bathroom stall did not “become[] a private fact merely by virtue of the location in which such activity occurs.”33 This assertion by the Daly court, if applied broadly, may have shocking consequences. For example, an act performed by non-celebrities, in private, potentially can become appropriated for advertising for entertainment purposes irrespective of the person's...
intentions or desires. A kiss in a restaurant, an argument in a backyard, or even extracurricular activities in a bedroom without shades drawn all appear to be fair game for the media to use broadly and disseminate widely.

Given the burden of proof that plaintiffs must meet in California, apparently little remains of the rights of privacy and publicity. One exception is when the sole use of a person’s image or likeness is to advertise a commercial product without any related First Amendment rights. For example, in Dovung v. Abercrombie & Fitch, the defendant used photos of the plaintiffs, former professional surfers, in one of its quarterly catalogs that used a surfing theme to advertise its clothing. The surfers never gave their permission to appear in the catalog. Although surfing had previously been adjudicated as a matter within the public interest,35 the Downing court noted the “tenuous relationship between Appellants’ photograph and the theme presented” and determined that “Abercrombie used Appellants’ photograph essentially as window-dressing to advance the catalog’s surf-theme.”36 Because the use of the photo did not “contribute significantly to a matter of the public interest,” Abercrombie could not assert a First Amendment defense to appropriation.37 The court held that the photograph was used in an advertisement without any connection to First Amendment speech. Based upon current California law, only purely commercial use falls outside the First Amendment exception to the rights of privacy and publicity.


5 Gionfriddo, 94 Cal. App. 4th at 409.
6 Id. at 410.
7 Id. at 411. “Profit, alone, does not render expression ‘commercial’... The term ‘commercial speech’ has a special meaning in the context of the First Amendment. The core notion of commercial speech is that it does no more than propose a commercial transaction.” Id. at 411-12 (quoting Hoffman v. Capital Cities/ABC, Inc., 225 F. 3d 1180, 1184 (9th Cir. 2001)).

8 Civ. Code §3344(e).
9 Michaels, 48 U.S.P.Q. 2d at 1897.
10 Id. (quoting Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 126 (1983)).
12 Id. at 538.
13 Id. at 540.
14 Id. at 541.
16 Id.
17 Id.
19 Daly, 238 F. Supp. 2d at 1124.
20 Downing v. Abercrombie & Fitch, 265 F. 3d 994 (9th Cir. 2001).
22 Downing, 265 F. 3d at 1002.
23 Id.
Revocation of a Family Trust without the Knowledge of the Cotrustee

**MOST OF US REMEMBER EDWARD L. MASRY** as the crotchety criminal and tort lawyer and principal of Masry & Vititoe who, with self-trained legal assistant Erin Brockovich, filed a class action suit in 1993 against Pacific Gas and Electric Company. Along with two large law firms, four years later they won a $333 million settlement on behalf of 648 residents of the town of Hinkley, California.

Masry made legal headlines again after his death. In his final days, Masry changed his trust without his wife’s knowledge, thereby pitching one last curve ball to the legal system. Edward and his wife Joette had created the Edward and Joette Masry Family Trust, which consisted of the property they acquired during their marriage. Edward and Joette were both the settlors and the trustees. The Masry family trust specifically provided: “[e]ach of the Settlors hereby reserves the right and power to revoke this Trust, in whole or in part, from time to time during their joint lifetimes, by written direction delivered to the other Settlor and to the Trustee.”

Not long after the Masry family trust was created and just prior to Edward’s death, Edward executed a notice of revocation of interest in the trust and resigned as trustee. The purpose of the revocation was to transfer Edward’s assets from the Masry family trust to another trust he had created, the Edward L. Masry Trust (Edward Trust), in which two of his children from a prior marriage were the named successor cotrustees. Edward did not deliver the notice of revocation to Joette during his life; instead, it was delivered to her two weeks after his death.

Edward’s most substantial asset was his employment agreement with Masry & Vititoe, which provided that if a termination occurred because of Edward’s death, the benefits of the agreement would go “to the legal representatives of Edward’s estate” if no valid beneficiary designation were in place. The court found that when Edward revoked his interest in the Masry family trust, his community share of his benefits under the agreement went to the Edward Trust, which stated that its property included Edward’s interest in the law firm. As trustee of the Masry family trust, Joette would have received all the benefits of the employment agreement. After Edward executed the revocation of the Masry family trust, however, Joette was no longer a trustee but had become merely a beneficiary of her community interest in the employment agreement. The Edward Trust and its appointed trustees were entitled to Edward’s community interest in the employment agreement.

The Arguments

Joette, not having received notice of the revocation until after Edward’s death, immediately sought a determination by the court that the revocation was invalid because it had not been completed as required in the Masry family trust (in that the revocation had not been delivered to her during Edward’s lifetime). In addition, she sought a determination that Edward had breached his fiduciary duty to his spouse under Family Code Section 1100 because he had not disclosed the revocation to his spouse. Third, she argued that to find the revocation valid would not be good public policy, because the revocation’s secrecy allowed one spouse to take advantage of the other.

The trial court found that under Family Code Section 100 one spouse is permitted to dispose of his or her share of the community without the consent of the other and that to dispose of property is only a breach of fiduciary duty when it results in impairment to the claimant spouse’s present undivided half interest in the community property under Family Code Section 1101. Most important, the trial court did not agree that the revocation was invalid because it failed under the requirements of the trust. In fact, the trial court found that the trust provisions were not the only way for Edward to revoke his portion of the family trust. Later, the appellate court found: 1) the revocation provision of the Masry family trust did not preclude revocation by the statutory method of a writing delivered to a trustee, 2) Edward revoked the trust by delivering notice of revocation to himself as trustee, 3) his act of revoking the trust did not violate the statute providing generally that each settlor may revoke as to the portion of the trust contributed by that settlor, and 4) the provisions of the trust did not preclude revocation of the trust by the statutory method of a writing delivered by a settlor to a trustee, since the trust did not state
that the method of revocation it provided was exclusive.

Joette relied upon Conservatorship of Irvine, which the appellate court found was not persuasive because it relied upon cases interpreting former Civil Code Section 2280 rather than Probate Code Section 15401(a)(2). The court went on to observe that Section 15401(a)(2) was at best a clarification of former Civil Code Section 2280, which was unclear with respect to explicitly exclusive language in the trust.

Louis Masry, trustee of the Edward Trust, relied on Huscher v. Wells Fargo Bank, which the appellate court, citing dicta, called helpful. Huscher analyzes the history of Civil Code Section 2280 before it was replaced by Probate Code Section 15401. The Huscher court concluded that revocation language in a trust document is reasonably subject to an analysis under Family Code Section 100 of whether the language explicitly or implicitly makes the method of revocation exclusive.

Both parties relied upon Gardenhire v. Superior Court. Joette found this case to hold that if the language of revocation in the trust is clear and express, the language is the exclusive method to revoke. Louis found Gardenhire to support the argument that the trustee had the choice of using either the language in the trust or the method for revocation stated in the Probate Code, because an implicit revocation provision is not explicitly exclusive language.

The Masry court ultimately found that Huscher’s reasoning, even though it was expressed in dicta, led to the conclusion that, absent language in the trust that its method of revocation is exclusive, the trustee has the option of revoking according to the method provided in Probate Code Section 15401(a)(2), under which Edward’s notice to himself was sufficient as notice to the trustee. That there were two trustees did not change the court’s view.

In affirming the trial court’s order, the appellate court in its review of Huscher relied not upon the difference in facts between the cases (whether there was one trustee or two, or an amendment rather than a revocation) but the differences between Civil Code Section 2280 and its replacement, Probate Code Section 15401. Huscher makes clear that the rule authorizing either implicit or explicit exclusivity for revocation in the trust instrument only applies with respect to former Civil Code Section 2280. Huscher determines that under the current Section 15401(a)(2), a trustee may use either the method of revocation in the trust instrument or the method prescribed by the statute unless the trust instrument explicitly makes exclusive the procedure provided in the trust. Huscher concludes that the distinction was clearly considered when the legislation replaced former Civil Code Section 2280, and as a result, implicit exclusivity does not apply under Probate Code Section 15401.

Probate Code Section 15401(a)(2) represented a change in the prior case law rule. The Masry court held that the change could be presumed to have been made to require a statement of explicit exclusivity and thereby avoid the problems of interpretation inherent in determining issues of implicit exclusivity.

The court of appeal also found that the method of revocation did not violate Probate Code Section 15401(b), because, pursuant to Family Code Section 761, “Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone.”

The Language in the Trust

Prior to Masry, legal practitioners generally placed language in revocable trust documents that was similar to the language in the Masry family trust. In Masry, several specific issues in the standard language were addressed: 1) a revocation must be in writing, signed and acknowledged by the settlors and delivered to the trustee, 2) either settlor can revoke that portion of the trust that pertains to his or her community property portion of the trust and to his or her separate property portion of the trust, 3) if only one settlor is revoking his or her portion of the community trust or his or her separate trust, a copy of the revocation should be delivered to the other settlor, and 4) the property distributed back to the settlors will retain its community or separate property character. This language generally did not include exclusivity language regarding the method of revocation.

These standard provisions made certain assumptions that the court in Masry was forced to address. For example, if both settlors are the co-trustees, is the revocation required to be delivered to both trustees, or can it be delivered to only one trustee? Does delivery of the revocation by the revoking settlor have to be delivered to the other settlor during the revoking settlor’s lifetime? If the trust is not silent about the four points above, is the language of the trust controlling, or can the revoking settlor choose another method of revocation as prescribed in the Probate Code?

Probate Code Section 15401 provides: A trust that is revocable by the settlor may be revoked in whole or in part by any of the following methods:

(1) By compliance with any method of revocation provided in the trust instrument.
(2) By a writing (other than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor. If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph.
(b) Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, except as provided in Section 761 of the Family Code.

The Masry family trust revocation provisions did not state that they were exclusive. Even though the trial court “had serious reservations concerning the inherent unfairness with the manner Ed Masry chose to modify his estate plan,” it denied Joette’s revocation petition and found no explicit language in the Masry family trust that made the revocation provisions exclusive. Thus, Edward could revoke the trust by delivering the notice of revocation to himself as settlor and trustee, because under Section 15401(b), “[E]ach settlor may revoke the trust as to the portion of the trust contributed by the settlor, except as provided in Section 761 of the Family Code.”

Family Code Section 761(b) provides: “(b) Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone.” The Masry family trust language stated, “Each of the Settlors hereby reserves the right and power to revoke this Trust, in whole or in part, from time to time during their joint lifetimes, by written direction delivered to the other Settlor and to the Trustee.” This language did not qualify as “expressly provides otherwise” under Family Code Section 761. In fact, the Masry family trust specifically states that either spouse can revoke the trust.

Further, Edward’s revocation did not equate to a breach of his fiduciary duties to his spouse under Family Code Sections 100 or 1100, or Probate Code Section 5020. Edward did not attempt to transmute community property; he merely revoked his interest in the community property that he had initially placed into the family trust.

No Prior Cases

Prior to Masry, there was no case on point with respect to a revocation method between married cotrustors and co-trustees regarding their community property. Masry puts a mark on the map deciding with certainty the effects of the Probate Code and the lack of exclusive language in the trust instrument. The Masry family trust was missing specific language making exclusive the method of revocation in
Los Angeles County Bar Association

2010 Installation and Awards Dinner

June 24 • Dorothy Chandler Pavilion

The following awards will also be presented:

Patricia Phillips Outstanding Committee Service Award
HeLEN B. KIM

Hon. Benjamin Aranda III Outstanding Public Service Awards:

AIDS Legal Services Project
Patricia L. McCabe

Domestic Violence Assistance Project
Dana M. Douglas

Immigration Legal Assistance Project
Gina Chi Lo

Dispute Resolution Services
Frank G. Blundo, Jr.

Entertainment provided by:
Los Angeles Lawyers Philharmonic
Gary S. Greene, Founder-Conductor

Reception: 5:30 - 7:00 PM • Dinner & Program: 7:00 PM
Coffee/Bar After Reception: 9:00 PM
Judges: $100  Individuals: $150  Table of 10: $1,550
Registration Code: 010950

To register call our Member Services Department at 213.896.6560
or visit our calendar on lacba.org

Deadline to register and cancellation notice: June 22, 2010

Sponsorships Available

Dorothy Chandler Pavilion • 135 N. Grand Avenue, Los Angeles, CA

— Special Thanks to Our Sponsors —
the trust. The lack of exclusive language in the trust allows the Probate Code to provide an additional method to revoke a married trust with respect to that settlor’s interest in the community property or his or her separate property, without providing notice of the revocation to the other spouse. Had the trust contained the exclusivity language, the revocation, not having been delivered to the other settlor during Edward’s life, would have been invalid. The court ruled that Probate Code Section 15401 allows settlors an option with respect to revocation rather than solely relying on a provision in a revocable married trust that may not serve a trustor well in the event the trustor desires to change a testamentary distribution provision as it pertains to his or her spouse. The Family Code certainly allows this flexibility, and the court in Masry confirmed that the legislative change from Civil Code Section 2280 to Probate Code Section 15401 allows spouses this option. 

In light of Masry, the method of revocation of an estate should be addressed with married clients. If Joette had been counseled regarding the effect of the provisions for method of revocation and the ability for either party to revoke the trust without the knowledge of the other, would she have signed the trust instrument as drafted, or would she have requested that the language be written to provide that it was the explicitly exclusive method for revocation? The plain language of the trust appears to provide a clear method of revocation that requires notice to the other spouse. A lay person would probably not think that more specific language is necessary. Masry confirms, however, that Joette’s reading of Probate Code Section 15401 is not in accordance with the Family Code. Family Code Sections 100 and 1100 clearly indicate that a spouse can do whatever he or she wishes with his or her interest in community property without breaching his or her spousal fiduciary duty.

It may therefore be difficult to explain this issue to clients. In counseling parties with respect to what happens if their marriage ends, for example during a divorce, an attorney should generally discuss 1) what can be done with respect to a trust and other assets prior to filing for dissolution, 2) what can and cannot be done once a petition for dissolution is filed, and 3) what can be done after the judgment for dissolution is entered.

In preparing for divorce, clients can be advised to execute new wills, consider severing joint tenancies, and transfer title of property to tenants in common (rather than husband and wife as community property with right of survivorship). Spouses may also decide to remove certain assets from the trust so that if either spouse dies prior to the completion
of the trust, the community property is not automatically passed to the surviving spouse but instead passes to a new will. Once a petition for dissolution has been filed, automatic temporary restraining orders may provide:

- Either party can revoke his or her portion of a revocable trust, but only with notice filed and served on the other party before a change takes place.6
- Either party can revoke the transfer to the beneficiary of a “nonprobate transfer” with notice filed and served before the changes take effect.7
- Either party can eliminate a right of survivorship for property—e.g., joint tenancy or community property with right of survivorship—but notice must be filed and served before the changes take effect.8

It may seem illogical, but when a couple is not in the midst of a dissolution proceeding, one spouse can revoke his or her trust with no notice to the other spouse. And, on the other hand, in the midst of dissolution a spouse must file and serve notice before revoking a trust. Ultimately, however, the effect is the same: one spouse has the right to give notice to the other of revocation of community interest in the trust assets. One spouse also has the right not to give the other notice of revocation, so long as the trust does not have an exclusive method for revocation and the revoking spouse gives notice to him- or herself.

Should attorneys counsel individuals not to make the trust revocation language exclusive? After all, spouses cannot anticipate the manner under which they may need to revoke their interest in their trust and should leave themselves the opportunity to choose at the time. As long as both spouses are aware of the effect of the choice, an attorney may have provided sufficient advice.

Masry confirms the consistencies of the Probate Code and the Family Code, both of which indicate that an individual spouse retains his or her rights with respect to his or her community property interests in the marital assets, whether those assets are in a trust or not. Unless a spouse specifically opts out, he or she may control his or her interests as desired, without notice to the other spouse unless to do so would impair the other spouse’s interest.

---

1 To avoid confusion, members of the Masry family are referred to by their first names.
2 See Prob. Code §15401(b).
6 Fam. Code §2040(b)(2), (d)(1).
7 Id.
8 Fam. Code §2040(b)(3), (d)(1).
IN JANUARY 2009, PRESIDENT OBAMA signed the Lilly Ledbetter Fair Pay Act, which extends the time period in which employees may sue employers for discriminatory compensation practices. The LLFPA appears to apply exclusively to discriminatory pay, but recent decisions have construed the legislation more expansively. Several U.S. district courts are finding the LLFPA applicable to any employment decision that ultimately affects an employee’s pay, such as allegedly discriminatory denials of promotions, negative performance evaluations, and unfavorable job assignments. According to these cases, employees may presumably sue and recover two years of back pay for discrimination that occurred years or decades before, so long as the discriminatory practice results in the employee experiencing an adverse impact on pay within the two years preceding the filing of an administrative charge of discrimination.

Nevertheless, other district courts have strictly construed the LLFPA. Practitioners await further guidance from the federal appellate courts, which have not yet weighed in on the issue of the LLFPA’s breadth. In the meantime, plaintiffs and their counsel perceive new opportunities to press their claims, while employers and their counsel face increasing challenges that require new strategies.

Prior to the LLFPA, a claim for a discriminatory nonpromotion that occurred before the charge-filing period—for example, 300 days for Title VII claims—was time-barred. Now, an employee can sue and recover back pay for a discriminatory nonpromotion if it “affects” pay, and the aggrieved employee received less pay during the two years preceding the filing of the charge.

It is no secret that the LLFPA is a response by Congress to the U.S. Supreme Court’s controversial decision in Ledbetter v. Goodyear Tire and Rubber Company, Inc. In Ledbetter, the Supreme Court held that a long-time Goodyear employee, Lilly Ledbetter, could not challenge ongoing pay discrimination that she maintained resulted from discriminatory performance evaluations received many years earlier. Although she had not filed timely discrimination charges with the Equal Employment Opportunity Commission challenging those discriminatory performance evaluations, she argued that paychecks received during the charge-filing period were discriminatory and thus actionable because her paychecks “would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charge period.”

Writing for a divided court, Justice Samuel Alito rejected Ledbetter’s argument:

Ledbetter, as noted, makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not communicated to her. Instead, she argues simply that Goodyear’s conduct during the charging period gave pres-
the "discrimination in compensation" language in limiting the LLFPA to compensa-
tion claims—"nothing more, nothing else." For example, in Rehman v. State University of New York at Stony Brook, the court explained, "It is well-settled that certain adverse employment practices such as the failure to promote, failure to compensate adequately, undesirable work transfers, and denial of preferred job assignments are discrete acts." Therefore, the "plaintiff has no right to recover damages based upon discrete acts of discrimination occurring prior to June 16, 2006 under Title VII." Other courts have followed suit.11

Indeed, by following the Supreme Court's pre-Ledbetter holding in National Railroad Passenger Corporation v. Morgan that an "employment practice" typically refers to "a discrete act of single occurrence,"12 several U.S. district courts have applied the LLFPA narrowly. They did so by finding that claims based on discrete acts, including job assignments and promotions, are time-barred if they fall outside the limitations period—even if the acts arguably affected compensation.

According to a district court in the Northern District of Iowa, "There is no indication Congress intended the Ledbetter Act to serve as a trump card that [plaintiffs]... might use to supersede all statutes of limitations in our nation's various civil rights acts."13 A finding by the district court in New Jersey is in accord: "While the Act certainly contains expansive language in superseding the holding in Ledbetter...it does not purport to overturn Morgan, and thus does not save otherwise untimely claims outside the discriminatory compensation context."14 Also in agreement is a district court in the Eastern District of Virginia, which held in Masterson v. Wyeth Pharmaceuticals15 that promotion and job assignment claims based on age and gender were time-barred and stated that the LLFPA "do[es] not affect this analysis" since the LLFPA "only pertain[s] to discrimination claims respecting unfair compensation, which is not an issue in this case." Because of this line of cases, plaintiffs have tried to circumvent Morgan by characterizing their LLFPA claims as "continuing violations" instead of one-time discrete acts that would trigger the charge-filing period.16 For example, in Holloway v. Best Buy,17 the plaintiffs filed a putative nationwide race and gender class action alleging discriminatory hiring, job assignment, promotion, and compensation practices. Defendant Best Buy moved for judgment on the pleadings on the named plaintiffs' claims for discriminatory initial job assignments on grounds that none had filed timely charges. The plaintiffs opposed the motion by arguing that the LLFPA saved their claims because initial job assignments could not be divorced from job assignments that occurred within the charge-filing period. The court rejected the plaintiffs' argument, stating that the "plaintiffs have not established that the FPA [LLFPA] provides support for the proposition that the court should consider any claims of 'initial assignments' that are outside the limitations period as actionable under a 'continuing violations' theory."18 Despite these decisions, other courts have allowed employees to challenge otherwise time-barred nonpromotions and job assignment decisions under the LLFPA on grounds that these practices "affect" compensation. For example, in Bush v. Orange County Corrections Department,19 a district court in the Middle District of Florida permitted the plaintiffs to challenge "demotions and pay reductions that occurred in 1990"—16 years before filing their lawsuit. The plaintiffs maintained that the alleged discriminatory nonpromotions were accompanied by pay reductions. The court held that the challenged nonpromotions were "no longer administratively barred" under the LLFPA: Under Ledbetter, Plaintiffs' claims would plainly be barred. However, the Ledbetter decision prompted a Congressional response, and just last week...President Obama signed into law the "Lilly Ledbetter Fair Pay Act of 2009." Thus, while [the defendant]s untimeliness argument was valid prior to last week, with the passage of the Act Plaintiffs' title VII claims are no longer administratively barred.20

The plaintiffs' victory was short-lived, however, since the court ultimately granted the employer's motion for summary judgment. The court did so because the plaintiffs failed to present a prima facie case of discrimination—that is, they did not prove that they occupied similar jobs to higher-paid white employees—and could not rebut the employer's legitimate nondiscriminatory reasons for the pay disparities.21

A district court in the Southern District of Mississippi also expanded the scope of the LLFPA in Gentry v. Jackson State University.22 The case involved a claim for the allegedly discriminatory denial of tenure at a university. The court noted that "the denial of tenure, which plaintiff has contended negatively affected her compensation, qualifies as a 'compensation decision' or 'other practice' affecting compensation within the recently-enacted Lilly Ledbetter Fair Pay Act of 2009."23

Other courts have gone even further by effectively inviting plaintiffs to plead that challenged, otherwise time-barred employment actions adversely affect compensation. For example, in Stewart v. General Mills, Inc.,24 a district court in the Northern District of Iowa concluded that the LLFPA did not apply because "[t]his legislation pertains to discriminatory compensation, which is not at issue in the instant action and does not affect the court's analysis." However, the court noted in its ruling that the "[p]laintiff has not suggested or submitted evidence that her temporary reassignment caused a reduction in salary, benefits or prestige."25 A district court in the Eastern District of Pennsylvania similarly stated that "[t]he Ledbetter Act does not help Plaintiff here because she pressed no discriminatory compensation claim with respect to her failure to promote."26

Some decisions, moreover, suggest that a plaintiff need only plead a plausible nexus between the employment decision and an adverse effect on pay in order to overcome timeliness challenges. In Minnesota, for example, a district court held in Onyiah v. St. Cloud State University27 that the plaintiff's claim based on a alleged refusal to hire was time-barred because "the Fair Pay Act applies only to pay discrimination claims" and the plaintiff "failed to provide the essential nexus between the alleged refusal to hire and the Plaintiff's pay discrimination claims." Likewise, a district court in the Southern District of Mississippi held in Johnson v. Watkins28 that the LLFPA did not apply to a...
claim of quid pro quo sexual harassment because the plaintiff’s “compensation was not affected.”

**Impact of the Discovery Rule**

Still another series of court decisions have focused on whether a claim is barred under the “discovery rule”—a creation of case law addressing discrimination claims. Under the rule, claimants must take prompt action to file a discrimination charge when they know or should have known of the alleged wrongdoing. The Southern District of New York addressed this issue in Vuong v. New York Life Insurance Company. The plaintiff in Vuong alleged discrimination based on race and national origin in the plaintiff’s January 1998 denial of promotion to the position of sole managing partner. The denial of promotion arguably affected the plaintiff’s compensation because the plaintiff would have received all performance-related compensation typically given to managing partners. Unlike other, non-Asian managing partners from other offices in the firm, the plaintiff had to split his performance-based bonus with a co-managing partner. The court nevertheless held that Vuong’s promotion claim was time-barred because “[i]t is clear that New York Life committed a ‘discrete’ act in January 1998 when it promoted plaintiff and DeBuono to be co-Managing Partners of the SFGO, rather than promoting plaintiff to be sole Managing Partner. Of course, plaintiff knew what was occurring at that time. This was more than 300 days before plaintiff filed with the EEOC on August 2, 2002, and any claim of wrongdoing at that time is time-barred.”

Interestingly, the court allowed Vuong to challenge a February 1998 decision concerning the allocation of the performance-related bonus that left the plaintiff with a smaller percentage of the bonus. The court stated that the LLFPA “clearly governs the compensation claim in the instant case.” Not only does the Vuong decision illustrate the application of the discovery rule, it suggests that the ability to successfully challenge an otherwise time-barred employment practice affecting pay will depend on how a plaintiff frames the connection between the employment practice at issue and its effect on compensation. Had Vuong characterized the January 1998 denial of promotion differently, the employer may have had to defend this decision on the merits.

The Eastern District of Louisiana reached a similar conclusion in Olubadeowo v. Xavier University by finding that the plaintiff had failed to take prompt action when he knew of the discrimination. The plaintiff alleged that the defendant university terminated and failed to rehire him in October 2005 because of his race and national origin. Rather than dismiss the termination and failure to rehire claims because they arguably did not affect compensation under the LLFPA, the court dismissed these on the ground that the plaintiff failed to take prompt action by waiting until April 3, 2007, to file his discrimination charge—“long after the limitations period had run.” Although it did not explicitly reference the discovery rule, its imprimatur on the court’s reasoning is obvious:

- **According to his own testimony, plaintiff knew in late October 2005 that his employment had been terminated and that other faculty members who were younger, white, female and non-Nigerian had been rehired for the January 2006 semester, while he had not been. Dr. Olubadeowo believed at that time that he was not being rehired because of discrimination...and that was why he contacted attorney Luscy for legal counsel.**

The court granted the employer’s motion for summary judgment, stating that “the limitations period would have begun to run in October or early November 2005 when plaintiff knew these facts and believed that he had suffered discrimination.”

The Southern District of Texas also examined the plaintiff’s diligence under the discovery rule in a post-LLFPA environment. In Leach v. Baylor College of Medicine, an African American plaintiff sued his former employer for discrimination, including “disparate job responsibilities.” While acknowledging that it was “unclear from the record” whether the plaintiff “had notice of the disparate job responsibilities more than 300 days before he filed his EEOC discrimination charge,” the court side-stepped the timeliness issue under the LLFPA because the plaintiff could not establish a prima facie case of discrimination in any event. Even though it avoided making a decision under the LLFPA, the court demonstrated a willingness to apply principles derived from the discovery rule to a claim of discrimination based on disparate job responsibilities—a claim that, at best, possessed a tenuous connection to compensation and was not tethered to any impact on compensation. According to the Leach court, “Although the Supreme Court in Ledbetter ‘declined to address whether Title VII suits are amenable to a discovery rule,’ the Fifth Circuit has held that ‘the operative date from which the limitations period begins to run is the date of notice of the adverse action.’”

Nonetheless, at least one court recently applied the LLFPA to claims alleging the discriminatory accrual of pension benefits and deemed them timely even though the plaintiff indisputably knew about the alleged discrimination years earlier. In Tomlinson v. El Paso Corporation, a district court in Colorado initially held that plaintiff Tomlinson’s age discrimination claim was time-barred because “the discriminatory act and Mr. Tomlinson’s actual knowledge of that act and its alleged disparate effect on older workers occurred more than 300 days before he filed his charge of discrimination.” The court later reversed course while acknowledging that the “policy justifications for enacting the Ledbetter Act include the difficulty of detecting pay discrimination, since pay-setting decisions are unlikely to be viewed as discriminatory and information about comparators is generally confidential.”

**Post-LLFPA World for States and Defense Counsel**

State courts are also beginning to grapple with the LLFPA’s impact on state antidiscrimination statutes. For instance, a New York state court held that the plaintiffs’ gender discrimination claims were time-barred because the LLFPA “does not affect this court’s analysis.” The plaintiffs alleged that the employer’s method of assigning jobs and favoring less qualified males caused the plaintiffs “to earn significantly less money than men in comparable positions.” However, a district court in the Middle District of Pennsylvania interpreting Pennsylvania’s antidiscrimination law held that the plaintiffs’ claims alleging discriminatory paychecks were timely under the LLFPA even though the plaintiffs knew of their salary disparity but failed to file timely administrative charges: “[T]he Court concludes that each paycheck issued pursuant to a discriminatory pay scheme is independently actionable under [Pennsylvania’s antidiscrimination law].”

Employment law practitioners in California who are more likely to litigate discrimination claims under the state Fair Employment and Housing Act should be aware that while the LLFPA does not apply to FEHA claims, courts may use the LLFPA to support California’s continuing violations theory set forth in Richards v. CH2M Hill, Inc. In Richards, the California Supreme Court held that a plaintiff could challenge an allegedly discriminatory employment practice even if the employee unreasonably failed to file a timely administrative charge. However, the plaintiff could only do so if the alleged discrimination had achieved a certain degree of permanence that rendered futile an employee’s conciliation efforts with the employer. A district court in the Eastern District of California avoided this issue in Harris v. City of Fresno:

No party has discussed whether to and what extent the Lilly Ledbetter Fair Pay Act impacts the statute of limitations issue in this case. Given
that neither party has raised or briefed this issue, and because the City’s motion can be decided on another ground, it is unnecessary to decide whether the Lilly Ledbetter Fair Pay Act brings the reclassification denials within the statute of limitations.42

As district courts continue to wrestle with the scope of the LLFPA, it seems certain that some district courts will be willing to interpret the LLFPA broadly and thus allow plaintiffs to challenge employment practices that occurred years ago so long as they affect compensation. This is welcome news for plaintiffs but not for employers, who now face the prospect of defending employment decisions that occurred in the more distant past. However, some key themes emerge from these early decisions that will help employers adapt to their new reality—at least until the federal appellate courts flesh out this emerging body of law to reconcile the competing interests of remediating discrimination and providing employers with closure and predictability.

First, a plaintiff’s ability to challenge an otherwise time-barred employment practice will largely depend on the ability to show a nexus between the alleged discriminatory practice and compensation as well as sufficient diligence under the discovery rule. Second, the list of employment practices that can arguably affect compensation is virtually limitless when left to the creativity of plaintiffs’ attorneys, who already benefit from antidiscrimination laws and fee-shifting statutes. As a result, employers should ensure that their pay decisions are well documented and factually supported in a manner sufficient to provide an effective defense in court should the need arise. This is especially critical when the decision maker no longer works for the employer or is otherwise unavailable—or unable—to explain any pay disparities.

Employers should also strive to make personnel decisions more transparent, especially those decisions that affect an employee’s compensation, such as performance reviews. They should inform employees whether their decisions will have an impact on pay. Indeed, the recent decision by the Third Circuit Court of Appeals in Mikula v. Allegheny County of Pennsylvania serves as a speed bump for employers. The court held that a “failure to answer a request for a raise qualifies as a compensation decision [under the LLFPA] because the result is the same as if the request had been explicitly denied.”43

The inescapable reality is that businesses and human resources professionals must always operate with an awareness of the latest developments in employment law. Not only are they at greater risk of defending personnel decisions that occurred decades
ago, but they also face increased monetary exposure for liability and more costly litigation. Proactively implementing solid employment practices now will help avoid problems in the future. Employers and their counsel need only read the court's decision in Bush v. Orange County Corrections Department4 to get a glimpse of what it is like in the post-LLFPA legal landscape to defend and explain a nonpromotion that occurred 16 years prior to the filing of the lawsuit. Fortunately for employers, plaintiffs must still prove their cases to ultimately prevail.

Bush shows that an employee plaintiff's inability to establish a prima facie case of pay discrimination or rebut an employer's proffered legitimate nondiscriminatory reasons for pay disparities will still doom the plaintiff's claims. Plaintiffs still face a steep climb even as the LLFPA does what Justice Alito claimed “current effects alone” could not do: “breathe life into prior, uncharged discrimination.”45

2 Id. at 624.
3 Id. at 619.
4 Id. at 645.
5 H.R. 11, 111th Cong. (1st Sess. 2009).
7 U.S. Senate Republican Policy Committee Legislative Notice, Jan. 14, 2009.
8 See note 6, supra, S. Deb. (Jan. 21-22, 2009).
10 Id. at 651.
17 Id.
18 Id. at *24.
20 Id. at 1296.
21 Id. at 1297-98.
23 Id. at 566.
25 Id. at *13.
31 Id. at *21.
32 Id. at *24.
34 Id. at *31.
35 Id. at *31-32.
37 Id. at *18; see also Schengrund v. Pennsylvania State Univ., 2009 WL 3182490, at *9 (M.D. Pa. Sept. 30, 2009) (“The plaintiff cannot simply ignore the facts of discrimination being uncovered around her and thereby receive benefits in court above and beyond those of the women who actively sought to remedy discrimination in the workplace for both her benefit and their own.”).
40 Schengrund, 2009 WL 3182490, at *11.
43 Mikela v. Allegheny County of Pa., 583 F. 3d 181 (3d Cir. 2009).
CHARACTER EVIDENCE is one of the most complex and misunderstood clusters of statutes in the Evidence Code. Civil courts exclude much of it, "not because it has no appreciable probative value but because it has too much." When admitted, character evidence can supply one of the most effective moments in a civil trial. Perhaps because so few civil matters reach trial, many civil lawyers lack an understanding of what character evidence is, how to generate it, and how to use it. One aspect of this variegated and complex area of evidence is its availability in a civil action to impeach a witness. The key is knowing when and how to use character evidence for the purpose of attacking a witness’s credibility.

Character evidence reveals a person’s propensity or disposition to act a certain way. Legal actions are about conduct—the conduct of parties pretrial (doing something or failing to do something) and the conduct of witnesses on the stand (telling the truth or lying). Behind every assessment of a person’s character, or trait of character, is a history of behavior. That history, in turn, generates opinions and reputations. Science confirms what experience anecdotally teaches—character, as evidenced by past conduct, is one of the best predictors of future behavior. As one court succinctly states, “[C]haracter is a more or less permanent quality and we may make inferences from it either forward or backward.”

Science and experience both recognize the power of character evidence. So why not permit a jury unlimited use of this robust predictor of human behavior to determine if a person’s conduct conformed with his or her character? Two reasons control. First, while past conduct is one of the best predictors of behavior, it can be more persuasive than accurate. While it may prompt compelling predictions about how a person will act, the predictions often generate unwarranted confidence. According to author and psychologist B. F. Skinner, “[Human behavior] may be beyond the range of a predictive or controlling science.”

Second, this form of proof often spawns
unfair prejudice, surprise, and undue consumption of time.\textsuperscript{6} Jurors may find against a side in a case simply because they do not like one of the parties based upon their perception of that person's character.\textsuperscript{7} In a legal system that strives for justice and struggles for economy, character evidence can invite a jury to decide a case based on who the “better” person is, not whether someone is legally responsible or telling the truth. Even the unlikable deserve justice in court.

Therefore, while the law severely restricts the use of character evidence in civil cases, it does not completely prohibit it. Character evidence is admissible in civil cases in three situations:

1) When the existence of a character trait is itself an issue to be determined in the case, character evidence is admissible to prove the trait exists.\textsuperscript{8}

2) When a witness testifies, character evidence is admissible regarding the witness’s honesty and veracity.\textsuperscript{9}

3) When the lawsuit involves allegations of sexual misconduct, character evidence is admissible to prove the conduct of the parties.\textsuperscript{10}

In contrast to the broader evidence permitted in criminal cases,\textsuperscript{11} the Evidence Code permits no other instances of character evidence in civil trial practice.

Every time a witness testifies—whether in trial before a jury, at a hearing before a judge, in a deposition, in a declaration, through verified pleadings, or through verified responses to written discovery—that person’s credibility is at issue, and his or her character traits supporting or negating honesty and veracity are admissible.\textsuperscript{12} Evidence of a witness’s propensity and disposition for telling lies (and in some instances for telling the truth)\textsuperscript{13} is admissible as circumstantial evidence of truthfulness while testifying. Evidence of good character is admissible only after a court has admitted evidence of a witness’s “bad character,”\textsuperscript{14} which is typically dishonest. Significantly, under no circumstances may a party use a witness’s religious belief to support or challenge the witness’s honesty or veracity.\textsuperscript{15}

Character evidence takes three different forms—opinion, reputation, and specific instances of conduct.\textsuperscript{16} Opinion evidence, whether lay or expert, is the specific impression of a person’s character by someone who knows the person reasonably well, through direct contact and specific instances of conduct.\textsuperscript{17} Reputation evidence is the collective impression of a person’s character, or trait of it, shared by a group close enough to the person to form reliable conclusions.\textsuperscript{18} Specific instances of conduct are just that—specific instances that reflect upon a person’s character.\textsuperscript{19}

Understanding how the three work, and when they are admissible, is critical to understanding the complex rules underpinning the admission of character evidence in civil cases.

A character witness may testify to his or her opinion of another witness’s trait for honesty and veracity. When character witnesses testify about their opinion of a witness’s honesty and veracity, they must, as a foundational matter, know the witness well enough to deliver an informed opinion of the witness’s truthfulness.\textsuperscript{20} Even experts can deliver this type of opinion.\textsuperscript{21}

Opinion evidence, while often more persuasive than reputation evidence, can be problematic under Evidence Code Section 352. While specific instances of conduct may help to formulate opinions, Section 787 prohibits the use of “evidence of specific instances of [a witness’s] conduct relevant only as tending to prove a trait of his character…to attack or support the credibility of a witness.”\textsuperscript{22} Thus, for instance, a court should prohibit a character witness from testifying that a party to a lawsuit is truthful simply because the party does charitable work or volunteers at a homeless shelter.

To present reputation evidence,\textsuperscript{23} as a foundational matter, the impressions of the person’s reputation must have crystallized at a time relevant to the lawsuit.\textsuperscript{24} A party can establish reputation evidence only through a witness who knows the reputation\textsuperscript{25} and not by proof of specific instances of conduct.\textsuperscript{26} Whether the character witness knows the individual about whom he or she testifies is irrelevant.\textsuperscript{27} The testimony centers on the “estimation in which an individual is held; in other words, the character imputed to an individual simply on the fact that he is actually known of him either by the witness or others.”\textsuperscript{28} It is “the net balance of so many debits and credits”\textsuperscript{29} in a person’s life that it evolves with every new action the person takes.

**Admissibility of Specific Instances of Conduct**

Specific instances of conduct are by far the most powerful type of character evidence for a jury. The first words out the mouths of many jurors after a verdict are typically, “Has [the defendant] done [the alleged wrongdoing] before?” Nevertheless, in civil cases California excludes specific instances of conduct as character evidence except for felony convictions reflecting honesty and veracity.\textsuperscript{30} Thus the only specific instances of conduct permitted to be introduced as character evidence is a felony conviction for crime in which honesty and veracity play a part, such as grand theft, fraud, and perjury.\textsuperscript{31}

Here is where a difference between the rules in civil and criminal cases is pronounced. In criminal cases, felony convictions used to impeach a witness’s credibility are not limited only to those that involve honesty and veracity pursuant to Evidence Code Section 786.\textsuperscript{32} With the passage of Proposition 8 in 1982, the California Constitution—under Article I, Section 28(f)—abrogated Evidence Code Sections 786 through 790 for criminal cases, allowing for the use of any felony conviction involving moral turpitude—that is, a readiness to do evil.\textsuperscript{33} In criminal cases, any felony conviction that evidences a person’s readiness to do evil, whether that felony directly reflects on honesty and veracity or not, can be used to impeach a witness, including, for example, felonies such as arson, domestic violence, and rape.\textsuperscript{34} In almost every civil case, attorneys ask deponents whether they have been convicted of a felony, because that evidence, if reflecting on honesty and veracity, can be admissible at trial to impeach the witness.\textsuperscript{35}

California’s Discovery Act permits the discovery of admissible evidence as well as any type of information reasonably calculated to lead to the discovery of admissible evidence.\textsuperscript{36} In fact, it allows inquiry into specific instances of conduct beyond felony convictions reflecting on honesty and veracity despite their inadmissibility to prove character. It does this because such instances of conduct may lead to the discovery of admissible opinion and reputation evidence. Witnesses base their opinions upon, and reputations emerge from, specific instances of a person’s conduct. Counsel questioning a witness during a deposition should ask whether the deponent is aware of instances of another witness’s dishonest conduct.

Consider, for example, a case in which a female employee alleges that a supervisor discriminated against her. She hopes to admit evidence that the supervisor had discriminated against others in virtually the same way. With this evidence, the plaintiff-employee tries to show the supervisor’s propensity to discriminate. The evidence is inadmissible.\textsuperscript{37} A court may, however, permit the evidence for a different reason. It may determine that the evidence tends to reveal the motive or intent that prompted the supervisor’s allegedly discriminatory actions against the plaintiff.\textsuperscript{38} Thus, discovery of specific instances of conduct beyond felony convictions reflecting on honesty and veracity may lead to other channels for admitting probative and relevant evidence in trial, such as evidence of a “bias, interest or other motive to lie”\textsuperscript{39} or evidence of a “crime, civil wrong, or other act” pursuant to Evidence Code Section 1101(b).\textsuperscript{40} Almost never heard at a deposition, but permitted, are inquiries into a deponent’s opinion about another witness’s reputation for truthfulness.\textsuperscript{41} Effective use and discovery of opinion and reputation evidence are equally advantageous to the employer in defending
the claim. The plaintiff-employee, who is certainly going to testify at trial, puts her character for honesty and veracity at issue. At trial, defense counsel may call witnesses to testify to their opinions that the employee is a dishonest person or that she has a reputation for being untruthful. These opinions are discoverable pretrial. Defense counsel may not admit at trial specific instances of the employee's conduct (other than felony convictions reflecting on honesty and veracity). The Discovery Act, however, permits inquiry into instances of dishonest conduct—even though they are inadmissible—if they are likely to lead to the discovery of admissible opinions and reputations. Defense counsel may ask other employees in depositions about specific instances in which the plaintiff-employee was less than completely honest. The answers could uncover other admissible, and embarrassing, evidence and may prompt the plaintiff-employee to settle the case.

Certainly the Discovery Act does not permit attorneys unlettered inquiry into who a person is and what he or she has done. While the Discovery Act permits pretrial inquiries reasonably calculated to lead to the discovery of admissible evidence, the Evidence Code limits exploration into evidence of a “person's general reputation” to the “relevant time in the community in which [the witness] then resided…. The relevant time may encompass “a time prior to” the date on which the alleged offense or bad act occurred. However, these inquiries, whether probing reputation or opinion, are always subject to the trial court’s review and limitation.

An effective way to attack character witnesses is to dig into the foundations of their testimony. The inquiry should include how well the character witness knows the other witness, or whether the character witness has any biases against, or a personal relationship with, the witness about whom the character witness is delivering an opinion. Strategically, this type of foundational questioning should occur in front of the jury.

Felony Convictions at Trial

To defuse the impact of a cross-examining attorney’s attack, felons testifying in trial often admit convictions when opposing counsel has the evidence to prove the conviction. On direct examination, the felon-witness’s attorney will typically ask, in a rehearsed exchange, “Have you been convicted of a crime?” The witness will answer with something like, “Yes. I’m embarrassed to say that, once when I was living out of my car, I stole some money from a liquor store so that I could eat.” In closing argument, opposing counsel often argue that, by admitting the conviction, the witness demonstrated his or her honesty. Despite objection, courts often allow this evidence and argument, which is why having and admitting court records regarding a felony conviction is so important.

With the records admitted, opposing counsel can respond that the felon-witness’s “honesty” is nothing more than self-protection. For the felon-witness who admitted to stealing money for food, the argument would look like this: “Just like [the felon-witness] got caught stealing money, he got caught here with proof that a jury convicted him of a crime. Honesty had nothing to do with it then, and honesty should tell a story like this:

“Few years ago, a friend told me about Ann Landers column he read. You remember Ann Landers, the lady who gave advice on what to do. Apparently, someone had written that she could not find her brooch—a one-of-a-kind pin that her family had passed down for generations. Shockingly, she found it on a dresser at a friend’s house months after it had gone missing. The woman writing for advice remembered that her friend had once commented on how much she liked and wanted to buy it. ‘Dear Ann,’ she asked, ‘Should I confront her?’ Landers wisely wrote back, ‘Don’t bother. If she is willing to steal it, she is willing to lie about it.’”

Counsel should then explain how what Ann Landers wrote applies to the lawsuit. “When you think about that witness, convicted of a felony, ask yourself, ‘should I believe him?’ Then, remember what Ann Landers said. If someone is willing to steal, she is also willing to lie. Theft and lying are acts of a dishonest person. Dishonest people lie, especially under oath.”

Some lawyers try to defuse the impending attack on their felon-witness by asking the jury to give the witness credit for admitting that he or she had committed the felony. They then make the same point in their closing argument to the jury. This argument focuses on an inadmissible, specific instance
“Selecting The Right Neutrals

California’s Foremost Mediators

The Academy is pleased to recognize over 60 neutrals.

Mark S. Ashworth
(949) 752-9401

Eleanor Barr
(310) 201-0010

Lynne S. Bassis
(626) 577-7807

Michael J. Bayard
(213) 383-9399

Daniel Ben-Zvi
(310) 201-0010

Lee Jay Berman
(213) 383-0438

Tim Corcoran
(909) 798-4554

Lawrence Crispo
(213) 926-6665

Greg Derin
(310) 552-1062

Michael Diliberto
(310) 201-0010

Max Factor III
(310) 456-3500

Jack D. Fine
(310) 553-8533

Gail Killefer
(310) 251-7777

Leonard Levy
(310) 201-0010

Christine Masters
(818) 955-8518

Steve Mehta
(661) 284-1818

Jeffrey Palmer
(626) 795-7916

Barry Ross
(818) 840-0950

At www.CaliforniaNeutrals.org you can search by subject matter expertise, location and preferred ADR service in just seconds. You can also determine availability by viewing many members’ ONLINE CALENDARS, finding the ideal neutral for your case in a way that saves both time and money.

The California Academy of Distinguished Neutrals is a statewide association of mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes. All members have been recognized for their accomplishments through the Academy’s peer nomination system and extensive attorney-client review process. Membership is by invitation only and is limited to individuals who devote substantially all of their professional efforts to service as a neutral.

For formal criteria and eligibility requirements, please visit www.californianeutrals.org/about
“Neutral Has Never Been Easier”

Neutral Profiles Online

Neutral profiles across Southern California, including...

- Viggo Boserup
  (310) 309-6205

- Kenneth Byrum
  (661) 861-6191

- George Calkins
  (310) 392-3044

- R.A. Carrington
  (805) 565-1487

- Hon. Eli Chernow
  (818) 995-3584

- Steven Cohen
  (310) 315-5404

- William Fitzgerald
  (310) 440-9090

- Linda C. Fritz
  (619) 236-1848

- Kenneth C. Gibbs
  (310) 309-6205

- Reginald Holmes
  (626) 432-7222

- Laurel Kaufer
  (818) 888-4840

- Joan Kessler
  (310) 201-0010

- Deborah Rothman
  (310) 452-9891

- Steve Rottman
  (310) 751-0114

- Myer Sankary
  (818) 231-2965

- Ivan K. Stevenson
  (310) 540-2138

- John Wagner
  (800) 488-8805

- Kenneth Weinman
  (310) 444-3030

To find the best neutral for your case, please visit our complete member roster at

www.CaliforniaNeutrals.org
of good conduct. Yet the only specific instance of conduct admissible to prove a character trait for honesty or veracity is the existence of a felony conviction, not the act of admitting to one. Opposing counsel should move to bar this argument regarding good conduct by a motion in limine.

**Opinions and Reputations at Trial**

In trial, on direct examination of a character witness, an attorney will usually begin by asking, “Do you know the defendant?” Answer: “Yes.” “How long have you known him?” Answer: “[A] number of years.” “Have you spent enough time with him to develop an opinion about how truthful he is?” Answer: “Yes.” “Based on your interaction with him, what is your opinion about how truthful the defendant is?” Answer: “He is a very honest guy.”

On cross-examination, an attorney may question the character witness about wrongdoing of which the witness may not know. The lawyer may ask do-you-know questions about conduct relating to character. For instance, after a character witness testifies that a party is honest and upstanding, the opposing lawyer could cross-examine by asking whether the witness knows that the party had been arrested for auto theft. Still, the allowable questioning in this instance is limited: “It is elementary that the misconduct inquired of must be inconsistent with the existence of a felony conviction, not the act of admitting to one.”

Opposing counsel could cross-examine the character witness about wrongdoings of which the witness may not know. The lawyer may ask do-you-know questions about conduct relating to character. For instance, after a character witness testifies that a party is honest and upstanding, the opposing lawyer could cross-examine by asking whether the witness knows that the party had been arrested for auto theft. Still, the allowable questioning in this instance is limited: “It is elementary that the misconduct inquired of must be inconsistent with the existence of a felony conviction, not the act of admitting to one.”

**Excluding or Sanitizing**

 Courts must analyze the proffered evidence under Evidence Code Section 352 to ensure it will not take too much time, mislead the jury, or cause undue prejudice or too much confusion. In general, the evidence must be sufficiently recent. It can become “too remote [in time] to have any probative value” and thus become irrelevant.

Recent case law suggests, however, that a felony conviction 17 years prior to the events at issue may continue to have probative value as the basis for impeachment. Counsel may object to the evidence under Section 352, and the trial court must then evaluate the evidence with the guidance of the Section 352 criteria. The court need not articulate its reasoning on the record, though the record must reveal that the court weighed the factors in generating its conclusion.

If a court appears disinclined to permit character evidence, counsel may wish to sanitize it, by making the evidence less prejudicial or inflammatory. If the evidence seems “too good” to disregard, it is probably an easy target for reversal on appeal. For example, a family sued a telephone company for wrongful death, claiming that the tension on telephone wires flung a large piece of a cut tree on to the decedent, who was also the family’s financial provider. The trial court permitted the defendant to try to minimize the damages it could owe the family by presenting evidence that the decedent had had an extramarital affair, and lived with, a 16-year-old girl. He had also been imprisoned for two years for passing worthless checks. During these times, the decedent had not financially supported the family. The jury found for the defendant, but the court of appeal reversed the trial court’s judgment finding this evidence unfairly prejudicial.

The reviewing court reasoned that, while the defendant had the right to show that the decedent had not provided for the family for periods of time, the reasons were “potentially inflammatory.” It hinted that the trial court could have sanitized the evidence: “It would have been simple to establish that the decedent left his wife and children for a period...and did not provide for their support during that time, without referring to the fact that his reason for leaving was to live with a minor girl. Similarly, nonsupport of his family during [his] incarceration could have been proved without reference to the deceased’s conviction...” Even if trial counsel is poised to win the opportunity to admit highly prejudicial evidence, he or she may wish to consider preserving the case on appeal by not overreaching. Counsel opposing the admission of character evidence may also consider suggesting that the court sanitize the evidence if the court appears ready to admit the harmful evidence.

Trials are a search for the truth. Knowing which witnesses testified truthfully, and which did not, is critical to getting to the truth of the matters at issue. Honest people tend to tell the truth, and dishonest people tend to lie. Knowing when the rules of evidence permit the discovery, and admission, of character evidence gives counsel a great advantage, both at trial and pretrial. In many ways, character evidence is the sleeping giant of civil litigation.

---

6. See KENNETH S. BROOKS, MCCORMICK ON EVIDENCE §187 (Update 2006).
9. The meanings of “honesty” and “veracity” are similar but not identical. Honesty refers to truth telling, veracity refers to a commitment to truth telling. See http://www.bartleby.com/6103/T0393300.html; Evid. Code §1101(c).
11. Rules permitting character evidence are more relaxed in criminal practice compared to civil practice. See Evid. Code §1101(c) (Character evidence may be used to impeach a witness.); Evid. Code §782 (Character evidence is admissible to show consent in prosecution for sexual misconduct.); Evid. Code §1102 (A defendant may present evidence of his or her own good character.); Evid. Code §§1103 (A defendant may attack the victim’s character.); and Evid. Code §1109 (Character evidence is admissible in cases alleging domestic violence, including violence against children, and cases alleging elder abuse or abuse of a dependent adult.).
14. Id.
In this case, the grass really is greener.

At a time when most companies are cutting back, Northwestern Mutual has added a record number of Financial Representatives to its sales force in 2009 and has yet to slow down in 2010. If you have the drive and talent to succeed, contact us.

Named one of the “Best Places to Launch a Career” -BusinessWeek, September 2009

Ranked one of the “Training Top 125” -Training magazine, February 2010

The evidence usually takes the form of certified records from the clerk of the court.

CACI 211.

EVID. CODE §787.

See 1 MCGORMICK ON EVIDENCE §43 (6th ed.).


Id.


See 1 MCGORMICK ON EVIDENCE §43 (6th ed.).


Marsh, 38 Cal. 2d at 745.

Eli, 66 Cal. App. at 79.


People v. Clair, 2 Cal. 4th 629, 654 (1992); People v. Castro, 38 Cal. 3d 301 (1985).


EVID. CODE §§1101(a), (b).


EVID. CODE §1101(b) (Evidence is admissible if it is “relevant to prove some fact [such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident...”). See Phillip R. Malin & Michael D. Schwartz, Second Acts, LOS ANGELES LAWYER, June 2004, at 31.

EVID. CODE §786.

EVID. CODE §1324.


CODE CIV. PROC. §2017.010.

EVID. CODE §1101(a-b).

EVID. CODE §788.

CODE CIV. PROC. §2017.010.

EVID. CODE §1101(b).
PARTING OF THE WAYS

Clients contemplating divorce need to consider revision of their estate plans

FAMILY LAW attorneys are well versed in divorce, and estate planning practitioners in death, but too often, family law attorneys do not give adequate consideration to estate plans before, during, or after filing for dissolution. Similarly, estate planning practitioners may not contemplate the consequences of a marital dissolution on the estate plans of clients. Attorneys of both specialties must prepare for the intersection of family law and estate planning. Estate planners need to inform their clients that dissolution of marriage often renders a previously prepared estate plan ineffective and the marital assets subject to the laws of intestate succession. Likewise, family lawyers need to recognize that protection of a divorcing client’s property involves ensuring that the client’s estate planning needs are met before, during, and after the dissolution.

Marriage or a registered domestic partnership imposes fiduciary duties on the partners. A spouse or domestic partner who is looking to protect his or her assets prior to dissolution is in an unusual position. While the constraints of the standard (or automatic) temporary restraining orders are not applicable until dissolution is initiated, his or her actions are subject to the interspousal fiduciary duties described under Family Code Section 721. Thus, asset protection and estate planning in the predissolution stage must adhere to the rules governing fiduciary relationships.

The interspousal fiduciary duties imposed under Family Code Section 721 provide that, in transactions with each other, a husband and wife are subject to the general rules governing fiduciary relationships that control the actions of a person in a confidential relationship. This relationship imposes a duty of the highest good faith and fair dealing, and neither spouse may take unfair advantage of the other. Further, the law obliges spouses to make full and fair disclosure of financial information to each other. These standards must be adhered to when evaluating changes to the character of marital property.

For example, estate planners may transfer or recharacterize property though a transmutation, as described by Family Code Section 850 et seq. A transmutation often drafted by estate planners involves changing one spouse’s separate property to community property in order to achieve an increase in basis of real property upon the death of either spouse or to equalize the estate between husband and wife. Although this transfer offers advantages in estate planning, it presents a significant disadvantage in divorce to the spouse who gave away half of his or her

by Howard S. Klein

Howard S. Klein, a certified specialist in estate planning, trust, and probate law, heads the Probate Department at Feinberg, Mindel, Brandt & Klein, LLP in West Los Angeles, where he specializes in probate and family law crossover matters. The author acknowledges the contributions of his associate, Taylor Bouchard.
separate property.

In addition, when only one spouse benefits from an interspousal transaction, the law presumes that the transaction was the product of undue influence. Once that presumption arises, the advantaged party has the burden to prove that the disadvantaged party was not unduly influenced. In re Marriage of Delaney sets forth the elements that the advantaged spouse must establish to prove that no undue influence was used in a transmutation. First, the transmutation must have been freely and voluntarily made by the disadvantaged spouse. Second, the disadvantaged spouse must have had full knowledge of all the facts. Third, the disadvantaged spouse must have had a complete understanding of the effect of the transmutation. These rigorous standards of fiduciary duty and undue influence leave little room for dishonesty in estate planning before a divorce. Once clients who are planning divorce have been advised of their fiduciary obligations as spouses, however, they may still benefit from a review of their estate plans with an eye not toward death but divorce, as the example of transmutation to community property shows.

The end of community property acquisitions is marked by the date of separation, as provided for under Family Code Section 771. Separation allows for the accumulation of separate property but does not terminate the duty of highest good faith and fair dealing owed to one’s spouse. This critical date is determined by the intent of one spouse to end the marriage, coupled with the objective conduct of furthering that intent. In Family Code Section 2100(a), the California Legislature has promulgated its policy to “marshal, preserve, and protect community and quasi-community assets and liabilities that exist at the date of separation so as to prevent commingling or enhancement with community property subject to the transfer without the written consent of the other party or order of court, except in the usual course of business or for necessities of life.”

Standard provisions also preclude cashing, borrowing against, canceling, transferring, or changing the beneficiaries of any insurance policy or other coverage. In addition, they preclude creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer without the written consent of the other party or order of the court. “Nonprobate transfer” is defined by Family Code Section 2040(d)(1) as an instrument other than a will that transfers property on death, including revocable living trusts, payable on death accounts, Totten trusts, and similar items.

Pursuant to Family Code Section 233, these restraining orders remain in effect until final judgment of dissolution is entered. A spouse who violates one of the ATROs is in contempt of court, and the aggrieved spouse who violates one of the ATROs is in contempt of court, and the aggrieved spouse may not change the beneficiary of a nonprobate transfer because that would affect the disposition of property and violate the ATROs. Subsection 2040(3) allows a party to a dissolution action to eliminate a right of survivorship to property. This subdivision was the product of a 2001 amendment that sought to make the section consistent with the holding in Estate of Mitchell. In Mitchell, a husband and wife held property as joint tenants. When the couple initiated dissolution proceedings, the husband recorded declarations of severance pursuant to Civil Code Section 683.2(a)(2) in order to terminate the joint tenancy and end the right of survivorship. About a month later, while the dissolution proceeding was still pending, the husband died. The court held that “when one spouse severs a joint tenancy with the other spouse by executing and recording a declaration of severance, there is neither a transfer nor a disposition of any property. Such a severance therefore does not violate an injunctive order entered pursuant to Family Code Section 2040.”

Postnuptial agreement. A postnuptial agreement is essentially a different label for a transmutation agreement and must therefore comply with the applicable statutes and cases. A severability clause may be an important provision in this type of agreement, so that the entire agreement is not void in the event that a particular provision is deemed invalid.

Creation of a separate property trust. This trust will enable the settlor of the trust to maintain the separate property character of certain assets free from the common pitfalls of commingling or enhancement with community property funds.

During Divorce Proceedings

During Divorce Proceedings

Whether or not new instruments are necessary or appropriate, an estate planner will need to deal with standard (or automatic) temporary restraining orders. Commonly known as ATROs, they bind the petitioner upon filing the petition for dissolution and issuance of summons, and the respondent upon service. For estate planners, the critical ATRO provisions are those that preclude any transfer, encumbrance, or disposal of community or separate property without the written consent of the other party or order of court, except in the usual course of business or for necessities of life.

Standards also preclude cashing, borrowing against, canceling, transferring, or changing the beneficiaries of any insurance policy or other coverage. In addition, they preclude creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer without the written consent of the other party or order of the court. “Nonprobate transfer” is defined by Family Code Section 2040(d)(1) as an instrument other than a will that transfers property on death, including revocable living trusts, payable on death accounts, Totten trusts, and similar items.

Pursuant to Family Code Section 233, these restraining orders remain in effect until final judgment of dissolution is entered. A spouse who violates one of the ATROs is in contempt of court, and the aggrieved spouse is entitled to restitution in the amount that would have been realized had the asset been available at the finalization of dissolution. Notwithstanding the ATROs, Family Code Section 2040(b) expressly reserves the right of a spouse to make certain estate planning changes during dissolution proceedings, providing these exemptions from the ATROs: 1) creation, modification, or revocation of a will, 2) revocation of a nonprobate transfer, most notably a revocable living trust pursuant to the trust instrument, provided that notice of the change is filed and served on the other party before the change takes effect (see “Revocation of a Family Trust without the Knowledge of the Cotrustee” by Kira Masteller, page 16), 3) elimination of a right of survivorship to property, typically by severing joint tenancy, provided that notice of the change is filed and served before the change takes effect, 4) creation of an unfunded revocable or irrevocable trust, and 5) execution and filing of a disclaimer.

Pursuant to Section 2040(b)(2), a client may revoke a nonprobate transfer so long as it does not affect the disposition of property. Otherwise, the revocation would violate the ATROs. An example of an estate planning tool that successfully avoids violation of the Family Code Section 2040(a)(4)—which prohibits nonprobate transfers that affect the disposition of property, and at the same time, is within the exemption of Family Code Section 2040(b)(2)—is naming a new trustee or successor trustee. In Estate of Khan, the court found the husband’s attempt to revoke a trust while engaged in dissolution litigation represented an attempt by him to transmute community property into separate property in violation of an existing restraining order. Specifically, the court held that because the trust was created jointly, the husband acting alone could not revoke it. Normally, under Family Code Section 2040(b), a spouse may revoke such an instrument, but if the revocation clauses of the trust agreement utilize language in the plural (e.g., “us”), the agreement is controlling, and both spouses must mutually agree to the revocation. In contrast, a spouse may not change the beneficiary of a nonprobate transfer because that would affect the disposition of property and violate the ATROs.
Walzer & Melcher
A Limited Liability Partnership

Exclusively Family Law

Peter M. Walzer is the founding partner of Walzer & Melcher LLP. He is past President of the Southern California Chapter of the American Academy of Matrimonial Lawyers. He is former chair of the State Bar of California Association of Certified Family Law Specialists.

Christopher C. Melcher earned his law degree at Pepperdine University, and was admitted to the California bar in 1994. His practice focuses on complex family law litigation and the preparation of premarital agreements. He is a certified family law specialist and a member of the Family Law Executive Committee of the State Bar of California. He is a regular lecturer on family law issues statewide, and the author of several family law publications.

Leena S. Hingnikar received a Bachelor of Arts Degree in 2003 from the University of California, San Diego. She received her Juris Doctor from Whittier Law School in 2007. She presented a program on family law and estate planning issues.

Jennifer L. Musika received a Bachelor of Arts Degree in 2005 from Vanderbilt University. She received her Juris Doctor from Boston University Law School in 2008. She gave a State Bar webinar on preparing initial pleadings in a divorce action.
The case of Allstate Life Insurance v. Davis is an example of the interplay between the ATROs and the estate planning changes expressly permitted pendente lite. In Allstate, a husband purchased a life insurance policy during the marriage naming his wife as the primary beneficiary and his sons as equal contingent beneficiaries. Several years later, the wife filed for dissolution, and the filing subjected the parties to the ATROs. On February 21, 2007, the husband and wife signed a marital settlement agreement, with each spouse waiving respective rights as beneficiaries to life insurance policies. The judgment was not entered until April 20. Before entry of final judgment, Allstate Insurance received husband’s request for a beneficiary change. On July 5, the husband died. The court found that the ATROs remained in effect until April 20, when the trial court issued its final order. Because the husband was enjoined from submitting a change of beneficiary form until after April 20, the April 4 request had no legal effect. However, since the wife disclaimed her interest under the marital settlement agreement, with each party having testamentary power over his or her half share; and terminating payable-on-death accounts (after providing the requisite notice) and then returning the revoked trust’s assets to the parties; severing any joint tenancies (after providing the requisite notice) so that the parties hold the subject property as tenants in common, with each party having testamentary power over his or her half share; and terminating payable-on-death accounts (after providing the requisite notice) so that the surviving spouse is not the beneficiary of the accounts in the event of the other spouse’s death during dissolution proceedings.

Together, the standard ATROs and the permissible actions listed under Family Code Section 2040(b) offer guidance when representing a client who is in dissolution proceedings. Possible steps to take include a new will that revokes the former will and designates a different executor and new beneficiaries. Although the final judgment will revoke the former spouse’s share of the decedent’s estate, this automatic revocation does not take place until the entry of the judgment. So, as a precaution, an estate planner should advise the client to revoke his or her will as early as the filing of the petition.

Additional steps to take include revoking an existing living trust (after providing the requisite notice) and then returning the revoked trust’s assets to the parties; severing any joint tenancies (after providing the requisite notice) so that the parties hold the subject property as tenants in common, with each party having testamentary power over his or her half share; and terminating payable-on-death accounts (after providing the requisite notice) so that the surviving spouse is not the beneficiary of the accounts in the event of the other spouse’s death during dissolution proceedings. Another option is to create an unfunded trust that serves as a receptacle for property, subject to a pour-over provision in a newly drafted will. The unfunded trust and the pour-over do not violate the ATROs. However, if the client dies during the proceedings, his or her will adds to the new trust all assets belonging to the client that were formerly in the revoked trust, together with the client’s share of the joint tenancy, payable-on-death accounts, and similar assets over which he or she acquired the right of testamentary disposition. While these assets would have to be administered in the decedent’s probate estate, at least they would pass to the client’s desired beneficiaries and would be under the stewardship of the client’s desired fiduciaries.

The family court is likely to scrutinize these transactions for compliance with the fiduciary duties of Family Code Section 721. But they are permissible within the language of Family Code Section 2040. They do not affect the status quo of the marital assets during the pendency of the family court proceedings. As a protective measure, an attorney may seek a court order. This is a viable option under Family Code Section 2040(a)(2). If certain estate planning devices cannot be implemented until final judgment is entered and the risk of death before final judgment is high, court intervention is appropriate. ATROs are boilerplate, one-size-fits-all orders, so they may be appropriate for modification when the unique circumstances of a family so demand. A court has the inherent power to modify an injunction when “the ends of justice would be served by modification.”

**After the Dissolution**

The entry of a marital dissolution judgment automatically revokes all testamentary distributions to, and appointments of, the former spouse. This automatic revocation may well create an intestacy, and at the very least it will leave large holes in the estate plan of the newly divorced spouse. Typically, the purpose of the previously created estate plan is frustrated or rendered ineffective as a result of a divorce. The automatic revocation of certain testamentary distributions is effectuated through Probate Code Sections 6122 and 5600.

As to estate plans involving a transfer other than by will, Probate Code Section 5600(a) provides that “a nonprobate transfer to the transferor’s former spouse, in an instrument executed by the transferor before or during the marriage, fails, if, at the time of the transferor’s death, the former spouse is not the transferor’s surviving spouse...as a result of the dissolution or annulment of the marriage....” The exceptions to Section 5600(a)’s causing of a nonprobate transfer to fail are any of the following: 1) the nonprobate transfer is...
not subject to revocation by the transferor at the time of the transferor’s death, 2) there is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse, or 3) a court order that the nonprobate transfer be maintained on behalf of the former spouse is in effect at the time of the transferor’s death.15

Although a client may feel secure in his or her knowledge that the judgment for dissolution will operate to ensure that the former spouse receives nothing from the estate, the judgment simultaneously functions to create gaps in an estate plan, possibly defeating the efficiency of the plan and even resulting in an intestacy. A client should not rely solely upon the statutory revocations and should instead work with an estate planner to revise all beneficiary designations in order to ensure that the client’s estate plan will meet current needs.

Estate planning attorneys should advise a newly divorced spouse to create appropriate estate planning documents, such as a new revocable living trust, pour-over will, trust transfer deeds, assignment of assets, power of attorney, and advance healthcare directive. When that is accomplished, the client will at least have provided for the most important persons in his or her life and will have a health directive in place.

If the client has a new spouse or domestic partner in the wings, a dissolution is also the time for the client to give serious consideration to the preparation of a premarital agreement, in order to determine the character of new earnings, and to handle such matters as spousal support and succession to property on death. Also, it is important for the client to create a new will that sets forth the testator’s intention to provide for (or not to provide for) his or her significant other.16 While divorce is not as certain as death, preparing for the complexities surrounding the intersection of divorce, death, and disposition of property enable an estate plan to remain effective.

1 California law recognizes registered domestic partners as well as spouses. FAM. CODE §297.5(a). Similarly, the Probate Code has been amended to provide for domestic partners or domestic partnerships as a logical analog to statutes mentioning spouses and marriage. See, e.g., PROB. CODE §§6401, 6122.1.

2 See I.R.C. §1014(b)(6).


5 See Fam. Code §§2040(a), 231, and 233; Judicial Council Form FL-110.

6 This restitution remedy is similar to the Family Code §1101(g) remedy for breach of a spouse’s fiduciary duty. See Marriage of McTernan & Dubrow, 133 Cal. App. 4th 1090 (2005) (A husband sold community property stocks pendente lite and used the proceeds to pay community debt. His wife was awarded 50% interest in lost profits.).


9 Id.


11 This technique is suggested in Estate Planning During Marital Dissolution, 30 CAL. L. REV. COMM’N REPORTS 603 (2000).

12 See Howard S. Klein, Tales of Two Courts, LOS ANGELES LAWYER, Apr. 2005, at 29.

13 See CODE CIV. PROC. §533, as cited in Estate of Ronald D. Fuller, 2005 Unpublished LEXIS 3380 (1st Dist. Div. 1 Apr. 18, 2005).

14 “Unless the will expressly provides otherwise, if after executing a will the testator’s marriage is dissolved or annulled, the dissolution or annulment revokes all of the following: (1) any disposition or appointment of property made by the will of the former spouse; (2) any provision of the will conferring a general or special power of appointment on the former spouse; and (3) any provision of the will nominating the former spouse as executor, trustee, conservator or guardian.” PROB. CODE §4122(a).

15 Prob. Code §5600(b).

16 If a decedent should elect not to provide for his or her spouse in his or her will or living trust, Probate Code §21610 will provide for the omitted spouse in the decedent’s estate unless one of three circumstances apply: 1) the failure to provide was intentional and that intention appears from the testamentary instruments, 2) the decedent provided for the spouse by transfer outside of the estate passing by the testamentary instruments, or 3) the spouse made a valid agreement waiving the right to share in the decedent’s estate. Prob. Code §21611.
IN JULY 2008, Facebook brought a trade dress infringement suit in the Northern District of California against a German Web site, StudiVZ, that had allegedly copied Facebook’s “look, feel, features and services.” On the same day the California suit was filed, StudiVZ brought an action in Germany seeking a declaratory judgment that it had not infringed Facebook’s site. Various online media outlets branded StudiVZ a “blatant Facebook clone,” an “exact duplicate,” and a “direct rip-off.” One of StudiVZ’s founders publicly admitted basing the site on Facebook.

Facebook’s California complaint howled with outrage at StudiVZ’s “unabashed and wholesale theft of Facebook’s user interface and webpage designs” and announced in its opening sentence, “This is a case to stop Defendants from running a knockoff of Facebook’s website.” Yet, just one year later, the world’s second most popular Web site lost its case in Germany and quietly dismissed its California lawsuit, agreeing to allow StudiVZ to continue operating in exchange for an undisclosed cash settlement.

The story of how mighty Facebook found itself unable to shut down a reportedly “blatant” knockoff speaks volumes about the legal and practical challenges faced by those seeking to protect a Web site’s “look and feel.” Despite those challenges, however, real benefits may arise from look-and-feel litigation. The Facebook story demonstrates the critical role look-and-feel claims can play in a broader business strategy to defend against knockoffs and preserve hard-earned goodwill. Businesses will always be able to protect the trademarks, trade names, and copyrightable text content (images, music, and the like) contained on their Web sites. Nevertheless, as companies invest more time and capital in the layout, user interface, and overall appearance of their sites—and as consumers increasingly come to associate distinctive Web site design (such as cnn.com and espn.com) with their favorite brands—the need to protect Web site look and feel becomes a priority. This protection can be rooted in either copyright or trademark law.

To be worthy of copyright protection, the look and feel of a Web site must be “original” and possess some “minimal degree of creativity.” These standards may seem low, but there are only a finite number of ways a Web site can be presented and over 200 million Web sites on the Internet. As a threshold matter, a copyright infringement lawsuit cannot proceed unless and until the claimant has applied to the U.S. Copyright Office for registration of the copyright at issue. Thus, the Copyright Office is the first arbiter of whether a Web site’s look and feel is sufficiently original and creative. However, its pronouncements on the subject cast some doubt on whether Web site look and feel can ever be copyrightable.

Virtually Identical

Case law on the point is scant but seems to indicate that the “look” or “design” of a Web site may qualify for copyright registration so long as the particular arrangement of Web content is unique and creative. In Darden v. Peters, an applicant for copyright registration sought the district court’s review of the Copyright Office’s denial of registration of the “formatting of an Internet web page.” The Web site in question, appraisers.com, pre-
presented a map of the United States highlighting each state and county. Users could click on a particular county to access the list of real estate appraisers working there.

The applicant sought a copyright for the “formatting of an Internet web page.” The Copyright Office found this wording too broad, reasoning that the language could include “unoriginal formatting elements” and “uncreative layout of those elements.”13 The Copyright Office acknowledged that the way in which “specific textual,…graphic or pictorial matter” had been “selected, coordinated and arranged” might be worthy of copyright protection, but it refused to grant registration unless a more limited application was submitted.14 However, the applicant did not do so, and the issue was left unresolved.15

In *Mortgage Market Guide, LLC v. Freedman Report, LLC,*17 the Copyright Office had granted registration of the plaintiff Web site’s “[c]ompilation [of] text, graphs, charts, tables and artwork relating to the mortgage market.”18 After a 15-day bench trial, the district court concluded that the plaintiff held a valid copyright in the Web site and that the site’s interface “customization options” combined with “the arrangement of dynamic charts and tables” to form a “unique creative expression.”19 Like *Darden,* this case acknowledges the potential for copyright registration of a Web site’s look and feel, provided that the way in which the site content is arranged is unique and creative.

If registration is secured for a Web site’s look and feel, the copyright holder not only may bring suit but also enjoys a rebuttable presumption that the copyright is valid.20 In response, the defendant must prove that the look and feel of the site at issue is neither original nor creative.21 The design’s originality can be attacked by presenting evidence that other Web sites used aspects of the plaintiff’s design before the plaintiff did. Web archive services can supply historical screenshots of Web pages to prove prior use of creative elements22—and this evidence can be quite effective in attacking claims of originality. To prove infringement, the Web site owner must also prove “copying,” which in the Ninth Circuit is generally established by evidence of 1) the defendant’s access to the copyrighted work prior to the creation of the defendant’s work, and 2) substantial similarity of general ideas and expression between the copyrighted work and the defendant’s work.23 Given the vast, wide-open nature of the Internet, a defendant is unlikely to dispute his or her access to a given Web site. However, in the context of Web site look and feel, the plaintiff will be required to meet a higher standard than substantial similarity. When a work’s copyright protection is limited to the originality and creativity of the particular “arrangement” of its elements—as is the case with a Web site’s look and feel—copyright law requires more than substantial similarity to prove infringement. Instead, the Ninth Circuit requires proof that the allegedly infringing work is “virtually identical.”24

The “virtually identical” standard is as unforgiving as it sounds. In *Crown Awards, Inc. v. Trophy Depot,* the plaintiff produced undisputed evidence that the defendant had intentionally copied its Web site.25 Nevertheless, the defendant also tweaked the look and feel of the knockoff site by changing the color scheme from the original and by adding text in places where the original Web site did not.26 The Web sites were similar but not identical, and so the plaintiff’s claim was denied.27

Unfortunately, *Facebook v. StudiVZ* did not clarify the issues surrounding copyright protection for Web site look and feel. Facebook asserted eight separate causes of action, but copyright infringement was not among them.28 It is not clear why Facebook chose this strategy. Maybe Facebook concluded that too little of its own design was original or that StudiVZ’s tweaks—for example, using the color red where Facebook used blue—meant the sites were no longer virtually identical. Still, Facebook might have been expected to at least plead the claim. Perhaps it simply had not registered its look and feel with the Copyright Office and was concerned that an application would be Kevin D. Hughes is a partner and David E. Rosen is an associate with Tisdale & Nicholson, LLP, in Century City. Hughes and Rosen are copyright and trademark litigators who focus their practice on entertainment and Internet cases.
denied. In any event, Facebook’s decision not to plead copyright infringement speaks volumes about the difficulty of supporting such a claim in a case involving Web site look and feel.

**Trade Dress**

Trademark law could provide another avenue for those seeking protection for Web site look and feel. More specifically, plaintiffs may invoke the form of trademark protection known as trade dress, which applies to the “total image and overall appearance” of a product. The theory behind trade dress protection is that a product deserves trademark protection if its overall image is sufficiently distinctive that consumers associate that image with the maker of the product. Examples include the hourglass shape of the classic Coca-Cola bottle; the cow-spotted boxes of Gateway computers; the décor of the Taco Cabana chain of Mexican restaurants; the size, shape, and graphic design of Reader’s Digest magazine; and the characters and design features used in the Pac-Man video game.

Unlike copyright, trade dress does not require registration, originality, or creativity. Recently, commentators and litigants, including Facebook, have sought to extend trade dress protection to a Web site’s distinctive look and feel.

To sustain a claim for trade dress infringement, a Web site owner must prove that:

1) Its design is nonfunctional.
2) Its design has acquired “secondary meaning.”
3) The knockoff Web site creates a “likelihood of confusion” in the mind of the consuming public as to the source, sponsor, or maker of the allegedly infringing site.

A product feature is “functional” if it is useful or serves a purpose that constitutes “the actual benefit the consumer wishes to purchase” rather than a “mere arbitrary embellishment.” For example, the hypertext links on cnn.com that allow a user to access news stories are “the actual benefit” the user seeks from the site, but the color scheme and particular arrangement of stories, images, and subjects are arguably “mere arbitrary embellishment.”

Even if individual elements of trade dress have a functional utility, the arrangement or combination of those utilitarian features may be protected as trade dress—but only if they reflect arbitrary or nonfunctional “design decisions” and leave a “multitude of alternatives” for competing arrangements that are not confusingly similar. In Clicks Billards, Inc. v. Sixshooters, Inc., the Ninth Circuit held that while many of the individual elements of the plaintiff’s pool hall were functional (such as lamps to illuminate the pool tables and rails for the customers to place their drinks), the plaintiff had offered sufficient evidence of the “arbitrariness and non-functional nature of [the] design decisions and the availability of alternative designs” to avoid summary judgment. The “arbitrary” elements of the pool hall’s trade dress included the “size, placement, and layout of the pool tables; the color combination, including the contrast between the carpet and the dark wood; the lighting; the neon beer signs…[and] the selection of video games.”

To date, only one opinion—and it is unpublished—has addressed functionality in the context of a Web site’s look and feel. SG Services, Inc. v. God’s Girls Inc. involved the creator of a so-called alterna-porn Web site, suicidegirls.com, which featured news, message boards, interviews, and photographs of clothed and nude models. The owner of this site sued a rival Web site, godsgirls.com, for trade dress infringement. While the court ultimately dismissed the infringement claim on summary judgment, it did conclude that the colors of the plaintiff’s site (predominantly pink) and the phrases used on the site (“they’re the girl next door” and “so you wanna be a suicide girl?”) were nonfunctional because they were merely adornment and do not ‘constitute the actual benefit that the consumer wishes to purchase’. Thus, existing case law leaves open the possibility that a Web site’s look and feel could be ruled nonfunctional, but the law is too undeveloped to draw any further conclusions.

The far more difficult trade dress hurdle is proving that the Web site design has acquired secondary meaning. A product design feature acquires secondary meaning when its “primary significance” in the minds of prospective purchasers serves to identify the source or maker of the product. Examples of trade dress that have acquired secondary meaning through use and advertising include the Rubik’s Cube and the small red tag stitched on to the back pocket of Levi jeans.

Some of the factors that courts consider when evaluating secondary meaning include:

- Whether consumers in the relevant market associate the trade dress with the maker.
- The degree and manner of advertising under the claimed trade dress.
- The length and manner of use of the claimed trade dress.
- Whether use of the claimed trade dress has been exclusive.
- Evidence of sales, advertising, and promotional activities.
- Unsolicited media coverage of the product.
- Attempts to plagiarize the trade dress.

Those seeking protection for a Web site’s look and feel will find that many of these factors simply do not apply in that context. Indeed, Web sites generally do not advertise their look and feel. Also, the type of longstanding use that supports a likelihood of secondary meaning is typically measured in decades, while most Web sites are relatively recent creations—and even established Web sites revamp their look and feel every year or so. Moreover, sales are a poor indicator of brand recognition for the many sites that provide content and services for free. Advertising may ultimately make sense as a substitute for sales, but no court has embraced that approach thus far.

To date, no court has held that a Web site’s look and feel has acquired secondary meaning. In Computer Access Technology Corporation v. Catalyst Enterprises, Inc., the plaintiff claimed that its computer software graphic user interface—akin to a Web site’s look and feel—was protectable trade dress. The court acknowledged that the plaintiff had spent $4.9 million on an advertising campaign aimed at creating identification of
MCLE Test No. 193

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

1. The "look and feel" of a Web site must be nonfunctional and distinctive to be worthy of copyright protection.
   A. True
   B. False

2. The U.S. Copyright Office has stated publicly that the formatting of Web pages generally is not copyrightable.
   A. True
   B. False

3. Web site owners may not bring a look-and-feel copyright infringement suit until they have first applied for copyright registration.
   A. True
   B. False

4. As a practical matter, it is impossible to prove copyright registration.
   A. True
   B. False

5. What is the Ninth Circuit's standard for how similar the look and feel of a knockoff Web site must be to the original in order for the copying to constitute copyright infringement?
   A. Substantially similar.
   B. Confusingly similar.
   C. Virtually identical.
   D. None of the above.

6. Unlike copyright, trade dress need not be registered, nor must it be original or creative.
   A. True
   B. False

7. To sustain a claim for trade dress infringement, a Web site owner must prove that:
   A. Its design is nonfunctional.
   B. Its design has acquired secondary meaning.
   C. The knockoff Web site creates a likelihood of confusion in the mind of the consuming public regarding the source, sponsor, or maker of the infringing site.
   D. All of the above.

8. Which of the following is not an example of protectable trade dress?
   A. The hourglass shape of the classic Coca-Cola bottle.
   B. Gateway's cow-spotted computer boxes.
   C. The characters and design features used in the Pac-Man video game.
   D. The words "Levi jeans."

9. A product feature is functional if it is useful or serves a purpose that is "the actual benefit the consumer wishes to purchase" rather than a "mere arbitrary embellishment."
   A. True
   B. False

10. In a Web site, what product feature can be characterized as functional?
    A. Hypertext links.
    B. Color scheme and particular arrangement of text, images, and subject matter.
    C. None of the above.
    D. A and B.

11. A product design feature acquires secondary meaning when its secondary significance in the minds of prospective purchasers serves to identify the source or maker of the product.
    A. True
    B. False

12. To prove secondary meaning, a Web site owner must present evidence that the general public associates the look and feel of the site with its owner.
    A. True
    B. False

13. The Ninth Circuit's factors for determining likelihood of confusion do not include:
    A. Similarity of the two marks or trade dress.
    B. The defendant's intent in selecting the mark.
    C. Evidence of actual confusion.
    D. Trademark registration.

14. Likelihood of confusion exists when a reasonable consumer believes that the defendant's product is licensed, sponsored, endorsed, or authorized by the plaintiff.
    A. True
    B. False

15. Evidence of actual confusion is the best evidence of likelihood of confusion.
    A. True
    B. False

16. Functionality, secondary meaning, and likelihood of confusion are highly fact-specific issues.
    A. True
    B. False

17. In trade dress actions, the court has discretion to award plaintiffs up to four times the amount of their monetary damages.
    A. True
    B. False

18. Likelihood of confusion when a reasonable consumer believes that the defendant's product is licensed, sponsored, endorsed, or authorized by the plaintiff.
    A. True
    B. False

19. A district court in California required a copycat site to 1) post hypertext links directing users to the infringed site and 2) forfeit its domain name.
    A. True
    B. False

20. A product feature is functional if it is useful or serves a purpose that is "the actual benefit the consumer wishes to purchase" rather than a "mere arbitrary embellishment."
    A. True
    B. False

ANSWERS

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

1. A B C D
   2. A B C D
   3. A B C D
   4. A B C D
   5. A B C D
   6. A B C D
   7. A B C D
   8. A B C D
   9. A B C D
   10. A B C D
   11. A B C D
   12. A B C D
   13. A B C D
   14. A B C D
   15. A B C D
   16. A B C D
   17. A B C D
   18. A B C D
   19. A B C D
   20. A B C D
the user interface and its source but concluded that it still had not established secondary meaning. Indeed, the court expressed skepticism that the primary significance in a consumer’s mind of a feature as inherently functional as a user interface could ever be to identify the source or manufacturer.12

The recent SG Services decision concluded that while the Web site at issue was popular, there was no evidence that its look and feel had acquired secondary meaning. Although the Web site owner introduced evidence of the commercial success and media coverage of its site (“the most popular web page on MySpace”), it still could not prove secondary meaning because it presented no evidence that the site’s commercial success had led the public to associate the look and feel of the site with its owner.13

Many of the most popular sites on the Internet claim millions of daily visitors. It seems plausible that users of sites like espn.com or cnn.com could identify these sites by their look and feel even if all trade names, trademarks, and logos were removed. However, until a Web site owner actually convinces a court that the primary significance of its look and feel is in the user’s mind is brand identification, these claims will face uncertain futures.

Facebook is the second most-viewed Web site in the world, with 175 million visitors every day. Shortly after Facebook filed suit against StudiVZ, one commentator quipped, “While Facebook’s interface is hardly the epitome of creativity, it is in its boringness, a distinctive look associated with Facebook.” 14

The German court hearing the case acknowledged that Facebook’s interface was “essentially distinctive” but dismissed Facebook’s claims without making a finding whether the interface had acquired secondary meaning.

**Likelihood of Confusion**

The final trade dress infringement requirement involves proof that consumers visiting the knockoff Web site would likely be confused that the site was owned or sponsored by the plaintiff. The Ninth Circuit has developed eight factors for determining likelihood of confusion:

1) Similarity of the two marks or trade dress.
2) Relatedness of the products or services of the plaintiff and defendant.
3) The advertising or marketing channels used by the plaintiff and defendant.
4) The strength or distinctiveness of the plaintiff’s trade dress.
5) The defendant’s intent in selecting the mark—for example, whether evidence exists of the defendant’s intent to infringe and create confusion.
6) Evidence of actual confusion.
7) Likelihood of expansion in product lines so that the two products at issue will ultimately compete directly.
8) The degree of care that purchasers are likely to exercise.

If a reasonable consumer believes that the defendant’s product is licensed, sponsored, endorsed, or authorized by the plaintiff or made by the plaintiff and sold by the defendant under the defendant’s brand name, then a likelihood of confusion exists. Knockoff Web sites often employ strategies to lure users from the original site, such as typo-squating (registering the copycat site at a domain name that is a close misspelling of the original site), tagging the knockoff site with key words associated with the original to divert search engine traffic, or placing misleading click-through advertisements or hyperlinks in popular third-party sites. While users may realize they are on a different Web site with a different domain name, the similarity in look and feel may lead them to believe the infringing site is somehow licensed or sponsored by the original site. However, no recorded decision to date has addressed these issues.

Evidence of actual confusion is the best evidence of likelihood of confusion. Perhaps Web site visitors are posting comments demonstrating confusion as to whether a knockoff site is affiliated with the original. While that evidence may be effective, it is also problematic because of the difficulty in proving its reliability. Web site visitors typically post comments under a fictional screen name and may be impossible to locate for purposes of acquiring a sworn affidavit or otherwise demonstrating that they are not employed by, or loyal to, the plaintiff.

In the German Facebook proceeding, the court addressed the likelihood of confusion but only to dismiss the issue in cursory fashion. The German court recognized that StudiVZ had duplicated elements of Facebook’s distinctive interface but concluded that no trade dress infringement had taken place because StudiVZ was not using Facebook’s look and feel as a trademark. Specifically, the court reasoned that StudiVZ was not using Facebook’s look and feel to mislead consumers regarding the origin or owner of the site because each Web page contained a visible StudiVZ logo. What the German court ignored was the possibility that users would conclude—visible logo or not—that StudiVZ was affiliated with Facebook as a German subsidiary or licensee.

The Facebook case presented an unusual wrinkle in the analysis of likelihood of confusion. The StudiVZ Web site launched in Germany before Facebook introduced its German language version. Because the knockoff was in German and targeted German consumers, the German court determined that the relevant consumer for the purposes of discerning likelihood of confusion was the German consumer. The German court concluded that the German consumer was not likely to confuse the knockoff (StudiVZ) with the original (Facebook) for the fundamental reason that during the relevant time frame—before Facebook had introduced a German-language version—the original site (Facebook) was relatively unknown in Germany. This circumstance, unusual as it may seem, would likely present itself whenever a knockoff Web site served a foreign market in its native language.

The German court’s ruling underscores the uncertainty in finding trade dress protection for Web site look and feel when 1) practitioners seek to apply existing legal principles in a new context, and 2) the Internet’s global nature means that ultimate questions of liability may be governed by the law of a foreign jurisdiction.

**Worthwhile Pursuit**

Even if a Web site owner is somehow able to prevail on a copyright or trade dress claim, the victory may ultimately be deeply unsatisfying. A victory would not result in shutting down the Web site. At best, the defendant would be enjoined from operating a virtually identical or confusingly similar site. Thus the knockoff could simply tweak its look and feel and be back in business within a day. Moreover, the tweaking itself is far too cheaply accomplished to strike much fear in a copycat’s heart. Losing a trade dress claim involving a tangible product like a child’s toy could cost the copycat millions in packaging redesign, withdrawing and destroying infringing packages, revising promotional materials, and retooling factories. By contrast, losing a Web site trade dress case may mean little more than asking a junior IT consultant to spend a few hours changing the site’s design and color scheme.

If the knockoff Web site is foreign, it only makes the trade dress fight more expensive and uncertain. As was the case in the Facebook litigation, forum non conveniens concerns will likely mean that substantive issues are litigated in the foreign jurisdiction, because the majority of relevant witnesses, documents, computers, and consumers most likely will be located on the knockoff’s home turf. In addition, the foreign tribunal may view the copycat in a sympathetic light as a local employer and taxpayer serving a multitude of local consumers. Indeed, Facebook found itself in the position of asking a German court to shut down a social media site owned by a German company, based in Germany, and with 13 million subscribers, nearly all of whom were German citizens who had invested time and effort in
establishing profiles and social networks on the German site.66

Nevertheless, despite the challenges and frustrations, pursuing claims regarding Web site look and feel may still be worthwhile for several reasons. While these claims may be extremely difficult to win on the merits, they are nearly as difficult to dispose of before trial, because each of the trade dress infringement elements is intensely factual.67 Generally, it is far more economical for a copycat to modify the look and feel of its Web site than litigate fact-intensive claims through discovery and trial.

Furthermore, the wide variety of available remedies give potency to claims for the protection of a Web site’s look and feel even though they are so hard to prove. A victorious plaintiff could recover the copycat’s profits,68 damages to the plaintiff’s goodwill,69 and the “reasonable royalty” the plaintiff would have earned had it licensed its intellectual property to the copycat.70 In trade dress actions, the court also has discretion to award plaintiffs up to three times the amount of their monetary damages71—including in exceptional cases, generally involving intentional or deliberate infringement, the court can award attorney’s fees.72 In copyright matters, if registration was secured prior to the infringement, the plaintiff may recover its attorney’s fees,73 and if the infringement was “willful,” the plaintiff can opt to recover statutory damages of up to $150,000 instead of its monetary damages.74

In addition to these remedies, courts have discretion to award fairly creative penalties. For example, the trial court in the Taco Cabana case penalized the defendant restaurant chain for its knowing and willful infringement by requiring it to post in each of its locations a white sign with 1-inch black letters reading: “Notice: Taco Cabana originated a restaurant concept which Two Pesos was found to have unfairly copied. A court order requires us to display this sign to inform our customers of this fact to eliminate the likelihood of confusion between our restaurant and those of Taco Cabana.”75 Courts have imposed similar penalties in the context of Web site infringement, including requiring the copycat to post hyperlinks directing users to the infringed site.76 Still another option is forcing the copycat to forfeit its domain name.77

Finally, plaintiffs will realize significant publicity benefits from bringing a suit to protect look and feel. Suing a copycat Web site generates positive attention for the plaintiff’s site—“we’re so good they’re copying us!”—and necessarily draws negative attention to the knockoff. Indeed, “knockoff” is a pejorative term that suggests inferior quality. Moreover, the infringed site may find it beneficial to resolve the matter by acquiring the copycat entity. In these cases, the expense of the litigation, the uncertainty it creates for the future of the copycat’s business, and the negative publicity can combine to reduce the acquisition price substantially.

By the time Facebook launched its German-language version, StudiVZ already had several million German members. Facebook entered the German market as an unknown, looking like it was a knockoff of the market-leading StudiVZ. Prior to bringing suit, Facebook had reportedly negotiated for months to buy StudiVZ, but the asking price was too high.78 The lawsuit generated much publicity and alerted German consumers to the fact that Facebook had been the original site and that StudiVZ was a mere knockoff. Reports on the litigation naturally compared the two sites and in so doing often pointed out that StudiVZ had experienced security and privacy problems.79 Thus, due to the litigation, at least some portion of the German market came to view the choice of social networking media as between the world market leader (Facebook) and a knockoff with security and privacy problems that might soon be shut down altogether by a judge (StudiVZ). This was fairly powerful marketing.

Indeed, just two weeks before Facebook settled and withdrew its U.S. lawsuit, the press reported that in the relatively brief period the action was pending, Facebook had managed to overtake StudiVZ as Germany’s largest social networking site.80 Facebook may have lost the legal battle, but it appears to have won the war for the marketplace.

---

1 Complaint, Facebook, Inc. v. StudiVZ Ltd., Case No. 5:08-CV-03468 JF, Docket No. 1 (N.D. Cal., filed July 18, 2008).
3 Alex Baka, StudiVZ Takes on Facebook, Nov. 7, 2006, http://www.spiegel.de/international/0,1518,446353,00.html.
4 Complaint, Facebook, Case No. 5:08-CV-03468 JF, at ¶1.
11 Circular 66, at 3.
12 Darden, 402 F. Supp. 2d 638.
13 Id. at 639-40.
14 Id.
15 Id. at 644.
16 Id.
18 Id.
19 Id. at *13.
21 Masquarade Novelty, Inc. v. Unique Indus., Inc., 912 F. 2d 663, 668 (3d Cir. 1990).
23 Apple Computer, Inc. v. Microsoft Corp., 35 F. 3d 1413, 1442 (9th Cir. 1994).
26 Id.
27 Id.
28 Complaint, Facebook, Inc. v. StudiVZ Ltd., Case No. 5:08-CV-03468 JF, Docket No. 1, at ¶¶ 75-119 (N.D. Cal., filed July 18, 2008).
30 Brunswick Corp. v. SpinT Reel Co., 832 F. 2d 513, 517 (10th Cir. 1987).
31 U.S. Trademark Registration No. 1,057,884.
32 Gateway, Inc. v. Companion Prods., Inc., 184 F. 3d 503, 506 (8th Cir. 2004).
34 Reader’s Digest Ass’n v. Conservative Digest, Inc., 821 F. 2d 800, 802 (D.C. Cir. 1987).
36 Two Pesos, 505 U.S. at 767.
37 See Blue Nile, Inc. v. Ice.com, Inc., 478 F. Supp. 2d 1240, 1246 (W.D. Wash. 2007) (Diamond retailer sought trade dress protection for look and feel of Web site); G. Peter Albert, Jr., INTELLECTUAL PROPERTY LAW IN CYBERSPACE 198-99 (1999 & supp. 2005) (“One of the next conflicts to arise between the Internet and trademark law is likely to be the question of whether a Web page contains elements protectable as trade dress....Trade dress protection of Web pages has yet to be the central issue in an infringement claim.”); Complaint, Facebook, Inc. v. StudiVZ Ltd., Case No. 5:08-CV-03468 JF, Docket No. 1 (N.D. Cal., filed July 18, 2008).
38 Two Pesos, 505 U.S. at 770.
39 Vuoton et Fils S.A. v. J. Young Enters., 644 F. 2d 769, 774 (9th Cir. 1981).
40 See Clinks Billiards, Inc. v. Sixshooters, Inc., 251 F. 3d 1252, 1261 (9th Cir. 2001) (A billiard hall may have a total visual appearance that constitutes protectable trade dress.).
41 Id. at 1259.
42 Id. at 1261.
46

WinningInventor.com

Home Of The Online “Inventor Success Guide” & Much More

LAW OFFICE

DAVID M. KLEIMAN

TRIAL LAWYER

REGISTERED U.S. PATENT ATTORNEY

Los Angeles California

(818) 884-0949

IMPORTANT INFORMATION AVAILABLE ONLINE FOR INVENTORS AND PRODUCT DEVELOPERS

Be an attorney who makes a difference

volunteer with the LACBA

Domestic Violence Project

— SAVE THE DATE: Training Seminar • September 29, 2010 —

We provide one-on-one legal assistance to our clients to enable them to obtain temporary (and ultimately permanent) Restraining Orders against their assailants. This is a rewarding opportunity (with a minimal time commitment) to give valuable assistance to an underrepresented population of our community who is in dire need of help. The Project is located in both the Downtown Los Angeles and Pasadena Branches of the Superior Court.

For information about the project and upcoming trainings, call Deborah Kelly, Directing Attorney

(213) 896-6491 • E-mail: dkhelly@lacba.org

44 Id. (quoting Rachel v. Banana Republic, Inc., 831 F. 2d 1503, 1506 (9th Cir. 1987)).

45 Clicks Billiards, 231 F. 3d at 1262.


48 Levi Strauss & Co. v. Blue Bell, Inc., 632 F. 2d 817, 818 (9th Cir. 1980).

49 See First Brands Corp. v. Fred Meyer, Inc., 809 F. 2d 1378, 1383 (9th Cir. 1987).


52 Id.


54 Id. at *10.


56 Korman, supra note 2.

57 Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F. 3d 1252, 1263 (9th Cir. 2001).

58 AMF, Inc. v. Sheekcraft Boats, 599 F. 2d 341, 349 (9th Cir. 1979).

59 First Brands Corp. v. Fred Meyer, Inc., 809 F. 2d 1378, 1384 (9th Cir. 1987).

60 SG Servs., Inc. v. God’s Girls Inc., 2007 WL 2315437, at *5 (C.D. Cal. May 9, 2007) (unpublished) (Postings made by unidentified users were inadmissible to prove actual confusion because “[t]here is absolutely no indicia that the statements...are reliable.”).

61 Facebook, Inc. v. StudiVZ Ltd., 33 O 374/08 (Cologne State Court, June 16, 2009), English translation at 13 of June 16, 2009, Judgment issued by the Cologne State Court filed as Exhibit “A” to Elsing Declaration in support of Facebook’s Opposition to Defendant’s Administrative Motion Requesting a Stay of Proceedings and a Status Conference (the Cologne Judgment), Facebook, Inc. v. StudiVZ Ltd., Case No.: 508-CV-03468 JF, Docket No. 185-1 (N.D. Cal. filed June 22, 2009).


63 Id.

64 Id. Facebook presented evidence that the English version of Facebook had been available to German consumers since before StudiVZ was introduced, but the German court concluded that Facebook’s presence was still relatively insignificant.

65 Not every jurisdiction protects intellectual property as extensively as the United States. For example, the German Facebook opinion suggested potential differences between German and U.S. law. While a U.S. court would ask whether the infringed design features created a likelihood of confusion among consumers as to the source of the infringing Web site, the German court used the German “doctrine of freedom of imitation” as the point of departure and asked whether the imitation in question caused “avoidable deception” of the consumer regarding the commercial origin of the imitated product. See the Cologne Judgment, at 8-10. It is not clear that the German approach would result in an outcome consistent with American law.

66 Notice of Motion and Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, for Forum Non Conveniens on Behalf of StudiVZ Ltd., Facebook, Case No. 508-CV-03468 JF.


68 Id.

69 Id.

70 Id.


74 17 U.S.C. §§412, 504(c).


77 Id.


ADMINISTRATIVE LAW

LAW OFFICES OF MICHAEL GOCH, APC
5850 Canoga Avenue, Suite 400, Woodland Hills, CA 91367, (818) 710-7190, fax (818) 710-7191, e-mail: gochmichael@aol.com. Web site: MichaelGoch.com. Contact Michael Goch. Licensing and related disciplinary proceedings with emphasis on healthcare practitioners, as well as Department of Health Services matters and related issues, from investigatory stage through trial and writ proceedings. Degrees/licenses: JD Southwestern University School of Law, Cum Laude, 1978; Admitted in California since 1978. Also admitted in Central, Eastern, Northern, Southern District and Ninth Circuit.

ADOPTION—DOMESTIC, STEPPARENT, ADULT

THE LAW OFFICES OF DAVID H. BAUM, APC

APPEALS AND WRITS

LAW OFFICE OF HERB FOX
1875 Century Park East, Suite 700, Los Angeles, CA 90067, (310) 284-3184, e-mail: hfox@1875CenturyPark.com. Contact Herb Fox. Herb Fox is a certified appellate law specialist who provides appellate law expertise to clients and trial counsel throughout California. A former research attorney for the California Court of Appeal, Herb has handled over 170 State and federal appeals involving a wide variety of cases, including class actions, professional negligence, family law and probate, insurance coverage, personal injury and arbitration law. Herb is AV-rated and has been named a Southern California Superlawyer® for the past two years. See display ad on page 49.

APPELLATE LAW

HONEY KESSLER AMADO
261 South Wetherly Drive, Beverly Hills, CA 90211, (310) 550-8214, fax (310) 274-7384, e-mail: honeyamado@amadolaw.com. Web site: www.amadolaw.com. Contact Honey Kessler Amado. Ms. Amado (AV-rated) is a Certified Appellate Law Specialist (Cal. State Bar Board of Legal Specialization). On the trial level, she joins the litigation team to assist with identifying issues, creating a sufficient record for appeal, and drafting complex briefs or postjudgment pleadings and motions. On the appellate level, Ms. Amado prepares all briefs and argues the case to the court. When retained as a consultant on an appeal, Ms. Amado assists counsel with identifying issues, strategizing the appeal, and drafting or editing the appellate briefs and motions. Ms. Amado has been counsel in a number of landmark cases and has written and lectured extensively in the area of appellate law.

HORVITZ & LEVY LLP
15760 Ventura Boulevard, 18th Floor, Encino, CA 91436-3200, (818) 995-0800, fax (818) 995-3157, e-mail: daxelrad@horvitzlevy.com. Web site: www.horvitzlevy.com. Contact David M. Axelrad. Horvitz & Levy LLP is the largest firm specializing exclusively in civil appeals. Founded in 1957 by Ellis Horvitz, the firm now has over 30 lawyers with extensive civil appellate experience. The firm has an outstanding record of success and since 1990 has participated in over 100 cases before the California Supreme Court. The firm’s areas of practice include all aspects of civil appeals involving sophisticated business disputes in federal and state venues. Clients include entertainment companies and studios, publishers, energy companies, utilities, manufacturers, aerospace contractors, retailers, government entities, universities, insurance carriers, charitable organizations, healthcare providers, law firms, trade organizations, and financial institutions.

LAW OFFICE OF PAUL KUJAWSKY

ASSET SEIZURE AND FORFEITURE DEFENSE

PAUL L.ギャバート
2115 Main Street, Santa Monica, CA 90405, (310) 399-3259, fax (310) 392-9029, e-mail: PLGabbart@aol.com. Contact Paul L.ギャバート. Over 30 years experience representing individual and corporate clients and providing the following services: responding to administrative seizure notices, avoiding the petition trap, releasing frozen bank accounts, tracing assets, providing expert witness referrals, including forensic accountancy and toxicology, suppressing illegally seized evidence, debunking drug dog alerts, excluding prior convictions, bad acts and weapons, navigating federal rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, local federal court rules and the federal forfeiture statutes.

AVIATION LAW

GLADSTONE MICHEL WEISBERG WILLNER & SLOANE, ALC
4551 Glencoe Avenue, Suite 300, Marina del Rey, CA 90292, (310) 821-9000, fax (310) 775-8775, e-mail: awillner@gladstonemichel.com. Web site: www.Gladstonemichel.com. Contact Arthur Willner. The firm’s Aviation Group has more than 30 years of experience representing airlines, product manufacturers, general aviation operations, and insurers in thousands of catastrophic injury, wrongful death, and products liability claims arising out of major airline disasters and other incidents. We also defend our aviation clients in racial and disability discrimination claims, breach of contract matters and class actions.

BANKRUPTCY EXPERT WITNESS

BRIAN DAVIDOFF, RUTTER HOBBS & DAVIDOFF
1901 Avenue of the Stars, Suite 1700, Los Angeles, CA 90067, (310) 286-1700, fax (310) 286-1728, e-mail: bdavidoff@rutterhobbs.com. Contact Brian L. Davidoff. Brian Davidoff is certified as a Business Bankruptcy Specialist by the American Board of Certification. Mr. Davidoff’s law practice has specialized in reorganization and bankruptcy for over two decades. Expert testimony covers a broad range of bankruptcy issues including chapter 11 corporate reorganization, chapter 7 liquidation, assignment for the benefit of creditors, purchase and sale of assets under section 363 of the Bankruptcy Code, adversary litigation, and UCC Article 9 secured creditor issues.

BANKRUPTCY LAW

BANKRUPTCY LAW FIRM, PC
10524 West Pico Boulevard, Suite 212, Los Angeles, CA 90064, (310) 559-9224, fax (310) 559-9133, e-mail: kmarch@BKYLAWFIRM.com. Web site: www.BKYLAWFIRM.com. Contact Kathleen P. March, Esq. Bankruptcy law firm, PC, Los Angeles, owned and operated by former CD CA Bankruptcy Judge Kathleen March, Esq.
certified bankruptcy specialist, represents individual and small business debtors in Chapter 7 and 13 bankruptcies, all divisions of CD CA Bankruptcy Court; represents creditors in all chapters; represents in bankruptcy adversary proceedings and bankruptcy appeals; expert witness. Free first consult to tell any prospective debtor or creditor client whether we can help you. Fair prices.

**LAW OFFICES OF STEVEN L. BRYSON**

11377 West Olympic Boulevard, Suite 500, Los Angeles, CA 90064, e-mail: slb9law@aol.com. Web site: www.4le4bankruptcy.com. Contact Steven L. Bryson. I am a certified bankruptcy specialist sole practitioner. I guide debtors through Bankruptcy Court with personal attention and knowledge. I also represent creditors in preference litigation, dischargeability issues and other matters pertaining to collection of their debt. I have 31 years of experience, and practice exclusively in the Bankruptcy Court.

**GLADSTONE MICHEL WEISBERG WILLNER & SLOANE, ALC**

4551 Glencoe Avenue, Suite 300, Marina del Rey, CA 90292, (310) 821-9000, fax (310) 775-8775, e-mail: jwallach@gladstonemichel.com. Web site: www.GladstoneMichel.com. Contact Jason Wallach. Gladstone Michel’s bankruptcy lawyers have substantial experience and up-to-the-minute substantive knowledge of bankruptcy and insolvency law, procedures, and alternatives. We have represented stressed businesses, creditors, debtors, trustees, lenders, investors, landlords, tenants, shareholders, directors, spouses, and other parties in all aspects of bankruptcies, work outs, turnarounds, restructuring and appeals, both in and out of court. We also have particular expertise in helping financially stressed businesses and individuals, and keeping financially healthy clients out of litigation. In addition to the bankruptcy and insolvency practice, the department also handles general business transactions and serves as outside general counsel to several small and family-owned businesses.

**CIVIL & PROBATE**

**LAW OFFICES OF LINK K. SCHWARTZ**

1925 Century Park East, Suite 2300, Los Angeles, CA 90067, (310) 553-LINK, fax (310) 553-5430, e-mail: Linkoram@earthlink.net. Contact Link K. Schwartz. Full-service divorce, custody, child support, child support arrearages and enforcement, Pre-nups, post-nups, domestic partners, grandparents, contested probate, conservatorships, and complex and simple property division.

**CIVIL RIGHTS LAW**

**GLADSTONE MICHEL WEISBERG WILLNER & SLOANE, ALC**

4551 Glencoe Avenue, Suite 300, Marina del Rey, CA 90292, (310) 821-9000, fax (310) 775-8775, e-mail: awillner@gladstonemichel.com. Web site: www.GladstoneMichel.com. Contact Arthur Willner. Gladstone Michel has a strong track record of success representing individuals and entities in consumer protection and civil rights cases involving employment discrimination, sexual harassment, First Amendment rights, racial profiling, individual rights in higher education, fair housing, public accommodations, police accountability, and due process and other constitutional rights and protections.

**COMMERCIAL COLLECTIONS**

**RONALD P. SLATES, P.C.**

523 West 6th Street, Suite 502, Los Angeles, CA 90014, (213) 624-1515, fax (213) 624-7536, e-mail: rslates2@slateslaw.com. Web sites: www.rslateslaw.com, and www.ronslateslaw.com. Contact Ronald P. Slates. If WE CANNOT COLLECT YOUR COMMERCIAL DEBT OR JUDGMENT, NOBODY CAN! Robert Mangels of Jeff, Mangels, Butler and Marmaro states: “It has been my experience that no one handles commercial collections better than Ron Slates”. Mary Kasper V.P. and General Counsel of Fresh and Easy Neighborhood Market, Inc. says: “I am extremely impressed with the depth and breadth of Ron’s legal knowledge and negotiating skills. He is very responsive and works well with his clients to develop cost-effective strategies to achieve the desired legal results.” Let us prove ourselves to you.

**CONSTITUTIONAL LAW**

**ROHDE & VICTOROFF**

1880 Century Park East, Suite 411 Los Angeles, CA 90067, (310) 277-1482, fax (310) 277-1485, e-mail: steve@rohde-victoroff.com. Web site: www.rohde-victoroff.com. Contact Stephen Rohde. Services available: we pride ourselves on our almost 40 years of experience in civil trial and appellate work in state and federal courts, focusing on intellectual property (copyright, trademark), entertainment (film, book publishing, art, photography), torts (defamation, invasion of privacy, right of publicity), business disputes and civil rights actions. We work well consulting and co-counseling with other lawyers. We’re very good at dealing with complex litigation issues including anti-SLAPP motions, First Amendment and Due Process issues. See display ad on page 53.

**CONSTRUCTION LAW**

**ABDULAZIZ, GROSSBART & RUDMAN**

6454 Coldwater Canyon Avenue, North Hollywood, CA 91606, (818) 760-2000, fax (818) 760-3998, e-mail: info@gaglaw.net. Web site: www.aglaw.net. Contact Teresa Weiss. Over the past 36 years, we’ve established our successful reputation in construction law emphasizing our practice in the area of mechanic’s liens, stop notice and bond claims; payment and performance bond claims; Contractors’ State License Board and licensing issues. Disciplinary disputes, defending accusation, citations and complaints; contract review, drafting and negotiation, mediation, arbitration, litigation and administrative hearings, and much more.

**HUNT ORTMANN PALFFY NIEVES LUBKA CONSTRUCTION LAW**

252 South Grand Avenue, Suite 1000, Los Angeles, CA 90071, (213) 244-1000, fax (213) 244-1005, e-mail: info@huntortmann.com. Web site: www.huntortmann.com. Contact Stephen Robbins, executive director. The cornerstone of construction law, Hunt Ortmann is one of the foremost authorities on California construction law, contracts, dispute resolution and Litigation offering additional legal services in the areas of business and commercial law, employment matters and
labor law compliance, real estate, insurance, and suretyship.

CRIMINAL DEFENSE LAW
HUTTON & WILSON
1055 East Colorado Boulevard, Suite 310, Pasadena, CA 91106, (626) 397-9700, fax (626) 397-9707, e-mail: hutwil@comcast.net. Web site: www.hutton-wilson.com. Contact Robert J. Wilson. Hutton & Wilson specialize in driving under the influence, vehicular manslaughter, DUI murder and shaken baby defense. Additionally, we represent drivers before the Department of Motor Vehicles regarding driving under the influence, medical and negligent operator suspensions or revocations.

KAPLAN MARINO, P.C.
9454 Wilshire Boulevard, Suite 500, Beverly Hills, CA 90212, (310) 557-0007, fax (310) 275-4651, e-mail: marino@kaplanmarino.com. Web site: www.kaplanmarino.com. Contact Nina Marino. Kaplan Marino is a criminal defense law firm dedicated to the representation of persons and entities accused or suspected of criminal conduct in the state and federal courts. Our clients, businesspeople, professionals, and others—are always guaranteed the highest degree of professionalism and personal attention. The firm regularly handles white collar cases including all areas of fraud, as well as traditional defense matters such as DUIC/DW hearings, domestic violence, drug cases, and sex crimes.

LAW OFFICES OF LAWRENCE WOLF
10390 Santa Monica Boulevard, Suite 300, Los Angeles, CA 90025, (310) 277-1707, fax (310) 277-1500, e-mail: youareinnocent@aol.com. Web site: www.youareinnocent.com. Contact Lawrence Wolf. By dedicating all resources and energy to getting the best result for our clients, combined with our firm’s 30 years of experience, we are prepared to handle the most serious offenses with confidence. We defend those that have been accused, or are under investigation for involvement in today’s complex crimes. Our experience includes cases such as embezzlement, child molestation, fraud, rape, theft, murder, drugs, domestic violence, sex crimes, weapons, drunk driving, and many others.

CRIMINAL DEFENSE/WHITE COLLAR
NASATIR, HIRSCH, PODBERESKY, KHERO & GENEGO
2115 Main Street, Santa Monica, CA 90405, (310) 399-3259, fax (310) 392-9029, e-mail: richard@hirsch.com. Contact Richard Hirsch. Delivering high quality and professional representation to both individual and corporate clients, our firm specializes in federal and state white collar and non-white collar criminal defense. Members of our firm have served as former state and federal prosecutors, and on faculty at the USC Gould School of Law. Members of the firm have received numerous awards for excellence in practice, as well as being named in Best Lawyers of America and Super Lawyers of Southern California.

DISPUTE RESOLUTION
HONORABLE LAWRENCE W. CRISPO
501 Glen Court, Pasadena, CA 91105, (213) 926-6666, fax (626) 744-0363, e-mail: lawrence@crispo.com. Contact Lawrence W. Crispo. Crispo & Associates is a law firm with 36 years of experience representing local and national clients in civil and criminal matters. Legal representation is provided in all areas of civil and criminal law. Crispo & Associates has achieved numerous success for their clients by delivering superior legal representation to their clients.

DISPUTE RESOLUTION
HONORABLE LAWRENCE W. CRISPO
501 Glen Court, Pasadena, CA 91105, (213) 926-6666, fax (626) 744-0363, e-mail: lawrence@crispo.com. Contact Lawrence W. Crispo. Crispo & Associates is a law firm with 36 years of experience representing local and national clients in civil and criminal matters. Legal representation is provided in all areas of civil and criminal law. Crispo & Associates has achieved numerous success for their clients by delivering superior legal representation to their clients.

INSURANCE BAD FAITH EXPERT
Clinton E. Miller, J.D., BCFE
Author: How Insurance Companies Settle Cases
39 YEARS EXPERIENCE
Qualified Trial Insurance Expert in Civil & Criminal Cases Nationwide
Tel: 408.279.1034 | Email: cemcom@aol.com | Fax: 408.279.3562
www.millerjd.qpg.com
Engineering Resolutions for the World’s Most Intractable Disputes

Reginald A. Holmes, ESQ.
Mediator • Arbitrator • Private Judge

Business • Intellectual Property • Franchise
Employment • International

✔ Superb judicial temperament
✔ Fiercely fair and impartial
✔ Orderly party driven process
✔ Deep subject matter knowledge

The Holmes Law Firm
1.877.FAIR.ADR (3) • 1.818.432.7223
dvitoshka@theholmeslawfirm.com
www.theholmeslawfirm.com

@earthlink.net. Web site: www.judgecrispo.com.
Contact Lawrence W. Crispo, Mediator-discovery referee/special master arbitrator, early neutral evaluation. See display ad on page 24.

KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324,
(818) 886-2525, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net. Web site: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work, free consultations, and all cases are taken on a contingency fee basis. See display ad on this page.

DUI

LAW OFFICES OF LAWRENCE WOLF
10390 Santa Monica Boulevard, Suite 300, Los Angeles, CA 90025, (310) 277-1707, fax (310) 277-1500, e-mail: youareinnocent@aol.com. Web site: www.youareinnocent.com. Contact Lawrence Wolf. With over 30 years of experience, Lawrence Wolf is a recognized expert in drunk driving, DUI, drug possession, and addiction-related matters. Our firm has rightfully earned the respect of judges, prosecutors, and police officers as aggressive attorneys who are not afraid to challenge them on tough cases. We have established long-term relationships with judges and district attorneys throughout Los Angeles, Orange, Sacramento, and Ventura Counties.

ELDER FINANCIAL ABUSE

KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2525, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net. Web site: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work, free consultations, and all cases are taken on a contingency fee basis. See display ad on this page.

EMINENT DOMAIN

CALIFORNIA EMINENT DOMAIN LAW GROUP, APC
3429 Ocean View Boulevard, Suite L, Glendale, CA 91208, (818) 957-0477, fax (818) 957-3477, e-mail: ajh@caledlaw.com. Contact A. J. Hazarabedian. The attorneys at California Eminent Domain Law Group—a Martindale-Hubbell AV® Rated law firm—are California’s premier eminent domain attorneys, with extensive experience in all facets of eminent domain. Our attorneys practice exclusively eminent domain law and have successfully handled hundreds of eminent domain cases. We are committed to obtaining maximum compensation for our property and business owner clients, and are happy to work with other law firms to assist their clients in their eminent domain needs. See display ad on page 30-31.

EMPLOYEES WORKERS’ COMPENSATION BENEFITS

GOODCHILD AND DUFFY PLC
16133 Ventura Boulevard, Suite 1250, Encino, CA 91346, (818) 380-1600, fax (818) 380-1616. Web site: www.jackgoodchildlaw.com. Contact Martha Castillo. We handle workers’ compensation cases, social security disability and personal injury. To referring attorneys we pay 20 percent of the fees regarding regular cases. Referrals are handled in strict accordance with the State Bar Rules.

EMPLOYMENT LAW

GLADSTONE MICHEL WEISBERG WILLNER & SLOANE, ALC
4551 Glencoe Avenue, Suite 300, Marina del Rey, CA 90292, (310) 821-9000, fax (310) 775-8775, e-mail: tracy@gladstonemichel.com. Web site: www.gladstonemichel.com. Contact Teresa Tracy. Gladstone Michel represents employers in all aspects of labor and employment law, including wrongful termination, discrimination, harassment, wage and hour, class actions, union organizing, negotiations, and charges of unfair labor practices. We also advise clients on compliance with the myriad of state and federal regulations governing employers such as leave statutes, wage and hour requirements, the issuance of employment policies and handbooks, the handling of discipline, termination, the investigation of harassment, and other matters. When disputes cannot be avoided, we aggressively represent clients in state and federal courts and in appellate proceedings.

LAW OFFICE OF ELI M. KANTOR
9955 Wilshire Boulevard, Suite 405, Beverly Hills, CA 90212, (310) 274-8216, fax (310) 273-6016, e-mail: driel173@aol.com. Web site: www.beverlyhillsemploymentlaw.com. Contact Eli Kantor. We specialize in all aspects of labor and employment law, including sexual harassment, wrongful discharge, employment discrimination, wage and hour, as well as class action litigation.

ENTERTAINMENT LAW

GLADSTONE MICHEL WEISBERG WILLNER & SLOANE, ALC
4551 Glencoe Avenue, Suite 300, Marina del Rey, CA 90292, (310) 821-9000, fax (310) 775-8775, e-mail: gladstonemichel@gladstonemichel.com and osloane@gladstonemichel.com. Web site:www.gladstonemichel.com. Contact Leon Gladstone and Owen Sloane. Gladstone Michel has a full-service Entertainment and Media Group focusing on music, film, television, radio, publishing and theater, as well as entertainment insurance, corporate sponsorship, and other agreements. We also advise clients on copyright, intellectual property, and digital media, and offer expert witness and litigation consultant services.

LAW OFFICES OF LINK K. SCHWARTZ
1925 Century Park East, Suite 2300, Los Angeles, CA 90067, (310) 553-LINK, fax (310) 553-5430, e-mail: Linkoramas@earthlink.net. Contact Link K. Schwartz. Full-service divorce, custody, child support, child support arrears and enforcement.
LAW OFFICES OF VINCENT W. DAVIS & ASSOCIATES
150 North Santa Anita Avenue, Suite 200, Arcadia, CA 91006, (626) 446-6442, fax (626) 446-6454, e-mail: v.davis@vincentwdavis.com. Web site: www.vincentwdavis.com. Contact Vincent Davis Esq. Litigators: family law, juvenile dependency, probate, civil, criminal, labor and immigration.

LAW OFFICES OF JUDITH R. FORMAN, P.C.
11355 West Olympic Boulevard, Los Angeles, CA 90064, (310) 444-8840, fax (310) 444-8841, e-mail: jrf@familylawcounsel.com. Web site: www.familylawcounsel.com. Contact Judith R. Forman. Our three attorney law firm focuses on marital dissolutions involving complex multi-asset estates, as well as custody matters, paternity cases, and the negotiation of premarital agreements. Our clients include high-profile members of the entertainment, professional athlete, and business communities. Ms. Forman has been selected as top 100 Southern California Super Lawyers and Top 50 Women Lawyers in Southern California. The firm is included in Martindale-Hubbell’s Bar Register of Preeminent Lawyers and in Best Lawyers in America.

LAW OFFICES OF MICHAEL KELLY
429 Santa Monica Boulevard, Suite 120, Santa Monica, CA 90401, (310) 398-0236, fax (310) 393-4221, e-mail: admin@cfli.com. Web site: www.CFLI.com. Contact Jack M. Bennett, Executive Administrator. Over 100 years combined family law experience. Practice limited to

Where can you find eight tax attorneys under one roof who have been named among the “Top Attorneys In Southern California”?

AVRAM SALKIN, Principal
CHARLES P. RETTIG, Principal
STEVEN R. TOSCHER, Principal
DENNIS L. PEREZ, Principal
EDWARD M. ROBBINS, JR., Principal
SHARYN M. FISK, Principal
MICHEL R. STEIN, Principal
DAVID ROTH, Of Counsel

HOCHMAN, SALKIN, RETTIG, TOSCHER & PEREZ, P.C.
9150 Wilshire Boulevard, Suite 300
Beverly Hills, California 90212-3414
Telephone: 310.281.3200
Fax: 310.859.1430
www.taxlitigator.com

Credibility, dedication and innovation in resolving sensitive tax issues for more than 50 years . . .

Specializing in federal and state civil and criminal tax litigation, controversies with federal, state, and local taxing authorities, white-collar crime criminal defense, forfeitures, estate and business planning, probate, tax-exempt organizations, and real estate, business and corporate transactions.
family law. One of California’s oldest and largest divorce and family law firms. Complex property lit-
gation. Complex child custody. No charge consul-
tation. Eight attorneys and 20 staff. See display
ad on page 39.

**LAWS OFFICES OF LINK K. SCHWARTZ**
1925 Century Park East, Suite 2300, Los Angeles, CA 90067, (310) 553-LINK, fax (310) 553-5430, e-mail: linkonlaw@healthlink.net, Contact Link K. Schwartz. Full-service divorce, custody, child support, child support arrears and enforcement. Prenuptials, postnuptials, domestic partners, grandpar-
support, child support arrears and enforcement. Counsel to California’s largest franchisor.

**FRANCHISE LAW**

**BARRY KURTZ, A PROFESSIONAL CORPORATION**
16000 Ventura Boulevard, Suite 1000, Encino, CA 91436, (818) 728-9979, fax (818) 886-4474, e-mail: bkurtz@barrykurtzpc.com. Web site: www.barrykurtzpc.com. Contact Barry Kurtz. Regulars on divorce, ownership, structuring and acquisitions and dispositions of franchsors and franchisees, with an emphasis on franchisors and franchisees in the restaurant business.

**RODNEY R. HATTER & ASSOCIATES**
1301 Dove Street, Suite 900, Newport Beach, CA 92660, (949) 376-9977, fax (949) 494-3448, e-mail: rodhatter@tan-law.com. Web site: www.californiafranchiseattorney.com. Contact Rodney Hatter. Providing advice and assistance to franchisors, franchisees and other businesses regarding issues of franchising and alternative dis-
tribution programs since 1985. Previously General Counsel to California’s largest franchisor.

**HEALTH AND LIFE INSURANCE CLAIM**

**KANTOR & KANTOR LLP**
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2252, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net. Web site: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work, free consultations, and all cases are taken on a contingency fee basis. See display ad on page 50.

**HEALTHCARE LAW**

**CURTIS & GREEN LLP**
701 North Brand Boulevard, Suite 200, Glendale, CA 91203, (262) 585-9800, fax (262) 585-4188, e-mail: tcurtis@curtisgreenlaw.com. Web site: www.curtisgreenlaw.com. Contact Tom Curtis. Healthcare litigation; representation of physicians, physician organizations and other licensed profes-
sionals; independent counsel to medical staffs; licensing; disciplinary and peer review proceed-
ings; reimbursement issues.

**INSURANCE BAD FAITH EXPERT**

**CHEEONG, DENOVE, ROWELL & BENNETT**
10100 Santa Monica Boulevard, Suite 2480, Los Angeles, CA 90067, (310) 277-4857, fax (310) 277-2524, e-mail: fmm@cbrl-law.com. Web site: www.cbrl-law.com. Contact Lorraine Jackson for Jack Denove. Attorney at Cheeong, Denove, Rowell & Bennett have successfully represented clients for 30 years in all types of insurance bad faith actions. Senior Partner Jack Denove has received numerous awards for his trial successes and commitment to representing the rights of the injured, including Trial Lawyer of the Year and Los Angeles Best Lawyer. He is the President of Italian American Lawyers Association; Past President of Consumer Attorneys Association of Los Angeles; Diplomate of ABOTA; and on the Board of Direc-
tors of the Consumer Attorneys of California. See display ad on page 24.

**KANTOR & KANTOR LLP**
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2252, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net. Web site: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work, free consultations, and all cases are taken on a contingency fee basis. See display ad on page 50.

**CLINTON E. MILLER, JD, BCFS**
502 Park Avenue, San Jose, CA 95110, (408) 279-1034, fax (408) 279-3862, e-mail: cem-
cornhillcol.com. Contact Clint Miller. Insurance expert regarding claims, underwriting, agent and brokers errors and omissions, coverage disputes, customs and practices, and bad faith. See display ad on page 49.

**JUVENILE DEPENDENCY**

**LAWS OFFICES OF PAULA S. TESKE**
3415 South Sepulveda Boulevard, Suite 660, Los Angeles, CA 90034, (310) 391-6800, fax (310) 391-1725, e-mail: Paula.teske@teskelaw.com. Web site: www.teskelaw.com. Contact Paula S. Teske. Paula S. Teske, Esq., has over 29 years of experience “in the trenches,” vigorously represent-
ing parents and relatives in the Los Angeles Juve-
nile Dependency Courts. She specializes in com-
plicated and serious abuse/neglect allegations, is well versed in the complicated Dependency Court process, is an experienced litigator, and has a keen awareness of the practical aspects of depen-
dency cases. Ms. Teske guides her clients toward the reunification/placement results they desire. Please see her Web site www.teskelaw.com for more detail.

**LAW FIRM ISSUES**

**BERNE ROLSTON, PC**
2245 South Beverly Glen Boulevard, Suite 303, Los Angeles, CA 90064, (424) 208-3820, fax (424) 208-3459, e-mail: brolston@rolston.net. Web site: www.rolston.net. Contact Berne Rolston. Serv-
ices available: expert advice and guidance regard-
ing the organization of law firms, including mergers and acquisitions, and where necessary providing testimony concerning, or assistance in resolving, issues or disputes between law firm members or
between present or former law firm member(s) and
firm(s). See display ad on page 49.

LEGAL MALPRACTICE

GLADSTONE MICHEL WEISBERG WILL-NER & SLOANE, ALC
4551 Glencoe Avenue, Suite 300, Marina del Rey,
CA 90292, (310) 821-9000, fax (310) 775-8775,
e-mail: amichel@gladstonemichel.com, Web site: www.GladstoneMichel.com. Contact Allen Michel. Gladstone Michel attorneys have more than three decades of jury trial and appellate experience representing lawyers and law firms and other professionals accused of professional malpractice. Allen Michel, chair of the firm’s Professional Liability Group, has successfully tried major legal malpractice cases arising out of claimed errors ranging from negligence to conflicts of interest, violation of the Rules of Professional Conduct, and other breaches of fiduciary duty. Our Professional Liability Group has represented attorneys in a wide variety of substantive areas, including entertainment law and intellectual property matters, real property and mechanics lien law, estate planning and tax issues, bankruptcy matters, and corporate advice, as well as in fee disputes, malicious prosecution cases, anti-SLAPP motions and appeals, and disciplinary proceedings.

LAW OFFICES OF CHRISTOPHER ROLIN
5707 Corsa Avenue, Suite 106, Westlake Village,
CA 91362, (818) 707-7065, fax (818) 735-9992,
e-mail: crolin@chrisrolin.com. Web site: www.chrisrolin.com. Contact Christopher Rolin. Christopher Rolin is a highly effective trial attorney with over 42 years of trial activity in civil litigation. His area of emphasis is attorney malpractice, focusing on the applicable community standard of care for practicing attorneys in the litigation and transactional areas. He is now focusing as an expert witness on trial and standards of care issues. He has been retained as an expert by both plaintiffs and defendants in legal malpractice cases. Also testifies on issues of professional ethics and fee disputes.

LEGAL MALPRACTICE EXPERT WITNESS
PHILLIP FELDMAN, BS, MBA, JD, ABPLA, AV
14401 Sylvan Street, Suite 208, Van Nuys, CA 91401, (818) 986-9890, fax (818) 986-1757, e-mail: legalmalpractice@aol.com. Web site: www.legalmalpracticeexperts.com. Contact Phillip Feldman. Board Certified in legal malpractice (ABPLA, ABA); Former Judge Pro Temp, state bar prosecutor, managing partner plaintiff’s and defense firms. LACBA 42 years, fee dispute arbitrator 32 years, author, and lecturer. Testifies on standard of care or conduct, fiduciary duties, causation/case within a case/underlying case on almost any matter-transactional, litigation, family, commercial, contract, tort, any case-in any state or federal court. Also State Bar Defense Counsel and preventative law.

LEMON LAW

LAW OFFICES OF DELSACK & ASSOCIATES, PC
1801 Century Park East, Suite 2400, Los Angeles,
CA 90067, (310) 475-1700, fax (310) 475-1799,
satisfactory settlements. Associations is known for experience, positive relationships with manufacturers, and speedy and satisfactory settlements.

LITIGATION
GLADSTONE MICHEL WEISBERG WILLNER & SLOANE, ALC
4551 Glencoe Avenue, Suite 200, Marina del Rey, CA 90292, (310) 821-9000, fax (310) 775-8775, e-mail: amichel@gladstonemichel.com, Web site: www.GladstoneMichel.com. Contact Allen Michel. Gladstone Michel attorneys have successfully litigated virtually every type of high-stakes complex litigation, from major insurance litigation and business disputes to class actions, real estate disputes, and entertainment and intellectual property litigation. We work closely with our clients from pre-litigation counseling through all appeals to achieve our clients’ business objectives. As a regional mid-size law firm, we offer the best of both worlds: exceptional legal service at a fair cost.

GILCHRIST & RUTTER PROFESSIONAL CORPORATION
1299 Ocean Avenue, Suite 900, Santa Monica, CA 90401, (310) 393-4000, fax (310) 394-4700. Web site: www.gilchristrutter.com. Contact Frank Gooch. Represent clients as plaintiffs and defendants at trial and appellate levels in state and federal courts, as well as mediations/arbitrations. Practice areas include insurance (e.g., coverage disputes, breach of contract, bad faith and punitive damage actions), business (unfair competition, antitrust, shareholder disputes, entertainment/ intellectual property litigation), real estate (breach of lease and sales agreements, quiet title, easement, owner-contractor and landlord-tenant disputes, environmental clean-up) and securities (defense against enforcement actions brought by the SEC, NASD and CCI).

HOLLAND & KNIGHT LLP
833 West Fifth Street, 21st Floor, Los Angeles, CA 90071-2040, (213) 896-2400, fax (213) 896-2450. Web site: www.hklaw.com. Contact Rex Fontenot. Holland & Knight is a global law firm with more than 1,000 lawyers in 17 U.S. offices as well as Abu Dhabi, Beijing and Mexico City. The firm is among the nation’s largest law firms, providing representation in litigation, business, real estate and government law. Interdisciplinary practice groups and industry-based teams provide clients with access to attorneys throughout the firm, regardless of location.

LAW OFFICES OF CHARLES PEREYRA-SUAREZ
445 South Figueroa Street, Suite 3200, Los Angeles, CA 90071, (213) 623-5923, fax (213) 623-1890, e-mail: opareyras@cpslawfirm.com. Web site: www.cpslawfirm.com. Contact Charles Pereyra-Suarez. Charles Pereyra-Suarez has handled a broad range of civil and criminal matters during three decades of practice. Mr. Pereyra-Suarez’s experience includes complex business litigation, white-collar criminal defense, whistle-blower cases, international, government contracts, healthcare, environmental, antitrust, civil rights and First Amendment representation. He is active as a mediator and arbitrator of various litigation and business disputes. See display ad on page 49.

LONG TERM CARE
KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2520, fax (818) 886-2522, e-mail: gkantor@kantorlaw.net. Web site: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work, free consultations, and all cases are taken on a contingency fee basis. See display ad on page 50.

LONG TERM DISABILITY
KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2520, fax (818) 886-2522, e-mail: gkantor@kantorlaw.net. Web site: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work, free consultations, and all cases are taken on a contingency fee basis. See display ad on page 50.

MEDIATION
THE CALIFORNIA ACADEMY OF DISTINGUISHED NEUTRALS
(310) 341-3879, e-mail: director@californianeutrals.org. Web site: www.CaliforniaNeutrals.org. Contact Darren A. Lee, Executive Director. The California Academy of Distinguished Neutrals is a professional association of mediators and arbitrators distinguished by their hands-on experience in the field of conflict resolution and by their commitment to the practice of alternative dispute resolution. Membership is limited to neutrals who have substantial experience in the resolution of commercial/civil disputes. Each attorney has been recognized for their accomplishments through the association’s peernomination procedure and client interview process. The Academy recognizes over 100 full-time ADR professionals across the entire state and our Web site provides a useful resource to firms interested in searching for particular case experience or expertise. See display ad on page 30-31.

GREG DAVID DERIN
10100 Santa Monica Boulevard, Suite 2300, Los Angeles, CA 90067, (310) 552-1062, fax (310) 552-1068, E-mail: gderin@kleimanlaw.net. Web site: www.kleimanlaw.com. Contact Greg David Derin. Greg is a past Chair of the State Bar ADR Committee, a member of the California Academy of Distinguished Neutrals, the CPR panel of Distinguished Neutrals, the American Arbitration Association, the Blockbuster Panel, the California Dispute Resolution Center, and the Los Angeles County Bar Association’s Arbitration and Mediation Panels. He has been recognized for his trial successes and commitment to representing the rights of the injured, including Trial Lawyer of the Year in both 2010 and 2011. He is past president of Consumer Attorneys Association of Los Angeles, and is a member of ABOT (Diplomate) and Consumer Advocates of California (Board of Directors). See display ad on page 24.
PRIVATE DISPUTE RESOLUTION

COMMISSIONER ANITA RAE SHAPIRO (RET)

Alternative Dispute Resolution. P.O. Box 1508, Brea, CA 92822-1508, cell (714) 606-2649, phone/fax (714) 529-0415, e-mail: privatejudge@adr-shapiro.com. Web site: http://adr-shapiro.com. Contact Anita Rae Shapiro. Mediation, arbitration, temporary judge, accounting referee, discovery referee, in probate (wills, trust, conservatorships), family law, and all areas of civil law, including real estate. See display ad on page 24.

REAL ESTATE LAW

GLADSTONE MICHEL WEISBERG WILLNER & SLOANE, ALC

4551 Glencoe Avenue, Suite 300, Marina del Rey, CA 90292, (310) 821-9000, fax (310) 775-8775, e-mail: agrebow@gladstonemichel.com. Web site: www.GladstoneMichel.com. Contact Arthur Grebow. Gladstone Michel has more than 45 years combined experience representing real estate clients in the following areas: manufactured housing law, rent control, failure to maintain, housing discrimination, land use, unfair competition, unlawful detainers, insurance claims, employment matters, personal injury defense, construction defect, mechanic lien enforcement, easements, licenses and boundary disputes, and bankruptcy litigation.

REAL PROPERTY FORECLOSURES

RICHARD G. WITKIN

530 S. Glencoe Boulevard, Suite 207, Burbank, CA 91502, (818) 845-4000, fax (818) 845-4015. Contact Richard G. Witkin. Specializing in non-judicial foreclosures for the past 23 years. See display ad on this page.

RECEIVER/BANKRUPTCY

RECEIVERSHIP SPECIALISTS


SALTZBURG, RAY & BERGMAN, LLP

12121 Wilshire Boulevard, Suite 600, Los Angeles, CA 90025, (310) 481-6700, fax (310) 481-6707, e-mail: DLR@srblaw.com. Web site: www.srblaw.com. Contact David L. Ray, Esq. Specializes in handling complex receivership matters, such as partnership and corporate dissolutions, including law firm dissolutions, and government enforcement receivership actions, including actions brought by the California Department of Corporations, Department of Real Estate, Commodities Future Trading Commission, and Federal Trade Commission. Nationally recognized in both the

Huron Law Group

Why do we get most of our work from other attorneys?

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

We handle business, real estate and entertainment litigation.

Your success is our business

310.284.3400 www.huronlaw.com
1875 Century Park East, Suite 1000, Los Angeles, CA 90067

TRIAL LAWYERS FOR LAWYERS.

Facing a trial emergency?

Your request for a continuance denied, you’re instructed to pick a jury in days. Removed to Bankruptcy Court, and you’ve never tried a Federal case. Your clients ‘knew’ their case would settle… now jury instructions, motions in limine and trial exhibits are due. We’ve encountered these situations, and we’ve won.

For a free consultation call
William E. Crockett, Managing Partner
818.883.4400
Dion-Kindem & Crockett

Distinguished member of the Million Dollar Advocates Forum
AV rating from Martindale-Hubbell

www.dkciaw.com
Expert4Law – The Legal Marketplace

Target Your Online Search for Experts Quickly, Easily

NEED AN EXPERT?
FIND ONE HERE!

www.expert4law.org
THE LEGAL MARKETPLACE

The Los Angeles County Bar Association’s official online directory

- expert witnesses
- legal consultants
- litigation support
- lawyer-to-lawyer referrals
- dispute resolution service providers

www.expert4law.org
available 24 hours a day!

For more information about expert4law.org, call 213.896.6470 or e-mail forensics@lacba.org

Lender and litigation communities as qualified to assist in complicated and commercially sophisticated liquidations, reorganizations, and ongoing business operations. See display ad on page 55.

SOCIAL SECURITY DISABILITY/SSI

LAW OFFICE OF JERRY PERSKY

5857 Wilshire Boulevard, Suite 410, Los Angeles, CA 90036, (323) 938-4000, fax (323) 938-4068, e-mail: jpersky48@aol.com. Represent disabled individuals at each step of appeals process, preparing and filing appeals, appearing at hearing, assisting in securing benefits, and handling payments.

SOCIAL SECURITY LAW (NATIONAL BOARD OF LEGAL SPECIALISTS CERTIFIED)

JAMES P. SHEA & JENNIFER L. CHO, OF THE LAW OFFICES OF SUSAN R. WASSERMAN


SPECIAL EDUCATION

VALERIE VANAMAN

Newman Aaronson Vanaman, 14001 Ventura Boulevard, Sherman Oaks, CA 91423, (818) 990-7722, fax (818) 501-1306, e-mail: intake@navlaw.net. Web site: www.navlaw.net. Contact Intake Department. For four decades, Valerie Vanaman has been providing knowledgeable and compassionate representation to people who need help obtaining services from private and government agencies. Since the inception of her firm, Newman Aaronson Vanaman in 1981, she has been the acknowledged leader in representing clients at IEP meetings, due process mediations and hearings, and related federal court actions. She also assists families with expulsions and in securing eligibility and services from regional centers.

STATE BAR AND CRIMINAL DEFENSE

JAMES R. DIFRANK, A PROFESSIONAL LAW CORPORATION

12227 Philadelphia Street, Whittier, CA 90601, (562) 789-7734, fax (562) 789-7735, e-mail: difrank@8@aol.com. Web site: www.bardefense.com. Contact Stephen Gonzales. We defend professionals including attorneys, physicians, and other licensed individuals, in disciplinary, criminal, and other legal matters. Seasoned and experienced attorney with over 20 years of experience, including experience as former senior State Bar prosecutor and senior State Bar counsel. Representation in moral character, admissions and other special proceedings in State Bar and Superior courts. Free thirty-minute consultations. See display ad on page 48.

TAXATION LAW

HOCHMAN, SALKIN, RETTIG, TOSCHER & PEREZ

9150 Wilshire Boulevard, Suite 300, Beverly Hills, CA 90212-3414, (310) 281-3200, fax (310) 859-1430, e-mail: sfl@taxlitigator.com. Web site: www.taxlitigator.com. Contact Sharyn Fisk. The firm specializes in federal and state civil tax and criminal tax litigation controversies with federal, state, and local taxing authorities, white collar crime criminal defense, forfeitures, estate and business planning, probate, tax-exempt organizations, real estate, business and corporate transactions. See display ad on page 51.

TRIAL LAWYERS FOR LAWYERS

DION-KINDEM & CROCKETT

21271 Burbank Boulevard, Suite 100, Woodland Hills, CA 91367, (818) 883-4400, fax (818) 676-0246. Web site: www.dkc.com. Facing a trial emergency? Your request for a continuance denied, you’re instructed to pick a jury in days. Removed to Bankruptcy Court, and you’ve never tried a federal case. Your clients knew their case would settle…now jury instruction, motions in limine and trial exhibits are due. We’ve encountered these situations, and we’ve won. See display ad on page 55.

WHITE COLLAR

LAW OFFICES OF LAWRENCE WOLF

10390 Santa Monica Boulevard, Suite 300, Los Angeles, CA 90025, (310) 277-1707, fax (310) 277-1500, e-mail: youareinnocent@aol.com. Web site: www.youareinnocent.com. Contact Lawrence Wolf. Specializing in embezzlement, theft, financial fraud, forgery, and bad checks, Lawrence Wolf has exclusively practiced criminal defense for more than 30 years. Our white-collar criminal attorneys are tenacious negotiators and fierce litigators who can handle complex, voluminous evidence. Our firm has established long-term relationship with judges and prosecutors throughout Los Angeles, Orange, Sacramento, and Ventura Counties.

WORKERS’ COMPENSATION

MORSE GIESLER CALLISTER & Karlin, LLP

330 North Brand Boulevard, Suite 300, Glendale, CA 91203, (818) 649-3200, fax (818) 649-3201, e-mail: mchadderton@mgcklawyers.com. Web site: www.mgcklawyers.com. Defense of work related injuries. Representing the self-insured employer, insurance company and adjusting company at the Workers’ Compensation Appeals Board. MGC&K, LLP also represents the employer on LC 132(a) and serious and willful allegations, as well as subrogation.

WAX & WAX LAW OFFICES

411 North Central Avenue, Suite 520, Glendale, CA 91203, (818) 247-1001, fax (818) 247-2421. Contact Alan Wax. We are certified specialists in Workers’ Compensation Law. We are on the Board of Governors of the California Applicants’ Attorneys Association with over 50 years of experience.
Business Opportunities

WANT TO PURCHASE MINERALS and other oil/gas interests. Send details to: P.O. Box 15577, Denver, CO 80221.

Consultants and Experts


NEED AN EXPERT WITNESS, legal consultant, arbitrator, mediator, private judge, attorney who outsources, investigator, or evidence specialist? Make your job easier by visiting www.expert4law.org. Sponsored by the Los Angeles County Bar Association, expert4law—the Legal Marketplace is a comprehensive online service for you to find exactly the experts you need.

Family Law

HIGH-CONFLICT CUSTODY SITUATIONS need the expertise of Ilene Fletcher and staff. With more than 20 years of experience providing supervised visitation and exchanges with high-conflict custody situations and unusual, difficult requests. Available hourly or extended basis, and will travel. Immediate response 365 days a year. Family law and dependency court, referrals accepted. Serving: San Fernando Valley, Santa Clarita, Orange County, all of Los Angeles County and immediate surrounding areas. References available. Contact Ilene Fletcher, (800) 526-5179 or (818) 968-8586, www.fcmonitoring.com, e-mail: visitsbyilene@yahoo.com.

Law Practice For Sale

$2 MILLION ESTABLISHED Orange County law firm specializing in estate planning, estate administration and related trust/estate litigation. Experienced attorneys, paralegals/legal assistants. Representing individuals and fiduciaries. Strong referral base. Call 800-837-5880.

LAW PRACTICE FOR SALE. Contingency litigation practice focuses on lucrative practice areas such as construction defects, personal injury, and complex business matters; practice includes hourly billing for business/corporate contracts and disputes, and construction defect matters. Significant growth history. Small office. See www.lawbiz.com or call (800) 837-5880 for more information.

Valuations and Appraisals

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

An acquired awareness:

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

Vibrant, engaging graduates integrating the theory and practice of law with public service.

www.CaliforniaWestern.edu
## INDEX TO ADVERTISERS

<table>
<thead>
<tr>
<th>Company NAME</th>
<th>Address</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accident Reconstruction Specialists.</td>
<td>Tel. 562-743-2730 <a href="http://www.FieldOfTestEngineering.com">www.FieldOfTestEngineering.com</a></td>
<td></td>
</tr>
<tr>
<td>Atern Insurance Brokerage.</td>
<td>Tel. 800-282-9786 810, <a href="http://www.info@aherninsurance.com">www.info@aherninsurance.com</a></td>
<td></td>
</tr>
<tr>
<td>The American Institute of Mediation.</td>
<td>Tel. 213-383-0454 <a href="http://www.americaninstituteofmediation.com">www.americaninstituteofmediation.com</a></td>
<td></td>
</tr>
<tr>
<td>Beme Rolston.</td>
<td>Tel. 478-28-882 www ролston.net</td>
<td></td>
</tr>
<tr>
<td>Lee Jay Serman, Mediator.</td>
<td>Tel. 213-383-0438 e-mail: <a href="mailto:leejay@mediationtools.com">leejay@mediationtools.com</a></td>
<td></td>
</tr>
<tr>
<td>Biehl, et al., CSR, Inc.</td>
<td>Tel. 800-281-8664 e-mail: <a href="mailto:laurin@biehltotal.com">laurin@biehltotal.com</a></td>
<td></td>
</tr>
<tr>
<td>California Eminent Domain Law Group, APC.</td>
<td>Tel. 818-957-0477 <a href="http://www.caledlaw.com">www.caledlaw.com</a></td>
<td></td>
</tr>
<tr>
<td>California Western School of Law.</td>
<td>Tel. 800-255-4252 <a href="http://www.americaninstituteofmediation.com">www.americaninstituteofmediation.com</a></td>
<td></td>
</tr>
<tr>
<td>Chapman University School of Law.</td>
<td>Tel. 818-957-0477 <a href="http://www.caledlaw.com">www.caledlaw.com</a></td>
<td></td>
</tr>
<tr>
<td>Cheong, Denove, Rowell &amp; Bennett.</td>
<td>Tel. 310-341-3879 <a href="http://www.CaliforniaNeutrals.org">www.CaliforniaNeutrals.org</a></td>
<td></td>
</tr>
<tr>
<td>Coldwell Banker Michael Edlen.</td>
<td>Tel. 310-213-7313 e-mail: <a href="mailto:michael@edlen.com">michael@edlen.com</a></td>
<td></td>
</tr>
<tr>
<td>Cook Construction.</td>
<td>Tel. 818-678-8936 e-mail: <a href="mailto:sokosud22@aol.com">sokosud22@aol.com</a></td>
<td></td>
</tr>
<tr>
<td>Lawrence W. Crigo.</td>
<td>Tel. 818-957-0477 <a href="http://www.caledlaw.com">www.caledlaw.com</a></td>
<td></td>
</tr>
<tr>
<td>Law Offices of Vincent W. Davis &amp; Associates.</td>
<td>Tel. 626-446-7412 <a href="http://www.vincentwda">www.vincentwda</a> lexis.com</td>
<td></td>
</tr>
<tr>
<td>Dinn-Kindem &amp; Crockett.</td>
<td>Tel. 818-887-4000 <a href="http://www.deklaw.com">www.deklaw.com</a></td>
<td></td>
</tr>
<tr>
<td>Charles J. Fleishman.</td>
<td>Tel. 310-553-5800 <a href="http://www.fleishmanrights.com">www.fleishmanrights.com</a></td>
<td></td>
</tr>
<tr>
<td>Steven L. Gliedman, Esq.</td>
<td>Tel. 310-553-5800 <a href="http://www.fleishmanrights.com">www.fleishmanrights.com</a></td>
<td></td>
</tr>
<tr>
<td>Greg David Dett.</td>
<td>Tel. 310-553-5800 <a href="http://www.dorrin.com">www.dorrin.com</a></td>
<td></td>
</tr>
<tr>
<td>Guaranteed Subpoena. Inside Back Cover</td>
<td>Tel. 310-341-3879 <a href="http://www.CaliforniaNeutrals.org">www.CaliforniaNeutrals.org</a></td>
<td></td>
</tr>
<tr>
<td>Herb Fox.</td>
<td>Tel. 805-899-4777 e-mail: <a href="mailto:hfox@foxappeals.com">hfox@foxappeals.com</a></td>
<td></td>
</tr>
<tr>
<td>The Holmes Law Firm.</td>
<td>Tel. 310-281-3200 <a href="http://www.taxlitigator.com">www.taxlitigator.com</a></td>
<td></td>
</tr>
<tr>
<td>Huron Law Group.</td>
<td>Tel. 310-284-3400 <a href="http://www.huronlaw.com">www.huronlaw.com</a></td>
<td></td>
</tr>
<tr>
<td>Jack Trinamco &amp; Associates Polygraph, Inc.</td>
<td>Tel. 310-247-2677 <a href="http://www.jacktrinamco.com">www.jacktrinamco.com</a></td>
<td></td>
</tr>
<tr>
<td>James R. Draline, PLC.</td>
<td>Tel. 310-284-3400 <a href="http://www.huronlaw.com">www.huronlaw.com</a></td>
<td></td>
</tr>
<tr>
<td>Kanto &amp; Kantor, LLP.</td>
<td>Tel. 877-789-7774 <a href="http://www.bardefense.net">www.bardefense.net</a></td>
<td></td>
</tr>
<tr>
<td>Law Office of Michael Kelly.</td>
<td>Tel. 310-393-0236 e-mail: <a href="mailto:adm1@ctf1.com">adm1@ctf1.com</a></td>
<td></td>
</tr>
<tr>
<td>Law Office of David M. Krieman.</td>
<td>Tel. 818-815-0493 <a href="http://www.davidmkrieman.com">www.davidmkrieman.com</a></td>
<td></td>
</tr>
<tr>
<td>Lawers’ Mutual Insurance Co.</td>
<td>Tel. 310-292-2045 <a href="http://www.lawyersmutual.com">www.lawyersmutual.com</a></td>
<td></td>
</tr>
<tr>
<td>Legal Tech.</td>
<td>Tel. 818-957-0477 <a href="http://www.CaliforniaNeutrals.org">www.CaliforniaNeutrals.org</a></td>
<td></td>
</tr>
<tr>
<td>MCELAWYERS.COM.</td>
<td>Tel. 310-292-2045 <a href="http://www.mcelawyers.com">www.mcelawyers.com</a></td>
<td></td>
</tr>
<tr>
<td>Michael Marcus.</td>
<td>Tel. 310-292-2045 <a href="http://www.mcelawyers.com">www.mcelawyers.com</a></td>
<td></td>
</tr>
<tr>
<td>Misa N. Sirkin, Esq.</td>
<td>Tel. 310-302-2914 <a href="http://www.sirkinlaw.com">www.sirkinlaw.com</a></td>
<td></td>
</tr>
<tr>
<td>Clinton E. Miller, Jr.</td>
<td>Tel. 310-553-5800 <a href="http://www.fleishmanrights.com">www.fleishmanrights.com</a></td>
<td></td>
</tr>
<tr>
<td>Ostrow, Krantz &amp; Associates.</td>
<td>Tel. 310-393-3410 e-mail: <a href="mailto:dstrove@comcast.net">dstrove@comcast.net</a></td>
<td></td>
</tr>
<tr>
<td>Charles Penry-Suarez.</td>
<td>Tel. 213-629-5927 <a href="http://www.cpclinlawfirm.com">www.cpclinlawfirm.com</a></td>
<td></td>
</tr>
<tr>
<td>Receivables Specialists.</td>
<td>Tel. 310-552-9044 <a href="http://www.receivablespecialists.com">www.receivablespecialists.com</a></td>
<td></td>
</tr>
<tr>
<td>Ringler Associates.</td>
<td>Tel. 310-552-9044 <a href="http://www.receivablespecialists.com">www.receivablespecialists.com</a></td>
<td></td>
</tr>
<tr>
<td>Rohde &amp; Victoroff.</td>
<td>Tel. 310-277-4482 <a href="http://www.rohde-victoroff.com">www.rohde-victoroff.com</a></td>
<td></td>
</tr>
<tr>
<td>Saltsburg, Ray &amp; Bergman, LLP.</td>
<td>Tel. 310-481-6700 <a href="http://www.srblaw.com">www.srblaw.com</a></td>
<td></td>
</tr>
<tr>
<td>Anita Rae Shapiro.</td>
<td>Tel. 714-519-0145 <a href="http://www.adr-shapiro.com">www.adr-shapiro.com</a></td>
<td></td>
</tr>
<tr>
<td>Shoreline Investigators.</td>
<td>Tel. 800-875-5480, 818-334-2193 <a href="http://www.shorelinetri.com">www.shorelinetri.com</a></td>
<td></td>
</tr>
<tr>
<td>Steinwald &amp; Kaufman, CPA’s.</td>
<td>Tel. 310-255-5080 <a href="http://www.steinwaldkaufman.com">www.steinwaldkaufman.com</a></td>
<td></td>
</tr>
<tr>
<td>Thomson West, Back Cover</td>
<td>Tel. 800-762-5177 <a href="http://www.thomsonwest.com">www.thomsonwest.com</a></td>
<td></td>
</tr>
<tr>
<td>Union Bank of California.</td>
<td>Tel. 310-550-6400 (B.H.), 213-236-7736</td>
<td></td>
</tr>
<tr>
<td>ValuEconomics, Inc.</td>
<td>Tel. 310-550-6400 (B.H.), 213-236-7736</td>
<td></td>
</tr>
<tr>
<td>Wais &amp; Melcher LLP.</td>
<td>Tel. 310-277-4482 <a href="http://www.waismelcher.com">www.waismelcher.com</a></td>
<td></td>
</tr>
<tr>
<td>Witten &amp; Eisenger, LLC.</td>
<td>Tel. 818-845-4000</td>
<td></td>
</tr>
</tbody>
</table>
3rd Annual Small Firm and Solo Practitioners Conference
ON FRIDAY, JUNE 18, the Small Firm and Sole Practitioner Division will host its third annual conference. This year’s conference focuses on providing strategies and information to transform today’s challenges into tomorrow’s opportunities. The impressive lineup of speakers will guide attendees through such topics as opening and running a law firm, rainmaking for smalls and solos, building a social media strategy, credit cards and compliance issues, and negotiation tips. The conference will take place at the Pasadena Convention Center, 300 East Green Street in Pasadena. If you are interested in sponsoring or exhibiting at the event, please contact Paulette Fontanez at pfontanez@lacba.org or 213-215-9416. The registration code number is 010621.
$199—CLE+ PLUS member
$225—Small Firm and Sole Practitioner Division member
$350—LACBA member
$399—all others
1 CLE hour

Asset Protection in a Troubled Economy
ON THURSDAY, JULY 1, the Los Angeles County Bar Association and the Small and Solo Division will host a program about protecting assets from plaintiffs and creditors. Speaker Jacob Stein will cover specific planning strategies and solutions, including planning with community property, business entities, and domestic and foreign trusts. Special emphasis will be placed on protecting assets in a troubled economy, including protection from lenders holding personal guarantees. The seminar will cover how to protect specific common assets: houses, bank and brokerage accounts, rental real estate, businesses and professional practices, and retirement plans. The 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 will be available at 4:30 P.M., with the program continuing from 5:15 to 8:45 P.M. The registration code number is 010853. This event is also available as a live Webcast. The prices below include the meal.
$60—CLE+ PLUS member
$75—Small and Solo Division member
$80—LACBA member
$100—all others
3.25 CLE hours

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

Healthcare Reform Should Not Follow MICRA’s Example

THIRTY-FIVE YEARS AGO, in response to rising medical malpractice premiums, the California Legislature declared the existence of a healthcare crisis. To address it, the Medical Injury Compensation Reform Act (MICRA) was created.

MICRA limits the ability of victims of medical malpractice to obtain justice by reducing the damages that victims can recover. The amount of recovery for noneconomic losses (pain, suffering, inconvenience, impairment, disfigurement, etc.) was capped at $250,000, and no adjustment for inflation has been made since. MICRA also gives doctors the right to introduce evidence of collateral sources of income for victims, such as disability payments or benefits received under group health plans, so that the victims’ recovery amount may be reduced. The act further allows doctors to make periodic payments to satisfy any judgment that exceeds $50,000, without necessarily requiring the payment of interest. Further, MICRA authorizes compulsory arbitration agreements in medical service contracts, depriving patients of the right to a jury trial. Finally, in order to reduce the incentive for lawyers to take medical malpractice cases, MICRA reduces the amount of the contingency fee that victims can pay.

As a result of MICRA’s provisions, unless a victim of medical malpractice has very serious economic damages (or, like Dennis Quaid, ready access to the media), it can be hard to find a lawyer and even more difficult to convince a doctor’s insurance company to make a reasonable pretrial settlement offer. MICRA stacks the cards in favor of doctors and their insurers. It does not give victims any new rights or remedies to level the scales for the rights that it takes away. Justice Stanley Mosk said it best in his dissent in American Bank & Trust Company v. Community Hospital, one of the cases rejecting a constitutional challenge to MICRA: “This imprudent legislation provides benefits to the wrongdoer at the expense of his victim.”

Only a few years after MICRA was enacted, statistics showed at best a negligible overall effect on healthcare cost containment. Malpractice premiums declined, but the cost of hospitalization continued to rise. If MICRA had solved the healthcare crisis that California was experiencing in 1975, it would be unlikely that so many Californians would have seen the need for the recent federal healthcare reform.

Whether or not MICRA has significantly reduced healthcare costs in California, the last 35 years offer many examples of the heavy price that has been paid by malpractice victims. Put simply, the law is unjust. For example, James Van Buren’s doctors diagnosed him with a peri-anal abscess and recommended surgery, during which Van Buren’s doctor negligently severed one of Van Buren’s muscles, causing Van Buren to suffer permanent fecal incontinence. At trial, the jury determined his damages for a lifetime of incontinence to be $2.5 million. Buren to suffer permanent fecal incontinence. At trial, the jury determined his damages for a lifetime of incontinence to be $2.5 million. MICRA also gives doctors the right to introduce evidence of collateral sources of income for victims, such as disability payments or benefits received under group health plans, so that the victims’ recovery amount may be reduced. The act further allows doctors to make periodic payments to satisfy any judgment that exceeds $50,000, without necessarily requiring the payment of interest. Further, MICRA authorizes compulsory arbitration agreements in medical service contracts, depriving patients of the right to a jury trial. Finally, in order to reduce the incentive for lawyers to take medical malpractice cases, MICRA reduces the amount of the contingency fee that victims can pay.

Other examples include the plaintiff in American Bank & Trust,3 who had to live with painful physical disfigurement and scars, and several women I know who lost a fetus late in pregnancy due to medical negligence. These are primarily emotional, not economic, injuries, but they are injuries nonetheless. Like it or not, we are emotional beings, and traumatic memories can be more painful than a broken leg, even if they cannot be found on an x-ray.

Moreover, medical providers should not be shielded from the consequences of causing injuries any more than any other group. People deserve to experience the consequences of their mistakes, and negligent doctors are not excepted, especially considering the gravity of the injuries they can cause. By what right did the legislature determine that it is more important to have negligent doctors earning a good living than it is to ensure that there is justice for those they injure? Torts reform advocates also like to deflect attention from the plight of medical malpractice victims by attacking the victims and their lawyers. Personal injury lawyers are demonized as money-grubbing charlatans, and noneconomic damages are treated with derision and skepticism. When a jury finds liability, the justice system is called a failure. This caricature is wrong. Personal injury specialists are entitled to be paid for their expertise, just like anyone else, and victims would gladly part with a percentage of something rather than get nothing. The bargain between a lawyer and a client deserves as much respect as any other contract. As for noneconomic damages, they are real. And as for the jury system, medical malpractice cases are no more complex than many other cases that go to trial. An expert and a lawyer should be able to explain medical facts to jurors. If not, shame on the lawyer and expert, not the jurors.

Doctors compelled to follow the latest federal healthcare reform guidelines will want some form of immunity from suits stemming from cost-cutting measures. If MICRA is any harbinger of things to come, the victims of medical negligence will still be bearing the brunt of reform in 2045.

---

3 American Bank & Trust Co., 36 Cal. 3d 359.
WE SERVE ANYTHING, ANYWHERE
STATEWIDE · NATIONWIDE · WORLDWIDE
1-800 PROCESS
"If we don't serve it, you don't pay"
U.S.A. Only

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

INTERNATIONAL
Call for cost · 1-800-PROCESS
ANY STATE · ANY NATION · ANYWHERE·
·ANY STATE · ANY NATION · ANYWHERE· ANY STATE · ANY NATION · ANYWHERE·
CAN’T SPOT YOUR WEB SITE ONLINE?

FindLaw is the #1 online legal marketing solutions provider to over 14,000 law firms, creating award-winning Web sites that help law firms get found more than any other.

• MORE VISITS - over 33 million visits sent to our customers’ Web sites each year
• MORE CLIENTS - our customers get twice as many client leads over industry average
• MORE VALUE - client leads average over $1 million in potential annual case revenue per customer Web site

SEE HOW YOUR CURRENT SITE MEASURES UP

Contact us today to receive a FREE evaluation of your firm’s existing Web site. Visit lawyermarketing.com/freeaudit or call 1-888-413-8994.