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Steven L. Gleitman, Esq.
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Valentine’s Day at my daughter’s school recently reminded me of a simpler time, when my own classmates left me nice notes in pretty envelopes, slipped surreptitiously into a brown paper bag taped to my chair. Sometimes they even attached candy to the messages.

That was then. This week, another wave of e-mails from e-discovery vendors hit my inbox, with news of yet another set of decisions issued from far-flung courts awarding draconian sanctions for failures to preserve electronically stored information. Never mind that no jury likely would have seen any of the documents that were spoiled. According to the judges’ decisions, the sanctioned conduct was over the line.

Of course, the flood of e-mails is nothing more than a scare tactic. Unfortunately, this tactic often works—either because of the cost of e-discovery and the failure to undertake it well, or the fact that, no matter how scared they are, some lawyers will never change their behavior. Regardless of its genesis, the fear is often justified.

Intentional spoliation and gross negligence are easy to spot and easier to sanction. But the spotting and the sanctioning are always after the fact. It is obviously much more difficult in situations that are closer to the line to see where the line is. Indeed, for more than a century, California courts have recognized that “[a]lthough the second sentence of [Code of Civil Procedure Section 2017.010’s predecessor] (‘reasonably calculated to lead to the discovery of admissible evidence’), gives some guidance for determining what is ‘relevant to the subject matter’ [n]o precise or universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience.” Pacific Telephone & Telegraph Company v. Superior Court, 2 Cal. 3d 161, 172 (1970) (citing Regents of University of California v. Superior Court, 200 Cal. App. 2d 787, 794 (1962) (quoting Moody v. Peirano, 4 Cal. App. 411, 418 (1906))). Surely that determination is neither easier nor less costly (even adjusting for inflation) than it was in 1906, long before the advent of electronically stored information.

As I see it, there are two options. The first is for practitioners to continue as they always have, try to act reasonably, and hope for the best. For this approach, I recommend watching the best show on television: the Discovery Channel’s Dirty Jobs. The show’s host takes viewers through the work days of real people doing real (dirty) jobs: lice removal technician, barbecue smoker cleaner, turkey inseminator, abandoned mine plugger, and bologna maker. If the show does not provide us with a laugh after getting sanctioned, at least it will provide perspective on our careers. And if that fails to work, I would go with a dram or two of Auchentoshan 21-year-old single-malt scotch. It’s very stiff but costs enough to make you want to go to work the next day.

The second option is for courts to get serious about the requirements of California Rule of Court 3.724(8). This rule, effective 16 months ago, requires practitioners to meet and confer about the scope of discovery of electronically stored information in advance of an initial case management conference. If courts do get more serious about enforcing the rule, joint case management conference statements might become the norm rather than the rare object of judicial surprise and delight. Plus, the conferences might actually prove to be worth planning for. They might actually result in the avoidance of discovery disputes later on as well as those dreaded draconian sanctions handed down after parties continue to disagree about the required scope of preservation.

Until then, I plan to keep watching Dirty Jobs and drinking scotch.
Civil Appellate Considerations in State Trial Court

WHILE FILING AN APPEAL PRESENTS NEW procedural and financial hurdles for attorneys and their clients, the appellate process actually begins in the trial court. If a potential appellate issue is not preserved on the record, it cannot be appealed, no matter how dispositive.

The failure to preserve an issue most often happens in one of two ways. First, when making evidentiary objections at trial, it is not enough to simply object or make the common foundational, argumentative, or cumulative objections. If there is a genuine evidentiary issue with a question, statement, or exhibit, the proper objection (for example, hearsay, relevance, or Evidence Code Section 352) must be made at the time of the objection, or that ground for exclusion is not preserved.

Second, during trials, attorneys and judges frequently have sidebar discussions and conferences in chambers. If an attorney anticipates that an issue for appeal will arise during one of these encounters, the attorney should request the court reporter and get the discussion recorded as it occurs. If the judge keeps the discussion off the record, the attorney should make a record of the issue at the earliest possible convenience of the court—for example, after the jury is dismissed for its next recess.

Once judgment is entered, the appellate process accelerates. A judgment can be executed on immediately—a plaintiff can begin serving abstracts of judgment and writs of execution on a defendant’s assets. The only way to avoid this is to obtain a stay of execution of the judgment. (For more on this topic, see “The Discretionary Stay against Enforcement of a Judgment” by David J. Cook on page 10.) The parties may stipulate to one or, on motion, the court may order one. A stay provides breathing room and engenders goodwill, which can be beneficial for resolving postjudgment issues or facilitating settlement discussions. When the defendant is a business or corporation, it will typically have insurance or sufficient assets to satisfy a judgment, so a plaintiff loses little in agreeing to a stay.

The most important filing for an appeal is the notice of appeal. The notice is filed with the trial court and lists what is being appealed, which typically is the final judgment. Subject to a few exceptions—such as the ability to decide motions for new trial and for costs—a notice of appeal divests the trial court of jurisdiction and vests it in the appellate court. Because it is a jurisdictional prerequisite, a notice of appeal must be filed timely. There are no extensions or relief for mistake. An untimely appeal will be dismissed.

The notice of appeal must be filed by the earliest of three potential deadlines: 1) 60 days after the party filing the notice of appeal serves or is served with notice of entry of judgment, 2) 60 days after the court clerk serves the party filing the notice of appeal with notice of entry of judgment, or 3) 180 days after entry of judgment. The clock does not start to run when the notice of entry of judgment is filed.

After the notice of appeal, the last part of starting the appellate process is the designation of the appellate record, which is filed with the trial court within 10 days of filing the notice of appeal. The burden is on the appellant to provide the appellate court with the information necessary for the appeal. Because error is never presumed on appeal, counsel for the appellant must provide an adequate record to overcome that presumption. The record must also be complete. Designating a partial record that fails to present the trial proceedings on which the trial court could be affirmed is grounds for a ruling against the appellant.

An appellate record consists of two parts, both of which must be identified in the record designation. The first is copies of the relevant trial court documents, and the second is a record of the oral proceedings.

For the documents, counsel for the appellant can choose to provide the copies by designating the use of an appendix; alternatively, counsel can request the trial court clerk to compile them by designating the use of a clerk’s transcript. For the latter, counsel must list the specific documents for inclusion; the clerk will only compile the listed documents. Counsel will also have to deposit funds with the trial court clerk.

For the oral component, almost all appellants designate a reporter’s transcript. Counsel must list on the designation the dates of the oral proceedings requested for inclusion in the reporter’s transcript. Counsel must also include either a deposit for the transcript’s cost or a waiver of this deposit from the court reporter.

The costs of an appeal go beyond transcripts. In addition to the expenses for prosecuting the appeal (including attorney’s fees and the costs of the appellate record), once judgment is entered, postjudgment interest begins to accrue at 10 percent simple interest per year. Because an appeal can take one to two years to complete, interest can become a sizeable cost and must be taken into consideration.

Lastly, a stay, if one is obtained, can extend at most to 10 days beyond the last date a notice of appeal may be filed. In order to have a stay during the appeal, an appellant must post a security, which an appellant cannot provide directly. The law permits two types of entities to post the security for the appellant. One is a third person (or personal surety); the other is a bonding or insurance company (admitted surety insurer). For large judgments, the latter are typically the only option, but they charge a premium for their services. This is another cost that must be considered when deciding to pursue an appeal.
The Discretionary Stay against Enforcement of a Judgment

THE RACE TO ENFORCEMENT begins as soon as a judgment creditor wins a lawsuit. While typically the plaintiff, a judgment creditor can also be the defendant in an anti-SLAPP suit. In either situation, the judgment creditor can begin enforcement procedures immediately upon entry of judgment and can go so far as to direct the sheriff to appear at the defendant’s front door, break it down, and seize the contents from floor to ceiling, including the family dog. Only settlement, posting of an expensive appeal bond, or entry of a discretionary stay of enforcement by the trial court can prevent enforcement.4

A debtor may apply for a stay under Code of Civil Procedure Section 918.5 The stay does not stop the race entirely, let alone reverse the judgment, and while discretionary stay motions are commonplace, judgment debtors sometimes leave themselves exposed to aggressive enforcement.

Once judgment is entered, the debtor immediately confronts postjudgment remedies. These include liens (which are passive) and levies (which are active) that can reach nearly all of the debtor’s assets.6 The creditor is also entitled to the issuance of an order of examination (commonly known as the OEX or ORAP)7 that compels the debtor to appear in court and testify about all its assets and liabilities, with the judge ready to compel the debtor to answer questions. The service of the order for the debtor’s examination imposes a lien upon the personal property of the debtor.8

To add to the debtor’s worries, some courts authorize the issuance of an OEX by letting the clerk affix the name of the judge. This permits the creditor to seek an OEX over the counter. The creditor thus may be able to start the race to seize assets on the day of judgment and execute on the judgment faster than the debtor can procure a stay. Moreover, the filing of a notice of appeal does not stay enforcement of a money judgment.9

However anxiously the debtor may contemplate these remedies, they are not likely to inspire the creditor to run more slowly. The existence of a judgment indicates that the parties have not settled their dispute, so the creditor has no reason to assume that the debtor will cooperate with enforcement. The debtor may quickly find ways to become judgment proof. The creditor faces a complete loss of the time and money it has expended on the suit if the debtor successfully shields assets, and the cost of unwinding a fraudulent conveyance may exceed the creditor’s resources. Moreover, a debtor may prefer one creditor over another and pay other creditors and financial institutions first.

The creditor may also be halted or slowed by the discretionary stay. Sections 918(a) and (b) grant a limited discretionary stay of enforcement for a money judgment—but only upon motion.10

The debtor may seek a stay under Section 918(b) even if a notice of appeal has not been filed, but courts will ordinarily show greater consideration for movants that have filed the notice of appeal. As an additional showing of good faith, the debtor should consider paying for trial transcripts and retaining known appellate counsel. This will mitigate any skepticism the court may have that the discretionary stay is merely a stalling tactic and that the debtor never intends to pursue an appeal or secure a bond. Another means of showing good faith is to indicate the issues to be raised on appeal.

The creditor, however, will understandably be concerned that the debtor will use the stay to shield assets. The debtor can overcome these concerns by demonstrating good faith efforts to secure a bond. The debtor may offer full details regarding efforts to secure and post the bond—including the names, addresses, and telephone numbers of bonding agents or bond companies; whether security and indemnitors have been offered; description of the securities and indemnitors; and written responses of the bonding company or companies. All but the most solvent debtors must collateralize the bond with liquid assets or provide financial statements and indemnities from financially responsible individuals. Debtors should expect to pay bond premiums of 1 to 5 percent. Counsel should explain to the court that the debtor (or indemnitor) has the ability to secure a bond.

Many debtors can argue that they will suffer irreparable injury if the creditor proceeds with enforcement. In the stay motion, the debtor may try to prove that the enforcement will destroy the debtor as a going concern, cause the sale of a key asset of significant value, or precipitate bankruptcy or insolvency. In addition, the debtor that loses the posttrial race can file for bankruptcy under chapter 11, which

Sections 918(a) and (b) grant a limited discretionary stay of enforcement for a money judgment—but only upon motion.

David J. Cook is the senior attorney at Cook Collection Attorneys PLC in San Francisco and practices in the areas of enforcement of judgment, collections, bankruptcy, and insolvency.
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creates an immediate stay, dissolves the levies and liens, and excuses the defendant from posting a bond. To substantiate the hardship claim, the debtor may produce financial statements, a description of net worth, and complete disclosure of prior major financial transactions. Careless debtors, however, do not always review financial statements sufficiently. If the documentation discloses or suggests that the debtor has committed a fraudulent conveyance or engaged in suspicious or dubious financial transactions, any claim of irreparable injury will be undermined and doom the motion for a stay. In addition, the creditor may be able to file a new claim under the Uniform Fraudulent Transfer Act.

In the race to enforce or prevent enforcement of a judgment, however, the creditor and other interested parties may also plead financial hardship. The creditor may argue that it will suffer a continuing injury and potential financial ruin in being deprived of the payment owed. The creditor will likely have obligations such as taxes, wages, trade debt, bank loans, damages, and other losses. The creditor may face ruin if the debtor takes steps to render the judgment uncollectible. In opposing the stay motion, counsel for the creditor may present the creditor’s financial and personal investment in the case, the attempts at settlement, the sharp practices of the debtor, the debtor’s proclivity to engage in judgment proofing, and the loss that will burden the creditor as a result of delay.

The debtor may also argue that its financial collapse will devastate others, leading to widespread financial calamity for many interested parties. Before posting the bond, the debtor will likely highlight its financial obligations to vendors, employees, family members, and customers. These arguments may be supported by a detailed account of the financial hardships or bankruptcies that will befall parties other than the judgment creditor. The debtor that serves a broad community of customers or patients may raise a public interest argument, especially if its services or goods are irreplaceable or if the debtor’s ruin may adversely affect members of the community. The debtor may provide important governmental, quasi-governmental, or community services, for example.

Under federal rules, the judgment debtor bears the affirmative burden to provide assurances of payment when seeking a stay without posting a bond. While a discretionary stay under Section 918(b) is not a surrogate for an appeal bond and does not require a debtor to assure the payment that is due, nonetheless the creditor is entitled to assurances that the debtor will refrain from judgment proofing, fraudulent conveyances, or otherwise experiencing a financial calamity that would render the judgment uncollectible.

Rule 62(d) of the Federal Rules of Civil Procedure provides a guide to a state court judge concerning which assurances are recognized and tested. For example, federal courts have issued unbonded stays in cases in which a debtor:
- Has ample assets, revenue, and net worth to assure payment.
- Has a funded program that assures payment.
- Is a long-time resident of the district and has no intention to leave.
- Would be eliminated as the creditor’s competition if enforcement were allowed and acts reasonably by placing stocks and cash in escrow and posting a security bond.

In a case involving a judgment for $36 million against Western Union Telegraph Company (which had a net worth of $3 billion but was financially distressed and illiquid) the company obtained a bond by persuading a bank to issue a letter of credit. The court allowed alternative security to be posted, consisting of a cash deposit of $10 million, $10 million more in accounts receivable, and a security interest. In another case, in which the judgment was for $145 million, the court ordered a partial bond of $75 million to secure the judgment. The debtor agreed to maintain a net worth of triple the balance and promised to provide detailed financial disclosures and an independent certificate of net worth.

In a case concerning an intellectual property judgment, the impairment of the debtor’s financial condition and good faith issues were raised on appeal, and the court ordered the debtor to deposit allegedly illicit profits into an escrow account and to report income and expenses during the pendency of action. In a different matter involving a relatively small judgment against an oil company and foreign state, the court denied the stay to a party that had “no intention of recognizing this court’s judgments against it...and has given this court the impression that it will not recognize this court’s jurisdiction.”

In a case in which judgment was entered for $2.1 million, the debtor had insurance for $500,000, lacked other assets, and would be insolvent after enforcement. The court granted a stay but on the conditions that the insurance proceeds be deposited in an escrow account, the debtor not transfer any assets, the creditor could proceed with asset discovery, and the debtor did not dispose of any asset other than what was necessary for living expenses and engaging in business.

While the conditions of a stay may be severe, they are likely to be less so than what the debtor faces if it fails (perhaps by oversight) to secure a stay. If no stay is granted, the creditor may commence enforcement without notice and before the posting of a bond and filing of the notice of appeal. The clerk of the court will issue writs of execution, abstracts of judgment (which list the creditor, debtor, and judgment) and—under the judge’s signature—an order of examination. The creditor can levy upon the debtor’s bank accounts, accounts receivable, escrow accounts, third-party funds held in trust, general intangibles due from a third party, deposits held by others, and any other debt. The creditor can engage a private process server to serve the writ of execution but must provide and complete the levy package. This includes the notice of levy (garnishee and defendant), memorandum of garnishee, sheriff’s instructions, writ of execution, list of exemptions, and fees due the sheriff.

This process can be a literal race. The counsel for the creditor (or a process server) must appear at the clerk’s window, get the writ issued, open the file with the sheriff, and physically serve the levy package upon financial institutions. As this happens, the creditor can expect that the debtor’s counsel is preparing the motion for a stay and likewise running to the courthouse.

The race may also reach the debtor’s home. Through an abstract of judgment, the creditor can encumber real property. Accounts receivable, equipment, farm products, inventory, chattel paper, and negotiable documents of title may be encumbered by filing a JL-1 (a Judicial Council form) with the California secretary of state. The debtor can also encumber the defendant’s personal property upon service of an OEX. If the debtor’s property is in a third party’s possession, service of an OEX upon that party creates a lien.

Del Riccio

As Del Riccio v. Superior Court holds, a discretionary stay will not undo or discharge a perfected levy. In Del Riccio, the creditor levied on the bank account of the defendant. At the debtor’s request, the trial court issued an order staying enforcement pending the determination of a new motion. The stay prevented the sheriff from turning over to the judgment creditor the funds that had been seized from the debtor’s bank account. The court noted that the purpose of its order staying enforcement was not to halt execution but only to restrain the sheriff from paying money in his possession to the creditor. Satisfied with this outcome, the debtor did not move to recall the execution or quash the levy and made no claim that the execution was irregular. The plaintiff sought review. The question before the court of appeal was whether, in the absence of statutory authority, the court had the power to stay enforcement when the sheriff’s duty was to pay the creditor.

The Del Riccio court held that the money
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in the hands of the sheriff was the property of the judgment creditor and not the debtor, and that the law compelled the sheriff to turn it over to the creditor. “[T]he money should be deemed to have been delivered to the creditor immediately upon its receipt by the officer, and [the creditor’s] right to receive it is not affected by any delay that may occur.” The appellate court held that the trial court lacked the power to unwise the levy, holding that the trial court “was without power to take control of the money of petitioners by ordering the sheriff not to pay it over as he was legally bound to do.” Under Del Riccio, trial courts cannot undo a perfected levy that results in the garnishment of the debtor’s funds. The case underscores the rule that a stay under Section 918(b) is prospective only. Until the debtor posts a bond and files the notice of appeal, the successfully levied funds belong to the creditor.

And unless the court expressly orders otherwise, prospective liens also survive the Section 918(b) discretionary stay. Code of Civil Procedure Section 697.040(b) provides that a discretionary stay does not extinguish or prevent the creation of a lien under Section 697.340 (recorded as abstract of judgment) and under Section 697.540 (filing of a JL-1 with secretary of state) except by express order. In drafting a discretionary stay motion, counsel for the debtor should therefore specifically seek to extinguish liens. Counsel for the creditor, in turn, can be expected to argue to retain them. All but the most solvent debtors should expect the court to retain the passive liens. On the other hand, the stay that arises from the filing of the notice of appeal and posting of the undertaking, as required under Section 917.1(a), extinguishes existing liens, including abstracts and JL-1s under Section 697.040(a)(1) and (2). One way a debtor can avoid losing the lien race is to convince a court of the sincerity of its intention to appeal, and the way to do that is to take verifiable steps to pursue the appeal.

A fleet-footed creditor, however, may still win the race. Without a properly perfected stay (which includes the bond), any of the debtor’s funds in the hands of the sheriff belong to the creditor and constitute payment on the judgment. The levy changes title to the funds from the debtor to the creditor. A judgment creditor that wins the race to the funds from the debtor to the creditor. And that the law compelled the sheriff to turn it over to the creditor. “[T]he money should be deemed to have been delivered to the creditor immediately upon its receipt by the officer, and [the creditor’s] right to receive it is not affected by any delay that may occur.” The appellate court held that the trial court “was without power to take control of the money of petitioners by ordering the sheriff not to pay it over as he was legally bound to do.” Under Del Riccio, trial courts cannot undo a perfected levy that results in the garnishment of the debtor’s funds. The case underscores the rule that a stay under Section 918(b) is prospective only. Until the debtor posts a bond and files the notice of appeal, the successfully levied funds belong to the creditor.

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Asserting the Right to Self-Represent at Parole Revocation Hearings

IN NOVEMBER 2010, THE NINTH CIRCUIT ruled in United States v. Spangle that criminal defendants do not have a Sixth Amendment right to represent themselves in probation revocation hearings. The decision might surprise those familiar with the U.S. Supreme Court’s holding in Faretta v. California that criminal defendants have a right to self-represent at trial. Self-representation, the Court explained, is a corollary of one of the most vaunted constitutional rights in American law—namely, the Sixth Amendment right of an indigent defendant to request assistance of counsel at criminal trial.

A criminal defendant’s Sixth Amendment right to assistance of counsel, according to Faretta, “implicitly embodies a correlative right to dispense with a lawyer’s help.” Thus the Faretta Court held that a trial judge was unable to impose a lawyer upon a criminal defendant “when he insists that he wants to conduct his own defense.”

In subsequent cases, however, the Supreme Court clarified that Faretta’s holding does not apply in probation revocation hearings. Spangle merely follows these precedents.

Nevertheless, despite these authorities, probationers do have a right to self-represent—even if that right is not grounded in the Sixth Amendment. Attorneys may look to other sources—case law and statutes alike—when arguing on behalf of clients who wish to represent themselves at probation revocation hearings.

Kenneth Spangle had a criminal history dating back many years, but this case before the Ninth Circuit related to his most recent in a string of probation violations. On probation in early 2009 pursuant to a federal conviction for mailing threatening communications, Spangle cut off his monitoring device and absconded from the California town where he had registered his residence. When the police apprehended Spangle for violating his probation terms, they found written information in his car relating to his former probation officer, an assistant U.S. attorney, and various state and federal judges, including some of their home addresses.

After making an initial appearance regarding the probation violation in February 2009, Spangle was compelled to appear a second time before the U.S. District Court for the Central District of California on April 6, 2009, for a status conference. The district judge had already calendared an evidentiary revocation hearing for three days later. At the status conference Spangle, who already had been appointed an attorney, requested to represent himself. The district judge denied Spangle’s motion, holding that it was untimely given the imminence of the evidentiary hearing.

At the April 9 evidentiary hearing, the judge found that Spangle had violated probation. He was later sentenced to jail time and additional supervised release. Spangle appealed, arguing, among other things, that the district judge had erred in denying his request to waive his right to counsel and proceed pro se. The Ninth Circuit dismissed the appeal.

The Spangle court first ruled that probationers do not enjoy a Sixth Amendment right to self-represent at revocation hearings. While the Ninth Circuit was merely repeating existing precedent, this conclusion had significant consequences for the viability of Spangle’s appeal. While improper denial of a Sixth Amendment right to self-represent requires automatic reversal of lower court proceedings, improper denial of the right to self-represent arising from a lesser legal source is subject only to the harmless error standard of review.

The Spangle court also considered whether a right to self-represent at a probation revocation might exist under 28 USC Section 1654, which states that “parties may plead and conduct their own cases personally” in all courts of the United States. Assuming without deciding that Section 1654 granted such a right to self-represent at a probation revocation hearing, the Ninth Circuit held that the trial court’s denial of the right was harmless error because Spangle presented no evidence that his pro se strategy would have yielded a different result.

Although the Spangle court concluded its discussion of the self-representation issue with its Section 1654 harmless error analysis, Section 1654 is not the only federal statutory source for the right to self-represent in federal probation revocation hearings—and it may not be the most compelling. Federal Rule of Criminal Procedure 32.1(b)(2), which was not briefed by the parties in Spangle, “governs the defendant’s right to self-representation [at a probation revocation], granting a defendant the right to retain counsel or request appointment of counsel.” A defendant may proceed pro se, however, if he or she knowingly, intelligently, and voluntarily waives the Rule 32.1 right to counsel.

A district court considering such waivers also must find that defendants are mentally fit to represent themselves at the proceeding. The standard applied to this determination may be higher than that employed in ascertaining fitness to stand trial.

Determining the Sufficiency of a Rule 32.1 Waiver

A district court’s examination of whether a defendant 1) is making a knowing, intelligent, and voluntary waiver of the right to assistance of counsel and 2) has the mental fitness to self-represent is designed to protect a would-be pro se probationer from unfairness. In its inquiry, a court has a duty “to indulge all reasonable inferences against the waiver of counsel.” Appellate standards of review reinforce this bias against allowing a waiver.

Indeed, a district court’s erroneous denial of a defendant’s petition to self-represent at a probation revocation is subject to the relatively toothless harmless error standard on appellate review, whereas a district court’s erroneous finding that a self-representing probationer knowingly, intelligently, and voluntarily waived his or her Rule 32.1 right to assistance of counsel usually results in vacatur of the sentence and renewed revocation proceedings.

Ryan Lozar, an attorney licensed to practice in New York, has recently relocated to Los Angeles.
framework, any reasonable judge understandably would be more attuned to the potential problems than the merits of a pro se petition.

A colloquy between defendants and the court is viewed as the most accurate method for determining whether defendants seeking to represent themselves have knowingly, intelligently, and voluntarily waived their Rule 32.1 right to counsel. A number of federal circuits have used a totality-of-the-circumstances test to review the sufficiency of these colloquies. While this test is the standard for appellate review of a Rule 32.1 waiver, it also provides a useful primer for attorneys arguing before a district judge on behalf of their client’s motion to proceed pro se at a federal probation revocation. As a complement to a courtroom colloquy, an attorney may assert a variety of factors—including a client’s age, education, background, experience, and conduct—to convince the court that a defendant’s waiver of counsel is not going to be construed later as empty words, and therefore reversible, but rather as the type of action that Rule 32.1 requires.

In United States v. Hodges, for example, the Fifth Circuit affirmed a district court’s ruling that the defendant’s waiver of his Rule 32.1 counsel rights was knowing and voluntary. The court relied on several facts, including:

- The defendant’s ability to cite the particular class of probation violation with which he was charged.
- Extensive attorney-client conversations prior to the courtroom colloquy that served to inform the defendant regarding the purpose and possible repercussions of the probation revocation hearing.
- The defendant’s prior experience as the subject of multiple criminal proceedings and even a full trial.

Practitioners may marshal circumstantial evidence like this to present to judges deciding motions to self-represent at a probation revocation.

Before a district judge even reaches whether a defendant has properly waived Rule 32.1, an attorney should anticipate concerns about a client’s mental fitness to self-represent. If the record reflects that the client exhibited worrisome behavior during previous criminal proceedings, and an attorney suspects that this behavior would color a judge’s decision to allow a motion to self-represent to proceed beyond the waiver stage, the issue should be addressed directly and not ignored.

In Spangle, for instance, the briefs before the Ninth Circuit revealed disputed allegations that the petitioning defendant had a history of disruptive behavior in court, including an outburst at an earlier revocation accusing the probation office of lying about him and persecuting him. The district judge in Spangle never had occasion to determine the defendant’s mental fitness to represent himself because the pro se motion was untimely made, but the lesson is nonetheless clear: If a client’s reputation bolsters a case against pro se representation before a motion is even made, an attorney should proactively present mitigating facts to gain a sympathetic judicial ear.

It is axiomatic that motions must be timely made to be effective, but there are special considerations in the context of a Rule 32.1 waiver. Rule 32.1(b) contemplates that a defendant facing allegations of probation violation must appear before the court at least twice: First, for a preliminary hearing, and then, if the court finds probable cause that a condition of probation was violated, a second time for the revocation hearing itself. Rule 32.1(b) explicitly states that the court must inform a probationer of his or her right to counsel at the probationer’s first appearance.

While Rule 32.1 does not explicitly state when a motion to self-represent will be considered timely, it seems logical that a motion is timely if it is made at the preliminary hearing. This is when the court is statutorily obligated to conduct a dialogue with the defendant about his or her right to counsel at a probation revocation and the sufficiency of a defendant’s waiver of that right.

Beyond the preliminary hearing, reasonability is an important guide. Moreover, if the timeliness of the motion has entered a gray area, an explanation is in order. In Spangle, the defendant moved to waive his right to appointed counsel and represent himself a mere three days prior to his evidentiary hearing on revocation. The district judge ruled the motion untimely. Thus the defendant lost his motion on formality rather than substance.

Due Process Arguments in State Court

The right to self-represent at a state probation revocation varies among jurisdictions. In certain states a statute establishes the right, while in others a defense attorney might need to be more creative in arguing a client’s motion. In California there is no statute directly addressing the right to self-represent at state probation revocation hearings, although courts in some California cases have referred to Faretta warnings or hearings even in this context.

One important alternative argument counsel can make in California state courts in seeking self-representation for a client in revocation hearings arises out of federal constitutional due process guarantees. Over the years the Supreme Court has provided certain indigent defendants, on a showing of special circumstances, with a federal constitutional due process right to assistance of counsel at probation revocation hearings. The triggering circumstances for this right are determined on a case-by-case basis and hinge on the expected complexity of the probation revocation hearing. If the hearing is likely to be simple, no constitutional due process counsel rights attach. If the hearing is likely to involve the considerable presentation of evidence and argument, constitutional due process requires the appointment of a lawyer.

This doctrine arose out of a triumvirate of Supreme Court cases issued in the late 1960s and early 1970s—Mempa v. Rhay, Morrissey v. Brewer, and Gagnon v. Scarpelli. These decisions, taken together, made clear that some federal constitutional due process rights—including the right to request assistance of counsel—are required at both federal and state probation revocation hearings. These cases destroyed the idea that probation was a freely revocable “act of grace” and held that probationers have defendable interests when faced with revocation.

The rationale behind the Supreme Court’s identification of constitutional due process as the foundation for the right to request assistance of counsel at probation revocation hearings in the Mempa/Morrissey/Gagnon line of cases is distilled most clearly in a much cited principle from Morrissey: When a criminal trial clearly triggered the Sixth Amendment’s protections because a defendant’s absolute liberty was at stake, a probation revocation hearing did not trigger the Sixth Amendment because it implicated lesser, conditional liberty interests.

Under most probation orders, according to the Supreme Court in Mempa, the trial judge imposes a sentence against a convicted defendant at the close of trial, while Sixth Amendment protections are still in effect. When a trial judge allows probation, the execution of that sentence is simply suspended pending the defendant’s compliance with the terms of supervised release. Under these circumstances, defendants who are subsequently haled into court to face revocation of their probation already have notice of the sentence to be executed against them. No new abrogation of liberty is threatened other than the one already fully adjudicated. Therefore, the Sixth Amendment protections attendant to adversarial criminal trial proceedings are not triggered.

Constitutional due process protections mirroring Sixth Amendment safeguards arise, however, when a defendant contests the alleged facts underlying a probation revocation at a hearing. The Supreme Court
in its Gagnon decision stated that although indigent probation revocation defendants generally do not have the right to request assistance of counsel, there is a presumptive rule that the state authority charged with administering the probation system should appoint counsel under due process “in cases where, after being informed of his right to request counsel, the probationer...makes such a request, based on a timely and colorable claim...that he has not committed the alleged violation of the conditions upon which he is at liberty...”. This determination is made on a case-by-case basis whenever an indigent probationer requests assistance of counsel.

At the federal level, Rule 32.1 codifies and expands these constitutional due process rights for all indigent probationers regardless of special circumstances. At the state level, asserting federal constitutional due process remains the proper argument.

Attorneys can present two primary arguments in state court that their client’s constitutional due process right to assistance of counsel at a probation revocation hearing also allows the right to self-represent. The first argument, and perhaps the easiest to be made, is that a waiver of the constitutional due process right to counsel can achieve self-representation in much the same way that waiver is deployed in the context of Rule 32.1. Discover whether a right to counsel exists, successfully waive that right, and seek the court’s permission to proceed pro se.

A slightly more complicated but nonetheless sound argument involves the proposition that if the constitutional due process right to assistance of counsel attaches, so too should a constitutional right to self-represent. As the Supreme Court has stated regarding the Sixth Amendment, a rule establishing an individual’s right to assistance of counsel necessarily implies a primary and absolute right to control one’s own defense—and that includes the right to defend oneself. This same logic should apply to finding a constitutional right to self-represent under constitutional due process.

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1 United States v. Spangle, 626 F. 3d 488 (9th Cir. 2010).
2 While Spangle refers to the revocation of supervised release, the term “probation” in this article refers to any of the three types of conditional release: probation, supervised release, and parole. Courts have held that there is no material difference between probation, parole, and supervised release, calling them “essentially identical.” United States v. Frazier, 26 F. 3d 110, 113 (11th Cir. 1994).
5 Faretta, 422 U.S. 806.
7 United States v. Spangle, 646 F. 3d 488, 492 (9th Cir. 2010).
8 Id. at 492-93.
9 Id.
10 Id. at 494.
11 Id.
12 Id.
13 Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (“[R]evocation of parole is not part of a criminal prosecution.”).
14 McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) (The denial of the Sixth Amendment right to self-represent “is either respected or denied; its deprivation cannot be harmless.”).
15 Spangle, 626 F. 3d at 494.
16 Id. at 495.
17 United States v. Missouri, 384 Fed. Appx. 252 (4th Cir. 2010); see also United States v. Hodges, 460 F. 3d 646 (5th Cir. 2006); United States v. Farrell, 393 F. 3d 498, 500 (4th Cir. 2005).
18 United States v. Stocks, 104 F. 3d 308, 312 (9th Cir. 1997). In most jurisdictions the inquiry is simply whether the Rule 32.1 right to counsel has been knowingly and voluntarily waived. The Ninth Circuit in Stocks also uses the word “intelligently.”
20 Id. (affirming a state’s decision to hold two separate hearings on a defendant’s mental competence—one to determine whether he or she was mentally fit to stand trial, and the other to assess whether he or she was mentally fit to conduct the trial pro se). See also Godinez v. Moran, 509 U.S. 389 (1993) (same as Indiana, with the second hearing to determine the defendant’s mental fitness to enter a guilty plea on his own behalf).
21 McCormick v. Adams, 621 F. 3d 970 (9th Cir. 2010).
23 United States v. Correa-Torres, 326 F. 3d 18 (1st Cir. 2003).
24 United States v. Hodges, 460 F. 3d 646, 652 (5th Cir. 2006) (joining the First Circuit in Correa-Torres, 326 F. 3d 18, and the Seventh Circuit in United States v. LeBlanc, 175 F. 3d 511 (7th Cir. 1999), in adopting the totality-of-the-circumstances test). See also United States v. Stokes, 104 F. 3d 308, 311 (9th Cir. 1997) (considering various extrinsic facts to find that the defendant’s waiver was knowing and intelligent).
25 Hodges, 460 F. 3d 646.
26 Rule 32.1 contemplates three appearances: an initial appearance, a preliminary appearance, and a final revocation hearing. The notes to Rule 32.1 observe that some districts collapse the initial and preliminary hearings into one and state that this does not violate the rule’s objective.
32 Id. at 782 n.4.
33 Morrissey, 408 U.S. at 480.
34 Mempa, 389 U.S. at 135.
35 Id. at 135-37.
36 Id.
37 Gagnon, 411 U.S. at 790-91.
38 Id. at 790.
39 United States v. Stocks, 104 F. 3d 308, 310-11 (9th Cir. 1997).
40 United States v. Navarro-Botello, 912 F. 2d 318, 321 (9th Cir. 1990) (upholding knowing voluntary waiver of constitutional due process rights by negotiated plea agreement).
SINCE ITS CREATION IN 2001, the genuine dispute doctrine has afforded a partial defense to some insurance bad faith claims. The doctrine holds that an insurer that denies or delays payment of policy benefits because of a genuine dispute with its insured regarding coverage or the amount of the claim is not liable for bad faith. As insurers have sought to spread its application, however, its boundaries have lost definition. In *Howard v. American National Fire Insurance Company,* the California Court of Appeal for the First District inched the doctrine toward clarity, but the California Supreme Court has denied review of genuine dispute cases, leaving practitioners without a comprehensive definition.

Over the past decade, insurers have increasingly used the doctrine to contest claims for tortious breach of the duty of good faith and fair dealing, commonly referred to as bad faith. Because extracontractual damages may be available for insurance bad faith, insurers have sought to use the genuine dispute doctrine to contest all bad faith claims. *Howard* rejects this approach, holding that one must look to the nature of the insurance coverage at issue (whether first party or third party) and the nature of the duty (e.g., to settle or indemnify) the insurer is alleged to have breached. *Howard* clarifies that the doctrine affords no defense to an insurer’s refusal to settle a third-party claim based on a coverage dispute. Arguably, the case also indicates that the doctrine does not apply to a refusal to defend based on a coverage dispute.

The law imposes a variety of duties upon insurers. Which duties apply in a specific case depends in part upon whether the policy provides first-party or third-party coverage. A first-party insurance policy covers loss or damage directly sustained by the insured. Examples include disability, health, theft, and fire insurance policies. Under a first-party policy, policy benefits are paid directly to the insured for the insured’s loss. The insurer’s fundamental duty under first-party policies is to indemnify the insured for the loss.

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John C. Keith is an associate at Peitzman, Weg & Kempinsky LLP in Los Angeles, where he maintains a broad-based business litigation practice.
A third-party insurance policy also entails a duty to indemnify the insured—but against the insured’s liability to a third party rather than the insured’s own loss. The policy indemnifies the insured for harm (e.g., bodily injury, property damage, or professional malpractice) suffered by a third party. Third-party policies generally obligate the insurer to defend the insured against third-party claims or to reimburse the insured’s defense costs. Examples include commercial general liability, directors and officers, and errors and omissions policies. Courts have also inferred an additional duty: to settle—or, more precisely, to accept a reasonable settlement demand within policy limits.

The Genuine Dispute Doctrine

Chateau Chamberay Homeowners Association v. Associated International Insurance Company, a 2001 first-party coverage case, is often cited as the source of the genuine dispute doctrine. In describing the doctrine, however, Chateau Chamberay cites earlier cases. The supreme court has also explicitly noted that the genuine dispute doctrine is a close corollary of the basic principle governing bad faith claims, which is that an insurer’s denial of or delay in paying benefits gives rise to tort damages only if the insured shows the denial or delay was unreasonable. As discussed in Chateau Chamberay and subsequent cases, the genuine dispute doctrine can fairly be viewed as a logical extension of existing, settled insurance law.

The doctrine has its origin in cases involving disputes over policy interpretation, but courts have applied it to factual disputes as well. Generally, insurers have invoked the doctrine when seeking summary judgment or summary adjudication of bad faith claims. The court in McCoy v. Progressive West Insurance Company affirmed the denial of the insurer’s request for a separate jury instruction on the doctrine, holding that it was subsumed within the general instructions providing that bad faith requires that the insurer acted unreasonably. McCoy indicates that the only utility of the genuine dispute doctrine may be at summary judgment. However, the doctrine does not change the standards for granting summary judgment, which are still that the insurer demonstrate the absence of triable issues about whether the disputed position on which the insurer denied the claim was reached reasonably and in good faith.

The genuine dispute doctrine emerged out of, and has been applied primarily in, first-party coverage cases. Howard suggests that, in third-party cases, the application of the doctrine is limited to the duty to indemnify, which is the only duty common to first-party and third-party coverage. Although Chateau Chamberay and subsequent cases have treated the genuine dispute doctrine as largely in keeping with settled insurance law, courts have had difficulty in reconciling the doctrine with two countervailing and equally settled principles of third-party insurance law.

The first of the countervailing principles is that the duty to defend is broader than the duty to indemnify and is triggered by any suit that potentially seeks damages within the coverage of the policy. The defense duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded or until it has been shown that there is no potential for coverage. A key rationale for giving the duty to defend a broad scope is that many insureds are unable to defend themselves effectively against third-party claims. If the insurer does not provide a defense, insureds may face liability (in the form of a judgment or settlement in excess of policy limits) that could have otherwise been avoided. The supreme court has described this rationale: “The insured’s desire to secure the right to call on the insurer’s superior resources for the defense of third-party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability,” and so the “[i]mposition of an immediate duty to defend”—even before all facts relevant to coverage have become settled—“is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf.”

The second countervailing principle is: “An insurer who denies coverage does so at its own risk.” As held in Comunale v. Traders and General Insurance Company, the insurer incurs this risk even if “its position may not have been entirely groundless.” If the denial is found to be erroneous, then the insurer is liable for all damages proximately caused by the breach, even in excess of policy limits. For example, an insurer that erroneously declines to defend and that refuses to accept a reasonable settlement within policy limits is liable for the entire judgment against the insured, even if it exceeds the policy limits. The insurer’s good faith belief is no coverage is not a defense. Courts have described the measure of damages provided for by Comunale and its progeny alternately as sounding in tort or as sounding in both contract and tort. As recognized by the supreme court more than 50 years ago, the logic behind awarding damages in excess of policy limits is much the same as that behind giving the duty to defend a broad scope. The insured is often unable to defend itself in court or to fund a settlement. If the insurer fails to discharge its defense or settlement duties, the insured will miss opportunities to minimize its exposure and will face a much greater risk of personal liability. Together, these third-party insurance principles require that an insurer, in order to avoid the risk of tort damages, accept a defense whenever there is even a bare potential for coverage, and accept a reasonable settlement within policy limits notwithstanding a good faith belief that there is no coverage.

As a result, these principles are not readily squared with the genuine dispute doctrine. It is not surprising, then, that in the years following Chateau Chamberay courts have usually resisted the efforts of insurers to extend the doctrine to third-party cases. In Century Surety Company v. Polisso, decided five years after Chateau Chamberay, the Third District noted that the doctrine had been applied primarily in first-party coverage cases, and that while the doctrine had also been applied in a third-party indemnity case, it had not been applied in any duty-to-defend case. The court declined to decide whether the doctrine applies in duty-to-defend cases, holding that even if the doctrine were available in theory, the defendant had failed to show it applied under the facts of the case.

Shortly before Polisso skirted the issue, the Fifth District addressed, in an unpublished opinion, whether the genuine dispute doctrine applies to the duty to defend. The court did not explicitly foreclose application of the doctrine to the duty to defend, but that conclusion is implicit. In Perez v. Fire Insurance Exchange, the court rejected the insurer’s argument that because its interpretation of the policy—that a motor vehicle exclusion precluded coverage of a third-party claim—was reasonable, its refusal to defend its insured could not subject it to bad faith liability. The court found that the insurer’s reliance on Call Farm Insurance Company v. Krasiewicz was misplaced, because that case involved a breach of the duty to indemnify, not the duty to defend. The court reasoned that, even assuming there were genuine issues regarding coverage at the time of tender, all the insured needed to show was a potential for coverage to be entitled to a defense. Or, as the court stated, “[E]ven if [the insurer’s] interpretation of the motor vehicle exclusion was reasonable, it was unreasonable for [the insurer] to fail to recognize the possibility” that it was mistaken.

Two years after Perez, the Second District reached a different conclusion in the short-lived Delgado v. Interinsurance Exchange of the Automobile Club of Southern California. The court remarked in dicta that in the case of a legal dispute over the insurer’s
duty to defend, the genuine dispute doctrine probably would apply. Delgado was reversed on different grounds, but in the interim, a U.S. district court in California, in Harbison v. American Motorists Insurance Company, remarked on Delgado and questioned whether the doctrine could ever properly apply to a dispute over coverage, whether legal or factual.30

In Griffin Dewatering Corporation v. Northern Insurance Company of New York, the Fourth District held that an insurer could not be held liable for bad faith for denying coverage and refusing to defend its insured based on a reasonable, though ultimately incorrect, interpretation of the policy’s “total pollution exclusion.”31 Although a later supreme court case made it clear that the coverage exclusion did not apply, the only two court of appeal cases on point at the time supported the insurer’s position. The court held, therefore, that it was not bad faith for the insurer to advance its legal position on the issue. The court disclaimed any reliance on or opinion about the genuine dispute doctrine. The court treated the doctrine as distinct from what it viewed as the real issue: whether the denial of coverage was objectively reasonable.32 Despite the disclaimer, however, practitioners may still consider how Griffin addresses issues presented by the genuine dispute doctrine, as do prior holdings that describe the doctrine as a close corollary of, or as even subsumed within, the general principles underlying the bad faith doctrine.33

Howard

Howard offers perhaps the clearest statement yet in a published California opinion that the genuine dispute doctrine does not apply in all bad faith cases and that its availability in third-party cases is far more limited than in first-party cases. However, Howard explicitly discusses only the doctrine’s application to the duty to indemnify and the duty to settle. It is arguably implicit in the case, however, that the doctrine is inapplicable to the duty to defend.

Howard arose from child molestation cases brought against the Catholic Church. The defendant insurer (American) had denied coverage and refused to defend or to contribute to the settlement of claims brought against the Bishop of Stockton for negligent retention of a molesting priest. The trial court ruled against American for bad faith failure to defend, to settle, and to indemnify.

On appeal, American argued, citing Chateau Chamberay, that its refusal to settle was prompted by a genuine dispute concerning coverage. The court held that American’s reliance on Chateau Chamberay was misplaced, observing that Chateau Chamberay was a first-party coverage case and explaining that a court must be mindful of the differences between first-party and third-party policies when determining the scope of an insurer’s duty of good faith.34 Application of the genuine dispute doctrine to American’s refusal to settle would, the court held, contravene the longstanding rule that a belief that the policy does not provide coverage should not affect the decision about whether a settlement offer is reasonable. The only permissible consideration is whether, in light of the victim’s injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer. Ultimately, the court held that while “[i]n first party cases an insurer may raise a reasonable dispute over coverage without being guilty of bad faith,” the “genuine dispute rule does not apply in all bad faith insurance contexts.”35

The court did not explicitly discuss whether, or the extent to which, the genuine dispute doctrine might apply to a refusal to defend based on a coverage dispute. However, that the doctrine does not apply can be inferred from the court’s holding. Among other things, the court affirmed (with immaterial modifications) the trial’s court judgment finding American liable for bad faith for its refusal to defend, settle, and indemnify.37 Supporting the inference is the court’s explicit distinguishing of Chateau Chamberay as a first-party case and the court’s explicit caution that a court must be mindful of the different purposes of first-party and third-party insurance in determining the scope of the insurer’s obligations. Finally, the immediate juxtaposition in the court’s opinion of the statement that, in first-party cases, an insurer may raise a reasonable dispute over coverage without being guilty of bad faith, with the statement that the genuine dispute rule does not apply in all bad faith insurance contexts, corroborates the inference that the court would apply the genuine dispute doctrine only to alleged breaches of the duty to indemnify.

The Duty to Indemnify

If the Howard court did in fact conclude that the genuine dispute doctrine should be limited to the duty to indemnify, whether in a first-party or third-party case, that would be a logical conclusion. An insurer’s refusal to indemnify its insured for a third-party judgment against it will have much the same effect as a refusal to indemnify for a first-party loss suffered by the insured. In both cases, the loss has, in effect, become settled, and there are no further prophylactic measures that the insurer can take to minimize the loss. At that point, the question becomes one of actual coverage—i.e., whether or not the policy in fact provides for indemnification of the loss. The insured having only bargained for indemnification of actually covered losses, and the insurer having only agreed to provide as much, the insurer should in fairness be able to advance a reasonable, genuine dispute about coverage without being subjected to the risk of additional liability for bad faith.

The situation is entirely different when the insured’s loss has not yet become settled. When faced with either a request for a defense or a request to settle within policy limits, the insurer can, by accepting that request, minimize the insured’s exposure to a potentially greater loss down the road. The insurer should therefore do so, notwithstanding any dis-
Putting aside whether Scottsdale was decided correctly, Delgado and Griffin extend that case beyond its context to hold that an insurer that uses an erroneous legal position to deny defense faces no risk of bad faith liability as long as its position is reasonable. While the insurer in Scottsdale sought to recoup its defense costs after the fact, it at least minimized its insured’s exposure to an adverse judgment by taking the prophylactic measure of providing the insured a defense under a reservation of rights. In contrast, an insurer that denies a defense, as in Delgado and Griffin, will often leave its insured significantly exposed to a potentially sizeable adverse judgment. It therefore seems hard to justify allowing an insurer to avoid liability for bad faith based on a coverage dispute—even a genuine one—at the time of tender.

This conclusion follows regardless of whether the dispute can be characterized as legal or factual. Put another way, it makes no difference to the undefended insured that the denial of coverage is based on unsettled law rather than unsettled facts; it is left without a defense, and the resulting increase in its exposure is the same, either way. Neither should it make a difference to the insurer that the claim presents a legal, as opposed to factual, coverage defense; the underlying claim is not altered. If anything, an insurer can more quickly and inexpensively resolve a legal coverage dispute than a factual one. Moreover, it imposes no undue burden on the insurer to require that it defend its insured, subject to a reservation of rights, as the price of avoiding the risk of bad faith liability. Typically, the insurer is better equipped to bear the burden of defense than its insured—and, as Scottsdale makes clear, if the insurer is later proved correct that no potential for coverage ever arose, it is entitled to recoup all defense costs advanced under a reservation of rights.

These arguments are subject to legitimate counterarguments in favor of the insurer, including that the insured’s other protections under the law should be sufficient, without the need for a bad faith claim, or that the insured may be judgment-proof and the insurer, practically speaking, unable to recover its defense costs. However, these arguments apply equally where the coverage dispute is factual rather than legal, and the rationale for treating legal coverage disputes differently in the bad faith context seems unconvincing. The California Supreme Court has denied review of genuine dispute cases, including Howard, so that question, and the application of the doctrine in general, has yet to be fully delineated.

6 See id. at 724; Amado v. Pringle Mut. Life Ins. Co., 290 F. 3d 1152, 1160-61 (9th Cir. 2002).
8 Wilson, 42 Cal. 4th at 724.
11 See id. at 295-96.
13 This conclusion follows regardless of whether the dispute can be characterized as legal or factual. Put another way, it makes no difference to the undefended insured that the denial of coverage is based on unsettled law rather than unsettled facts; it is left without a defense, and the resulting increase in its exposure is the same, either way. Neither should it make a difference to the insurer that the claim presents a legal, as opposed to factual, coverage defense; the underlying claim is not altered. If anything, an insurer can more quickly and inexpensively resolve a legal coverage dispute than a factual one. Moreover, it imposes no undue burden on the insurer to require that it defend its insured, subject to a reservation of rights, as the price of avoiding the risk of bad faith liability. Typically, the insurer is better equipped to bear the burden of defense than its insured—and, as Scottsdale makes clear, if the insurer is later proved correct that no potential for coverage ever arose, it is entitled to recoup all defense costs advanced under a reservation of rights.
14 Scottsdale does hold that the law governing the insurer’s duty to defend need not be settled at the time the insurer makes its decision. Instead, subsequent case law can establish, in hindsight, that no duty to defend ever existed. Scottsdale relied for its holding on an earlier case, Tamrac, Inc. v. California Insurance Guarantee Association, in which the court distinguished between legal or factual uncertainty regarding coverage.
15 With Tamrac, however, the subsequently decided supreme court case supported the insurer’s position. As a result, the court’s holding—that the insured could not recover the defense costs that it incurred before the adverse precedent came down—does not necessarily resolve the question of whether, had the insurer been proved wrong instead of right, the insured could have maintained a claim for bad faith.
Even though California voters enacted Proposition 51 more than 20 years ago, Civil Code Section 1431.2—codified as part of the initiative known as the Fair Responsibility Act of 1986—continues to create controversy. Parties seek to avoid the potentially harsh consequences of the section, which mandates the several apportionment of general damages between joint tortfeasors. Both plainiffs and defendants are particularly concerned about entities involved in the dispute but not party to the litigation or otherwise immune from suit.

Proposition 51 governs the apportionment of noneconomic damages in most tort cases. It amended the pre-existing common law rule that all tortfeasors were jointly and severally liable to the plaintiff for all damages resulting from an indivisible injury proximately caused by the tortfeasors collectively. The common law rule had come under increasing criticism for allowing substantial verdicts against relatively less blameworthy defendants, including public entities, that seemingly had deep pockets but were often financially burdened. Proposition 51 left the common law rule in place regarding joint and several liability for economic damages, but for general damages, Section 1431.2 states, “In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for noneconomic damages shall be several only and shall not be joint.”

Proposal 51 thus contains pitfalls for plainiffs and defendants. Regarding economic damages, defendants still must contemplate the prospect that other joint tortfeasors will not be able to contribute their apportioned share—and those with deep pockets may find themselves paying disproportionately. Conversely, under Section 1431.2, plainiffs face the risk that each tortfeasor will not be able to pay its proportionate share of general damages, perhaps leaving some portion of a judgment uncollectible.

Michael M. Walsh is an associate at Sedgwick, Detert, Moran & Arnold in Los Angeles, where he focuses on appellate law and complex litigation, including products liability and insurance.
“fault” in a general sense and thus can include intentional tortfeasors as well as strictly liable defendants in its calculation of apportionment.

Section 1431.2 does not explicitly include procedures for addressing absent parties for purposes of apportionment. Indeed, this failure was the impetus for an unsuccessful constitutional challenge to the validity of Proposition 51 on the grounds of vagueness in *DaFonte v. Up-Right*—the first California Supreme Court case to specifically address Section 1431.2. The court held that the only reasonable construction of Section 1431.2 was that “a defendant[s]’ liability for noneconomic damages cannot exceed his or her proportionate share of fault as compared with all fault responsible for the plaintiff’s injuries, not merely that of ‘defendant[s]’ present in the lawsuit.” The *DaFonte* court further held that the statute “neither states nor implies an exception for damages attributable to the fault of persons who are immune from liability…. ” *DaFonte* lays the foundation for determining how plaintiffs and defendants can deal with absent entities or individuals who are potentially at fault for purposes of apportionment as well as the significance, if any, of immunity for those nonparties.

### Immunity versus Blamelessness

The basis of potential liability in negligence is duty. If a defendant had no duty toward the plaintiff, then for the purpose of liability, it does not matter whether or not the defendant’s actions caused the plaintiff’s harm. A classic, although extreme, example of the lack of duty is the ancient doctrine that “the king can do no wrong.” Since all law flowed from the king, any action by the king, by definition, could not be a violation of the law. Anyone injured by an action of the king could at best petition the king for relief at his discretion. In effect, the king could voluntarily grant permission for suit or otherwise voluntarily provide a remedy, but the king had committed no legal wrong and was therefore not at fault in the legal sense. Under Civil Code Section 1431.2, the king would not be considered for purposes of apportionment, since he would not be at fault for the injury as a matter of law. This monarchical rule has morphed into government sovereignty, although modern governments generally consent to a wide range of tort liability. For other nonroyal defendants, either a judicial finding (such as summary judgment) or a legislative enactment (for example, a statute defining the potential scope of liability) can remove a party from any consideration of fault.

Immunity from suit—a principle that is sometimes applied loosely—refers in its more common application to protection from liability for a legal wrong that would otherwise be actionable. It is not the same as blamelessness. Indeed, immunity involves the recognition that the person or entity in question has committed a wrong for which liability could attach but, for public policy reasons, is not subject to suit despite being legally at fault. A common example is the immunity from prosecution sometimes granted to a criminal suspect who agrees to a plea bargain. While shielding the person entering the plea from further criminal liability, the immunity agreement generally does not pretend that the criminal suspect is not at fault or that no crime was committed.

### State and Federal Governmental Immunity

In California, the Tort Claims Act is the primary authority defining the scope of governmental immunity. This act, codified at Government Code Sections 815 et seq., abolishes “all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution, e.g. inverse condemnation.” Thus, with exceptions for certain constitutional or statutory claims, a public entity in California does not commit a legal wrong through its actions, regardless of who is hurt, and cannot be sued in tort in state court.

These standards apply for purposes of apportionment under Civil Code Section 1431.2 when the public entity is an alleged joint tortfeasor. Apportionment is based on fault, so a public entity will only face apportionment when a showing is made that the entity is potentially liable under the applicable provisions of the Government Code or as required by either the state or federal constitutions. Otherwise, there is no fault to apportion to the public entity because it has not committed any legal wrong as a matter of law—and therefore it cannot be at fault for the claimed damages, regardless of whether any action of the public entity resulted in damage to the plaintiff.

For example, in *Munoz v. City and County of San Francisco*, the court dismissed a claim that the city had negligently selected and trained its police officers. It did so because the claim did not fall within the statutory language of Sections 815 et seq. that permit exceptions to the prohibition against liability for governmental entity. Moreover, the city could not be assessed for apportionment since the only claim against it was outside the Tort Claims Act (although it was still vicariously liable for the actions of a police officer).

The Tort Claims Act also provides public entities with various immunities—for example, for discretionary acts (Government Code Section 820.2) and prosecuting actions (Section 821.6). These provisions protect public employees from suit under circumstances that might otherwise support a basis for liability. However, immunity is not even an issue until the plaintiff makes a showing that the government agent was at fault and would otherwise be liable for the injury in the absence of immunity. Therefore, the immunity derived from the Tort Claims Act does not remove the government agent from apportionment consideration under Civil Code Section 1431.2, even though the agent is protected from suit by statute.

The federal concept of governmental immunity is similar to that of California, with similar results for the application of Section 1431.2. As a sovereign, the United States remains immune from tort liability except as it provides express statutory consent for suit. The broadest example of this type of statutory consent is the Federal Tort Claims Act, which permits tort claims against the federal government “to the same extent as a private individual under like circumstances,” with specified exceptions. As in California, various immunities then apply to protect federal agents from suit for actions that are otherwise wrongful and would be subject to liability under the FTCA. The application of these immunities is the same as in California: The government agent, while protected from suit and a damages award, is still at fault under the FTCA and therefore still considered for the purpose of apportioning fault under Section 1431.2.

In *Collins v. Plant Insulation Company*, the California Court of Appeal reversed a decision by the trial court that the U.S. Navy could not be subject to apportionment in an asbestos exposure case. There was no dispute that the decedent had been exposed to asbestos while working at a Navy shipyard, or that the Navy itself was immune from suit, but the trial court concluded that the Navy’s sovereign immunity removed it from apportionment consideration entirely. The appellate court noted that the Navy’s immunity was based on the discretionary function exception to the FTCA, which expressly applies even if that discretion is abused by actions or conduct recognized as wrongful or negligent. As a result, the Navy was at fault for purposes of apportionment, even if it was protected from suit.

### Legal Absolution

States also can grant legal absolution to private parties, thereby removing them from any consideration based on fault. Distinguished from mere immunity, which protects the beneficiary from suit despite his or her fault, this type of absolution declares that no legal wrong was committed in the first
Section 877(a), it is no longer considered for apportionment. If the plaintiff's economic damages, even though some defendants have sufficient assets to cover the entire judgment. From Section 1431.2, if apportionment, only as provided for by statute.

A manufacturer produces a defective product that sells to the plaintiff, who is then injured. If the plaintiff's injuries are considered cause of the plaintiff's injuries under strict products liability, a manufacturer might be forced to cover all of the plaintiff's economic damages, even though that defendant was only apportioned 5 percent of the liability.

C. Apportionment is not considered in the apportionment of fault under Section 1431.2.

A California entity may be considered for purposes of apportionment under Section 1431.2.

An employer, by virtue of being vicariously liable for its employee's actions, is also considered for purposes of apportioning fault under Section 1431.2.

Under current law, an employer is not considered separately liable under a claim of negligent entrustment if the employer concedes that it is vicariously liable for the employee's actions.

A California public employee who is protected by statutory immunity is not considered for purposes of apportionment. Under Proposition 51, a portion of a plaintiff's judgment.

When more than one product was a substantial cause of the plaintiff's injuries under strict products liability, fault is apportioned between the products, according to Section 1431.2.

Once a party has obtained a good faith settlement by private parties do not constitute legal wrongs and are therefore removed from any consideration of apportionment.

Civil Code Section 1431.2 codifies a longstanding common law rule in California.

Because the U.S. Navy has sovereign immunity from suit in tort, it is not considered in the apportionment of fault with other joint tortfeasors.

A party must be served with process to be considered for purposes of apportionment under Section 1431.2.

Because Section 1431.2 was enacted, a defendant whose proportionate fault was 1 percent could be held to pay all of the plaintiff's damages.

Before Section 1431.2 was enacted, a defendant or considered for purposes of apportionment under Section 1431.2.

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A California entity may be considered for purposes of apportionment under Section 1431.2.
A common example of vicarious liability is respondeat superior—a doctrine that holds an employer liable for the actions of its employees within the scope of employment. Civil Code Section 1431.2 is applicable to employees under these circumstances, but an employer vicariously liable under respondeat superior cannot use Section 1431.2 to reduce its liability for noneconomic damages based on the argument that the employer bears no personal fault for the injury.

Vicarious Liability

Vicarious liability makes one party responsible for the actions of another by operation of law, rather than on the basis of fault. For example, a person with a nondelegable duty may be held vicariously liable for the negligence of a contractor hired for a particular task, even though the actual contractor was innocent of any personal wrongdoing. Civil Code Section 1431.2 is applicable to the application of Section 1431.2, which apportions liability on the basis of fault. For example, a person with a nondelegable duty may be held vicariously liable for the negligence of a contractor hired for a particular task, even though the actual contractor was innocent of any personal wrongdoing. While 1431.2 would apply in apportioning fault to a vehicle owner regarding his or her personal liability for negligent entrustment, the section cannot be used to reduce the statutory liability of the vehicle owner under Vehicle Code Section 17150, since that liability is based not on fault but rather on the status of being an owner of the vehicle. A common example of vicarious liability is respondeat superior—a doctrine that holds an employer liable for the actions of its employees within the scope of employment. Civil Code Section 1431.2 is applicable to employees under these circumstances, but an employer vicariously liable under respondeat superior cannot use Section 1431.2 to reduce its liability for noneconomic damages based on the argument that the employer bears no personal fault for the injury. Of course, if the employer was itself a joint tortfeasor based on its own actions, it could invoke Section 1431.2 regarding its own direct liability while separately still being vicariously liable for its employee’s liability.

A potential exception regarding the separate liability of employers is currently pending before the California Supreme Court. In

A similar result occurs with a judicial finding that a party had no duty to the plaintiff. In these cases, courts have made legal findings that the defendant bears no fault for the injury at issue because the defendant had no duty to the plaintiff relating to the injury. For example, in Ford v. Polaris Industries, Inc., the court granted summary judgment in favor of the owner/operator of a two-person watercraft, finding that she owed no duty of care to the plaintiff, a passenger in the watercraft, under the doctrine of primary assumption of the risk. Since the operator had no duty to the plaintiff, she could not have breached any duty or committed a tort and therefore had no legal fault regarding the plaintiff’s injuries, which resulted from the plaintiff falling off the craft. This legal conclusion precluded any consideration of the operator for purposes of apportioning fault

The employer seeks to extend this ruling to claims of negligent hiring and retention—a rejection rejected by the trial court and court of appeal, in part because Armenta predates Proposition 51.

Strict Products Liability, Workers’ Compensation, and Absent Parties

In a strict products liability case in which an allegedly defective product was the only cause of the injury, Civil Code Section 1431.2 does not apply among the defendants in the chain of distribution for that product. The imposition of strict liability upward in the chain of distribution for a defective product is a deliberate allocation of responsibility based on the social cost of distributing a potentially defective product—and independent from a finding of fault. Similar to vicarious liability, strict products liability is an obligation imposed as a matter of policy.

However, if multiple products caused an injury, then comparative fault principles come into play. These principles apply to apportion liability between the different products, thus invoking the application of Section 1431.2.
November 24, 2009

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

Dear Jack:

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

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

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

Yours truly,

Andrew M. Stein
Similarly, if negligence defendants are named in the action, apportionment under Section 1431.2 applies between the defendant manufacturers and distributors of the products and the defendants facing claims of negligence. For considerations of apportionment, each product at issue is a party in itself, subject to an allocation of fault in the same manner as a negligent defendant. Once a product is assigned with its portion of fault, then strict products liability principles are employed to determine which entities are responsible for that portion of the judgment.

The DaFonte court addressed another common scenario in determining apportionment under Section 1431.2—the interaction of workers’ compensation law and claims of employer liability. In DaFonte, the plaintiff was injured by a mechanical grape harvester that he was trying to clean, and he sued the manufacturer for product liability. The manufacturer argued that the negligence of the plaintiff’s employer was the cause of the accident.

While the employer was protected under workers’ compensation law from a suit in tort, the jury apportioned 45 percent of the fault to the employer’s negligence. Although the product defendant remained jointly and severally liable for the economic damages, DaFonte held that the immunity of the employer to civil suits did not remove it from consideration in apportioning fault for general damages.

According to the DaFonte court, the employer still had “legal fault” and therefore remained a tortfeasor for purposes of apportionment—even if the extent of the employer’s obligation to pay was defined solely under workers’ compensation law. This result follows the practical reality that an employer, although immune from most civil suits, is legally responsible for employee injuries. As a result, an employer still has a remedy against an employer—albeit one controlled by the workers’ compensation laws. This result is similar to what can be achieved in a civil suit against third parties by an employee receiving benefits under the federal Longshore Act.

Insofar as an employer is found to be at fault for an employee’s injuries, and the workers’ compensation payments are attributed to economic damages, a third-party defendant is entitled to a credit in the amount of the workers’ compensation payments. Of course, this works both ways, with an employer also entitled to recover from the tort defendants if any of the employer’s workers’ compensation payments exceed its designated share of liability.

The fact that a party has settled does not stop the trier of fact from considering that party in apportioning liability for a plaintiff’s injuries. This is true even if the settlement was approved as a good faith settlement under Code of Civil Procedure Section 877(a). Insofar as the settlement proceeds are attributed to general damages, the remaining parties are not entitled to any offset, as these damages are only several under Civil Code Section 1431.2 and therefore are specific to each defendant. As a result, how settlement proceeds are allocated between economic and general damages will determine the amount of any offset in favor of the remaining defendants. This allocation can be addressed by the settling parties as part of the settlement agreement and can even be approved as part of the determination that a good faith settlement was reached. The division can also be accomplished after the verdict is returned and the applicable offsets are being determined.

Similarly, a party who is simply missing from the proceedings because no one chose to name and serve that party can still be considered for purposes of apportionment. For example, in a slip and fall claim against property owners, the owners were permitted to admit evidence regarding the alleged medical malpractice of the healthcare providers who treated the plaintiff, even though neither the plaintiff nor the defendants had named the providers as a party to the suit. As with all such attempts, however, the defendant bears the burden to establish the potential liability of the absent party to support the apportionment.

While the application of Civil Code Section 1431.2 may seem inconsistent to plaintiffs who are attempting to recover their damages, the basic principles governing apportionment of fault and the application of several liability for general damages have remained consistent since DaFonte. Any nuance in application hinges on what it means to be legally at fault—a concept that predates Proposition 51 but dominates the outcome of any attempt to apply it. Once that issue is resolved, and a jury verdict reached, the application of Section 1431.2 is largely a question of arithmetic.

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3 Civ. Code §1431.1; see also Buttram, 16 Cal. 4th at 528.
5 See Weidenfeller v. Star & Garter, 1 Cal. App. 4th 1, § 1 (1991). The Weidenfeller court addressed the right of a negligent defendant to apportionment when a codefendant is found liable under an intentional tort. It ruled that a defendant found liable for an intentional tort does not have a corresponding right to apportionment. See also Thomas v. Duggins Constr. Co., Inc.,
7 Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1200-02 (1988).
8 DaFonte v. Up-Right, 2 Cal. 4th 593, 603 (1992).
9 Id. at 601.
10 Since apportionment does not apply regarding economic damages, any defendant found liable to any degree can be held accountable for the entire award of economic damages. The issue then becomes one of contribution, as the defendant saddled with the economic damages attempts to collect from the other joint tortfeasors.
14 Richards v. Owens-Illinois, Inc., 14 Cal. 4th 985, 989 (1997);
15 GOV’T CODE §§811.2 et seq. (1951) (noting the increasing criticism of the doctrine in modern jurisprudence); see also Collins v. Plant Insulation Co., 185 Cal. App. 4th 260, 272-73 (2010); BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND, First Book, ch. 7, Of the King’s Prerogative.
16 1 GOV'T CODE §815, Legislative Committee cmts.—Senate. The state remains subject to suit for violations by joint tortfeasors.
17 Under Government Code §811.2 a public entity includes the state as well as each county, city, and any other political subdivision in the state and is intended to encompass each “independent political or governmental entity.” California Law Revision Commission, cmt. to GOV’T CODE §811.2.
18 GOV’T CODE §815; see also cases cited in 5 WITKIN, SUMMARY OF CALIFORNIA LAW, Torts, §223.
20 Id. at 176-77.
21 Id.
22 Davidson v. City of Westminster, 32 Cal. 3d 197, 202 (1982).
28 Id. at 264-65.
29 Id. at 270, 272.
30 CIV. CODE §1714.45(a).
33 Collins, 185 Cal. App. 4th at 268.
34 Richards, 14 Cal. 4th at 989.
46 DaFonte v. Up-Right, 2 Cal. 4th 593 (1992).
47 LAB. CODE §§3602, 3864.
48 DaFonte, 2 Cal. 4th at 604.
49 Id. at 604 n.6.
51 DaFonte, 2 Cal. 4th at 604.
55 Regan Roofing, 21 Cal. App. 4th at 1706-08.
In 2006, the California Supreme Court ruled in *Bernard v. Foley*¹ that the Probate Code prohibition of transfers by dependent elders to specified classes of individuals, including caregivers, applied even when a caregiver’s services were unpaid and the caregiver and the elder had a personal relationship before the services began. *Bernard* represented a turning point in inheritance cases. It transformed a rule that previously only invalidated the most obvious and overreaching cases of elder abuse by caregivers into a trap that potentially could ensnare even well-intentioned friends and neighbors. Concerned estate planning attorneys responded accordingly with defensive measures, with their attendant complications and expense.

Several decisions followed *Bernard*, providing both guidance and concern for lawyers. These cases, in turn, led to Senate Bill 105—effective January 1, 2011—which provides some relief by limiting the reach of *Bernard* and enacting guidelines for independent attorneys who review donative transfers to “care custodians,” as caregivers are known in the Probate Code.

Still, lawyers are faced with the issue of elderly clients susceptible to the influence of care custodians. Often this occurs for medical and psychological reasons not intuitively discernible to lawyers trained to detect the decades-old legal factors of undue influence, lack of capacity, and fraud. Planners are thus increasingly confronted with situations in which individuals subject to financial abuse by care custodians do not meet the historical standards of lack of testamentary capacity.

In California, any adult is permitted to execute a will.² But when that document is the product of diminished capacity or undue influence, a court will set it aside as not representing the true intentions of its creator. The traditional grounds for challenge are the doctrines of lack of capacity and undue influence. Probate Code Section

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Mark J. Phillips is a partner with Goldfarb, Sturman & Averbach in Encino, where he practices in the areas of estate planning and estate administration. He is a certified specialist in estate planning, trust, and probate law. Steven Hunt is a licensed clinical psychologist with a clinical and consulting practice in Westlake Village.
6100(a) provides that an individual is not mentally competent to make a will if he or she does not have sufficient mental capacity to do any one of the following:

- Understand the nature of the testamentary act.
- Understand and recollect the nature and situation of the individual’s property.
- Remember and understand the individual’s relationship to living descendants, spouse, parents, and those whose interests are affected by the will.

Further, an individual is not competent to make a will if he or she suffers from mental disorders with symptoms including delusions or hallucinations—and the result is the disposition of property in a way that the individual would not otherwise have chosen except for the existence of the delusions or hallucinations.3

Probate Code Section 2104 codifies the doctrine of undue influence. The section provides that a will or a part of a will is ineffectual to the extent that its execution was procured by duress, menace, fraud, or undue influence.4

**Susceptibility to Fraud and Abuse**

These standards are often of limited help in dealing with the issues of older clients. Practitioners often find that elderly clients susceptible to fraud or abuse nevertheless do not meet the tests of incapacity in Probate Code Sections 6100 et seq. and are not subject to provable undue influence or duress. Instead, these clients may suffer from cognitive deficiencies that leave them vulnerable to the influence of others while leaving their remaining reasoning capabilities relatively intact.

Every experienced estate planner has been confronted with an apparently well-oriented elderly client wishing to make an unprecedented and unusual disposition of assets, often to a caregiver or companion the client has met only recently. The client can discourse for hours on economic or social issues and otherwise exhibit rational behavior, but clearly some cognitive defect exists in the client’s reasoning—and that defect is neither addressed nor detected by the application of standards for discerning an ordinary lack of capacity.

Aging is a progressive, complex process of physiological and psychological changes. Normal aging tends to eventually reduce short-term memory and reaction time more significantly than other psychological factors. Intelligence, learning, problem solving, life skills, and personality are more resilient to aging. Dementia and senility are not normal or expected outcomes of aging—they occur in some but not all individuals as they age. Nonetheless, psychological decline increases geriatric susceptibility and vulnerability, which is commonly accompanied by depression and dementia.

What causes an elderly individual to be misled by a care custodian is not clearly understood. However, an increasing number of studies have begun to identify a consistent group of variables found in circumstances of elder abuse. A large-scale analysis of reports on elder financial abuse collected by The National Foundation of Adult Protective Services discovered factors that significantly predict susceptibility to mistreatment, including cognitive impairment, social isolation, depression, loneliness, a tendency to trust others without question, and compromised decision-making. They note that susceptibility to abuse is especially enhanced by loss, particularly that of a spouse, friend, or other family member.5

Other researchers have highlighted the dynamic interaction that takes place between elderly individuals and their caregivers. They report that the most vulnerable elderly are lonely, depressed, anxious, and have a propensity for pleasing others. Moreover, the researchers describe exploitative caregivers as expert manipulators who possess excellent skills of persuasion to convince the elderly person of their trustworthiness. Persuading elders is partly accomplished by isolating them from contact with their support network. Indeed, elderly individuals in second and third marriages are most vulnerable because they may experience the higher levels of conflict that are frequently found in blended families.6

Elder abuse affects hundreds of thousands of victims. Reports to state adult protective services revealed a near doubling of reported cases between 1986 and 1996, from 117,000 to 293,000, and some experts estimate that only one in 14 cases of domestic elder abuse is reported to authorities.7 Most incidents involve physical abuse or neglect, not financial abuse, but the latter comprises approximately 12 to 15 percent of reported cases. According to the National Center on Elder Abuse, the vast majority of victims are female, and the vast majority of perpetrators are male (although the abuse is rarely sexual). Approximately 60 percent of perpetrators are members of the victim’s family.

**Prohibited Transfers**

Since 1993, California has prohibited donative transfers by dependent adults during their lives or upon their deaths to a list of professionals involved in the drafting and/or transcribing of documents. This statutory proscription was codified in Probate Code Sections 21350 et seq. In 1997, persons acting as occupational care custodians were added to the list of prohibited transferees in an attempt by the legislature to stem the increasing number of cases in which caregivers targeted weakened or enfeebled elderly individuals in their care. If the transferee qualified as a “dependent adult” under Section 21350,9 his or her lifetime or testamentary transfer to a prohibited transferee was automatically void. The addition of care custodians to the list of prohibited transferees was a tacit acknowledgement that the traditional tools of contests based on lack of capacity or undue influence were ineffective in ferreting out suspect transfers.

From the beginning, a series of exceptions was incorporated into Section 21350 to ameliorate its harshest effects. These included exceptions for transfers to those persons 1) related to the transferee, 2) who received benefits under documents or transfers previously approved by the court in a conservatorship proceeding, and 3) who were subsequently able to prove to a court by clear and convincing evidence that the donative transfer was not the subject of fraud or undue influence.12

The reach of those covered by the prohibitions against transfers by the elderly to care custodians took a dramatic turn with the California Supreme Court’s 2006 decision in *Bernard*. The case had its origins in 1991, when Carmel Bosco, then 87, created a trust. She then added James Foley and Ann Erman as her caregivers. After three months, Bosco amended her trust a final time. The reach of those covered by the prohibitions against transfers by the elderly to care custodians took a dramatic turn with the California Supreme Court’s 2006 decision in *Bernard*. The case had its origins in 1991, when Carmel Bosco, then 87, created a trust. She then added James Foley and Ann Erman as her caregivers. After three months, Bosco amended her trust a final time. The reach of those covered by the prohibitions against transfers by the elderly to care custodians took a dramatic turn with the California Supreme Court’s 2006 decision in *Bernard*. The case had its origins in 1991, when Carmel Bosco, then 87, created a trust. She then added James Foley and Ann Erman as her caregivers. After three months, Bosco amended her trust a final time. The reach of those covered by the prohibitions against transfers by the elderly to care custodians took a dramatic turn with the California Supreme Court’s 2006 decision in *Bernard*. The case had its origins in 1991, when Carmel Bosco, then 87, created a trust. She then added James Foley and Ann Erman as her caregivers. After three months, Bosco amended her trust a final time. The reach of those covered by the prohibitions against transfers by the elderly to care custodians took a dramatic turn with the California Supreme Court’s 2006 decision in *Bernard*. The case had its origins in 1991, when Carmel Bosco, then 87, created a trust. She then added James Foley and Ann Erman as her caregivers. After three months, Bosco amended her trust a final time.

James Foley and Ann Erman were long-time friends of Bosco. In July 2001, Bosco, then seriously ill, moved into their home, where they cared for her until her death three months later. The nature of that care was commensurate with hospice care and included bandage replacement, supervision of medication, personal hygiene, and feeding. There is some dispute whether they were paid for these services, but the reasoning of the decision applies as if they were not.

Three days before her death, Bosco amended her trust a final time to leave the bulk of her estate to Foley and Erman, who had never previously been beneficiaries of her estate plan. The trust was challenged by the heirs of Bosco, who characterized Foley and Erman as care custodians prohibited from receipt of any part of the estate under Probate Code Section 21350(a)(6).

Until the enactment of SB 105 in 2010, the definition of a “care custodian” was governed by Welfare and Institutions Code Section 15610.17(y), which contains a list of 25 categories of caregivers. The first 24 of those categories consist of institutional and professional paid providers of personal services, including health facilities, clinics, home health agencies, adult day healthcare centers, foster homes,
and regional centers. The final category is “any person” who provides health or social services.

Courts in California previously held that the prohibition of Section 21350(a)(6) against transfers to care custodians did not include transfers to friends acting as nonprofessional caregivers to a dependent adult without remuneration. Yet, in assessing the facts in *Bernard*, the supreme court concluded that “nothing in the statute’s structure, terms or language authorizes us to impose a professional or occupational limitation on the definition of ‘care custodian’ or to craft a pre-existing personal friendship exception.”

The decision was 4-3, with a concur- ring opinion by Chief Justice Ronald George urging the legislature to revisit Probate Code Section 21350 to avoid injustice to well-intentioned friends of dependent adults. The case also sported a vigorous dissent.

**The Bernard Progeny**

The succession of opinions issued after *Bernard* has left estate planners wondering where the boundaries of the “care custodian” definition might lie. The briefing in *Estate of Odian* had concluded but oral argument had not commenced when *Bernard* was decided. Helen Odian never married and did not have any children. She died in January 2003 at age 87 and left her entire estate to Catharina Vulovic, who had been her paid live-in companion for two years before Odian moved into a nursing home.

On appeal, Vulovic conceded that Odian was a dependent adult within the meaning of Probate Code Section 21350(a). However, Vulovic contended that she was not a care custodian because she had a pre-existing personal relationship with Odian, was not a professional caregiver, and did not provide the kind of services that typically define a care custodian’s role. Vulovic relied on *Conservatorship of Davidson* for the contention that her personal relationship with Odian excluded disqualification under Probate Code Section 21350.

Enter the *Bernard* decision, which held that the legislature did not intend to exclude caregivers who had pre-existing personal relationships with a dependent adult from the classes of individuals to whom the presumption of undue influence applies under Probate Code Section 21350(a). Relying on *Bernard*, the *Odian* court determined that Vulovic was a prohibited care custodian and thus the bequest to her was invalid. The fact that Vulovic had never previously worked as a caregiver and was arguably not a professional caregiver was irrelevant to her qualification as a care custodian within the meaning of Section 21350(a)(6), according to the court.

Indeed, the broad reach of Welfare and Institutions Code Section 15610.17(y)(25)—which includes within the definition of “care custodian” any person who provides either health or social services—was fatal to Vulovic’s argument. Neither *Davidson* nor *Bernard* discussed the meaning of the term “social services,” and neither held, as Vulovic contended, that only the provision of substantial, ongoing health services rendered a person a care custodian within the meaning of Section 21350(a)(6). Odian thus treated the meaning of “social services” in the context of Section 21350(a)(6) as a question of first impression, stating, “A ‘paid, live-in caregiver’ clearly provides social services within the meaning of §21350(a) and is, therefore, a care custodian.”

*Estate of Trevillian,* an unpublished decision, addressed the issue of the exemption for spousal gifts. The case involved a decedent, Marvin Trevillian, whose estimated estate was $175 million. Trevillian was first married to Joyce, with whom he had three daughters. They separated in 1983, and he subsequently cohabitated with his longtime companion, Terri. What followed was a string of estrangements and broken relationships, including marriages with several women. Ultimately, Trevillian married Terri in June 2001. He signed an amendment to his trust in January 2002 and died in October 2003, leaving his estate principally to Terri. Extensive litigation ensued.

The many claims brought after Trevillian’s death included the allegation by Joyce and two of the daughters that Trevillian was a dependent adult under Probate Code Section 21350 and Terri was a care custodian based on the services she provided to Trevillian in the last years of his life. In an otherwise lengthy decision, the court made short work of this claim, citing that Probate Code Section 21351(a) exempts transferees who are related to the transferor, including spouses.

The challengers argued that the Section 21351(a) exception for a spouse was inapplicable since Trevillian and Terri were not married during the relevant period of care services. The court found this argument unpersuasive, ruling that the Section 21351(a) exemption for gifts between spouses applied, notwithstanding many prior years of unmarried custodial services by Terri. In not limiting the spousal exception to gifts to care custodians under Section 21351(a), *Trevillian* is important because it signals that a California appellate court chose to neither restrict nor expand the language of Section 21350 and, by implication, the reach of *Bernard* and its progeny.

*Trevillian* is consistent with *Estate of Pryor,* which held that the spousal exception of Section 21351(a) is not extinguished by a pre-existing care custodian relationship. Pryor involved a challenge by Elizabeth, one of six children of comedian and actor Richard Pryor, to documents that provided benefits for Jennifer, Pryor’s wife and caregiver. Jennifer and Pryor were married in 1981 and divorced in 1982. Pryor was diagnosed with multiple sclerosis in the mid-1980s, and his condition deteriorated thereafter. Jennifer became his care custodian at least as early as 1994. In 2001, Jennifer and Pryor were married again in secret, and he died in 2005. Elizabeth challenged transfers made to Jennifer by Pryor over the years before his death, with the appeal limited to the validity of the transfers made to Jennifer after the date of the second marriage.

The primary focus of Elizabeth’s argument was that the spousal exception of Section 21351(a) did not apply even to gifts made after
Pryor’s second marriage to Jennifer, as that marriage took place fol-
lowing years of service by Jennifer as Richard’s care custodian.
Essentially, Elizabeth was arguing that “once a care custodian, always
a care custodian.” In supporting her challenge on appeal, Elizabeth
argued that Bernard is authority for the proposition that if a person
serves as a care custodian, a donative transfer to that person is
presumptively invalid—whether or not the care custodian enjoyed a per-
sonal relationship with the transferee before or after providing ser-
vices to the dependent adult.

Rejecting Elizabeth’s argument, the Pryor court held that the
Section 21350(a) exception for transfers to spouses had its own pro-
phylactic exception for gifts made to a spouse who had previously been
a care custodian. The court characterized Bernard as holding that the
court is not empowered to craft judicial exceptions to Section 21350
based on personal relationships with the decedent. The court reiter-
ated Chief Justice George’s concurrence in Bernard, inviting the leg-
islature to modify or augment Sections 21350 et seq. to more fully
protect the interests of dependent adults and society as a whole by
according separate treatment to longer-term care custodians who
undertake that role as a consequence of a personal relationship with
the decedent rather than as an occupational assignment.

Finally, Estate of Austin19 further defined what constitutes a care
custodian. Debra Simpson was the former stepdaughter of the depen-
dent adult, Donald Austin. Debra lived next door to her mother and
Austin for 22 years, providing assistance to her stepfather that could
be characterized as nonprofessional but nonetheless allegedly involve-
ing the provision of health and social services. Austin entered a nurs-
ing home in November 2006, and while there he gave Debra six checks
totaling approximately $185,000. Austin died a year later, in December
2007, without ever returning to his home. Austin’s daughter, Dawn,
challenged the gifts to Debra. Dawn alleged that the transfers were
invalidated by Section 21350 as a result of the prior custodial care
relationship that Debra had with Austin before he moved into the nurs-
ing home.

On a review of the facts, the Austin court held that Dawn had failed
to demonstrate that Debra was a care custodian. According to the
court, Debra’s limited services of driving the decedent to his doctor,
preparing some meals, and performing other duties described with-
out specificity as “helping out” were not sufficient to characterize her
as a care custodian.20 The Austin court cited the holding by the
Davidson court that “cooking, gardening, driving to the doctor, run-
ning errands, grocery shopping, purchasing clothing or medication,
[and] assisting with banking” were insufficient to qualify an individual
as a provider of health services or social services within the definition
of a care custodian. These findings of the courts in Austin and
Davidson are distinguished from Bernard because the services in
Bernard, though similar to those provided in the later cases, were decid-
edly more health-related and thus categorized the transferee as a care
custodian.

Certificates of Independent Review

None of the exceptions to Probate Code Section 21350 automatically
shelter a transfer to a care custodian. Indeed, the transferee usually
must rely on a review of the transfer by an independent attorney, who
issues a Certificate of Independent Review (CIR) in accordance with
Section 21351(b).

The CIR is evidence that the transferor has been interviewed by
an independent attorney who certifies, in the form set forth in the
statute, that the questioned donative transfer was not the product of
fraud or undue influence. Nevertheless, the necessity of obtaining a
CIR is fraught with difficulty. It adds what clients perceive to be a need-
less additional expense to the estate planning process. Moreover, this
step is neglected when attorneys do not detect a custodial relation-
ship between the client and the beneficiary. Also, until the enactment
of SB 105, the process for the issuance of a CIR did not involve spec-
ified standards of examination.

It was inevitable that a litigant would challenge the quality of a
CIR and the competence of the attorney to issue it. Osorno v. Weingarten21 had already established in 2004 that the failure to
obtain a CIR when circumstances required it constitutes malpractice
by the estate planning attorney. A challenge to the quality of a CIR
arrived in March 2010 in Estate of Winans.22

When Winans was 89 or 90 years of age, he lived in a residential
care facility that was owned and operated by Elizabeth Timar. Because
of his deteriorating condition, Winans relied on others, including Timar,
to assist him with his affairs. Prior wills benefited his siblings and nieces
and nephews, with whom he had cordial but not close relationships.
In April 2007, more than three years after entering the facility,
Winans suffered a stroke and his condition declined. The ombud-
man suggested contacting the attorney who had previously drafted
wills for Winans, but Timar directed Winans to another attorney,
Patrick Coyle. Under the impression that Winans had no prior will,
Coyle arranged for Ira Lowenthal, an attorney who shared office space
with Coyle, to draft one for Winans. Coyle and Lowenthal met with
Winans at the facility in June 2007, with Lowenthal acting as the
drafter and Coyle present to prepare a CIR under Probate Code
Section 21351(b). Coyle’s discussion with Winans took no more than
“one to five minutes,” following which Coyle prepared the CIR.
Winans died a month later.

Section 21351(b) did not describe the level of involvement and
investigation expected of the attorney giving the CIR. Relying on
Osorno, Winans’s relatives argued that Coyle was required to do
more than conduct a limited interview; rather, he should have discus-
sed with Winans the existence of the statute governing prohib-
ited donative transfers, its purpose and operation, and explore with
him the concept of disqualified persons under the statute. Recognizing
that Osorno did not purport to interpret the level of counseling
required by Section 21351(b), the court in Winans nevertheless con-
cluded that a triable issue of fact existed as to the adequacy of
Coyle’s counseling:

Section 21350 was intended to ensure that persons who are the
natural objects of a testator’s bounty are not excluded inadvert-
ently or improperly in favor of a disqualified person.

Accordingly, the “consequences” of a bequest refers not only,
as Coyle seems to have interpreted, [to] who will receive the
property, but also [to] who will not receive it.

The Winans court then proceeded to set forth a test for the ade-
quacy of a CIR, requiring attorneys to ensure that the testator under-
stands three factors: 1) the nature of the property bequeathed, 2) a
disqualified person will receive the property, and 3) the natural object
of the testator’s bounty, if any, will not receive the property. The court
stated that the certifying attorney also must ensure that the testator
voluntarily intends these results and does not feel compelled for any
reason—legal, financial, or otherwise—to make the bequest.

The court expressed concern that Timar was present during all or
some of the consultation. It found that this was potentially inconsistent
with the obligation of an attorney under Section 21351(b) to give
“independent, impartial and confidential” counsel.

Finally, the court noted that Section 21351 required the counsel-
ing attorney to be independent. The appellants in Winans contended
that Coyle was not independent because he was the designated execu-
tor in the will and therefore stood to earn a substantial fee if the will
were admitted to probate.

The Legislature Acts

The Bernard and Winans decisions caused understandable conser-
nation in estate planning circles.23 Probate Code Section 21350 was
originally promulgated to eliminate costly challenge litigation by
categorizing certain individuals as presumptively prohibited beneficiaries. Both Bernard and Winans undercut the goal of litigation reduction, with the result that far more litigation is likely, both in determining the identity of those prohibited from receiving bequests and in challenges to the quality of CIRs.

SB 105—passed by the legislature in August 2010 and signed by then Governor Arnold Schwarzenegger on September 30, 2010—was designed to respond to those concerns. The new legislation brings significant clarity to the issues raised by Bernard and Winans.

New Probate Code Section 21362 replaces the awkward and ambiguous definition of “care custodian” under Section 21350(c) (for gifts that became or will become irrevocable on or after January 1, 2011). It defines this class of prohibited transferee as any person who provides health or social services to a dependent adult, except that the term “care custodian” will no longer include “a person who provided services without remuneration if the person had a personal relationship with the dependent adult (1) at least 90 days before providing those services, (2) at least 6 months before the dependent adult’s death, and (3) before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care.” This limitation on the broad scope of those who might be prohibited transferees under Bernard will exclude most well-meaning friends and neighbors who also provide personal services to a decedent. Still, it will also make it more difficult to weed out unscrupulous caregivers who prey on the vulnerability of elderly dependent adults.

New Probate Code Section 21370 defines the term “independent attorney” in the context of those issuing CIRs. It provides that an independent attorney is one who “has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer... and who would not be appointed as a fiduciary or receive any pecuniary benefit as a result of the operation of the instrument containing the donative transfer...” Under the new law, the CIR in Winans would still be defective, as Coyle was appointed as executor under the will that he reviewed.

However, the new definitions should provide comfort to attorneys who issue CIRs. Previously these attorneys may have worried that their independence was in question based on their relationship with the referring drafting attorney, with whom they may share office space, or with the transferor. Also, new Probate Code Section 21384(c) provides that the CIR can be issued by the same attorney drafting the instrument. This surprising addition will have the benefit of reducing the time and expense of estate planning in the best of circumstances but eliminates a barrier in the worst of them.

Thus practitioners still need to probe carefully as they provide counsel to transferees and transferees. To detect and address financial abuse of elderly clients, practitioners must go beyond their law school training in lack of capacity and undue influence. Many clients will not meet the textbook or statutory definition for those defects and yet suffer nonetheless from very significant cognitive impairment, leaving them susceptible to financial abuse by family, friends, and care custodians. By reducing the size of the class of individuals prohibited from taking from elderly individuals, the statutory changes under SB 105 likely expand the potential for abuse.

Drafting attorneys need to be more vigilant in identifying and stopping abusive caregivers. In every case, attorneys must ask if a potential beneficiary is related to the transferor. If no blood or other kinship tie exists, attorneys need to delve into the relationship between the client and his or her seemingly chosen transferee, exploring all possibilities for influence and questioning the nature and duration of the relationship.

Attorneys also need to look past the comfortable and admittedly low standards for lack of capacity, because clients who appear to have a keen grasp of their circumstances may still be the subject of abuse. Attention should be given to other factors, including unexplained withdrawal from normal activities and associations, unusual depression, change in financial condition, belittling or threatening behavior by companions, and recently strained or tense relationships with existing family members.

3 Prob. Code §6100.5(a)(2).
4 Civ. Code §1575 (defining “undue influence”).
5 American Psychological Association, Elder Abuse and Neglect: In Search of Solutions (2010), available at http://www.apa.org/paging/resources/guide/elder-abuse.aspx. The causes for susceptibility to abuse are not wholly, or even primarily, physical. Research has generally failed to find support for the view that physical frailty of elderly persons is itself a risk factor for impairment of activities of daily living. Similarly, there is a lack of evidence that an older person’s need for assistance leads to greater risk of mistreatment. This leads to the conclusion that there is little or no connection between elderly dependence and abuse. Elder MISTREATMENT (Bonnie & Wallace eds., 2003). The causes are likely more likely to be cognitive. The impairment of thinking, memory, functional ability, and ultimately decision making can prevent elderly persons from seeking help, advocating on their own behalf, or extricating themselves from abusive situations. Id.
6 Bennett Blum, Forensic and Geriatric Psychiatry (2010), available at http://www.bennettblummd.com/interview; Andrew C. Coyne, The Relationship between Dementia and Elder Abuse, GERIATRIC TIMES (2008). Other studies have reported on the problems that contribute to elder financial abuse by caregivers who began their service without harmful intent. Among the factors burdening these caregivers are mundane repetitive tasks, role conflict, role overload, and psychosocial issues.
8 S.B. 105 restricts Probate Code §§21350 et seq. to gifts that became irrevocable before Jan. 1, 2011. The bill adds a new statute, codified at Probate Code §§21362 et seq., that is only applicable to gifts that became or will become irrevocable on or after Jan. 1, 2010. See text, supra, and Staff Memorandum 2010-54 from the California Law Review Commission (Nov. 29, 2010), available at http://www.clrc.ca.gov/pub2010/MM10-54.pdf.
9 The term “dependent adult” is defined in Welfare and Institutions Code §15610.23 and also includes those persons who (1) are older than age 64 and (2) would be dependent adults, within the meaning of §15610.23, if they were between the ages of 18 and 64. Prob. Code §21350(c).
10 Prob. Code §21351(a).
11 Prob. Code §21351(c).
12 Prob. Code §21351(d).
15 Davidson, 113 Cal. App. 4th 1035.
18 Elizabeth also cited Estate of Shinkle, in which a gift was made to a former ombudsman at a care facility where the decedent resided until a month before death. The ombudsman had been transferred to another facility six months before the trust was executed but thereafter remained in contact with the transferor on a purely personal basis. The Shinkle court concluded that it would be contrary to the purpose of Probate Code §21350 to allow care custodians to avoid the restrictions of the section by changing assignments or jobs or by ending other services to the transferor. Estate of Shinkle, 97 Cal. App. 4th 990 (2002). Based on that holding, Elizabeth argued that neither Jennifer’s prior nor subsequent marriages inoculated her from the prohibitions against the receipt of gifts by care custodians either during the intervening unmarried years when she served as a care custodian or after the second marriage.
20 The decision in Austin left several residual issues. First, the court stated that Debra was never a “paid” caregiver, ignoring the clear ruling of Bernard that a person need not be a paid professional to qualify as a care custodian. Second, the court noted that the decedent did not live with the caregiver, as was the case in Bernard, nor did the individual live with the decedent, as was the case in Odian—a distinction that should not steer the decision toward or against invalidity under Probate Code §21350. The court was most likely convinced by the fact that Debra was not providing any services at all that the gifts were given—a fact that is consistent with the result in Pryor, in which the court rejected applying the permanent taint of “caregiver” to Pryor’s wife.
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Cornerstone Research 633 West Fifth Street, Suite 200, Los Angeles, CA 90071-2005, (213) 553-2500, fax (213) 553-2950. Web site: www.cornerstonere.com. Contact George G. Strong, Jr., Richard W. Dalbeck, Katie J. Galley, Elaine Haywood, Caryn Irwin or Elisabeth Browne. Cornerstone Research provides attorneys with expert testimony and economic and financial analyses in all phases of commercial litigation. We work with faculty and industry experts in a distinctive partnership that combines the strengths of the business and academic worlds. Our areas of expertise include identifying and supporting experts on all aspects of property, antitrust, securities, entertainment, real estate, financial institutions, and general business litigation.


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Law Offices of Philip Feldman 14401 Sylvan Street, Suite 208, Van Nuys, CA 91401, (818) 988-9850, fax (818) 988-1757, e-mail: LegMalpracticeExperts@aol.com. Web site: www.Law OfficesofPhilipFeldman.com. Contact Philip Feldman. Specializes in legal malpractice cases. Expert witness on fee disputes and cases involving issues of attorney ethics. He served 13 years on the State Bar Committee on Mandatory Fee Arbitration, a term on the State Bar Committee on Professional Responsibility and Conduct, and has been appointed as an expert consultant by the Los Angeles Superior Court.

John Mark Nordman Company Hair & Compton LLP 100 Town Center Drive, 6th Floor, Costa Mesa, CA 94386, (949) 988-8300, fax (949) 988-7700, e-mail: jmark@nchlc.com. Web site: www.nchlc.com. Contact Joel Mark. Mr. Mark has had in excess of 40 matters as an expert witness in attorney malpractice cases. Testifies in numerous attorney fee disputes and cases involving issues of attorney ethics. He served 13 years on the State Bar Committee on Mandatory Fee Arbitration, a term on the State Bar Committee on Professional Responsibility and Conduct, and has been appointed as an expert consultant by the Los Angeles Superior Court.

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Scorpions

CAN THE FEDERAL GOVERNMENT seize a steel mill? Can a public school enforce segregation? Is the wartime internment of Japanese Americans constitutional? These are some of the important questions that Hugo L. Black, William O. Douglas, Felix Frankfurter, and Robert H. Jackson ruled on as “scorpions in a bottle,” as Frankfurter’s clerk Alexander Bickel described the often bitterly divided U.S. Supreme Court. Noah Feldman’s Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices is an engrossing and well-written biographical study of these famous men.

Franklin D. Roosevelt was elected president in 1932. During Roosevelt’s first term, Congress enacted an avalanche of New Deal legislation in response to the Great Depression. These progressive laws regulated Wall Street, banks, and the agricultural and labor sectors. New social welfare programs were established, such as Social Security. As a result of these laws, the federal government’s power and reach increased dramatically. Legal challenges to these New Deal laws quickly arose, and many were struck down by the then-conservative Supreme Court, often because the laws exceeded Congress’s powers under the commerce clause.

During the New Deal as today, there was a struggle on the Court between liberals (who saw few constitutional limits on federal power) and conservatives (who believed in a less expansive role for the federal government). The New Dealers grew frustrated with the Court’s rejection of Roosevelt’s social and economic agenda. But by his second term, Roosevelt had a pro-New Deal majority on the Court, including the four justices he nominated. The new, liberal Court began to deny constitutional challenges to New Deal laws.

Roosevelt appointed all four justices during the New Deal and pre-war era. They had many things in common. They came from humble origins and were hardworking and ambitious. They were supporters of Roosevelt and were beneficiaries of his patronage. They were ardent New Dealers who advocated the enactment of federal regulations to effectuate greater federal control over the economy and new programs to help the unemployed and poor. They made mistakes, including rulings that history has not vindicated, and they did not always get along.

Frankfurter was a gifted Harvard Law School professor who advised Roosevelt about legal matters and helped draft New Deal legislation. He was a progressive and a civil liberties activist with a national reputation. Frankfurter was eventually rewarded with an appointment to the Court in 1939. His guiding constitutional philosophy was judicial restraint—the theory that deference must be given to the legislative branch when deciding the constitutionality of laws. His nemesis on the Court was Hugo Black. An Alabaman, Black became a successful attorney and politician and was elected to the U.S. Senate as a Democrat. Black was a booster for the New Deal, having witnessed the devastating effects of the Depression on his native Birmingham. Roosevelt named him to the high court in 1937. His judicial philosophy was originalism: Jurists should look to the plain meaning of the text along with the intent of the Framers.

Douglas was from the state of Washington. He attended Columbia Law School and taught at Yale Law School, where he embraced legal realism in his approach to the law. Utilizing his Roosevelt administration connections, he became chairman of the Securities and Exchange Commission, where he attained national prominence by investigating and regulating Wall Street. Appointed to the Court in 1939 when he was only 40 years old, he served for 36 years, the longest-serving justice in history. Although he long harbored political ambitions, when President Harry S. Truman offered him the vice presidency he turned the offer down.

Jackson fancied himself a country lawyer. After becoming a successful business lawyer in western New York, he joined the Roosevelt administration as general counsel to the Bureau of Internal Revenue. He rose to become one of the most able solicitors general in American history. He next served as U.S. attorney general. Roosevelt appointed him to the Court in 1941. In 1945, in an unprecedented move, he took leave from the Court to lead the Allied prosecution team at the Nuremberg Trials. He dreamed of becoming the chief justice but never got the job.

The justices were all liberal New Dealers and political friends of Roosevelt, but there was a great deal of tension and conflict among them. Frankfurter and Jackson disliked Black, and they often formed a voting bloc against Black and Douglas. Despite the infighting, the justices collaborated in many major decisions, such as Korematsu v. United States (internment of Japanese Americans permitted), Youngstown Sheet & Tube Company v. Sawyer (federal seizure of a steel mill unconstitutional), and Brown v. Board of Education (segregation of public schools unconstitutional).

The Court was initially divided on ending racial segregation. Some of the justices were concerned about social upheaval if segregation ended immediately. Frankfurter opposed segregation and engineered a delay in the ruling so that wavering justices could switch their votes to make the decision unanimous. The strategy worked. Chief Justice Fred Vinson suddenly died of a heart attack, and former California Governor Earl Warren was confirmed as chief justice. Warren soon obtained unanimity. Black, a former Klansman, voted to stop racial segregation.

One spat spilled out of the secretive chambers and into the public light. In March 1945, before Jackson assumed his Nuremberg duties, the Court considered a wage dispute case involving coal miners. Jackson and Frankfurter favored the coal companies, and Black...

Jeffrey Andrew Hartwick practices business litigation in Torrance.
and Douglas sided with the miners. The miners prevailed in a 5-4 decision. But the coal companies filed a petition for rehearing, arguing that Black should have recused himself because his former law partner was the miners’ attorney. Jackson strongly believed that Black should have recused himself, but Black disagreed. When the Court denied the rehearing, Jackson issued his own public statement on the Court’s recusal policy—an unsubtle attack on Black, who became an implacable enemy of Jackson. When a Washington columnist wrote about the tension on the Court, Jackson responded by writing a defensive memo that was made public.

Then and Now

The differences between the Court of the 1940s and the Court of today are striking. Justices of the 1940s were confirmed fairly quickly, without lengthy hearings. Regionalism was important—Black was politically attractive to Roosevelt because he was a Southerner, as was Douglas, who was a Westerner. Today, three justices on the Court hail from New York City and may be claimed as representatives of different demographics rather than regions. In the 1940s, a justice did not have to be a law school graduate to be nominated, and Roosevelt’s justices did not have to undergo background checks. If they had, Black may not have been confirmed, although his membership in the Ku Klux Klan in Alabama did create a political headache for Roosevelt and haunted Black during his time on the bench.

One of the ironies raised in Scorpions is that the Roosevelt justices did not support pre-1937 Supreme Court decisions upholding the liberty of contract because the right was not found in the Constitution, yet Douglas concluded in his Griswold v. Connecticut opinion that a constitutional right to privacy exists in the Constitution, even though it is not explicitly mentioned. This type of contradiction could have received more treatment.

Students of American history and the law will enjoy Scorpions, which is replete with personal facts about the justices, including Douglas’s womanizing, Jackson’s relationship with his secretary, and Frankfurter’s support for the anarchists Nicola Sacco and Bartolomeo Vanzetti. Feldman does a great job of weaving together historically significant events and personages in just over 400 pages. The decisions of these four justices continue to affect lives 70 years later, whether the Court is considering how to try enemy combatants captured during the War on Terror or determining the constitutionality of the individual insurance mandate. Time will tell whether the scorpions of today’s Court will have as lasting a legacy as those of the Roosevelt Court.
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ON WEDNESDAY, APRIL 6, the Remedies Section will present a program on prejudgment remedies (Departments 85, 86, 12, and 1A of the Los Angeles Superior Court Central District). Commissioner Matthew C. St. George Jr. and Judges James Chalfant, Ann I. Jones, Barbara A. Meiers, and Robert H. O’Brien will discuss what the judges and commissioners of these departments expect of practitioners regarding injunctions, writs of attachment and possession, and receiverships. Those who attend will have the opportunity to ask direct questions of the judicial officers. The program will be moderated by Mark L. Share. It will take place at Department 86, Room 836, Los Angeles Superior Court, 111 North Hill Street, Downtown. Please bring your State Bar card to assist with early morning security at the courthouse and use the First Street or Olive Street entrances. The meal and reception will be available at 7 a.m., with the program continuing from 7:20 to 8:20. The registration code number is 011250. The prices below include the meal.

$18—CLE+PLUS cardholder
$55—Remedies Section member
$70—LACBA member
$90—all others
$100—payment at the door for all
1 CLE hour

Joint Ventures and Brand Licensing following American Needle

ON MONDAY, APRIL 11, the Antitrust and Unfair Business Practices Section will host a program in which speakers Warren S. Grimes, Carole E. Handler, Maidie E. Oliveau, and Jason D. Russell will discuss the recent U.S. Supreme Court antitrust decision American Needle, Inc. v. National Football League and its emerging implications for the antitrust analysis of joint ventures and for intellectual property licensing programs. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On both days, the reception and breakfast will be available at 8 a.m., with the program continuing from 8:30 a.m. to 5:15 p.m. on Thursday and 8:30 a.m. to 3:30 p.m. on Friday. The registration code number is 011256. The prices below include the meals.

$300—CLE+PLUS member
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$695—at-the-door registrant
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THE CALIFORNIA CORPORATIONS CODE abounds with acronyms—LLC, LLP, GP, LP, FLP, and FLLC, to name a few. If State Senator Mark DeSaulnier and a group of 10 California lawyers have their way, soon there will be one more: FPC, or flexible purpose corporation.

On February 8, 2011, DeSaulnier introduced Senate Bill 201, the Corporate Flexibility Act of 2011, which will soon start its journey through the maze of the California legislature. The FPC, which is the centerpiece of SB 201, is the brainchild of the California Working Group for New Corporate Forms. The group, comprising 10 California lawyers with diverse corporate law experience, was convened in 2008 by Co-chairs W. Derrick Britt, R. Todd Johnson, and Susan H. MacCormac with the goal of amending the Corporations Code “to facilitate the organization of companies in California with greater flexibility for combining profitability with a broader social or environmental purpose.”

The notion of a corporation having a “broader social or environmental purpose” is at the heart of today’s “corporate social responsibility” (CSR) movement. The concept of CSR took hold in the 1960s and continued to develop throughout the 1970s as the civil rights movement, the consumer movement, the environmental movement, and other social causes swept the country. With each of these movements came an entirely new set of corporate legal mandates and societal expectations, chief among them being that corporations stop causing societal problems and start fixing them.

In The Responsibility Revolution, Jeffrey Hollender and Bill Breen observe that today’s corporations have recognized that CSR can strengthen their brands and build their competitive advantage and are now “scrambling to proclaim their values and vision, by driving do-good messages into their websites, their annual reports and occasionally their advertising.” Indeed, Hollender and Breen report that more than 52,000 corporate Web pages are now devoted to CSR.

Though CSR has infiltrated the boardrooms of every major corporation and the curriculum of every top business school, a great debate is raging over its efficacy. Corporations seem to have divided into two camps—those that profess CSR and actually do something about it and those that profess CSR and do nothing about it. In these latter cases, corporations are using CSR merely as a public relations gimmick to appease the interests of stakeholders and, in more extreme cases, to mask their socially irresponsible business practices.

Without making excuses for the pernicious CSR being practiced by some corporations, critics of the CSR movement must take into account the fact that present corporate forms make it difficult for many corporations, especially public ones, to both talk the CSR talk and walk the CSR walk. This difficulty is explained in SB 201’s fact sheet:

Currently, the use of a traditional corporation creates a potential risk for directors making decisions on the basis of a Special Purpose, if it is done at the expense of maximizing financial returns for shareholders. This is because corporate boards and management generally have a fiduciary duty to act solely in the interest of maximizing shareholder value. By removing these obstacles, SB 201 would make it easier for corporations to adopt and implement meaningful CSR strategies by allowing directors and management the flexibility to pursue social and environmental purposes in addition to profitability.

In the current iteration of SB 201, the FPC has several features and requirements that make it distinct from other corporate forms. First, an FPC would be required to specify in its articles of incorporation at least one special purpose chosen from the types of charitable or public activities typically engaged in by nonprofit public benefit corporations and other activities having a meaningful impact on its employees, suppliers, customers, creditors, the community, society in general, or the environment. Second, a vote of at least two-thirds of an FPC’s shares would be required to materially alter or eliminate the FPC’s special purpose. Third, an FPC’s directors and management would be protected from liability when making decisions that favored the FPC’s special purpose over the FPC’s profitability, subject to existing standards of reasonableness in making the decisions. Fourth, an FPC would be required to specify objectives for measuring the impact of its efforts relating to its special purpose and to include an analysis of those efforts—financial and otherwise—in both its annual reports and certain statements to shareholders.

California is not the first state attempting to enact CSR legislation. In April 2010, Maryland passed the first “benefit corporation” legislation in the nation, followed in May by similar legislation enacted in Vermont and introduced in New York. The proponents of the CSR legislation in New York have argued that this type of legislation would give their state a competitive advantage over its rival states by helping to attract socially-minded corporations and thereby accelerating development of a new sector of the economy. With corporations fleeing California in droves for a multitude of reasons, one can only hope that California’s legislators will see the same potential in SB 201 and adopt this legislation as soon as possible.

David Adelman is a transactional partner at Greenberg & Bass, LLP in Encino, where he focuses on corporate and real estate matters. He would like to thank Alyssa Radtke, a law school-bound intern from U.C.L.A., for her contributions to the article.
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