Beat the Clock

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Chapman University School of Law continues its rapid gains in bar pass results, with first-time takers of the July 2009 California State Bar Examination passing at an 81% rate. Not only is this the highest score in Chapman history, but it also marks the first time that Chapman has surpassed the statewide score for California ABA Accredited schools (79%). Chapman also significantly surpassed the non-California ABA accredited school score of 69%, and the overall statewide pass rate for first-time takers of 70%.

Since 2005, Chapman has seen a 36% increase in pass rates for first-time takers of the California examination. The 81% pass rate in 2009 puts Chapman among California’s elite schools with pass rates above the statewide average.

We would like to congratulate all of our graduates who passed the July 2009 bar exam. In addition to the hard work of those former students, the gains are attributable to heightened admissions standards, an active bar preparation program and an aggressive writing program at Chapman. More than nine of every ten students who graduated in the top three-quarters of the class passed the exam on their first attempt, as did all 21 members of the Chapman Law Review.
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Asset Protection Planning Now Can Insulate Your Clients’ Assets From Future Judgments

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

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

Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.
everett Dirksen, a respected Republican Senate minority leader in the sixties, once said, “I am a man of fixed and unbending principles, the first of which is to be flexible at all times.” These days, “compromise” is often seen as a dirty word, talked about as something politicians do when they give in to special interests. When a lawyer suggests to clients that they accept a deal, too often that suggestion seems to imply that the lawyer simply cannot handle the case. One of the reasons neutrals have become so critical to dispute resolution is that they can alert clients to weaknesses in their position that lawyers might not be comfortable admitting. But inflexibility and unwillingness to compromise often come at a serious cost to clients.

This brings to mind a couple of stubborn creatures from the imagination of Dr. Suess. Among my children's favorite stories is “The Zax,” from Dr. Suess’s collection, The Sneetches and Other Stories. This cautionary tale features a North Going Zax and a South Going Zax who happen to come face to face in the middle of nowhere. Each becomes entrenched and refuses to move even an inch to the side to allow the other to pass. Eventually, a society is built around them and leaves the two Zaxes, for all literary eternity, “standing un-budged in their tracks.”

I think all mediators should have a portrait on their office wall of North Going Zax and South Going Zax standing forever in their intransigence. Most legal disputes naturally lend themselves toward Zax-like face-offs. The parties are already adversaries. The attorneys have a duty to zealously represent their clients and generally have a financial incentive to keep the parties fighting. “The Zax” is a simple and clear reminder that complete inflexibility generally leads to unhappy results.

To be clear, I am not suggesting that lawyers sell out their clients. Willingness to compromise does not mean simply giving in to demands. The point is that often our clients' best interests are served by some degree of flexibility and an ability to consider options.

We need look no further than our local soccer team to find a good example. In 2009, David Beckham went on loan to AC Milan in Italy during the Major League Soccer off-season so he could maintain his form and compete for a spot in England’s World Cup qualifying games. The MLS season started up again before the Italian season finished. Beckham wanted to stay, and Milan wanted to keep him. The L.A. Galaxy understandably demanded their star player back.

The situation seemed intractable and headed for disaster, but the parties found an unusual way to compromise. AC Milan paid a reasonable sum and kept Beckham for its season. Beckham reportedly made the unprecedented move of paying the Galaxy to allow him to stay. The Galaxy gave up their star player for a couple of months but were compensated for their loss and got him back for the second half of the season in top form. As a result, AC Milan placed well, Beckham earned his record 100th appearance in a World Cup match for England, and the Galaxy used his return to help fuel their run to the MLS Cup.

The ability to compromise is not a weakness but a strength. Truly great advocates find a way to achieve good results by creating room for negotiation. It is time that lawyers and clients alike stop looking at compromise as giving in and instead see it for what Everett Dirksen did—an important principle in its own right.
New Nondiscrimination Law Protects Genetic Information of Employees

THE GENETIC INFORMATION NON-DISCRIMINATION ACT (GINA) was enacted by Congress to allay growing public concern about the use of genetic information. GINA prohibits the improper use of genetic information in health insurance and employment. GINA’s employment provisions, which are contained in Title II of the law, stem from Congress’s determination that the limited federal and state laws addressing genetic discrimination in employment are an incomplete patchwork that warrants uniform, federal legislation. Title II took effect in 2009, and the Equal Employment Opportunity Commission’s proposed regulations implementing the law are expected soon.

Title II prohibits employers from engaging in three types of conduct: 1) discrimination on the basis of genetic information, 2) the intentional gathering of genetic information about employees or applicants, and 3) retaliation against employees who complain about a violation of any GINA provision. In addition, GINA creates new rules regarding the protection of genetic information to the extent it is obtained by employers. GINA covers employers with 15 or more employees, employment agencies, labor unions, and apprenticeship or training programs. It protects employees, job applicants, labor union members, and apprentices and trainees.

GINA makes it unlawful for employers, employment agencies, unions, and training programs to discriminate against an individual on the basis of genetic information in regard to hiring, discharge, compensation, terms, conditions, or privileges of employment. “Genetic information” is defined as information about: 1) an individual’s genetic tests, 2) the genetic tests of that individual’s family members, 3) the manifestation of a disease or disorder in the individual’s family member, 4) an individual’s request for, or receipt of, genetic services, or the participation in clinical research that includes genetic information by the individual or a family member of the individual, and 5) genetic information of a fetus carried by an individual or family member, and genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology. Information about the sex or age of the individual or the individual’s family members is expressly excluded from the definition of genetic information.

GINA’s definition of “family member” is broad and is defined to include a person who is 1) a dependent of the employee as the result of marriage, birth, adoption, or placement for adoption, or 2) a first-, second-, third-, or fourth-degree relative of the employee, or of a dependent of the employee.

Under GINA’s antidiscrimination provisions, an employer may not, for example, terminate a healthy employee based upon a concern that because his or her mother has Alzheimer’s disease, the employee may someday suffer from the same disease and be unable to perform his or her job in the future. Nor may an employer decline to promote an asymptomatic employee, based on its knowledge of the employee’s genetic predisposition to develop a medical condition, in order to avoid expenses associated with absenteeism, health benefits, or risky occupational exposure. These would be prohibited uses of an employee’s family medical history or genetic profile as the basis for employment decisions.

Other Prohibitions

GINA also provides that covered employers may not intentionally gather their employees’ genetic information. This includes requesting, requiring, or purchasing genetic information relating to employees and applicants. However, if an employer does acquire this information, it will not be found in violation of GINA’s prohibitions as long as the acquisition falls into one of several narrow exceptions. The exceptions include information revealed in a casual conversation, through a lawful request for medical certification, or through certain types of qualified wellness programs, among others. Even if an employer acquires genetic information under one of the exceptions, however, the employer is still prohibited from discriminating against the employee based on the information and must keep the information confidential.

An employer that possesses genetic information about its employees must treat the information as a confidential medical record.

An employer that possesses genetic information about its employees must treat the information as a confidential medical record. Accordingly, it must maintain the information on forms and in medical files that are separate from personnel files. Employers are also generally prohibited from disclosing genetic information about an employee to others, except in very limited circumstances.

Covered employers also are prohibited from retaliating against an employee because he or she has opposed any act or practice made unlawful by GINA. Employers also may not retaliate against an employee who makes a charge, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under GINA.

In addition to requiring employers to review and update their policies and forms, GINA will likely also affect the types of health-related programs many employers offer to their employees, and how they operate them. The other ways in which GINA will affect employers will continue to unfold, particularly as the EEOC finalizes its implementing regulations. The changes will not stop there—just as science rapidly evolves, so will the laws regarding how that science can be used.
August 4, 2009

John R. “Jack” Trimarco
9454 Wilshire Blvd., 6th Floor
Beverly Hills, CA 90212

Dear Jack,

I am writing this letter with my deepest thanks for your tremendous efforts in assisting in a murder investigation which focused on my client, Damien Gatewood.

During the early morning hours, shots were fired at a house party in the Southern California area. Tragically, a guest was struck and died. Questionable eye witness identification by one neighbor, identified Damien Gatewood as the shooter.

Mr. Gatewood was arrested days later and had been incarcerated at Wayside Honor Ranch for one year awaiting trial.

I never believed that the authorities had the right man. Your long recognized and unmatched expertise in the polygraph field made you the obvious best choice to perform this critical examination.

You contacted me after you examined Mr. Gatewood. You told me that according to your examination Mr. Gatewood was conclusively not the shooter, a fact which was supported by retired FBI Agent and polygraph examiner Ron Homer, during his quality control.

Armed with the Examination video, polygraph report and your curriculum vitae, I met with the prosecutor assigned to the case. He directed me to the Los Angeles County Sheriff’s Department Polygraph Unit. I met with them to evaluate your test. They all acknowledged your unimpeachable integrity and expertise. They reviewed all charts, documents and video. I was advised by the Unit Chief that you ran a perfect examination and they agreed that Mr. Gatewood was not the shooter. Two days later the case was dismissed and an innocent man was not convicted.

It is a tribute to your reputation that polygraph testing conducted by you is so well received and respected in the legal community.

Warm Regards,

MARKS & BROOKLIER, LLP

ANTHONY P. BROOKLIER

A proud member of the Los Angeles County Bar Association
WHEN A LAW FIRM CLOSES ITS DOORS, plenty of other firms are waiting in the wings, all too eager to snatch up partners fortunate enough to emerge with a book of business. A word to the wise: proceed with caution. Based on a July 2009 bankruptcy court decision, hiring partners from bankrupt law firms can yield negative financial and legal consequences. Specifically, these partners and their new firms may be on the hook for profits earned from completing the bankrupt firm’s “unfinished business.”

Since 1984, the unfinished business rule has impacted partners of dissolved, but not bankrupt, firms. When a law firm dissolves, partners of the firm typically take unfinished matters with them to their new firm. Some law firms have agreements addressing the consequences of this typical business practice. Less cautious firms do not. In *Jewel v. Boxer*, the California Court of Appeal decided what happens when a law firm dissolves and the firm has no agreement stating whether the partners, and their matters, are free to profitably move on.

According to *Jewel’s* unfinished business rule, in the absence of a partnership agreement to the contrary, former partners of a dissolved law firm have a duty to account to the dissolved firm, and each other, for profits earned from the dissolved firm’s unfinished business. A law partnership’s unfinished business includes “any business covered by retainer agreements between the firm and its clients for the performance of partnership services that existed at the time of dissolution.” In other words, former partners of a dissolved firm can file lawsuits against each other for an accounting and recoupment of any profits generated from completing unfinished matters, no matter where those matters are completed.

However, the unfinished business rule is not absolute. The partners of a law firm can opt out of the unfinished business rule by including a *Jewel* waiver in their partnership agreement. A *Jewel* waiver minimizes the disruptive impact of dissolution by eliminating the former partners’ continuing duty to account to the dissolved firm, and each other, for profits earned from the dissolved firm’s unfinished business. If a law firm dissolves and its partnership agreement contains a *Jewel* waiver, the former partners of the dissolved firm can complete their unfinished matters without any financial and legal obligations to their old firm.

In the bankruptcy context, the unfinished business rule and the *Jewel* waiver carry additional implications. To date, only one court has considered the rule and the *Jewel* waiver in bankruptcy. When a firm dissolves and enters bankruptcy, the trustee’s special bankruptcy powers allow the trustee to sue not only the former partners but also the firms that hire them. In *In re Brobeck*, the court held that the *Jewel* waiver, added to the partnership agreement at the 11th hour before dissolution, was valid. However, the court also held that the *Jewel* waiver constituted a fraudulent transfer under the Bankruptcy Code and California law. In essence, *Brobeck* allows a bankruptcy trustee to capture (from the former partners or their new firms), and rein into the bankruptcy estate, profits earned from completing the bankrupt firm’s unfinished business.

*Jewel* made clear that former partners of a dissolved law partnership must share profits earned from their dissolved firm’s unfinished business. In *Jewel*, former partners of a dissolved firm sued other former partners, seeking fees received on cases in progress upon dissolution of the firm. Because the dissolved firm had no written partnership agreement, the Uniform Partnership Act governed the former partners’ relationship. Under the act, no partner is entitled to extra compensation for services rendered in completing the dissolved partnership’s unfinished business. Accordingly, all former partners must share the net postdissolution income received from completing the dissolved firm’s unfinished business.

**Jewel’s Arguments**

The former partners, attempting to keep the fruits of their labor, made several arguments, each rejected by the court. First, the former partners argued that executing “substitutions of attorneys transformed the old firm’s unfinished business into new firm business.” The court, however, focused on the circumstances existing on the date of dissolution, not subsequent events, to determine whether business belonged to the dissolved firm. The court held that the execution of substitution of attorney forms subsequent to dissolution did not alter the character of the cases as unfinished business of the dissolved firm. Consequently, even if the client executes a substitution agreement with the former firm, the new firm is responsible for paying the former firm back for the profits earned from the unfinished business.

Amanda A. Main is a litigation associate in the Los Angeles office of White & Case LLP.
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of attorney, the former partners still have a duty to account to each other for profits earned on unfinished business matters.

The former partners also maintained that forcing them to share future profits infringed upon their clients’ absolute right to select the attorney of their choice. The court held that a client’s right to hire the attorney of his or her choice was irrelevant to the rights and duties between former partners with regard to income from unfinished business. The client’s right to hire the attorney of his or her choice is distinct from, and does not offend, the rights and duties between partners relating to profits from unfinished business. For that reason, as long as the clients choose the former partner to complete their matters, the former partner retains his or her obligation to share profits.

Following the decision in Jewel, at least one court has held that Jewel’s principles apply whether the dissolved law firm is organized as a partnership or a professional corporation. The court’s decision in Jewel therefore carries serious implications for partners and shareholders who continue to work on legal matters from their dissolved firm.

**In re Brobeck**

In July 2009, the U.S. Bankruptcy Court for the Northern District of California examined a matter of first impression: the “dramatic intersection” of well-established principles relating to the winding up and dissolution of a law partnership, including Jewel claims, with the well-established rights of third-party creditors in bankruptcy. In Brobeck, the chapter 7 bankruptcy trustee sought to invalidate an 11th-hour amendment to Brobeck’s partnership agreement and to recover fraudulently transferred profits from Brobeck’s unfinished business. Brobeck’s partners, shortly before dissolution, approved a final partnership agreement. The final partnership agreement contained a Jewel waiver, which waived the partners’ and partnerships’ claims to unfinished business, as defined in Jewel. Thus, if the execution of the Jewel waiver was valid, then Brobeck’s partners had no duty to account back to Brobeck, or each other, for profits earned from completing Brobeck’s unfinished business.

In 2003, certain Brobeck creditors filed an involuntary chapter 7 bankruptcy petition. In 2008, the trustee filed complaints against former Brobeck partners and the law firms that hired them. This case was the first instance in which the former partners’ new law firms were sued under Jewel. Under the Bankruptcy Code, the trustee can sue the new firms as immediate or mediate transferees of the property.

The trustee sought an accounting and turnover order of unfinished business profits. Alternatively, the trustee argued that the Jewel waiver was avoidable as a fraudulent transfer under the Bankruptcy Code and the California Uniform Fraudulent Transfer Act. The trustee and defendants filed cross-motions for summary judgment on these issues. The court made two significant findings. First, the court found that the Jewel waiver was valid and barred the trustee from asserting claims under Jewel. Even though the Brobeck partners added the Jewel waiver to their final partnership agreement shortly before dissolution, Jewel encouraged partners to enter into this precise type of agreement, reflecting how they wanted to handle the firm’s unfinished business. When the final partnership agreement became effective, Brobeck no longer had an interest in unfinished business profits.

While the court’s first finding favored the partners and their new firms, the court’s second holding declared the trustee as the ultimate winner. The court held that the Jewel waiver could constitute a fraudulent transfer under state and/or federal law. Simply put, the court found that Brobeck had a property interest in its unfinished business profits and the Jewel waiver transferred that interest to the Brobeck partners.

Although the trustee alleged two types of fraudulent transfer—actual and constructive—the court only granted summary judgment, in favor of the trustee, as to the constructive fraudulent transfer claim. The court found that Brobeck had a property interest in its unfinished business profits and the Jewel waiver transferred that interest to the Brobeck partners. Only the fourth requirement was at issue in Brobeck: “Because the policy behind fraudulent transfer law is to preserve assets of the estate, reasonably equivalent value is determined from the standpoint of creditors.”

Further, the reasonably equivalent value must be exchanged contemporaneously with the transfer. Despite numerous arguments made by the former Brobeck partners, the court found that the Brobeck partners failed to provide value to Brobeck in exchange for the Jewel waiver.

**Good Faith Defense**

Even if the requirements for a constructive fraudulent transfer are satisfied, hiring law firms can avoid liability by establishing a good faith defense. The law firms, as immediate transferees, are not liable if they take the transfer for value, in good faith, and without knowledge of the fraudulent transfer. Tellingly, the law firm defendants in Brobeck did not assert this defense.

Jewel and Brobeck effectively render law firm partners or shareholders temporarily illiquid in the event that their firm dissolves and declares bankruptcy. In these circumstances, a bankruptcy trustee could make a viable claim that the waiver constitutes a constructive fraudulent transfer. Generally, firms distribute profits at the end of each year. As long as a firm is generating money and distributing profits to its partners, a trustee would have difficulty establishing insolvency.

**The Reach-Back Period**

Also, the fraudulent transfer statute only applies to transfers made within the statutory reach-back period. Thus, a bankruptcy trustee cannot claim that the Jewel waiver constitutes an actual or constructive fraudulent transfer unless the transfer occurred within the statutory period. The length of the statutory reach-back period relates to the trustee’s “strong arm” powers, which allow it to avoid fraudulent transfers under state law for the benefit of all creditors. Consequently, law firms and former partners of bankrupt law firms must evaluate their potential liability in light of California’s longer reach-back period. Based on California law, the trustee can reach back four years before the date of the bankruptcy filing to identify fraudulent transfers. The “transfer” date is the date the partners execute the Jewel waiver. Accordingly, a law firm’s partners generally have no longer risk the financial and legal consequences associated with Jewel and Brobeck if the law firm dissolves and enters bankruptcy more than four years after the partners execute a Jewel waiver.

Law firms who wish to hire former partners of dissolved and bankrupt firms should be cognizant of Jewel and Brobeck. The hiring firm, before taking on qualified partners with lucrative practices, should determine
whether the former partner’s partnership agreement, or other agreement, contains a Jewel waiver. If so, the hiring firm should exercise due diligence and inquire about the circumstances surrounding the execution of the Jewel waiver to determine whether hiring a new partner who continues to work on matters from the partner’s previous firm would expose the hiring firm to a fraudulent transfer claim. If a Jewel waiver is not included in the prospective partner’s former partnership agreement, or other governing document, the hiring firm should think twice before making a hiring decision that invites a lawsuit.

While the economic downturn has provided some economically healthy firms with the opportunity to recruit unemployed partners in desirable practice areas, what is clear from Jewel and Brobeck is that partners from dissolved and bankrupt firms can bring in more than just their clients. Prudent firms would do well to expand their due diligence to include an examination of a prospective hire’s former partnership agreement or other agreement. Doing so would enable a hiring firm to generate new business while avoiding the pitfalls of protracted and expensive litigation.

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3 In re Brobeck, 408 B.R. at 333.
4 Id.
5 Jewel, 156 Cal. App. 3d at 174.
6 Id. at 175-76, 180.
7 Id. at 176-78.
8 Fox v. Abrams, 163 Cal. App. 3d 610, 616-17 (1985) (“The fact that a law corporation is involved is no reason to disregard the fair and reasonable principles of Jewel….”).
9 In re Brobeck, 408 B.R. at 325.
10 Id. at 325-28.
11 Id. at 330.
12 11 U.S.C. §550(a) (The trustee may recover the property transferred, or the value of such property, from the “initial transferee” or “any immediate or mediate transferee of such initial transferee.”).
13 In re Brobeck, 408 B.R. at 330, 336.
14 Id. at 333-36.
15 Id. at 336-48.
16 Id. at 340-41.
17 Id. at 341.
18 Id. at 342.
19 Id. at 343-47.
20 11 U.S.C. §550(b)(1) (“The trustee may not recover…from a transferee that takes for value…in good faith, and without knowledge of the voidability of the transfer avoided.”).
21 See 11 U.S.C. §544(b)(1) (“[T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable under section 502(e) of this title.”).
22 CIV. CODE §3439.09 (“A cause of action with respect to a fraudulent transfer…under this chapter is extinguished unless action is brought…within four years after the transfer.”).
23 In re Brobeck, 408 B.R. at 339 n.30.
Helping California Courts Protect Settlement Beneficiaries

EVER SINCE CONGRESS AUTHORIZED federal income tax incentives in 1982, the use of structured settlements in catastrophic injury and other personal injury cases has provided financial stability to millions of injured individuals and their families. As an alternative to lump sum payments of settlement proceeds, structured settlements offer settling personal injury claimants the flexibility and tax advantages to resolve a dispute while creating a steady stream of secure income for the injured.1

The growth of the structured settlement industry also led to a secondary market of factoring companies that specialize in acquiring, at a discounted price, a structured settlement recipient’s rights to receive future payments. In response to reports of unconscionable structured settlement factoring transactions and the potential for exploitation of accident victims in factoring transactions, 47 states—including California—have enacted structured settlement protection laws that restrict structured settlement factoring. In California, the statute is named the Structured Settlement Transfer Act, but the commonly used term is “structured settlement protection act,” or SSPA.

This legislative trend also led in 2001 to federal tax legislation that reinforced those state laws by imposing a punitive excise tax on factoring companies that acquire structured settlement payment rights without complying with a state’s SSPA. The federal tax code now imposes excise tax on a factoring company unless the factoring transaction was first judicially approved.2 Thus, state SSPAs typically require court review of factoring transactions, and the federal tax code provides a strong incentive to factoring companies to comply, by penalizing transactions that take place outside of the court approval process. Together, these laws are designed to stem the abuses of structured settlement factoring, to protect the interests of the parties to structured settlement agreements, and to protect the public’s interest in preventing additional dependency on tax-funded social safety nets.

One key feature of most state SSPAs is that they authorize courts to approve a factoring transaction only on a finding that the transaction is in the best interests of the structured settlement recipient. California has revised its SSPA, effective January 1, 2010, to elaborate on the best interests standard, and in doing so has become the first state to provide statutory guidance on the meaning of that term. The changes address some of the concerns raised by recent court decisions, but they also leave other questions unanswered.

Periodic Payment Settlement Act

Traditionally, tort claims were resolved either by way of settlement of a lump sum or payment of a judgment after trial on appeal. Recognizing the special needs of personal injury victims and especially of individuals with long-term disabilities, Congress enacted the Periodic Payment Settlement Act of 1982, creating favorable tax treatment for qualified periodic payments that constitute damages on account of physical injury or sickness.3

Although personal injury damages have been excluded from federal income tax for decades,4 for many years there was some uncertainty about the tax treatment of periodic payments. The 1982 act made it clear that periodic payments for personal injury damages, when the payments are funded by an annuity not owned by the personal injury victim, are excludable from the recipient’s income for tax purposes, if the conditions of the act are satisfied.5 Structured settlements are generally funded by single-premium annuity contracts held by a party contractually obligated to make the future settlement payments. Also, typically, the annuity issuer, for the convenience of the obligor, assumes responsibility for such administrative duties as ensuring that the scheduled payments are made. The Internal Revenue Code also allows the party with the payment obligation to exclude from its gross income the amount funding the periodic payments, as well as accumulations on that amount.6

Fueled by these incentives, structured settlements have become an everyday fact of life in personal injury litigation. Structured settlements are often the settlement vehicle of choice for individuals who have been severely injured and whose healthcare requirements and income streams need to be secured over time. Likewise, they have become popular for use in cases involving injuries to children, as well as matters involving molestation, environmental, and workers’ compensation claims.

The benefits are numerous: The injured individual (or family) is often provided with a stream of income sufficient to cover necessities, including medical and living expenses. Because of the flexibility inherent in the creation of structured settlements, they can be tailored, at the time of settlement, to the specific needs of the individual or family.

With the economic downturn, the financial stability of insurance companies recently came into national focus, but state and federal regulations have long required insurance companies to abide by strict solvency standards to protect their assets. The California Department of Insurance must first approve companies offering structured settlements in California. Those insurers are subject to mandatory annual audits and other financial compliance requirements.7 The insurance commissioners in California and other states developed these regulations to preserve the solvency of general accounts in which assets are held so that contractual obligations to policyholders are met. These general accounts typically support only the obligations of the insurance companies—and not the obligations of a parent company or other subsidiaries.

Structured settlements are subject to noteworthy restrictions. To qualify for the desirable income tax benefits, the recipient cannot accelerate, defer, increase, or decrease the payments. The payments also

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must be fixed and determinable at the inception of the settlement, and the money used must come from a party or its insurer in an amount no greater than the original liability. Most structured settlements are designed by professional consultants who are themselves licensed. Also, many individuals have been certified as structured settlement consultants, pursuant to a program of the National Structured Settlement Trade Association (NSSSTA). This professional program trains licensed individuals to assist insurance companies, banks, and other institutions with organizing and running structured settlement programs. The NSSSTA certification program has included instruction in needs-based evaluations, tax implications, special needs trusts, guardianship rules, loss reserving, Medicare set asides, and claim valuations. After completing the course, an individual may become a Certified Structured Settlement Consultant.

**Factoring**

Beginning in the late 1980s, a new wrinkle emerged in structured settlements. Entities known as factoring companies targeted individuals who had structured settlements, buying the future structured settlement payment rights for a discounted lump sum, usually a fraction of the overall settlement figure. For the structured settlement payee, the transaction represented instant cash, free of the structured settlement’s restrictions on acceleration, albeit at a substantial cost.

Many payees sold their settlement payment streams without fully realizing the financial ramifications of their actions. Throughout the 1990s, significant abuses by factoring companies were reported, leading to SSPA regulation of factoring transactions. Under California’s SSPA, court oversight is now required for individuals who wish to sell their structured settlement payment rights.

The California SSPA is comparable to those enacted in other states and is based on model legislation recommended by the NSSSTA. The statute has three key components. First, a structured settlement payment recipient, or payee, must receive from the factoring company a set of disclosures about important financial and other terms of the proposed transaction. Second, the factoring company must initiate court review, providing notice and copies of the court-filed papers to all interested parties. Third, a court must review the transaction, and may approve the transfer only based on findings satisfying the statutory conditions.

California’s disclosure requirements are more extensive than those of any other state. The factoring company must provide the disclosure statement at least 10 days before the payee signs any agreement with the company. The disclosure must identify the dollar amount of the payments being sold, the present value of those payments (based on a federally established rate for valuing annuity interests), the amount being paid to the payee, and the interest rate calculated as if the transfer were a loan and not a sale of the payment rights. The factoring company must advise payees that they should get professional advice from an attorney or accountant and must explain in the disclosure statement that the payee may cancel the transaction at any time before court approval. Unlike other state SSPAs, the California SSPA also requires that certain disclosures be included in the agreement signed by the payee and the factoring company.

The California SSPA’s court filing requirements are also more extensive than those of most other states. Factoring companies must file and serve on interested parties copies of the structured settlement agreement and annuity contract, along with the disclosure statement and other required documents. Factoring companies also must send documents—including copies of any order that approved the structured settlement at its outset—to the California attorney general. The attorney general and interested parties (including the payee, the annuity issuer, the structured settlement obligor, and persons who are entitled to receive payments in the event of the payee’s death) must receive notice of the court proceeding and of the hearing that the court is to hold on the factoring company’s request for court approval.

Court approval is necessary for any structured settlement to be valid, so if a transaction does not receive court approval, the payee may walk away with no obligation to the factoring company. The California SSPA authorizes a court to approve a transfer only upon specific factual findings, including that the transfer of the structured settlement payments is in the best interest of the individual, taking into account the welfare and support of any dependents, that the transfer meets the standards of the statute and does not contravene any other court order, and that the payee reasonably understands the terms and conditions of the transfer agreement.

The California SSPA statute also calls for independent professional advice, requiring that the payee be advised to “obtain independent professional advice regarding any federal and state income tax consequences arising from the proposed transfer, and that the transferee may not refer the payee to any specific advisor for that purpose.” The California SSPA is similar to many other state SSPAs that require that payees be advised to obtain advice, but California goes further, requiring the factoring company to pay up to $1,500 to the payee’s chosen adviser. California is also among a small number of states whose laws provide that a violation of the state’s SSPA is also a violation of the state’s unfair business practice laws.

Despite these statutory demands, some courts have been critical of the quality of disclosures in matters presented for judicial approval. Some recent California decisions examined some of these issues, as well as the public policies underpinning California’s SSPA. For example, in 321 Henderson Receivables Origination LLC v. Sioteco, the court reviewed a string of superior court orders denying petitions for approval of transfers. The Fresno County superior court judges had been critical of factoring company 321 Henderson’s petitions, pointing to omissions in the submissions, perceived violation of the independent counsel requirements, and violations of the antiassignment clauses in the annuity contracts. At least one trial court indicated that the company had engaged in a pattern of judge shopping, by filing petitions but dismissing them on receipt of adverse tentative rulings. When 321 Henderson attempted to dismiss new petitions, the court declined to enter the dismissals.

The court of appeal reversed the lower court decisions, concluding that requests for dismissal must be granted if made prior to the commencement of trial (or, in this case, hearings on the petitions). As to petitions in which “trial” had commenced, the court of appeal concluded that, absent objection by an interested party, a contractual antiassignment clause does not prohibit factoring, and further that the evidence did not support the trial courts’ findings of systematic violations of SSPA requirements. To be sure, the appellate court acknowledged shortcomings in the filings, but those might be cured on remand, by amendment of the petitions, or were otherwise too intertwined with issues that required reversal.

**Amending California’s SSPA**

As cases moved through the courts, California’s legislature examined the adequacy of the California SSPA, and in 2009 adopted additional safeguards in order to better protect consumers who wish to transfer their structured settlement payment rights. Revisions effective January 1, 2010, provide that, when making the best interest determination, a court should look to the “totality of the circumstances.” The statute supplies a nonexclusive list of criteria that include, among other things:

- The payee’s age, mental capacity, legal knowledge, and apparent maturity level.
- The payee’s stated intended uses for the money to be received from the factoring company.
- The payee’s “financial and economic situation.”

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• The terms of the transfer agreement.
• Whether the payments were intended to be used for medical care due to the payee’s original injuries, and whether the payee still needs the payments for such purposes.
• Whether the payee needs the payments for future medical expenses.
• Whether the payee lacks insurance or other resources to cover medical expenses for the payee’s original injuries.
• Whether the payee has sufficient resources to cover financial obligations for the support of the payee’s dependents.
• Whether the payee has previously transferred, or attempted to transfer, some payments.
• If any previous transfers were denied within the past five years.
• Whether the payee received independent financial advice about the transfer.
• “Any other factors or facts that the payee, the transferee, or any other interested party calls to the attention of the reviewing court or that the court determines should be considered…”36

California is the first state to codify the factors relevant to the best interests examination.37

Court Approval

Notwithstanding the restrictions set forth in the California SSPA, most factoring transactions receive court approval. While the economy over the past two years has affected factoring companies, and the Fresno County cases have also had an impact on the number of transactions in California, there is little reason to believe that the situation has changed greatly since 2004, when the California attorney general issued a detailed report on factoring of structured settlement payment rights. The dollar value of structured settlement payments purchased by factoring companies grew from $10.6 million in 2001 to $53.7 million in 2003.38

The 2004 report revealed that 21 companies were in the structured settlement factoring business, purchasing structured settlement payments in California, with two companies involved in more than 80 percent of the transactions. The attorney general’s report observed that the average effective annual discount rate charged by factoring companies—that is, the equivalent interest rate that the factoring company would charge if the transaction were treated as a loan—was 19 percent.

The attorney general also reported that, of the 632 decisions on California petitions from January 2002 through September 2003, 541 (85.6 percent) were approved by the courts, one was approved with a change, 66 (10.4 percent) were withdrawn, and 24 (3.8 percent) were denied.39 Since 2002, one factoring company alone had secured judicial approval of more than 2,000 structured settlement transfers.40

One likely reason for routine approval of transfer petitions is that they are rarely opposed. The payee typically joins the petition, and objections are infrequent. Before 2009, a single unpublished appellate decision interpreted the California SSPA, and that was in a case in which the structured settlement obligor and annuity issuer objected, for various reasons, to a factoring transaction.41 The focus of that opinion was the assignment provision, which the appellate court held validly precluded any transfer—precisely because the structured settlement obligor and annuity issuer had exercised their contractual and statutory rights to object and prevent the transfer. This contrasts with the Sioteco court’s conclusion that, because no party had exercised its rights to object under the assignment provisions, those contractual prohibitions on transfers did not bar the transactions.

The public policy embodied in the California SSPA—as with other state SSPAs and the federal tax provisions that reinforce those state laws—reflect a decision to protect the benefits provided by structured settlements. Those protections extend to payees, the primary beneficiaries of the statutes. But payees are not the only parties whose interests are at stake, and safeguarded, by protection acts. The dependents of payees, for example, are also a focus of the protections—and the 2010 version of the California SSPA includes new provisions aimed at arming courts with information needed to take appropriate actions in favor of the dependents. Other interested parties, and the public as well, benefit from the protections. But in many regards, the protections are only effective when enforced, in the day-to-day decisions by judges in hundreds and even thousands of SSPA proceedings.

The courts have been tasked to ensure that structured settlements continue to serve as the financial safety net that they were intended to be when they were first devised more than 25 years ago. The newly revised California SSPA adds important protections designed to assist the courts in doing their job of protecting those for whose benefit the structures were originally made. It will be up to California’s judiciary to make sure those safeguards work in practice.42

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4 See Revenue Act of 1918, §213[b](6), 40 Stat. 1037,
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5 See 26 U.S.C. §104(a), (130).
7 See INS. CODE §§729-736, 900-925.4, and 10 CAL. CODE REGS. tit. 3.
8 See 26 U.S.C. §130(c).
9 See INS. CODE §§1631 et seq.
11 See id.
13 See Structured Settlement Transfer Act, codified at INS. CODE §§10134 et seq. (also referred to as the California Structured Settlement Protection Act or the California SSPA).
15 See INS. CODE §10136.
16 The California SSPA also applies to factoring transactions structured as a loan to the payee, with payments paying off the loan in installments. See INS. CODE §10134(a) (defining transfer within the scope of the statute as “any sale, assignment, pledge, or other form of alienation or encumbrance” of structured settlement payment rights). Most structured settlement factoring transactions are based on documents drafted by factoring companies that describe the transaction as a sale or assignment of the payment rights and not a loan. Some payees have challenged this terminology and alleged that the factoring transaction was a loan and that the interest rate violated state usury laws. See, e.g., 321 Henderson Receivables Origination LLC v. Sioteco, 173 Cal. App. 4th 1059 (2009). These challenges have generally fared poorly. See id.
17 INS. CODE §10136.
18 INS. CODE §10136(c).
19 INS. CODE §10139.5.
20 INS. CODE §10139(a).
21 INS. CODE §10139.5.
22 Id. See also INS. CODE §§10139.3, 10136.
23 See INS. CODE §10139.5.
24 INS. CODE §10136(a)(9).
25 INS. CODE §10139.3(h).
26 See INS. CODE §10139.4.
28 Sioteco, 173 Cal. App. 4th 1059
29 Id. at 1067.
31 See id. at 297; Sioteco, 173 Cal. App. 4th at 1068; see also Ramos, 172 Cal. App. 4th at 312.
33 Sioteco, 173 Cal. App. 4th at 1074-79.
34 S.B. 510 (2009), legislative digest.
35 INS. CODE §10139.5(h).
36 Id. These criteria are similar to those that have been identified in court opinions in California (as well as in other states, particularly New York) as important to the best interest determination.
37 INS. CODE §10139.5(c).
39 Id.
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Complying with the Buy American Provisions in the Federal Stimulus Act

FACED WITH A GLOBAL FINANCIAL CRISIS of unequaled proportions, the United States enacted a program to expend a similarly unprecedented sum to stimulate its economy. The American Recovery and Reinvestment Act—which took effect on February 17, 2009—is intended to steer the American economy away from meltdown and back toward growth. ARRA generally provides for a combination of government spending and tax incentives of more than $780 billion, with spending appropriated at approximately $460 billion and incentives accounting for about $320 billion. The spending program includes a broad range of construction, procurement, research, and other projects within the United States. These projects present many opportunities for domestic and foreign contractors, consultants, manufacturers, and suppliers.

The funds allocated for infrastructure, science, and energy-related projects amount to approximately $154 billion. ARRA funding on construction-related projects includes direct spending by the U.S. government, such as the construction of an interstate highway or federal building, and indirect spending in the form of grants or loans made to state governments. Those in turn will be used to fund construction of local roads or facilities.

The ability of contractors and vendors to benefit from this bonanza may be limited, however, by the domestic content provisions they must follow to participate in ARRA projects. Section 1605 of ARRA bears the title “Buy American.” This section was the subject of significant debate within Congress as well as objection from trading partners of the United States. Interested parties and administrators began wrestling with the language of the provisions from the moment of ARRA’s enactment, struggling to interpret the Buy American terms.

Now, however, federal agencies are providing significant guidance to clarify the initial confusion. Indeed, reading ARRA Section 1605 in conjunction with recent Federal Acquisition Regulations (FAR) and Office of Management and Budget (OMB) regulations brings the parameters of the domestic content restrictions in sufficient focus so that interested parties can move forward with their participation in ARRA programs. They can do so with greater confidence that they can comply with the statute—and administrators will be less likely to issue inconsistent interpretations of the applicable requirements and exemptions.

Section 1605 addresses the “use of American iron, steel, and manufactured goods”:

(a) None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

(b) Subsection (a) shall not apply in any case or category of cases in which the head of the Federal department or agency involved finds that—

(1) applying subsection (a) would be inconsistent with the public interest;

(2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

(c) If the head of a Federal department or agency determines that it is necessary to waive the application of subsection (a) based on a finding under subsection (b), the head of the department or agency shall publish in the Federal Register a detailed written justification as to why the provision is being waived.

(d) This section shall be applied in a manner consistent with United States obligations under international agreements.

Although ARRA limits the domestic content restrictions to the iron, steel, and manufactured goods used in a project, practitioners immediately identified a number of areas of concern. One critical question is whether Congress intended that its reference to iron and steel was applicable only to raw pieces or instead also encompassed iron and steel incorporated into other construction materials or elements. Counsel wondered whether, for example, the steel reinforcement contained in a precast concrete pipe would be subject to an analysis of whether the steel was made in the United States. Another critical issue is whether the term “manufactured goods” requires an analysis of the origin of every internal component of a product or merely where the final manufacturing step took place.

Some commentators suggested interpretations based on similar language used in two other domestic content statutes. One is the Buy American Act, which was enacted in 1933 and is applicable to construction projects for which the U.S. government directly buys products or directly contracts to build public works via a procurement covered by the FAR. The other is the Buy America Law, which was enacted in 1964 and is applicable to Federal Transit Administration (FTA) grants that are given to states and local governments for the development of mass transportation systems and for improvements. However, these two laws use different standards to define American-made products, so attempting to rely on either to interpret the ARRA provisions is problematic at best. Furthermore, ARRA appears to mix and match word...
New regulations that apply to federal grants

The FAR clarifies some issues relating to federal regulations on projects for which a Clean or Drinking Water State Revolving Fund has or will conclude an assistance agreement using ARRA funds, so long as the fund solicited bids on or after October 1, 2008, and prior to February 17, 2009. The EPA used the public interest exemption provision under Section 1605(b)(1) as the basis for issuing this waiver.

The FAR and OMB regulations establish guidance for how agencies can make these exceptions—and at least one agency has exercised its authority. The Environmental Protection Administration has issued a national waiver of the Buy American requirements on projects for which a Clean or Drinking Water State Revolving Fund has or will conclude an assistance agreement using ARRA funds, so long as the fund solicited bids on or after October 1, 2008, and prior to February 17, 2009. The EPA used the public interest exemption provision under Section 1605(b)(1) as the basis for issuing this waiver.

The FAR and OMB regulations also provide guidance regarding the application of ARRA’s Buy American provisions in a manner consistent with international agreements. A number of international agreements could be affected by the Buy American requirements. The regulations exempt countries signatory to the World Trade Organization Agreement on Government Procurement (GPA), as well as countries establishing various Free Trade Agreements (FTAs) with the United States. Some major trading partners of the United States—including China, India, and Brazil—are not GPA or FTA countries and do not appear to have any basis to seek exemption from the Buy American requirements under ARRA Section 1605(d).

Some differences exist between the OMB and FAR regulations regarding the international agreement exception. The FAR expressly excludes the Caribbean Basin countries, noting that the Caribbean Basin Trade Initiative is not an agreement listed among the FTAs. Costa Rica is the only country within the Caribbean Basin Trade Initiative that is also an FTA country. The FAR also includes less developed countries within the exception, noting that the explanatory report accompanying ARRA indicates that goods from “least developed countries” will also be exempted from the content restrictions.

The OMB regulations do not expressly include less developed countries within the trade agreement exception but do so for countries covered by the United States-European Communities Exchange of Letters (although this appears to be redundant as these countries are all covered by the GPA).

The GPA and the various FTAs contain differing thresholds that must be met before the benefits of the respective agreements will apply to a particular foreign country. Generally, the FAR and OMB regulations provide that the international agreements exemption will apply when the business opportunity amounts to $7.433 million or more.

Further Issues before Proceeding

Contractors should forego the launch of a project until the responsible government agency makes its determination whether the Buy American provisions are applicable. The agency will also address compliance issues at the project’s inception. During these early stages of the construction process, contractors have an opportunity to engage in discussions with agencies about whether an exemption from Section 1605 is appropriate. Interested parties should review and familiarize themselves with the general procurement regulations and polices established in the FAR for guidance on solicitation, procurement, and contract management. ARRA has adopted procedures to ensure enhanced transparency for ARRA-funded projects, including the requirement that pre-solicitation notices must be posted on the Federal Business Opportunities Web site. Interested parties can also sign up for e-mail alerts for various types of opportunities.

A contractor that learns it is not in compliance with the Buy American restrictions after the project has been awarded may still apply to the appropriate agency for an exemption—a “late request” under the OMB or “post award determination” under FAR. However, if the administering agency determines that the contractor should have reasonably foreseen the need to request an exemption at the beginning of the project, the request for an exemption may be rejected. Pursuing a late request or post award determination is a high-risk exercise because if the request is denied, a violation of the Buy American restrictions may be a foregone conclusion. But the regulations at least leave open the opportunity for rehabilitation if the violation was not due to the contractor’s negligence.

ARRA not only has domestic content restrictions applicable to construction projects. It also contains a similar requirement for certain textile and fiber-based material purchases by the U.S. Department of Homeland Security (DHS). This domestic content pro-
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adequate prices.24 There is also an express exemption for goods containing a de minimus amount of nonconforming fibers—less than 10 percent of the total purchase price of the item.25 As with Section 1605, Section 604 provides that the domestic content requirement will be applied in a manner consistent with international agreements.26 However, unlike Section 1605, which was effective as soon as it was enacted, the DHS restriction did not become effective until August 13, 2009—180 days after the adoption of ARRA.27 Since DHS procurements are likely to be direct purchases, the additional guidance provided by the FAR regulations are applicable to clarify and implement the domestic content restrictions contained in Section 604.

Neither Section 1605 nor Section 604 expressly preempts the application of other domestic content restriction laws, including the Buy American Act and the Buy America Law. So, for example, roadway improvement projects funded through the FTA must still comply with the Buy America Law in addition to meeting the ARRA requirements.

The text of the ARRA legislation is over 400 pages, and the current and future implementing regulations will likely fill substantial volumes. Government agencies are continuing to solicit bids and grant projects under ARRA, and that process is expected to be ongoing for several more years. During that time, the agencies will likely develop new regulations and practices to provide additional guidance. With careful planning and advice regarding compliance with existing regulations, parties wishing to do business under ARRA should not be deterred.

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2. ARRA also includes a “Hire American” provision. ARRA §1611 encourages the employment of Americans in projects funded by the Troubled Asset Relief Program (TARP).
5. See, e.g., 74 C.F.R. §176.130; FAR §25.607.
7. 2 C.F.R. §§176 et seq.
8. OMB §176.70(a)(2)(i); FAR §25.602(a)(2)(i).
9. OMB §176.70(a)(2)(i); FAR §25.602(a)(2)(ii).
10. OMB §176.70(a)(2)(ii); FAR §25.602(a)(2)(ii).
11. ARRA §1605(c); OMB §176.100(a); FAR §25.604.
13. OMB §176.160; FAR §25.400. The countries covered by the GPA include: Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.
14. OMB §176.160; FAR §25.603(c).
15. OMB §176.160; FAR §25.400. Countries with FTAs include: Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Mexico, Morocco, Nicaragua, Oman, Peru, and Singapore.
16. Other exemptions may be employed by these countries or others that are not beneficiaries of the international agreements exception. For example, these countries might be a source of components or subcomponents in an item to be manufactured in the United States.
18. The “least developed countries” listed in pt. 25.003 of the current federal procurement regulations are: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, and Zambia.
19. For state projects covered by the OMB regulations, a more detailed breakdown of the particular international agreements applicable to specific agencies or departments within a particular state’s government should be consulted on a project-specific basis. OMB app. to subpt. B of pt. 176.
20. OMB §176.90(a); FAR §25.603(c).
21. See FAR §§5.001 et seq.
23. OMB §176.120; FAR §25.606.
24. ARRA §604(c).
25. ARRA §604(d).
26. ARRA §604(k).
27. ARRA §604(l).
FEW THINGS IN PROCEDURAL LAW are as critical or as potentially fatal to an action as the timely filing of a notice of appeal. Not only does a timely notice of appeal vest the court of appeal with jurisdiction but it is also an absolute prerequisite to that court’s exercise of jurisdiction. If the notice of appeal is filed after the expiration of the time to appeal, the court is without jurisdiction to proceed and is mandated to dismiss the appeal.

This rule is unforgiving, as illustrated by *In re Hanley’s Estate*. In Hanley’s, the notice of appeal was filed one day late because counsel representing the appellant in her capacity as executrix told the appellant’s personal attorney the wrong date on which the appealable order had been filed. The court of appeal said that “it is immaterial whether the misrepresentations concerning the date...were willful or inadvertent, whether the reliance thereon was reasonable or unreasonable, or whether the parties seeking to dismiss [the appeal] are acting in good faith or not.”

The time to appeal is governed by Rule 8.104 of the California Rules of Court. The general rule is that the notice of appeal must be filed 1) within 60 days after the superior court clerk mails the party filing the notice of appeal a document titled “notice of entry” of judgment or a file-stamped copy of the judgment (“triggering documents”), showing the date either was mailed, or 2) within 60 days after any party serves on the party filing the notice of appeal a document titled “notice of entry” of judgment or a file-stamped copy of the judgment (“triggering documents”), showing the date either was mailed, or 2) within 60 days after any party serves on the party filing the notice of appeal either of the triggering documents, accompanied by a proof of service, or 3) within 180 days after entry of judgment. In the absence of service, the date of entry is critical for determining the outside date for filing the notice of appeal (180 days), but when the triggering document is served by the clerk or a party, the date of service—not date of entry—becomes the critical date for determining the timeliness of an appeal.

Service by mail requires strict compliance with the court rules. Thus, service on an incorrect address—indeed, the mere use of an incorrect zip code—will not suffice as legal notice. Similarly, service of an unsigned judgment (which necessarily would not include the file stamp) will not trigger the 60-day period for filing the notice of appeal. If the party filing the notice of appeal was not properly served with one of the triggering documents, the court of appeal will dismiss the appeal.

Honey Kessler Amado is an appellate law specialist certified by the State Bar of California Board of Legal Specialization. She practices in Beverly Hills.

The deadlines for filing notices of appeal are unforgiving.
documents,12 or absent proof of service of the triggering documents by either a party or the clerk, the party seeking to appeal will have 180 days from entry of the judgment or order within which to appeal.13

When a party is represented by several cocounsel, service on one of the counsel and not the others will suffice as the required notice.14 One important caveat: If the clerk or counsel serve the triggering document by mail, Code of Civil Procedure Section 1013 will not expand the time within which to appeal.15

To satisfy Rule 8.104(a), the clerk must mail a single, self-contained document—a notice of entry or a file-stamped copy of the judgment or appealable order—which shows the date of mailing of the document. If the judgment is not file stamped or the minute order containing the court’s ruling is not titled “notice of entry,” the document will not operate to commence the 60-day appeal period.16 As the California Supreme Court has noted, “[T]he rule does not require litigants to glean the required information from multiple documents or to guess, at their peril, whether such documents in combination trigger the duty to file a notice of appeal. Neither parties nor appellate courts should have to speculate about jurisdictional time limits.”17

Thus, in one case, a document titled “Court Order re Stipulated Judgment” that did not also bear the title “Notice of Entry of Judgment (or Order)” did not commence the 60-day time period within which to appeal under Rule 8.104(a)(1).18 Moreover, in another decision, a 14-page minute order that contained the ruling on a motion but did not state under “nature of proceedings” that the minute order was a ruling on the motion until page 13, at which point the document was defined as a “clerk’s certificate of mailing/[[¶]] notice of entry of order,” did not comply with the requirement that the triggering document must be titled “notice of entry” and did not commence the 60-day appellate clock. Placing the critical language on page 13 of the minute order was not the same as titling the document with the mandated title.19

Within reason, Rule 8.104 must be read literally and stand “without embroidery.”20 But the rule has been brought into modernity, albeit in small steps. Thus, when Rule 8.104(a)(1) requires the clerk to “mail” the triggering document, “mail” refers to the use of the U.S. Postal Service and does not encompass e-mail.21 However, when Rule 8.104(a)(2) mentions “service” by a party, service is broader than mail and will include delivery by fax and e-mail upon agreement of the parties.22 However, the e-mail being served must be a copy of the actual triggering document, not a link to the document.23

Under Rule 8.104(d), the date of entry of a judgment is the date the judgment is filed or the date it is entered in the judgment book. Case law has interpreted this to require only that the judgment be signed by the judge and file stamped by the clerk. It does not require that the judgment be entered in the registry of actions.24 In Los Angeles, where a judgment book is not maintained, entry of the judgment occurs upon the filing of the document.25

For an appealable order, entry is the date that the order is entered in the permanent minutes. However, if the minute order directs that a written order be prepared, the entry date for appeal purposes is the date on which the signed order is filed.26 The operative words in the applicable court rule are “minute order directs”—not if another rule directs preparation of the order, and not if counsel unilaterally prepares the order. If a proposed order is submitted pursuant to Rule 3.1312, which requires a party who prevails on a motion to prepare and submit a proposed order, that written order will not supplant the original minute order as the triggering document. Rule 3.1312 does not abrogate Rule 8.104(d)(2), which requires that, unless a written order is expressly directed or required by the minute order, the time to appeal runs from the minute order, not from the written order.27 Thus, for the order required by Rule 3.1312 to begin the appellate clock, the minute order must direct that the Rule 3.1312 order be prepared.

Similarly, a written order that is gratuitously prepared by counsel without an express direction in the minute order is not the operative order for appellate purposes and will not start the appellate clock.28 If an appealable order is not entered in the minutes, the entry date is the date the signed order is filed, whether or not the minute order directs preparation of a written order.29

Not only does a late notice of appeal fail to vest jurisdiction in the court of appeal but also writ relief will not be available if the claim could have been raised, but was not, by a timely appeal.30 However, unlike a late appeal, which is fatal, a premature appeal may be treated as timely under some circumstances. Pursuant to Rule 8.104(e)(1), if the notice of appeal is filed after the judgment is rendered but before it is entered, the appeal is valid. It will be treated as if it were filed after entry of judgment. Under Rule 8.104(e)(2), if the notice of appeal is filed after the court has announced its intended decision but before the court has rendered the judgment, the reviewing court may treat the notice of appeal as being filed immediately after entry of the judgment.31 If the notice of appeal is filed after the filing of the minute order but before the filing of the written order required by the minute order, the notice will be deemed to have been filed after the written order.32

However, if the notice of appeal is filed before the court announces its intended decision, the notice of appeal is not valid and cannot be treated as a premature notice.33 For example, if the notice of appeal is filed after a default was entered but before the default prove-up, the appellant is not entitled to relief under Rule 8.104(e) because the judgment had not been rendered.34

**Extending the Time to Appeal**

Rule 8.108 extends the time to appeal for cross-appeals and certain motions—specifically, motions for new trial or to vacate a judgment or order, for judgment notwithstanding the verdict (JNOV), and for reconsideration. Each of these motions is treated differently for the purpose of calculating the time within which to appeal; thus, one cannot rely on the rules applicable to one motion to determine the time to appeal from another of the motions. In no event can Rule 8.108 operate to shorten the time allowed to appeal under Rule 8.104.35 (Worksheets for calculating the time allowed for filing a notice of appeal after each of the Rule 8.108 motions are available online at [http://www.lacba.org/lalawyer/appellatetimelines](http://www.lacba.org/lalawyer/appellatetimelines).)

For all the motions, Rule 8.108 uses the word “valid,” which means that a motion must comply with all procedural requirements regarding its components and its grounds.36 For example, in *Branner v. Regents of the University of California*, a motion to reconsider was deemed invalid because the moving party neglected to include the requisite declaration in support of his relief with his moving papers. His attempt to cure the problem by submitting the declaration along with his reply documents was insufficient to render the motion valid.37 The court noted that Rule 8.108 “does not appear to countenance a piecemeal filing of a motion…[A] single, complete, valid motion must be filed—not one that is later assembled from constituent parts like some Frankenstein monster.”38 In *Payne v. Rader*, a motion to vacate was declared invalid because it did not contain a recognized ground for that type of motion.39

Furthermore, “valid” means timely. An untimely motion is an invalid motion, and an invalid motion will not extend the time to appeal.40 This is so even if the trial court believes it has jurisdiction to act.41 When a motion is untimely or otherwise invalid and cannot extend the time to appeal, the court of appeal expects a litigant to abandon the invalid motion and file a notice of appeal to protect the appellate court’s jurisdiction.42
Failure to do so will result in the appeal being dismissed.

The withdrawal of a Rule 8.108 motion is equivalent to a denial and will be treated as such for Rule 8.108 calculation purposes. To extend the time to appeal, the ruling on the Rule 8.108 motion need not be file stamped or titled “notice of entry of order,” as required for appealable orders under Rule 8.104. However, the order or notice of ruling must show a date of mailing if sent by the clerk and must be accompanied by a proof of service if served by a party.

**Motion for New Trial.** Rule 8.108(b) extends the time to appeal from a judgment upon the service and filing of a valid notice of intention to move for a new trial. If the motion for a new trial is denied, the time is extended to the earliest of: 1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order, 2) 30 days after denial of the motion by operation of law, or 3) 180 days after entry of judgment.

An order granting a motion to vacate or set aside operates to vacate the underlying judgment. Once a judgment is vacated, it ceases to exist, and there is no appealable order.

**Motion to Vacate.** Rule 8.108(c) extends the time to appeal when any party, within the time to appeal from the judgment allowed by Rule 8.104, serves and files a valid notice of intention to move—or a valid motion—to vacate the judgment. The time to appeal is extended for all parties until the earliest of: 1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order, 2) 90 days after the first notice of intention to move or standing the time frames allowed by Code of Civil Procedure Sections 473(b) (generally, within a reasonable time, not exceeding six months) and 663a (generally, within 15 days of mailing of notice of entry or within 180 days, whichever is earliest), Rule 8.104 will control the time for filing the motion if it will affect the time to appeal from the underlying judgment.

An order granting a motion to vacate or set aside operates to vacate the underlying judgment. Once a judgment is vacated, it ceases to exist, and there is no appealable order. Moreover, parties cannot appeal from a vacated judgment. However, if, upon reconsideration of the motion to vacate, the trial court reverses itself and denies the set aside, the effect is to reinstate the judgment, and the appellate clock begins anew. The clock begins from the date the judgment is reinstated pursuant to entry of the order denying the motion

denial of the motion by operation of law, or 3) 180 days after entry of judgment. The order denying the motion for JNOV is itself separately appealable, and Rule 8.104 governs the time to appeal from that order.

Motions for JNOV and for a new trial can be filed in tandem. Indeed, in 1961, the Code of Civil Procedure was amended to synchronize the times for filing and ruling on the two motions to eliminate the requirement that aggrieved litigants elect between the two remedies. But the motions are not the same, and ultimately they can lead to different paths and may be guided by different timetables.

The filing of a motion for JNOV does not extend the time within which to file a motion for new trial, but the trial court may not rule on the JNOV motion until the time to file a motion for new trial has expired. The power of the court to rule on the motion
for JNOV does not extend beyond the last date on which the court has the power to rule on a motion for new trial—a time set by Code of Civil Procedure Section 660. If the court has not ruled on the motion for JNOV before the date on which it loses the power to rule, the motion will be deemed denied by operation of law.60 This date is critical to determining the time within which to appeal from the ruling on the motion. A party may appeal directly from an order denying a motion for JNOV; the time to appeal is governed by Rule 8.104.61

If a party files a motion for JNOV and a motion for new trial, and the trial court denies both, the party may appeal from the underlying judgment and from the ruling on the motion for JNOV.62 The time within which to appeal from the judgment is governed by Rule 8.104, as affected by Rule 8.108(b), and the time within which to appeal from the order denying the motion for JNOV also is governed by Rule 8.104, as dictated by Rule 8.108(d)(2). If it appears to the court of appeal that the motion for JNOV was wrongly denied, the appellate court may order that the judgment be entered either through its review of the underlying judgment or its review of the ruling on the motion for JNOV.63

If a party files a motion for JNOV and a motion for new trial, and the motion for new trial is granted but the motion for JNOV is denied, the party seeking the JNOV may appeal directly from the order denying the motion for JNOV.64 If the court grants both the motion for JNOV (or on its own motion directs entry of a JNOV) and the motion for new trial, the order granting a new trial will be effective only if, on appeal, the judgment is reversed and the order granting a new trial is not appealed or, if appealed, is affirmed.65 Thus, when a party is aggrieved by the granting of motions for JNOV and a new trial, it behooves that party to appeal from both orders.

If a party files only a motion for JNOV and does not file a motion for new trial, the time for the court to rule on the motion for JNOV will be the earliest of 60 days from the mailing of the judgment or notice of entry of judgment by the clerk or 60 days from service of the triggering document by a party, as outlined in Code of Civil Procedure Section 660.66 The filing of a motion for JNOV will not be treated as the equivalent of a notice of intention to move for a new trial for the purposes of calculating the time within which the trial court must rule on the motion for JNOV.67 A denial by operation of law may be critical to determining the time within which to appeal from a ruling on a motion for JNOV, so correctly calculating the length of the trial court's jurisdiction to act is imperative.

**Motion for Reconsideration.** Rule 8.108(e) extends the time to appeal when a party serves and files a valid motion for reconsideration under Code of Civil Procedure Section 1008(a). This extension of time to appeal specifically does not apply to a motion for reconsideration brought on the court's own motion pursuant to Code of Civil Procedure Section 1008(d).68 Rule 8.108(e)—which became effective January 1, 2002—resolved the split of authority on whether a motion for reconsideration would extend the time within which to file the notice of appeal.69 The rule extends the time but only upon the filing of a valid motion for reconsideration.

A motion for reconsideration is not valid if it is filed after the final judgment is signed because entry of a judgment divests the trial court of the power to rule on the motion.70 After the judgment is entered, if the court does rule on the motion to reconsider, its ruling will not operate to extend the time within which to appeal.71 Even if the court believes itself empowered to rule on the motion, its beliefs or findings cannot extend the time to appeal.72

Under some circumstances showing "extremely good cause," a motion for reconsideration will be construed as a motion for new trial, which may be filed after entry of judgment.73 In one case, the court treated a motion for reconsideration as a motion for new trial because the court itself had suggested that such a procedure would be appropriate.74 In another case, which involved earthquake-insurance coverage, the trial court granted a demurrer on several grounds, including the statute of limitations, notwithstanding that a law extending the statute of limitations on earthquake-related suits was awaiting the governor's signature. The court invited the plaintiff to file a motion for reconsideration once the bill was signed. In fact, the bill was signed one day after the hearing on the defendant insurance company's demurrer. The plaintiff's motion, titled a motion for reconsideration, was truly one for a new trial.

In the motion she requested that her matter be restored to the court's trial calendar and argued error in law by the trial court regarding the statute of limitations.75 The court of appeal believed that the plaintiff either would have brought the correct motion or would have appealed from an unfavorable ruling on the demurrer had the court not invited a motion for reconsideration and, thus, treated her motion as one for a new trial.76 Such circumstances are very limited, and generally counsel are held to the labels they attach to their motions and to the remedies they elect.77

**Cross-Appeal.** Under Rule 8.108(f), if a party files a timely notice of appeal, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk mails notification of the first appeal. However, this extension only applies when the first appeal is timely. Thus, if the first appeal is untimely, it cannot operate to create a 20-day period within which to file a cross-appeal.78

The Branner case is a cautionary tale. Appellant Branner miscalculated his time to appeal—he relied on an invalid motion to reconsider to extend his time to appeal. The respondents filed their notice of cross-appeal within 20 days of Branner's notice of appeal, but the cross-appeal was also untimely. The time to appeal for all parties began from mailing or service of the appealable order. As the time to appeal could not be extended by an invalid motion for reconsideration, so the time to cross-appeal could not be extended by an invalid—that is, untimely—notice of appeal.79

The right to appeal is entirely statutory, and the time to appeal is strictly controlled by court rules. A late filing bars entry into the court of appeal. It prevents the court from exercising jurisdiction—either to give relief from the error or to address the merits of the case. Few other deadlines will cause counsel to sit for long hours with worksheets and calendars to determine the correct final date for filing—and few other missed deadlines will be so utterly irredeemable.80

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1 Adoption of Alexander S., 44 Cal. 3d 857, 864 (1988).
3 Cal. R. Ct. 8.104(b); People v. Lyons, 178 Cal. App. 4th 1355, 1360 (2009). The only exception is when the court is closed due to a natural disaster. Cal. R. Ct. 8.66. See also In re Hanley’s Estate, 23 Cal. 2d 120, 122 (1943).
4 Hanley’s Estate, 23 Cal. 2d at 122; see also Hollister Convalescent Hosp. v. Rico, 15 Cal. 3d 660 (1975).
5 The dissent in Hanley’s Estate pointed out that a rigid rule against late filings would preclude any remedy if the messenger taking the notice of appeal to the court clerk’s office were kidnapped or if “the court house and all its occupants were destroyed by...earthquake.” 23 Cal. 2d at 127 (J. Carter, dissenting).
7 See further references to rules are to the California Rules of Court.
8 All further references to hazards are to the California Rules of Court.
10 The phrase “judgment” includes any judgment or appealable order. Cal. R. Ct. 8.104(f), 8.104(f).
13 Id. at 288.
17 Id. at 288.
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LEGAL ETHICS faced considerable pressure in 2009 as the economy remained weak. Superior courts furloughed employees and closed their doors once a month, and law firm layoffs continued. U.S. District Judge Stephen G. Larson resigned his lifetime appointment, complaining his family could not live on his federal salary. Irked by leaks over his appointment to the California Court of Appeal of a political insider who had not practiced law in 21 years and a State Bar employee embezzlement scandal, Governor Arnold Schwarzenegger vetoed the State Bar dues bill (before eventually signing another version of it in January 2010).4

Reflecting the tidal wave of home foreclosures and related lawsuits, the State Bar’s Committee on Professional Responsibility and Conduct (COPRAC) issued an Ethics Alert, warning California lawyers that ethics rules prohibit paying referral fees or splitting attorney’s fees with foreclosure consultants and filing lawsuits simply to delay or impede foreclosure sales.5 By year-end, the State Bar’s loan modification task force had obtained resignations from or placed on involuntary inactive status 14 lawyers, and state Attorney General Jerry Brown and the Justice Department were investigating and suing lawyers for loan modification scams.6

Major federal criminal cases collapsed due to prosecutorial misconduct. U.S. Attorney General Eric H. Holder Jr. agreed to set aside former Senator Ted Stevens’s guilty verdict on corruption charges and dismissed the indictment due to the government’s withholding of exculpatory evidence and misrepresentations to the court.7

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allegations of stock option backdating, Central District Judge Cormac J. Carney denounced the prosecutors’ “shameful” intimidation of witnesses, which he said “distorted the truth-finding process and compromised the integrity of the trial.” The judge dismissed charges against one of Broadcom’s cofounders as well as a former chief financial officer, set aside another cofounder’s felony guilty plea, and signaled his intention to dismiss the SEC’s civil fraud complaint.8

Efforts to disbar or discipline former Bush Administration lawyers for excusing torture were met with skepticism. Ninth Circuit Judge Jay Bybee even set up a legal defense fund.9 Northern District Judge Jeffrey S. White, however, refused to dismiss a torture victim’s lawsuit against John Yoo for crafting policy that allegedly deprived the plaintiff of his constitutional rights. “Like any other government official, government lawyers are responsible for the foreseeable consequences of their conduct,” the court held.10

Last year the U.S. Supreme Court made its own foray into legal ethics issues. In Mohawk Industries, Inc. v. Carpenter,11 the Court held that discovery orders compelling the production of information claimed to be privileged do not qualify for immediate appeal under the collateral order doctrine.

Colleagues and friends mourned the death of lawyer Jeffrey A. Tidus, who was shot by an unknown assailant outside his Rolling Hills Estates home on December 7, 2009. A member of COPRAC and the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee (PREC), Tidus left a wife and daughter and a legacy of selfless service to the bar and the integrity of the profession.

Attorney-Client Privilege

The attorney-client privilege was the subject of significant decisions in 2009. In Costco Wholesale Corporation v. Superior Court,12 the California Supreme Court granted review after the Los Angeles Superior Court ordered the production of portions of an opinion letter from the Sheppard Mullin law firm to its client Costco, and the Second District Court of Appeal denied a petition for a writ of mandate to block production. At issue was whether statements by employees interviewed by a Sheppard Mullin partner and reflected in her opinion letter were confidential and protected by the attorney-client privilege. The superior court ordered Costco to submit its lawyer’s letter for in camera review by a discovery referee, who concluded the employee statements were not privileged because they were obtained by the lawyer “in her role as fact-finder rather than attorney, a role that could have been performed by a non-attorney.”13 The court of appeal denied Costco’s writ petition, ruling narrowly that it had not shown that production of the allegedly privileged letter would cause irreparable harm.14

The case settled, but the supreme court retained jurisdiction because the case raised issues of continuing public importance. It unanimously reversed the court of appeal, holding that the risk of the privilege possibly resulting in the suppression of relevant evidence was outweighed by the importance of preserving confidentiality in the attorney-client relationship.15 The court ruled that the privilege attached to the opinion letter in its entirety, “irrespective of whether it includes unprivileged material,”16 and that Evidence Code Section 915(a) bars in camera review of documents claimed to be privileged. Moreover, it held that a party seeking extraordinary relief from a discovery order that wrongfully invaded the attorney-client relationship need not establish harm from disclosure.17

Highlighting differences between California and federal law, the Ninth Circuit Court of Appeals decided an expedited interlocutory appeal by the government in United States v. Ruehle.18 During the prosecution of Broadcom’s former chief financial officer, William J. Ruehle, for his role in backdating stock options that resulted in a $2.2 billion restatement of earnings, the government sought to use statements made by the defendant to attorneys at Irell & Manella. The Irell lawyers had shared those statements with outside auditors at Ernst & Young and the FBI. Ruehle objected that he had an attorney-client relationship with Irell, which represented Broadcom and its officers in various lawsuits, and therefore his statements were privileged.

Following a three-day hearing, the district court judge ruled that Ruehle had a reasonable belief that Irell represented him. According to the court, Ruehle had never given informed written consent to Irell’s dual representation of him and Broadcom or the disclosure of privileged information to third parties, including the government. The court suppressed Ruehle’s statements and referred Irell to the State Bar for possible discipline (though the State Bar only disciplines individual members of the bar, not law firms).19

The Ninth Circuit reversed, finding that the district court erred in applying California’s liberal presumption that all communications during an attorney-client relationship are privileged. Instead, the district court should have followed the federal common law’s strict view of the privilege, which obliges the party asserting the privilege to segregate privileged information from nonprivileged information.20 In contrast to the California Supreme Court in Costco, the Ninth Circuit stated that since the privilege is “an obstacle to the investigation of the truth,...it ought to be strictly construed within the narrowest possible limits consistent with the logic of its principle.”21

With the burden on Ruehle, the Ninth Circuit held that he failed to prove his statements were made in confidence, given that Ruehle knew the fruits of Irell’s inquiries would be disclosed to the company’s outside auditors.22 Though the district court subsequently dismissed the criminal charges against Ruehle in December 2009, the case serves as a warning regarding the ethical pitfalls for lawyers who jointly represent a company and its officers and fail to obtain proper informed written consent or to advise the officers of their need for independent counsel.

Conflicts of Interest

Conflicts continue to hound and at times confound lawyers. Last year courts analyzed conflicts in a variety of situations. As these cases illustrate, lawyers who disregard conflicts risk disqualification, loss of fees, and malpractice liability.

In PrediWave Corporation v. Simpson Thacher & Bartlett LLP,23 the Sixth District Court of Appeal allowed PrediWave to proceed with a malpractice claim against its former counsel, Simpson Thacher. After representing PrediWave in transactional work, Simpson Thacher jointly represented the company and its CEO in heated litigation by a PrediWave shareholder alleging that the CEO was looting the company. Simpson Thacher also opposed efforts by directors aligned with the complaining shareholder to investigate the allegations. Over the next 13 months, Simpson Thacher collected about $10 million in legal fees. In the end, the complaining shareholder obtained a judgment against PrediWave and the CEO for $2.8 billion. The CEO fled the country, PrediWave filed for bankruptcy, and Simpson Thacher withdrew.

When the dust settled, those aligned with the complaining shareholder controlled PrediWave. Under new management, PrediWave sued Simpson Thacher for legal malpractice, breach of fiduciary duty, constructive fraud, and unfair business practices. PrediWave alleged that the firm breached its ethical duties by representing two clients—PrediWave and its CEO—that had conflicting interests and by taking steps in the litigation (such as obstructing the efforts of the new directors to investigate their concerns about looting) that were deleterious to PrediWave. Simpson Thacher moved to dismiss the complaint under the anti-SLAPP statute.24 The court of appeal concluded that the action should be permitted to move forward, reasoning that the anti-SLAPP statute cannot be used to prevent a client from suing a
lawyer for acts ostensibly done in furtherance of the client’s rights.25 Similarly, in United States Fire Insurance Company v. Sheppard, Mullin, Richter & Hampton,26 Sheppard Mullin attempted, without success, to use the anti-SLAPP statute to dismiss a lawsuit filed by a former client claiming that Sheppard Mullin accepted an engagement notwithstanding a conflict of interest. The former client, U.S. Fire, alleged that Sheppard Mullin had represented it on insurance coverage issues regarding claims asserted against an insured arising from asbestos-related bodily injury actions. In subsequent litigation, U.S. Fire filed a declaratory relief action against a different insured concerning the existence and scope of U.S. Fire’s duty to defend it in other asbestos-related bodily injury actions. In this latter litigation, Sheppard Mullin represented an informal committee of asbestos creditors and two law firms providing legal services to creditors in their asbestos lawsuits against U.S. Fire’s insured. U.S. Fire objected, contending that Sheppard Mullin had a disqualifying conflict because Sheppard Mullin’s new clients were adverse to U.S. Fire and the two engagements were substantially related.

U.S. Fire sued to enjoin Sheppard Mullin from representing any party in the subsequent litigation. Invoking the anti-SLAPP statute, Sheppard Mullin moved to dismiss U.S. Fire’s complaint, arguing that the firm’s representation of parties in the subsequent litigation involved protected “petitioning activity,” and U.S. Fire could not demonstrate a probability of prevailing on the merits of its claims.

The First District Court of Appeal held that U.S. Fire could go forward with its action. The principal thrust of the alleged misconduct was the acceptance by Sheppard Mullin of the representation adverse to U.S. Fire, not the acceptance by Sheppard Mullin of the representation of parties in the subsequent litigation. Invoking the anti-SLAPP statute, Sheppard Mullin argued that the firm’s motion to dismiss should be granted because U.S. Fire failed to demonstrate a probability of prevailing on the merits of its claims.

A conflict between named plaintiffs and members of a class created problems for plaintiffs’ counsel in Rodriguez v. West Publishing Corporation.28 Seven named plaintiffs filed a putative class action against the providers of bar review courses for violations of the antitrust laws. Five of the named plaintiffs had incentive agreements through which their lawyers agreed to pay them compensation tied to the dollar amount of any settlement. Two of the plaintiffs, represented by separate counsel, did not. The district court certified a class with all seven as class representatives and appointed both sets of counsel as class counsel. Rather than dispositive the existence of the incentive agreements during the class certification process, class counsel instead did so for the first time during proceedings to approve a settlement. The district court approved the settlement but denied the plaintiffs’ motion for compensation based on the incentive agreements.

The Ninth Circuit agreed that the incentive agreements “tied the promised request to the ultimate recovery and in so doing, put class counsel and the contracting class representatives into a conflict position from day one.... They created an unacceptable disconnect between the interests of the contracting representatives and class counsel, on the one hand, and members of the class on the other. We expect those interests to be congruent.”29 The court chastised plaintiffs’ counsel for not disclosing the existence of the incentive agreements during the class certification process. Although affirming approval of the settlement (because two of the class representatives did not have conflicts created by the incentive agreements), the court reversed the award of attorney’s fees to plaintiffs’ counsel and remanded that issue to the district court.

May a law firm that drafted a will represent one beneficiary in probate proceedings adverse to other beneficiaries? The Fifth District Court of Appeal addressed this issue in Baker Manock v. Superior Court.30 The Baker Manock firm drafted a will for an elderly woman who left a portion of her estate to her husband and the remainder to a trust for the benefit of two of her sons, who were also named co-executors. The will and the trust omitted the mother’s two other sons, but her husband had a will designating one of those sons as his executor. After the woman died, the two co-executors of her will instituted probate proceedings with the Baker Manock firm representing one of them. While the mother’s will was in probate, her husband died. As a result, one of the two sons omitted from the mother’s will and trust, as the executor of the father’s will, became a party to the probate proceedings over the mother’s will.

The son serving as executor of the father’s will moved to disqualify Baker Manock. Granting the motion, the trial court reasoned that it was inappropriate for Baker Manock to represent one beneficiary (the coexecutor) in proceedings against another beneficiary (the deceased husband) regarding the estate plan it drafted. According to the trial court, Baker Manock had an active and acute conflict of interest.

The Fifth District Court of Appeal reversed. It reasoned that even though Baker Manock, in drafting the will for its client (the mother), may have owed certain duties of care to its client’s three named beneficiaries (the husband and two sons), Baker Manock did not represent these beneficiaries for purposes of a conflicts analysis:

[The potential for negligence liability—a contingency that may never arise in a particular case and certainly not yet implicated in the present case—in no way corresponds to or implicates the duties of confidentiality and loyalty that are present in any instance of an attorney-client relationship....] It is incorrect to conclude that potential negligence liability somehow brings into the attorney-client relationship those who are merely third-party beneficiaries of the contract to draft a will.31 Baker Manock should not have been disqualified.

Confidentiality

Generally, only a person who has or had an attorney-client relationship with a lawyer has standing, under appropriate circumstances, to move to disqualify the lawyer. In 2007, the supreme court created an exception to this rule in Rico v. Mitsubishi.32 If a lawyer improperly obtains and uses confidential information belonging to a nonclient, the nonclient has standing to disqualify the lawyer. In 2009, in Meza v. H. Muehlstein & Company,33 the Second District Court of Appeal applied this principle in a different context.

Plaintiff Meza sued several defendants for injuries sustained from exposure to toxic chemicals in her workplace. The trial court entered a case management order that, among other things, permitted defense counsel to share confidential information relating to their common interests without waiving attorney-client privilege and work product protections. After the trial court entered judgment for the defendants and the plaintiff’s appeal was pending, the plaintiff’s law firm hired a lawyer who had represented one of the defendants. The court of appeal reversed, remanding the matter to the trial court. The defendants then moved to disqualify the plaintiff’s counsel.

In anticipation of the motion, the plaintiff’s law firm had terminated the side-switching lawyer and dismissed the particular defendant he represented. The law firm also had erected an ethical screen precluding lawyer from disclosing any confidential information shared among the defense group. In opposition to the motion, the plaintiff’s law firm submitted a declaration by the lawyer verifying that he had not disclosed any confidential information to the plaintiff’s law firm. Nevertheless, the trial court granted the disqualification motion.

Finding no abuse of discretion, the court of appeal affirmed. The court rejected the
1. Federal court orders compelling the production of attorney-client privileged documents are not immediately appealable under the collateral order doctrine.
   True. False.

2. In California, the attorney-client privilege attaches to the whole document, even if it contains unprivileged material.
   True. False.

3. A California court may conduct an in camera inspection of a document claimed to be privileged.
   True. False.

4. A party filing a writ petition to block production of a privileged document must prove harm from the disclosure.
   True. False.

5. In the Ninth Circuit, the attorney-client privilege is strictly construed.
   True. False.

6. The anti-SLAPP statute shields a law firm from a malpractice claim for acts done in furtherance of the client’s rights.
   True. False.

7. A lawyer who drafts a will has an attorney-client relationship with the beneficiaries for conflict-of-interest purposes.
   True. False.

8. Only a person who has an attorney-client relationship with a lawyer has standing to disqualify the lawyer.
   True. False.

9. A lawyer for a party to an arbitration is not subject to discipline by the panel conducting the arbitration.
   True. False.

10. A bankruptcy court has authority to suspend a lawyer from practice in that court if it finds the lawyer engaged in bad faith and willful misconduct.
    True. False.

11. After the court certifies the class in a class action, a lawyer may not contact class members whom the lawyer does not represent.
    True. False.

12. Violations of the Rules of Professional Conduct are the equivalent of violating a court order.
    True. False.

13. Filing a false State Bar complaint is protected under the anti-SLAPP statute.
    True. False.

14. Lawyers breach their duty to uphold the law by changing their votes during deliberations to avoid further jury duty.
    True. False.

15. A lawyer may include a Civil Code Section 1542 release in a settlement agreement with a client.
    True. False.

16. Clients waive their right to arbitration under the Mandatory Fee Arbitration Act (MFAA) if they seek affirmative relief from the lawyer.
    True. False.

17. Once MFAA arbitration is completed, a lawyer can enforce a predispute agreement with the client to submit all disputes to binding arbitration.
    True. False.

18. An attorney lien has priority over a medical lien, even if the latter is first in time.
    True. False.

19. Attorneys who successfully represent themselves may recover fees incurred by other lawyers in their firms who also worked on the case.
    True. False.

20. It is unethical for a defense lawyer to make a settlement offer conditioned on a waiver of the plaintiff’s statutory right to attorney’s fees.
    True. False.
plaintiff’s argument that members of the defense group lacked standing to file the motion because although the side-switching lawyer had never represented them, he was privy to their confidential information. In addition, the court rejected the plaintiff’s contention that an effective ethical screen could prevent disqualification. Each member of the firm was presumed to have imputed knowledge of the defense group’s confidential information. Finally, the court confirmed that the defendants had not waived the privilege by sharing confidential information because the disclosures related to their common interests, they had a reasonable expectation of confidentiality, and the disclosures were reasonably necessary for the accomplishment of their purpose.

In Cassel v. Superior Court, the Second District Court of Appeal analyzed the extent of protection afforded confidential communications made during mediation. Evidence Code Section 1119 provides that oral and written communications made “for the purpose of, in the course of, or pursuant to, a mediation” are inadmissible. The plaintiff, unhappy with a $1.25 million settlement reached as a result of a mediation, sued his former law firm for legal malpractice. The firm sought to exclude from evidence private communications that its lawyers had with the plaintiff on the eve of the mediation. The trial court granted the motion in limine, but the court of appeal issued a writ of mandate instructing the trial court to vacate its ruling. In a case of first impression, the majority concluded that the communications that the firm sought to exclude were not between disputants within the meaning of Evidence Code Section 1119, because the petitioner and his lawyers were the same party in the mediation.

Sanctions

Lawyers challenged the authority of tribunals to sanction them, with varying results. In Bak v. MCL Financial Group, a lawyer appearing before an arbitration panel of the Financial Industry Regulatory Authority (FINRA) argued that the panel exceeded its authority by sanctioning him. Attorney Theodore C. Peters represented defendant MCL Financial Group in a dispute by former employees over commissions. During prehearing document production, the plaintiffs inadvertently produced 112 pages of privileged documents to the defendants. After the plaintiffs demanded immediate return of the privileged documents, the defendants did so, but not before Peters had reviewed the documents, copied them, and sent copies to a FINRA staff attorney. The panel ordered Peters to pay $7,500 as sanctions for copying the privileged documents and included the sanctions in the award confirmed by the superior court.

On appeal, Peters argued unconvincingly that because he was not a party to the arbitration agreement, the arbitration panel lacked authority to sanction him. The Fourth District Court of Appeal held that by voluntarily appearing for the defendants in the proceedings, conducting discovery, and responding to the plaintiffs’ privilege claims, he had subjected himself to the panel’s authority. The court affirmed the sanctions, noting that under State Compensation Fund v. WPS, Inc., Peters should have sought guidance from the arbitration panel rather than unilaterally copying the material and sending it to FINRA.

In a case of first impression, In the Matter of Lebtinen, the Ninth Circuit held that a bankruptcy court has the inherent authority to sanction a lawyer by suspending him from practice in that court. The bankruptcy court sanctioned Jim Price, the lawyer for the chapter 13 debtor, after he failed to attend the meeting of creditors or the confirmation hearing and falsely informed his client that her case had been dismissed when the court had confirmed the plan. Price had multiple conflicts of interest: While serving as the debtor’s lawyer, he also acted as a loan broker and conditioned her new loan on being hired as the real estate broker when she sold her house. The bankruptcy court ordered Price to disgorge his $1,500 fee and suspended him from practice in the bankruptcy court of the Northern District of California for three months. The Bankruptcy Appellate Panel upheld the bankruptcy court’s authority to sanction Price, and the Ninth Circuit affirmed.

On appeal, Price challenged the bank-
from further communications with class members. When Judge Sutro was disqualified for the appearance of probable bias under Code of Civil Procedure Section 170.1(a)(6), based on remarks at the sanctions hearing, his replacement formalized the sanctions and Spencer appealed, arguing the sanctions were null and void. The First District Court of Appeal affirmed the injunctive relief.

The court of appeal held that the disqualified judge’s orders were not null and void under Code of Civil Procedure Section 170.3(b)(4), which provides that if grounds for disqualification are first learned or arise after a judge makes his or her rulings, the rulings will not be set aside even if the judge is disqualified. Spencer pointed out that Judge Sutro’s disqualification was based on comments he made before issuing his sanctions orders, but the appellate court swept aside the argument, explaining disingenuously that the finding of bias was prospective only. Further, the court held that Rule 2-100’s “no contact” rule was triggered by the court’s conditional certification of the class, and that absent class members are “parties” represented by class counsel. Thus the superior court had the authority to ensure the neutrality and objectivity of the notice to the court had the authority to ensure the news presented by class counsel. Thus the superior court held that Rule 2-100’s “no contact” rule was triggered by the court’s conditional certification of the class, and that absent class members are “parties” represented by class counsel. Thus the superior court had the authority to ensure the neutrality and objectivity of the notice to the court and attorney’s fees of $2,587 to the court and attorney’s fees of $2,587 under Code of Civil Procedure Sections 177.5 and 575.2, which authorized sanctions for violation of a court order or local rule. The appellate court reversed, because no court order or local rule was violated.

The court of appeal explained that the Rules of Professional Conduct are not normally regarded as court orders or local rules for purposes of awarding monetary sanctions, since trial courts do not have responsibility for enforcing the rules and disciplinary authority is lodged in the state supreme court, which has delegated it to the State Bar Court. Although a court order appointed the attorney for the conservatee, and the appointed attorney could request that other lawyers in the case make contact only through her, violations of that request would violate Rule 2-100, not a court order. Even if the probate court concluded Paquette had violated Rule 2-100, this would not be tantamount to disobeying a court order under the cited statutes.49

Lawyers Behaving Badly

A lawyer who filed a false State Bar complaint against his cocounsel could not claim a constitutional right to petition or free speech because the complaint was an illegal attempt to extort attorney’s fees from the other lawyer. This was the ruling in Cohen v. Brown,50 a dispute between two lawyers over the division of fees from a personal injury case. Michael Brown of the California Lawyers Group LLP induced Arian A. Cohen to associate into the case as cocounsel for the plaintiff by lying about his trial experience, the status of preparation of the case, and the client’s consent to a division of fees with Cohen. Cohen assumed the laboring oar, prepared the case for trial, and obtained a partial settlement at a mediation. When Cohen proposed a new fee-sharing arrangement in recompense for his extra work, Brown fired him. Cohen served an attorney’s lien on Brown, defense counsel, and the defendant’s insurer, but after the rest of the case settled for $2 million, Brown informed Cohen that he was not entitled to any portion of the $800,000 attorney’s fees because the client had never signed a written agreement to the division of fees under Rule 2-200 of the Rules of Professional Conduct.51

Adding insult to injury, Brown threatened to file a complaint with the State Bar if Cohen did not sign off on the settlement check and allow all the fees to go to Brown.52 Cohen offered to sign the check so the client could be paid if the disputed fees were placed in an escrow account. Brown refused and filed a falsified State Bar complaint against Cohen in the name of the client. The State Bar initiated an inquiry of Cohen, the client sued Brown for breach of fiduciary duty and conversion, and Cohen sued Brown for fraud, breach of contract, extortion, and unjust enrichment.

In defense, Brown filed an anti-SLAPP motion under Code of Civil Procedure Section 425.16, claiming that Cohen’s suit was an attempt to chill Brown’s exercise of his constitutional right to petition and free speech. The trial court denied the motion, citing Flatley v. Mauro53 in holding that the State Bar complaint was an illegal act of extortion and not a protected activity. The Second District Court of Appeal affirmed, finding that Brown had unleashed the State Bar to make Cohen’s life a living hell unless he signed the settlement check.54 The appellate court gave Cohen reason to hope that Brown would not receive a windfall and that Cohen could recover his quantum meruit recovery under Huskinson & Brown v. Wolf.55 Also, the court noted that it was still possible to fulfill the requirements of Rule 2-200 because the client (now solidly allied against Brown) could consent to the fee split anytime before the actual division of fees.56

In the Matter of Francis T. Fahy involved the disbarment of a lawyer after he found a convenient, but unethical, way to cut short his jury duty.57 The lawyer, Fahy, was serving as a juror in a medical malpractice case. After five days of deliberations, the jury was deadlocked, and the court ordered the jury to return the following week to resume its deliberations. Displaying a misguided dedication to his law practice, Fahy changed his vote to break the deadlock and reach a verdict for the defendant so he could return to his office. The foreperson reported her concern that jurors had changed their votes solely to end the deliberations, but when questioned by the judge, Fahy stated he had acted consistently with the court’s instructions and the evidence. Six weeks later, the plaintiff moved for a new trial based on jury misconduct and, surprisingly, submitted a sworn declaration from Fahy in which he stated he had decided to vote for the defense solely to end deliberations and return to his practice.58 Confronted with his declaration in court, Fahy testified that he was tricked into signing it or that his signature was forged. A new trial was ordered, and the State Bar filed disciplinary charges against Fahy.

The State Bar Court found that Fahy breached his duty under Business and Professions Code Section 6068(a) to comply with the law by violating his duties as a civil trial juror, noting that his vote was decisive in breaking the jury’s deadlock. His deceit during the judge’s questioning was an act of moral turpitude and reprehensible conduct by an attorney under Business and Professions Code Section 6106.59 Concluding that “clients, courts, and the legal profession are at serious risk of future harm should he be allowed to continue to practice,” the State Bar Court recommended Fahy’s disbarment;60 and the supreme court obliged on July 22, 2009.61

Getting Paid

In another difficult economic year, courts, COPRAC, and PREC gave attorneys new issues to think about with respect to collecting and splitting fees.

COPRAC, in its Formal Opinion 2009-178, analyzed certain ethical duties that arise when an attorney attempts to settle a fee dispute with his or her client and wishes to include a Civil Code Section 1542 waiver to wipe out a potential malpractice claim. The committee noted that the existence of a fee dispute alone does not necessarily create a conflict requiring withdrawal. A decision to withdraw under Rule 3-700 of the Rules of Professional Conduct depends on several fac-
The committee also concluded that it is ethically permissible to include a Section 1542 waiver in the settlement agreement, even if the attorney has not withdrawn from the engagement. However, if the attorney has not withdrawn, he or she must first 1) promptly disclose to the client the facts giving rise to any legal malpractice claim, 2) comply with Rule 3-400(B) of the Rules of Professional Conduct by advising the client of the right to seek independent counsel regarding the settlement, 3) give the client an opportunity to do so, 4) advise the client that the attorney is not representing the client in connection with the fee dispute, and 5) fully disclose to the client the terms of the settlement in writing, including the effect of the release and other provisions of the settlement.

The Mandatory Fee Arbitration Act per- 62mits clients to elect nonbinding arbitration before a local bar association for their fee disputes with their attorneys. If a client makes the election, his or her attorney must participate in an MFAA arbitration. Arbitration under the MFAA is intended to be quick and inexpensive so that the client need not hire a new lawyer in connection with the fee dispute. Clients waive their right to an MFAA arbitration by filing any pleading seeking affirmative relief or a setoff based on alleged malpractice or professional misconduct. MFAA arbitrations are strictly limited to fee disputes. The Second District Court of Appeal confirmed this principle last year in Fagelbaum & Heller, LLP v. Smylie.63 The MFAA permits either party to request a trial de novo within 30 days after the MFAA arbitration is completed.64 The supreme court in Aguilar v. Lerner,65 a 2004 decision, held that an agreement between a client and his attorney to submit all disputes between them to binding arbitration was enforceable, notwithstanding the MFAA, because the client had failed to elect MFAA arbitration. The majority opinion left undecided the issue of whether a client who elects MFAA arbitration may request a trial de novo after the MFAA arbitration has concluded when the client and attorney agreed in their engagement letter to resolve all disputes through binding arbitration. In 2009, the supreme court decided this issue in Schatz v. Allen Matkins Leck Gamble & Mallory LLP.66

The plaintiff, Schatz, retained Allen Matkins to represent him in a couple of matters. The original engagement memorialized an agreement to submit any disputes between them, including fee disputes, to binding arbitration before a retired judge or justice in San Diego. Schatz disputed a bill of about $170,000. The parties participated in an MFAA arbitration that concluded with an award in favor of Allen Matkins. Schatz timely requested a trial de novo. At that point, Allen Matkins petitioned to compel arbitration in accordance with the arbitration clause in the parties’ engagement letter. Following Alternative Systems, Inc. v. Carey, a 1998 appellate decision,67 the trial court denied the petition to compel. The court of appeal affirmed, reasoning that the language in the MFAA permitting either party to a “trial after arbitration” means that the parties must thereafter adjudicate the fee dispute in court rather than through arbitration.

The supreme court, overruling Alternative Systems, reversed. The court reasoned that the phrase “trial after arbitration” should be harmonized with other language in the MFAA that recognizes that a client and lawyer may adjudicate disputes between them in court or in “other proceedings.” Thus, the phrase “trial after arbitration” means a trial in accordance with applicable law: “The MFAA confers no immunity from valid defenses, such as the existence of a contractual obligation to arbitrate.”68

While an attorney cannot force a client to forego his or her right to MFAA arbitration, once the MFAA arbitration is completed (or if the client fails to elect MFAA arbitration in the first place or waives his or her right to MFAA arbitration by seeking affirmative relief against the attorney), the attorney can enforce a predispute agreement with the client to submit all their disputes to binding arbitration. The MFAA “does not foreclose the possibility that, under a general agreement between the parties, the nonbinding MFAA process should be followed by binding arbitration, rather than by a lawsuit.”69

The Third District Court of Appeal in Gilman v. Dalby,70 a case of first impression, concluded that as a matter of public policy, an attorney lien for fees and costs has priority over a medical provider’s lien even if the medical provider’s lien was first in time: As a practical matter, medical liens have value only if the treated patient obtains a judgment from which the liens can be paid…[U]nless the patient gets a monetary recovery in a lawsuit, the medical liens will usually remain unpaid, and the provider will never obtain payment for the services rendered…An attorney lien that includes fees and the costs of suit is a necessary incentive for personal injury plaintiffs’ lawyers to represent such clients.71

In general, a lawyer may not split legal fees with a nonlawyer.72 PREC concluded in its Opinion No. 523, issued in June 2009, that an attorney does not violate the fee-splitting rules by entering into an agreement with the client in a contingency fee case to include a statutory award of attorney’s fees in the gross recovery for purposes of deciding the attorney’s compensation. This is so even though the statutory award belongs to the attorney, not the client.

May lawyers who successfully represent themselves as a party in litigation recover fees based on their time working on the case if the prevailing party has a right to fees under Civil Code Section 1717? The Sixth District Court of Appeal concluded in Gorman v. Tassajara Development Corporation73 that the answer is no, even if the attorney has incorporated or is a member of a partnership. But the court permitted the attorney in Gorman to recover fees incurred by other lawyers and paralegals in his firm who worked on the matter.

In Formal Opinion No. 2009-176, COPRAC considered ethical obligations arising when defense counsel implements a policy of making settlement offers conditioned on the plaintiff’s waiver of his or her statutory right to attorney’s fees. The committee opined that a defense lawyer could ethically do so. Further, the plaintiff’s lawyer has an ethical obligation to transmit the settlement proposal to the plaintiff and consummate the settlement if instructed to by the client even if the settlement, because of the fee waiver, would result in the lawyer receiving compensation considerably less than the reasonable value of the lawyer’s services. A concern that this defense strategy could potentially drive a wedge between plaintiffs and their counsel must yield to the strong policy encouraging settlements.

The Second District Court of Appeal’s decision in Karton v. Dougherty74 provides a cautionary tale to lawyers regarding aggressive efforts to pursue clients who have failed to pay. Karton, a lawyer, represented a client, Dougherty, in a marital dissolution action. The fee agreement gave Karton the right to collect 10 percent interest on fees and costs not paid within 30 days. The fee agreement also included an attorney’s fees clause that was applicable in the event of litigation to collect unpaid fees and costs. At the end of the engagement, Dougherty owed Karton about $65,000. Karton filed an action in superior court to collect. When Dougherty failed to appear, Karton obtained a default judgment against Dougherty for about $87,000, which included interest and collection costs.

Dougherty filed several motions to set aside the default, all of which the superior court denied. He moved out of state. He filed a bankruptcy petition. He filed other litigation to set aside the default judgment. Although Karton in the interim collected about $56,000 on the $87,000 judgment,
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Karton continued to fight every step of the way. He ultimately asked the superior court to increase the amount of the default judgment from $87,000 to about $1.3 million to cover the additional fees and costs he incurred in his collection efforts. The superior court did so, and Dougherty filed a motion to set aside the default under Code of Civil Procedure Section 473.

The superior court denied the motion. Dougherty appealed. The Second District concluded that Karton's original application for a default judgment was defective and reversed the judgment.

**Revision of the Rules of Professional Conduct**

After nine years of labor by the Commission on the Revision of the Rules of Professional Conduct, the State Bar Board of Governors approved 35 revisions to the rules. State Bar President Howard Miller declared that the remaining revisions will be completed in 2010 so that the new rules can be submitted to the supreme court for adoption.75

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4 Schwarzenegger Vetoes State Bar Dues Bill, Says Bar Must Abandon ‘Business as Usual,’ 25 LAWS. MAN. ON PROF. CONDUCT 568 (ABA/BNA).
7 Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice, United States v. Stevens, Case No. 08-231 (2009).
9 See http://www.bybeefund.org.
10 Ex Bush lawyer can be sued for justifying abuse, S.F. CHRON., June 13, 2009.
12 Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725 (2009).
13 Costco Wholesale Corp. v. Superior Court, 74 Cal. Rptr. 3d 345, 352 (2008), rev’d, 47 Cal. 4th 725 (2009).
14 Id. at 358-59.
15 Costco, 47 Cal. 4th at 741.
16 Id.
17 Id. at 746-47.
18 United States v. Ruehle, 583 F. 3d 600 (9th Cir. 2009).
19 Id. at 606.
20 Id. at 608-09.
21 Id. at 607 (quoting In re Horowitz, 482 F. 2d 72, 81 (2d Cir. 1973)).
24 CODE CIV. PROC. §§425.16 et seq.
25 PrediWave Corp., 102 Cal. Rptr. 3d at 258, 263.
27 Id. at 1628.
28 Rodriguez v. Schneider, 563 F. 3d 948 (9th Cir. 2009).
29 Id. at 959-60.
31 Id. at 1421.
36 Id. at 1122.
37 Id. at 1124.
41 Id. at 1061.
42 Id. at 1059.
43 Id. at 1061.
45 Id. at 1450-51.
46 Id. at 1458-59.
48 Id. at 1483.
49 Id. at 1484.
51 Id. at 310.
52 Id.
58 Id. at 144-45.
59 Id. at 145.
60 Id. at 150.
62 BUS. & PROF. CODE §§6200 et seq.
64 BUS. & PROF. CODE §6204(a).
68 Schatz, 45 Cal. 4th at 572.
69 Id.
71 Id. at 618-19.
72 CAL. RULES OF PROF'L CONDUCT R. 1-320.
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The California Electronic Discovery Act
ON TUESDAY, MARCH 16, the Association and the Small and Solo Division will host a seminar featuring Alexander H. Lubarsky of Class Consultants on how longstanding rules have been amended pertaining to the handling of electronically stored information (ESI). The discussion will include case law regarding some of the less defined areas of the new rules as well as the best practices with respect to meet-and-confer requirements, cost splitting or shifting, and electronic data preservation and production. The seminar will also cover when to preserve, collect, and produce ESI. Finally, the speaker will address ethical guidelines pertaining to the handling of the ESI of clients and opponents. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at that address for $10 with validation as well as various lots nearby for less. On-site registration and the meal will begin at 4:30 P.M., with the program continuing from 5 to 8:30 P.M. This event is also available as a live Webcast ($185 to $235). The registration code number is 010706. The prices below include the meal.
$80—CLE+PLUS member
$140—Small and Solo Division member
$175—LACBA member
$225—all others
3.25 CLE hours

Evidence Skills Workshop
ON WEDNESDAY, MARCH 17, Trial Advocacy and the Litigation Section will host the Evidence Skills Workshop, which provides step-by-step instruction on how to admit and exclude evidence in court. Topics covered in the lecture portion of the program include evidentiary foundations, authenticity of physical evidence, expert and lay opinion, business records and other hearsay exceptions, expert qualifications and hypothetical questions, and written and oral motions in limine. In the workshop portion of the program, participants perform vignettes, in which they seek to admit and exclude different types of evidence in trial and pretrial settings. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at that address for $10 with validation as well as various lots nearby for less.

On-site registration will begin at 1 P.M., with the program continuing from 1:30 to 5:30. The registration code number is 010743.
$250—CLE+PLUS member
$350—LACBA member
$500—all others
3.75 CLE hours

What Physician Clients Need to Know
ON WEDNESDAY, MARCH 24, the Healthcare Section, along with the Los Angeles County Medical Association, will host a program addressing risks affecting physicians and healthcare lawyers. Regarding employment practices, speakers Beth Schroeder and Connie Michaels will address significant risks currently affecting physicians as employers, supervisors, and employees. Topics will include discharging employees, incorrectly classifying employees as exempt or nonexempt (or as independent contractors or employees), and employee leave requirements.

In another segment, Bruce Dizenfeld and Jeremy Miller will address risks involving transactions that may run afoul of antikickback and antireferal laws and the laws prohibiting the corporate practice of Medicare. Topics will include risks associated with ancillary services arrangements (e.g., clinical laboratory and diagnostic imaging), ambulatory surgery centers, and professional practice arrangements (e.g., part-time arrangements at another practice’s location).

After that, Patric Hooper and Steve Goldsobel will address risks associated with RAC audits and Medical Board investigations, as well as how to respond when law enforcement arrives and what to do when presented with a subpoena.

The event will take place at the AON Building Auditorium, 707 Wilshire Boulevard in Los Angeles. Parking at the AON Building is complimentary. On-site registration and the meal will begin at 5:30 P.M., with the program continuing from 6 to 9:30. The registration code number is 010718. The prices below include the meal.
$75—CLE+PLUS member
$105—Healthcare Section member
$115—LACBA member
$125—all others
$135—at-the-door registrants
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.
When Is Humanitarian Intervention Legal?

**FROM TWO STARKLY CONTRASTING EXAMPLES**—the NATO invasion of Kosovo and Operation Restore Hope in Somalia—one can clearly see both the benefits and drawbacks of humanitarian intervention. As is apparent in the recent U.S.-led invasion of Iraq, abuse of the obligation of states to protect human rights, especially by nations with military prowess, can have a tremendous impact for a world not yet ready to deal with the consequences. Humanitarian intervention has always posed a number of difficult and divisive concerns for international legal scholars and nations. Until those issues are hammered out, there will continue to be intense debate on when humanitarian intervention can be an exception to the United Nations’s prohibition on the use of force. Underlying this debate is the tension between the need to ensure fundamental human rights and the need to respect state sovereignty, the principle of nonintervention, and the right of self-determination—all of which are considered essential elements in maintaining peace and international security.

Although many states agree there is an obligation to protect human rights, there is no official legal definition of humanitarian intervention in international law, leaving the concept open to interpretation. According to *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, a book edited by political scholars Robert O. Keohane and J. L. Holzgrefe, humanitarian intervention is generally defined as an armed intervention by a state, group of states, or an international organization into another state’s territory, without the agreement of that state, to address a humanitarian disaster, particularly one caused by grave and large-scale human rights violations such as genocide, crimes of aggression, and crimes against humanity. The roots of humanitarian intervention can be traced back to the writings of the father of international law, Dutch philosopher Hugo Grotius, and his just-war theory. In his treatise, *De Jure Belli ac Pacis (On the Law of War and Peace)* written in 1625, Grotius maintained that war taken on behalf of another sovereign’s citizens is only justifiable if the intention is to protect the people from a tyrant.

After World War II and the signing of the U.N. Charter in 1945, the world witnessed an increase in military intervention based on human rights violations. For example, when the Indian military entered East Pakistan in 1971 to support Bangladeshi independence, primarily for regional political reasons, evidence of mass slaughter taking place in Bangladesh also heavily influenced the Indian government’s decision to go to war. Between 1978 and 1979, Tanzania, prompted by humanitarian purposes, invaded Uganda to remove the brutal Idi Amin regime, which was responsible for executing 300,000 Ugandan citizens and raping and displacing many thousands more.

Ultimately, it was NATO’s military invasion of the former Federal Republic of Yugoslavia (Serbia) from 1993 to 1996 that intensified the highly controversial debate on the legality of humanitarian intervention. NATO’s three-year battle in Bosnia and Herzegovina had international organizations, nations, and legal scholars accepting the concept that military interventions in the affairs of another state based on human rights violations were indeed legal. Because of these recent developments in humanitarian intervention, it is now necessary to establish some type of legal guidelines to govern its use.

Whether one views these legal guidelines as requirements or limitations to a state’s right to prevent gross violations of human rights, set standards are needed to help judge the validity of a particular military action taken under the premise of humanitarian intervention. I have devised standards that are narrow and strict enough to help deter nations from abusing this use of force, but, at the same time, broad enough to define certain instances of humanitarian intervention as a legal use of force. I propose that nations adhere to the following criteria in order to validate military missions based on humanitarian purposes:

1) The use of humanitarian intervention must be immediate and only occur during the actual commission of the human rights violation or immediate threat of an offense.
2) Authorization for intervention must be by a competent body within the United Nations.
3) Humanitarian intervention must be a collective effort executed by more than one nation.
4) Humanitarian intervention must be used as a last resort when all other means have failed.
5) Humanitarian intervention must only be used for grave and large-scale violations of human rights.
6) All military forces involved in the intervention must respect the principles and spirit of the Geneva Conventions and all other applicable international humanitarian laws.

Given the nature of international relations, it cannot be expected that these proposed criteria for humanitarian intervention would regulate the conduct of states absolutely. As noble an idea as humanitarian intervention is, it is easily subject to distortion, misinterpretation, and abuse. However, completely abandoning legal restraints on the use of external military intervention is a dangerous policy that can lead to devastating consequences. The global community faces an essential need to formulate standards to test the legality and legitimacy of humanitarian intervention in order to guide conduct during that intervention.

As noble an idea as humanitarian intervention is, it is easily subject to distortion, misinterpretation, and abuse.

Asian C. Udoh is an attorney licensed in the states of California and Illinois.
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