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18 Who’s the Boss?
BY ROCHELLE B. SPANDORF
A district court ruling has extended the employee-independent contractor controversy to franchise relationships

25 2010 Ethics Roundup
BY JOHN W. AMBERG AND JON L. REWINSKI
Last year’s developments in legal ethics saw important changes in the areas of conflicts of interest and client relations

Plus: Earn MCLE credit. MCLE Test No. 201 appears on page 27.
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The Expedited Jury Trials Act, which became effective on January 1, 2011, codifies a set of procedures for trying cases to a jury in about a day. While lawyers could have stipulated to these procedures before, the act now codifies a way for parties to secure a short trial at a substantially reduced cost. (See California Rules of Court, Rules 3.1545 to 3.1552, and Code of Civil Procedure Sections 630.01 et seq.)

Among other things, the act generally requires consent to eight or fewer jurors, with voir dire limited to 15 minutes per side; a limit of three peremptory challenges per side; and a waiver of appeal rights as well as directed verdict and posttrial motions. Plus, the jury’s verdict in an expedited jury trial is binding, subject to any written high/low agreement. Most important among the requirements, however, is Rule 3.1550 of the California Rules of Court, which, excluding jury selection, gives each side “three hours to present its case, including [cross-examination,] opening statements and closing arguments….The parties are encouraged to streamline the trial process by limiting the number of live witnesses. The goal is to complete an expedited jury trial within one full trial day.” See also Code of Civil Procedure Section 630.03(e).

The time limits are subject to a good cause exception. Of course, what constitutes good cause to warrant additional time is a matter of the trial court’s discretion—and I am glad the act was not named the One Day Jury Trial Act. While the goal of the act is to try cases within a day, the complexity of a case or the number of witnesses may justify more than a day to secure its just resolution.

Perhaps the greatest benefits of the act might be realized if transactional attorneys begin incorporating these procedures into contracts as the method by which to resolve disputes—although proponents of the act have not marketed it to lawyers for this purpose. With careful consideration in drafting an agreement, and after consultation with a trial attorney, the act permits parties to strike a novel balance that avoids many of the criticisms of arbitration and the usual civil process.

The act creates the opportunity for another salutary benefit as well. Based upon the most recent data, the U.S. District Court for the Central District of California tried only 184 civil cases in the preceding 12 months—and only 99 of them were jury trials. (See http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009 /JudicialBusinesspdfversion.pdf.) These figures represent just 1.3 percent and 0.7 percent of all dispositions during the same period. California’s superior courts have similar trial rates: only 1,884 civil jury trials statewide, substantially less than 1 percent of all dispositions. (See http://www.courtinfo.ca.gov/reference/documents/csr2010 .pdf.) Historically, only personal injury, property damage, and wrongful death cases are tried more often than one in 100.

These rates threaten the public’s access to experienced trial counsel. Taken to its logical conclusion, lawyers’ lack of expertise in going to trial inhibits plaintiffs from obtaining the highest settlements achievable and artificially increases the threat of trial for defendants. These make settlement and de minimus trial rates a self-fulfilling prophecy. They also denigrate the judicial process.

The act is not a panacea, but it does create the availability of another form of trial that is shorter, less expensive, and more frequent, with a degree of finality absent from other civil proceedings. The new law can only serve to improve the perception of the judicial process, the quality of trial counsel, and the cause of justice.
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Putting a Lawyer’s Skills to Work outside the Law

CURRENT ECONOMIC CONDITIONS make it difficult for many lawyers to obtain traditional legal work, but they may apply their lawyering skills to jobs outside the traditional practice of law. For example, a little over a year ago, I decided to quit my job at a large law firm to pursue a career in the nonprofit world—and not as legal counsel. I have discovered that many of the skills I learned in law school and honed during legal practice are fully transferable to a nonlaw job, especially in the nonprofit sector.

Nearly every lawyer is familiar with how the economic recession has affected the legal job market. Although we appear—thankfully—to be past the days of massive layoffs, many recent law school grads and young lawyers still face a highly daunting process in finding employment as legal counsel. For a lawyer in this position, a nonlaw job can be perfect. The question that lawyers applying for nonlegal jobs need to answer is: “How does being a lawyer prepare you for this job?”

A lawyer is an advocate, and advocacy is not limited to the legal profession. Many employees of issue-based nonprofits are advocates for their organizations, and this advocacy takes different forms. For example, a program director at a nonprofit that assists the homeless must advocate for funding from donors and foundations. The program director must also advocate within the organization to gain support for his or her ideas. Finally, the director is an advocate for the people that the organization serves. Lawyers are trained to be advocates, and thinking about nonlegal jobs in terms of advocacy will help young lawyers draw parallels between their experiences and the demands and responsibilities of a potential job.

What makes an effective advocate? One of the primary building blocks is writing. The ability to write clearly and concisely is an invaluable skill in any profession. Attorneys are trained to be superior writers whose arguments are easily understood and persuasive. A lawyer applying for a nonlaw job should stress his or her writing ability at every step of the application process and draw attention to how this skill will help the organization achieve its goals.

This is not as hard as it may seem. Nearly every job requires an employee to transmit his or her ideas in some fashion—even if the mode of communication is not as obvious as a brief or a memo analyzing a legal position. Writing is especially important in the nonprofit sector, where communication between the organization and external audiences is critical. For example, many nonprofits have development or fundraising positions. These positions require an employee to communicate with individual donors, potential donors, foundations, and government agencies to secure funding. Lawyers are uniquely trained to write these types of communications, which essentially must tell the story of the organization and persuade a third party to give support.

Another building block of effective advocacy is the ability to think critically and apply analytical reasoning. Lawyers are trained to recognize the meaning and significance of a concept and determine whether an argument is valid. This skill has a wealth of applications outside of the traditional practice of law.

For example, currently, many healthcare nonprofits are dealing with federal healthcare reform. Lawyers are uniquely positioned to help figure out what the new law will mean for safety net organizations that serve the uninsured. Lawyers are not only accustomed to wading through the gobbledygook of statutes but also capable of analyzing how a statute may affect an organization. “I use the skill set I learned previously as a civil litigator every day—negotiation, managing complex processes, and in communications—not to mention the ability to predict and work toward preemptively mitigating any potential organizational risks,” says Kerry Ayazi, director of compliance at a nonprofit agency based in Los Angeles. “While working for a nonprofit organization was always a dream, I’m not sure that as a new litigator many years ago, I could have envisioned the positive transition between litigation and my current career—it’s been a very rewarding experience.”

When applying for nonlaw jobs in the nonprofit sector, lawyers should keep in mind that their legal degrees may still be valuable. As private and public funding for nonprofits has dried up in recent years, many organizations have decided that they can no longer afford an in-house attorney and have cut back on use of private counsel. Likewise, many law firms have cut back on pro bono resources. Attorneys applying for a job can gain an advantage over other candidates by selling themselves as a Jack or Jill of all trades with the ability to advise the organization on day-to-day legal issues such as lease interpretation or insurance. (Of course, one must be clear when the advice does not constitute a formal legal opinion and should advise the organization to seek formal counsel when necessary.)

For a lawyer, the idea of not practicing law can be alarming. After all, the decision to go to law school is not one that most people make lightly or cheaply. However, legal jobs can be difficult in uncertain economic times. Lawyers should take heart in the fact that the training and knowledge they have received translate into other opportunities. A job in the nonprofit sector can be the perfect way for lawyers to develop advocacy skills, form connections, and pursue an issue about which they are passionate.

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WHILE CALIFORNIA statutory and case authority imposes a duty of supervision on school districts, courts have varied in their interpretations of the scope of this duty. However, as case law continues to develop, a broad view of a school's duty has emerged.

The California Constitution requires school supervision of students during compulsory attendance periods. This requirement is based upon the premise that students have an inalienable right to attend safe, secure, and peaceful campuses. The California Code of Regulations further provides for supervision during noncompulsory hours: “Where playground supervision is not otherwise provided, the principal of each school shall provide for the supervision by certificated employees of the conduct and safety, and for the direction of play of the pupils of the school who are on school grounds during recess and other intermissions and before and after school.”

In Dailey v. Los Angeles Unified School District, a 16-year-old high school student died after falling and fracturing his skull during lunch period while engaging in slap-boxing with another student. The California Supreme Court reversed a directed verdict in favor of the school district and its teachers, citing evidence that the students were negligently supervised during the lunch period. In so doing, the court held that a school district owes its students a duty of care at all times while students are on school grounds. In reaffirming Dailey, Hoyem v. Manhattan Beach City School District extended the duty of supervision to off-campus injuries proximately caused by negligent on-campus supervision. In Hoyem, a 10-year-old left summer school prior to the end of classes and was seriously injured when struck by a motorcycle four blocks from the school.

Conversely, the courts have held that there is no duty of supervision owed to nonstudents who frequent school premises for their own purposes. Bartell v. Palos Verdes Peninsula School District involved a nonstudent who trespassed on school grounds during the weekend and was killed while skateboarding. The court only considered whether a school district owes a general duty of supervision to all who frequent its premises for their “own purposes.” In determining that the school district did not owe a duty to supervision to all who frequent its premises for their “own purposes,” the court held that there was no evidence that the son was “a student at the school, or [was] on school grounds in connection with normal school attendance or in connection with a school function. Rather, he was apparently there after school hours on his own volition and for his own amusement.” Bartell clarified that the duty of supervision, set forth in Dailey, included functions related to or encouraged by the school in addition to activities taking place during school hours.

School Programs
The courts have also extended the duty to supervise to school activities that occur during noncompulsory hours. While it is the compulsory nature of education that makes children attend school, many children are present and participate in school activities at a time when attendance is not compulsory. In Leger v. Stockton Unified School District, for example, the plaintiff was attacked in an unsupervised school bathroom by a nonstudent while changing for wrestling practice. The court explained that the school owed the injured student a special duty to protect him from harm that was reasonably foreseeable in the absence of supervision or a warning. The court held that the unsupervised bathroom made the harm reasonably foreseeable.

M.W. v. Panama Buena Vista Union School District, like Leger, also concluded that the district owed students a duty of care during noncompulsory hours. In M.W., a 15-year-old special education student with a third-grade mentality was sodomized in a bathroom by another student before school hours, when the campus was open to students but with no organized supervision. The district did assert that there was informal supervision by the teachers and staff present on campus before the start of classes. Nevertheless, the court in M.W. held that the defendant school district owed the injured student a duty of care. The court went on to weigh the burden of providing supervision to students before school hours as part of its determination of duty: "The burden on school districts to provide adequate supervision for such student prior to the start of school is minimal.

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In fact, a school district could satisfy its responsibility merely by precluding students from coming on campus in the early morning hours. Moreover, there is no additional financial burden placed on school districts to prevent sexual assault as compared to any other assault... We are not imposing an unusual or onerous duty upon the District to provide supervision prior to 7:45 a.m.  

In J.H. v. Los Angeles Unified School District, an elementary school student was sexually assaulted by fellow elementary students in an unlocked storage shed on campus while participating in a voluntary after-school playground program. The district argued that there was no legal duty owed to the minor victim because she was participating in a voluntary after-school program. The district also advanced the defense that the minor student had left the boundaries of the playground, where the program was taking place, so that even if there were a duty to supervise, it expired when the student left the program. The trial court granted the district’s motion for summary judgment, and the court of appeal reversed, stating that the district had a duty to use ordinary care in supervising the after-school program and that what constituted ordinary care was a question for the trier of fact.

Foreseeability

Some torts require evidence of prior specific threats in order to establish the element of foreseeability and, thus, duty. However, a school’s negligence is established if a reasonably prudent person could foresee injuries of the same general type would likely occur in the absence of adequate supervision. Foreseeability is determined in light of all circumstances and does not require prior identical events or injuries.

In discussing foreseeability, the M.W. court stated: “In short, we find it reasonably foreseeable that, given the lack of direct supervision in the early morning hours, a special education student, such as the minor, was at risk for sexual or other physical assault...”

It was not necessary for the district to have foreseen that an act of sodomy could have occurred. The court found no distinction between a physical assault and a sexual assault for purposes of foreseeability. The fact that a particular act of sodomy in a school bathroom may have been unforeseeable does not automatically exonerate the district from the consequences of allowing students, particularly special education students, unrestricted access to the campus prior to the start of school with wholly inadequate supervision. The district’s policy created a foreseeable risk of a particular type of harm—an assault on a special education student. Not only was such an assault reasonably foreseeable, it was virtually inevitable under the circumstances.

In Jennifer C. v. Los Angeles Unified School District, a 14-year-old with a mental disability was led away by another student to an alcove where she was sexually assaulted. The court held that maintenance of a hiding place where a “special needs” child can be victimized satisfies the foreseeability factor of the duty analysis even in the absence of prior similar occurrences. The court explained that its “task in determining whether there should be a duty is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.

The J.H. court further clarified the issue and held that the plaintiff was not required to demonstrate that the type of injury (sexual assault) she received was foreseeable. Rather, the question to the trial court should be “whether it is foreseeable that one child may be assaulted by another child during the [after school program] in the absence of adequate protective safeguards.”

The J.H. court also clarified that the duty-to-supervise holding in M.W., which involved a special needs child, was not limited to special needs students. The student in M.W. was a special education student, but the type of plaintiff is not necessarily the focus of a negligence analysis. Rather, the goal is to have school grounds that are safe not only for special needs children but for all children.

In addition, the J.H. court made it clear that the hiding place issue is not limited to special needs students. J.H. was not a special needs student, but at her young age she had the emotional and mental maturity level of the plaintiffs in M.W. and Jennifer C., which warranted a similar level of supervision.

Rejecting the Specific Threat Standard

It is established law that knowledge of a specific threat of harm is a precondition for establishing duty in a negligent supervision case in a private setting. The M.W. court held that applying this requirement to the school setting contradicts the settled law of California. Based on the special relationship that exists between a school and its students, the court distinguished the duty imposed on a school district in a school setting from the duty owed by an adult to a minor in a private setting.

In Margaret W. v. Kelley R., a 15-year-old left a sleepover at a private residence to go to a party at another house, where she was raped. The guardian of the 15-year-old brought suit against the mother who owned the home where the sleepover was to have taken place. The court held that the mother owed no duty to the teenager, once she left her house, as she had no knowledge of the sexual propensities of the boys at the party that the teenager went to.

In coming to its conclusion that there was no duty to protect a minor from a sexual assault unless the defendant had actual knowledge of the perpetrator’s propensity to commit a sexual assault, the court applied the Romero/Chaney rule. Under the rule, an adult who invites a minor into the adult’s home assumes a special relationship with the child based on the minor’s dependency and vulnerability. The rule holds that liability for sexual attacks on the minor will not attach absent the homeowner’s actual knowledge of the propensity of the assailant to attack. The M.W. court put this defense to rest in school settings, holding that the Romero/Chaney rule does not apply to school districts.

The District implores us to extend the Romero/Chaney rule to this case. We find no authority to support the District’s position and decline to adopt it. The public policy reasons surrounding the Romero/Chaney rule do not exist in the context of a school district’s supervisory responsibilities. Simply put, the school grounds provide a different setting than an adult’s home. And there are differing public policy concerns related to the responsibilities of school districts that provide mandatory education as compared to adults who invite children into their home on a voluntary basis.

Another important distinction between incidents in a school setting and incidents in a private setting is that in the school setting, the perpetrator is often also a student, and the school also has a duty to supervise and control the perpetrator’s conduct.

Public Policy

While different parties in school litigation push for different interpretations of the duty to supervise, policy reasons clearly support a broad duty of supervision. Quite simply, parents place trust in schools to keep their children safe. Along the same lines, working parents frequently utilize summer school and after-school programs to supervise their children.

The facts of the Hoyem, M.W., and J.H. decisions all clearly demonstrate this. The well-recognized reliance that parents place on school districts gives students a right to reasonable protection regardless of whether they
are in a required geometry class or attending a school dance.\textsuperscript{35}

The duty to supervise was once a murky area of the law but has slowly been clarified over the years. The general consensus of the case law is that schools owe a duty to supervise all students during compulsory and non-compulsory hours to prevent any reasonably foreseeable risk of harm. This can be viewed as a positive result wherein school districts are aware of the supervisory responsibilities required of them by law and can undertake to assure that adequate supervision is provided in compliance with the law. The long-term benefit of the court’s recent rulings should ultimately be a safer learning environment for the state’s students.

\begin{itemize}
\item \textsuperscript{1} CAL. CONST. art. I, §28, subd. c.
\item \textsuperscript{2} CAL. CODE REGS. tit. 5, §5552.
\item \textsuperscript{3} Dailey v. Los Angeles Unified Sch. Dist., 2 Cal. 3d 741 (1970).
\item \textsuperscript{4} Hoyem v. Manhattan Beach City Sch. Dist., 22 Cal. 3d 508, 513 (1978).
\item \textsuperscript{5} Id.
\item \textsuperscript{6} Bartell v. Palos Verdes Peninsula Sch. Dist., 83 Cal. App. 3d 492 (1978).
\item \textsuperscript{7} Id. at 499.
\item \textsuperscript{8} Id.
\item \textsuperscript{9} Id.
\item \textsuperscript{11} Id. at 1459-60.
\item \textsuperscript{12} M.W. v. Panama Buena Vista Union Sch. Dist., 110 Cal. App. 4th 508 (2003).
\item \textsuperscript{13} Id. at 512.
\item \textsuperscript{14} Id. at 521.
\item \textsuperscript{15} J.H. v. Los Angeles Unified Sch. Dist., 183 Cal. App. 4th 123 (2010).
\item \textsuperscript{16} Id.
\item \textsuperscript{17} See Constance B. v. State of Cal., 178 Cal. App. 3d 200 (1986) (no duty to prevent rape at rest stop absent notice of prior specific threat).
\item \textsuperscript{18} See Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594, 600 (1941); see also Charonnat v. San Francisco Unified Sch. Dist., 56 Cal. App. 2d 840, 844 (1943).
\item \textsuperscript{19} M.W., 110 Cal. App. 4th at 520.
\item \textsuperscript{20} Id.
\item \textsuperscript{22} Id. (quoting Ballard v. Uribe, 41 Cal. 3d 564, 573 n.6 (1986)).
\item \textsuperscript{24} Id. at 123.
\item \textsuperscript{25} Jennifer C., 168 Cal. App. 4th at 1329-30.
\item \textsuperscript{26} J.H., 183 Cal. App. 4th at 148.
\item \textsuperscript{28} Margaret W. v. Kelley R., 139 Cal. App. 4th 141 (2006).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id. at 148.
\item \textsuperscript{31} Id. at 151-54 (citing Romero v. Superior Court, 89 Cal. App. 4th 1068 (2001); Chaney v. Superior Court, 39 Cal. App. 4th 152 (1995)).
\item \textsuperscript{32} M.W., 110 Cal. App. 4th at 524.
\item \textsuperscript{33} Id. at 517.
\item \textsuperscript{34} Hoyem v. Manhattan Beach City Sch. Dist., 22 Cal. 3d 508, 519 (1978).
\item \textsuperscript{35} J.H. v. Los Angeles Unified Sch. Dist., 183 Cal. App. 4th 123, 143 (2010).
\end{itemize}
Constitutional Standards for the Care of Pretrial Detainees

PURSUING A CONSTITUTIONAL CLAIM on behalf of a pretrial detainee for the denial of medical care in a state or federal nonmilitary prison in California requires practitioners to enter an ever-evolving legal labyrinth. For example, courts have held that most police misconduct cases occurring in a prison are governed by the Eighth Amendment’s prohibition against cruel and unusual punishment. However, if the misconduct is against a pretrial detainee, the Eighth Amendment does not apply. Pretrial detainees—such as those held in prison without bail—have been charged and detained but have not been convicted of a crime. For pretrial detainees, courts apply the due process clause of the Fifth or Fourteenth Amendment. Pretrial detainees cannot be “punished” and have the right to be free from deprivation of “life, liberty, or property, without due process of law.”

A pretrial detainee, in contrast to a convicted prisoner, is presumed innocent and only accused of wrongdoing. Yet despite this distinction, the pretrial detainee essentially has the exact same rights—or lack thereof—as the prisoner regarding the denial of medical care.

The method for bringing a claim for police misconduct in a prison depends on whether the prison involved is a state or federal entity. If the prison is a state entity, the constitutional action is frequently brought under 42 USC Section 1983, the Federal Civil Rights Act. Section 1983 enables a plaintiff to bring an action against a state actor who, while acting under color of law, deprives the plaintiff of his or her rights or privileges under the U.S. Constitution or other federal law. The proper action for a convicted prisoner alleging the denial of medical care is a claim under Section 1983 asserting a violation of the Eighth Amendment (made applicable to the states through the Fourteenth Amendment). A constitutional claim for police misconduct asserted against federal officials is brought as a Bivens action. This type of action is derived from Bivens v. Six Unknown Federal Narcotic Agents, in which the U.S. Supreme Court held that a plaintiff has a valid cause of action for constitutional violations against federal agents in their individual capacities even if no statutory authority for the claim exists. As the Court stated in a later case, “Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.” A recent district court further noted that a “Bivens action is the nonstatutory federal counterpart of a civil rights action pursuant to 42 U.S.C. §1983.” To have a claim under Bivens, plaintiffs “must allege that [they were] deprived of a constitutional right by a federal agent acting under color of federal authority.” Although Bivens addressed a Fourth Amendment violation, subsequent cases have held that Bivens applies to most constitutional violations.

Appropriate Constitutional Provision

Whether an action is brought against state actors (under Section 1983) or federal actors (under Bivens), it must allege violations of the appropriate constitutional provision. While it may seem intuitive that a convicted prisoner would have less rights than a detainee awaiting trial, this is not necessarily the case. In the context of the denial of medical care, the rights of pretrial detainees seem to mirror those of convicted prisoners even though they are analyzed under two different amendments to the Constitution.

In the case of convicted prisoners, it is well established that while a convicted prisoner may be punished, the punishment may not be cruel and unusual as proscribed by the Eighth Amendment to the Constitution. This is so because the Eighth Amendment “was designed to protect those convicted of crimes.” The Supreme Court has repeatedly stated that “[a]fter incarceration, only the unnecessary and wanton infliction of pain...constitutes cruel and unusual punishment forbidden by the Eighth Amendment.” Yet, according to the Court, “What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishment Clause depends upon the claim at issue.” This typically involves looking at the state of mind of the actor involved.

A claim that an official used excessive force in violation of the Eighth Amendment, for example, requires the plaintiff to prove that the actor used force “maliciously and sadistically.” In Hudson v. McMillan, an inmate was punched and kicked while handcuffed after arguing with a prison guard. Rather than focusing on the injuries of the inmate, the Supreme Court looked to the state of mind of the prison guard inflicting the injuries and held that the Eighth Amendment is violated “[w]hen prison officials maliciously and sadistically use force to cause harm” regardless of “whether or not significant injury is evident.”

Deliberate Indifference

Other Eighth Amendment claims require less culpability. For instance, the standard in claims for the denial of medical treatment to prisoners is that the official’s action was taken with “deliberate indifference” to the prisoner’s serious medical need. Plaintiffs must first show that they had a serious medical need or condition and then proceed to demonstrate that the need or condition was treated with deliberate indifference.

The Supreme Court first applied the Eighth Amendment to denial of medical treatment in prison in Estelle v. Gamble, in which the Court concluded that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.” After a dispute among the circuits regarding what constitutes deliberate indifference, the Court resolved the issue in Farmer v. Brennan. The Farmer test for deliberate indifference is subjective and involves a two-prong finding that “the official knows of and disregards an excessive risk to inmate health or safety.”

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Applying the test requires a determination that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” The Farmer test was codified in the Ninth Circuit Model Civil Jury Instructions, which require the plaintiff to prove that he or she has a substantial risk of serious harm or serious medical need that is known of and disregarded by the defendant.\textsuperscript{18}

The first prong of the test—the plaintiff’s serious medical need—is a fact-specific determination.\textsuperscript{19} Many courts seem to gloss over this prong and focus only on the second prong. Indeed, in Estelle, the inmate had an injured back, but the Court did not focus on this fact. Rather, the Court turned its attention on whether the treatment administered to the plaintiff met the deliberate indifference standard.

The second prong of the test, deliberate indifference, requires determining whether an “official knows of and disregards an excessive risk to inmate health or safety.”\textsuperscript{20} In Estelle, the Court held that the government has an “obligation to provide medical care for those whom it is punishing by incarceration.”\textsuperscript{21} The Court also observed that since “[a]n inmate must rely on prison authorities to treat his medical needs, if the authorities fail to do so, those needs will not be met.”\textsuperscript{22}

However, the Estelle Court did not rule for the plaintiff, stating that “an inadvertent failure to provide adequate medical care cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscience of mankind.’”\textsuperscript{23} The Court held that the negligence of a physician in diagnosing or treating a medical condition is not a cognizable claim under the Eighth Amendment simply because the malpractice was against a convicted prisoner.\textsuperscript{24}

The Supreme Court has not determined whether the deliberate indifference test that applies to convicted prisoners asserting a denial of medical care also applies to pretrial detainees.\textsuperscript{25} However, the Court has analyzed the rights of pretrial detainees generally\textsuperscript{26} and determined that the appropriate standard is due process.\textsuperscript{27} In comparing the due process clause of the Fifth or Fourteenth Amendment to the Eighth Amendment, the Court stated that “Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.”\textsuperscript{28}

Rights of Detainees and Convicted Prisoners

In Bell v. Wolfish, the the Supreme Court held that the due process clause applies to pretrial detainees because they cannot be punished. In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.\textsuperscript{29}

However, this analysis is so broad that a pretrial detainee may be subjected to basically any aspect of detention even though none of it is deemed to be punishment. Indeed, the Supreme Court has held that pretrial detainees may suffer all the constraints that define detention—as long as the restrictions imposed on the pretrial detainee are “reasonably related to a legitimate government interest.”\textsuperscript{30} Under Bell, pretrial detainees may face “the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment....”\textsuperscript{31}

Thus, according to the Supreme Court in Bell, once the government decides to detain someone, the fact of the detention, as well as all the conditions that follow—including restriction of movement and the loss of privacy, freedom of choice, and the ability to live as comfortably as possible—are not deemed punishment.\textsuperscript{32} As Justice Thurgood Marshall characterized the majority’s holding in his dissent, “[T]he Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are ‘arbitrary or purposeless.’”\textsuperscript{33}

Notwithstanding these conclusions, the Supreme Court has not decided the issue with respect to denial of medical treatment to pretrial detainees.\textsuperscript{34} As stated by the Fifth Circuit in Hare v. City of Corinth:

An open question has remained: Given that both pretrial detainees and convicts have constitutional rights to basic human needs while incarcerated and therefore unable to fend for themselves, what standard applies when a pretrial detainee asserts a deprivation of a constitutional right held in common with convicted prisoners, albeit through a different textual source.\textsuperscript{35}

At present, the majority of the court circuits follow the Eighth Amendment deliberate indifference test in cases involving pretrial detainees claiming lack of medical care, using the same analysis as if the detainee were a convicted prisoner. These courts assess whether the official being sued was “deliberately indifferent to a detainee’s serious medical need.” Nevertheless, the cases addressing the denial of medical treatment for pretrial detainees are brought pursuant to the due process clause of the Fourteenth Amendment or the Fifth Amendment—and virtually all of the circuits are in agreement that the Eighth Amendment itself does not apply, even though many find that the deliberate indifference test does apply.\textsuperscript{36}

Some of the circuits applying the Eighth Amendment deliberate indifference test to pretrial detainees seem apprehensive, however. For example, in Gibson v. County of Washoe, Nevada, the Ninth Circuit stated, “It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment.”\textsuperscript{37} Yet, it is unclear in what “instances” a different standard would apply.

However, according to the standard expressed in the Ninth Circuit’s Model Civil Jury Instruction 9.25, “the defendant was deliberately indifferent to [the serious medical need] [if] the defendant knew of it and disregarded it by failing to take reasonable measures to address it.”\textsuperscript{38} This instruction is prefaced with an explanatory statement that “a prisoner has the right to be free from cruel and unusual punishment.” Moreover, the comment to this instruction expressly informs the trier of fact “[u]se this instruction... when the plaintiff is either a pretrial detainee or a convicted prisoner and claims defendant’s deliberate indifference to a substantial risk of serious harm or serious medical needs.”\textsuperscript{39}

In the 1990s, the Fifth Circuit also seemed less quick to buy the argument that pretrial detainees have no more rights than convicted prisoners.\textsuperscript{40} In Nerren v. Livingston Police Department, the plaintiff arrestee was injured in an automobile accident and, despite complaining of pain and requesting medical attention, he was taken into custody.\textsuperscript{41} Citing Bell, the court held that the rights of pretrial detainees and arrestees are “evaluated under the same standards” for the purpose of determining whether substantive due process rights were denied. The court held that pretrial detainees “are entitled to reasonable medical care unless the failure to supply that care is reasonably related to a legitimate government objective.”\textsuperscript{42}

Still, the Nerren court applied the subjective indifference standard, holding that a pretrial detainee’s right to medical care is violated if “the official acts with subjective deliberate indifference to the detainee’s rights.”\textsuperscript{43} Thus, at the time of the Nerren decision, it seemed unclear whether the Fifth Circuit would apply the arguably higher stan-
stand of “reasonable medical care” to pretrial detainees.

Substantial Harm

Subsequently, the Fifth Circuit tightened the standard for pretrial detainees in its ruling in Easter v. Powell by adding the factor of “substantial harm” to the Eighth Amendment deliberate indifference standard. In a later case, Flores v. Jaramillo, the Fifth Circuit applied its substantial harm requirement.

The Flores case involved officers executing a search pursuant to a warrant. They refused Flores’s requests for her antianxiety medication for 20 minutes although she was exhibiting symptoms and complaining of health problems. After 20 minutes, the officers finally called emergency medical services (EMS) to treat her. EMS arrived, treated Flores, and left the scene. When the officers called EMS a second time, EMS transported Flores to the hospital, where she experienced cardiac arrest and fell into a coma.

The Fifth Circuit’s analysis involved treating Flores under the same standard as a pretrial detainee. In doing so, the court held that “[w]hile a delay in treatment may support a finding of deliberate indifference, Flores has offered no evidence from which we can infer that the delay in treatment attributable to the officers caused substantial harm.”

The Second Circuit has used language that seems to express a desire to provide more rights to pretrial detainees:

The rights of one who has not been convicted are protected by the Due Process Clause; and while the Supreme Court has not precisely limited the duties of a custodial official under the Due Process Clause to provide needed medical treatment to a pretrial detainee, it is plain that an unconvicted detainee’s rights are at least as great as those of a convicted prisoner.

However, the Second Circuit did not expound further beyond this statement and, instead, applied the Eighth Amendment deliberate indifference test. The court held that an official may be liable for violating a pretrial detainee’s due process rights if “the official denied treatment needed to remedy a serious medical condition and did so because of his deliberate indifference to that need.”

This confusion among the circuits is understandable. Although the Eighth Amendment presupposes punishment, the Fifth Amendment prohibits it. Thus, the application of an identical analysis for convicted prisoners and pretrial detainees is counterintuitive. While the due process clause is intended to safeguard any person’s right to life, liberty, and property, the Eighth Amendment only provides safeguards for those individuals who are already being punished under the criminal justice system.

Reasonable Medical Care

In Hare, the Fifth Circuit determined that pretrial detainees and convicted prisoners are both entitled to the same basic human rights, such as medical care. The court also reasoned whether “Bell’s reasonable-relationship test is functionally equivalent to a deliberate indifference inquiry.” According to Hare, ultimately it does not matter which test applies, because both tests are means to the same end. Nevertheless, this analysis does not take into account that the pretrial detainee has not been convicted of any wrongdoing and thus should be afforded greater rights than the convicted prisoner.

For example, with respect to matters such as continuing a specific medication rather than being arbitrarily switched to a generic version, should the pretrial detainee have a choice? What about the right to medical care that is substantially similar to that covered by the detainee’s private insurance? The trend in most circuits is to hold the pretrial detainee to the deliberate indifference standard. The circuits seem to find that unless the pretrial detainee has a serious medical condition that is treated with deliberate indifference, he or she has no constitutional right to even “reasonable” medical care. And in the Fifth Circuit, substantial harm is now required in addition to deliberate indifference.

Pretrial detainees should at least be afforded the right to argue that they are entitled to “reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective.” “Reasonable medical care” should include medical treatment covered by a detainee’s private insurance policy. However, perhaps the notion that a different test for pretrial detainees would ultimately guarantee better treatment for them is naive.

Regardless of the applicable test for adequate medical care in the California prison system, the reality is that prisons are so grossly overcrowded that, according to the Ninth Circuit in Coleman v. Schwarzenegger, “the California prison medical care system is broken beyond repair.” The three-judge panel hearing the Coleman case ordered the reduction of the “population of the CDCR’s [California Department of Corrections and Rehabilitation] adult institutions to 137.5% of their combined design capacity.”

The court held that its extreme remedy was essential and inevitable:

The harm already done...to California’s prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action....
Indeed, it is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR’s medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California’s prison walls due to the gross failures of the medical delivery system.\(^5\)

The Supreme Court has granted certiorari and heard oral arguments in *Coleman*.\(^7\)

Although access to medical care in prisons may improve overall after the Supreme Court decides *Coleman*, the question will remain as to whether a pretrial detainee should be afforded more rights than a convicted prisoner. For now, regarding inadequate medical treatment in prison, a person’s status—whether prisoner or pretrial detainee—equates to a distinction without a difference.

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4 Carlson v. Green, 446 U.S. 14, 17 (1980).


6 See, e.g., Carlson, 446 U.S. 14.


8 Id. at 664.


11 Id. at 9.

12 Id.

13 See, e.g., Estelle, 429 U.S. 97.

14 Id. at 104.


16 Id. at 837.

17 Id.

18 Ninth Circuit Model Civil Jury Instructions 9.25.

19 See, e.g., Gayton v. McCoy, 593 F. 3d 610, 621 (7th Cir. 2010) (An inmate’s pre-existing heart condition, for which she took medication, was considered a serious medical need.).

20 Farmer, 511 U.S. at 837; Gibson v. County of Washoe, Nev., 290 F. 3d 1175, 1187 (9th Cir. 2002).


22 Id.

23 Id. at 105-06.

24 Id. at 106; however, claims for medical negligence may be brought under the Federal Tort Claims Act. See, e.g., Carlson v. Green, 446 U.S. 14 (1980).


26 Although, the Supreme Court, in dicta, stated that “[s]ince it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, it follows that such deliberately indifferent conduct must also be enough to
satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial. County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) (internal citations omitted).

27 Bell v. Wolfish, 441 U.S. 520, 533-37 (1979) (Fifth Amendment claim).

28 Id. at 537 n.16 (quoting Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977)).

29 Id. at 535.

30 Id. at 539.

31 Id. at 536-37.

32 Id. at 537.

33 Id. at 563 (Marshall, J. dissenting).


35 Hare v. City of Corinth, 74 F. 3d 633, 640 (5th Cir. Miss. 1996) (en banc).


37 Gibson v. County of Washoe, Nv., 290 F. 3d 1175, 1189, n.9 (9th Cir. 2002).

38 NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS 9.25.

39 Id.

40 Nerren v. Livingston Police Dep’t, 86 F. 3d 469 (5th Cir. 1996).

41 Id. at 470-71.

42 Id. at 472-74.

43 Id. at 473.

44 Easter v. Powell, 467 F. 3d 459, 463 (5th Cir. 2006) (citing Mendoza v. Lynaugh, 989 F. 2d 191, 195 (5th Cir. 1993)).

45 Flores v. Jaramillo, 2010 U.S. App. LEXIS 16520 (5th Cir. Aug. 9, 2010).

46 Easter, 467 F. 3d at 463.


48 Id. at *4-6.


50 Weyant, 101 F. 3d at 856.

51 The court stated that there is “no constitutionally significant distinction between the rights of pretrial detainees and convicted inmates to basic human needs, including medical care and protection from violence or suicide,” and thus held that the deliberate indifference standard applies to both. Hare v. City of Corinth, 74 F. 3d 633, 643 (5th Cir. Miss. 1996).

52 Flores, 2010 U.S. App. LEXIS 16520.

53 Nerren v. Livingston Police Dep’t, 86 F. 3d 469, 474 (5th Cir. 1996).


55 Id. at *394-95.

56 Id. at *60 (citing Plata, 2005 U.S. Dist. LEXIS 43796, at *1).

57 Schwarzenegger v. Plata, 130 S. Ct. 3413 (2010) (Coleman and Plata are now consolidated.). At press time, the Supreme Court has not yet issued its opinion.
OWNING A FRANCHISE has always seemed to guarantee a franchisee’s legal status as an independent contractor—the right to be one’s own boss. Specifically, franchisees pay a fee for the right to use a franchisor’s brand name and business concepts in operating their own business and have the ability to sell the business. These characteristics are distinctly at odds with employment relationships. Employees, after all, do not pay for the right to be hired and have no business to sell.

However, simply calling an arrangement a franchise does not guarantee that a court or government agency will not reclassify the franchisor’s franchisees as employees. Outside of the franchise context, workers retained by companies as independent contractors have been winning “employee misclassification” lawsuits, in which they (or their own employees) or government agencies acting on their behalf have recovered unpaid wages, unpaid employer taxes, unemployment compensation, or other employee benefits from the hiring firm. Now, with a decision issued last year, franchisors face the prospect of their own exposure for misclassification.

In March 2010, in an apparent case of first impression, a Massachusetts district court in Awuah v. Coverall North America, Inc., found a franchisor liable for misclassifying its franchisees as independent contractors. The decision has rocked a significant sector of the U.S. economy that has always thought franchise arrangements were immune to employee misclassification claims. California practitioners must now arm themselves appropriately to assist their franchisor clients in reducing exposure for misclassification lawsuits.

Misclassification Defined

Individuals who perform services in exchange for compensation fall into one of two categories: employee or independent contractor. The traditional common law distinction turns on the amount of control that the hiring

by Rochelle B. Spandorf

Franchisors must be able to demonstrate the separate and distinct businesses that they and their franchisees operate
party imposes over how the assigned work is performed.4

Different statutory tests of employee status exist at the federal and state levels, and these override common law.5 Multiple employment tests, each with different criteria, may exist within the same jurisdiction.6 While two jurisdictions may adopt the same employment test, judicial interpretations may produce different outcomes despite similar facts. Consequently, a company with workers in different states, or even within the same state, may find its workforce classified differently depending on where a person works or what is at stake.7

Cost is the primary reason companies seek to classify their workers as independent contractors.8 Employee costs typically add 30 percent to the personnel expenses of a business compared to retaining contract workers.9 Employers must pay payroll taxes, unemployment insurance, disability and workers’ compensation coverage, Social Security contributions and other employer taxes, and possibly overtime pay. Retaining independent contractors allows a company to bypass all these costs. Using independent contractors also 1) eliminates worries about timely wage laws, rest period laws, and medical leave rules, 2) reduces the likelihood of vicarious liability for a worker’s acts or omissions, 3) thwarts labor unions from organizing workers, and 4) spares a company from having to prove otherwise.15

To stay lean, especially in a down economy, businesses not only pare their workforce but also outsource worker functions to contractors.8 Employee costs typically add 30 percent to the personnel expenses of a business compared to retaining contract workers.9

Misclassification results when a business improperly classifies its employees as independent contractors. For workers, misclassification suits are a means to recover unemployment compensation and other employee benefits or rectify workplace offenses, including discrimination and harassment. For the government, misclassification suits not only protect workers but also generate significant revenue and advance a public policy that requires employers to shoulder a share of public welfare costs.13 Consequently, courts and government agencies interpret employee status tests broadly.14 Workers are presumed to be employees unless the hiring firm can prove otherwise.15

The federal government estimates its losses from misclassification as $5 billion annually in lost taxes, Social Security contributions, and penalties. As a result, it has significantly stepped up its enforcement activities.16 With swelling unemployment and dwindling treasuries, state governments, too, have cracked down by passing legislation to expand the definition of who is an employer under state employment laws and by beefing up enforcement and coordinating state investigations with the Internal Revenue Service.17

Serious financial liabilities cascade from employee misclassification. Companies that misclassify workers face potential penalties for:

- Not paying workers minimum wage, overtime pay, or for meal and rest periods.
- Not documenting time worked or issuing itemized paycheck statements.
- Not withholding state and federal income taxes (resulting in employer liability for unpaid taxes).
- Not paying the employer portion of Social Security and Medicare taxes.
- Not paying state and federal unemployment taxes.
- Not paying workers’ compensation insurance.

If a reclassified worker has his or her own employees, misclassification liability extends to those individuals as well. Besides taxes and penalties, companies may be vicariously liable for the acts and omissions and past discrimination of their reclassified workers. Additionally, misclassification can support claims for unfair business practices and even criminal penalties.18

**Distinguishing Franchise and Nonfranchise Independent Contractors**

Franchise and nonfranchise relationships are similar methods for enabling a company to enlist others—presumed to be independent contractors—to offer, sell, or distribute the company’s goods and services at retail or wholesale. Operationally, little separates franchise and nonfranchise arrangements. However, from a regulatory perspective, franchises and nonfranchises are as different as night and day.19

Franchises are strictly creatures of statute. They are classically defined by the presence of three elements: 1) a trademark license, 2) significant assistance offered to, or control over, the licensee’s business, which may take the form of a prescribed marketing plan or what some jurisdictions more broadly describe as a community of interest, and 3) payment of a required fee to the brand owner for the right to use or associate with the brand owner’s trademark.20 If any one statutory element is missing, the relationship is not a franchise.21 What the parties call their relationship is irrelevant. Franchises often masquerade under different names, including dealership, distributorship, license, strategic alliance, joint venture, and marketing alliance, among others.22

While nonfranchises are unregulated private consensual arrangements, franchise relationships are highly regulated. In the United States, franchisors are subject to a comprehensive federal presale disclosure law. Some 15 states add additional disclosure and filing duties.23 Another two dozen states restrict the conditions under which a franchise may be terminated or not renewed.24 Some states dictate substantive terms for the franchise relationship.25 A franchisee cannot waive these statutes even if it wants to.26 Furthermore, many franchise laws impose joint and several personal liability on the franchisor’s owners and key management for a franchisor’s statutory mistakes.27

Nonfranchise arrangements typically possess the first two statutory elements of a franchise—the trademark license and marketing plan or community of interest. The trademark license may be expressed in the parties’ contract or implied in the parties’ relationship by virtue of the licensee deriving more than an insignificant percentage of its overall revenue from the distribution or sale of the licensor’s branded merchandise or services. The marketing plan and community of interest are expressed through various assistance or controls that licensors provide to, or impose on, independent operators, such as minimum purchasing obligations, product and sales training, sales scripts and demonstration kits, exclusive territories, mandatory merchandising requirements, prohibitions against carrying competing merchandise, trade dress requirements, and financial reporting and accounting protocols.28

What most commonly distinguishes franchises from nonfranchises is the third statutory element—the payment of a required fee. Distributors and dealers typically buy inventory from a supplier for resale, sales agents procure third-party purchase orders, and all may perform postsale merchandising duties. Nevertheless, their payments do not qualify as a required fee.29

Under the franchise laws, inventory bought for resale at bona fide wholesale prices is expressly excluded from the definition of a required fee.30 Payments to third parties for operating expenses are not required fees because they are not paid to the trademark licensor. The classic distributorship, dealership, and sales agency is not a franchise because the distributor, dealer, or sales agent pays no required fee to the supplier to associate with the supplier’s brand.

The payment of a required fee has been assumed to be an essential fact keeping franchise relationships distinct from employment.

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20 Los Angeles Lawyer March 2011
relationships. A telltale sign of an employment relationship is that the employer, not the employee, supplies the tools of work, and the employer pays nothing for the right to be hired. However, the payment of a required fee—the fact that legally separates franchises from nonfranchises—may be unimportant to whether a franchisee is truly independent and not the franchisor’s employee.

**Misclassifying Nonfranchise Independent Contractors**

Employee misclassification cuts across all industries, including such varied occupations as seasonal farm workers, healthcare workers, and construction workers. In California, nonfranchise courier services have been favored targets of misclassification lawsuits. In 1999, FedEx drivers brought a misclassification lawsuit under California law for lost overtime and expense reimbursements. Nearly 10 years later, FedEx settled the case by agreeing to pay over $27 million in damages and legal fees. In 2007, California’s Department of Industrial Relations penalized JKH Enterprises, a small courier business, $1,000 per worker for misclassifying its drivers as independent contractors. Nearly 10 years later, FedEx settled the case by agreeing to pay over $27 million in damages and legal fees. In 2007, California’s Department of Industrial Relations penalized JKH Enterprises, a small courier business, $1,000 per worker for misclassifying its drivers as independent contractors.

In a July 2010 California courier misclassification case, Narayan *v.* EGL, Inc., the Ninth Circuit overturned a summary judgment awarded to Eagle Freight Systems, a Texas-based global transportation company, and reinstated employment claims brought by drivers who performed freight pickup and delivery services in California. EGL required its drivers to sign contracts acknowledging their status as independent contractors. The drivers argued they had been improperly classified as independent contractors and sought overtime pay, expense reimbursements, and meal periods under the California Labor Code.

The multifaceted common law test applied by the Ninth Circuit to determine the drivers’ status was comparable to the test followed by the federal government and 23 other states, which focuses on whether the putative employer has the “right to control” the worker’s actions. Taking a “common sense” approach in analyzing the facts, the Ninth Circuit regarded the parties’ mutual at-will termination rights as “a substantial indicator of an at-will employment relationship.” The record also showed that EGL controlled driver schedules, including vacation periods; disciplined drivers who showed up late; required drivers to display EGL’s trademark on their trucks and uniforms; and described the drivers’ job in driver training materials as key to EGL’s entire shipping process. Drivers attended meetings about company policies, used company forms, and followed detailed instructions on how to conduct themselves.

The court rejected the self-serving provision in EGL’s contract regarding the independent contractor classification of the drivers as well as the contract’s Texas choice-of-law provision. In doing so, the court concluded that the issue of whether drivers were entitled to benefits under the California Labor Code was determined by statute rather than specific contract terms or even the existence of a contract between the parties.

**Misclassifying Franchise Independent Contractors**

When analyzing misclassification issues in the context of franchise relationships, it is important to remember that a primary attraction of purchasing a franchise business is independence. Classification as an independent business owner is exactly how the franchisee sees itself, at least at the outset of the franchisor-franchisee relationship.

Nevertheless, last year’s headline-grabbing *Awuah* decision pushed this attraction aside in ruling that a commercial cleaning franchisor had incorrectly classified its Massachusetts franchisees as independent contractors instead of employees. The court applied Massachusetts’s “ABC” test for the definition of “employee”—a three-prong test for unemployment compensation that more than half of the states (but not California) follow in some form. The result was a finding that Coverall, the franchisor, failed to prove that its franchisees performed a service outside of Coverall’s usual course of business—a necessary element to proving independent contractor status under Massachusetts law.

Like all franchisors, Coverall required its franchisees to perform services following its detailed operating standards, which allowed Coverall to maintain its strong brand identity. Coverall provided its prospective franchisees with a franchise disclosure document explaining these requirements and a franchise agreement identifying the franchisee as an independent contractor. Franchisees wore uniforms and identification badges with Coverall’s logo and completed mandatory training. Like other janitorial franchise systems, Coverall priced and sold its franchisees as a bundle of prenegotiated customer contracts, gave franchisees initial training, and handled customer billing and collection. It paid franchisees the balance of collections after deducting its royalty and other fees.

Filed in 2007 as a class action by Coverall’s Massachusetts franchisees, *Awuah* had its origins in 2004, when a single Coverall franchisee filed for unemployment compensation after Coverall terminated her franchise. The franchisee’s relationship with Coverall began as an employee of another franchisee for whom she worked exclusively at one nursing home. When the franchisee left the system,
leaving the employee without a job, Coverall sold the employee a franchise allowing her to continue working at the same nursing home. After Coverall terminated her franchise, she filed for unemployment compensation and ultimately won benefits on appeal. As luck would have it for Coverall, in 2006 the highest court in Massachusetts chose on its own to review the state agency’s appellate decision in the matter. After doing so it upheld its analysis of the independent contractor statute in Massachusetts as applied to the state’s unemployment compensation rules, agreeing that the franchisee was not engaged in an independently established trade apart from Coverall.40

Awuah, the class action, was filed in federal court on the heels of the 2006 ruling by the same lawyers who had won the individual misclassification lawsuit. In the class action, the lawyers sought damages on behalf of all Massachusetts Coverall franchisees for employment misclassification under the same Massachusetts independent contractor statute analyzed in 2006. The result was a grant of summary judgment on behalf of the plaintiffs. The court rejected Coverall’s argument that it was engaged in a different business than its franchisees. Even though Coverall never engaged in any cleaning services, the court found that Coverall and its franchisees are in the same business—selling janitorial cleaning services to end users. The court noted that Coverall negotiated all customer contracts; set prices; handled back office billing and collection functions; controlled cleaning methods; provided uniforms, badges, and initial supplies; and took a percentage of every cleaning job performed.

After ruling on the summary judgment motion, the court allowed the four named plaintiffs to try their employment claims before a jury, which they did unsuccessfully in May 2010. The plaintiffs were unable to prove they had suffered any real damages as a result of the misclassification.41

Despite the positive ending for Coverall, the court’s initial ruling remains intact and puts at risk many fundamental assumptions about franchise relationships. Until Awuah, franchisors thought that by collecting a required fee and adding a franchise fee to their independent contractor arrangements, they were safe from the kinds of employee misclassification claims that nonfranchise distribution systems have faced for years. However, in reclassifying the franchisees as Coverall’s employees, the Awuah court paid little attention to the plaintiffs’ upfront payments to purchase accounts.

Unsurprising Results
Companies turn to franchising to expand their footprint using other people’s money. Franchising allows trademark owners to grow without the attendant overhead costs of hiring and supervising employees to manage new locations. Moreover, as long as the franchisee’s business remains profitable, there is no reason a franchisee would question its classification as an independent contractor.

However, as Awuah demonstrates, things can change when relationship problems surface or an independent operator’s business fails. This is true whether the operator is a franchise or a nonfranchise independent contractor. To a so-called independent contractor facing the sudden at-will cancellation of affiliation rights or left without a livelihood, employee status offers a financial bailout. Overtime pay for long hours worked, unemployment benefits, Social Security contributions, and medical benefits make employee status look like a far better deal than being one’s own boss.

Franchise or not, misclassification claims require the application of the appropriate legal test to determine the validity of a company’s unilateral decision to classify workers as independent contractors. Awuah suggests that a worker’s payment of a required fee—the fact that typically separates franchisees from nonfranchisees—is not dispositive to the classification issue. The express or implied trademark license—a characteristic that franchisee and nonfranchise programs share—appears to supply the legal foundation for franchisees to bring misclassification lawsuits like their nonfranchise counterparts.

Federal trademark law requires trademark owners, whether they are franchisors or not, to control the quality and uniformity of the goods and services associated with their brand or otherwise risk abandonment of trademark rights. Consequently, both in the franchise and nonfranchise arenas, brand owners must dictate detailed standards and specifications over a licensee’s distribution activities.42 A licensor’s specified operating controls can easily resemble workplace rules. This is especially true when a licensee has neither a workforce of its own nor bricks-and-mortar locations and operates as a sole proprietor, such as the plaintiffs in Narayan and Awuah. Under these facts, the licensee looks less like an independent business owner and more like an employee, which makes it difficult for licensors to convince a trier of fact that operating controls are entirely brand-justified.

Licensors are accustomed to defending quality controls as justifiable in support of the brand. Not infrequently, licensors are sued by third parties under agency theories for acts or omissions by licensees. In defense, licensors cite the brand purpose of their controls to explain why the licensee’s use of their brand does not make the licensee their agent or make them responsible for the licensee’s mistakes. While licensors have used the brand-justification defense to defeat vicarious liability claims, they have not had equal success with the argument to defeat misclassification liability.

Misclassification and vicarious liability involve different legal issues and policy considerations. The legal tests to prove employee status are different than the tests to prove agency, and the political stakes in employee misclassification cases are significantly higher than in vicarious liability cases, since misclassification involves multiple victims—including the contractor-worker as well as the governments (federal, state, and local) that are denied their tax revenue.

Undoubtedly more franchisee misclassification claims will follow after Awuah, especially if the economic recession continues to increase franchisee terminations. With the right facts, it should surprise no one if California franchisee plaintiffs prevail in extending Narayan and the reasoning of cases like Awuah to California franchisees.

Indicia of Potential Vulnerability
In misclassification lawsuits, the outlook for franchise and nonfranchise companies is similar. Given the recent successes of misclassification cases and the significant dollars at stake, private and public enforcement efforts will continue to proliferate.43 Awuah in the franchise context and Narayan in the nonfranchise context expose the vulnerability of self-proclaimed independent contractor arrangements, especially when the contractor has no bricks-and-mortar base of operations. This is a worrisome development in an era of proliferating contract, freelance, temporary, and seasonal workers, along with shrinking payrolls and dwindling tax revenues.44

Of course, not all franchise and nonfranchise independent contractor arrangements are equally vulnerable. It is important to underscore the similar characteristics of the truck drivers in Narayan and franchisees in Awuah—characteristics prototypical of potential misclassification claims:
- Small businesses with few, if any, employees.
- Sole proprietorships, not legal entities.
- Workers without a bricks-and-mortar presence who perform services at home, in the field, or at the customer’s location.
- Workers who make minimal investments in equipment to perform their jobs and drive their own or a company-furnished vehicle to job sites when work is performed away from home.45

These characteristics fit a broad assortment of contract worker arrangements across all industries, backgrounds, and incomes, both franchise and nonfranchise. They can be
found in businesses in which workers repair homes, clean offices, bathe pets, tutor children, operate courier services, or perform senior care or home healthcare services. They also describe contract workers with special skills or higher levels of education, including computer trainers, freelance journalists, graphic designers, software programmers, and business coaches.

The franchisees in Awuah fit this profile. They were reclassified as employees because Coverall could not convince the court that its program for training and licensing others to operate a janitorial business was a separate and distinct business apart from the franchisees’ cleaning service. Undoubtedly, Coverall was doomed by bad facts.

**Taking Precautions**

By choosing to franchise a business model, franchisors should be able to accentuate the separate and distinct businesses that they and their franchisees operate. Franchisors are in the business of designing uniform operating systems and protocols, recruiting network members, training recruits, running marketing campaigns, developing brand identity, and protecting the licensed brand. Some franchisors do more: they source ingredients and supplying functions, supply point-of-sale computer solutions, and provide support for back-office billing, accounts receivable, and bookkeeping. Franchisees, by contrast, are in the business of selling branded goods or services to customers.

Franchisors can proactively enhance their position that their franchisees are independent contractors. As precautionary steps, they should:

- Provide franchisees with best practices advice but actively police only those standards that are truly essential to brand identity and control those to that can be best justified as crucial to brand protection.
- Refrain from requiring franchisees to adopt particular employment policies.
- Take no part in the hiring and firing decisions of franchisees.
- Require each franchisee to operate its business through a business entity, not as a sole proprietor.
- Require franchisees to purchase uniforms from designated third parties and use their own tools and vehicles on the job.
- Emphasize their separate identity in communications with existing and prospective franchisees, lenders, suppliers, the trade press, public filings, landlords, and others. A franchise should emphasize, with concrete examples, that despite sharing a common brand name with franchisees, it operates a very different business.
- Require each franchisee to notify its own employees, suppliers, and customers in obvious places like invoices, purchase orders, advertising, business cards, in-store signs, and the like of the independence of the franchisee’s business. A franchisee should note that while it operates under a license from a franchisor, the franchisor is not responsible for the franchisee’s activities or financial obligations.

Any company that enlists others to distribute its branded goods or services faces two potential dire outcomes. It can belatedly learn that its independent contractor network is a franchise and face liability for violating franchise laws. Also, it can misclassify its franchisees as independent contractors and face liability for violating employee status laws. Experienced legal counsel can highlight what to keep a distribution program outside the ambit of franchise laws and guide a company in implementing sound practices to maximize legal defenses to employee misclassification claims.

Misclassification cases are fact-intensive statutory claims that are expensive to defend, impervious to self-serving contract provisions, susceptible to class certification, resistant to pretrial summary dismissal, and costly to lose. While neither franchisors nor their nonfranchise counterparts seek to face these actions, of the two franchisees ultimately may have the better prospect for defeating misclassification claims.

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4. Carlson, supra note 3, at 369 (The common law test is inherently imprecise.).
6. Several California agencies are involved in classification decisions: the Employment Development Department, the Division of Labor Standards Enforcement, and, to lesser extent, the Franchise Tax Board, the Division of Workers’ Compensation, the Department of Industrial Relations, and the Contractors State Licensing Board. Each has its own regulations concerning independent contractors. See http://www.dir.ca.gov/dlse/faq_independentcontractor.htm (last visited Dec. 15, 2010) (“[S]ince different laws may be involved in a particular situation...it is possible that the same individual may be considered an employee for purposes of one law and an independent contractor under another law.”).
15. Narayan v. EGL, Inc., 616 F. 3d 895, 900 (9th Cir. 2010) (citing Robinson v. George, 16 Cal. 2d 238, 242 (1940)).
20. Two California statutes regulate franchise and define the term “franchise” in an identically substantive way: the California Franchise Investment Law, CORP. CODE §31005 (franchise sales); and the California Franchise Relations Act, BUS. & PROF. CODE §20001 (franchise relationships).
23. Some states with filing requirements subject franchise disclosure documents to a full review. California is among this group. Other states utilize a notice-filing system.
24. California’s Franchise Relations Act requires a franchisor to have good cause to terminate or refuse to renew a franchise regardless of the contractual language agreed to by the parties. BUS. & PROF. CODE §§50200, 20201, 20025.
25. For example, California’s Franchise Relations Act voids an out-of-state venue provision in a franchise agreement. See BUS. & PROF. CODE §20404.5.
26. See, e.g., CORP. CODE §31512.
27. Joint and several liability exists for violations of California’s Franchise Investment Law (CORP. CODE §31302) but not the Franchise Relations Act.
30. CORP. CODE §31011; Release 3-F, supra note 28.
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Located in the Twin Towers building in the heart of Century City, Los Angeles, the firm offers professional, high-quality legal solutions for corporate clients and high net worth individuals nationwide involved in franchise/IP/business litigation. The firm assist clients with their franchise registration needs and FTC compliance issues.

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Our founding and principal attorney, Al Mohajerian, is a certified legal specialist in franchise and distribution law by the State Bar of California Board of Legal Specialization. He was also selected for inclusion in the 2009, 2010 and 2011 California Super Lawyers lists, among other accomplishments. A well-known litigator with a reputation for confident, aggressive representation, he maintains a practice devoted to excellence in legal service.

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majority of the claims. The court found that FedEx drivers were independent contractors in a majority of states. The litigation is far from over: drivers are expected to appeal the ruling, and a number of claims have been remanded for further factual development. http://www .workplaceclassification.com/class-action/fed-ex-triumphs -in-jpmdl-class-actions-as-to-independent-contractor -classification-issues (last visited Jan. 17, 2011). Meanwhile, several state attorneys general are suing or have recently settled misclassification cases against FedEx.http://www.natlawreview.com/article/new-york-joins -other-states-suing-fedex-misclassification-its-ground -division-drivers-indepe (last visited Dec. 17, 2010).32 http://www.dir.ca.gov/dlse/MisclassificationOfWorkers .htm (last visited Dec. 17, 2010).33 Narayan v. EGL, Inc., 616 F. 3d 895, 900 (9th Cir. 2010).34 Id. at 903. At will termination provisions are also characteristic of many independent contractor arrangements.35 Id. at 904.

By contrast, hiring companies in nonfranchise distribution arrangements frequently thrust independent contractor status on workers without explaining the implications. See http://www.labornotes.org/2010/03 /when-%2280%-99%-worker-contractor-when-boss -wants-cheat (last visited Dec. 15, 2010).


Id. at 84-85 (citing Mass. GEN LAWS ch. 149, §148B). The Massachusetts ABC test presumes a worker is an employee unless the putative employer can show the worker: A) is free from control and direction in performing servs, B) performs services outside the usual course of the employer’s business or outside of the employer’s place of business, and C) is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the services performed. The Awnah court held that Coverall’s inability to prove that franchisees performed services that were “independent, separate and distinct” from Coverall’s business meant the franchisees were Coverall’s employees.


Five leading janitorial franchisors are currently defending franchise misclassification class actions, including two in California. http://www.sturdevantlaw .com/Cases.php?Cases=34 (last visited Dec. 17, 2010). See also note 31, supra.

See Carlson, supra note 3, at 353 (“In most cases in which independent contractor or employee status is questioned, the workers in question have no employees of their own.”). Some companies finance their operators’ initial costs or own the building, fleet, or equipment that the operators need to perform their jobs. The companies may pay their operators a commission net of specific deductions to recoup their setup and carrying costs, which they would otherwise have to absorb with an employee workforce. Commission deductions do not constitute a required payment under California’s franchise laws. See Thurstson v. U-Haul Int’l, Inc., 144 Cal. App. 4th 664, 676 (2006), and Adrees Corp. v. Avis Rent a Car Sys., 157 Fed. Appx. 2 (9th Cir. 2005) (unpublished).
In 2010, a full 20 percent of the U.S. Supreme Court’s docket involved cases dealing with lawyers and how they do their jobs.

The Number of reported cases in 2010 involving legal ethics and professional responsibility showed an increase from previous years. The U.S. Supreme Court took up 16 cases dealing with how lawyers do their jobs—nearly 20 percent of its decision docket.1

The Court granted certiorari to consider former Attorney General John D. Ashcroft’s claimed immunity for allegedly abusing the material witness statute to detain and label—a Muslim convert as a terrorism suspect. George W. Bush appointee Judge Milan D. Smith Jr. of the Ninth Circuit described these actions as “chilling…and a cautionary tale to law-abiding citizens….”2

After Fox News reported that seven Justice Department lawyers previously represented Guantanamo Bay detainees, American Bar Association President Carolyn Lamm asserted a lawyer’s ethical obligation to represent people “who otherwise would stand alone against the power and resources of the government.” Most of the lawyers were former Supreme Court clerks, and several had been hired by the Bush administration.3

Judges were not spared from the harsh spotlight on ethical misconduct. The Senate convicted U.S. District Judge G. Thomas Porteous of Louisiana for corruption and perjury, making him only the eighth federal judge in history to be removed.4 U.S. Senior District Judge Jack Camp of the Northern District of Georgia pleaded guilty to charges that he bought drugs for a stripper who was secretly cooperating with the FBI.5 Five members of the Michigan Supreme Court censured former Chief Justice Elizabeth Weaver after she publicly released a secret tape recording of the court’s deliberations.6 U.S. District Judge Manuel L. Real was scolded for failing to explain his rulings and “acting obdurately regarding appellate directives” by the U.S. Judicial Council’s conduct and disability committee.7 Moreover, he was removed from a patent case by the U.S. Circuit Court of Appeals for the Federal Circuit—the 12th time he had been removed from a case by an appellate panel.8

In California, the Santa Clara University School of Law presented James E. Towery, the State Bar of California’s new chief trial counsel, with a study reporting that prosecutors are rarely punished for professional misconduct.9

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2009 in which appellate courts had found prosecutorial misconduct but the State Bar disciplined only six deputy district attorneys.10 Meanwhile, a State Bar task force investigating complaints against lawyers accused of home loan modification fraud continued to obtain suspensions, resignations, and disbarments, though more than 1,800 investigations remained open based on 4,000 complaints.11

A U.S. magistrate judge lifted her 2008 discovery sanctions against six California attorneys who had represented Qualcomm, Inc., concluding that Qualcomm had misled the lawyers when it withheld documents.12 The Ninth Circuit suspended Walter J. Lack and Paul A. Traina for six months and formally reprimanded Thomas V. Girardi for filing an appellate brief containing false statements and offering evidence they knew was spurious.13 When the State Bar declined to prosecute, finding the lawyers did not intend to deceive, Girardi claimed total vindication.14

Conflicts of Interest

Not unlike prior years, 2010 provided examples illustrating that law firms accepting engagements for clients with conflicts risk disqualification15 and client lawsuits.16 But 2010 is particularly noteworthy because in *Kirk v. First American Title Insurance Company*,17 a California appellate court concluded for the first time that a private law firm may use an ethical screen to rebut a presumption that knowledge about a closed matter obtained by a lawyer when he or she worked at a prior law firm must be imputed to all lawyers in the new firm.

*Kirk* was one of four related lawsuits commencing in February 2005 against First American Title Insurance Company alleging improper business practices. A team of lawyers at Bryan Cave represented First American. In October 2007, the plaintiffs’ lawyers asked Gary Cohen, formerly the general counsel of the California Department of Insurance, to consult with them. The plaintiffs’ lawyers spoke with Cohen for 17 minutes. Shortly thereafter, Cohen declined the engagement. Fourteen months later, Sonnenschein, Nath & Rosenthal hired Cohen to join its insurance practice. A few months after that, in 2009, Sonnenschein hired lawyers from the Bryan Cave team defending First American.

Wishing to preserve its multiyear investment in the team, First American signed substitutions of attorney transferring the defense to Sonnenschein. After receiving the substitutions, plaintiffs’ counsel objected, citing their prior confidential communication with Cohen. Sonnenschein immediately erected an ethical screen around Cohen. Notwithstanding the screen, the plaintiffs moved to disqualify Sonnenschein for violating Rule 3-310(E) of the Rules of Professional Conduct by failing to obtain written consent from the plaintiffs before agreeing to represent First American.

The trial court granted the motion, reasoning that Cohen received confidential information about the actions during his 17-minute conversation with the plaintiffs’ lawyers in October 2007. The trial court imputed Cohen’s knowledge to his Sonnenschein colleagues and ruled that Sonnenschein’s disqualification was mandatory. According to the court, even if screening were permitted under California law, Sonnenschein’s screen was not effective enough, as evidenced by the fact that while the screen was in place, Cohen assisted First American on an unrelated matter. First American and Sonnenschein appealed. Due to the significance of the issues, the Second District Court of Appeal set briefing and argument on an expedited basis. Twenty-five law firms filed amicus briefs in support of Sonnenschein.

In an opinion by Justice Walter Croskey, the Second District reversed, noting that the paradigm with which courts have historically justified vicarious disqualification—the everyday reality that attorneys, working together and practicing law in a professional association, share each other’s, and their clients’, confidential information18—represents an outdated view of the practice of law. According to the court:

> We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in the proper circumstances, the presumption is a rebuttable one, which can be rebutted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case.19

While the specific elements of an effective screen will vary from case to case, two are necessary. First, the screen must be timely imposed. Second, an effective screen must involve preventive measures to guarantee that information will not be conveyed.20 Depending on the circumstances, an effective ethical wall may require:

- Physical, geographical, and departmental separation of attorneys.
- Prohibitions against and sanctions for discussing confidential matters.
- Established rules and procedures preventing access to confidential information and files.
- Procedures preventing a disqualified attorney from sharing in the profits from the representation.
- Continuing education in professional responsibility.

Duty of Loyalty

In a closely watched case that has been accepted for review by the California Supreme Court, a lawyer’s duty of loyalty to a former client was pitted against his First Amendment right to speak out on matters of public interest. The case, *Oasis West Realty, LLC v. Goldman,*21 involved Kenneth A. Goldman, a Reed Smith LLP partner and Beverly Hills resident, who was retained by Oasis West Realty in 2004 to help secure approval from the Beverly Hills City Council for construction of a new hotel and condominiums at the intersection of Wilshire and Santa Monica Boulevards. Goldman resigned in 2006, after he had been paid $60,000 for representing Oasis in meetings with city officials, the city council, and homeowners associations. In 2008, the city council approved the Oasis development, and Beverly Hills residents opposed to the project formed a political action committee to force a public referendum.

Goldman supported the referendum by appearing before the city council to oppose a rule requiring individuals seeking signatures on the referendum petition to carry the complete environmental impact statement on the project. Goldman also went door to door with his wife to solicit signatures on the petition. Feeling betrayed, Oasis immediately wrote to Goldman and Reed Smith, demanding that they withdraw from all activities adverse to the project and that Goldman and his wife “remain silent” on the issue. Goldman agreed to take no further steps in opposition to the project.

After the development was narrowly approved by the voters, Oasis sued Goldman and Reed Smith for breach of the fiduciary duties of loyalty and confidentiality and sought $4 million for the cost of fighting the referendum and winning approval of the ballot measure. The defendants moved to strike the complaint under the anti-SLAPP statute, Code of Civil Procedure Section 425.16, on the ground that Goldman’s activities were in furtherance of his constitutional rights of petition and free speech.
1. When a lawyer joins a law firm, an irrebuttable presumption exists that confidential client information in the lawyer’s possession is imputed to all the other lawyers in the new firm.
   True. False.

2. The general rule for avoiding conflicts of interest is vicarious disqualification of the entire law firm.
   True. False.

3. An effective ethical screen must be timely and guarantee that confidential client information will not be conveyed.
   True. False.

4. More than 75 years ago, the California Supreme Court ruled that a lawyer may not do anything that would injure his or her client in any matter in which the lawyer represented the client.
   True. False.

5. An attorney may be violating his or her fiduciary duties to a client if the attorney uses a laptop through a public wireless connection without encryption.
   True. False.

6. In the Ninth Circuit, an employee can claim the attorney-client privilege for communications with corporate counsel if the employee meets a five-factor test from the Third Circuit.
   True. False.

7. Sharing confidential details about a lawsuit with family and friends via the Internet does not waive the attorney-client privilege because these communications are private.
   True. False.

8. A member of the bar cannot enter into a business relationship with a client unless the terms are fully and comprehensibly disclosed in writing to the client and the client is also advised in writing that he or she may seek independent counsel.
   True. False.

9. The statute of limitations for legal malpractice claims is tolled when a defendant is absent from the state.
   True. False.

10. A legal malpractice claim is automatically time-barred if the lawyer has had no contact with the client for two years.
    True. False.

11. The statute of limitations for legal malpractice is tolled when a defendant is absent from the state.
    True. False.

12. The Code of Civil Procedure requires plaintiffs to receive court approval before suing a lawyer for conspiring with the lawyer’s client.
    True. False.

13. The sale of a corporation’s assets usually results in the transfer of the corporation’s attorney-client privilege to the buyer.
    True. False.

14. An attorney’s signature approving a contract “as to form and content” is an actionable representation.
    True. False.

15. Negotiations to settle pending litigation constitute protected petitioning activity under the anti-SLAPP statute.
    True. False.

16. A plaintiff seeking to rely on the commercial speech exemption to an anti-SLAPP motion bears the burden of proof.
    True. False.

17. For a malicious prosecution lawsuit, the plaintiff must prove that any reasonable attorney would agree that the underlying claim was totally and completely without merit.
    True. False.

18. Transactional matters are exempt from the requirements for contingency fee agreements under the Business and Professions Code.
    True. False.

19. A charging lien for attorney’s fees in a contingent fee arrangement does not create an adverse interest under Rule 3-300 of the Rules of Professional Conduct.
    True. False.

20. When a client fires one of his or her lawyers, the fee-sharing contract between the two lawyers ceases to exist.
    True. False.
The superior court denied the motion, but the Second District Court of Appeal reversed. It found no evidence that Goldman had revealed any confidential information or encouraged others to think that he was basing his opposition on that type of information. Moreover, the court noted that Rule 3-310(E) of the Rules of Professional Conduct, which limits successive representations, applies when the lawyer has accepted a second client with conflicting interests—but in this case there was no second client.

The appellate court distinguished the California Supreme Court’s sweeping 1932 dictum in *Watchunna Water Company v. Bailey*,

23 that an attorney “may not do anything which will injuriously affect his former client in any matter in which he formerly represented him.” It did so on the ground that if read literally, the *Watchunna* dictum would bar Goldman not only from circulating the petition but also from signing it or voting against the ballot measure. The court concluded, “We cannot find that by representing a client, a lawyer forever forfeits the constitutional right to speak on matters of public interest.” The state supreme court has granted review in *Oasis* and depublished the opinion.

**Duty of Confidentiality**

In Formal Opinion 2010-179, the State Bar’s Standing Committee on Professional Responsibility and Conduct (COPRAC) tackled the duties of confidentiality and competence in the context of an attorney’s use of technology to transmit or store confidential client information. COPRAC concluded that an attorney risks violating duties of confidentiality and competence by using a laptop in a coffee shop through a public wireless connection unless the attorney takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions, and a personal firewall—particularly when dealing with sensitive client information. COPRAC also concluded that an attorney likely does not violate ethical duties by using a laptop at home provided his or her personal wireless system has been configured with appropriate security features.

**Attorney-Client Privilege**

In *United States v. Graf*,

24 the Ninth Circuit Court of Appeals applied two new standards to the attorney-client privilege. Defendant Graf was convicted of selling fraudulent health insurance plans and ordered to pay $20 million in restitution after the court-appointed fiduciary waived the attorney-client privilege of the company with which Graf was associated, and its lawyers testified against him. On appeal, Graf argued that he was an outside consultant to the corporation, not an officer, director, or employee, so he had his own personal privilege that the company could not waive.

Noting that he was not an officer or director because he had been previously banned from the insurance industry, the Ninth Circuit held that Graf was a “functional employee,” and the waiver applied.

25 Addressing the issue of whether a corporate employee may hold a joint privilege for communications with corporate counsel, the Ninth Circuit adopted the Third Circuit’s five-factor test from *In re Bevill, Bresler & Shulman Asset Management Corporation*,

27 and held that Graf failed to establish he had a personal attorney-client privilege.

A client sacrificed her attorney-client privilege to the culture of narcissism in *Lenz v. Universal Music Corporation*.

29 A 29-second video on the Internet of the plaintiff’s toddler dancing to the Prince song “Let’s Go Crazy” led to a takedown notice from Universal to YouTube.com. After YouTube complied, the plaintiff contacted the Electronic Frontier Foundation and, with its support, sued Universal under the Digital Millennium Copyright Act for allegedly misrepresenting that her video infringed its copyright.

Prior to and during the litigation, Lenz generated a constant stream of e-mails, electronic “chats,” and postings to her blog in which she blithely disclosed her conversations with her attorneys, her motives for bringing the suit, her strategy, her lack of injury, and the legal issues she was pursuing or abandoning. While the e-mails containing what should have been confidential details were sent to her mother and friends, she also spewed forth to strangers not only on her blog but also to a reporter at Zerogossip.com.

Universal moved to compel discovery of her conversations with her lawyers on the ground that Lenz had repeatedly waived the attorney-client privilege.

The magistrate judge granted the motion, and the district court overruled her objections. At her deposition, Lenz tried to retract her blog admission that hers “was not a ‘fair use’ case at all” by testifying, “It may have been I was misunderstanding what I’d been told by counsel.” The court summed up the cost of her foolish lack of discretion: “A party may not attempt to explain an apparent admission as a misinterpretation of a conversation with counsel, and then deny the opposing party on the basis of privilege access to the very conversation at issue.”

**Business with a Client**

Rule 3-300 of the Rules of Professional Conduct prohibits a member from entering into a business transaction with a client unless the transaction is “fair and reasonable,” the terms are fully and comprehensively disclosed in writing to the client, the client is advised in writing that he or she may seek independent counsel, the client has an opportunity to do so, and the client provides his or her written consent. The existence of an attorney-client relationship at the time of the transaction is generally an essential element of a Rule 3-300 violation, as illustrated by *In the Matter of Marie Darlene Allen*.

Allen, a lawyer, agreed to purchase a duplex from her close friend and sometime client for $700,000. Because of delays in closing escrow, Allen and the friend entered into an interim occupancy agreement, pursuant to which Allen made extensive renovations to the duplex. Having difficulty with financing, Allen placed the refurbished duplex on the market without telling her friend and accepted an offer to buy it for $895,000, subject to closing the still pending escrow.

When the friend refused to close escrow on the sale to Allen, Allen sued her for breach of contract. The friend filed a cross-complaint against Allen for breach of fiduciary duty and fraud. Although Allen prevailed in this civil case, the State Bar filed a notice of disciplinary charge against her for violating Rule 3-300.

The charge was dismissed by both the hearing judge and the State Bar Court’s Review Department. Rule 3-300 does not apply to transactions between a lawyer and a former client unless the transaction is related to the former representation and as a result, the former client has placed continuing trust in his or her former lawyer. The Review Department rejected the State Bar’s contention that the parties’ former professional relationship and ongoing and long-term personal friendship created an “ongoing aura of inherent influence” by Allen. It also concluded that the State Bar failed to prove that the attorney-client relationship was resurrected while escrow was pending.

**Malpractice Claims and Defenses**

Legal malpractice claims are subject to a one-year statute of limitations.

22 In 2010, appellate courts analyzed theories for tolling this statute in a trio of published opinions.

In *Lockton v. O’Rourke*,

33 the plaintiff filed a legal malpractice claim against the Quinn Emanuel firm 13 months after the plaintiff lost a claim that Quinn Emanuel had allegedly failed to take appropriate steps to preserve. In *Lacette v. Galindo*,

34 a real estate agent sued her lawyer two years after she entered into a settlement agreement negotiated by her lawyer who, she alleged, had a conflict. In *Jocer Enterprises, Inc. v. Price*,

35 the plaintiffs replaced their lawyer (Price) with new counsel on July 3, 2006. On July 9, 2007, the plaintiffs filed a legal malpractice action against Price and Price’s law firm. In all three
cases, the malpractice claims were facially time-barred. In Lockton and Jocer Enterprises, appellate courts affirmed dismissal of the claims (although not because of the statute in Jocer Enterprises). In Laclette, the appellate court reversed a dismissal of the claim.

The different results demonstrate the importance of client engagement and disengagement letters. In Lockton, the plaintiff argued that the statute of limitations against Quinn Emanuel should have been tolled under Code of Civil Procedure Section 340.6(a)(2) because Quinn Emanuel continued to represent the plaintiff during the 13-month period between the loss of his claim and the commencement of his malpractice claim. The court disagreed because Quinn Emanuel argued that the plaintiff's legal malpractice claim against attorney Price—filed a year and six days after Price was replaced—was tolled by Code of Civil Procedure Section 340.6(a)(4) and therefore was not time-barred. Section 340.6(a)(4) tolls a malpractice claim while “[t]he plaintiff is actually has or reasonably should have no legal action.” The plaintiff had no legal or physical disability. Nevertheless, the court reasoned that the legislature intended Section 340.6(a)(4) to encompass the general tolling provisions codified in Chapter 4, Title 2, Part 2 of the Code of Civil Procedure—including tolling when a defendant is absent from the state. Price was outside California during the year preceding the filing of the claim. Therefore, the claim was tolled. The court remanded the case with instructions to allow the plaintiff an opportunity to amend its malpractice claim against Price.

Conspiring with a Client

In Favia v. Katten Muchin Rosenman LLP, the Second District Court of Appeal construed Code of Civil Procedure Section 1714.10, which requires a showing by the plaintiff and the court’s permission before a lawyer can be sued for conspiring with his client. Although the estate of the founder of Motion Graphix, a photographic and imaging technology company, was the majority shareholder after his death, the minority owner, Raleigh Souther, sold Motion Graphix’s assets for $5,000 to a disgruntled home purchaser. After two years of making payments, the agent sued her lawyer, claiming that he improperly undertook to represent her and her employer notwithstanding a conflict of interest between them. The Second District Court of Appeal reversed summary judgment for the lawyer: “We cannot say as a matter of law that [the agent] could not reasonably expect [her lawyer] to represent her in the event of issues arising concerning the performance of the settlement. We reject [the lawyer’s] theory that the two-year hiatus, when no legal services were required of [the lawyer] with respect to the settlement agreement, had the effect of implicitly terminating [the lawyer’s] representation of [the agent].

A representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. A disengagement letter or notice of withdrawal would have made a difference.

In Jocer Enterprises, the Second District Court of Appeal concluded that the plaintiff’s legal malpractice claim against attorney Price—filed a year and six days after Price was replaced—was tolled by Code of Civil Procedure Section 340.6(a)(4) and therefore was not time-barred. Section 340.6(a)(4) tolls a malpractice claim while “[t]he plaintiff is under a legal or physical disability which restricts the plaintiff’s ability to commence legal action.” The plaintiff had no legal or physical disability. Nevertheless, the court reasoned that the legislature intended Section 340.6(a)(4) to encompass the general tolling provisions codified in Chapter 4, Title 2, Part 2 of the Code of Civil Procedure—including tolling when a defendant is absent from the state. Price was outside California during the year preceding the filing of the claim. Therefore, the claim was tolled. The court remanded the case with instructions to allow the plaintiff an opportunity to amend its malpractice claim against Price.

Case law has established that negotiations to settle pending litigation qualify as protected petitioning activity. Moreover, the plaintiff could not establish by a reasonable probability that she would succeed on the merits because the litigation privilege protects any “publication or broadcast” made in a judicial proceeding. Thus, the plaintiff’s claims should have been dismissed.
the lawyers knew the estate was still the majority owner of Motion Graphix and that Souther’s misrepresentations were made to induce the estate not to block the sale. The court discounted the fact that one lawyer had left Katten before express misrepresentations were made and the other Katten lawyer was not involved at the outset of the alleged fraudulent scheme, because everyone who enters into a common design is deemed a party to every act previously or subsequently done by the others.

Acknowledging it was a case of first impression, the court of appeal also held that the estate had standing to maintain a derivative action for Motion Graphix because a dissolved corporation can prosecute actions while winding up its affairs, and a shareholder’s interest does not abruptly end upon dissolution. It disagreed that the new corporation had acquired Motion Graphix’s attorney-client privilege because a sale of the corporation’s assets generally does not transfer the privilege. Because California law does not permit judicially created exceptions to the attorney-client privilege, the court remanded the case for a determination whether the privilege had been waived or if the crime-fraud exception applied.

**Approved as to Form and Substance**

As a matter of first impression, the Second District Court of Appeal concluded in *Freedman v. Brutzkus* that an attorney’s signature approving a contract “as to form and content” does not constitute an actionable representation to an opposing party’s attorney. Attorneys Freedman and Brutzkus represented opposing parties in negotiations over a license agreement. Both attorneys signed the final license agreement under the recital “Approved as to form and content.”

After many subsequent unhappy events, Freedman sued Brutzkus, claiming that Brutzkus’s representation that he “approved” the license agreement “as to form and content” was a lie. The superior court sustained Brutzkus’s demurrer to Freedman’s complaint. The Second District Court of Appeal affirmed:

We conclude that the only reasonable meaning to be given to a recital that counsel approves the agreement as to form and content, is that the attorney, in so stating, asserts that he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties.

Brutzkus, therefore, made no misrepresentation to support the fraud claims.

**Anti-SLAPP Defense**

Code of Civil Procedure Section 425.16, the anti-SLAPP statute, provides lawyers and law firms with a powerful shield against claims of wrongdoing by persons other than former clients. If a defendant establishes that a claim is based on protected “petitioning activity,” which includes written and oral statements made in connection with judicial proceedings, Section 425.16 requires the court to strike the claim unless the plaintiff can establish a likelihood of success on the merits by a reasonable probability. A plaintiff often cannot do this because of the litigation privilege. With certain exceptions, the prevailing defendant is entitled to recover attorney’s fees and costs.

In two cases last year—*Seltzer v. Barnes* and *Couler v. Murrell*—courts ordered the dismissal of claims alleging that lawyers made false statements during settlement negotiations in prior litigation. In *Seltzer*, the plaintiff alleged that her attorney colluded with her insurance carrier during settlement negotiations in a prior case. The First District Court of Appeal reversed an order denying the defendant attorney’s special motion to strike the plaintiff’s claims alleging fraud and intentional infliction of emotional distress. Case law has established that negotiations to settle pending litigation quality as protected petitioning activity. Moreover, the plaintiff could not establish by a reasonable probability that she would succeed on the merits because the litigation privilege protects any “publication or broadcast” made in a judicial proceeding. Thus, the plaintiff’s claims should have been dismissed.

Similarly, in *Couler*, the U.S. District Court for the Southern District of California, invoking the anti-SLAPP statute, dismissed fraud and conspiracy claims against a lawyer who allegedly lied about facts to an opposing party to induce him to settle a trust dispute on terms that he subsequently regretted.

The anti-SLAPP statute has an exemption for commercial speech that the California Supreme Court analyzed in *Simpson Strong-Tie Company, Inc. v. Gore*. Attorney Gore ran a newspaper advertisement inviting wood deck owners whose decks were built with certain fasteners and connectors manufactured by Simpson Strong-Tie to “call if you would like an attorney to investigate whether you have a potential claim” because “you may have certain legal rights and be entitled to monetary compensation….” After Gore refused a demand to pull the advertisement, Simpson Strong-Tie sued him for defamation, trade libel, false advertising, and unfair business practices. Gore filed a special anti-SLAPP motion to dismiss, which the superior court granted and the court of appeal affirmed. The supreme court granted review to resolve a split among the courts of appeal over which party bears the burden of proving or disproving the commercial speech exemption and to decide the applicability of the exemption to Gore’s advertisement.

The supreme court concluded that a plaintiff seeking to rely on the commercial speech exemption bears the burden of proving it. Affirming the order granting Gore’s special motion to dismiss, the court held that the commercial speech exemption applies to statements about “a business competitor’s business operations, goods or services….” Gore’s advertisement did not qualify as commercial speech because Gore and Simpson Strong-Tie are not competitors.

**Malicious Prosecution**

In *Franklin Mint Company v. Manatt, Phelps & Phillips LLP*, a malicious prosecution lawsuit, the Second District Court of Appeal reversed judgment in favor of the Manatt law firm and attorney Mark S. Lee, and the supreme court declined review, permitting the suit to proceed. The case arose out of a federal lawsuit for trademark infringement and related claims filed in 1998 by Manatt on behalf of the estate of Diana, Princess of Wales, and her Memorial Fund against Franklin Mint and its principals, Stewart and Lynda Resnick, relating to Franklin Mint’s use of Diana’s name and image in the sale of commemorative plates and dolls. The complaint accused Franklin Mint of falsely advertising that proceeds would be donated to charity and characterized the defendants as “vultures feeding on the dead.” After one federal judge denied a motion to dismiss claims for false advertising and trademark dilution, a second judge granted Franklin Mint’s summary judgment motion and awarded attorney’s fees under the Lanham Act, finding the estate’s claims “groundless and unreasonable.”

In 2002, Franklin Mint sued Manatt and Lee in state court for malicious prosecution. The court denied Manatt’s summary judgment motion, and the case was tried before a different superior court judge who directed a verdict for the lawyers. According to the judge, “[I]t is overwhelmingly clear that Mr. Lee had probable cause to bring his action and…had he failed to file a cause of action, one would have had a serious question of whether or not he committed malpractice.”

In a 2-1 decision, the Second District Court of Appeal reversed, holding that “no reasonable attorney” could find tenable the claims for false advertising or trademark dilution. This was surprising, since a federal judge had denied Franklin Mint’s motion to dismiss on the ground the underlying complaint failed to state a claim and a superior court judge had directed the verdict from which Franklin Mint appealed.

To establish malicious prosecution, a plaintiff must prove the underlying action...
In *Arnall*, a tax attorney entered into two service agreements to provide tax advice to clients for a fixed monthly stipend plus a success fee of 2 percent of specified reductions in “adverse economic impact” and other “economic savings.” The agreements did not contain a statement that “the fee is not set by law but is negotiable between attorney and client,” as set forth in Section 6147(a)(4).

rejected Franklin Mint’s attempt to shift the burden of proof to Manatt and concluded that the malicious prosecution plaintiff had failed to carry its burden of proving that Manatt’s claims were legally or factually untenable. First, the federal court’s denial of the Franklin Mint’s motion to dismiss established the legal tenability of the claims under *Swat-Fame, Inc. v. Goldstein*. Second, Franklin Mint failed to prove the claims were factually untenable because it did not introduce evidence the record from the underlying case.

Justice Mosk traced the history of malicious prosecution as a disfavored tort since it deters citizens from resorting to the courts to protect their rights and chills the zeal and creativity of lawyers. Lamenting the “diminishing appreciation by the judiciary for the increasing hazards and pitfalls faced by those in private legal practice,” he expressed sympathy for any party that is sued and prevails—even as he noted that Franklin Mint had already recovered its attorney’s fees. Nevertheless, Justice Mosk added, “That does not mean the lawyers who represented the losing party should be fair game.”

Vindication of Substantial Injustice

Usually the foolish, dishonest, and venal are the ones who provide ethics lessons by their negative example, but a case in which a lawyer persisted, against obstruction and indifference, in a nine-year quest to clear her name after being held in contempt is also instructive. In 2001, a court granted the defendant’s motion to strike the complaint in *Moore v. Kaufman* under the anti-SLAPP statute. The defendant’s motion asked for attorney’s fees as sanctions against both the plaintiff and her attorney, Frances Diaz, though Code of Civil Procedure Section 425.16 does not authorize an award of attorney’s fees against a party’s attorney, and the defendant offered no authority to support the award. In September 2001, the court signed a judgment prepared by the defendant that awarded fees and costs against both the plaintiff and Diaz, leaving the amounts blank. The plaintiff appealed, but Diaz did not.

The defendant filed a motion for attorney’s fees and costs of $41,000 against the plaintiff alone. In a January 2002 minute order, the court granted the motion without specifying that the award was only against the plaintiff and directed the defendant to prepare a formal order. However, the defendant’s lawyer never complied and refused Diaz’s requests for a formal order or for a stipulation to correct the judgment so it would state the attorney’s fees award was against the plaintiff only. In June 2002, the court denied Diaz’s ex parte application to correct the judgment nunc pro tunc, admitting it “did not have a whole lot of recollection” about the matter. Diaz filed a noticed motion to correct the judgment, but this, too, was denied in January 2003 on the ground that no error was committed in the underlying matter. This conclusion was based on an incomplete exhibit from the defendant, who falsely implied that the court had been presented with authority to support the award of fees against the lawyer. In April 2004, the defendant filed a new motion for attorney's fees incurred to enforce the judgment as well as accrued interest. The court ordered Diaz to pay $131,635—more than three times the original award.

In September 2005, Diaz appeared for a judgment debtor exam and refused to answer questions on the ground the September 2001 judgment was “void.” In February 2006, the court ordered Diaz to show cause why she should not be judged in contempt. The court held a contempt trial in May 2006 and warned it would impose criminal sanctions that Diaz had waived her attack on the judgment, explaining that were it to do so, “we would be deliberately shutting our eyes to a manifest misapplication of existing principles that results in substantial injustice.”

Getting Paid

Business and Professions Code Section 6147 requires contingent fee agreements (except for those in medical malpractice actions) to be in writing, signed by both attorney and client. Also, the agreements must contain various specified elements, including a statement that “the fee is not set by law but is negotiable between attorney and client.” An agreement that fails to comply with all of the statutory requirements is void. Although contingent fee agreements are generally assumed to more likely arise in litigation, certain transactional matters may also involve contingent fee agreements subject to Section 6147, as demonstrated by the Second District Court of Appeal in *Arnall v. Superior Court*.

In *Arnall*, a tax attorney entered into two service agreements to provide tax advice to clients for a fixed monthly stipend plus a success fee of 2 percent of specified reductions in “adverse economic impact” and other “economic savings.” The agreements did not contain a statement that “the fee is not set by law but is negotiable between attorney and client,” as set forth in Section 6147(a)(4). The tax lawyer sued the clients for compensation under the service agreements. The court of appeal, issuing a writ of mandate ordering the trial court to reverse its order
denying the clients’ summary adjudication motion, concluded that the agreements were void for failure to comply with Section 6147(a)(4).

In Cotchett, Pitre & McCarthy v. Universal Paragon Corporation, the First District Court of Appeal had occasion to analyze Rule 4-200(A) of the Rules of Professional Conduct, which makes it an ethical violation for a member to charge an unconscionable fee. The court affirmed an order confirming a contingent fee award by a JAMS arbitrator to the Cotchett firm. The case involved a client of the Cotchett firm, UPC, which owned a parcel of land earmarked for development. UPC retained the Cotchett firm to represent it in negotiations and litigation designed to persuade the owner of an adjacent parcel to compensate UPC for damages resulting from environmental problems and to sell its parcel to UPC. Represented by separate counsel, UPC and the Cotchett firm entered into a carefully negotiated written retainer agreement providing that if settlement involved UPC’s purchase of the adjacent parcel, the Cotchett firm would be paid, among other things, 16 percent of the greater of the fair market value of the property or the total damages as contained in UPC’s most recent damages assessment made for settlement purposes. UPC acquired the land in settlement, as well as a $6 million payment. UPC argued that the property, which needed extensive remediation, was worth only $1.8 million. It also argued that the Cotchett firm’s fees, based on hourly rates or a quantum meruit theory, would have been between $1.081 and $2.162 million.

Despite UPC’s arguments, the arbitrator awarded the Cotchett firm $7.554 million in fees. In doing so, she relied on an internal UPC communication claiming the property had a fair market value of $18.45 million and valuing its damage claim at $50 million. The trial court confirmed the arbitration award, and the court of appeal affirmed.

The appellate court concluded that UPC failed to demonstrate that the fee was unconscionable: “This was a private business transaction between equally matched parties, pure and simple.” Moreover, according to the court, “That the fee was based on UPC’s estimate of the actual damages rather than the fair market value of the property does not render the fee unconscionable when it was within UPC’s power to control the estimate.” The fee was 30 percent of $24.45 million—the value of UPC’s settlement, according to the arbitrator’s finding—which is “well within the range of reasonable contingency fees.”

In two appellate opinions—Plummer v. Day Eisenberg, LLP and Olsen v. Harbison—lawyers who were forced out of cases prior to settlement fought over the division of contingent fees they had negotiated. In both cases, the clients consented to agreements by their lawyers to split their contingent fee, as required by Rule 2-200 of the Rules of Professional Conduct. In Plummer, the Fourth District Court of Appeal concluded that the plaintiff-attorney’s claims should have survived the defendant-attorneys’ summary judgment motion. In Olsen, the Third District Court of Appeal concluded that the plaintiff-attorney’s claims were properly dismissed on the defendant-attorney’s demurrer and subsequent motions. What was the reason for the different results?

In Plummer, the client also gave attorney Plummer a lien against any settlement proceeds to secure the payment of his fee. After about a year, cocounsel allegedly squeezed Plummer out of the case. Cocounsel then associated in new counsel, the Day Eisenberg firm. Ultimately, the underlying case settled for $1 million. The settlement check included attorney Plummer as a payee, but the bank negotiated the check without his signature. Having received none of his fee, Plummer sued, among others, Day Eisenberg for conversion and interference. The trial court granted summary judgment for Day Eisenberg, but the Fourth District reversed. The court rejected Day Eisenberg’s argument that Plummer’s lien was invalid pursuant to Rule 3-300 of the Rules of Professional Conduct. A charging lien created in a contingency fee agreement does not create an adverse interest within the meaning of Rule 3-300.

In Olsen, attorney Olsen associated attorney Harbison into a contingent fee case on behalf of a client injured on a golf course. The client then fired Olsen but continued to engage Harbison, who ultimately settled the client’s case for $775,000. Olsen received none of the fee. The Third District affirmed judgment for Harbison. While Olsen might have a quantum meruit claim against the client, he had no such claim against Harbison because Olsen performed services for the client, not for Harbison. The litigation privilege precluded Olsen’s claims for fraud and interference based on allegedly disparaging statements that Harbison made to the client about Olsen. In the end, Olsen’s breach of contract claim lacked merit:

[O]nce [the client] fired [Olsen] as her attorney, the contract between them ceased to exist. When the [client-Olsen] contract ceased to exist, the fee-sharing agreement between [Olsen] and [Harbison], premised on that agreement, also ceased to exist. There was
no viable contract on which to base a breach of contract claim.\textsuperscript{85}

\textbf{Revision of the Rules of Professional Conduct}

The State Bar’s Board of Governors approved 67 new rules of professional conduct after a nine-year effort by the Commission for the Revision of the Rules of Professional Conduct. The rules will go into effect after they are approved by the California Supreme Court.\textsuperscript{86}

\begin{enumerate}
\item Lawyer suits pile up at high court, National L. J., July 26, 2010.
\item Al-Kidd v. Ashcroft, 598 F. 3d 1129 (9th Cir.), cert. granted, 131 S. Ct. 415 (2010).
\item ABA Prez Defends Lawyers Dubbed ‘Al Qaeda Seven’, ABA J., Mar. 2010.
\item Senate convicts L. judge on impeachment charges, Associated Press, Dec. 8, 2010.
\item Federal judge pleads guilty to drug charge, Atlanta J.-Const., Nov. 19, 2010.
\item Michigan Supreme Court censures ex-Justice Elizabeth Weaver for secret recording, Associated Press, Nov. 22, 2010.
\item Harmless Error? A new study claims prosecutorial misconduct is rampant in California, ABA J., Dec. 2010.
\item Judge Lifts Sanctions over Qualcomm Discovery Scandal, Law.com, Apr. 6, 2010.
\item In re Thomas V. Girardi, 611 F. 3d 1027 (9th Cir. 2010).
\item See, e.g., California Earthquake Auth. v. Metropolitan West Sec., LLC, 712 F. Supp. 2d 1124 (E.D. Cal. 2010) (Plaintiff CEA disqualified defendant’s law firm, which had signed a retainer agreement to provide CEA legal advice on an unrelated matter—even though the law firm never did any legal work on the CEA engagement); Genentech, Inc. v. Sanofi-Aventis Deutschland GMBH, 2010 WL 113478 (N.D. Cal. Mar. 20, 2010) (Plaintiff Genentech disqualified defendant’s law firm because it employed lawyer who represented Genentech 20 years before on a substantially related matter); Lee v. Pacific Telesis Group Comprehensive Disability Benefits Plan, 2010 WL 2721449 (N.D. Cal. July 7, 2010) (Defendant disqualified the plaintiff’s lawyer, who had served as a neutral in a substantially similar claim asserted by a different plaintiff against the defendant); Openwave Sys., Inc. v. 724 Solutions (US) Inc., 2010 WL 1687825 (N.D. Cal. Apr. 22, 2010) (In patent case, the plaintiff disqualified the defendant’s law firm, which had previously represented the plaintiff in substantially related patent matters.).
\item See, e.g., Tethys Biosci., Inc. v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 2010 WL 2287474 (N.D. Cal. June 4, 2010) (denying the defendant law firm’s motion to dismiss claim for breach of fiduciary duty based on allegations that the defendant concur-
\end{enumerate}
rently represented the plaintiff and its competitor in prosecutions over allegedly competing patents).

18 Id. at 801 (quoting People v. SpeeDee Oil Change Sys., 20 Cal. 4th 1135, 1153-54 (1999)).

19 Id.
20 Id. at 810.
21 Id. at 810-11, 813.
24 Oasis, 110 Cal. Rptr. 3d 612.
25 United States v. Graf, 610 F. 3d at 1148 (9th Cir. 2010).
28 Graf, 610 F. 3d at 1164.
30 Id., 2010 WL 4789099, at *5.
32 CODE CIV. PROC. §340.6.
34 Laclette, 184 Cal. App. 4th 919.
35 Id. at 929.
36 Id.
37 Id.
38 Id.
40 CODE CIV. PROC. §§330 et seq.
Los Angeles Superior Court Litigation Program

ON SATURDAY, MARCH 12, the Los Angeles County Bar Association and the judges of the Los Angeles Superior Court will host a program offering a general overview of the court. The presenters will share valuable ideas for successful pretrial and trial techniques and discuss best courtroom practices. The first hour will involve court administration issues and alternate dispute resolution. Among the topics to be covered during the afternoon session are opening statements, voir dire, cross-examination, and final arguments. Lawyers, law students, and paralegals are encouraged to attend. Attendees will learn about many common pitfalls to avoid in the courthouse. Handouts will include court research and attorney checklist forms. Continental breakfast and lunch are also included. The program will take place at Room 222 of the Los Angeles Superior Court, 111 North Hill Street, Downtown. On-site registration will begin at 8:30 A.M., with the program continuing from 9 A.M. to 4 P.M. The registration code number is 011225.

$125—at-the-door registrants
6 CLE hours

Domestic Violence Project Volunteer Training

ON TUESDAY, MARCH 29, on behalf of the Domestic Violence Project, Fabiola Hernandez, Deborah Kelly, Sara Rondon, Stephanie Shadowens, and Supervising Judge Marjorie S. Steinberg will host a training session for new volunteers. After the training, attorney, paralegal, and law student volunteers may provide service at two three-hour sessions per month for six months. No ongoing representation is required. Those who volunteer can gain expertise in an important area of family law. Through the commitment of new volunteers working with project veterans, the project can continue to protect victims and their children as well as sexually abused minors and abused elderly persons. All recipients will receive substantial materials. The session will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. On-site registration will begin at 5:15 P.M., with the program continuing from 6 to 9:10. Parking is available at 1055 West 7th and nearby parking lots. The prices below include the meal.

$35—nonattorney volunteer
$85—LACBA member
$100—all others
3 CLE hours

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/where you will find a full listing of this month’s Association programs.
The Lawyer’s Toolkit: A 30-Year Retrospective

IN DECEMBER 1980, THE STATE BAR ISSUED bar number 93548 to J. Scott Bovitz, Loyola Law School class of 1980. In December 2010, the State Bar issued bar number 273894 to Joy Chen, Loyola Law School Class of 2010. I had the pleasure of mentoring Joy while she was a law student, and one of the questions she asked me was how the practice of law has changed during “my time.”

In many ways, the job of lawyering has not changed much. A lawyer helps a client identify options and make the best choices under difficult circumstances. The transactional lawyer’s job is to find and clearly document practical solutions for a client. The litigator’s job is to present a client’s position in the best light, be a master of civil procedure and evidence, and identify the time to press for a fair settlement or do battle. A lawyer’s key assets are intelligence, education, experience, thoughtful analysis, and a good attitude.

What has changed over the last 30 years are the tools and procedures a lawyer uses to meet client expectations. In 1980, a lawyer started his (or, less frequently, her) day with stale black coffee and a donut. In 2011, a lawyer starts the day with an “extra hot, skinny, no whip, Americano” and an organic muffin. In 1980, communications took place in meetings, by letter, by fax, by cable, by telegram, and on telephone handsets designed in 1948. When I was a young associate, I purchased a 45-pound “car phone” for $3,500. In 2011, meetings are rare. Communications take place by e-mail and texting, on speaker phones and BlackBerrys (with Hip Hop ring tones). But, unreturned communications are still a major source of attorney discipline.

In 1980, the average ratio was one law firm partner and one associate to one secretary. In 2011, the average ratio is about five lawyers to one professional assistant. In 1980, document preparation started with an outline on a yellow pad, followed by dictation to a secretary, who wrote in shorthand. Secretaries had typewriters without error correction. Legal secretaries were top spellers, editors, and letter-perfect typists. There were no modern word processing features—spell check, track changes, cut and paste, and the like. When computers finally landed on lawyers’ desks, a controversy sprang up. Could a lawyer ethically bill a client for typing his or her own letter or pleading in WordPerfect 5.1? In 2011, document preparation means zippy word processing in Word 2010. Lawyers prepare most of their own drafts on computers. A few true lawyer-geeks dictate directly into the computer while the software types along.

In 1980, secretaries used carbon paper. Large firms and law schools owned finicky black-and-white photocopy machines. In 2011, color photocopy machines are ubiquitous. In 1980, court filings were blue-backed and carried by messengers. In 2011, most federal pleadings are filed online. Lawyers are deputy clerks of the court and make direct entries onto the court docket. As a result, docket entries are filled with spelling errors and unwelcome advocacy.

In 1980, a client found a lawyer by reputation and word of mouth. Martindale Hubbell was a daily tool, and lawyer certification was still a pilot program. Lawyers promoted themselves by public service, getting quoted in the paper, writing articles, and volunteering in organizations. In 2011, clients still find lawyers by reputation and word of mouth. But Martindale Hubbell is now part of Lexis Nexis. State and national certification programs abound, and lawyer advertising is everywhere. But lawyers still like to be quoted.

In 1980, lawyers recorded their billable time on paper time sheets. Good lawyers charged $60 an hour and mailed paper invoices. In 2011, lawyers log every minute onto a computer program, and some lawyers charge up to $1,000 an hour. Invoices are e-mailed.

In 1980, research was done in libraries with books. Lexis and Westlaw were new. Lawyers worked in law firms to spread out the cost of a library. In 2011, legal research is almost always done online. Lexis and Westlaw have artificial intelligence. Boolean searching is taught in law school. Primary legal resources are available online. In 1980, a librarian was the best resource for…almost everything. In 2011, Google is the best resource for…almost everything. (But I still love librarians.) In 1980, appearances were made in person. In 2011, appearances are done on the telephone, by video, and in person. In 1980, books were published on paper. In 2011, books are published on paper and in digital form.

In 1980, every pleading was a custom project, typewritten in Courier font. In 2011, many common pleadings have been reduced to fillable PDF forms. In 1980, lawyers wrote down their tasks on a pad of paper. A manual tickler system and paper calendar served as backup. In 2011, a computer keeps the task list and sounds an alarm for each deadline. In 1980, a lawyer kept up-to-date through dinners and a few formal educational programs. In 2011, a lawyer has boundless educational opportunities—in person, on demand via recorded media, or live via Webcast.

In 1980, white males predominated in the profession, and it took years to become a partner at your law firm—if ever. In 2011, color and gender barriers are slowly dissolving—but it still takes years to become a partner at your law firm—if ever. My robot looks forward to reading Joy Chen’s own retrospective in 2041.

J. Scott Bovitz, the senior partner of Bovitz & Spitzer in Los Angeles, is certified as a bankruptcy specialist by the Board of Legal Specialization of the State Bar of California and the American Board of Certification. He thanks attorney Nicole LeBlanc for her editorial suggestions.
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