Los Angeles lawyer Robert L. Kehr examines the issues that arise when lawyers act as scriveners.

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Robert C. Brandt
2011-2012 Chair, LACBA Family Law Section

FMBK is proud to announce that its Partner, Robert C. Brandt, Certified Family Law Specialist* and a Fellow in both the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers, has been elected to serve as Chair of the Los Angeles County Bar Association Family Law Section for the 2011-2012 term.

Over the years, Mr. Brandt has served in many capacities on the Los Angeles County Bar Association Family Law Section, including Chair Person of the Continuing Legal Education sub-committee. He has been a member of the Los Angeles County Bar Association Family Law Executive Committee for over seven years.

The LACBA Family Law Section has approximately 1300 members. It is one of the largest Family Law sections in the United States and consists of many practitioners who set important Family Law precedents in California as well as the entire nation. As Family Law Section Chair, Mr. Brandt will, among other duties, promote educating both attorneys and the public in the area of Family Law, encourage Family Law practitioners to help each other resolve problems and practice issues, work with judicial officers and court staff to improve the administration of justice and support pro bono legal organizations.
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Yet large numbers of people give their personal information every year to Cold Stone or Baskin Robbins for the mere price of an annual scoop of Rocky Road. Many more let Internet companies, retailers, and data mining companies harvest enormous amounts of information directly off their “personal” computers through cookies, data trackers, and other software and malware. Millions of us go blissfully through our daily lives transmitting sensitive information through radio frequency identification tags, GPS tracking devices, automobile driving-habit monitors, and programs that send packets of personal information every time we turn on our phones, our computers, our e-book readers, or any other devices that connect to the Internet.

This information is given for free or, more commonly, taken without knowledge—and anyone who thinks they can stay “off the grid” is either sorely mistaken or a subsistence farmer in a remote part of Tanzania.

Historically, personal information existed in “silos” within discrete government agencies and commercial ventures. Today, those silos are connected through the Internet. Further fueling the rapid explosion of data are the sophisticated techniques of gathering and analyzing the information, along with the increasing willingness of consumers to provide it. Worse, this data is stored potentially indefinitely and is often indiscriminately available to anyone willing to pay for it, regardless of the intended use.

The technology industry is quick to point out that any reputable company acquires information to make our lives better. Companies assert that their aim is “personalization”—providing each of us with information about products and services we really want and making it easier and faster for us to make those purchases. This goal may be laudable, but companies are hardly altruistic. It is disconcerting to log on to the Internet three months after a vacation to find multiple pop-up ads hawking new trips to the same destination. There can be too much of a good thing.

Polls reveal that most people are deeply concerned about information gathering and its uses and, for many reasons, this Wild West of data mining requires some control. The most obvious is the risk that government, insurers, employers, and others will use the information in violation of our constitutionally established right to privacy. Next is the fear that hackers will obtain and use our information for illicit financial gain. No less harmful are the various levels of cyberbullying.

There are also more subtle reasons to be concerned. Among these is that “personalization” becomes a delimiter of our choices. We are shown only the news or offers that others think we want to see based on past experience. Thus it becomes more and more difficult to learn about the broader world. We always have to live tomorrow with the choices we make today, but cyberspace, which should open up the world to us, risks becoming a closed loop at the expense of our free will.

Perhaps most fundamentally, our society believes that a person has a right to live life free of unwarranted intrusion. Voluntary efforts to provide security, disclosure, and means for opting out have been weak or nonexistent—and this is where the need for regulation comes in. But regulation will only happen if the public calls for it vigorously and vociferously. Feel free to make that call online or on your cell so that all those following you without your knowledge can hear you.

Ken Swenson is in-house counsel for Bank of America in Los Angeles. He is the 2011-12 chair of the Los Angeles Lawyer Editorial Board. He can be reached at swensonatlal@aol.com.
Representing an Asylum Seeker Who Has Experienced Trauma

A CRITICAL TASK FOR AN ATTORNEY who represents an asylum seeker is to prepare a detailed and credible declaration that articulates the applicant’s past persecution and fear of future persecution. This task is hugely challenging because asylum seekers often have been subjected to torture or other major trauma and as a result may suffer from posttraumatic stress disorder (PTSD) and other mental health disorders, such as major depressive disorder. PTSD often negatively affects a client’s ability to recall and narrate traumatic events.

An attorney who fails to recognize PTSD symptoms and take appropriate actions jeopardizes the possibility of winning an asylum case. Courts have long recognized that PTSD can affect a person’s testimony, and if the immigration court fails to recognize the effect of PTSD on a person’s asylum testimony, a denial of asylum may be reversed.1 A court’s recognition that testimony must be evaluated in light of PTSD is only beneficial to asylum applicants who establish a PTSD diagnosis in the record. Attorneys should ensure early evaluation for PTSD so that clients obtain the psychological treatment to facilitate the client’s cooperation in all aspects of the asylum case and promote the client’s well-being.

PTSD is a severe anxiety disorder that may develop after a person is exposed to an extremely traumatic stressor. Characteristic symptoms include persistent reexperiencing of the traumatic event (flashbacks, nightmares), strong reactions (rapid breathing and heartbeat, sweating, muscle tension, and nausea) to things that recall the trauma, avoidance of things associated with the trauma, inability to remember important aspects of the trauma, loss of interest in activities and life, emotional numbness, and increased arousal (insomnia, irritability, anger, difficulty concentrating, hypervigilance, and being easily startled). A medical diagnosis of PTSD is warranted if symptoms are present for more than one month and cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. Other common posttraumatic symptoms include substance abuse, suicidal ideation, shame, guilt, self-blame, mistrust, and alienation.

These symptoms can make it very difficult for the victim to assist the attorney. A client subjected to torture or other major trauma should be referred to a mental health professional for psychological evaluation and treatment if PTSD is diagnosed. Treatment providers can provide essential tools to help clients manage PTSD symptoms throughout the asylum process. The client may also need to be referred to a psychiatrist or a medical doctor for prescription medication. It is important that the attorney work with the client’s therapist. The attorney should understand PTSD, its symptoms, and the coping techniques the client uses to deal with them. For example, a client may dissociate or have a flashback when recalling a traumatic event. The attorney should know from the therapist—in advance—what technique the client uses to come back to the present and calm down. Some of these techniques may include recalling a pleasant memory, focusing on a particular object, or receiving verbal reassurance that the experience is just a memory and that the client is safe and is not being tortured again.

When working with an asylum applicant with PTSD, an attorney should secure a comfortable and stable environment for client meetings. Smaller conference rooms may work better than large, impersonal ones. Phones and electronics should be set on silent mode or turned off. Client meetings should initially be short, no more than one or two hours. Attorneys should refrain from asking the client to retell the entire story of the persecution in one sitting and instead focus initially on nontraumatic events.

Before discussing a traumatic event with a client who suffers from PTSD, the attorney should give the client notice of when that discussion will take place. The attorney should discuss with the client’s therapist the client’s readiness to discuss trauma details and ensure that the attorney meeting does not follow an intense therapy session or vice versa. The attorney should also seek advice from the client about when and how to discuss the trauma. During the discussion, the attorney should monitor the client’s reactions and adjust the conversation accordingly. Attorneys can expect the client to avoid certain topics and even fail to show up for meetings.

The attorney should reinterview the client several times before finalizing the client’s declaration. The client’s story may change as the client becomes less averse to discussing the most traumatic details of the event. In general, the declaration should not be more detailed than the client will be capable of narrating in one sitting. The client must have ample time to review the declaration before signing it. The attorney should explain how important accuracy is in declarations and that any inconsistency may cause an adverse credibility finding and an ultimate denial of the petition for asylum.

An attorney working closely with PTSD clients may develop vicarious trauma, a condition that often mirrors PTSD. The symptoms should not last long. However, attorneys should take precautions by setting clear boundaries with the client, discussing feelings with peers or a therapist, and maintaining a healthy lifestyle.


Katka Werth practices immigration law with a focus on asylum cases at Public Counsel in Los Angeles.
ON DECEMBER 17, 2010, President Barack Obama signed into law an overdue and controversial tax cut extension package that had been hotly debated for over a year. At issue were the tax cuts that the former president, George W. Bush, signed into law to make good on his promise to reduce or even eliminate certain taxes for all taxpayers. These included the estate tax, which would be eliminated in 2010 but only in that year, as the pre-Bush tax cut rates were set to return in 2011.

For years after the Bush tax cuts, politicians and commentators relentlessly speculated about whether the cuts would be extended and what would happen to the estate tax. There was even more heated debate and speculation about which taxpayers would benefit from any extension of the tax cuts. Adding to the uncertainty was the fact that a high note of President Obama’s presidential campaign was a pledge to restore taxes to pre-Bush tax cut levels for high-income taxpayers—namely, joint filers with income over $250,000 per year.

By signing the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act (the 2010 act), President Obama continued the Bush federal income tax cuts for two years for all income level taxpayers. Overshadowed by that aspect of the act was its provision of a two-year fix for estate, gift, and generation-skipping transfer (GST) taxes. For 2011 and 2012, the estate tax is reinstated with a $5 million exemption amount. Estates of decedents who died in 2010, however, have the option of electing out of the estate tax, but the cost of doing so is to forego the normal step-up in tax basis in assets to fair market value as of the date of the decedent’s death.

Therefore, for estate, gift, and GST taxes, the planning aspects of the new law are complex and highly dependent on the size of an individual’s estate, his or her circumstances and desires, and when death occurs. Unfortunately, the certainty of the 2010 act is short-lived, because what happens in 2013 and beyond is anyone’s guess. For now, the rules applicable to 2001 are scheduled to return in 2013.

Increased Exemption Amount and Lower Rates

Current law imposes an estate tax on transfers made by a decedent at death. However, a credit (the applicable credit amount or unified credit) based on the applicable exclusion amount (often referred to as the exemption amount) is available for the year of the taxpayer’s death. Under the law in effect in 2009—the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA)—the applicable exclusion amount was increased on a phased-in schedule, growing from $1 million in 2002 to $3.5 million for estates of decedents dying in 2009. EGTRRA also temporarily repealed the estate tax for decedents dying in 2010 but scheduled its return in 2011 with an exemption amount of $1 million and a top tax rate of 55 percent on transfers exceeding $3 million.

The 2010 act increases the applicable exclusion amount, now called the basic exclusion amount, for decedents dying after 2009 and before 2013, to $5 million and indexes it for inflation after 2011. The act also lowers the estate tax rate from a maximum of 45 percent on transfers in 2007 through 2009 to a flat rate of 35 percent on transfers that exceed the basic exclusion amount.

Generally, a gift tax is imposed on taxable transfers made by a taxpayer during life, and a credit is allowed against the tax due based on the applicable credit amount. Under EGTRRA, the gift tax was not scheduled for repeal, and the exemption amount remained at $1 million for all years after 2001, with a top rate of 45 percent in 2009. For 2010, the top gift tax rate was 35 percent, reverting to 55 percent in 2011. The 2010 act kept the $1 million gift tax exemption amount in place for 2010 but increased it to $5 million for 2011 and 2012, thereby reunifying it with the estate tax exemption amount.

The top 2010 gift tax rate of 35 percent for gifts in excess of $500,000 was extended to transfers made in 2011 and 2012.

In addition, taxable transfers made outright by a taxpayer to a skip person, in trust or by any other similar arrangement, are subject to a GST tax. Under EGTRRA, the GST tax exemption mirrored the...
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estate tax exemption for deaths through 2009 and was scheduled for repeal for decedents dying in 2010. The 2010 act retroactively imposes the GST tax for decedents dying in 2010 and provides a GST exemption amount of $5 million for decedents dying after 2009 and before 2013.10 Additionally, the GST tax rate for deaths in 2010 under the act is zero.11 For decedents dying in 2010, it appears that the GST exemption amount may be allocated to a trust funded or created in 2010, regardless of whether an election out of the estate tax and into the carryover basis regime is made by the executor.12

**Carryover Basis Repeal**

Many practitioners and their clients are familiar with the step-up (or step-down) rule, which increases or decreases the income tax basis of most property acquired from a decedent to its fair market value as of the date of the decedent’s death.13 For community property assets, the interests of the decedent and his or her surviving spouse (that is, both halves) get stepped up or down.14 Perhaps of greater importance is that the step-up rule restores basis to depreciated assets like rental property, thereby avoiding not only capital gains tax but also the recapture of depreciation as ordinary income.15

When the rule applies, property received from a decedent can be subsequently sold by the recipient with no or minimum capital gains tax. The rationale behind the rule seems to be that it would be unfair to impose a capital gains tax on the decedent’s appreciation in an asset that was subject to estate tax at its full fair market value, as finally established for federal estate tax purposes. Doing so would tax the property twice. Under EGTRRA, the step-up rule applied for decedents dying through December 31, 2009, but decedents dying in 2010 were subject to the modified carryover basis regime.16 However, EGTRRA’s sunset was scheduled to revive the step-up rule for decedents dying in 2011 and beyond.17 Section 301(c) of the 2010 act restores the step-up rules for decedents dying in 2010 but allows for the executor of the decedent’s estate to opt out of the estate tax and step-up rules and opt in to the carryover basis regime.

EGTRRA’s modified carryover basis regime added significant complexity to the tax law. The executor of the decedent’s estate must ascertain the decedent’s basis in each asset. Under the general rule of Internal Revenue Code Section 1022(a), property acquired from a decedent dying after December 31, 2009, is to be treated as transferred by gift, and the basis of this property in the hands of the recipient is to be the lesser of 1) the adjusted basis of the decedent or 2) the fair market value at the date of the decedent’s death.

This treatment of property seems consistent with the rationale behind the step-up rule, in that the property would not be subject to estate tax but would instead be subject to capital gains tax upon later disposition by the recipient. Subsections 1022(b) and (c) of IRC 1022 are exceptions to the general rule. The subsections provide an aggregate basis increase of $1.3 million for property passing to anyone and an additional $3 million of aggregate basis increase for property passing to a surviving spouse either outright or as qualified terminable interest property.18 The aggregate increase is further adjusted for certain unused built-in losses and carryovers.19 The adjustment under these subsections may not increase the basis of property acquired from a decedent above its fair market value as of the date of death.20 Further, no increase is allowed for appreciated property acquired by a decedent within three years of his or her death.21

**Election for Qualifying Estates**

For estates of decedents who died in 2010, the 2010 act allows an election out of the estate tax regime—namely, the $5 million basic exclusion amount and basis step-up rules—and into the modified carryover basis regime with no estate tax.22 The election must be made by the executor or an administrator appointed by a court. In the absence of a personal representative, the election must be made by the person in actual or constructive possession of the assets.23 In cases where no probate proceeding is required—for example, if the decedent had a living trust and/or assets that passed by operation of law—the trustee of the trust and the beneficiaries of the assets that passed by operation of law would all be deemed executors for purposes of making the election.24

The problems that could arise with more than one deemed executor are obvious. Multiple executors could be unwilling to share information and could file multiple returns. If this happens, the allocation of the limited basis increase would be problematic. Even when there is one executor, the allocation of basis among the beneficiaries is likely to result in conflicts, given that most estate plans do not contain a provision specifically allocating the aggregate basis increase. Moreover, California has not enacted legislation providing guidance about the allocation. The potential for conflict will be exacerbated if the executor is also a beneficiary, and the election would benefit him or her to the detriment of the other beneficiaries. As a result, executors who elect into the carryover basis regime should consider the potential litigation that could arise as a result.

Deciding how to allocate the basis increase will involve several calculations and will require a significant amount of information about the decedent’s assets and from the beneficiaries. This information will likely include guesstimates of the built-in appreciation in each asset, the approximate date of sale, the applicable tax rates at the date of sale, and the tax bracket and attributes of the beneficiary.

According to the report of the Joint Committee on Taxation (Joint Committee Report), the GST exemption is available to estates of decedents that elect out of the estate tax.25 However, the language of the statute seems to indicate that if the election out of the estate tax is made, the GST exemption is not available.26 Therefore, practitioners should caution clients about the potential adverse consequences of relying on the Joint Committee Report in allocating GST exemption if contradictory guidance is provided in the future.

Under EGTRRA, the executor was required to file an information return (Form 8939) allocating the increase in basis for property acquired from a decedent by April 18, 2011—which was the same deadline for filing the final income tax return (Form 1040) for a decedent who died in 2010. At the moment, the filing deadline for the information return has been extended indefinitely. Further guidance is awaited from the Treasury Department and the IRS.27 For estates of decedents who died between January 1 and December 17, 2010, the election out of the estate tax and into the carryover basis regime must be made no later than September 19, 2011,28 which is the date when the decedent’s estate tax return must be filed with the IRS.

**Reunification of the Estate and Gift Tax**

Prior to 2004, gift and estate taxes were calculated using the same graduated rate schedule and applicable exclusion amount.29 During 2004 through 2009, estate and gift taxes continued to be calculated based on the same graduated rate schedule, but the applicable exclusion amount allowed for gift tax purposes was smaller than the applicable exemption allowed for estate tax purposes. For 2009, the highest gift and estate tax rate was 45 percent, the gift tax exemption amount was $1 million, and the estate tax exemption amount was $3.5 million.30

The increase of the gift tax exemption, from $1 million in 2010 to $5 million for 2011 and 2012, brings a reunification of estate and gift taxes for 2011 and 2012.31 This is perhaps one of the most important aspects of the new law for planning purposes. Making lifetime gifts is a common strategy used to decrease the size of one's
gross estate, thereby minimizing the estate tax and avoiding estate taxation of the appreciation of the gifted assets at death. For large estates, the increased lifetime gift exemption—when combined with the use of fractional interest discounts and more sophisticated planning vehicles such as grantor retained annuity trusts (GRATs), charitable lead annuity trusts (CLATs), qualified personal residence trusts (QPRTs), or sales to defective grantor trusts—provides an excellent opportunity to leverage the exemption amount and further increase the ultimate amount passing free of transfer taxes. Although several attempts have been made to eliminate or greatly reduce the opportunities to leverage the gift tax exemption, fractional interest discounts and zeroed-out GRATs, for now, remain viable planning techniques.

The 2010 act also affects the calculation of gift and estate taxes for donors who have made lifetime taxable gifts. It ensures the use of consistent tax rates for the credit against the estate tax for gift taxes payable under Section 2001(b) of the act, regardless of the rates in effect when the gifts were made. Although it is possible that the gift tax exemption may be rolled back to $3.5 million or less, it is reasonable to assume that no further tax will be assessed against gifts made under the $5 million exemption. Even if additional taxes are assessed, the appreciation on the gifted assets would still remain exempt from further taxes.

The corresponding increase in the GST exemption raises the amounts that may be given to grandchildren and beneficiaries of even lower generations, such as dynasty trust beneficiaries. This provision, when combined with the gift tax exemption, can make generational gifts free of transfer tax. As with gifts generally, using irrevocable trusts can ensure that the gifted funds will not be prematurely dissipated by beneficiaries.

Portability

The ability to pass unused exemption to a surviving spouse has long been on taxpayers’ wish list. A novel aspect of the 2010 act is that it allows a surviving spouse to tack on to his or her exclusion amount the unused applicable exclusion amount of a spouse who dies after December 31, 2010. Section 303(a) of the 2010 act amends IRC Section 2010(c) and provides that the applicable exclusion amount is the basic exclusion amount plus the deceased spousal unused exclusion amount (DSUEA). The DSUEA is equal to the lesser of 1) the basic exclusion amount or 2) the excess of the basic exclusion amount of the last deceased spouse dying after December 31, 2010, over the amount on which the tentative tax on the estate of that deceased spouse was calculated.
The surviving spouse may use the DSUEA, which is not subject to inflation adjustments, during life or at death. However, the GST exemption of the deceased spouse is not portable, because the 2010 act defines the GST exemption amount with regard to the basic exclusion amount. Therefore, in order to fully utilize the GST exemption of both spouses, a bypass trust or a reverse QTIP trust must be established at the death of the first spouse.

In order to secure portability, the executor of the decedent’s estate must timely file an estate tax return (Form 706) that calculates the unused basic exclusion amount and makes an irrevocable election to transfer the decedent’s unused applicable exclusion amount to his or her surviving spouse—even if no estate tax return is otherwise required. Portability, therefore, comes with some expense. The statute of limitations applicable to the DSUEA but not regarding the making of adjustments to the estate or gift tax for the deceased spouse is tolled indefinitely.

Many think that portability is synonymous with simpler estate plans, but this is not necessarily true. For modest estates, it may be possible to avoid estate taxation by leaving everything to the surviving spouse, without using a bypass trust to hold all or part of the assets of the deceased spouse. Of course, this simpler plan may not be wise or desirable if there are blended families, differing estate planning goals, or a need to protect an inheritance from creditors or from the beneficiary. But even modest estates may suffer from this type of plan if the portability of the DSUEA is repealed or lost and/or the exemption amount drops to $1 million for the surviving spouse in 2013 and later years.

For estates that are close to the aggregate exemption amount for married couples, which is currently $10 million, the use of portability means that the growth in the size of the estate will lead to a tax that could have been avoided by using a bypass trust or outright gifts to beneficiaries other than a spouse at the first death. However, unlike assets that are transferred to a surviving spouse outright or in a trust that qualifies for the marital deduction, assets in a bypass trust do not receive a step up in basis at the death of the surviving spouse. Planners thus must consider potential capital gains taxes. For large estates, portability will generally be a nonissue because of the risks involved.

EGTRRA’s sunset rule—which was extended by the 2010 act until December 31, 2012—also applies to the portability rule. Therefore, absent further legislation, the effect of a portability election as of January 1, 2013, is uncertain.

A surviving spouse cannot use the unused exclusion of more than one deceased spouse. Given that the statute limits the use of the DSUEA to the last deceased spouse, interesting issues arise out of the applicability of portability to subsequent marriages. The Joint Committee Report provides several examples:

- Example 1: Husband 1 dies in 2011 with no taxable estate but having made taxable transfers of $3 million. Husband 1’s executor elects to allow Wife to use Husband 1’s DSUEA. As of Husband 1’s death, Wife has made no taxable transfers, so her applicable exclusion amount is $7 million (her $5 million basic exclusion amount plus Husband 1’s $2 million of DSUEA). Wife may use the $7 million exclusion amount to make lifetime or death transfers.

- Example 2: Same facts as in Example 1, but Wife thereafter marries Husband 2, who also predeceases her after having made $4 million of taxable transfers and with no taxable estate. Husband 2’s executor elects to allow Wife to use Husband 2’s DSUEA, which is $1 million. Wife’s applicable exclusion amount is now $6 million (her $5 million basic exclusion amount plus Husband 2’s $1 million of DSUEA). This example demonstrates that the DSUEA from more than one spouse cannot be combined, and that the DSUEA of the last deceased spouse is the only DSUEA available to the surviving spouse. Wife may use the $6 million exclusion amount to make lifetime or death transfers.

- Example 3: Same facts as in Examples 1 and 2, but Wife predeceases Husband 2 after Husband 1’s death, having a $7 million applicable exclusion amount (her $5 million basic exclusion amount plus Husband 1’s $2 million of DSUEA). Wife made no taxable transfers and died having an estate of $3 million. Wife’s executor elects to allow Husband 2 to use Wife’s DSUEA, namely $4 million (her $5 million basic exclusion amount plus Husband 1’s $2 million of DSUEA, minus Wife’s $3 million taxable estate). Husband 2’s applicable exclusion amount is now $9 million (his $5 million basic exclusion amount plus Wife’s $4 million of DSUEA).

Example 3 indicates that although the statute contains no ordering rule, the DSUEA of Husband 1 appears to have been used first to shelter Wife’s estate from taxation, with her own basic exclusion amount being applied to the DSUEA allowed for Husband 2. This result appears to be inconsistent with the language of the 2010 act, which provides that the DSUEA is equal to the lesser of 1) the decedent’s basic exclusion amount, or 2) the decedent’s basic exclusion amount minus the decedent’s taxable estate plus taxable gifts. Under the statute, the DSUEA available to Husband 2 would be $2 million (the lesser of $5 million, or $5 million less Wife’s $3 million taxable estate).

The Joint Committee on Taxation has issued an errata notice stating that a technical correction to the 2010 act may be necessary for it to reflect true intent. Example 3 does not indicate how the ordering of the DSUEA and the basic exclusion amount would be applied to lifetime gifts.

Nevertheless, the order of deaths in light of a subsequent marriage is clearly important. Given the reference to the last deceased spouse, it appears that a surviving spouse can use the DSUEA of a deceased spouse while married to a subsequent spouse to make lifetime gifts, provided that the subsequent spouse is still alive. Additionally, the determination of the order of death for spouses who die together is also critical, in that only the estate of a decedent who has a last deceased spouse can receive the DSUEA from a predeceased spouse. Accordingly, planners should consider incorporating survivorship clauses in their documents to establish a conclusive presumption of the order of death.

Other practical issues embedded in portability include the potential reduction of the basic exclusion amount after 2012 with a corresponding reduction of DSUEA during the surviving spouse’s lifetime. Another consideration is the calculation of gift and estate taxes at the death of the surviving spouse if the already used DSUEA is later lost or reduced by the death of a subsequent spouse. Further legislation or guidance is needed to address these and other issues that lurk in the 2010 act.

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1 The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act (the 2010 act), Pub. Law No. 111-312, H.R. 4852 (Dec. 17, 2010).
2 I.R.C. §201.
3 I.R.C. §2010(a), (c).
5 I.R.C. §2010(a), (c).
6 I.R.C. §§2501, 2505.
8 I.R.C. §§2501, 2505.
9 I.R.C. §§2501, 2505.
10 I.R.C. §2613(a).
11 The GST exemption is determined by reference to the basic exclusion amount and is also indexed for inflation. See I.R.C. §2631(a), amended by §303(b)(2) of the 2010 act.
13 I.R.C. §1014(a). See I.R.C. §1014(a)(2)-(4) for
exceptions to the general rule. The basis of assets received from a decedent is based on alternate valuation date values—six months after the date of death or earlier date of disposition, if applicable. I.R.C. §2032. Annuities, qualified retirement assets, and other items that are considered to be income with regard to a decedent do not receive a step-up in basis. I.R.C. §1014(c).  
14 I.R.C. §1014(b)(6).  
15 I.R.C. §§167(c), 179, 1250.  
16 I.R.C. §§1014(f), 1022.  
17 Pub. L. No. 107-16, §901.  
18 “Qualified terminable interest property” is property that passes from the decedent and in which the surviving spouse has a qualifying income interest for life—an interest from which he or she is entitled to all income for life. No other person has the power to appoint any part of the property to any person other than the surviving spouse. I.R.C. §1022(c)(5).  
19 I.R.C. §1022(b)(2). The basis increase for a nonresident decedent who is not a citizen of the United States is limited to $60,000, without the unused loss or loss carryover increase.  
20 I.R.C. §1022(d)(2).  
22 Pub. L. No. 111-312, tit. 3, §301(c).  
23 I.R.C. §2203.  
24 Id.  
25 JOINT COMMITTEE REPORT, supra n.12.  
26 The GST exemption is equal to the applicable exclusion amount for estate tax purposes. Therefore, if there is no exclusion amount for estate tax purposes, it should follow that there is no GST exemption.  
28 Pub. L. No. 111-312, tit. 3, §301(d)(1). This is also the deadline for making a disclaimer under I.R.C. §2518(b).  
30 Under the law before the enactment of the 2010 act, the GST exemption amount was equal to the applicable exclusion amount for estate tax purposes. I.R.C. §2631(c).  
37 A “bypass trust” is an irrevocable trust generally used to hold assets valued up to the exemption amount of the first spouse to die. It is not included in the gross estate of the surviving spouse for federal estate tax purposes. A “reverse QTIP trust” is an irrevocable trust that holds assets of the first spouse to die and to which a portion or all of his or her GST exemption is allocated. This type of trust is included in the gross estate of the surviving spouse for estate tax purposes.  
41 JOINT COMMITTEE REPORT, supra note 12, at 52, 53.  

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Courts Limit the Privacy Rights of Public and Private Employees

Recent Rulings on Privacy in the workplace show an unambiguous trend of favoring employer interests. Two recent California state court decisions and two unanimous decisions from the U.S. Supreme Court dealing with the privacy rights of public sector employees strongly suggest that the courts are unwilling to rule against employer intrusions into employee privacy in the workplace.

In *City of Ontario v. Quon*, the Supreme Court unanimously concluded that a California municipality did not violate the Fourth Amendment rights of one of its police officers by auditing the content of text messages he sent on a city-provided pager. The city conducted the review to determine whether the officer's extensive use of the pager, which resulted in considerable overage charges, involved work-related communications. The officer sued when the city disciplined him after finding that a number of the messages were not work related and contained sexually explicit content.

Although the Court indicated that the officer likely had a reasonable expectation of privacy in his use of the pager to send text messages, it ultimately concluded that the city employer complied with the Fourth Amendment due to the reasonableness and scope of the search. Because the city's audit of the text messages was “motivated by a legitimate work-related purpose, and because it was not excessive in scope,” the Court found it permissible. The Court discussed and cautiously applied the test set forth in an earlier four-justice plurality opinion in *O'Connor v. Ortega*, which found that a court must consider, on a case-by-case basis, “the operational realities of the workplace” in order to determine whether an employee's Fourth Amendment rights are implicated and whether an employee has a reasonable expectation of privacy. “If an employee does have a legitimate privacy expectation, an employer's intrusion on that expectation ‘for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.’”

The Court seemed persuaded by the fact that the city reviewed only a limited portion of the text messages available and stressed that the nature of the audit was not directed personally at the employee but was motivated by a need to determine the cost-effectiveness of the city's wireless communications plan.

*Quon* involved a public employer, but Justice Anthony Kennedy, delivering the opinion of the Court, noted that any similar review conducted by a private employer would be “reasonable and normal.” The Court reached this conclusion because the “employer had a legitimate reason for the search, and the search was not excessively intrusive in light of that justification.”

Another recent decision, *NASA v. Nelson*, further supports this conclusion. In *Nelson*, the Court considered the workplace privacy rights of a group of employees of the California Institute of Technology who worked as contractors for NASA at the Jet Propulsion Laboratory in Pasadena. The employees challenged the federal government's right to conduct background checks that involved inquiries about illegal drug use as well as open-ended questions on a wide spectrum of issues directed to the employee's references. The questions were posed presumably to assess the employees' ability to work on confidential government projects.

The Court issued a unanimous (although Justice Elena Kagan did not participate) ruling in *Nelson* that echoes the Court's decision in *Quon*. The Court, in an opinion authored by Justice Samuel Alito, once again “assume[d] for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance,” and then moved on to find that the background check inquiries were “reasonable” in light of the government's interest in vetting its employees' fitness for government jobs. As he had done in *Quon*, Justice Scalia (joined by Justice Clarence Thomas) filed a concurring opinion arguing that no constitutional right to informational privacy exists, in the workplace or elsewhere. Also as in *Quon*, the Court held that the petitioners had no cognizable claims under the Fourth Amendment. Justice Scalia sought to move the debate further along by arguing that informational privacy, in the absence of any statutory declaration to the contrary, simply does not exist.

Alito's opinion in *Nelson*, unlike Kennedy's in *Quon*, does not contain any comments regarding the prospective application of the holding to private sector employees. However, the employer in *Nelson* was not a government agency. Rather, it was a private contractor that worked with the government, which suggests that the Court's approach to informational privacy disputes in the workplace could extend to situations involving purely private employers. The Court would, presumably, assume the existence of a privacy right but consider the employer's right to take reasonable steps to safeguard the integrity of its operations. In light of *Quon* and *Nelson*, those steps could override the basic right of employees to privacy. If Justice Scalia's concurring opinions are any indication, the Court seems to be sidestepping a broader debate on the general availability of privacy rights. Not surprisingly, given the Court's unwillingness to define with precision the scope of the individual right to privacy, the subjective evaluations of the employer's interest in any intrusions have controlled.

California Cases

Two recent appellate decisions on workplace privacy provide clear guidance to the current state of the law in California. While the California Constitution contains an express right to privacy, the trend in California jurisprudence has been to limit this right, often by ele-
vating the employer’s articulated concerns above the express privacy rights of its employees. Even if the Quon and Nelson holdings did not extend to private employers, the California courts have reached similar conclusions in their evaluation of private-sector workplace privacy claims.

In Hernandez v. Hillsides, Inc., the California Supreme Court considered the case of a plaintiff who worked for a nonprofit, private residential facility for abused children. The plaintiff and a coworker used a shared office to conduct private conversations and on occasion change clothes after closing the door. The administrators of the facility, after learning that the computer in the employees’ office had accessed pornographic Web sites, placed a hidden camera on bookshelves in the office in an attempt to catch the person making improper use of the computer. The employer maintained that the camera was only activated after work hours, when the plaintiff and her coworker would not have been on the premises, but the plaintiff filed suit against the facility after learning of the camera’s placement, claiming a violation of her right to privacy.

Using a framework and language that closely mirror the analysis of the Court in Quon and Nelson, the California high court found that although a right to privacy existed, the employer’s substantial interest in identifying the perpetrator of their improper Internet usage was a “countervailing” concern that outweighed the intrusion into the plaintiff’s right to workplace privacy. In justifying its decision, the court cited the employer’s particularly high interest in detecting and stopping pornographic Web access in a facility for abused children, as well as the safeguard of not turning on the camera until after work hours. These factors overrode the plaintiff’s right to privacy, even though the hidden camera never recorded anyone engaged in improper Internet usage. Notably, the Hernandez decision lacks any discussion of potentially less intrusive means of accomplishing the employer’s objectives.

In Holmes v. Petrovich Development Company LLC, the court of appeal examined the case of an employee who believed that she was subjected to a hostile work environment by her supervisor. The supervisor made comments in a series of e-mail exchanges concerning the employee’s pregnancy and impending maternity leave that she found offensive. While she was still an employee of the defendant, the plaintiff sent e-mail messages to an attorney from her home computer seeking legal advice. The defendant later accessed those messages, and the trial court permitted their introduction at trial. The plaintiff contended that this invaded her privacy, specifically her right to privileged and confidential communications with her attorney. The court of appeal disagreed. Discussing Quon in detail, the court held that the plaintiff had no reasonable expectation of privacy because she communicated with her attorney by e-mail using an employer-owned computer, with knowledge of clear warnings from the employer that workplace e-mail was not private. The court directly analogized the Supreme Court’s decision in Quon to the private plaintiffs, finding that even if the court were to accept some of the arguments made by the Quon plaintiffs, the plaintiff in Holmes could not prevail because the company clearly articulated its policy concerning the nonprivate nature of workplace e-mail and never deviated from that policy. Accordingly, although the plaintiff may well have had a cognizable claim for invasion of privacy under California law, the employer’s policy (set forth in its employee handbook) of monitoring its employees’ workplace e-mails overrode the plaintiff’s privacy interests.

Hernandez and Holmes illustrate that the right to privacy in California, the existence of which is not in dispute, may be trumped in workplace settings if the employer demonstrates reasonable countervailing interest. Moreover, the two decisions show that the balancing test between the two interests is highly subjective. In both cases, the courts readily set aside the private employee’s right to privacy because the employer enunciated a reasonable rationale for intruding upon that right. Indeed, in Holmes, the court’s ruling sharply turned upon the reasonableness of the employer’s policy of e-mail monitoring at all, apparently assuming that because the plaintiff was aware that the employee handbook set forth the policy clearly, it was a legitimate expression of the employer’s interests. Moreover, Hernandez and Holmes are striking because neither the inherent intrusiveness of a hidden camera nor the involvement of potential confidential attorney-client communications was enough to sustain a claim.

The California courts’ decisions in Hernandez and Holmes are compelling evidence that the right of employees to workplace privacy under California law will frequently be superseded by the employer’s interests in running its business, as long as the employer has clearly articulated its policies. Moreover, while the U.S. Supreme Court’s decisions in Nelson and Quon involve Fourth Amendment analysis and government employers or contractors, the analytical framework in each opinion may be reworked to consider similar issues in private employment. When and if the Court considers the question of workplace privacy in the private sector, it is not likely to be troubled by employer conduct that, in the
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words of Justice Kennedy in Quon, is “reasonable and normal.”23 In short, the current landscape of workplace privacy in California, for private as well as public employees, is not likely to be reshaped by the courts soon. Even in the face of an articulated right to privacy under the California Constitution, an employer’s countervailing interests have carried the day.

Policies and Plans
The lessons for employers, employees, and practitioners are relatively straightforward. Employers should articulate a clear and unambiguous written policy regarding the privacy of employee workspaces and communications and make certain that employees acknowledge receipt of these policies. Ideally, employers should promulgate their policies in a comprehensive employee handbook, distribute a copy to all employees at the hiring stage, and obtain a written acknowledgment of that distribution from each employee. Employers should also be careful to distribute any subsequent amendments to the handbook in writing and again obtain written acknowledgement from each employee.

Employers may also wish to include a brief but detailed description of the business rationale for each policy. In addition to leaving little room for doubt in employees’ minds about the intent of workplace policies, this step makes it easier for any reviewing court to articulate a legitimate countervailing interest that overrides the employees’ right to privacy. As long as these basic steps are followed, courts are unlikely to find an invasion of workplace privacy rights in either the public or the private sector.

Employees should not expect to rely on the California Constitution, California common law, or the Fourth Amendment to support their claims of invasion of privacy in the workplace as long as the employer has a reasonable interest to protect and the employer has clearly communicated its policies. Employees should be very wary of engaging in any activity at work that they do not want their employer to discover and should assume that all workplace communications may be monitored, especially if the employer has announced this policy. For now, a reasonable business justification suffices to intrude upon employee privacy rights.

2 U.S. CONST. amend. IV. See also id. at 2627-28.
3 Quon, 130 S. Ct. at 2626.
4 Id. at 2630-31.
5 Id. at 2632.
7 Id. at 718.
8 Quon, 130 S. Ct. at 2628 (citing O’Connor, 480 U.S. 709, 725-26).
9 Id. at 2633.
10 Id. (quoting O’Connor, 480 U.S. at 732 (Scalia, J., concurring)).
11 Id. at 2629.
13 Id. at 756, 759.
14 CAL. CONST. art. I, §1. To assert a claim for invasion of privacy under the California Constitution, a plaintiff must show 1) a legally protected privacy interest, 2) a reasonable expectation of privacy in the circumstances, and 3) an intrusion so serious as to be an egregious breach of social norms. Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 287 (2009). See also Sheehan v. San Francisco 49ers, Ltd., 45 Cal. 4th 992 (2009).
15 Hernandez, 47 Cal. 4th 272.
16 For the most part, Hernandez conflated the plaintiff’s right to privacy under the California Constitution with a common law claim for invasion of privacy under California law. Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 227 (1998).
17 Hernandez, 47 Cal. 4th at 278, 297-99.
18 Id. at 299.
20 Id. at 1070-72.
21 Id. at 1071.
22 Cf. Stengart v. Loving Care Agency, 990 A. 2d 650 (N.J. 2010) (An employee communicated with counsel, using a computer owned by her employer, about a potential lawsuit against the employer. The employer’s policies were ambiguous, and the employee used a password-protected, private Web-based e-mail account.). Id. at 663-64.

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PARTIES who have reached an agreement on their own sometimes ask a lawyer to document their agreement. This request implies a limitation on the scope of the lawyer’s responsibilities to those of a scrivener—that is, a “copyist or writer” of the parties’ agreement. One implication of categorizing the services requested as those of a scrivener is that the lawyer might not owe a lawyer’s duty of competence, because the lawyer does not represent the parties to the agreement.

When a lawyer provides services as part of a lawyer-client relationship, the lawyer’s obligation is “to fully inform [each] client about his or her rights and the alternatives available under the circumstances...alternative remedies, their cost and the likelihood of their success.” As a scrivener or copyist of the parties’ agreement, and not as a lawyer for any party, the lawyer’s performance might be measured by a lesser standard.

In Buehler v. Sbardellati, the California Court of Appeal offers the key to understanding a lawyer’s ability to act as a scrivener in California without bearing the potential malpractice risk inherent in a lawyer-client relationship. In Buehler, lawyer Sbardellati successfully limited his duties to those of a scrivener so that he bore no responsibility for the consequences of a business transaction that went awry.

Sbardellati’s law firm had represented Buehler, a cardiac surgeon, and Parrish, a real estate investor with prior success with Texas real estate. Sbardellati’s law firm apparently knew that Buehler was looking for investments, because it introduced the two to each other. Buehler and Parrish, after discussing between themselves various possible real estate acquisitions, decided to purchase an apartment complex in Texas. Acting without Sbardellati’s involvement, they agreed on the essential business terms of the acquisition and their relationship with one another. The latter included, among other things, the formation of a limited partnership in which Parrish would be the general partner and Buehler one of the limited partners, with an initial capital contribution by Buehler of $100,000 and certain compensation and reimbursements to Parrish.

Buehler and Parrish then asked Sbardellati to document their agreement. The evidence

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by Robert L. Kehr

Write It Up

An attorney may be able to act as a scrivener by putting a deal into writing as long as the attorney does not represent either party.
was that Buehler and Parrish did not want Sbardellati’s advice concerning the terms of the property acquisition or their relationship with one another. Their only request of Sbardellati was that he prepare a limited partnership agreement “to make sure this agreement is okay according to California law.” Sbardellati agreed to do so by representing only the limited partnership, and he also told Buehler and Parrish that he would not be involved in anything adversarial between them—neither in their negotiations nor representing either one against the other.5

While doing the requested drafting, Sbardellati became doubtful about the prospects for the venture. He did not share his misgivings with Buehler, but Buehler knew the facts on which they were based and therefore had the ability to protect himself.

Before the closing of the purchase, the lender insisted on personal guaranties from Buehler and Parrish and these were provided, again without Sbardellati’s involvement. The evidence was that Buehler signed the guaranty without requesting or waiting to receive any advice about it from Sbardellati.

When the project failed, Buehler lost his entire investment of about $700,000, leading to his action against Sbardellati for malpractice and breach of fiduciary duty. Buehler argued that whether Sbardellati was deemed to be representing him and Parrish jointly, or was operating only within a limited scope of representation, he was unable to advise Buehler with the “undivided loyalty and commitment to the client” required of lawyers under California law.6 The court of appeal rejected Buehler’s theory, and the result was a complete victory for Sbardellati.

The Buehler Analysis

The court first concluded that Sbardellati could not have a conflict of interest because he had only one client—the limited partnership. The court sensibly conflated the common enterprise (which existed by the parties’ agreement in advance of their consulting with Sbardellati) with the limited partnership (which was not formed until the required filing with the California secretary of state).7 Also, since Sbardellati represented only the limited partnership, the arrangement did not limit his duties to Buehler, who was not Sbardellati’s client in the matter.8 Fundamental to an understanding of the opinion is the court finding that Sbardellati had no lawyer-client relationship with Buehler or with Parrish.9

However, Buehler cannot be fully analyzed without addressing additional, and significant, elements of the opinion. If the job of a scrivener is “to record the stated agreement of the parties to the transaction,”10 Sbardellati’s role was not so limited. He was asked to prepare a limited partnership agreement and “to make sure this agreement is okay according to California law.”11 The quoted words are not a precise definition of what the parties expected of Sbardellati or what he impliedly promised to deliver when he accepted the assignment. Nevertheless, a lawyer who agrees to act as a scrivener will be required to provide something more than the recordation of words communicated by the parties. This is implicit in the parties having hired a lawyer rather than a typist. It also is implicit in the fact that the drafting process typically will require the lawyer to apply professional knowledge and experience. Further, if the lawyer is providing only typing services but billing at rates applicable to providing legal services, doing so would violate the unconscionable fee prohibition of Rule 4-200 of the Rules of Professional Conduct, or the unreasonable fee prohibition of ABA Model Rule 1.5.

Thus, Buehler stands for the proposition that a scrivener-lawyer may exercise professional skill and judgment in suggesting provisions typical to the kind of agreement involved, including terms needed to give legal effect to the parties’ agreement, without thereby creating lawyer-client relationships with the parties to the agreement. It is equally clear that a scrivener-lawyer may not add any provision that would alter the balance of rights and duties among the parties to the transaction.12

Buehler might appear to establish a rule that a lawyer who documents a transaction for the parties to it always can reduce or even eliminate the potential for malpractice liability by the simple step of defining a scope of engagement that is narrowly limited to the representation of the parties’ common enterprise, to the exclusion of the parties individually. (See “Engagement Agreement Provision for Scriveners,” page 24.) The court’s opinion does not support such a broad reading. To the contrary, the court reached its conclusion only in light of important facts about the parties and their conduct, and the conduct of Sbardellati. Each is significant to the court’s conclusion.

An essential part of this analysis is that Sbardellati unambiguously identified the limited partnership as his only client, and his conduct was consistent with this delineation of the engagement.13 Sbardellati did not involve himself in the parties’ negotiations and provided no advice to them on the acquisition of the property. He did nothing else to permit Buehler to have a reasonable basis for believing that he was Buehler’s lawyer with respect to the transaction. The agreements embodied in the written instruments were arrived at by the direct negotiations of its parties.14 If Buehler had reasonably relied on Sbardellati to provide legal advice to him regarding the proposed investment or the terms of the limited partnership agreement, Sbardellati would have been obligated to provide that advice.15

The court also emphasized Buehler’s sophistication and ability to look out for his own interests. This was not a generalized idea of sophistication based on the fact that Buehler held a graduate degree. The court’s reasoning went in a different direction. Rather than underlining Buehler’s education and intelligence, the court instead focused on his having made eight prior investments—and several of these were related to real estate—with little or no involvement from Sbardellati’s firm.16 Buehler not only had the ability to protect his own interests but in fact took an active role, including going to Texas to look at the property, hiring a (nonlawyer) consultant in Texas to advise him on the potential investment, and personally negotiating with Parrish.17 These actions demonstrated a practical ability to make an informed decision and an effort to do so.

Still, practitioners should be cautious in analyzing the court’s reliance on Buehler’s experience and active involvement in the investment, given the fact that Sbardellati did not represent Buehler and the rule that a lawyer generally owes no duty of competence to a nonclient.18 Perhaps the court’s interest in Buehler’s ability to make his own decisions implies that, without this, a scrivener-lawyer might facilitate one party in taking advantage of the other. If one party were incapable of self-protection, the scrivener-lawyer effectively would favor the other party by remaining silent while the helpless party is ensnared. A lawyer acting in this way might be seen as shifting his or her role from neutral agent of the limited partnership to someone favoring and advancing the interests of one party to the transaction. The court may have been mindful of the rule that a lawyer may not assist criminal or fraudulent conduct.19 Or perhaps the court simply did not want to be a party to the sharp practices of one party to the transaction and was comforted by Buehler’s abilities and active involvement.

Any of these explanations reduces the emphasis on the importance of Buehler’s sophistication from a high standard requiring detailed assessment to a matter of judicial comfort. Framing the issue of party competence in this way emphasizes the autonomy of the parties over a more paternalistic theory of the duties of lawyers, freeing the parties to act as they wish even if, as was true of Buehler, his action ultimately proved unwise.20

This narrow emphasis on party sophistication also is supported by the fact that the limited partnership agreement contained more than the basic business points of the parties’
relationship. These extras included the amount and timing of Buehler’s investment and Parrish’s role as the only general partner. The court’s description of Buehler’s experience largely related only to the transaction. Moreover, the court did not suggest that Buehler had any notable ability to study a limited partnership agreement and identify possible alternative provisions that might have been substituted to his advantage. Obviously the drafting details of any complex contract create choices among many alternatives, and those choices can have important substantive consequences for the parties.

Buehler’s apparent lack of expertise in the drafting of limited partnership agreements is not a theoretical point. Buehler’s initial investment was $100,000, but his ultimate loss was $700,000. The increase was due in part to a provision in the limited partnership agreement obligating him to make additional capital contributions to the limited partnership. Any experienced business lawyer representing Buehler would have alerted him to the risks of this provision and the potential alternative arrangements that might have limited or conditioned Buehler’s exposure. Shbardellati was not required to give this advice to Buehler because Shbardellati was not his lawyer for the transaction.

A generalized standard of a party’s ability to protect itself gives Buehler application well beyond its particular facts. The opinion states that Shbardellati’s law firm had represented Buehler for several years and therefore knew of his prior investment experience. In many situations, however, one or more of the parties will have little or no prior experience with the particular transaction, or at least the lawyer will not know much about the parties’ relevant experience. For example, consider the common, everyday situation in which the lawyer for a business is asked to draft agreements that will be signed by the business and its owners, such as employment agreements, indemnification agreements for directors and officers, or a buy-sell agreement. If the other elements of the Buehler opinion are present, the company’s lawyer is not prevented from preparing these agreements on behalf of the company only, without providing legal advice directed to the individual needs of the owners of the business.

Two other aspects of Buehler should be treated carefully by any lawyer considering a scrivener’s role. The transactions in Buehler were fairly straightforward. They involved the purchase of a single property to be managed by Parrish as the general partner of a limited partnership. Even the addition of Buehler’s bank guaranty did not overly complicate the deal. Many transactions will be similarly plain, but it is predictable that a court will balk at some point depending on the degree of complexity of the transaction and the extent of the parties’ abilities and personal involvement. In addition, implicit in the court’s description that it found nothing unfair or out of the ordinary in the agreement that Buehler reached with Parrish is the expectation that another court might react differently if a scrivener-lawyer’s involvement promoted or validated an obviously unfair agreement.

Clearly the question of enforceability between the parties is distinct from the question of whether the scrivener-lawyer has limited duties that will foreclose responsibility to the parties for malpractice under a lawyer’s standard of care.

The most recent two-party case in California is Marriage of Egedi. It does not establish whether a lawyer may act as a scrivener in a two-party situation without meeting the standard of care owed in a lawyer-client relationship. While the court ordered the enforcement of the parties’ agreement, its opinion is unclear as to whether the lawyer was acting as a scrivener who had no lawyer-client relationship with the parties or jointly represented the parties and did so with the informed written consent that met the requirements of California’s applicable conflict-of-interest rule. The problem was that the lawyer provided a disclosure under Rule 3-310 of the Rules of Professional Conduct—a disclosure that would have been unnecessary if the lawyer had no lawyer-client relationship with the parties. Thus, the lawyer’s conflict disclosure made his role unnecessary if the lawyer had no lawyer-client relationship with the parties. The reservation of the malpractice issue in Egedi evokes the much earlier opinion in Ismael v. Millington. In Ismael there was no question that the lawyer represented both spouses in the preparation of a marital settlement agreement. Although the wife testified that she signed the settlement agreement...
an agreement prospectively limiting a lawyer's duty of competence to a client is void.30

Earlier cases than Egedi and Ismael support the idea that a lawyer can serve as a scrivener without having a lawyer-client relationship with any of the parties to the transaction: Collette v. Sarrasin,31 a California Supreme Court decision, and court of appeal decisions Towns v. Towns32 and Delger v. Jacobs.33 In these cases, the lawyer did not represent a joint business. These opinions do not involve the standard of care. Each only addressed the issue of whether communications with the lawyers were privileged. In each case, the dispute at issue centered on the lawyer's preparation of a deed previously registered with the organization. The reason for including these cases is that the lawyer-client relationship is void.37

Engagement Agreement Provision for Scriveners

Lawyers seeking to serve as a scrivener to an agreement should consider using language in an engagement document that conforms with the guidance of Buehler v. Sbardellati:

You are jointly engaging me to assist you by documenting your agreement to invest together in buying and operating a [business entity]. You acknowledge that there is no lawyer-client relationship between me or my firm and either of you with respect to this project. [If the lawyer will be representing the parties' entity, consider adding: My only client is the entity that you intend to form. ] You also acknowledge that you reached your agreement by discussions between you in which I was not involved. In drafting your agreement, I may make suggestions regarding the form or content of contracts, but my suggestions will be intended only to establish a legally binding agreement between you. None of my suggestions will be intended to advance the interests of either of you over the interests of the other, and none of my suggestions is intended to express any opinion about your decision to invest, the terms of your investment, or the terms of your relationship with one another. I encourage each of you to obtain legal advice from independent lawyers concerning your personal interests. –R.L.K.

On the other hand, some courts have suggested that a lawyer in a two-party situation might be able to serve as a scrivener without having a lawyer's duty of competence.39 However, these decisions, and others, do not reliably distinguish between the possibility that a lawyer might serve merely as the scrivener of an agreement already reached by its parties, having no lawyer-client relationship with either party regarding the agreement, and the distinct question of whether a lawyer who represents both parties to an agreement violates applicable conflict-of-interest rules.

Despite the lack of clarity regarding two-party agreements in California and elsewhere, there is no reason in principle to distinguish a two-party scenario from the multiparty dispute that was the subject of Buehler. There also is no reason in principle to distinguish a two-party situation from the extremely common multiparty scenario in which the lawyer for an existing organization represents only the organization in preparing an agreement to which the organization's unrepresented owners also became parties. The reason for this is that any argument against permitting a lawyer to serve only as a scrivener in a two-party matter applies equally to a multiparty situation.

For example, one commentator has argued that it is unwise to permit lawyers to act in the limited role of a scrivener because the task of putting an agreement into proper legal form is not simple, and such limited services therefore endanger the parties' interests: “[T]he concept of lawyer-as-amanuensis is chimerical….For any given agreement there will be dozens, maybe hundreds, of possible ‘proper legal forms’ in which it can be memorialized.”41 The commentator also asserts that even when the parties to a transaction appear to share common interests, “the parties will have a host of unrecognized, predicate, or underlying interests that place them well out of perfect alignment, even as they are attempting to increase everyone's wealth. That is why they need lawyers in the first place.”42

The commentator is correct to a degree, but his criticism does not apply to a true scrivener who acts in the presence of all the Buehler elements. What he addresses is a diluted lawyer-client relationship—one that leaves a client without competent legal advice when the client has made the decision to be advised by a lawyer. Of course, no one is obligated to hire a lawyer, and a person's decision to do so involves personal decisions about self-determination as well as potential expense, delay, and alteration of relationships with other parties to the proposed transaction.

Reasonable Measures

In either the two-party or multiparty situation, a lawyer's work as a scrivener might leave a client thinking that the full range of legal services and protections are being provided. Many lawyers furnish services to clients that in some sense are related to the practice of law and therefore might be thought of as within a lawyer-client relationship. Examples include lawyers who serve as investment advisers, financial planners, and real estate brokers. There is no question that a lawyer may provide these and other law-related services without creating a lawyer-client relationship. As stated in Comment [3] to ABA Model Rule 5.7, the key is that “the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.” This is consistent with Buehler.

This is not to say that a lawyer is entitled to serve as the “lawyer for the situation,” as Justice Louis Brandeis once described some of his work when practicing law.43 The correct conclusion is to the contrary: A lawyer should be allowed to draft an agreement for unrepresented parties without having a lawyer-client relationship with any of them.
a lawyer also may draft an agreement for less than all the parties while representing only some of them and where the other parties are unrepresented.44

In either circumstance, a lawyer should be able to act without owing a lawyer’s duty of competence to the agreement’s parties whenever the standards of the Buehler opinion are satisfied. Among these requirements are that the scrivener-lawyer does not act in any way that would lead to any of the nonclients reasonably believing that the scrivener is providing his or her services within a lawyer-client relationship. To accomplish this, the scrivener-lawyer must make clear at the outset that no lawyer-client relationship exists with respect to the matter—and the lawyer must strictly adhere to that limitation. The scrivener-lawyer also must not be involved in the parties’ efforts to reach terms of agreement. He or she must remain neutral, so that the agreement is forged by the parties alone. In addition, the parties must have the capacity to look after their own interests and must act to do so—and the resulting agreement must be fair and reasonable.

Buehler provides a helpful guide to the ability of a lawyer to act as a scrivener, employed to record the agreement of the parties. A scrivener carefully excludes any representation of the parties individually—both by the terms of the engagement and by consistent conduct that gives the parties no reasonable expectation that they are receiving the benefits of a lawyer-client relationship. In this situation, the parties are able to make their own decisions about the agreement and actually are engaged in doing so, and the fairness and reasonableness of the resultant agreement can be measured at the time it is reached, not by hindsight. A scrivener may add provisions to fully state and give effect to the parties’ agreement, including those that are usual in the type of instrument that is being created.

All the reasons for permitting a lawyer to avoid lawyer-client relationships in the multiparty situation apply in the two-party situation. The presence of a single lawyer can speed and simplify the agreement and the drafting process, reduce legal expenses, lessen the risk of adversity arising between the parties, and preserve the parties’ right to control their own conduct and expenditures. Prohibiting lawyers from serving as scriveners would lead to one of two results: The parties might unwillingly hire multiple lawyers (for the apparent enrichment of lawyers at the expense of their clients), or lead the parties to do their own drafting and risk less predictable understandings of their ultimate agreement, which increases the chance of a future dispute.

A lawyer who serves as a scrivener will avoid the lawyer’s standard of care but might face additional issues about resulting responsibilities. It is reasonably clear that a lawyer who has acted only as a scrivener would not be subject to professional discipline under Rule 2-100—the no-contact rule—of the Rules of Professional Conduct.45 The reason is that this rule states that it applies only to a lawyer “while representing a client.” It also seems reasonably clear that in a business transaction between a lawyer and client, the client has not been independently represented within the meaning of Rule 3-300 if the representation was by a lawyer who acted only as a scrivener of the transaction.46 On the other hand, there is no clear authority as to whether the fiduciary duties of loyalty and confidentiality apply to a lawyer while and after acting as a scrivener.47 This important question must await further developments.

1 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1981).
4 Id. at 1532-33.
5 Id. at 1534. The lawyer’s clear statement that no legal services would be provided is an essential predicate of the Buehler decision. Compare Layton v. Pendleton, 864 S.W. 2d 937 (Mo. App. 1993) with Chang’s Imports, Inc. v. Sadr er, 216 F. Supp. 2d 325, 331 (S.D. N.Y. 2002). Also see Marsh v. Wallace, 666 F. Supp. 2d 651 (S.D. Miss. 2009); In re Conduct of Boyer, 669 P. 2d 326, 327 (Or. 1983).
6 Buehler, 34 Cal. App. 4th at 1536-37 (citation omitted).
7 CORP. CODE §15902.01.
8 Buehler, 34 Cal. App. 4th at 1539.
11 Buehler, 34 Cal. App. 4th at 1534.
12 Scrivener’s of a deal do not advise on its business terms.
14 Buehler, 34 Cal. App. 4th at 1535.
16 Buehler, 34 Cal. App. 4th at 1532.
17 Id. at 1531-32, 1533, 1535.

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19 Haggard v. Sonoma County Water Agency, 81 F. 3d 1466, 1479 (9th Cir. 1996) (concurring opinion).
20 For a recent discussion of the competing theories of the ethical lawyer as client-empowering versus the ethical lawyer as responsible for the rights and interests of nonclients, see Katherine Hunt Federle, Laundering in Juvenile Court: Lessons from a Civil Gideon Experiment, 37 FORDHAM URB. L. J. 93 (2010).
21 Buell v. City of Santa Monica, 34 Cal. App. 4th at 1532.
22 Id.
27 Marriage of Egedi, 88 Cal. App. 4th at 19 n.2.
29 Id. at 524-27.
31 Collette v. Sarrasin, 184 Cal. 283 (1920).
34 Evid. Code §959.
38 Utah Opinion 02-10 addresses the duties of a lawyer for a mediator and a lawyer’s obligation to obtain consent before limiting the scope of a representation.
41 See Lubet, supra note 35, at 345. In fairness, Lubet’s article was written in response to an earlier article that also did not identify the possibility that a scrivener-lawyer might have no client. Jonathan R. Macey & Geoffrey P. Miller, An Economic Analysis of Conflict of Interest Regulation, 82 Iowa L. Rev. 965 (1997).
42 See Lubet, supra note 35, at 344.
44 ABA Model Rule 4.2 governs a lawyer “dealing on behalf of a client with a person who is not represented by counsel...” That rule does not apply in the two-party scenario because the lawyer has no client—but it does apply in a multiparty situation in which the lawyer has a client.
46 Groshek v. Trewin, 784 N.W. 2d 163, 169 (Wis. 2010).
47 See, e.g., Olender v. United States, 210 F. 2d 796, 806 (9th Cir. 1954); Griffith v. Taylor, 937 P. 2d 297 (Alaska 1997); McKnew v. Superior Court, 23 Cal. 2d 58, 63-64 (1943).
INDEMNIFICATION is the legal obligation of one party, the indemnifier or indemnitor, to compensate for the loss or damage to another party, the indemnitee.1 In indemnification actions, practitioners who are not mindful of the applicable statute of limitations may win their battles but ultimately lose the war.

Consider the example of a large, sophisticated client that is doing everything right before closing a lucrative deal, including performing its due diligence and thoroughly researching the other party. The client assumes that in the best-case scenario, everyone will profit. Nevertheless, the client includes a fail-safe provision in its contract: an indemnity clause. Then, even if the deal turns bad, its liabilities would be covered.

Unfortunately, the client finds itself mired in litigation because of its reliance on the representations made by the other contracting party. A third party files suit against the client, asserting that the products the client purchased from the other contracting party infringes upon the third party’s intellectual property. As the client litigates the suit, it seeks compensation for reasonable attorney’s fees from the other contracting party, which replies that there is no need to rush into indemnification proceedings.

Wisely, the client does not take the indemnitor’s advice. Otherwise, it could be barred from recovering reasonable attorney’s fees because of the statute of limitations—despite having included within its contract a valid, enforceable indemnification clause.

The scenario highlights how efforts to recover damages pursuant to an indemnification clause are prone to complication. At the root of these difficulties is the fact that the Code of Civil Procedure’s statute of limitations for indemnity actions is not sufficiently explicit. Indeed, the Code of Civil Procedure does not categorically differentiate the respective statutes of limitations for express and equitable indemnity actions. This ambiguity, combined with confusion as to when the statute of limitations begins to run, can cause clients to lose their right to recover attorney’s fees.

Historically, courts recognized three forms of indemnity actions: express indemnity, implied contractual indemnity, and traditional equitable indemnity. California courts now acknowledge only two basic types of indemnity—express and equitable. Implied contractual indemnity is considered to be a form of equitable indemnity.2

Express indemnification is an obligation

by Bryant Y. Yang

Troubled INDEMNITY

The application of the four-year statute of limitations on indemnity actions requires that the indemnification be expressed in writing

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created by express contractual language. Equitable indemnity, on the other hand, is the obligation to indemnify another party arising from a particular circumstance. Equitable indemnity, unlike express indemnification, requires no contractual relationship between an indemnitor and an indemnitee. Implied indemnification is the obligation to cover another party’s loss or damage implied from a contract that does not specifically mention indemnity. In the past, implied contractual indemnity was available when two parties party, the supreme court held that an action against an escrow holder for failure to comply with escrow instructions was founded upon an instrument in writing, despite the fact that the escrow holder and its agents did not sign the instructions. The buyer of the property sued the escrow company when the escrow closed without payment to the state for liens on the property. The escrow holder argued that the two-year statute of limitations for actions on oral contracts barred the action. The supreme court held otherwise: “A con-

Courts have ruled on the issue of when a cause of action accrues, but few have specifically decided what limitation period applies—whether four years under Section 337(1) or two years under Section 339(1). Appropriately wary attorneys will do best if they assume that a two-year statute of limitations pursuant to Section 339(1) applies to equitable indemnity causes of action.

in a contractual relationship were both responsible for injuring a third party. Correctly identifying an indemnification by type is critical because different statutes of limitations apply to each variant under the Code of Civil Procedure and case law.

The statute of limitations for actions based on express indemnification is straightforward, unlike the statute of limitations for actions based on equitable indemnity. Code of Civil Procedure Section 337(1) requires “[a]n action upon any contract, obligation or liability founded upon an instrument in writing” to be commenced within four years. In contrast, Code of Civil Procedure Section 339(1) requires that “[a]n action upon a contract, obligation or liability not founded upon an instrument of writing” be commenced within two years. Therefore, the statute of limitations for a claim based upon an expressed promise to indemnify in a written contract is four years, while a claim grounded upon an oral contractual term is two years.3

**Likely Two Years, Not Four**

The statute of limitations for actions based on implied indemnity claims and traditional equitable indemnity claims is more ambiguous than for actions based on express indemnity. This is so even though a California Supreme Court decision in 1962 found that when a written contract exists between the indemnitor and indemnitee, the applicable statute of limitations for an implied obligation to indemnify is four years.

In *Amen v. Merced County Title Com-

tract may be ‘in writing’ for purposes of the statute of limitations even though it was accepted orally or by an act other than signing.” The court then applied the four-year statute of limitations.4

Following *Amen*, California courts continued to recognize that “[w]hen the law implies a promise from the terms of a written contract, the promise is as much a part of the contract as if it was written out.”5 Therefore, if an implied obligation to indemnify exists in a written instrument, Code of Civil Procedure Section 337(1) may control.

Even when no written or oral contract exists between an indemnitor and indemnitee, the California Court of Appeal has held that the statute of limitations on an indemnity action is four years. In *Liberty Mutual Insurance Company v. Hartford Accident & Indemnity Company*, the court ruled that an action brought by one insurer against another based on a written policy of insurance between one of the insurers and an insured individual was an action upon an obligation or liability founded upon an instrument in writing.6

The defendant insurer argued that the plaintiff’s claim was based upon an implied contract of indemnification, and thus a two-year statute of limitations controlled. The court agreed that actions for implied indemnification are “subject to the two-year period of limitations.” The court, however, found the plaintiff’s claim was based on a written contract for indemnification, even though there was no contractual relationship between the

Mount Tecarte Land & Water Company ruled that for a cause of action to be founded upon an instrument in writing, “the instrument must, itself, contain a contract to do the thing for the nonperformance of which the action is brought.”7 Therefore, if there is no written contract, or the written contract does not contain an expressed indemnification clause, the indemnification action cannot be founded upon an instrument in writing. A two-year statute of limitations would apply.

This is supported by the Ninth Circuit’s holding in *Pacific Employers Insurance Company v. Hartford Accident & Indemnity Company*. In that case, insurance companies were disputing the nature of their respective insurance agreements with a mining company as well as the distribution of policy settlements following an incident. The Ninth Circuit, interpreting California law, held that an insurer as subrogee to an insured was required to bring an action based upon an implied contract of indemnity within two years.8 The court ruled that a two-year limitation was applicable to implied indemnity pursuant to Code of Civil Procedure Section 339(1).

Similarly, in *Century Indemnity Company v. Superior Court*, the California Court of Appeal held that an insurer’s cause of action for contribution from a coinsurer is based on an implied promise to contribute, which invokes principles of equitable contribution or indemnity. The court posited that when no privity of contract exists between the parties, any obligation to contribute is recognized as a matter of law and founded in principles of
MCLE Test No. 206

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

1. Indemnification is an agreement between two parties in a business relationship that allows a third party to mediate and settle monetary disputes.
   True.
   False.
2. The California Code of Civil Procedure contains explicit guidelines regarding the statute of limitations for indemnity actions.
   True.
   False.
3. Equitable indemnity requires a contractual relationship between an indemnitor and an indemnitee created from a written instrument.
   True.
   False.
4. California courts currently view implied contractual indemnity as a separate form of equitable indemnity instead of as a separate form of indemnity.
   True.
   False.
5. Courts only recognize a claim for indemnity when the contract at issue explicitly provides for indemnification.
   True.
   False.
6. The statute of limitations for an express indemnity action based on a written instrument is two years.
   True.
   False.
7. The statute of limitations for an indemnification claim based on an oral contractual provision is two years.
   True.
   False.
8. Parties can find California case law supporting an interpretation that the applicable statute of limitations for an implied obligation to indemnify is four years, not two.
   True.
   False.
9. In Amen v. Merced County Title Company, the California Supreme Court held that the statute of limitations was two years because one of the parties had not signed the written instrument and, therefore, only an oral contract existed.
   True.
   False.
10. Liberty Mutual Insurance Company v. Hartford Accident & Indemnity Company is conclusive authority that the applicable statute of limitations for indemnity actions not derived from a written contract—for example, equitable indemnity—is four years.
    True.
    False.
11. For disputes involving a contract indemnifying against liability, the statute of limitations begins to run when liability is incurred.
    True.
    False.
12. When an agreement indemnifies against damages, the party indemnified is entitled to recover without first making a payment.
    True.
    False.
13. When an indemnity agreement contains provisions for liabilities and damages, the statute of limitations for all provisions is the shortest applicable statute of limitations.
    True.
    False.
14. The costs of legal services incurred by the indemnitee to defend against a suit are not indemnified unless the indemnity contract explicitly provides for the recovery of those costs.
    True.
    False.
15. Under Civil Code Section 2778(5), any and all costs incurred in pursuing an indemnity claim against the indemnitee are indemnified.
    True.
    False.
16. When the indemnitee must pay a legal obligation after losing in litigation, the statute of limitations commences on the date when payment is made to satisfy the liability—not when the expenditures for attorney’s fees are made.
    True.
    False.
17. When an indemnitee loses a lawsuit, its attorney’s fees are added on to the payment made to satisfy the liability—and the indemnitor must indemnify that sum.
    True.
    False.
18. An indemnitee that is victorious in litigation cannot recover the reasonable costs of attorney’s fees from the indemnitee.
    True.
    False.
19. If an indemnitee successfully defends itself in a lawsuit, the claim for indemnification of attorney’s fees accrues when the indemnitee pays the fees.
    True.
    False.
20. An indemnitee defending a lawsuit may find itself barred from recovering the amount it paid to its attorneys if the lawsuit is not resolved until after the applicable period of limitations has expired.
    True.
    False.

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2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
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ANSWERS

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

1. [ ] True [ ] False
2. [ ] True [ ] False
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equity, not in the terms of an agreement. Thus Code of Civil Procedure Section 339(1) would apply, not Code of Civil Procedure Section 337(1). In fact, the court expressly concluded that “Liberty Mutual was wrongly decided.” Other courts have recognized that “the two-year statute of limitations [applies] for implied contract claims.”

Practitioners clearly should be cautious when faced with an indemnity action that is not grounded upon an expressed indemnification clause in a written instrument. The cases addressing the statute of limitations for traditional equitable indemnification and implied indemnification are scant. Courts have ruled on the issue of when a cause of action accrues, but few have specifically decided what limitation period applies—whether four years under Section 337(1) or two years under Section 339(1). Appropriately wary attorneys will do best if they assume that a two-year statute of limitations pursuant to Section 339(1) applies to equitable indemnity causes of action.

**Beginning to Run**

When transactions go awry, attorneys must pay attention to more than just the type of indemnity at issue. While the type of indemnification affects the length of the statute of limitations, the nature of the indemnity agreement affects the time the statute of limitations begins to run. Civil Code Section 2778 prescribes rules on interpreting indemnity contracts. When an agreement indemnifies against “liability,” “the person indemnified is entitled to recover upon becoming liable.” Conversely, when an agreement indemnifies against “damages,” “the person indemnified is not entitled to recover without payment thereof.”

In covenants indemnifying against liability, the statute of limitations begins to run when liability is incurred. For example, in *Oaks v. Scheifferly*, the California Supreme Court affirmed that a cause of action for breach of a covenant to indemnify against liability “would accrue as soon as a judgment [is] recovered.” An obligee of a bond in the *Oaks* case was permitted to bring suit after a judgment had been obtained against him, although the obligee had not paid the judgment.

In contrast, for the statute of limitations covering covenants indemnifying damages, “it is well settled that a cause of action would not accrue for a breach of that covenant [to indemnify against damages] until the obligee had been compelled to pay and had paid damages.” Federal and state courts have affirmed this distinction.

When an agreement contains covenants to indemnify against liability and to indemnify against damages, a cause of action for one can still exist even if the other is barred. In *Oaks*, for example, the supreme court affirmed a judgment against an indemnitor because the indemnitee’s suit for the recovery of damages was filed within four years of his payment to a third party—although he had been liable for more than four years. Thus statutes of limitations on separate indemnity clauses within an agreement run independently of one another, and one recovery action can be valid even if the other is not.

**Indemnity Actions for Attorney’s Fees**

Civil Code Section 2778(3) provides that the costs of defending claims are included in the expenses to be indemnified, unless the contract provides otherwise. It is important to keep in mind, however, that only the costs of defending underlying claims are indemnified under Section 2778(3). Any costs incurred in pursuing an indemnity claim against the indemnitor are not indemnified.

When the indemnitee does not successfully defend against a claim and pays a legal obligation, whether toward a settlement or a judgment, the statute of limitations commences on the date when payment is made to satisfy the liability, not when attorney’s fees are paid. For example, in *Globe Indemnity Company v. Larkins*, the court of appeal used the date of payment to satisfy a liability to determine that an indemnity action was not barred by the statute of limitations. The court did not use the dates when the indemnitee had paid attorney’s fees.

Moreover, in *Gribaldo v. Agrippina Versicherungs A.G.*, the supreme court explicitly held that “an indemnitor is not liable for a claim made against the indemnitee until the indemnitee suffers actual loss by being compelled to pay the claim.” Similarly, the court of appeal in *Ramey v. Hopkins* dismissed a complaint that did “not allege payment, nor...show payment of the sum for which judgment was entered.” When an indemnitee loses a suit, the attorney’s fees paid by the indemnitee are added on to the payment made to satisfy the liability, and the indemnitor must indemnify the total amount.

Thus, a potential pitfall exists in cases when an indemnitee successfully defends itself against a claim. While the indemnitee can recover the reasonable costs of attorney’s fees from the indemnitor when the indemnitee is victorious in litigation, the statutes of limitations may block its efforts. In *United States Fidelity & Guaranty Company v. Smith*, the court of appeal held that an obligee who in good faith successfully defends a claim may be indemnified for attorney’s fees pursuant to Civil Code Section 2778(3). The date when the expenditures for attorney’s fees are made, however, is when the cause of action accrues. This can create a situation in which the indemnitee pays its attorney’s fees for a case that it ultimately wins but the case is not resolved until after the applicable period of limitations has expired. Consequently, the indemnitee finds itself barred from recovering the amount it paid to its attorneys.

Given the possibility of this type of scenario, attorneys and clients face a peculiar Catch-22 in indemnity actions. There is a perverse incentive for the indemnitee to lose the litigation so that it can be assured of recovering all attorney’s fees. One way for both client and counsel to avoid this pitfall is for the client to sign another agreement with the indemnitor in which the indemnitor promises to pay later. This contract will protect the indemnitee even if it wins the case after a trial that outlasts the statute of limitations. Another, more speculative, option is for the indemnitee to seek advance recovery of payments made to attorneys within the statute of limitations period, even if the litigation is ongoing.

Counsel should also advise their clients to include in indemnification contracts express language permitting recovery of attorney’s fees and costs in an action between the indemnitee and indemnitor. This will ensure that the client indemnitee will be compensated for costs incurred in pursuing an indemnity claim against the indemnitor.

Practitioners and their clients should never assume that an indemnity clause is a definitive guarantee against disputes. Indemnity clauses are limited by statute and case law. Even though the statute of limitations for express indemnity claims based on a written contract is four years, practitioners should operate under the prudent legal assumption that the statute of limitations for implied indemnity actions and traditional equitable indemnity actions is most likely two years.

If the indemnity agreement covers liability, the statute of limitations does not commence until the indemnitee becomes legally liable. If the indemnity agreement covers losses or damages, then the statute of limitations does not begin to run until the indemnitee makes a payment to satisfy a settlement or judgment. In the event that the indemnity agreement contains provisions for both liabilities and damages, the statutes of limitations for the respective provisions run separately.

Paid attorney’s fees generally are indemnified and added to the losses and damages that an indemnitee may recover once payment on a settlement or judgment is made. Expenditures for attorney’s fees in an action in which the indemnitee successfully defends against a third party’s claim are recoverable, but the statute of limitations is initiated when the expenditures are made. To ensure that
clients are protected in the event of litigation, practitioners should advise clients regarding the type and timing of the statute of limitations in indemnity actions before and after the clients agree to contracts.

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3 Carrier Corp. v. Detrex Corp., 4 Cal. App. 4th 1522, 1529-30 (1992) (Although there was a battle of forms between the parties, the “parties concede[d] that the time limitation for an action for indemnity under the facts of [the] case is controlled by the four-year provision of Code of Civil Procedure section 337, subdivision 1.”). See also 14A Cal. Jur. 3d Contribution and Indemnification §64 (2009).
10 Id.
12 Civ. Code §2778(1).
13 Civ. Code §2778(2).
15 Id. at at 480 (citation omitted); see also Gribaldo v. Agrippina Versicherungen A.G., 3 Cal. 3d 434, 446-47 (1970).
16 Exxonmobil Oil Corp. v. Nicoletti Oil, Inc., 713 F. Supp. 2d 1105, 1113 (E.D. Cal. 2010) (“Because section 2778 provides that an indemnitee may not recover from an indemnitor without first making payment on a claim, the statute of limitations for an action against the indemnitor does not begin to run until such payment is actually made.”).
18 Id. at 480 (citation omitted).
19 Id. at 480 (citation omitted); see also Gribaldo v. Agrippina Versicherungen A.G., 3 Cal. 3d 434, 446-47 (1970).
20 Exxonmobil Oil Corp. v. Nicoletti Oil, Inc., 713 F. Supp. 2d 1105, 1113 (E.D. Cal. 2010) (“Because section 2778 provides that an indemnitee may not recover from an indemnitor without first making payment on a claim, the statute of limitations for an action against the indemnitor does not begin to run until such payment is actually made.”).
21 Id. at 480 (citation omitted).
24 Gribaldo, 3 Cal. 3d at 447 (emphasis added).
26 In Globe Indemnity, the court of appeals affirmed a judgment against an indemnitee for $8,656.11—the sum of $6,830 paid by the indemnitee to third parties for liability and $1,806.11 paid by the indemnitee for attorney's fees. The court used the date of payment for the judgment to determine that the indemnity action was not barred by the four-year statute of limitations. See Globe Indem. Co., 62 Cal. App. 2d at 893-94.
27 United States Fid. & Guar. Co. v. Smith, 97 Cal. App. 492, 496-97 (1929) ("The cause of action, however, did not accrue until the expenditures were made.").
CONSUMERS and businesses regularly encounter end user license agreements (EULAs), which govern the relationship between the owner of a copyrighted work and someone who wants to obtain a copy of or use it. One type of copyrighted work is software, for which EULAs may include limits on how the user may use it. Restrictions may cover the installation, the number of registered users, and the purposes for which the software may be used. Today, it is all but impossible to access the Internet, draft a document, listen to an MP3, or watch streaming video without encountering at least one EULA. EULAs are so ubiquitous that consumers often consider them to be irrelevant. Even the animated television show *South Park* has made fun of the general tendency to accept the terms of a EULA without reading it.\(^1\)

Client businesses, however, cannot afford to ignore their EULAs, and attorneys should review those EULAs in light of three recent Ninth Circuit decisions. The cases—*Vernor v. Autodesk*,\(^2\) *UMG v. Augusto*,\(^3\) and *MDY v. Blizzard*—have changed how EULAs control the relationships between software vendors and consumers.

Two of the three Ninth Circuit EULA cases—*Vernor* and *UMG*—represent the opposite boundaries of the question of whether consumers have the right to resell a legally obtained copy of a copyrighted work. The answer depends upon how the consumer obtained the copyrighted copy. If the consumer purchased the work, he or she may resell it at any time for any price. On the other hand, if the consumer licensed the work, resale rights may be restricted or even prohibited. In *Vernor*, the consumer licensed a work, and the license restricted resale rights. The second case, *UMG*, concerns the purchase of a copy of a work. (“Purchase” or “sale” can mean receiving it for free).

**Vernor**

*Vernor* began when Vernor purchased copies of Autodesk’s AutoCAD Release 14 at an office sale held by an architectural firm, Caldwell/Thomas. The firm had obtained Release 14 from Autodesk and upgraded to a newer version. Wanting to dispose of Release 14, Caldwell/Thomas sold its discs to Vernor along with a handwritten note containing the product keys for the software. After acquiring the copies of Release 14, Vernor put them up for sale on eBay. Autodesk became aware of the sales and filed a takedown notice under the Digital Millennium Copyright Act (DMCA).\(^5\) The takedown notice alleged that the software was sold pursuant to a software license agreement (another common name for a EULA) that prohibited transfers to third parties of that software without Autodesk’s consent. By selling Release 14 to Vernor, Caldwell/Thomas had (in Autodesk’s view) exceeded the scope of the license and caused an infringement of Autodesk’s copyrights in the software. This infringement was compounded by the subsequent transfers of

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IMPORTANT: PLEASE READ THE TERMS AND CONDITIONS OF THE LICENSE AGREEMENT CAREFULLY BEFORE USING IT AND/OR ITS SUBSIDIARIES ARE WILLING TO LICENSE THE SOFTWARE TO YOU AS THE INDIVIDUAL. THE LEGAL ENTITY THAT WILL BE UTILIZED FOR REFERENCE BELOW AS "YOU" OR "OWNER" IS THE LICENSEE. THIS AGREEMENT, THIS IS A LEGAL AND BINDING AGREEMENT BETWEEN THE SOFTWARE MANUFACTURER ON THE "ACCEPT" BUTTON OR OTHER ELECTRONICALLY OR MANUALLY ON THE "CANCEL" BUTTON AND OTHER TERMS OF CONDITIONS. FURTHER USE OF THE SOFTWARE IS TO CONSUME THE SUPPORT TEAM.

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Release 14 from Vernor to other parties. Upon receipt of Autodesk’s takedown notice, eBay removed Vernor’s listings for Release 14. Vernor responded with a DMCA counternotice, claiming that the sales were lawful because the first-sale doctrine allows an owner of a lawful copy of a copyrighted work to dispose of that copy as he or she sees fit. In Vernor’s view, Caldwell/Thomas had purchased Release 14 from Autodesk. Because Caldwell/Thomas had bought the software, it could take advantage of the first-sale doctrine, and so could any subsequent purchaser. Autodesk never responded to the counternotice but continued to send takedown notices to each new instance of Vernor’s sales of Release 14. Eventually, eBay suspended Vernor’s account because of repeated charges of infringement. Vernor then filed a declaratory action against Autodesk, seeking to have a court find that based on the first-sale doctrine he lawfully owned copies of Release 14 and could sell those copies to anyone he wished.

After hearing the case, the Ninth Circuit ruled that Caldwell/Thomas had licensed, not purchased, Release 14 from Autodesk. As there was no sale of copies of Release 14, the first-sale doctrine did not apply. Thus, Caldwell/Thomas could not transfer Release 14 to Vernor without exceeding the scope of the license. When it did so anyway, it infringed upon the exclusive distribution right that Autodesk held in Release 14. In finding in favor of Autodesk, the Ninth Circuit found the Release 14 EULA created a license and not a sale because it did three things: 1) it specified that users of Release 14 were licensees, not owners, 2) it significantly restricted the user’s ability to transfer the software, and 3) it imposed notable restrictions on the use of the software.

The first element of the Ninth Circuit’s “license versus sale” test was satisfied by the Release 14 EULA, which specified that Autodesk retained title to all copies of the software and that each Autodesk customer had a nonexclusive and nontransferable license to use Release 14. In addition, the EULA specifically prohibited any renting, leasing, or other transferring of the software without Autodesk’s prior consent, which satisfied element two. Finally, the EULA prohibited using Release 14 outside of the western hemisphere, as well as modifying, translating, reverse-engineering, decompiling, or disassembling it, which the court found to be sufficiently “notable” to meet the final element of its test. As a result, the court held that Autodesk had licensed Release 14 to Caldwell/Thomas, that Caldwell/Thomas’s transfer to Vernor had exceeded the scope of the license, and that the first-sale doctrine did not apply.

**UMG**

Months after Vernor was published, the Ninth Circuit ruled in another case concerning whether the software in question was licensed or sold. UMG Recordings, Inc. v. Augusto concerned UMG’s regular practice of sending promotional CDs to radio programmers, music critics, popular bloggers, and others. Typically, UMG sent promotional CDs to these individuals through the mail without first obtaining any kind of agreement from the recipients. In fact, UMG typically merely stamped the following language on each promotional CD:

> This CD is the property of the record company and is licensed to the intended recipient for personal use only. Acceptance of this CD shall constitute an agreement to comply with the terms of the license. Resale or transfer of possession is not allowed and may be punishable under federal and state laws.

Alternatively, UMG simply put this language: “Promotional Use Only—Not for Sale.”

The facts of Augusto mirrored those of Vernor. Just as Vernor was not the original recipient of the copyrighted work, the plaintiff in Augusto was not the original recipient of the promotional CDs. Instead, the plaintiff acquired several CDs from the original recipients and resold them on eBay. UMG, like Autodesk, tried to prevent the sales of the CDs on eBay by utilizing eBay’s DMCA-based dispute resolution program. When this proved unsuccessful, UMG sued Augusto for copyright infringement.

Just as the facts of Augusto mirrored those of Vernor, so too did the key legal question—whether the copyrighted material had been licensed or sold. If the transfers were sales, then the first-sale doctrine applied and allowed the recipients to sell the CDs to Augusto, who in turn could sell the CDs to his eBay buyers. If, however, the transactions were licenses, then the first-sale doctrine would not apply, and Augusto’s resales of the CDs constituted an infringement upon UMG’s exclusive right to distribute.

The Vernor decision could lead one to think that UMG had met the standard of a license, at least for those CDs marked with the longer statement, which states that UMG is transferring the CDs pursuant to a license and that the CDs were the property of UMG. This meets the first criterion stated in Vernor. UMG’s longer statement further restricts the ability to transfer the CDs by prohibiting resale or transfer of possession, thus meeting
the second criterion. With two of three elements of the Vernor test met, one could argue that UMG had licensed, not sold, the CDs.

Nevertheless, the Ninth Circuit ruled against UMG and held that the transfers were sales and not licenses. The Augusto court, which featured the same three judges that had decided Vernor, reached this holding by adding one caveat and one new element to the Vernor test. The caveat related to the first Vernor element (that calling something a license counts in favor of there being a license). According to Augusto, however, merely calling a transaction a license is not necessarily sufficient. Courts need to look beyond the agreement and examine the actions and intent of the parties.

In Vernor, for example, Caldwell/Thomas affirmatively ordered and paid for a piece of software that was delivered subject to a license agreement that Caldwell/Thomas accepted. This was not the case in Augusto, in which UMG sent CDs to various recipients without a prior agreement and without any way of knowing whether the recipient accepted the CD and the terms pursuant to which UMG sent it. The silence of the recipient could not be interpreted as assent to the terms (brief though they may have been) that UMG proposed. The recipients of the CDs could not be said to have agreed to UMG’s terms.

The additional element that Augusto added to the Vernor test is an examination of whether the putative licensor tracked and policed transfers of the work to third parties. In Vernor, Autodesk tracked its licenses through issuance of unique product keys that required Autodesk’s approval to reuse. Thus, Autodesk had some ability to know if a person in possession of a copy of Release 14 had transferred the software to a third party. In Augusto, however, the situation was different. UMG did not track or police the CDs it sent and had no way of knowing what the recipients did with them. Nor did UMG require the CDs to be returned after use. As such, UMG’s distribution practices did not show “sufficient incidents of ownership” over the CDs to “be sensibly considered the owner of the copies.” Therefore, the Augusto court found that a failure to police transfers of a copyrighted work is an indication of a sale, rather than a license, of that work, thereby adding this element to the Vernor test.

License or Sale

The difference between a license and a sale greatly affects a person’s ability to transfer copyrighted works to third parties. As a result, copyright holders seeking control over a work’s resale have an interest in structuring EULAs to create licenses rather than sales. To ensure the creation of licenses, older, existing EULAs should be examined and changed as needed in at least four ways.

First, all indicia of sales should be removed from EULAs. This may include plain language, such as “The work at issue is licensed to you, not sold,” or “Your use of this work is subject to the terms of this license agreement.” This type of language can be found in many EULAs seen today. Second, EULAs may be altered to include transfer and use restrictions. Simple statements such as “This license is nontransferable” and “You may not copy this work” may be a starting point, but actions to enforce those restrictions will be highly advisable.

Third, copyright holders may stop giving away works for free on a promotional basis without prior agreements. A new means of distributing promotional copies may include some form of program enrollment or registration. This will allow copyright holders to obtain an agreement from users to abide by the terms of the EULA. For example, the Academy of Motion Picture Arts and Sciences has tried various means of restricting redistribution of promotional copies, including use of copies that can be played only on special players and placing digital “watermarks” in each screener copy. Finally, copyright holders will likely increase their policing. This will extend not only to transfer provisions but to all EULA covenants.

MDY v. Blizzard

The third recent EULA case is MDY Industries, LLC v. Blizzard Entertainment, Inc. Unlike Vernor and UMG, MDY Industries does not delve into the difference between a sale and a license. Rather, it examines how EULA provisions can foreclose the licensor’s ability to bring copyright infringement claims. MDY Industries may become more important than Vernor and Augusto because it has the potential to change the promises that users of a copyrighted work make when agreeing to a EULA.

MDY Industries began when players of the online computer game World of Warcraft began using automated computer programs, known as bots, to play the game. Players used the bots to gain character experience and virtual money without having to actually be at the computer playing the game. To stop this practice, Blizzard created a program to scan for player accounts using bots and ban those accounts from WoW servers.

MDY sold licenses to a bot. Even after learning that users of its bot were being banned from the WoW servers, MDY continued to sell the program. After the bans did not stop MDY from distributing the bot, Blizzard sent MDY cease-and-desist demands and threatened to bring legal action to stop the bot sales. After receiving the lawsuit threat, MDY filed a declaratory judgment
FILM & TV? NEW MEDIA? COPYRIGHT INFRINGEMENT?

BEEN THERE, DONE THAT.

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action against Blizzard, seeking a declaration that the use of bots did not infringe upon Blizzard’s copyrights in the game. Blizzard filed a counterclaim for contributory copyright infringement.

To make its case for infringement, Blizzard had to show that 1) players of WoW were given licenses, not copies, of the game, 2) the license was governed by a EULA that restricted use of the bots, 3) by using bots, players were exceeding the scope of the license in a way that infringed upon one of Blizzard’s exclusive rights, and 4) by making a program that allowed WoW players to violate the EULA, MDY was committing contributory copyright infringement. The first three elements were the most important, since it would be difficult for MDY to claim that selling its bot did not constitute contributory infringement if the use of the bot itself directly infringed upon Blizzard’s copyrights.

As to the first element—that WoW players were licensees, not owners—the court sided with Blizzard based on the pre-Augusto test in Vernor. Blizzard explicitly reserved title to the software, imposed transfer restrictions, and limited the use of the game. Even had the case been decided using the post-Augusto Vernor test, the outcome would likely have been the same, since Blizzard tracked and policed license transfers fairly diligently. Moreover, the MDY Industries court also held that the WoW EULA restricted players from using bots, based on the language in section 4(B) of the WoW terms of use:

You agree that you will not...(ii) create or use cheats, bots, “mods,” and/or hacks, or any other third party software designed to modify the World of Warcraft experience; or (iii) use any third-party software that intercepts, “mines,” or otherwise collects information from or through the Program or Service.

That left the question of whether use of the bot exceeded the scope of the license in a way that violated one of Blizzard’s exclusive rights. While this inquiry may seem simple, it can be quite complex; because not all EULA violations implicate copyright. Rather, some violations are merely breaches of the contractual agreement between the licensor and the licensee.

Covenant or Condition

In general, a EULA violation belongs to one of two categories. One is a condition, and the other is a covenant. A condition is an act or event that must occur for the license to be valid, while a covenant is a contractual promise to act (or not act) in a certain way. If a term in a EULA is a condition, violation of that term can constitute copyright infringement. If, however, the term is a covenant, a
violation of that term cannot give rise to a claim for copyright infringement, and a breach of contract action is the appropriate remedy.

Based on the language of section 4(B) of the WoW EULA, the court construed the “no bot” provision to be a covenant, not a condition. The court found two reasons for this holding. First, Blizzard did not make the grant of a license contingent on the players’ compliance with the restriction. Second, the use of the bot did not implicate any exclusive right that Blizzard held. The bot did not copy, decompile, or modify the WoW code. As such, there was no nexus between the EULA’s “no bot” term and Blizzard’s exclusive copyrights, meaning that the “no bot” provision was a covenant, not a condition. Violation of a covenant leads to contract damages; it cannot support a claim of copyright infringement.

Had the bot copied portions of the WoW code, and had Blizzard made compliance with the “no bot” restriction a contingent part of the EULA, then the result would likely have been different. While Blizzard could not have controlled how the bot functioned, it could have controlled the terms in the EULA. Turning a promise to act (or not act) in a certain way into a license condition can be difficult but not impossible. For example, the promise to pay a license fee can be a condition to a license agreement, making failure to pay the kind of activity that can lead to a claim of copyright infringement.

Owners of copyrighted works have an interest in not only controlling the channels of distribution but also structuring EULA provisions as conditions instead of covenants. The reason for turning covenants to conditions is simple. A violation of a covenant can result in an award for actual damages, while a violation of a condition can result in the statutory penalties provided under copyright law (and costs and attorney’s fees, depending upon the circumstances). As a result of Vernor, UMG, and MDY Industries, copyright holders should reexamine their EULAs to make the following changes.

First, EULAs should rephrase restrictions as conditions rather than covenants. For example, provisions such as “You cannot use bots with this program” may be modified to say, “This license is specifically conditioned on the representation that you have not, and throughout the Term of this License you will not, utilize any form of automated or semiautomated program to modify the gameplay experience of the software.” In addition, in light of the recent rulings, EULAs should ask for a greater number of representations from the end user to increase the chance that a violation of a EULA will result in a copyright infringement action rather
than a breach of contract action.

The three Ninth Circuit cases indicate a need for vendors to change their older EULAs. A EULA drafted 10 years ago may indicate a sale instead of a license. Similarly, an older EULA will almost certainly characterize any number of provisions as covenants rather than conditions, which will limit the vendor’s ability to sue for copyright infringement against EULA violators.

For the end user, the consequences of these decisions may be even more drastic, because the penalties for violating EULAs are likely to increase substantially. For example, a provision in a cell phone operating system EULA may condition the user’s ability to use the phone’s data network on the promise not to unlock the phone so that it can work on another network. Under the most recent anticircumvention exemption proceeding conducted by the U.S. Copyright Office, unlocking a cell phone for this purpose does not violate the DMCA. Through careful drafting of a EULA, however, unlocking a phone may constitute copyright infringement. The same issue may apply to other activities such as modding (the creation of derivative works) and screenshot sharing.

These three decisions change the relationship between the owner and the user of a work. The balance of rights, responsibilities, obligations, and restrictions will be altered in new and, in many cases, unexpected ways. To that end, parties on both sides of the transaction should examine the EULAs to which they agree.

2 Vernor v. Autodesk, 621 F. 3d 1102 (9th Cir. 2010).
3 UMG v. Augusto, 628 F. 3d 1175 (9th Cir. 2011).
4 MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F. 3d 928 (9th Cir. 2011).
5 17 U.S.C. §512(c).
6 17 U.S.C. §512(g).
8 Vernor v. Autodesk, 621 F. 3d 1102, 1115-16 (9th Cir. 2010).
9 Id. at 1108.
10 Id. at 1116.
11 UMG Recordings, Inc. v. Augusto, 628 F. 3d 1175 (9th Cir. 2011).
12 Id. at 1177-78.
13 Id. at 1183.
14 Id. at 1105.
15 See RESTATEMENT (SECOND) OF CONTRACTS §69 cmts. a, c.
16 See Krause v. Titleserv, Inc., 402 F. 3d 119, 124 (2d Cir. 2005).
17 MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F. 3d 928 (9th Cir. 2011).
19 S.O.S., Inc. v. Payday, Inc., 886 F. 2d 1081 (9th Cir. 1989).
20 MDY Indus., 629 F. 3d at 941. 
Iphigenia in Forest Hills

By Janet Malcolm
Yale University Press, 2011
$25, 155 pages

Readers of this book may glean some general lessons for anyone involved in a family law dispute. First, in a custody dispute, if the status quo is working or at least some progress is being made, judicial intervention may be counterproductive. Second, the remedy should fit the wrong. Even if a mother is perceived as lying in order to keep custody, should a father be granted it if he is not seeking it? Third, not telling the truth has consequences. The party that loses credibility may lose the case. Once Borukhova was perceived as having lied in an accusation that Malakov had molested Michelle, Borukhova lost not only the custody case but also her murder trial and a dependency court case in which she forfeited all parental rights. (Michelle was placed in foster care.) In the murder trial, the court allowed the family court judge’s ruling to be read into the record as evidence to support the prosecution’s theory that Borukhova conspired to murder in order to regain Michelle. The validity of the jury instruction that a person who lies about one thing may be lying about another reverberates throughout Malcolm’s book.

Malcolm portrays Borukhova with empathy but does not offer the reader a version of what Malcolm believes happened. In one passage, Malcolm relates that Justice Sidney Strauss decided to award Malakov custody of Michelle without a hearing, in Strauss’s opinion, Borukhova was “‘prevent[ing] Michelle from bonding and further strengthening her relationship with her father’ during court-ordered visits…. “ Malcolm quotes a report by the agency that monitored the visits: “Michelle does not speak to Mr. Malakov or make eye contact with him….Michelle will cry hysterically on her mother and becomes incapable of being consoled.”’ Malcolm then concludes, “In other words, the solution to the problem of a child who cries hysterically when threatened with separation from her mother while in the presence of her absent father—is to take the child away from the mother and send her to live with the father!…How had this nightmare—every mother’s nightmare—become a reality?…At another court proceeding, Borukhova had identified herself as ‘a refugee in the United States. I came for freedom of speech and freedom of religion and civil rights as well.’ What missteps had she made to place herself under state control as powerful and arbitrary as that of the old Soviet regime?”

As an author of nonfiction, Malcolm is familiar with the difficulty of determining the truth, even in a courtroom. In 1991 in Masson v. New Yorker Magazine, the U.S. Supreme Court ruled against her (and reversed the Ninth Circuit) on a summary judgment issue in a libel case concerning her article and later book about psychoanalyst Jeffrey M. Masson. Many judges and jurors are likely to agree with Malcolm’s argument in Iphigenia in Forest Hills that the truth of how one spouse treats another is something that, however much they may examine the facts and try to overcome any biases, they will never fully know.

David J. Cowan is a Los Angeles Superior Court commissioner who hears family law cases at the Santa Monica Courthouse.
Dear Jack:

As you know, Bryan Stow, a San Francisco Giants fan, was brutally attacked by two men in the Dodger Stadium parking lot on opening day, March 31, 2011.

On May 22, 2011, Los Angeles Police Department (LAPD) SWAT officers arrested my client, Giovanni Ramirez at an East Hollywood apartment complex. LAPD Chief Charlie Beck said at a news conference that day, “I believe we have the right guy. I wouldn’t be standing here in front of you. I certainly wouldn’t be booking him later on tonight. You know this is a case that needs much more work, but we have some significant, significant pieces to it that leads me to believe that we do indeed have the right individual”.

Mr. Ramirez agreed to take a LAPD polygraph examination, to be conducted on June 1, 2011.

I retained your services as a nationally known and respected polygraph examiner. You agreed to polygraph my client at Los Angeles County Men's Central Jail, on that day prior to the LAPD examination. Further, you agreed to monitor the LAPD polygraph examination in an observation room within Parker Center (LAPD Headquarters).

After you polygraphed Giovanni Ramirez, as you departed the jail, you telephoned me. You said, “LAPD arrested the wrong guy, Giovanni Ramirez was not on Dodger stadium property on March 31, 2011”.

On June 1, 2011, you accompanied me to Parker Center to monitor the LAPD polygraph examination. The respect shown to you by the LAPD polygraph personnel comforted me. You advised them that Mr. Ramirez passed your exam as you handed them your report.

Although this case had many interesting facets, central to Giovanni Ramirez being eliminated as a suspect, were your “non deceptive” polygraph results.

It is a tribute to your reputation that polygraph testing conducted by you is so well received and respected by the prosecution, as well as the defense. You saved my client's life...thank you.

Very truly yours,

[Signature]

Donald B. Marks
Anthony P. Brooklier

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Legal Basics of Renewable Energy Projects

ON WEDNESDAY, SEPTEMBER 14, the Real Property Section and its Land Use Committee, together with the Environmental Law Section, will host a program on basic renewable energy law, featuring speakers Kevin M. Kemper and H. David Nahai. Although much of the traditional real estate market has stalled, solar and wind energy projects are being planned and built throughout many regions in California. Hear experts discuss the potentials and pitfalls of renewable energy projects and the legal complexities of bringing such projects to fruition, including site identification and acquisition considerations, interconnection, permitting, power purchase agreements, financing, and tax planning. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration and the meal will be available at noon, with the program continuing from 12:30 to 2:30 P.M. The program is also available as a live Webcast and as an audio conference (a current e-mail address is required). The registration code number is 011411. The rates below include the meal.

- $20—CLE+PLUS member
- $45—Environmental Law, Real Property Section member
- $55—LACBA member
- $65—all others

2 CLE hours

Immigration Law Training Course

ON THURSDAY, SEPTEMBER 22, the Immigration Legal Assistance Project will host a two-day training course led by numerous experienced speakers that is designed for attorneys who are new to the field of immigration law or have been practicing in the field for less than one year. The training will focus on legal concepts and practical steps as well as government and immigration court policies. The course will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration will be available at 8 A.M., with the program continuing from 8:15 to 4:30 P.M. This program will not be recorded, and materials are only available for program registrants. The registration code number is 011382.

- $350—all attendees
- 13 CLE hours
Dispelling Some Myths about Arbitration

ON APRIL 27, 2011, THE U.S. SUPREME COURT, in a 5-4 decision in AT&T Mobility LLC v. Concepcion,1 granted corporations the power to enforce arbitration clauses contained in consumer contracts. While the decision has generated its fair share of heated commentary, it is important that everyone keep the decision in perspective. Generally speaking, corporations would prefer to have arbitration clauses in boilerplate consumer contracts, in the belief that these clauses result in the more efficient and less costly resolution of litigation. An examination of the data and academic analysis, however, seem to indicate otherwise. Thus, before employers, in particular, start imposing arbitration clauses on their employees—much less agreeing to them in commercial disputes with their insurance carriers—they should consider the record.

Arbitration can be quite costly, especially since fees for both arbitration and arbitrators have increased significantly in recent years. Although it takes only a few hundred dollars to file a lawsuit, arbitration can cost hundreds of thousands of dollars in fees, depending on the amount being claimed as damages and the length of the arbitration. According to a recent survey2 by Public Citizen, a consumer watchdog group, the cost just to initiate an arbitration is notably higher than the cost of filing a lawsuit: $6,650 to $11,625 to initiate a claim to arbitrate a consumer claim worth $80,000 versus $221 to file that action in an average county court. And unlike traditional court proceedings in which judges are paid by the states, parties in arbitration must pay the arbitrators themselves. Hourly rates in sophisticated commercial and insurance claims are often $500 per hour or arbitrator.

Insurance arbitration clauses, specifically, usually require three arbitrators, thereby tripling arbitration costs to $1,500 to $2,000 per hour. Earlier this year, the American Arbitration Association looked at the most recently awarded large complex commercial dispute cases and compared the cost in time and money of cases involving one arbitrator (57 total cases total, with the largest claim at $128 million) versus three arbitrators (43 total cases, with the largest claim at $100 million). The average compensation for three arbitrators was $111,576—more than five times the average amount of $20,430 for one arbitrator. Moreover, three-arbitrator panels took, on average, 517 days to reach settlement, while single arbitrators took an average of 375 days.3 Clearly, the courtroom appears to be more efficient and less costly.

In addition to costs, arbitrations contain other disadvantages, such as the inability to appeal. It is extremely difficult, if not impossible, to appeal an arbitration decision, because arbitration cases are considered binding and generally cannot be brought to court. If the arbitrator’s award is unfair, a business is stuck with it. Arbitrators actually have more decision-making power than a judge or jury, because, unlike judges and juries, arbitrators are not compelled to follow the law. As a result, if an unskilled or biased arbitrator is elected, the consequences can be more extreme.

In fact, bias and fairness have recently become critical questions for the arbitration industry. No one can understand the importance of getting detailed background information before agreeing to accept a particular arbitrator. In fact, insurance industry lawyers have become particularly skilled in disqualifying the opposing party’s choice of arbitrators and presenting arbitrators who are clearly biased but who, on the surface, appear to be either neutral or qualified. It is not uncommon and may even be worth it, if enough money is at stake, for a party to seek to disqualify arbitrators until it is rea-

Although it only takes a few hundred dollars to file a lawsuit, arbitration can cost hundreds of thousands of dollars in fees.

1 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

Nicholas Roxborough, co-managing partner of Roxborough, Pomerance, Nye & Adreani, engages in insurance litigation and the enforceability of arbitration clauses and arbitratability of claims. Donna Puyot is a paralegal with Roxborough, Pomerance, Nye & Adreani.
Adrien Katherine Wing is the Bessie Dutton Murray Professor at the University of Iowa College of Law. During her fall 2011 visit, Professor Wing will teach International Human Rights and Critical Race Theory Seminar. On October 27, 2011, she will give a free MCLE presentation, “After the Last Judgment: The Future of Middle East Constitutionalism,” as part of the continuing Chapman Dialogues series.

About the Bette and Wylie Aitken Distinguished Visiting Professorship
The Bette and Wylie Aitken Distinguished Visiting Professorship was created in 2008 to attract the nation’s leading legal scholars to the Chapman University School of Law. This distinguished professorship reflects the commitment of Chapman to enrich and strengthen the academic experience of our students by offering new perspectives and exceptional expertise from nationally acclaimed scholars.

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