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Looking for a Better Way to Manage E-Discovery?

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A BETTER WAY. Rather than spend millions to buy, manage and support complicated e-discovery software, plug into the Catalyst grid. You get immediate access to an easy-to-use, automated platform, backed by a support team with decades of experience. Processing, ECA, search, analysis, review and production. Pay only for what you need, when you need it.

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The Survival Guide for New Attorneys in California is a compilation of articles that were selected to assist new lawyers with their pursuit of truth, justice, and the American way. Okay, the articles and the knowledge they bestow will not make a new lawyer “faster than a speeding bullet, more powerful than a locomotive, and able to leap tall buildings in a single bound.” Nevertheless, they do provide new lawyers with critical insight, guidance, and direction.

The editors of the Survival Guide designed the publication to impart valuable information to new lawyers—the type of knowledge that new lawyers did not learn as students in law school.

All of us lawyers—new and not so new—recall that in law school we were taught, for the most part, black letter law, how to IRAC, and the philosophy of the law. After graduation we studied voraciously for the California bar exam and then took that nasty little three-day test. Our reward for our herculean efforts was months of stress and agony as we awaited our results.

During that wait for bar results, when time seems to stand still, most of us enjoyed—as we had the two summers before—the luxury of working as a law clerk for a firm or solo practitioner. In the process we used our finely tuned new skill set to write legal briefs and otherwise assist senior counsel with the grunt work that they did not want to do themselves. Finally the big day came when we learned we passed the bar exam. We were sworn in amid congratulations and an enjoyable party or two.

Somehow, for some inexplicable reason, the world—including those who taught you naught during your clerkships—thinks that since you passed the bar exam and were sworn in, you now possess the knowledge of Prosser and Witkin and are able to expertly navigate the tumultuous waters of the court system, sagely avoid the land mines of litigation, and steer unerringly around the twists and turns of transactional dealmaking.

Fortunately, enough of us have not forgotten our shared rites of passage, including the painful and seemingly endless searches we engaged in to gain the knowledge and find the guidance to help us traverse through yet another legal challenge.

The transformation from student to professional can be difficult. The good news is that excellent resources are available, including the Survival Guide, for new lawyers seeking to minimize the obstacles on their road to becoming proficient attorneys. This third edition of the Survival Guide—along with its predecessor editions in 2005 and 2006, which are also available at the Los Angeles County Bar Association Web site—is a collection of nuts and bolts practice tips for litigators and transactional attorneys alike. These articles will assist new lawyers with the development and direction of their legal careers. We know the stakes for new lawyers are high and trust that this guide will help new lawyers gain a competitive advantage over those who fail to see the light and fall prey to the kryptonite of ignorance.

The members of the Survival Guide’s Editorial Committee are Ethel Bennett, Ori Blumenfeld, Robert Glassman, Ted Handel, Michelle Michaels, Mhare Mouradian, Adam Post, David Reinert, Naeun Rim, Heather Stern, Damon Thayer, Koren Wong-Ervin, Andrew Yen, and myself, Stuart R. Fraenkel. On behalf of Clark Kent, the Man of Steel, and all of the authors and editors of the Survival Guide, I wish you all the very best and trust that in your pursuit of truth and justice, you will prevail.

Stuart R. Fraenkel is the co-founding partner of the Los Angeles office of Kreindler & Kreindler LLP. His practice involves representing plaintiffs in high-profile and complex personal injury, wrongful death, business litigation, entertainment, qui tam, and insurance-related matters. He is a member of the Editorial Committee of the Survival Guide for New Attorneys in California. The other members are Ethel Bennett, Ori Blumenfeld, Robert Glassman, Ted Handel, Michelle Michaels, Mhare Mouradian, Adam Post, David Reinert, Naeun Rim, Heather Stern, Damon Thayer, Koren Wong-Ervin, and Andrew Yen.
honors when their careers are ended? If it all will allow law professionals to graduate with lifetime. That will be taken while enrolled in law school whether lawyers and judges master the essential long series of professional tests determining the profession of law, searching for those truths and mastered by finding themes, overarching humorous comment on law school exams, "I was all ears. He lowered his voice to a near whisper as he passed along his nugget of wisdom to me. "Never miss a class," he said. "Write down every word the professor says. Take notes at every turn—in your study group, when reading cases, even when you wake up at night with a bright idea. You will end up with perhaps 1,000 pages of notes, too much to remember for the exam. So outline your notes. Keep the outline to under 50 pages. Even that is too much to remember, so outline your outline to no more than 10 pages. On the night before the exam, boil it all down to 1 page, then to a paragraph, then a sentence, then one word, and finally a single letter. Cram yourself into the shape of that letter, and go take the exam."

His advice, while certainly offered as a humorous comment on law school exams, made a crucial point. Life's large tasks are mastered by finding themes, overarching truths, silver threads woven into life's fabric. And, for those aspiring for success in the profession of law, searching for those truths and remaining true to them is essential.

Law school exams are only the first in a long series of professional tests determining whether lawyers and judges master the essential theme. The "final examination" is not one that will be taken while enrolled in law school but rather throughout a whole professional lifetime.

Is there a single theme that, if mastered, will allow law professionals to graduate with honors when their careers are ended? If it all could be reduced to a single letter, what would be that letter? I suggest there is one letter, and that letter is "I." Not "I" as in "me," but "I" as in "integrity."

For lawyers and judges, integrity is more than an ethical imperative. Integrity is everything. The word, by standard definition, includes notions of personal credibility, integration within the professional community, and a balance that comes from wholeness in one's personal and professional lives—integrity in the ethical sense, integrity in the integration sense, and integrity in the wholeness sense.

Ethical Integrity

Personal credibility is the quality of character and judgment that attracts clients to lawyers, gives lawyers the capacity to win consistently before judges and juries, and gives judges the ability to do justice as well as ensure that the public sees that justice has been done. This credibility attaches itself not only to the argument or ruling of the moment but also to the reputation of the person making the assertions or rendering the decision. It is built day by day through countless interactions with others, from the moment one first aspires to the profession. The wise lawyer and judge knows that every word and deed has, at least, the potential for enhancing one's personal credibility, and that credibility is more easily lost than gained.

Integration

Integration within the professional community is the great advantage of having a network of professional relationships upon which one can consistently rely for encouragement, information, and assistance in time of real need. The loner is often the loser in cooperative matters. A profession is a body of persons engaged together in a calling, and the legal profession is a body demonstrably greater than the sum of its many parts. The job of lawyer and judge is one of the most complicated, demanding, and risk-ridden undertakings imaginable. Those who fully integrate themselves within the professional body generally tend to be more productive, work more efficiently, and benefit greatly from the help and cooperation of their professional colleagues.

Wholeness

Wholeness in one's personal and professional lives generates the wisdom and empowerment that flow from living a balanced existence. While lawyers and judges often specialize in their professional focus, specialization in this sense should not be taken as a synonym for narrowness. Any lawyer standing before a jury to argue a cause knows the skills most needed to win are often learned outside the law arena in the world where ordinary people live.

The trial lawyer out of touch with common folks will likely strike out in court—and most especially in communicating with jurors. Out of touch judges may produce technically correct decisions, but they will not necessarily convince the public that justice has been done. For the scales of justice to remain balanced, those who operate them, both at bench and bar, must themselves live balanced lives. Those who do that most successfully will be empowered in their work far beyond those who do not.

A legal career is a test of character. We who devote our careers to law want to pass that test with honors. And one key to winning top grades here is found in the silver thread that holds the fabric of our profession together—the imperative of integrity.

Charles W. McCoy Jr is a Los Angeles County Superior Court judge and past presiding judge.
Forget (Some of) What You Learned in Law School

How often do law school professors advise you to forget what you have learned? While I don’t advocate throwing out the baby with the bath water, consider the following to help you survive in the real world.

**WRITE SIMPLY.** I think there is something in the water at law schools that turns perfectly good writers into terrible ones. People who once knew how to express an idea or argument in a simple sentence with a noun and a verb come to believe that legal esplain requires so much more. All of a sudden, a straightforward point gets loaded up with “therefores” and “wherefores” and “but howeveres.” But however?

**BAD.** Just bad.

Law is a discipline, not a language. Write in English. Write simply. Write so that someone who is not a lawyer can understand what you are saying, even if the reader may not be in a position to know if you are right.

By the time I began my clerkship with Justice John Paul Stevens of the U.S. Supreme Court, I think it is fair to say that my writing had become a caricature of legalese. I could barely say something without at least a few commas, semicolons, and dashes in the sentence. Justice Stevens, who had been a lawyer in practice for years before becoming a judge, laid down the law. If we wanted to write drafts he could use, they had to be written the way he wrote. Simple English. Short sentences. Clear statements. First, second, and third. No “wherefores” or “therefores.”

If you can’t make the argument in simple English, it is almost certainly because there is something wrong with the argument. Your job is not to cover it up but to figure it out.

Some easy legalese to spot:

“Thus” almost always means, “Of course this doesn’t follow from that, but I was hoping you wouldn’t see that if I said ‘thus.’”

“Therefore” is even worse. “Therefore” almost always signals “not therefore.” “Therefore” tells you that there is a missing link you are trying to hide; otherwise, the “therefore” would be superfluous.

But my absolute favorite worst sentence begins with “Thus, for example,” which means, “Not only does this not follow from that, but this is the only example I have.”

**RESEARCH CREATIVELY.** Many, many years ago, attorneys performed legal research using books. I kid you not. You would find one case, which would lead you to another, and then another—perhaps a case that really are alike.

You can’t do that just by conducting a keyword search. And don’t expect the computer—no matter how well programmed—to produce the obscure case that can win the argument. Only a person can do that. I remember a new lawyer explaining to me that after literally days (maybe even weeks) of research, he was only able to come up with two on-point cases for what seemed to me a proposition that had to have generated more authority. He explained all the things that he had done on the computer with keyword searches, even the keywords he used, as if that would convince me that there really was no authority.

So I decided to try the old-fashioned method—not keyword searches, but natural language—which produced more results than I could read. I picked a few that looked like good ones, read them, and those decisions sent me to some others. Lo and behold, while there were, in fact, only two cases interpreting the state law in question, there were at least half a dozen others interpreting analogous statutes that were clearly relevant—except to the computer.

So view legal research not as drudgery but as a chance to be creative, to approach an issue from a different direction. Legal research is not simply a computerized exercise but—dare I say it—a forum for creative artistry, which is also a much better way to think of what you’re doing in front of the computer at midnight.

**DON’T FORGET WHY YOU WENT TO LAW SCHOOL.** Law students tend to forget why they came to law school in the first place. All those students who wrote those wonderful essays—about international work, bringing the rule of law to other countries, using law as a vehicle for social change, prosecuting and defending, working for the government or public interest or in underserved areas—suddenly decide all that matters is getting a job in a top corporate firm. Big Law Rules!

Nothing against top firms. I am fortunate to be a partner in one. But it is not the only path. And these days, it is not a path available to most law students, not because they don’t deserve the work or couldn’t do it but simply because of the economy.

If your definition of success is getting a certain job and then you realize you aren’t going to get it or you don’t have it, you have left yourself no option but to see yourself as a failure. And why? Because you didn’t get a job that you really didn’t even want until you
saw everyone else rushing up the escalator in the hope of getting it?

I have been teaching now for 30 years. That gives me a pretty big group of former students who serve as my eyes and ears. Many of them started at big firms and found that the environment did not suit them at all, which is just fine. Pay back those loans before you put on the golden handcuffs of a condo you really can’t afford and a fancy car you don’t really need. You may not be in a position to follow your heart in your first job, you may love Big Law. But don’t forget that even if no one can have it all at once, you don’t have to give up your dreams because of what it cost to earn that J.D. My happiest former students are the ones doing things that they love—prosecuting, defending, practicing law in the four corners of the world, starting new firms and businesses, and yes, practicing in big law firms that really do suit them.

Try to remember. What was it you wanted to be? Even if you can’t do it today, don’t give up on doing it tomorrow. Hold onto your dreams. Build toward them.

At the end of the day, as in all things, it is not the hand you are dealt but how you play it. Not where you went to law school but what you do with that degree. Not what your first job is but where you choose to make your mark.

There are good days and bad days in the practice of law—tedium and excitement, challenge and disappointment. But more than three decades after graduating from law school, I am still in love with the law—in love with the way we think and analyze, the push and pull, with the struggle to create a legal system that commands and deserves respect, and most of all, with the feeling of doing well by my client. Years ago, I reviewed a law review article submitted by a distinguished professor, the gist of which was "the lawyer as friend." How silly and simplistic, I thought at the time, and with the arrogance of a third-year law student, I rejected it. I was wrong.

People may hate lawyers, but when they are in trouble, they want the best. Clients put their businesses, their lives, their careers, and their families in their hands. It is a great responsibility but also an act of trust and respect. We go out into the world and do our best by them, standing by our clients whether they are right or wrong, serving as their advocates but not their judges. To be that kind of friend is a noble act, a blessing that our education allows us to offer.

Congratulations on joining our profession. Presumably you arrived here at the start of your career after several years of law school. That experience should have provided you with a new vocabulary and a variety of skills to enable you to think like a lawyer. You probably have already discovered, however, that law school does not actually prepare you to practice law. Thus, you recognize the need to continue your education through practical training. But before rushing off to expand your knowledge by building on that law school foundation, you must evaluate that foundation and shed some bad habits you probably picked up along the way.

One vocal critic of the bad practices fostered by law school is Ninth Circuit Chief Judge Alex Kozinski, who recently quipped: ‘Every year I hire as law clerks some of the best and brightest law students in the country, and spend a year wringing out of them all the wrong-headed ideas their law professors taught them.” Or as Jedi Master Yoda said to Luke Skywalker in The Empire Strikes Back, “You must unlearn what you have learned.”

Here’s what you really need to rethink from your law school days.

**READ ENTIRE OPINIONS.** Students spend great amounts of time reading appellate opinions in law school. Actually, what students read in all those casebooks are excerpts from appellate opinions, edited to focus on a particular facet of a decision. Only rarely do they read a full opinion. Typically, the edited-for-teaching version omitted, at the very least, factual and procedural details, and may have omitted additional analysis and concurring or dissenting opinions. The habit of reading only part of an opinion can be very dangerous. To paraphrase Professor Emeritus Gideon Kanner of Loyola Law School, “Every opinion carries within it the seeds of its own destruction.” If you fail to read the entire opinion, you may miss something important—something your adversary is likely to find and use against you. At some point in law school, your professors warned against relying on headnotes. Heed that advice, and break the habit of reading only selected portions of cases. Read the whole megillah every time.

**ALWAYS THINK CROSSOVER.** Back in law school, you knew that if it was Tuesday morning, it must be torts. Wednesday afternoon was property. Friday was ethics. Class topics were a given, so you knew what to expect. Later, for the bar exam, you prepared for the dreaded crossover questions, which involved more than one area of law at a time. Beyond law school, every day is a crossover day. Real world legal problems aren’t confined to a single subject. You must canvas the entire spectrum of conceivable relevant topic areas in every case and revisit that analysis as the case progresses.

**PROCEDURE IS CRITICAL.** The abridged casebook opinions you studied probably lacked procedural details (except, of course, in your civil procedure class), and thus, all procedural aspects could be safely ignored while you diligently pondered the substantive law. After law school, you’ll quickly learn that procedure permeates everything. The procedural basis for a matter supplies the critical context for all other issues. You may have thought that procedure—simply a bunch of complicated and random rules—is not “real law,” but, in fact, mastering procedure is not optional. Though woefully undervalued in law school—which tends to emphasize the big picture and deep thinking—procedure and evidence are often as important as substantive law.

**STRONG WRITING WINS CASES.** Speaking of undervalued topics and skills, you probably had only one legal research and
THE FACTS MATTER—A LOT.

In law school, the focus, naturally, was on the law. Procedure and writing skills received short shrift. So, too, did facts. Yet in the real world, the facts drive the outcome. How valuable are the facts and their presentation? Associate Justice Robert S. Thompson, who served on the California Court of Appeal from 1968 to 1979, revealed that he almost always decided how a case would be resolved after reading the statement of facts and that reading the legal discussion rarely changed his mind.

Accordingly, appellate attorney Ellis J. Horvitz is known for making this offer to adversaries: “If I can write the statement of facts in your brief, you can write the legal arguments in mine.” You may not have gone to law school to become a detective or a storyteller, but without ability in those roles, your mastery over the law may be meaningless.

NEVER CRY “UNPREPARED!”
The more popular law school professors probably provided you with a chance to respond “pass” when called on in class. There is no such luxury in court. In the real world, pleading unprepared is an invitation to professional ridicule and malpractice. Nor can you make up an answer on the spot to see how it plays out.

From now on, adopt the Boy Scout motto: Be prepared. And when the question you can’t answer eventually does come your way, politely ask the court for an opportunity to quickly supply a supplemental written response.

No doubt many other law school teachings suffer in real-world practice:

• Law school often focuses on federal law and practice, yet most litigation is done in the state courts.

• Law school emphasizes trial and appellate practice over more common activities, such as discovery, client counseling, and settlement.

• Law school emphasizes case law analysis, yet practice requires much, if not more, analysis of rules and statutes.

• Law school teaches legal research through the use of digests, online searches, and case law, but lawyers more often use treatises and practice guides.

• Law school frequently presents concepts through twisty, jerky, circuitous routes of developing common law, yet real practice prizes pinpoint directness.

To return to the wise words of Master Yoda: “Much to learn, you still have.”

Ditching some bad law school habits will forge a clearer path for you.

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Book jacket blurb by Alex Kozinski, U.S. Court of Appeals judge, in WALTER OCON, SCHOOLS FOR MUSCLE: LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA (Cato 2011); see also Alex Kozinski, In Praise of Most Court—Not!, 97 COLUMBIA L. REV. 178 (Jan. 1997).
Networking in any profession is not only vital to career growth but also critical to professional success. In today’s increasingly competitive market, new associates face an even greater challenge than the mere billable hour requirement. They must also build their professional network. Proactively leveraging contacts from law school, business, and social and professional events can help elevate an attorney’s career to the next level by providing personal satisfaction and financial success.

Although networking seems intimidating at first, the foundation of a strong professional network can easily begin with friends, family, and former law school classmates and professors. Once people in this inner circle become aware of your areas of expertise, they can keep you in mind for future referrals. Following up with holiday cards, occasional e-mails, or electronic status updates on social networking sites can keep you fresh in their mind.

Technology also provides an easy way to begin making a name for yourself in your field. Joining alumni and bar association groups on LinkedIn can provide a list of potential contacts with whom you may have something in common, and if you have a mutual friend or colleague, that person can make an introduction on your behalf through the site. In addition, specialty-specific groups—such as the Asbestos Professionals Network or the Products Liability Defense group—provide access to a virtual network of attorneys, experts in the field, and even legal recruiters who are looking to place attorneys with which to share ideas and referrals. Beyond providing access to potential clients, joining an organization or volunteering can increase the chances of being selected for a job or potential client out to lunch, or writing an article for the firm’s newsletter. If your firm offers seminars to potential or current clients, volunteer to be a speaker. Doing so will show initiative and will provide you the opportunity to become further acquainted with particular legal issues in your area of specialty. Do not be afraid to take on new responsibilities and ask your supervisor for support.

Finally, never underestimate the power of your reputation. Performing excellent work and being cordial to opposing counsel or co-counsel can also result in future referrals or even job opportunities. If you prove yourself to be an invaluable member of the team on your cases, other attorneys in the community will notice your skills and professionalism in court, at mediation, or even through more routine case tasks such as discovery.

Laying the foundation for business development early on will provide immense benefits for your career. Networking takes time, commitment, and the persistence to follow through and maintain lasting professional relationships. Even if the results do not become immediately apparent, the actions you take to build your network now will undoubtedly help your career in the future when you are looking for new clients, a new job, or to make partner.
The Challenges of Time Management for Associates

At any law firm, chances are you will hear associates asking, “When do you want this?” As a junior associate, I asked it more times than I can remember, and now I hear it whenever I assign work to associates. While the question may be ubiquitous, the answers could not be more varied.

Just how long should that project take? I often mentor associates, with tongue in cheek, that there is an inverse relationship between the number of years a lawyer has been practicing and the accuracy with which he or she will make that estimate. Many senior lawyers have forgotten their earlier years and set unrealistic deadlines for completing an assignment, whether it is research or a draft of a brief. Understandably, associates compound this problem by failing to push back.

There is no better time than the beginning of your career to develop effective time-management skills and set reasonable expectations with your colleagues about your ability to do the highest-quality work. Putting off this part of your development or taking short cuts will inevitably cause issues in the future. As senior lawyers become more familiar with your work, rather than being assigned the discrete, one-off project, you will be staffed on cases or transactions as part of a team. As the junior member of the team, you will be responsible for many of the most time-consuming activities, often with deadlines that compete with work for other assigning lawyers.

Learning to manage the time you spend on projects and the expectations of more senior lawyers is critical to your success.

• As a new associate, I found that more senior associates or junior partners were my best resource within the firm for learning how long a particular assignment should take (as well as how to go about completing it). They provided me with templates (often work products that had been completed for the same partners who had assigned a project to me) and gave me a good time estimate.
  • Look for templates, especially from past associates asking, “When do you want this?” As a junior associate, I asked it more times than I can remember, and now I hear it whenever I assign work to associates. While the question may be ubiquitous, the answers could not be more varied.
  • As a new associate, I found that more senior associates or junior partners were my best resource within the firm for learning how long a particular assignment should take (as well as how to go about completing it). They provided me with templates (often work products that had been completed for the same partners who had assigned a project to me) and gave me a good time estimate.
• Look for templates, especially from past projects involving the lawyer who has given you the assignment. Save your time and the client’s money by avoiding reinvention of the wheel.
  • When you receive a research assignment or some drafting activity, ask other associates if they have any similar research or templates, or go to the firm’s document management system and look for examples. This is especially true with motions and discovery. Even better, find similar documents created by or for your assigning partner.
  • Factor in time for your learning. Your first few major projects will take longer than you think. This is true even if you receive guidance. It is especially true with motions and briefs.
  • Some lawyers are naturally talented writers and can whip up a brief with little time and effort. The rest of us take more time. Start early, work late, and plan ahead.
  • Early in your career, do not fixate on billable hours. This piece of advice may be controversial—firms always tell associates to bill all their time and let partners write off what they feel is excessive. Firms also say this practice allows partners to realize that their time expectations may not have been well founded. You must communicate the amount of time you spend on a project to the assigning lawyer, but do not let the billable hours be an impediment to creating the best possible work product.
  • The time you spend on an assignment and the time you bill are different. Learn to do the best, most thorough work that you possibly can, and be prepared not to bill some of your time when you fill out your time sheets. Early in your career—when you are establishing work relationships around the office and building trust with more senior lawyers—spending additional time that you do not bill to make sure that memoranda, briefs, or discovery responses are as good as they can be will reap benefits. Partners will remember the quality of the work product, not necessarily how much time you spent on it. If the work product is not up to par, even efficient billing will be viewed as a waste of the client’s money.
  • Asking “when?” is not the same as “how long?” Do not be afraid to ask how much time the assigning lawyer thinks a project should take—or sometimes more important, how much time the lawyer wants you to spend. With research projects, most assigning lawyers will say, “Spend ‘x’ number of hours, and then come back to me with the results.” If you get the infamous “this should only take a couple of hours,” always say, “I’ll spend two or three hours on this, and let you know what I have come up with before spending more time on it.” If the time spent is insufficient to complete the project, you implicitly educate the assigning lawyer as to how much time the project should take.
  • Avoid memos, unless you are asked to prepare one. Do not hand in a lengthy memo that plods through the facts and holdings of a litany of cases when all that is needed is a citation that can be dropped into a letter or brief.
  • If you are asked to research a point, once you find the best case or cases to support a particular point, drop the summarized holdings and salient quotes into an e-mail message and send it to the assigning lawyer. He or she will appreciate that you saved time by getting the information quickly.
  • Do not be afraid to go back to an assigning lawyer empty-handed. Not all research assignments yield the desired result. Treat the assignment like a high school math exam, and be prepared to show your work. Explain what sources, databases, and treatises you research...
ed, what types of cases and authorities you examined, and what search strings you used. Be prepared to offer your analysis as to how the research you performed advances the client’s position, even if the cases offer no direct support. You will earn higher regard from your colleagues if you leave them with more than the perception that you did not find anything useful.

- Learn to say “yes, but.” Most associates do not want to say no when asked to take on new projects or cases. Associates may fear rejecting a more senior lawyer or worry that if they reject an assignment they will not be asked again. Associates can often find themselves accepting more work than they can handle. This problem is compounded by failing to adequately budget how much time it will take to complete the projects. As a result, deadlines are missed, work product declines, all-nighters are pulled, and work-related stress is exacerbated; your career suffers.

“Yes, but” is simply a statement that you would be happy to help on a case, or work on a project, but you have other deadlines to which you are already committed, and if the new assigning lawyer is willing to accept those other demands, then the two of you can work out the details. For this approach to work, you have to be honest about those other projects. You may not want someone else to get the assignment, but at least with “yes, but,” the partner makes that decision rather than you.

- Be proactive when faced with demands from competing assigning lawyers. Firms tell associates that they should let partners hash out the associates’ competing deadlines and workload demands. This advice is sound, but it is easier given than followed. While partners or assigning lawyers certainly should talk, do not leave the communication up to them. Reasonably or not, some of them will inevitably harbor some resentment that you put them in that situation. Instead, be assertive, and map out deadlines and communicate expectations. It is far more productive to have discussions about workload before you fall behind than it is to tell an assigning lawyer a day or two before an expected draft or work product is due that you are too busy.

Being proactive and managing expectations about how much work you can do, and how long it will take you to do it, will go a long way toward establishing the working foundation you need to succeed in any firm or practice.

As you well know, this is one of the toughest times to start a legal career. It is likely that as a new lawyer, you are starting your career already in debt. The amount of debt that many new lawyers accrue in law school is growing each year as the cost of education continues to rise. When I speak to new attorneys about their finances, the ability to manage debt is their most common concern.

Further, given the recent economic recession and consolidations in the legal industry, just having a full-time job is an achievement. There are thousands of experienced lawyers out of work. When law firms hire, they tend to be selectively looking to bring on experienced lawyers—often those who can bring or generate business—at entry level price tags. In addition, the top clients of these law firms are leveraging their relationships by looking for ways to cut expenses.

This triple whammy of increasing debt loads, job insecurity, and lower salaries can be devastating to your bottom line. That is why, as a new lawyer, it is vital that you begin to map your financial future as early in your career as possible. There are some simple but important steps you can take.

Find a Professional for Advice

If you do not already have a relationship with a financial adviser or banker, an easy way to start would be for you to find out where your law firm banks and ask for an introduction to the banker or “relationship manager” who is assigned to your firm.

If you still want other options, do not hesitate to ask your family, colleagues, or friends—including people with whom they work—for an introduction to a financial professional. You will find that if people are pleased with their financial adviser or banker, they will jump at the chance to refer him or her.

Once you establish that relationship, you will thank yourself later when you have some type of banking emergency or a need that goes beyond planning advice. Such a future need can include buying a home, obtaining a line of credit, or taking out a partnership loan. Working with someone who knows you, understands the nuances of your business, and, most importantly, has the ability to provide some flexibility and customization to your needs is vitally important.

Ultimately, now that the economy is on its way back on track, so should you try to get on track with respect to your personal (or family) financial plan. If you make basic financial planning a priority today, the more complicated planning will be easier for you to implement down the road. Here are some important steps to follow to help establish your financial health.

- Create a balance sheet (all your assets and liabilities) and a personal cash flow statement in an electronic spreadsheet. The balance sheet should detail all your liabilities (with corresponding interest rates on loans, credit cards, and so on) and, in a separate column, all your assets (cash, real estate, stocks/bonds, personal items of value, etc.). When you subtract the value of your liabilities from your assets, the resulting number will be your net worth. Do not be alarmed if the number is negative; it is not uncommon to have a negative net worth as a new lawyer. In the balance sheet’s cash flow statement, detail every monthly recurring expense that you have in your budget (rent or mortgage payment, car payments, insurance, student loan payments, dry cleaning, utilities, your $4 daily lattes, meals out, groceries, entertainment expenses, and so on—everything!). Then, deduct this monthly expense total from your net after-tax income (your take-home pay that reaches

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your bank account). This resulting cash flow, which should be a positive number, is your monthly savings. This savings, in turn, should go to your rainy day fund. If you have a negative balance on your monthly cash flow, then it is time to trim the expenses by getting rid of unnecessary expenses and by reducing your overhead fixed costs (such as rent, insurance, entertainment, etc.). Once a positive monthly cash flow is established, the next step applies.

- Set up a recurring monthly transfer to a separate bank account. Open a separate bank account and try to save a portion of your monthly net income and your bonuses (or at least a portion of them). It is wise to use this account to pay down your debt. Pay the higher interest debt first. Your salary should go toward your recurring monthly obligations, but what is left over should go to paying off debt and savings. Once you have enough cash saved up, begin an investment strategy that fits your risk tolerance. Be sure to start your investment conversations with a licensed investment professional at your bank or investment management firm.

- If you do not know where to start, simply find out the name of the person with whom your law firm does its banking business and ask to be introduced to that banker or financial adviser. If you feel that you connect well with that person, seek his or her advice. Lawyers are not expected to be financial planners or estate planners and insurance providers. So hire a professional who not only is a good personality fit for you but also someone who has experience in providing financial advice.

- Make it a goal to save up an emergency fund that can cover at least six months of your monthly expenses. If you cannot quite get there, work to save enough for three months. You just never know when you might need to dip into your emergency savings.

- Always pay off your most expensive debt first. This is especially true for credit cards and personal loans. Your law school loans should be consolidated as much as you can at the lowest interest rates possible. If you still have relatively high rates, consider your options. You may be able to consolidate your student loans into a home equity line of credit, for example. This applies only if you are a homeowner and have available equity to borrow. This type of consolidation may allow for interest-only payments, which may enhance your cash flow (by reducing the amount of your minimum payment due) and potential tax deductibility.

- Contribute to your firm’s 401k plan or to your IRA account regularly, but only to the extent that you can afford it. Paying your monthly obligations must take precedence, but try to force yourself to pay off money every month. Your retirement contributions reduce your taxable income and allow you to invest in your 401k with each pay period. As much as possible, buy during dips in the financial markets. This allows you to lower your cost basis with your investments. As a new attorney, you have time on your side, so investing more aggressively can make sense, if doing so fits your risk tolerance. Discuss your 401k asset allocation with your investment adviser.

- If you do not have the time, ability, or interest in doing your own tax returns, you should hire a CPA. Consider it likely that in the long run, an accounting professional’s services will be more efficient, reliable, and helpful to you than your own (especially in the event of an IRS audit). As a new professional, hiring professionals to do the things that will help make your already busy life easier can make a lot of sense. Your banker or financial adviser can offer referrals.

- Finally, consider basic estate planning—especially if you are married, have children, or own real estate. Basic estate plans and insurance policies are affordable and will start you down the path of responsible planning for your heirs in the event of an accident, disability, sickness, or untimely death. Your banker or financial adviser will have referrals for estate planners and insurance providers. Although these initial steps may seem basic, you would be surprised how many of your peers do not actually follow through. By implementing these steps, you will be far more prepared than most.

Orthopedic–Spinal Expert Witness

GRAHAM A. PURCELL, MD, INC.
Assistant Clinical Professor of Orthopedic Surgery, UCLA

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- American Board of Orthopedic Surgery-Board Certified Orthopedic Surgeon
- California Department of Industrial Relations-Qualified Medical Evaluator

Memberships:
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- Fellow, North American Spine Society
- Fellow, Scoliosis Research Society

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ORTHOPEDIC SPINAL SURGEON
Professional liability insurance is an important part of a lawyer's practice management. While having liability insurance is not mandatory in California, it is important to understand the benefits of having insurance and the risks of not being insured.

**WHAT DOES PROFESSIONAL LIABILITY INSURANCE COVER?** A professional liability policy covers an attorney's defense costs and indemnity resulting from a claim of professional negligence and personal injury from professional services.

**WHAT ARE THE TYPES OF LEGAL SERVICES THAT ARE COVERED UNDER THE POLICY?** Covered services may include providing legal advice for a client, acting as a mediator, arbitrator, notary public or a title agent, as an administrator, conservator, executor, guardian, trustee, receiver or in any similar fiduciary capacity, provided that such services are performed in connection with and incidental to an attorney's practice of law.

Additionally, acting as a member of a bar association or other legal/lawyer related ethics, peer review, accreditation, licensing board, committee, or organization is covered. Acting as an author also may be covered, but only for the publication or presentation of research papers or similar work, and only if the fees generated annually from all such work are less than $25,000.

**WHAT TYPES OF PERSONAL INJURY CAN BE COVERED?** Personal injury encompasses malicious prosecution, abuse of process, defamation, false imprisonment, and wrongful eviction.

**WHAT IS ERP COVERAGE AND SHOULD MY FIRM HAVE IT?** Extended Reporting Periods (ERPs) or “tail” provisions give a law firm the right to report claims after a policy has expired or been canceled. ERPs do not, however, increase or reinstate the policy's limit of liability. If your firm dissolves, merges, or is not renewed by its current carrier and the new carrier is unwilling to provide full prior acts or retroactive coverage to the date provided under the expiring policy, then you should consider an ERP.

**WHAT CLAIMS SHOULD BE REPORTED?** Report all claims. Failure to report could result in denial of coverage. Your duty to report is especially important when filling out an application or renewal form. If you disclose a potential claim on an application to a new insurer, they will specifically exclude the claim. By concurrently reporting the potential claim to the firm's current carrier, this claim will be covered under the expiring policy.

**HOW DOES MY FIRM GO ABOUT GETTING A POLICY?** Working with an insurance brokerage that has access to multiple insurance carriers can help you determine what type of coverage you need. A brokerage will be able to compare rates as well as help you through the application process. Obtaining insurance shouldn’t be just about getting the best price. You must also consider the carrier's rating and its financial size, policy form, the reputation of the insurance company, and how it handles claims.

**ARE THERE ANY STRATEGIES THAT CAN HELP ENSURE COST SAVINGS WHILE OBTAINING THE BEST COVERAGE AVAILABLE?** Positioning your practice in a way that appeals to insurance underwriters is key to maximizing savings. When applying for professional liability insurance, indicate which attorneys are full time, part time, or of counsel. Indicating the number of hours an attorney bills can save you from being charged a full rate for attorneys working part time. Underwriters want to see that your firm is well managed. Provide the insurance company with a description of your client intake methods. If your firm has trust accounts, use “evergreen” retainer agreements, which require that a minimum balance be maintained within the trust. Note that seminars your firm attorneys attend that contribute to their practice and risk management skills. Be diligent about your accounts receivable. Underwriters don’t want to see that your clients owe you significant amounts of money or that suits for fees are a norm.

If your firm offers services out of the norm, provide a detailed explanation of the services. Be sure that the skills you state on your insurance application mirror those on your Web site. Web site text can be held as misrepresentation in a malpractice claim, so accurately and thoroughly state what you do.

**ARE THERE SPECIFIC INSURANCE REQUIREMENTS FOR LLPs?** California Code Section 16956 requires all law firms that are LLPs and have five or fewer licensed attorneys to hold an insurance policy and/or policies amounting to no less than the total annual aggregate limit of liability of $1 million. For LLPs with more than five legal professionals, an additional $100,000 of insurance must be obtained for each additional licensed professional. The maximum amount of insurance is not required to exceed $7.5 million.

**MUST MY FIRM DISCLOSE THAT WE DO NOT HAVE INSURANCE?** Rule 3-410 of the California Rules of Professional Conduct requires that attorneys who are not covered by professional liability insurance must so inform clients. Additionally, if an attorney has had insurance but elects to drop his or her malpractice coverage, clients must be advised in writing within 30 days of the termination of the insurance coverage. The rule applies to any legal matter that will require four hours or more of legal representation but does not apply to emergency legal services.

W. Brian Ahern, RPLU, is president/CEO of Ahern Insurance Brokerage, one of the largest independently owned insurance brokerages specializing in the insurance needs of law firms.
omething you hear at any law school graduation ceremony is, “Welcome to the practice of law.” The practice of law is not limited to writing memos or motions or contracts for a specific side or client. It includes becoming a member of a profession, with all the attendant rights and responsibilities of membership. I believe that getting involved in a bar organization is an integral part of practicing law.

Law school offers an orderly predictability that, for many, ends with graduation. We and our friends took the same classes in the same buildings and spent hours working toward the day that we would all finally practice. Once we graduated, passed the bar, and began our lives as lawyers, things changed. Now, classmates are practicing on their own, often in what can appear to be a line of work that is absolutely distinct from our own. Some go to court and argue for their side, while others have no interest in ever seeing the inside of a courtroom. If you picked 50 bar members at random, you could likely find 25 different areas of law and provide its members with sections covering virtually all practice areas, and it comes with a long list of affiliated associations. The Association’s members are spread wide, geographically and demographically, and thus it is likely that you will find other members near you. If you want to succeed in a particular practice area, there is likely to be a LACBA section for the practice area in which you work or want to work.

Being a LACBA member and leader myself makes me a bit biased, but when you are looking at California organizations, the Bar Association has hundreds of programs and lots of people who want to help you be a better lawyer.

Bar associations provide the opportunity to expand our craft. They expose us to people we never thought we would meet, and they allow us to build friendships.

Los Angeles and across California, numerous voluntary bar associations offer practitioners the opportunity to find commonality by practice area, geography, ethnicity, and other criteria. Just as law school unites people who are studying law, these associations unite people who are practicing law. Regardless of practice area, bar associations provide the opportunity to expand our craft. They expose us to people we never thought we would meet, and they allow us to build friendships, relationships, and know-how. Associations foster relationships among new attorneys and veteran and former attorneys, many of whom are truly impressive people.

For example, MCLE courses are often taught by people you would not otherwise meet. But you should not join a bar association merely to get MCLE credit, because your membership is good for more than that. Join a bar association to learn to be a better lawyer. When you find a group that fits you well, you will have access to years of insight into the legal world, and you will find people who earlier made the same mistakes you have made (or now will not make) and who have succeeded in the practice of law.

Many associations have law school chapters. At any given school you can find a variety of ethnic and local bars. However, when it comes to bar associations, do not limit yourself to what you have already experienced. For example, the Los Angeles County Bar Association has hundreds of programs and lots of people who want to help you be a better lawyer.

What Joining an Association Can Do for You

SHAPING YOUR CAREER

By David Reinert

David Reinert is the immediate past president of the Los Angeles County Bar Association Barristers Section and a Los Angeles County deputy district attorney.
I guarantee that only those with egos bigger than their offices revel in being referred to as senior partners. The title implies that the attorney is experienced, is a rainmaker, or is a thought leader. But truth be told, being a senior partner just means you’re old. Of course, “old” is a relative term. I thought my fourth-grade teacher, Mrs. Tjomsland, was old. She was in her late twenties at the time.

In a law office, “old” just means someone is separated by a gap of a generation or experience. The gap entitles the person with the substantially lower bar number to rule your world—quietly and benevolently, or with a loud voice and an iron fist. While some would humorously compare the relationship of partner and associate to that of dog and master, the relationship of a younger attorney with a senior partner is much more symbiotic.

Senior partners rely on you. You make them profitable. You make it possible for them to be out of the office to develop more business, to play golf, and to do whatever they want to do instead of meeting and conferring about the impropriety of the objections to Request for Production number 143.

So, assuming you want to become a senior partner one day, or at least develop experience before hanging out a shingle of your own, consider the following in approaching senior partners. I’ll write it in the first person (and interrupt me booking my next tee time) and offer my bad.

**Bring a Pad and Pens.** When you come to my office, bring a pad and pens. I have pearls of wisdom to impart. They fall from the sky like rain when you’re in my office. Now I know that’s mixing metaphors, but don’t point it out when senior partners mix metaphors. Whenever we talk, have a pad to catch them.

This is my desk. These are my pens. I have our central services person order them for me special. They have the gel ink I like that smears on glossy paper but makes my signature and atrocious handwriting look more important. Don’t touch my pens. Bring two pens of your own to every meeting. One will run out when you need it most.

**Understand What You Are Supposed to Do.** My time is more valuable, or at least more expensive, than yours. And the more time I spend with you, the less time I spend with my kids and playing golf. Don’t waste my time making me repeat an assignment. When you leave my office, know what you’re supposed to do. And know how and when I expect it to be done. Understand the client’s deadlines for review as well. If we don’t meet the client’s deadlines, we won’t have the opportunity to do so in the future.

So, when we’re talking about the assignment, the first time is the time to nail it down. If there is any question in your mind about what you’re supposed to be doing, write an outline first and send it to me to look at. If I don’t respond and you follow the outline, my bad.

Of course your research and writing may reveal a different path to pursue. Talk to me about it before spending much time that I don’t think is valuable (e.g., because I didn’t think of it).

**Be a Problem Solver.** Everyone gets stumped from time to time. And not every theory is a path to summary judgment or victory at trial. But if we (the royal “we”) want to make an argument and have no support for it, I can’t exactly say, “Gosh, Judge, I couldn’t find any case authority. And I can’t think of any ground in logic, reason, or public policy to support my argument. But I think you should find in my client’s favor anyway.” That’s a problem. So too is anything else you uncover that negatively impacts a case. But you’re a lawyer. Figure it out. Then talk to me about it. In other words, don’t come into my office (and interrupt me booking my next tee time) with a problem that you’ve spent two weeks unsuccessfully researching and expect me to have a flash of genius. Come to me with a range of possible solutions based upon legal authority, or at least reason. Whether I like it or not, you did the research and are in a better position than I to say whether there is support for any of the solutions you’ve created or others I concoct while you’re sitting there.

**Be Creative, to a Point.** You do not work on an assembly line. You have the true privilege of working on different cases that present unique legal and factual problems. You’re smart and curious. And your tasks are not ends in themselves but are parts of larger endeavors for your clients’ cases and causes.

Your luxury of time thinking about issues may span substantially longer periods than mine. So if you’re doing your job, you’ll be thinking creatively about the next steps in the case. Some of your ideas we can laugh about together. Others may be case dispositive. Don’t let the former prevent you from disclosing the latter. I want to know your ideas. Some senior partners will view any idea that is not their own as a bad idea. Play to it in your presentation if necessary. And I want to have your ideas presented in a way that doesn’t cost the client much, if anything. In other words, be deliberate about the tangents you pursue before we collectively go down a path.

**Research Off the Internet.** It’s very easy to look for electronic gadgets and restaurant reviews on the Internet, where your search results are driven by the keywords you use and algorithms you’ll never see. But I use less scrutiny when I am looking for...
the best gluten-free pizza than when I am looking for case authority.

Thanks to the Internet, keywords have become the worst form of blinders, often preventing people from analyzing the hierarchy of results the keyword searches create. And they most certainly divert thinking about analogies to other situations that might exist in the cases.

Old lawyers and I were trained with books. If I find something in a book that you missed in your keyword searching, tighten up your resume. In other words, when you hit a stumbling block, go to the books (codes, digests, etc.) or their electronic equivalent.

WRITE LIKE ME. I care about the way I am perceived by judges and juries. I care about my reputation and credibility. And when you sign something that is submitted to a client or the court, you’re doing it for a client I represent. My name is at the top. So write like me.

You will not know how to do this on day one. You will have to learn how to do it. It may be demoralizing for the first several assignments you see covered in red ink (or otherwise all marked up). Sentence structures will be changed. Adjectives and adverbs will be changed or deleted. Ad hominem attacks will vanish. A court’s “findings” will be correctly recharacterized as holdings.

Either get used to it or get a new job. And remember, the more redlining I have to do, the less golf I play. The less golf I play, the less happy I am. The less happy I am, the less I care about whether your pride of authorship comes through in the final work product, and the more redlining I do. It’s a vicious cycle.

MORE WORK IS A COMPLIMENT. While praise is nice, don’t expect it. Don’t even expect an evaluation. If you get more work, consider it praise. Here’s where senior lawyers observe the generation gap most. In recent years, little leagues have given out large trophies to every player. Everyone is a winner, the philosophy goes. Not so for lawyers of the past generations. Not everyone gets praise. And not everyone keeps their job.

There is a time and a place for evaluations—some frequent, some annual, and some not at all. Don’t ask the senior partner for an evaluation of your work at an inappropriate time. If you’re not getting enough evaluation, express an interest in it, and set a lunch to talk about it—away from the office.

If you do senior partners the favor of understanding and fulfilling their needs and respecting their time, they will do you the favor of practice development. If they don’t, leave.

In today’s economic paradigm, businesses not only are more closely scrutinizing their expenditures but are also particularly conscious of their legal fees. Nevertheless, this can work to your advantage as a new outside attorney. Since you bill at a lower rate than the partners in your firm, you may be the one who performs the bulk of the work. But fees are not the sole issue in keeping in-house counsel happy. The most important factor in establishing trust.

DO YOUR HOMEWORK. The phrase “Do your homework!” may foster memories of your parents’ nagging, but knowing your client is vital to providing the best representation and will, in turn, keep in-house counsel pleased about retaining your services. Countless books and literature address the importance of understanding your client’s business, and with the advent of the Internet and other sources of social media, researching the type of business your client conducts does not pose an exceptionally difficult task. Your research will impress in-house counsel, and if your study happens to reveal a few gaps in your comprehension, then a discussion with in-house counsel will help build their confidence in your ability to properly handle the case.

DEVELOP A RELATIONSHIP. Where possible, always make personal contact. Typically, your supervisor will inform in-house counsel that you are working on the matter with them. However, before contacting in-house counsel, make sure that your supervisor has given you the authority to do so. Then set up a face-to-face meeting, preferably at their office. Do not wait for the senior partner to make the formal introduction.

Because everyone’s time is valuable, the meeting can be short and concise depending on the circumstances. Conducting business in person allows you to work together closely and enables in-house counsel to get to know and trust you.

PREPARE BEFORE YOU DIAL. Speaking to in-house counsel as a new attorney can be nerve-racking. However, being prepared before you place your phone call will go a long way in calming your nerves. Unless it is an emergency, resist the impulse to immediately return calls. First make sure you have your supervisor’s authority to contact counsel. Don’t wait hours or days before dialing, but do research the issue quickly and construct an outline of your points and any additional questions you may have. By being prepared before you dial, your return call will go much more smoothly.

INVOLVE IN-HOUSE COUNSEL. Whether you are a litigation attorney or a transactional attorney, you can involve in-house counsel with your case in a number of different ways. Who will know your client’s business better than in-house counsel?

In litigation cases, in-house counsel can help you figure out what types of questions should demand your focus during depositions, or whose depositions you or your partner should take. When you are responding to discovery, first draft a response containing all the information you have, and then ask in-house counsel to fill in any gaps. Once you are done, set up a meeting with in-house counsel to review the drafts together in person or telephonically.

Invite in-house counsel to attend depositions or mediations; if a specific issue arises of which you may not be aware—such as prior lawsuits in which the company took a specific defense (especially important when dealing with a national company)—in-house counsel can help make sure you do not deviate from prior positions.

If you are working on a dispositive motion
Since you bill at a lower rate than the partners in your firm, you may be the one who performs the bulk of the work. But fees are not the sole issue in keeping in-house counsel happy. The most important factor is establishing trust.

**PROVIDE DETAILED DESCRIPTIONS WHEN YOU BILL.** More often than not, in-house counsel will review the legal bills from outside counsel. Unfortunately, for most new attorneys, adequately describing billable tasks can be difficult. After all, most law schools do not provide a class on billing. The most important rule to remember is to use the five Ws—who, what, when, where, and why. For example, if you bill for review of medical records, state the reason why you conducted the review (such as “in preparation of damages section of mediation brief”).

Follow these key recommendations, and you’ll be on your way to keeping in-house counsel happy. Although your primary obligation is always to your firm, you’ll make valuable connections that you may need in the future.

David Schnider is general counsel for Leg Avenue, Inc., a leading distributor of costumes and apparel.

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**SHAPING YOUR CAREER**

**By David Schnider**

**WEIGHING THE BENEFITS OF BEING AN IN-HOUSE COUNSEL**

Do you remember Kermit the Frog sitting in a boat, strumming a banjo, singing “The Rainbow Connection”? It’s an inspirational tune about finding an idyllic place. Long after my first hearing of “The Rainbow Connection,” I began my legal career as an associate in a large litigation firm. I learned that the legal profession has its own version of the rainbow connection. Firm lawyers whispered of a pleasant place where lawyers work in harmony with other people and don’t spend their days scrambling to meet deadlines and scrapping with opposing counsel, where lawyers don’t have to sacrifice their personal lives to earn their keep. They called this happy place “in house.”

No one really knew how to get there. We all knew lawyers who had, but each one of them had a different story of how to arrive. It wasn’t like the Emerald City, to which there was a yellow brick road where you just put one foot in front of another. Then, one day, my time came. There wasn’t much warning. There were no signs leading to the end. Like a spirit abandoning its earthly shackles, I left the world of litigation and passed through the pearly gates of corporate counsel.

The truth is, most in-house counsel started their careers at law firms. Companies generally look for experienced lawyers to assist them with specific needs, so they are less likely to recruit straight from law school. Instead, most companies are looking for lawyers with existing experience in particular fields who can help deal with the immediate problems the business is facing. Of course, there are lawyers who begin their careers in house, often with internships at larger companies. But the majority spend at least a few years at a firm before moving in house.

You may expect that particular practice areas are a better path to in-house positions, and corporate and transactional experience is likely to be useful to a company. But in-house lawyers have very diverse backgrounds, and many come from litigation or any number of other disciplines. Some practice areas do not lend themselves well to transitioning in-house. Few companies need a criminal lawyer or family law practitioner on staff. But a surprisingly large number of practice areas can lead to an in-house career. Businesses deal with corporate, intellectual property, product liability, real estate, insurance, compliance, and other issues regularly, so lawyers who have practiced in those areas may have an in-house role. There is no one field that creates the best path to a career in house, but gaining experience with issues that are the most likely to affect businesses on a regular basis does increase the chance that a candidate will fit a business’s needs when a position opens up.

Perhaps it should be no surprise that a good way to position yourself for an in-house job is also the best way to secure your position at a firm. Do quality work that motivates your superiors to work with you again. Develop relationships with coworkers and clients. Learn your field well, and get your name out there as an expert. When companies go looking for counsel, they want people who they believe can resolve their challenges and work with their employees. An outside attorney with whom they have already established a relationship may qualify, especially if the attorney has the resume, qualifications, and personality to get the job done. The more successful you are as outside counsel, the more likely that some company will want you as in-house counsel.

However, being a good lawyer is not enough to increase the likelihood of finding an in-house position. A recent survey by the Association of Corporate Counsel revealed that the majority of in-house lawyers found
their position through networking or business connections rather than by responding to a job listing. I made the transition by developing a relationship as outside counsel for a client. Once the client became large enough to need in-house counsel, I was the first choice. The best way to position yourself for an in-house position is to develop relationships with businesspeople by reliably giving them useful advice as outside counsel. Attending networking events and social events with in-house counsel can also help develop relationships that can lead to being considered when an appropriate in-house opportunity opens.

**Pluses and Minuses**

Do you really want to go in house? On the surface, in-house positions appear very attractive. But know what you are getting into, because they are not for everyone. There are certainly some benefits to most in-house positions. For many attorneys, the first benefit of being an in-house counsel that comes to mind is billing. In a firm setting, the pressure to bill is so constant that many lawyers end up thinking in six-minute increments. Most in-house positions do not require billing, and even those that do are rarely as rigorous about recording time. As a result, performance for in-house lawyers is far more likely to be measured by quality of work and value to the business than sheer hours billed.

In part as a result of the lack of billable hours, most in-house jobs require less work, even if they are not 9-to-5 jobs. Corporate counsel still put in long hours that can include travel and weekends. When the company needs you, you’re expected to be there, but the job is typically less intense than one at a firm where 80-hour weeks are not uncommon.

Further, even though the hours of an in-house position may not be as demanding as they are at a firm, an in-house attorney, simply by virtue of representing a single client, may generally become much more deeply involved in the client’s business. It is not unusual for in-house counsel to transition into other senior business positions. Even entry-level corporate counsel have a closer relationship with their business counterparts than outside counsel. It is rewarding to feel directly involved in helping to build a business. Businesspeople sometimes see the familiarity that attorneys have with the law as almost magical and trust our reading of documents, even when those documents are in plain English.

Professional respect and an end to the tyranny of the billable hour, however, are only half the story. To make the transition in-house, most firm lawyers have to take a pay cut. Most attorneys can earn more working for a firm. Leaving a firm to go in house also means accepting a significant change in work environment. Given the variety of in-house positions, it is hard to generalize about that change. A lawyer going into a smaller company may find that he or she is the only lawyer at the company. At a firm, an attorney may get used to spending time with other lawyers, and it can be a shock to be surrounded by people who don’t get jokes about the rule of perpetuity. Even in a large company with many lawyers, the legal team is rarely the most important part of the company. In a firm, every person, every piece of equipment, and every outside vendor is there to serve the lawyers. In a company, on the other hand, lawyers may be seen as a necessary evil.

Furthermore, while working for a single client allows an in-house attorney to become deeply involved in the business, that means far less variety. Firm lawyers with many clients are able to handle a wider assortment of matters. The in-house counsel must focus on the specific challenges of only one business.

Another downside of representing a single client is that your fortunes are tied to that company. To some extent, the same could be said about firm lawyers, whose firm could go out of business. But lawyers at firms are generally at far less risk of losing their jobs. When law firms tighten their belts, they fire staff first. Companies tightening their belts see lawyers as staff, and expensive staff at that. Further, firm lawyers who have a book of business can continue to represent clients regardless of what may happen to the firm or to one client. If one client cuts legal work or goes under, attorneys at a firm still have others to rely on for business. When you have only one client, its demise is the end of your job.

It is also harder to transition out of an in-house position. Unlike a law firm partner, in-house lawyers rarely bring any portable business with them. Going back to a firm essentially means starting over from scratch trying to build a client base. In addition, because in-house lawyers usually have a less diverse practice than firm lawyers, they are more likely to be pigeonholed by the industry or type of work they handled in house. An employment lawyer coming from a firm has likely handled a variety of issues for different types of businesses and brings all that experience to any interview. By contrast, an in-house employment lawyer’s experience is limited to the types of issues handled for a single company in a single industry.

The greatest challenge in-house lawyers face is explaining their value. At a law firm, the lawyers are the producers. They bill the hours that bring in the money that pays for everyone and everything at the firm. In house, the situation is the opposite. Lawyers are usually a very large cost that seems to do nothing but eat away at profits. In many ways, it is difficult to justify to a businessperson why that cost is worthwhile. When a salesperson makes a big sale, measurable amounts of money roll into the company. When a lawyer writes a contract so a ticking time that it is unchallengeable, nothing happens. Even worse, doing a good job may mean telling businesspeople that they can’t do what they want because of risk to the company. Saying no may be the right way to protect the client, but it can make businesspeople feel that the legal department is merely an obstacle to growth.

In short, while there are plenty of advantages to being an in-house counsel, there are just as many disadvantages. Being an in-house attorney is not a one-size-fits-all dream job. While outside counsel may hear “The Rainbow Connection” in their heads when thinking of being in house, corporate counsel may hear “It Ain’t Easy Being Green.”

or some of you, your first job may mirror those of days gone by, when associates stayed at their first firm for their entire career. However, the majority of new practitioners will become part of the increasing trend of lawyers changing legal fields or even careers. Many paths can lead to a fulfilling career in the law, but lawyers often may question where their individual path will lead.

In these rough economic times, with hordes of new lawyers competing not only for the top firm jobs but also for all legal jobs, new lawyers need to maintain perspective—which can be especially hard when student loans become due.

In today’s job market, some new attorneys—who as students arrived at law school dreaming of becoming an entertainment lawyer—find themselves now accepting jobs at large insurance defense firms. In fact, many new lawyers are not lucky enough to begin in the practice area of their choice. The key is to not lose hope if you find yourself in a position that does not fit your long-term career goals.

While searching for that first position, one option available to lawyers who find themselves in career flux is to perform temporary legal contract work. Many legal staffing companies list short-term and long-term projects that require the assistance of temporary lawyers. Even document review for a legal staffing company can be a good way to buy time to network with other lawyers while still bringing in an income.

If you want to stay in the law and change your practice area, consider the idea of discovering your own way of moving ahead. For many new lawyers who realize that they are unhappy in their initial legal job, spending time and effort to find a better fit within one of the many niches of the law may very well pay off. Many new lawyers realize that the remedy to finding themselves at the wrong firm or area of the law is to transfer to a new firm or to start their own practice. These options allow a new lawyer or a lawyer with a few years’ experience to avoid completely abandoning the practice of law by shifting gears.

Ask yourself if your dissatisfaction with your current legal job is based on the firm culture where you are employed or on your area of practice. This question will allow you to determine how to focus your efforts.

If you are considering a change in your practice area, one of the best ways to do this is to contact your law school alumni office and find local experienced attorneys who practice in your newly targeted area of practice.

For example, one lawyer friend of mine practiced civil litigation for several years before deciding that he was interested in estate planning and tax law. He slowly started to speak to other attorneys who practiced in this field, taking them out for lunch or coffee. This led to his researching LL.M. degrees and subsequently enrolling at one of the nation’s top LL.M. taxation programs.

Now, instead of being an unhappy civil litigation associate, he has found happiness in practicing estate planning at a small firm. His journey to find his place in the law took him just a few years of introspection and retraining to prepare for a new practice area. Just think what he would have missed if he had chosen to simply abandon the practice of law completely.

A re-exploration of your legal interests may not be applicable if you have certain goals that a career as a lawyer just may not fulfill. If you have had an epiphany that you really want to become a professional painter, a firefighter, or a musician, then merely finding a different legal field probably will not resolve your current dissatisfaction with your initial job.

You will not be the first to leave the practice of law altogether. Go follow your dreams, but there is one caveat. You must take the requisite time and self-reflection to make sure you want to enter a field unrelated to law, because if you wish to return to the practice of law at a law firm someday, a few hiring partners may look at your venture as a black mark on your resume. However, this will be of little importance if you do not ever see yourself returning to the billable hour and the firm career track.

Fight the feeling that you might have wasted your time and money by going to law school if you eventually decide that you want to change careers. You can still apply your legal training to your new position. Remember, the analytical and decision-making skills that you gained by studying the law apply to a broad range of fields, including banking, business, and government.

For example, a law school friend of mine joined the U.S. Army as an officer, and another colleague has applied to work for the Federal Bureau of Investigation. Both of them view their time spent in law school and in the legal profession as invaluable assets that they can bring to their new careers.

After incurring law school debt, many attorneys who decide to leave the law don’t know where to begin. The next step can seem overwhelming. Talk with people you know who are in careers that interest you. Don’t think that your professional path in the law or in another field needs to mirror that of your law school colleagues. As lawyers, our career paths are as different and varied as our individual personalities.

Adam J. Post is a criminal defense attorney and a former deputy district attorney who began practicing law in California in 2004 after graduating from UC Davis School of Law.
Dispelling the Common Myths about Careers in Public Interest Law

By Hernán Vera

Do you want to create public schools that offer every child a chance to excel? Are you eager to tackle the tough issues of poverty affecting millions of Americans? These challenges, and more, are the daily work of public interest lawyers. Despite the opportunities, talented would-be public interest lawyers sometimes are sidetracked by common misconceptions about the profession. For those of you who dream of becoming a public interest lawyer, the first step is to learn the facts too often obscured by the myths surrounding this exciting area of the law.

**MYTH 1: PUBLIC INTEREST LAWYERS SHOULD NOT BEGIN THEIR CAREERS AT PRIVATE LAW FIRMS.** Perhaps the most persistent myth is that lawyers seeking to make a career in public interest law must head straight to a public interest organization for their first job as lawyers. This is untrue for three reasons.

First, public interest opportunities are very tough to find for new lawyers just graduated from law school. Most public interest organizations only hire first-year lawyers if they are able to secure a fellowship—and the competition for these rare and coveted slots is fierce.

Second, faced with paying back hefty student loans, more and more students have no choice but to spend some time at a private law firm before they are in a position to jump into public interest work. That's just a reality, and public interest employers are well aware of it.

Finally, public interest employers, like everyone else hiring attorneys, want practitioners with experience. In fact, the halls of most public interest organizations are increasingly filled with former private firm lawyers. That's how I got started as a litigator at O'Melveny & Myers LLP. Many attorneys committed to public interest law join firms with the intention of obtaining valuable litigation experience and skills. Years at a firm can provide an attorney with an intensive, world-class education about all levels of complex litigation. Firms also provide new attorneys with mentors who can demonstrate in direct and personal terms what people of conscience can accomplish in a business environment.

While at a firm, however, you absolutely must show a continued commitment to public interest law—either through significant pro bono work, volunteering on boards of nonprofit organizations, or other forms of public service. Public interest organizations routinely receive impressive applications from lawyers working at large firms in which the stated commitment of these lawyers to public interest law is belied most strikingly by their lack of pro bono service during their time at their firms. These applicants do not go far.

Seek out high-quality opportunities at your firm that complement the interests and goals you have for public interest work. If your dream is to litigate high-impact civil rights cases, immerse yourself in complex class actions. Take as many depositions as you can, and volunteer for any cases going to trial. If you are interested in economic development issues, seek out opportunities in the transactional departments at your firm. Many of these departments can provide you with the corporate and tax experience that you will need to be an effective advocate on affordable housing, redevelopment, zoning, and similar issues. Be strategic in your workload choices.

**MYTH 2: PUBLIC INTEREST WORK IS LESS SOPHISTICATED THAN HIGH-END TRANSACTIONAL MATTERS OR CORPORATE LITIGATION.** Another common misconception is that public interest work is not as intellectually challenging as the transactional or litigation work performed at well-regarded private law firms. Many outsiders assume that the public interest profession, while ethically satisfying, does not require the most refined levels of legal analysis and skill.

This is simply not true. To succeed, a good public interest lawyer must be an excellent writer, oral advocate, negotiator, social worker, and theorist. Tackling poverty is no small task. It requires an enormous amount of creativity. Whether constructing novel constitutional theories to attack cuts in social services or litigating on behalf of a single mother about to lose her home in foreclosure, a public interest lawyer is usually fighting an uphill battle not just to apply the law but often to expand current interpretations of the law. Doing this with limited resources for clients with a complex mix of legal, social, and economic problems requires the very best from any attorney.

The rewards of this daily work, however, are immense. Public interest attorneys rise in the morning with a clearly defined sense of purpose, knowing they are part of a larger movement of advocates dedicated to creating a more equitable society. Like any attorney, those of us who are public interest attorneys want to win for our clients. We take seriously the realities of poverty, unequal opportunity, discrimination, and economic injustice.

**MYTH 3: PUBLIC INTEREST ATTORNEYS DO NOT BRING ABOUT MAJOR SOCIAL CHANGE.** Many attorneys in the private sector believe that the work of public interest lawyers is limited to one-on-one representation of low-income clients. Because of this myth, attorneys routinely ask those of us in public interest organizations, “With so much poverty in our communities, how can your attorneys make a larger impact?”

The truth is that virtually every sophisticated legal services organization devotes significant time and resources to addressing systemic issues. Impact litigation, policy advocacy,
Impact litigation is a good example of how public interest organizations can improve the lives of tens of thousands of people at once. Public interest lawyers have been involved in statewide settlements that garnered millions of dollars in benefits for special-needs children and the disabled as well as class actions that expanded the rights of detained immigrants, students, homeowners in foreclosure, and the homeless.

Likewise, public interest attorneys have been very active in sponsoring and advocating for state legislation affecting the communities that they serve. Public policy advocacy is an important part of public interest lawyering. Much of the recent legislation protecting foster children and consumers and providing affordable housing and healthcare has been passed with the on-the-ground work of public interest lawyers.

MYTH 4: PUBLIC INTEREST LAWYERS LACK THE RESOURCES TO TACKLE THE BIG ISSUES. Many believe wrongly that state and federal government enforcement agencies are the only organizations well equipped to hold corporations and other groups accountable. While it is certainly true that most public interest organizations have lean budgets, this does not mean that they are powerless to tackle major issues. The principal means allowing public interest firms to leverage enormous resources is, of course, pro bono. Virtually all of the firms from The Am Law 100 have a keen interest in supporting pro bono litigation. Those firms that are especially active often assign large teams of partners, associates, and paralegals for complex pro bono cases that last years. Moreover, legions of attorneys—from solo practitioners to small firms to plaintiffs’ attorneys—are eager to get involved by becoming cocounsel with public interest firms. This enormous reservoir of pro bono talent, passion, and resources allows public interest organizations to be at the forefront of efforts to address the important legal issues of our time—and is an amazing credit to our profession.

A career in public interest law offers a variety of opportunities for creating social change. Whether you find your way to public interest work after toiling at a firm or fresh from law school, don’t let these myths about the profession deter you from your dream.
Adams described the experience as “the most exhausting...causes I ever tried,” he wrote, that “it...was...one of the most gallant, generous...and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country.” As a volunteer attorney for the American Civil Liberties Union, Clarence Darrow represented the teacher accused of teaching evolution in the 1925 Scopes “monkey trial” case. Chief Justice John Roberts and Justice Ruth Bader Ginsburg both engaged in significant pro bono work before they joined the bench. Justice Ginsburg, in particular, was one of the nation’s leading advocates for gender equality during the 1970s.

Many of the most fundamental legal decisions that have shaped American jurisprudence are the result of this rich tradition of pro bono representation. Indeed, constitutional law casebooks are full of cases brought by pro bono attorneys. Some of these landmark U.S. Supreme Court cases include:

- Mirandav. Arizona, which requires police to inform individuals of their rights before a custodial interrogation.
- Gideon v. Wainwright, which establishes a Sixth Amendment right to counsel for serious state criminal offenses.
- R.A.V. v. St. Paul, which declares that content-based distinctions in speech regulations aimed at unprotected speech violate the First Amendment except in limited circumstances.
- Loving v. Virginia, which abolished laws prohibiting interracial marriage.

Pro bono attorneys were also critical in helping then-lawyer Thurgood Marshall argue and win Brown v. Board of Education of Topeka, which struck down laws that established racially segregated schools.

It is hard to imagine our legal system without these and myriad other important precedents that simply would not exist were it not for attorneys who agreed to represent individuals who lacked the resources to pay for litigation.

The Pro Bono Crisis

Most attorneys will not have the opportunity to brief and argue a landmark Supreme Court case, but there are numerous areas of the law for which pro bono legal representation is urgent and essential. These opportunities give lawyers with any level of experience the chance to have an important impact.

As Samuel Johnson said, “A decent provision for the poor is the true test of civilization.” And every day, low-income Americans face life-altering challenges such as deportation, eviction, foreclosure, unsafe housing, bankruptcy, domestic violence, and child custody disputes. The consequences of losing in these matters can be disastrous, including the breaking apart of families, loss of a home, serious injury, or even death. Individuals lacking resources at such critical moments in their lives simply cannot afford even basic legal representation, nor can they navigate the legal system without the aid of an attorney.

The problem is that at least 80 percent of those who need civil legal assistance do not receive any. One report concluded that “the number of free legal service needs per year in the United States could be as high as 150 million.” These are startling figures that should motivate every new attorney to increase his or her commitment to serving those in need. According to a 2004 ABA survey, the average number of pro bono hours per year was 77, with 46 percent of attorneys providing 50 or more hours of pro bono service during the year. This level of participation will need to rise substantially to even come close to filling the needs of individuals and families.

New lawyers are in perhaps the best position to help close the critical gap between the need for pro bono legal services and the availability of lawyers to perform the work. Pro bono work offers new lawyers critical litigation experience that helps them gain skills earlier in their careers than they might otherwise obtain from working on cases for paying clients.

The reason for this is not a mystery. Clients who spend hundreds of dollars per hour for their representation want experienced attorneys arguing motions, taking depositions, and examining witnesses. The learning curve for these tasks is steep, and clients do not want to spend money training the associates working on their matters. For example, clients want associates that have been previously trained on depositions in other cases to take the depositions in their cases—and understandably so.

What results is somewhat of a cycle for new attorneys. The oral arguments and depositions are given to more senior attorneys because the junior attorney lacks the experience. By missing out on the depositions that are passed up the seniority ladder, the junior attorney is denied the experience necessary to be able to take the deposition in the next case.

Pro bono clients generally do not have the same demanding requirements as paying clients. They are usually thrilled to have legal representation and are willing to allow the attorneys taking their case to do some learning on the job. As a result, newer lawyers are able to take on far more significant roles in pro bono cases than they would in other similarly complex cases for paying clients. This allows attorneys to develop their skills and gain experience that transfers directly to their daily matters, because clients value experience, regardless of whether the work was for a paying client or a pro bono client.

The immediate need for pro bono services is clear and present. Our legal system needs lawyers to offer pro bono representation for the millions of individuals who are struggling through crises without any legal assistance. The lawyers who are willing to do so will benefit in several ways. In addition to fulfilling a key civic responsibility, new lawyers who perform pro bono work will gain experience far more rapidly than they otherwise would at their paying jobs.

Pro bono work is therefore not only a critical societal investment. It is also important for the development of a new attorney’s career.
Assessing the Risks and Rewards of a Solo Career

By R. J. Molligan

According to the U.S. Bureau of Labor Statistics, about 25 percent of attorneys are self-employed. Many solo practitioners say that they prefer to be the master of their destiny, and many clients prefer the reduced rates and personal treatment available from a solo practitioner. The big firm pyramid does not suit all attorneys or clients.

At a big firm, the lowest compensation goes to those at the bottom of the pyramid and the highest to the top, which is reserved for equity partners. Most attorneys occupy the bottom. As associates climb up, their salaries increase. However, toward the top of the pyramid, compensation approaches the billable rate, and the firm’s profit margin diminishes. The more senior a lawyer becomes, the less profit an equity partner makes from his or her billed hours. This is why many big firm lawyers are let go in their 7th through 10th years. (On the other hand, many big firms lose money training new lawyers who leave after only four or five years.) Given the realities of the pyramid, many attorneys who work for big firms begin to sense, sooner or later, that they are just grist for the mill. This is why many leave in their fourth and fifth years. Moreover, after a few years, many feel confident enough in their legal abilities to go solo.

Doing the Math

A solo practitioner billing at $250 per hour (and working 1000 rather than 2000 hours) can earn a gross income of $250,000. Thus, a solo can gross about the same as a big firm lawyer while working half as much. A more ambitious solo could work 2000 instead of 1000 hours per year and gross $500,000. What is more, the solo can be his or her own boss, set his or her own hours, and work from home in pajamas and bunny slippers. And for as little as $350 per month (a little over an hour’s worth of work) the solo practitioner can lease a virtual office with call forwarding and use of a conference room as needed. However, major issues remain for the would-be solo’s consideration.

First, the solo practitioner may not fill a full book of business. Few clients are willing to pay $250 per hour forever. Landing one client for one job certainly seems possible, but since overhead is ongoing, too much must be the solo’s stream of income. This is especially true for solo personal injury lawyers who must have significant capital to advance costs to fund litigation, which is usually taken on contingency.

Building a client base that can sustain a law practice can be a very slow process involving a major commitment to networking, which many lawyers consider to be beneath them. Attorneys who cannot ask for business may not be candidates for solo practice. Those who can market themselves have myriad networking opportunities, including joining bar associations and committees in their areas of practice, joining the boards of organizations, and attending sponsored events. These activities are generally scheduled after hours, however, and can extend a working day well into the night.

Running a Business

A second issue is that a solo without clear priorities risks creating a private hell. Most lawyers become lawyers because they want to practice law. Lawyers often find that they want nothing to do with the tasks involved in running a business. These include case management, human resources, collecting on accounts receivable (a major time vortex), office administration, fixing the copy machine, and all the other basic business operations that are necessary for a firm to thrive. Also, unless you have an MBA, you can expect to need to learn a lot about how to operate a business.

In 1989, author Stephen Covey published a bestseller called The 7 Habits of Highly Effective People. The habits are in harmony with what Covey calls natural law. One of these laws is best illustrated by Aesop’s fable of the goose and the golden eggs.

You probably remember the story of a poor farmer who discovers a golden egg in the nest of his goose. He cannot believe his good fortune and becomes more incredulous the next day when he finds another golden egg. Day after day he awakens to rush to the nest. He is becoming rich, and it all seems too good to be true. Impatient with this morning ritual of retrieving the golden egg, the farmer decides to kill the goose and get all the eggs at once. But when he opens the goose, he finds it empty. There are no golden eggs and no way to get them anymore.

Covey suggests, “Within this fable is a natural law, a principal—the basic definition of effectiveness. Most people see the effectiveness from the golden egg paradigm: the more you produce…the more effective you are. But, as the story shows, true effectiveness is a function of two things: what is produced (the golden eggs) and the producing asset or capacity to produce (the goose).”

Covey warns, “If you adopt a pattern of life that focuses on golden eggs and neglects the goose, you will soon be without the asset that produces the golden eggs. On the other hand, if you only take care of the goose with no aim toward the golden eggs, you soon won’t have the wherewithal to feed yourself or the goose. Effectiveness lies in the balance…”

Unfortunately, balance is often woefully lacking in the lives of solo practitioners.

The third and most important consideration is the reality of the lives of many solo practitioners. Although some no doubt work
contentedly in bunny slippers, more often than not, financial stress is a big part of the equation. This can and does lead to depression, which can lead to drug and alcohol abuse and even suicide.

The California Bar Journal states, “Although attorneys who practice in large firms also feel intense pressure to... produce heavy billable hours, they usually do not struggle with the same kind of financial pressure a solo practitioner faces. A solo practitioner has to be in charge of marketing, human resources, business development and information technology at the same time he has to be an attorney...” Faced with such pressures, some succumb to the temptation to self-medicate.5

In 2003, the California Legislature established the Lawyer Assistance Program, which is a confidential service of the California State Bar that helps judges and lawyers with substance abuse and mental health concerns such as anxiety and depression. The program’s 2009 report states, “Consistent with a trend that started in 2003, 60 percent of the attorneys who entered the structured recovery component during 2009 have a mental health diagnosis [primarily depression] either singularly or in combination with a substance abuse diagnosis.”6 According to the report, nearly three quarters of those who sought help for depression and substance abuse were solo practitioners. In addition, the study found that more than four out of five are male. Significantly, 58 percent of the participants were over the age of 50—a testament to the cumulative nature of stress.7

Life can be overwhelming for the solo practitioner who must be the rainmaker, the office administrator, the copy maker, the hole puncher, and the person who does all the legal work. This may explain why only 25 percent of the legal population is self-employed.8

Is going solo really worth it? For many solo practitioners, the answer is still yes. However, this response is more typical of lawyers who have left big firms. Whatever your decision, remember to be good to the goose.9


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Society, and the legal profession, are fixated on high-profile cases. Although the infamous O. J. Simpson case in 1994–95 riveted the nation like no other previous case, high-profile and celebrity cases have always had a prominent role in U.S. history. Lawyers who find themselves in a case that is generating intense media interest should proceed proactively on a number of fronts.

First, it is essential that the lawyer not lose focus. No matter how intense the media spotlight may be, the most important person in the courtroom is the client. Every decision a lawyer makes should put the client’s welfare before the lawyer’s.

While I was defending actor Robert Blake in his homicide case, he told me that cameras were like a drug—and no one is immune. He was correct. For whatever reason, lawyers have a tendency to change their countenance and alter their values when cameras loom. This is dangerous.

Many of the reasons behind this phenomenon begin with societal values. On some level, most human beings seek recognition and approval—consciously and subconsciously. The boundaries of this need may extend no further than one’s immediate social group, such as a school, club, athletic team, or professional association. However, this desire for recognition is reaching absurd heights in a culture that seems to have gone beyond the goal of 15 minutes of fame to constant 24/7 celebrity. Social media—including Facebook, YouTube, and other Web sites—are enabling everyone to obtain some form of celebrity status.

But lawyers have a unique role. When we represent clients, we have their lives and welfare in our hands. What we do can save or destroy someone’s life, financial welfare, reputation, and freedom. It is paramount that the lawyer’s approach to the media constantly and consistently places the client’s interest ahead of the lawyer’s.

Trials are won in the courtroom. The lawyer’s primary focus should be on 13 individuals—the judge and the jury. If a trial lawyer forgets this cardinal fact and wastes too much time on media strategy and its inevitable component of self-promotion, a winnable trial can easily be compromised. The best public relations for a lawyer is a reputation for professionalism and success. Never violate court orders or the canons of professional ethics.

Media outlets are powerful. They have an enormous capacity to influence public perception. The media’s goal is never justice. Ratings, revenue, and advertising dollars are the media’s only concern. They will constantly look for the entertainment value in criminal and civil cases and exploit whatever furthers their profit. It often becomes necessary for lawyers to calculate how best to “spin” their client’s position. Before a lawyer can effectively do this, he or she has to understand not only the client’s case but also exactly who the client is. You cannot humanize someone that you don’t understand. Great effort must be made to study the facts and evidence as well as the client’s personal situation.

Developing a Media Strategy

Lawyers tend to be more effective at mastering cold evidence than understanding humanity. Law school does not train us in compassion, empathy, sympathy, and human emotion. But these are often the ingredients that affect media strategy the most.

In preparing a media strategy, first create a list with two columns—positive and nega-
and conduct his life with an emphasis on being a valued position in society.

The savvy lawyer also develops contacts in all forms of media. If the lawyer has a reputation for integrity and professionalism, the lawyer is more likely to be treated favorably. If a lawyer feels that he or she should not comment on a particular issue, the lawyer should say so. Don’t intentionally mislead media representatives. Once burned, they don’t forget.

The goal was to reduce the prosecution’s interpretation and misguidance. We focused on a particular issue, the lawyer should say so. Don’t intentionally mislead media representatives. Once burned, they don’t forget.

The media overwhelmingly predicted that O. J. Simpson, Robert Blake, Michael Jackson, and Casey Anthony would be convicted. They were wrong.

Further, you must identify precisely how the media has or may target the client for negative commentary. In a criminal case, the charge itself provides fodder for damaging commentary and innuendo. Prepare a compelling counterattack, in the form of a story.

Experts in marketing and advertising often discuss emotional “hooks.” A hook can be little more than a theme that succinctly and powerfully associates the client’s case with something desirable. It also can be a vehicle for turning your opponent’s negative perspective about your client into a positive message.

In the Michael Jackson case, the media consensus was very much against Jackson from the beginning. The public is often more repelled by charges of child molestation than even murder. Because Jackson devoted an enormous portion of his life to charity for children, my colleagues and I decided to try to turn the prosecution’s allegations into misinterpretation and misguidance. We focused on the fact that Jackson lacked a normal childhood because of his talent and being forced to work at an early age. While other children visited the playground, Jackson was rehearsing in the studio until three in the morning. He was signing contracts at the age of five. We sought to use information to explain why an adult would construct a home like Neverland and conduct his life with an emphasis on children.

Rather than run away from Jackson’s focus on children, we embraced it. We emphasized his desire to champion the cause of children from violent and impoverished backgrounds. We discussed his history of helping children with AIDS and degenerative diseases. We also portrayed his childlike tendencies as a key to his music and choreography. What the prosecution portrayed as monstrous, we portrayed as harmless and beneficial.

The goal was to reduce the prosecution’s presentation to one, simple question: “Given cameras in the courtroom. In the Robert Blake case, I favored them for the three-week preliminary hearing. The media’s treatment of Blake had been horrific. I felt that I could change public opinion by attacking the prosecution’s case and witnesses in public. As a result, CourtTV’s polling registered the biggest change in public opinion that it had ever recorded. Before the hearing, the polls showed that more than 80 percent of the public thought Blake was guilty. Three weeks later, the same percentage viewed him as innocent.

In the Michael Jackson case, I opposed having cameras in the courtroom. I felt that television coverage would emphasize the circus-like atmosphere that already existed around the case. I did not want potential witnesses watching what other witnesses said. I also felt that excluding cameras would send a message to the trial judge and the public that the defense was serious, focused, and not trying to emphasize publicity at the expense of the client.

Fashioning a media strategy also means determining whether or not to seek a gag order. Gag orders preclude lawyer commentary on the merits of a case. In the Blake case, I was against any type of gag order and felt that open commentary would allow me to level what appeared to be an uneven playing field.

It was clear that the prosecution and police had repeatedly poisoned the media with negative information on Blake.

In the Jackson case, I favored a gag order and wanted the case to be primarily tried in the courtroom. Again, I felt this would send a message that Jackson’s defense was going to be characterized by professionalism and focus rather than cheap theatrics.

Of course, trial lawyers also can speak to the media through filed pleadings. As a result, the trial judge in the Jackson case forced salacious pleadings to be filed under seal.

How one spins the media varies from case to case. However, lawyers should always remember that the best media spin is effective trial lawyering in the courtroom. American juries tend to be very independent and, while not perfect, they try to be fair.

Don’t get too carried away with the media. The media overwhelmingly predicted that O. J. Simpson, Robert Blake, Michael Jackson, and Casey Anthony would be convicted. They were wrong. The media also predicted an acquittal or hung jury in the Scott Peterson case. He now sits on death row.
Beyond Liability, Damages, and Collectibility: The Importance of Vetting a Plaintiff’s Case

Vetting a plaintiff’s case is a very challenging task and should not be taken lightly. It is an ongoing process that does not end once a retainer agreement is signed. The consequences of not thoroughly analyzing and evaluating a case can be severe. On the extreme, lawyers have been subject to State Bar proceedings and malpractice actions due to their failure to properly vet a case. Additionally, even with a detailed and methodical evaluation of a case, success cannot be guaranteed. However, the likelihood of success is significantly increased if a comprehensive and continuing case analysis is undertaken.

In addition to analyzing the big-three factors—liability, damages, and collectibility—there are myriad other factors that need to be reviewed. Some of these include competency and resources to handle the case, potential conflicts of interest, client and witness credibility, access to evidence, choice of law and forum, statutes of limitations, and what type of experts may be needed. Gathering the information necessary to evaluate these factors will require multiple meetings with a prospective client and witnesses, thorough document collection and examination, and meticulous legal research and investigation.

Generally, the first contact with a prospective client is by telephone or e-mail. This first contact should be used to gather basic information about the client and the alleged claim, and to determine whether there are any related legal proceedings currently pending. You need to gather enough information to determine whether you would like to set up a face-to-face meeting to explore the matter further and in more detail or reject the matter.

The basic information about the prospective client should include his or her name, residential and business addresses, telephone numbers, e-mail addresses, Facebook or other social media accounts, and the contact information for an individual who will always be able to reach the prospective client if he or she moves or changes jobs. Although it may seem mundane, the identity of a contact person can be very informative. Additionally, always ask the prospective client whom you should send a nice note to any attorney or other person who recommended you as counsel, whether you accept the matter or not. During your initial conversation, make sure to ask the prospective client not only about the general nature of the issue, occurrence, or dispute but also what he or she would like you to do for him or her. It is important to find out right up front what the prospective client wants from you. The prospective client may be seeking some type of remedy that you are not able to assist with—or, more importantly, a remedy not provided for in the law. Further, make sure to determine the operative facts of the matter, the important dates relating to the issue, who are the main players, who are the relevant witnesses, what documents relate to the matter, and any other issues or facts that you or the prospective client feel are important.

This basic information should be adequate to determine whether to invite the prospective client for an in-person meeting. If you determine that you cannot or will not accept the matter, it is critical that you send a written communication to the prospective client advising him or her that you are not going to be taking the case. Make sure the letter advises the prospective client that you are rejecting the matter, that there may be statute of limitations or other applicable claim issues, and that you are not giving the individual any legal advice regarding these prospective statutes, claims, the merits of their case, or any other legal issues. Most plaintiff’s lawyers will also advise prospective clients to seek other counsel as soon as possible if they are still interested in pursuing the matter.

It is also very prudent to have an in-person, face-to-face meeting with the prospective client prior to any written agreement. You are afforded not only the opportunity to begin the process of establishing a trusting and professional relationship but also the occasion to assess the prospective client’s demeanor, credibility, and his or her ability to articulate, recall, and explain the facts of the case. Cases are won and lost on the prospective client’s performance during a deposition or on the stand at trial. Skilled plaintiff’s lawyers will use this meeting to query the prospective client and to see how he or she will hold up under a road map to the elements of the claim and the proof that will be required.
mild cross-examination. However, before you begin to grill the prospective client, make clear what you are attempting to do so you do not upset him or her and lose the opportunity to represent a person with a valid claim.

Prior to signing an engagement letter, it is important to conduct detailed legal research on all relevant issues. Researching the applicable law will help you determine what additional details and information you will need, and more critically, will allow you to determine the applicable deadlines. Are there any statute of limitations issues? Is this a matter in which tolling of the statute may apply? Does this matter require the filing of an administrative claim or a Standard Form 95?1

Most lawyers will focus their legal research on generic Lexis or Westlaw searches, applicable practice guides, and law review articles. Seasoned trial lawyers, however, always start with the jury instructions. The applicable jury instructions will give you a road map to the elements of the claim and the proof that will be required. It is also essential that you research the applicable defenses to the claim, choice of law issues, and forum issues. One of the more relevant issues will be whether there is jurisdiction over all potential parties. Also, consider in what court the matter will likely be venue. Is this a matter that can be removed to federal court? Are you licensed to practice in the specific federal district court if the matter is removed?

Prior to signing up any case, it is also essential to conduct a conflicts-of-interest analysis. The California Rules of Professional Conduct are an excellent source to assist you in determining whether any such conflicts exist. For example, do you or another lawyer in your firm have a relationship with a party, witness, opposing counsel, or other entity, that must be disclosed? Have you, or another lawyer in your firm, ever represented the prospective defendant? Are you, or another lawyer in your firm, currently representing another plaintiff in the same action?2 It is better to determine up front whether such conflicts exist and whether an informed written disclosure can cure them.

Once you have gathered the preliminary facts and have conducted the initial legal and other research, you need to evaluate whether you have the competence to handle the matter and the time, resources, and finances available to properly prosecute the case. Performing legal services competently means to apply the diligence, learning, skill, and mental, emotional, and physical ability that is reasonably necessary for the performance of the services that are required.3

In lay terms, do you have the background, training, and experience necessary to competently handle the case? If you do not personally have the expertise, you must consult with, associate with, or refer the matter to an attorney who you believe is competent, and who has the additional time, resources, and finances available to handle the case. For example, many complex products liability matters require hundreds of thousands of dollars to prosecute. Further, these cases are usually defended by large defense firms, which will staff the case with numerous lawyers, object to everything you attempt to do, bury you with motion practice, and create other resource-consuming tasks, all in the name of zealously defending their clients. If you do not have the expertise, money, and staffing to aggressively prosecute the case and handle the barrage from the defense, it is clear that you should not handle the case by yourself. You will be doing a serious disservice to your client—and you may subject yourself to a malpractice claim if things go wrong.

Vetting a plaintiff’s case is an ongoing process that must be handled with skill, competency, and care. If you need help, guidance, or advice, do not be bashful. Ask for it. Not only is it the right thing to do, there are many very skilled practitioners who would be very happy to assist you.

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1 Social media accounts can be a valuable source of information about a prospective client and witnesses, and can also be very detrimental to the case, if information is shared in this quasi-public setting. Many plaintiff attorneys routinely instruct their clients to cease and desist from engaging in all social media until after the case resolves. Others advise their respective clients that they can continue engaging in all social media until after the case resolves. Not only is it the right thing to do, there are many very skilled practitioners who would be very happy to assist you.

2 For example, although most personal injury or wrongful death matters are governed by a two-year statute of limitations, “In an action for injury or death against a health care provider based upon such person’s alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person….” CODE CIV. PROC. §340.5

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4 See RULES OF PROF’L CONDUCT R. 3-310, 3-320.

5 See RULES OF PROF’L CONDUCT R. 3-110.
To Share Fee-Splitting Arrangements Is Human, to Disclose Is Divine

Fee-sharing arrangements among attorneys can be a useful tool, providing incentives for attorneys in one discipline to refer cases to attorneys in another. They allow solo attorneys to associate in larger firms that will assist or handle cases needing the financial backing or workforce made possible by a large firm. These arrangements encourage attorneys to collaborate for the benefit of the client. However, fee-sharing arrangements must be properly documented and disclosed, and attorneys must be mindful of the rules that apply.

Attorneys may only share fees with other attorneys. A fee-sharing arrangement between a licensed attorney and a nonattorney is an illegal contract and a violation of Rule 320(A) of the California Rules of Professional Conduct.1 For example, an attorney is prohibited from splitting attorney’s fees with an investigator.2 The California Supreme Court has stated that a relationship between an attorney and a nonattorney would tend to encourage solicitation and lead to the practice of law by laypersons.3 (Interestingly, however, at least one court held that an investigator may enforce an agreement with an attorney and collect his or her share of the attorney’s fees.4)

Rule 2-200 of the Rules of Professional Conduct regulates fee-sharing arrangements. Its focus is on disclosure, and its purpose is to “protect the public and promote respect for and confidence in the legal profession.”5 The rule is intended to safeguard the client’s rights and ensure the client knows how the fees are being charged.6 It addresses the concern that the total fee might be higher because the fee is divided between two attorneys. In fact, the total fee cannot be greater than the fee would have been absent the fee-sharing agreement.7

To accomplish these goals, Rule 2-200(A) emphasizes that attorneys must disclose in writing to the client the nature of the fee-sharing arrangement.8 To the extent that there will be a division of responsibility between the two attorneys, that also must be disclosed.9 The client then must provide written consent to the arrangement after receiving full disclosure.10

The best practice is to obtain the client’s written consent to any fee-sharing arrangement at the outset. However, by law, written consent need only be obtained after disclosure of the arrangement and prior to the division of the fees.11 In Mink v. Macabee, the court of appeal concluded that an attorney complied with the consent requirement by obtaining consent after the conclusion of the representation but before the fee was split.12 That said, an attorney still has an obligation to keep a client “reasonably informed” of significant developments in a case that could include the development of a fee-sharing arrangement.13

Failure to comply with the requirements of Rule 2-200 renders the fee-sharing arrangement void and unenforceable.14 Consequently, an attorney who is brought in to work on a case in exchange for a split of the fee should ensure that the client has provided written consent to the arrangement. Without client consent, the attorney has no protection that he or she will receive the negotiated amount of the fee.

If the attorney loses the negotiated percent of the fee because the written consent was not obtained from the client, the attorney’s only recourse is to obtain a quantum meruit recovery from the other attorney.15 The quantum meruit recovery is not considered a division of fees and is not subject to the disclosure requirement of Rule 2-200.16 It involves no apportionment of the fee and is based solely on the reasonable value of the attorney’s services. However, the quantum meruit recovery may only be obtained from the other attorney; the client is not liable to pay any fees to the later-retained attorney because there would be no enforceable agreement.17 The disclosure requirements of Rule 2-200 apply when the fee is split between two attorneys. However, the rule does not apply if the attorneys are members of the same firm. Rule 2-200 expressly exempts a relationship between attorneys who are partners, associates, or shareholders in the same firm.18 This exception does not extend to contract attorneys or other attorneys who work in the same suite.19

One form of fee-sharing arrangement is a straight referral fee. Early ethics rules prohibited these types of fees and only allowed for a division of fees when there was a true division of services to be performed. However, the modern approach and current rules permit referral fees regardless of whether the referring attorney performs work. The rationale is that

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a referral is many times in a client’s best interest. It makes an attorney more likely to refer a case to a more competent attorney or one who is more capable of handling the large costs required by larger cases. Consequently, the current rule is that a referring attorney does not need to accept any responsibility for a referred matter, he or she must only ensure compliance with Rule 2-200.21

Fee-sharing arrangements among attorneys are commonplace. Attorneys often associate with other counsel for many reasons. An attorney might not have the time or the resources to handle a matter. Or a case might involve an area of law that requires specific expertise. In most instances, the fee-splitting arrangement works to the benefit of the attorneys and to the client who receives better legal representation because of the association of the new counsel. Both attorneys should ensure compliance with Rule 2-200. However, as a practical matter, the newly associated attorney (the one without the signed retainer agreement with the client) should be the most concerned about ensuring proper compliance. Without compliance with the disclosure and consent requirements, the newly associated attorney will lose the benefit of the agreed-upon split of the fee. At best, the attorney will be left with a quantum meruit recovery that is usually much less than the agreed-upon fee division.

2 Hildebrand v. State Bar, 18 Cal. 2d 816 (1941).
4 Lyons v. Swope, 154 Cal. App. 2d 598 (1957). Yet, if the investigator was found to be in part delictus, or in equal fault, such as when he or she had knowledge of the illegality of the agreement and participated in the scheme, a court would likely refuse to enforce the agreement. McIntosh, 121 Cal. App. 4th 333.
7 CAL. R. OF PROF’L CONDUCT R. 3-500.
8 In a class action, the fee-splitting arrangement must also be disclosed to the court. CAL. R. CR. 3:700(b).
12 Id.
13 CAL. R. OF PROF’L CONDUCT R. 3-500, BUS. & PROF. CODE §6068(m).
16 Id.
18 CAL. R. OF PROF’L CONDUCT R. 2-200(A).
21 Id.

法律法规

7. CAL. R. OF PROF’L CONDUCT R. 3-500。
8. 在集体诉讼中，分担费用的安排必须也向法院披露。CAL. R. CR. 3:700(b)。
10. CAL. R. OF PROF’L CONDUCT R. 2-200(A)(1)。
12. 同上。
13. CAL. R. OF PROF’L CONDUCT R. 3-500, BUS. & PROF. CODE §6068(m)。
16. 同上。
18. CAL. R. OF PROF’L CONDUCT R. 2-200(A)
19. Los Angeles County Bar Ass’n, Prof’l Responsibility & Ethics Comm., Formal Op. No. 470。
You will soon realize something you didn’t learn in law school—how to run a business. Don’t panic or go running for the hills. Tools exist to keep your business running efficiently while allowing you to focus on what you do best—practice law.

Insurance policies help clients hedge against risks, including the risk of litigation. When a client is sued for bodily injuries or property damage or other claims specifically listed in a policy, such as malicious prosecution, the client’s insurance policy can be the key to a satisfactory resolution to the case. The policy may require the insurer to pay for the client’s defense in the case. It also may require the insurer to pay to settle the case and avoid the potential that the client may be found liable for a judgment in excess of policy limits. Additionally, the plaintiff will want to review the policy to explore, among other things, the assets against which it might execute a potential judgment. Therefore, whether an attorney is on the plaintiff side or the defense side, it is critical to know the basics of what must be done to trigger coverage under an insurance policy—that is, the steps an insured must take to obligate an insurance company to fulfill its promises made in the policy.

TENDERING A CLAIM. A “tender” of the claim to the insurer commonly refers to a request that an insurer provide a defense and indemnity under a policy. The first basic rule of a tender is that it should comply with the provisions of the insurance policy. Insurance policies are contracts. Before tendering the claim, make sure that the parties named in the lawsuit are the same ones listed on the declarations page of the insurance policy as an insured or fall within the “Who Is an Insured” provision of the policy. For instance, a lawsuit filed against a business and its owner as an individual may trigger coverage only for the business if the business is the only named insured and the owner does not fall within the policy’s definition of who is an insured. If there is any question regarding who is an insured under the policy, provide information to the carrier at the time of tender explaining why all named defendants should be covered under the insurance policy.

Most policies include provisions that instruct the policyholder on how to make a claim. Read the policy carefully, and follow the steps for notifying the company about the claim.
Submit a tender in writing to the insurance company and send it by certified mail or other means by which the date of delivery of the correspondence can be tracked and proven if necessary. The written request should include identification of the insured or insureds making the tender, an identification of the policy number or numbers pursuant to which the claim is being tendered, a request for a copy resulting in bodily injury or property damage.” Thus, when requesting that the insurance company provide your client with a defense, highlighting the accidental nature of the harm is important. The policy also will contain specified exclusions, such as the exclusion for intentional acts. For a claim to be covered, it must fall within the grant of coverage and not be ruled out by any exclusion.

More information seldom results in a carrier withdrawing a defense, but not providing enough information can result in a denial of the duty to defend.

of all relevant policies, a copy of the summons, complaint, and other pertinent pleadings or papers relevant to the tender, an unambiguous request that the insurer accept the client’s defense and indemnify the claim in the particular case. In some instances, notification to the carrier can be done through the insured’s insurance agent or broker. The insurance agent or broker can often assist insureds in tendering the claim, or at a minimum can give instructions on how to tender a claim for the specific carrier.

**COVERED RISKS.** The risks covered by an insurance policy—the circumstances under which an insurer will agree to accept a client’s defense and/or indemnify in a particular action—will vary depending on the type of insurance policy purchased by the client.

Assuming the client has a general liability policy, the grant of coverage in a typical liability insurance policy reads something like this: “We will pay sums that an insured becomes legally obligated to pay as damages for bodily injury or property damage arising from an occurrence to which this policy applies and which is covered by the policy.” An “occurrence” is typically defined as “an accident including continuous or repeated exposure to substantially the same general harmful conditions during the policy period resulting in bodily injury or property damage.”

**DUTY TO DEFEND.** As part of triggering insurance coverage, the insured must understand the broad nature of the duty to defend, as distinguished from the duty to indemnify. The duty to defend is the insurance company’s obligation to defend the insured from claims brought against the insured. If there is a potential for coverage at the beginning of the lawsuit, there is a duty to defend, even if ultimately there is no duty to indemnify—i.e., to pay for the liability incurred by the insured, up to the policy limits—at the end of the lawsuit.1 Once tendered, an insurance company must defend any claim that is potentially covered under the policy.2 In determining whether there is a duty to defend, “the insured need only show that the underlying claim might fall within policy coverage; the insurance company must prove that it cannot.”3

The insurer also has an obligation to defend the entire lawsuit as long as there is even one claim that is potentially covered—even if other, noncovered claims predominate.4 Once you show that at least one claim is potentially covered, the duty to defend obligates an insurer to defend immediately.5 The courts have imposed a broad duty to defend on insureds based on public policy and not on the language of the insurance contract.6 Hence, the basic axiom of third-party insurance law is that “the duty to defend is broader than the duty to indemnify.”7

In Gray v Zurich Insurance Company, the California Supreme Court held that an insurance company is excused from its duty to defend only “if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.”8 Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured’s favor.9 The duty to defend extends to any claim in the complaint that creates a potential for coverage, whether it is true or not.10 The duty to defend attaches even if the covered claims are frivolous.11 The insurer may not decline to defend a suit merely because it is devoid of merit or because the allegations are false.12

An insurer must provide the policyholder with a defense “as long as the complaint contains language creating the potential of liability under an insurance policy...even though it has independent knowledge of facts not in the pleadings that establish that the claim is not covered.”13 However, if an insured has independent facts or allegations that support coverage that are not in the complaint, such as interrogatory answers or an amended complaint, the insured may use these facts or allegations to trigger coverage. The carrier should be notified immediately upon receipt of any information that supports coverage, if the carrier initially refused to provide a defense.14

**INTENTIONAL ACTS EXCLUSION.** The most common reason a carrier will deny a duty to defend is the intentional acts exclusion. Intentional acts are generally excluded from coverage in liability policies. Although some policies provide coverage for specific intentional acts such as malicious prosecution, Insurance Code Section 533 prohibits indemnity for intentional acts. Therefore, at most, a liability policy provides a defense for intentional acts but not indemnity.

Even if the complaint alleges only intentional acts, the claim still should be tendered to the insurer. Since at least 1966—when the state supreme court decided Gray, the leading case on this principle—the general rule in California is that a defense must be provided even for allegations of intentional conduct, because there is always the potential that the plaintiff will be able to establish only negligent acts.15 The court found coverage for the insured’s alleged assault and battery because the insured claimed self-defense, which would not be considered an intentional act. Therefore, when tendering a complaint against a client in which intentional acts are alleged, you must explain the negligent or accidental aspects of the claim.
California law generally finds conduct to be accidental when the event leading to the injury was unintended by the insured and a matter of fortuity.\(^{18}\) Courts look to the nature of the insured’s conduct, not to his or her state of mind.\(^{17}\) As an example, a shopkeeper at closing time might intentionally lock the storage vault but forget that he or she had sent an employee inside to take inventory. Even though the shopkeeper deliberately engaged the locking mechanism, courts have said that the conduct could be negligent and accidental within the meaning of the insurance policy because it potentially arises from extrinsic causes, such as the employee’s unexpected or chance distraction or the carelessness of the shopkeeper.\(^{16}\) In contrast, there is no coverage for a deliberate act that is alleged to have been a sexual assault—such as grabbing someone’s wrist—when the insured contends only that his or her subjective state of mind was not intentional.\(^{15}\)

On occasion, an insured may be sued for negligence—such as negligent hiring or negligent failure to supervise—that is alleged to have contributed to a co-insured’s intentional act. Coverage of the negligence claims may depend on whether the policy excludes coverage for intentional acts committed by “an insured” as opposed to accidental. Because an insurer’s defense subject to a reservation of rights, the carrier may choose to a tender may be a reservation of rights. This insurance applies separately to each insured.\(^{25}\)

The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer’s gambles—on which only the insured might lose.\(^{27}\) California authorities establish that an insurer who fails to accept a reasonable settlement offer within policy limits or it might be responsible for the entire judgment against its insured, even those amounts in excess of the policy limits. The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer’s gambles—on which only the insured might lose.\(^{27}\)

Finally, the insurer assumes the duty to indemnify an insured for any judgments entered against that insured for damages covered under the policy. “Standard comprehensive or commercial general liability insurance policies provide, in pertinent part, that the insurer has a duty to indemnify the insured for those sums that the insured becomes legally obligated to pay as damages for any covered claim.”\(^{29}\)

The more information that you can provide a carrier—demonstrating why the claim is covered, or if the insurer issues a reservation of rights letter, why Cumis counsel should be appointed—the better for your client. You may have to explain why the conduct could be construed as accidental as opposed to intentional to trigger coverage. And to get Cumis counsel appointed, you may need to spell out the conflict for the carrier. More information seldom results in a carrier withdrawing a defense, but not providing enough information can result in a denial of the duty to defend. This will leave your client to defend himself or herself in a lawsuit, which can be detrimental both financially and emotionally.

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5 Buss, 16 Cal. 4th at 49 (holding that “[t]o defend meaningfully, the insurer must defend immediately”).
7 Montrose, 6 Cal. 4th at 295.
9 Montrose, 6 Cal. 4th at 299-300.
10 Id. at 298.
12 Montrose, 6 Cal. 4th at 298.
17 Id.
18 Id.
19 Id.
23 Cumis, 162 Cal. App. 3d at 364.
25 Id. at 1007.
26 Cumis, 162 Cal. App. 3d at 364.
Finding the Best Expert Online: A Direct Examination of Directories and Referral Services

It is no secret that today we can use the Internet to find just about anything we need. And in the legal industry, it is also the medium of choice in finding expert witnesses. Besides seeking referrals from those whom you know, going online is the new first step in an attorney's search.

More often than not, a search engine will first generate Web sites for either expert witness directories or expert witness referral services. Both can produce a positive outcome to your search for an expert, and both can offer their experts potential exposure that leads to work with attorneys—especially in the competitive age of the Internet. Practitioners, however, should be aware of the structural differences between the two.

**ONLINE DIRECTORIES.** Experts who choose to submit their qualifications publicly often pay to do so via online expert witness directories. Directories are practical avenues for attorneys who presumably have targeted exactly what they need to research and also have the time to scroll through typically large databanks of experts' information to meet that need. Besides finding solo experts, you also may come across multi-expert consulting firms and related service providers. These same parties, as well as law firms, often advertise on these popular sites.

Well-categorized directories offer advanced searches via keywords, name of expert, topic of expertise, or geographic area. Once a potential match is made, connecting with the expert is relatively simple. Directories are geared toward making experts' information readily available. Many directories offer downloadable curricula vitae, links to experts’ Web sites, and direct contact information.

**REFERRAL SERVICES.** The other viable solution is an expert witness referral service. Perhaps an attorney is short on time or help or simply needs to explore several options before making a decision. Referral teams can assist in this process. They are your initial point of contact and remain a dedicated, service-oriented liaison throughout your case. While these groups may vary in their levels of service, a reputable firm will provide you—its client—with an objective, quality-controlled selection of experts. The decision to retain an expert is ultimately yours. However, premier referral firms will practice due diligence, so screening and qualifying experts is standard procedure.

No two experts’ resumes are identical. A referral group can offer cross-disciplined, cohesive presentations of handpicked candidates who can provide precisely what is needed. The diverse backgrounds of prospective experts enable attorneys to compare angles, strategize, and determine the expert best suited to shape their case. Moreover, referral services have an inside track to experts who can recommend others. If the perfect expert for your case does not yet exist in a referral pool, the group’s recruiters can use an entire support system of professionals at their fingertips. First-rate firms will even do additional recruiting for free.

When teaming with a referral group, particularly regarding complex cases, provide as many elements of your case as possible. Information is key. Issues of confidentiality could limit the information that you divulge, of course, but a trustworthy firm will check for conflicts and pair its product with your needs as seamlessly and accurately as possible. Like any organization with a solid foundation of client service, a referral firm will strive to constantly keep the communication lines open in every case.

You will notice common components among the Web sites for referral services. They typically include a disciplines index, a keyword search, an online request for an expert, accolades, and experts’ blogs. Discipline indexes and keyword searching may lead you to experts’ bios, credentials, and locations served. An online request will prompt you for your contact information, as well as the type of expertise needed or case background. (Competitive firms generally advertise quick response times to inquires and promise to adhere to your deadlines, although high-quality products and services should be the compelling factors.) Visit the testimonials section on these sites. Occasionally, you will read praise from the referral firm’s own experts in addition to satisfied attorneys.

Today, expert directories and referral services alike maintain an online media edge. Blogging is becoming increasingly prevalent on these Web sites as well as on the experts’ own sites. Experts may gain exposure and market their skills to attorneys through this interactive vehicle.

In addition to information for attorneys, referral sites often reserve a section for experts or professionals seeking to apply or register as experts. Potential experts may learn the benefits of joining a referral service and what each registration process entails.

Both online expert witness directories and expert witness referral services share a common goal—to help attorneys select the best experts for their cases. Finding the perfect expert online is no easy task, but it is not as daunting as it seems. Armed with a few strategic tips, your search can be as many layers thick as you need: useful databanks or a comprehensive service to help you every step of the way.
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Expert witnesses are more important than ever. Most complicated cases do not settle until after the experts have issued comprehensive reports or have been deposed. This trend will accelerate because education has not kept pace with the continuing increase in knowledge, causing an ever-widening gap between what the average person knows and what specialists know.

The selection of an expert should begin with consideration of the candidates’ resumes:
- Select someone who was previously successful as a witness and is enthusiastic about doing it again. Serving as a witness is an unusual and rigorous job. Many people aren’t suited to its requirements. The first time we do anything, we’re not likely to be good at it. The same is true when serving as an expert witness.
- Select experts who have the premier credentials in their field. Avoid the nearly meaningless credentials requiring little more than an application fee and a basic test that most people pass. Also troubling are credentials given by using a point system to credit unrelated experience. In contrast, most noteworthy credentials require difficult tests, lengthy experience requirements, and peer evaluation.
- Insist that the expert’s firm perform a comprehensive conflict check. This is particularly true of large expert referral firms that have multiple service offerings. Learning of a conflict after you have committed yourself can be costly. A conflict could even disqualify you.

After qualifying under these screens, meet with (or have an extended phone discussion with) the candidate. This meeting should preview how the person will act in the expert role:
- Be careful when your potential expert witness agrees with your position too quickly. As a better alternative, the expert should understand the opposing party’s position and thoughtfully explain why it is incorrect. An expert who is too agreeable may either become too agreeable with an opponent who provides additional information or may not have the character strength to tell you the weaknesses in your position. You are better off with an expert who can reach a conclusion thoughtfully and hold to it under pressure.
- Test an expert’s ability to provide short and direct answers. Experts who regularly provide longer-than-necessary answers will get themselves and your case into trouble.
- Select witnesses who can explain their craft to the jury. Most experts primarily work with highly educated, motivated peers who have the training necessary for their specialized field. These people are not on the jury. Before employing experts, test their ability to explain difficult concepts quickly in simple terms.
- Identify people with energy and enthusiasm. Experts should be quick to offer an illustration, audit, business appraisals, and related financial consulting. He regularly serves as an expert witness.
- Insist that the expert’s firm perform a comprehensive conflict check. This is particularly true of large expert referral firms that have multiple service offerings. Learning of a conflict after you have committed yourself can be costly. A conflict could even disqualify you.

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There are Expert Witnesses and there are Effective Expert Witnesses

LAWRENCE H. JACOBSON’s record of success as an expert witness in a wide range of real estate and business related court trials is without peer. Clients will tell you why. His expertise encompasses:

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• Custom & Usage Real Estate Transactions/Documents
• Lawyer Malpractice (in real estate and business transactions)

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TAKING AN EFFECTIVE DEPOSITION OF YOUR OPPONENT’S EXPERT. Before the deposition of an opponent’s expert begins, determine whether you plan to use the deposition for persuading your opponent to settle or to prepare for trial. Each strategy will involve tradeoffs. For example, if you aggressively cross-examine during the deposition, you may get exact admissions and a better chance of settlement. However, you will also show your attacks, allowing your opponent to create responses between the deposition and trial. This is particularly troubling with experts, who presumably are required to modify their opinions as new information is learned.

On the other hand, if you just ask for the expert’s opinion and the basis for the opinion, your opponents are more likely to remain unaware of their vulnerabilities. However, you will also lose opportunities to obtain valuable concessions.

Your preparation for your opponent’s deposition should include a session with your own expert, who should be able to provide you with years’ worth of insights and understanding. Your expert can educate you about weaknesses and flaws in the opposing posi-
tion as well as the jargon necessary to understand what is being said. Your expert also may know information about your opposing expert that you would otherwise have difficulty learning.

Since the deposition is your time to learn, ask plenty of questions that you would never use at trial. Most examiners make insufficient use of open-ended questions that force the witness to explain what work was done and the rationale for the conclusions. Questions that start with who, what, where, when, why, and how will generate information that you would never get with questions that demand a yes-or-no response, which should be limited to areas in which you already know or wish to clarify the expert's conclusion and rationale.

Add questions that usually challenge expert witnesses. Make extensive use of simple follow-up questions such as “How do you know that?” or “Why is that true?” Also ask questions that elicit limitations in or concerns with the opposing expert's work. Examples include:

- What assumptions did you make?
- What is the factual basis for this opinion, and how do the facts lead to your conclusion?
- What information have you relied on that was provided by counsel or your client?
- What concerns do you have regarding your conclusion?
- Under what circumstances would you use a different methodology?
- What alternative hypotheses could explain what you observed?
- What other work would you have liked to perform?

Use hypothetical questions to move an expert witness off of the established script that opposing counsel is presenting. Hypothetical questions can be used to turn an opposing expert into your witness when a different set of facts is presented. Hypothetical questions also can support the positions of your other witnesses.

Reverse psychology is sometimes the best way to isolate a witness. Test the limits of how far the opposing expert will go to support the untenable. Discredit an extreme witness by taunting him or her into taking positions that most will see as silly.

Most depositions spend too much time on the expert’s background. Unless the expert is truly inexperienced in the relevant field(s), many background questions can be covered by asking the expert whether his or her resume or curriculum vitae is accurate. However, spend time looking for areas where the current testimony contradicts or is impeached by:

- The witness's writings. Has he or she written or testified previously with conclusions inconsistent with those taken in your case?
- Authoritative works in the field, including texts that the witness uses as references or in classes taught by the witness. Get the expert to acknowledge which works are authoritative.
- The witness's testimony in other matters. Some of this can be obtained through databases that provide such information for a fee.
- On whose behalf the expert usually testifies. An impartial expert can ply his or her trade on behalf of both plaintiffs and defendants.

These same questions also can help your own expert prepare. Review these issues with your expert before the deposition, and allow sufficient time for your expert to perform whatever additional work is cost-justifiable to remedy the problems you uncover.

Experts often make a huge difference, but serving as an expert witness is a difficult job. Selecting an experienced witness will make that challenging task much easier.
Dos and Don’ts of Paper Discovery

By Justice Richard C. Neal (ret.) and Barbara Reeves Neal

For new litigators, the importance of knowing everything about “paper” discovery—particularly document requests and interrogatories—will be apparent during their first days on the job. Counsel must learn how to propound them and respond to them. New attorneys also need to master the practices and procedures surrounding disputed responses. By keeping a few general guidelines in mind and avoiding common mistakes, practitioners can use discovery efficiently and effectively.

Discovery was not always an integral part of American litigation. It was not known under the English common law—the parent of our system—but was invented in the United States in the mid-twentieth century. The aspiration of those who created discovery was that disclosure of information relevant to claims and defenses would lead to more and earlier settlements and dispositions more closely based on the true merits of the dispute. Experienced practitioners know that discovery instead has become, in many cases, a source of protracted and expensive preliminary battles in litigation, often without significant advancement of the original goals.

Well thought out, focused, reasonable discovery still can achieve the benefits originally envisioned by its founders. Discovery can do this while avoiding the pitfalls of needless delay and expense.

Discovery Plan

Before the first document requests, interrogatories, and requests for admissions are drafted, prepare a written discovery plan. This should preliminarily identify the kinds of documentary evidence that will be requested, the persons who will be deposed, and any subjects that can be explored effectively with interrogatories and requests for admissions.

Preparing the plan requires a beginning understanding of what proof will be needed to sustain claims and defenses. Some good trial lawyers create a first draft of their closing argument at the beginning of case preparation, modifying it as the case develops. This practice forces early and continuing consideration of exactly what must be put before a judge or jury to win—or in mediation, to obtain a favorable settlement.

The statutory scope of discovery is very broad. A discovery request is permissible if the inquiry is reasonably calculated to lead to the discovery of admissible evidence. The smart lawyer, though, wants information that is relevant and reliably revelatory about case weaknesses. The lawyer wants to get that information with minimal sifting through documents that “might lead to the discovery of admissible evidence” but are not really helpful. So the goal is to frame focused discovery requests that will yield the most useful information with the least amount of extraneous material.

Do consider the cost of the discovery in relation to the stakes in the litigation. When making a discovery plan, selectivity is especially important if the amount in controversy is limited. Conversely, if the stakes are high, broad and deep discovery may be warranted.

Document Requests

Discovery usually begins with requests for document production. Writings created at the time of the disputed events are the best source of reliable evidence. They show the positions of the parties before either begins to shade its position to enhance its arguments in a lawsuit. Remember that counsel prepare responses to interrogatories and requests for admissions. Moreover, practitioners usually prepare their clients for deposition testimony. By contrast, contemporaneous documents are free of the taint of litigation.

Do focus the requests. Don’t ask for “any and all documents that refer or relate in any way to [insert subject].” Code of Civil Procedure Section 2031.030(c)(1) requires the party making the request to designate the information being sought “by specifically describing each individual item or by reasonably particularizing each category.” “Any and all” requests usually do not comply with this requirement. Further, the requesting party does not need “any and all documents,” and gathering them may be burdensome. Adversaries will seize on the phrase as evidence of overbreadth, and judges and referees are likely to agree.

For example, if lost profits are at issue, a typical document demand might ask for “any and all documents relating to plaintiff’s financial performance for the last eight years.” Arguably, this request calls for every invoice, purchase order, check, statement of account, bank statement, and every accounting entry in every journal and ledger. Production of all these items could be time-consuming, expensive, and most likely unnecessary for the requesting party’s purpose. On the other hand, annual profit and loss statements, balance sheets, and cash flow statements—audited if available—for the relevant years probably will suffice. Consider making a request for “documents sufficient to accurately show plaintiff’s revenues and profits for the [years inserted], including profit and loss statements, balance sheets, and cash flow statements.”

Additional relevant documents identified as discovery proceeds may be requested with new targeted requests. Have the plaintiff’s accounts payable become an issue in profits analysis? Send a supplemental request, or ask a question in deposition.

Some lawyers defend the “any and all documents that refer or relate” formula as neces-
sary to ensure that the opposing lawyer will not omit possibly responsive materials from production. But remember, discovery is an honor system. A conscientious lawyer responding to a request for "documents reasonably sufficient to accurately show" will produce the relevant documents. Conversely, a lawyer abusing his or her discovery duties and withholding relevant material likely will not be forestalled by the breadth of an "any and all" documents request.

Do keep the number of requests reasonable. Your adversary will be less likely to resist, and a court, referee, or arbitrator will be less likely to view the request as burdensome.

Do not preface your request with extensive definitions. Use succinct, plain English and rely on its clarity if a dispute arises.

Responses

Responding to document requests typically is a two-step process. First, you tender a written response confirming that the requested documents will be produced and/or stated objections to some categories. Second, you deliver the requested documents (usually copies rather than originals) to the other side.

Do become familiar with the statutory requirements for a Statement of Compliance in Full or in Part and a Statement of Inability to Comply, found in Code of Civil Procedure Sections 2031.220 and 2031.230. These affirm what documents will be produced and explain what will not be produced and why.

Do not preface written responses with a recitation of every possible objection. Unfortunately, this practice has become an industry standard, and written responses to document requests routinely begin with a half to a full page of objections. This refrain of boilerplate objections hardly ever accomplishes any useful purpose. Not only that, it also kills trees—and creates the appearance that the responding party is obstructionist.

Assert only those objections that are real and material. If the document requested truly is an attorney-client communication, by all means object. Ditto if there is some other clear-cut ground. But don't dilute the force of material objections by burying them in a sea of marginal ones.

Do not object on the grounds that the request is a burden but thoughtful consideration of the validity of this objection. Quantify any burden in a way that can be persuasively presented to the court or referee in the form of admissible evidence.

Do not use the phrase "discovery is continuing" as part of your response. It has no legal meaning or purpose nor any effect other than to create an impression of evasion. The legal obligation of the responding party is to produce the requested documents. A responding party is entitled, and indeed required, to supplement its responses if additional documents are later discovered. The obligation to produce is not avoided or ameliorated by reciting that "discovery is continuing."

Do comply with the statutory command of Code of Civil Procedure Section 2031.280(a).

Documents must be produced in the order that "they are kept in the usual course of business" or "labeled to correspond with the categories" in the document request.

Interrogatories and Requests for Admissions

Interrogatories and requests for admissions should be carefully, and sparingly, used. These forms of discovery are generated by the hundreds or thousands in civil litigations, yet the responses only infrequently find their way before the trier of fact. The opposing lawyer generally crafts the responses to provide the minimum useful information that will pass muster if challenged by a motion to compel.

Interrogatories may be useful in obtaining information that usually is not controversial—for example, the names and contact information for persons with knowledge of relevant events. Convention interrogatories can be helpful in ferreting out the particulars of the opponent's claims. Standard form interrogatories developed by the California Judicial Council use this format.

Do, though, bear in mind that interrogatories can have a negative effect. An adversary may retaliate by serving as many, or twice as many, as he or she received, and responding to interrogatories is hard, tedious, dull work.

Further, as one of our mentors once observed, forcing your opponent to do that work may have the unintended consequence of enhancing his or her case preparation.

In addition, the results of motions to compel responses to interrogatories are frequently unsatisfactory. The court can force an adversary to provide an answer, or supplemental answer, but has little control over how useful or genuinely responsive the answer is. Counsel can expend large amounts of time, effort, and money to force supplemental interrogatory responses that are ultimately of little value.

The approach for responses is the same as for responding to document requests. Avoid litigies of objections and assert only those that have merit and are material. Provide frank, substantive answers. Forceful, direct, accurate articulation of favorable information helps the responding party's case, while obfuscation does not. Also, the rules require disclosure of unfavorable information. Sooner or later, the other side usually learns the "bad" information.

Discovery Disputes

If you find yourself in a dispute over discovery, your first step should be an attempt to resolve the dispute informally through discussion with opposing counsel. This is the notion underlying requirements for meeting and conferring.

Do attempt to meet face-to-face with opposing counsel. Be prepared to earnestly discuss ways in which objections can be resolved and necessary information produced without undue burden. For example, if one side objects to a wide-ranging request phrased as "all documents related to," a genuine meet-and-confer process should be the opportunity to narrow that request by agreeing to identify the subset of useful documents.

Do not rely on meet-and-confer letters. The heart of the meet-and-confer process is "confer." An exchange of argumentative position letters without conferring is unproductive. An exchange of noninflammatory letters can be useful, though, as a first step in meeting and conferring.

However, do not send copies of these letters to judges, referees, or arbitrators. If the judge, referee, or arbitrator is available, do consider requesting an informal conference about the dispute before filing a full-fledged motion.

If motions are unavoidable, present the dispute in an efficient, compressed, and streamlined fashion. Judges, referees, and arbitrators frequently will require a joint statement in which the parties are admonished to include everything needed to resolve the dispute.

In preparing briefs and joint statements in discovery disputes, do not use templates to replicate identical arguments multiple times for a series of similar disputed requests. Do group together all requests raising the same issue. Set forth one request as an example, and list parenthetically the numbers of the other requests that are similar or raise the same issue. Then, make the arguments once. The judge, referee, or arbitrator will be powerfully grateful, and moreover, more likely to carefully consider and thoughtfully dispose of the arguments.
California E-Discovery Basics: Tips for the E-Competent Litigator

Today, most corporate information originates electronically, making electronic discovery an integral part of discovery in virtually every case. Using e-discovery entails more than just an understanding of the technology involved. Attorneys must develop strategies for successfully obtaining and producing electronically stored information (ESI).

**START EARLY.** The ESI discovery obligations of counsel and clients start earlier than most counsel expect. Therefore, as soon as a civil litigation matter comes to the desk of counsel, they should hear the ESI discovery clock ticking. Two items should be attended to immediately: litigation hold and preparation for the early meeting of counsel.

Litigation hold is the process whereby a party contacts the custodians of its information and acts to preserve discoverable information. There is no specific statute that imposes this duty. Rather, it is the consequence of other duties owed. If parties do not preserve relevant evidence, the entire legal system will be undermined. Therefore, courts hold that every party has a duty to preserve relevant evidence if litigation or government investigation is reasonably anticipated. In California, the destruction of relevant information once the duty to preserve attaches is a sanctionable discovery abuse.

The primary problem in litigation-hold practice is that it is painfully unclear to parties when litigation investigations are “reasonably imminent” and preservation should commence. For example, in some cases, courts have found that obligations should have started years before parties actually began the preservation process. Litigation hold must be of particular concern to counsel, as litigation hold duties run first to counsel and only thereafter to clients. Attorneys must consider litigation hold obligations and counsel their clients specifically, especially with regard to ESI records. Therefore, as soon as a new matter is received, counsel should ask pointed questions about litigation hold procedures and, particularly, whether those procedures are adequate to preserve relevant ESI. If no procedures have been set in place, or if the procedures need to be more robust, this should be the first order of business. A litigation hold should be made in writing, as failure to do so can constitute “gross negligence,” supporting an imposition of sanctions.

In addition to fulfilling litigation-hold tasks immediately, counsel should also begin preparing for the early meeting of counsel and then the case management conference (CMC). The CMC must be held no later than 120 days out from the service of the complaint. California Rule of Court 3.724 requires that counsel meet no later than 30 calendar days prior to the case management conference to discuss discovery-related items, including eight specifically related to ESI discovery. This means that counsel must talk with their clients, meet and confer with opposing counsel to address discovery, and specifically ESI discovery, within the first 90 days after service of the complaint to complete the early meeting 30 days before the CMC.

Failure to adequately prepare—and come to the early meeting prepared—can be construed as failure to meet and confer in good faith, which is sanctionable as discovery abuse. To prepare adequately, courts advise that counsel speak personally to “key players,” core custodians including individuals who are involved in the subject matter and create ESI documents as well as IT custodians who keep data such as e-mail servers, human resources databases, and accounting databases on behalf of the company. They should be questioned about what data they produce in general, what data they have that is relevant, where it is located, and whether there is anyone else who should be contacted.

If the other side comes to the early meeting of counsel unprepared to meet and confer meaningfully on these topics, be sure to file with the court a written account of this failure prior to the case management conference. Data difficulties do not improve with time, and failure to address the points made in Rule 3.724 early on will increase the already high costs of discovery. If you wish to show the judge that the other side is not taking the discovery seriously or is willfully refusing to meet its discovery obligations, there is no time like the case management conference to start showing the court the other side’s true colors and highlighting your client’s diligence.

**E-DISCOVERY REQUIRES SUBSTANTIAL COOPERATION AMONG COUNSEL.** Courts understand that the costs of ESI discovery increase exponentially when counsel will not cooperate. Indeed, courts appreciate when counsel bring their A game to the meet-and-confer table and are helpful in solving e-discovery problems. However, this requires substantial preparation. Counsel must know what ESI exists and how it can be made available. They must know at least the basics on how to search and cull the ESI sources to find relevant materials and also how long that process takes. They must be prepared to bring IT personnel into the conversation who can address and resolve systems and data issues. ESI discovery is an area of the law that rewards proactive lawyering and creative problem solving.

On the flip side, ESI discovery is an area in which courts have little patience with counsel and clients who refuse to work through the data issues in an efficient manner. Courts have an impressive panoply of pressures that they can bring to bear on attorneys who appear to
be hiding the ball or otherwise holding up the discovery. Don't be an easy target.

**FORMAT MATTERS.** The California Code of Civil Procedure permits requesting parties to specify the format for producing ESI.

Requesting parties should ignore the “may” language. Always specify a format because there is one that will invariably work better for your client and legal team. Specification of a reasonable format has a strategic advantage. If you specify a format and the opposition objects, the ensuing discussion before a court or discovery referee usually begins with asking why the responding party cannot give you what you asked for. If the other party is the first to specify a format and you object, the discussion will probably begin with questioning why you cannot accept what the other side is offering. By specifying a format, you often receive what you ask for. If there are problems, you set the starting point for negotiations.

What format should you ask for? Know where the data will go after you obtain it. For example, if it will go into an in-house electronic document review platform, then TIFFs and a selection of metadata in platform-specific load file format are fine. If the legal team will use a sophisticated analysis tool that requires access to the original native ESI, ask for that. Your technology group or litigation support vendor should write a specification for how the data should be delivered. Use the spec as Attachment A to your inspection demand. Better yet, provide it at the early meeting of counsel, and also attach it to the formal inspection demand.

Responding parties should be mindful that, if the other side asks for a load file for a basic, commercially available litigation support database, the cost of objection is probably greater than the cost to make the load file. However, if counsel asks for a product that imposes substantial extra costs, a “reasonably usable format” is not a bad standard to fall back on. Courts interpreting that phrase look to the usefulness of the data format being offered. Does the proposed format degrade the searchability of the ESI? Consider e-mails: In their original format, e-mails are fully searchable and can be sorted by field. However, if the producing party provides only a TIFF of the e-mail, it cannot be searched or sorted. The TIFF is not a reasonably usable format for the e-mail ESI. But if the proposed format offers TIFFs and some fielded searchable data (such as author, subject, or body text), even if it is not the precise format preferred by the requesting party, it is probably reasonably usable.

The Code of Civil Procedure states that a producing party need not produce the same ESI twice. ESI is generally less expensive to deal with than the same information in paper format. State in your discovery demand that if the same information is available in both paper and ESI format, you want ESI rather than paper.

**NEGOTIATE COST-SHARING/COST-SHIFTING OPTIONS EARLY.** The Code of Civil Procedure authorizes the producing party to seek a protective order when ESI is “not reasonably accessible due to undue burden or cost.”

If discovery is ordered, the court can require sharing of costs. The Code of Civil Procedure also provides that when data must be “translated,” the requesting party must pay reasonable costs. The cost shifting of translation is different from federal practice, where the default position is that the producing party pays.

Under Code of Civil Procedure Section 2031.280(d)(2), a court considering “undue burden or costs” will look to the cost of the production, the probable value of the ESI in question, and the overall amount at stake. Is the cost undue given the amount in controversy and the usefulness of the target ESI? Cost alone does not prove undue burden.

It isn’t clear what processes are referenced by the term “translation.” In Toshiba v. Superior Court, the court stated that the backup tapes in question required translation but did not explain what translation meant. As a guideline, consider that producing ordinary ESI items from active data sources is probably not considered “translation.” However, if accessing the data requires specialized IT work, such as bringing it back from compressed archival or writing scripts to search a database, it probably qualifies as translation.

The value of these rules is that you can identify potentially expensive items from the discovery process early when only minimal costs have been expended for them. The duty to preserve this material remains, but you can avoid spending costs to collect, process, review, analyze, produce, and present it unless the other side pays part or all of the remaining production costs, or a court orders you to produce. Done properly, the only costs borne 100 percent by your client would be for preservation. This kind of early exclusion can save 70 percent or more of the discovery costs that might otherwise be paid for these items.

Identify items for cost sharing/shifting at the early meeting of counsel, identify them as excluded items in any written discovery response, consider bringing a motion for a protective order (or make the other side bring a motion to compel), and document your cost claims with items such as written vendor estimates.

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8. See, e.g., Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D. N.Y. 2003) (Counsel should make early attempt to speak personally with information source personnel.).
10. See, e.g., Chen v. Dougherty, 2009 WL 1938061 (W.D. Wash. 2009). (Court refused a costs bill, stating that the lead attorney’s skills were so deficient in the area of discovery, that the court could not command the fee she had requested.)
13. See e.g., DE Techs., Inc. v. Dell, Inc., 2007 U.S. Dist. LEXIS 27690 (W.D. Va. 2007) (TIFFs alone are not a reasonably usable format where the original media was ESI; TIFFs plus data in a load file is reasonably usable.).
16. The new Code of Civil Procedure Section 2031.060(c) on “not reasonably accessible” is based on Federal Rule of Civil Procedure 26(b)(2)(D).
Cloud-Based Electronic Discovery Is in Your Future

PRACTICE BASICS

By Robert J. Ambrogi

Cloud-Based Electronic Discovery Is in Your Future

Lawyers have a reputation for exercising caution when it comes to embracing advances in technology. So it was with the fax machine. So it was with e-mail. And so it is now with cloud computing.

But once they understand the benefits and allay their fears, lawyers not only embrace new technology, they run with it. So it was with these earlier technologies, and so, again, it is with cloud computing.

Over the last few years, legal professionals have begun using the cloud for everything from practice management to client relations. Even so, one area of legal practice stands out as particularly well suited to the cloud—electronic discovery and the handling of electronically stored information (ESI).

In electronic discovery, the cloud offers distinct advantages: power, flexibility, mobility, economy of use, and ease of deployment. In fact, in a 2010 report on electronic discovery, the technology research firm Gartner, Inc. concluded that the future of electronic discovery technology is in the cloud. A cloud-based e-discovery platform, Gartner said, “offers benefits that on-premises software or applications cannot.”

WHY THE CLOUD FOR E-DISCOVERY?

As a new lawyer, you are entering a profession that is increasingly unbounded. The businesses you represent—even small and mid-sized ones—will be global in their operations. The cases you take will require you to interface and collaborate with people all over the country, if not the world.

And everything you do will be driven by data. Whereas lawyers once pushed paper, they now deal with electronic information—and lots of it. Even relatively run-of-the-mill cases can involve megabytes of electronic documents and e-mails stored on any number of servers in any variety of locations. Big cases can reach into terabytes.

At a time when the information that lawyers deal with is electronic, the cloud is uniquely well suited to the task.

Consider the following:

• When a single case can involve multiple terabytes of data, cloud computing offers virtually unlimited power and scalability.
• As enterprises increasingly become global, cloud computing enables the loading and processing of data from locations anywhere in the world.
• When multiple languages threaten Babel-like confusion, cloud computing simplifies sorting and searching.
• When legal teams are likely to be spread across multiple venues, cloud computing enables them to collaborate seamlessly.
• As litigation costs spiral out of control, cloud computing eliminates capital and maintenance costs, cuts staff requirements, and enhances efficiency.
• When time is of the essence, cloud computing allows rapid deployment, faster processing, and quicker review.

Whereas the early development of e-discovery technology was centered in locally installed appliances, the future is in the cloud. And that future is already here.

WHAT IS CLOUD COMPUTING?

Think of cloud computing as a method of harnessing computer power, as much or as little as you need for the task at hand—available when you need it and out of sight when you don’t. Using nothing more than a laptop or iPad, you can tap into virtually limitless computing power.

Vivek Kundra, named by President Obama as the nation’s first chief information officer, compares cloud computing to the public water supply. Where once each household had to find and maintain its own water supply, we now turn on a tap when we need water and turn it off when we’re done. By drawing on the public supply, our lives are greatly simplified.

Kundra led the charge to move the federal government’s IT infrastructure to the cloud. “By using cloud services, the federal government will gain access to powerful technology resources faster and at lower costs,” he wrote. “This frees us to focus on mission-critical tasks instead of purchasing, configuring, and maintaining redundant infrastructure.”

Just as the public-works utility delivers a virtually unlimited supply of water to your kitchen tap, cloud computing delivers virtually unlimited power to your local computer. Instead of pipes and reservoirs, cloud computing uses the plumbing of the Internet to tap into files and applications on remote computers.
THE DIGITAL HUB IN THE CLOUD. When Apple CEO Steve Jobs unveiled the company's iCloud service in June 2011, he described a world in which our data is increasingly disembodied from our devices. The solution, Jobs said, is “moving the digital hub into the cloud.”

Jobs's notion of a digital hub in the cloud is an apt description for cloud computing. In reality, of course, the data is not “in the cloud.” It is stored on a server somewhere and perhaps on multiple servers. Rather than access data and applications directly on your computer, you use your computer to access data and applications located elsewhere on computers with far more firepower and capacity than your paltry PC could ever provide.

The National Institute of Standards and Technology (NIST) says that cloud computing is defined by five essential characteristics:

- On-demand self-service. The user can access the system unilaterally whenever needed.
- Broad network access. The system is available over the Internet and accessed through standard computing devices such as laptops, mobile phones, and PDAs.
- Resource pooling. The provider pools its computing resources to serve multiple consumers, with different physical and virtual resources dynamically assigned and reassigned according to demand.
- Rapid elasticity. Capabilities can be rapidly provisioned to quickly scale up and rapidly released to quickly scale down.
- Measured service. Cloud systems automatically control and optimize resource use, providing system monitoring, control, and transparency.

Cloud-computing services are delivered according to various models, NIST says. The one most familiar and applicable to e-discovery is Software as a Service (SaaS). The consumer uses applications that run on the provider's cloud infrastructure.

ADVANTAGES OF THE CLOUD FOR E-DISCOVERY. So, what does all this have to do with e-discovery? Consider the following.

Your client, a multinational corporation, recently concluded an intricate and interconnected series of major commercial transactions in Eastern Europe, Europe, and Asia. Now it is under investigation by the U.S. Department of Justice for possible violations of the Foreign Corrupt Practices Act. The DOJ has demanded that your client produce all documents related to those transactions—and that it produce them within 90 days.

Complying with the request will require collection and review of some 500 gigabytes of ESI, which translates to more than 30 million pages. The documents reside in the custody of many individuals in various divisions and subdivisions on computers in far-flung locations—including Russia, Italy, and China—and are written in at least a dozen different languages.

You face the daunting task of collecting, transcribing, indexing, searching, reviewing, and producing the documents, with little time to do it. How does a cloud-based e-discovery provider help? Here are some of the ways:

- Zero to 60 in a flash. Appliance-based systems require purchase, installation, and setup, consuming precious time. With a cloud-based application, no time is wasted getting up to speed, because a computer and Web browser are all you need.
- Universal access. When your case is far-flung, your team may be also. Lead counsel may be in New York. One review team might be in the Midwest. Foreign-language reviewers may work in Hong Kong. Wherever your team is working, at whatever hour, the cloud provides easy access to the system and the data.
- Unbridled power. When you face a massive document review, sluggish computers don't cut it. With a cloud-based system, you tap into an expandable grid of high-capacity processing power. With an appliance-based system, you can hit the wall, but in the cloud, there are no walls.
- Capability of handling multiple languages. Cloud systems often have specialized tools and applications not available in locally installed systems. Some cloud platforms offer sophisticated multilanguage capabilities, translating documents on the fly and searching across multiple languages.
- Elasticity to meet demand. Cloud platforms are built using high-capacity storage devices with massive processing power. If your project suddenly scales up, you need not rush out to buy more hardware. The system scales to the demand.
- Reliability and security. With cloud-based platforms, you have no maintenance worries. Hardware systems become redundant. Software is always up to date. And electronic discovery companies are zealous about system security.
- Lower costs. Cloud-based systems are the most economical because they do not require up-front investment for hardware and software, nor additional IT staff. Training is simplified, and project time is reduced.

Lower costs translate to an added plus for lawyers in smaller firms. With a cloud-based system, small firms stand on a level playing field with their larger firm counterparts.

CAUTIONS REGARDING CLOUD COMPUTING. Before you conclude that cloud computing is all pie in the sky, a new lawyer should consider certain cautions when selecting a cloud provider.

One is ethics. Lawyers are duty bound to ensure the confidentiality and security of client documents and communications. A handful of state ethics panels have examined whether it is ethical for lawyers to store their clients' documents in the cloud and use cloud-based applications. Every panel so far has concluded that cloud computing is on solid ethical ground.

At the same time, these panels urge lawyers to exercise common sense in selecting a cloud provider. In particular, they urge lawyers to thoroughly vet a provider's security and stability. That means you should look for a provider with an established reputation, not only for the strength of its security but also for the viability of its business. An established provider can supply you with detailed information regarding its system security and its practices regarding backup and disaster recovery. Once you are satisfied, be sure to enter into an express, written nondisclosure agreement with the provider.

In addition to ethical considerations, there may be legal issues. One involves the location of the data. A U.S.-based company should fully understand the legal implications before using a provider whose servers are outside the United States. The converse is equally true: A foreign company may not want to use a U.S. provider unless the provider also has non-U.S. data centers.

Of course, lawyers' use of any technology should be guided by caution and common sense. In e-discovery, however, the choice of technology is increasingly driven by the sheer magnitude of the task at hand. As megabytes become gigabytes and then terabytes, as data is stored in multiple locations in multiple formats and in multiple languages, as the task of document review becomes more complex and the consequences of mistakes become more severe, one form of technology stands out as having the power, capability, and flexibility to handle the task. In e-discovery, the future is in the cloud.
ew attorneys may find, as they proceed in their practices, an aspect of the law of unintended consequences that I call “law by accident.” Even a brief immersion in the legal system will reveal that rules and doctrines are established more by accident than by design. As practitioners handle the daily tasks of moving cases forward, they should consider the bigger picture of how to use a case to actually establish new law or advance a legal rule or theory that will benefit the long-term interests of their clients.

Practitioners generally focus on a case in light of a client’s short-term interests in winning or defending the case. The client and the attorneys share one goal: reaching a successful conclusion in the case in front of them. The resolution of the case may involve the emergence of an important legal issue that ultimately must be settled on appeal—and that appeal leads to a legal precedent. However, the litigants actually do not anticipate or plan this result. It is, in many ways, an accident. The new rule is established essentially by happenstance.

But the development of new law does not have to occur by chance. Rules that have long awaited a bright-line revision or a reversal continue to be unchallenged because litigants fail to look ahead, determine their long-term goals, and plan accordingly.

The short-term approach is understandable. After all, the job of attorneys is to resolve suits in their clients’ favor. Still, the disadvantages to purely short-term thinking cannot be overlooked. For one, thinking only about the task in front of you can result in an issue being inadequately presented to the court. Counsel may present a possible legal defense with potentially broad implications in a cursory fashion, resulting in the court rejecting the argument. Or an important argument or case is completely left out of a motion or brief to the court, resulting in the issue being waived. Further, the possible ramifications of a legal challenge to the current state of the law are not fully examined, resulting in a missed opportunity or an argument that backfires. The result of failing to plan ahead is that infrequent and promising chances to change the law may be lost—sometimes permanently.

Some laws continue to sit on the books when clearly they are likely to be reversed if challenged. Alternatively, other laws change more as a result of chance or luck, without much planning. This is not an effective way to create a set of rules and laws favorable to your clients.

Thinking Ahead

The best players in the game of chess are those who can visualize several moves ahead, anticipate their opponent’s moves, and respond accordingly. Similarly, the best and most effective attorneys are those who think several steps ahead to anticipate what their opponent and the courts are likely to do and act accordingly.

Instead of waiting for issues to arise, attorneys (and their clients) should consider 1) what they want the law to be, 2) the likelihood of achieving the change they seek, and 3) the steps they must take to realize their goal.

Deciding what you want the law to be is generally the easy part. Attorneys should review recent litigation in their area of practice to determine emerging issues as well as those that seem to be most frequently arising in appeals. In addition, they should prioritize what issues are most important.

Attorneys should next determine the chance of success in establishing a new legal precedent or reversing unfavorable law. It is impossible to make an absolute determination of one’s chance of success. However, there are often signals as to whether particular legal issues are good candidates for challenge:

- There is no binding law on your issue. If an issue is not already resolved in your favor, this may be the ripest target, since you are free to argue what the law should be. This situation is even more appealing if courts in other jurisdictions have generally persuasive opinions.
- The courts are split on your issue. Appellate courts at the state and federal levels are frequently divided. Sometimes all circuit courts but one have ruled in a favorable manner on
an issue—and the one holdout is the court in which your case is venued. You may be able to argue that recent changes in the law in other jurisdictions support a change in the law in your court as well.

• The U.S. Supreme Court has recently issued a decision that applies a new rule favorable to your client, but the parameters of the rule have not yet been fully defined by the lower courts. Practitioners can use the new authority to argue that an issue should be decided in their favor.

The next step is determining how to seek a change in the law. Once again, thinking ahead about long-term goals is key. When you are presented with a new case, don’t think merely about its resolution. Think about whether your client’s case raises significant issues beyond its particular facts. Discern whether the case implicates a law you seek to affect. Develop a strategy at the beginning of the case for how to address these cutting-edge issues.

Careful Planning

You should revisit your goals at regular intervals throughout the case. Is there a legal claim or defense you should preserve at the beginning of the case for a dispositive motion, trial, or appeal? Is there a fact you need that would help obtain the change you seek? Is there a trial exhibit or testimony you should use to preserve an argument for later presentation on appeal? Be prepared to challenge the law in a clear and convincing fashion and to use the appropriate authority to do so.

Of course, every strategic legal plan faces pitfalls. Pursuing a long-term strategy may result in an adverse ruling to your client. Additionally, an ill-advised argument could result in unnecessary costs and legal proceedings. As you pursue the long-term goals, no matter how much they may ultimately benefit your client, you always need to consider the client’s short-term interests as well.

With careful planning, you can avoid an approach to law that merely addresses one file at a time and never considers how the law should be changed. A long-term approach has the potential of establishing favorable legal precedent for future cases. It will also save your current clients money by avoiding the need for making claims or asserting defenses to issues that are now already established in your clients’ favor.

In short, think several steps ahead, just like a chess player. You will be glad you did.

Applying the “Usual Stipulations” at a Deposition

The last question has been asked, the last objection has been made, and the witness has given the last answer. Finally, the deposition has concluded. One of the lawyers asks, “The usual stipulations?” For a new lawyer unfamiliar with this custom, this question can spark anxiety and self-doubt. With a little preparation, however, the lawyer can respond with confidence.

Deposition stipulations are often entered into among counsel at the conclusion of a deposition in a case pending in state court. These stipulations may be used to change the rules imposed by the Discovery Act concerning the handling of the transcript.1

In truth, there is no such thing as the “usual stipulations.” In most of the time, they are entered into orally and transcribed by the court reporter as part of the record. They change the duties that the law would otherwise impose on the court reporter, the lawyers, and the deponent regarding the handling of the deposition transcript. If there is a video or audio recording of the deposition, the stipulations may also address the handling of the recordings.

As an initial matter, lawyers typically stipulate that the court reporter is relieved of his or her duties under the Code of Civil Procedure, which is often referred to simply as “the Code.” Some lawyers do not agree to this broad stipulation, which relieves the court reporter of the duty to transcribe the record accurately. A narrower stipulation can be proposed that relieves the court reporter of his or her duties under the Code concerning the custody of the transcript and notification to other parties of any changes to the transcript.

The purpose of this stipulation is simply to eliminate the default application of the statute to the handling of the deposition transcript. The default rules concern the amount of time a deponent is given to make any changes to the transcript, the means by which the transcript is reviewed and approved or rejected by the deponent, and who has custody of the transcript following its preparation.

If counsel stipulate to relieve the court reporter
of his or her duties, counsel should also agree on the alternative obligations.

**Review of the Transcript**

By statute, deponents have 30 days to review the written transcript of the deposition, make any changes, and approve or refuse to approve the transcript. The statutory 30-day period begins when the court reporter provides the required written notice to the deponent and all parties attending the deposition that the transcript is available for reading, correcting, and signing.5

In many circumstances, counsel attending the deposition stipulate to a different deadline for the deponent to review the transcript. An impending trial or motion date may lead counsel to stipulate to a shorter period. A deponent’s upcoming vacation or pressing work obligations may lead counsel to stipulate to a longer one.

In addition, counsel typically stipulate that the transcript, once prepared, shall be sent to the deponent or to the deponent’s counsel for review. Counsel then typically agree that the agreed-upon time for the deponent to review the transcript begins on the date that the transcript is sent to the deponent or the deponent’s counsel, rather than the date on which the court reporter advises the deponent that the transcript is available for review at the court reporter’s office.

In the absence of a stipulation to the contrary, any changes to the transcript are either made by the deponent in person at the office of the court reporter or by means of a letter to the deposition officer signed by the deponent which is mailed by certified or registered mail with return receipt requested.4 Lawyers usually stipulate that the transcript, once prepared, shall be sent directly to the deponent or to the deponent’s counsel (usually by a specified means, such as overnight mail) so that the review does not need to occur in person at the court reporter’s office. In addition, lawyers may stipulate to a different means by which parties are notified of any changes ultimately made to the transcript.

One common stipulation obligates the lawyer for the deponent to provide written notice within a stipulated period by regular U.S. mail (or some other means) to all parties of any changes that are made to the transcript after receiving notification of the changes from the deponent. If the deponent is not represented by counsel, the stipulation typically imposes those duties on the lawyer for the deposing party. With an impending motion or trial date, the terms of this stipulation can be important. No one wants to file a motion for summary judgment on the basis of key admissions made in a deposition, only to find out after filing the moving papers that the deponent has changed the transcript to disavow the admissions. If timing is critical, negotiate a shorter period for the deponent to review the transcript and an obligation to report any changes by electronic mail or facsimile rather than by postal mail.

**Custody of the Transcript**

By statute, after the review period expires, the court reporter is obligated to certify and deliver the sealed original transcript to the attorney who noticed the deposition.5 That attorney is then obligated to store the original transcript “under conditions that will protect it against loss, destruction or tampering.”6 Counsel sometimes agree instead that the original transcript shall be maintained by counsel for the deponent, or by someone else other than the lawyer for the party noticing the deposition. For example, if the deposing party is likely to be dismissed in the near future, counsel may stipulate that the original be maintained by someone else to avoid imposing ongoing duties on a party that is likely to be no longer involved. The stipulation also sometimes specifies that the original transcript must be maintained until after final disposition of the action.7 Counsel also usually stipulate that the lawyer with custody of the transcript is obligated to make the transcript available upon demand of any party for any trial, hearing, or other purpose in the litigation.

While a stipulation as to how many days a deponent has to review a completed transcript is useful, deponents often fail to expressly approve, disapprove, or make a single change to a transcript after receiving it. Lawyers therefore often stipulate that if the deponent fails to approve or provide notice of any changes to the transcript within the allotted period, the deposition shall be given the same force and effect as though it had been approved and signed without corrections. By statute, this would be the same result in the absence of a stipulation.8

A deponent may never return the original transcript that he or she was sent, or an attorney may have difficulty obtaining the original transcript from the lawyer with custody of it when the trial occurs years later and the lawyer with custody is no longer involved in the case. To cover these scenarios, lawyers typically stipulate that if the original transcript is for some reason lost, stolen, or otherwise unavailable, that an unsigned certified copy can be used in lieu of the original.

**Rare outside Southern California.**

While deposition stipulations may be common practice in Southern California, in other areas, customs differ. For example, lawyers in Northern California do not ordinarily enter into stipulations at the conclusion of depositions. If you are attending a deposition outside Southern California, find a moment during a break to ask the other lawyers attending the deposition whether the common practice includes deposition stipulations. And if it does, not be sure to familiarize yourself with the default rules under the Code, since they are the guide for handling the transcript.

Although there are common topics covered by a deposition stipulation, the details—such as the number of days for the deponent to review the transcript and who retains custody of the original transcript—will differ from case to case depending on the circumstances. So if at the conclusion of the deposition, you are asked to stipulate to the usual stipulations, you should not hesitate to ask the lawyer to offer a particular proposed stipulation for your consideration. In listening to the proposal, make sure that the proposed stipulations suit the client’s needs, particularly regarding the timing of the review of the transcript. Assuming that the stipulation is satisfactory on these grounds, you should feel comfortable responding with the customary “so stipulated.”

Similarly, if you are counsel for the deposing party, be ready to offer a proposed stipulation of your own. Assuming that it covers the necessary topics and addresses any unique needs of the deponents or the lawyers in attendance, you can end your deposition with a smooth invocation of this Southern California tradition.

1 Cal. CIV. PROC. § 2016.030
2 See Cal. CIV. PROC. § 2025.520.
3 Cal. CIV. PROC. §§2025.520(b), 2025.520(a).
4 Cal. CIV. PROC. § 2025.520(c).
5 Cal. CIV. PROC. § 2025.550(a).
6 Id.
7 Cal. CIV. PROC. § 2025.550(b).
8 Cal. CIV. PROC. § 2025.520(d).
How to Survive—and Even Succeed—in the Los Angeles Superior Court

You have recently graduated from law school. You have passed one of the toughest bar exams in the country. I congratulate you on these achievements, and I promise you that they are just the start of what will be exciting and fulfilling professional careers. We bench officers on the Los Angeles Superior Court look forward to having you appear before us.

Obviously, one of the best ways to be successful in court is to have a great case on both the facts and the law. But even if you do not have the world’s greatest case, there are techniques you can use to do the best job with the facts and the law that you do have. Applying these tips can make appearances less stressful for you and keep bench officers happy. Although these techniques are offered with a civil practice in mind, many of the concepts are applicable in any courtroom.

**BE PREPARED.** This is the overarching rule: Do not go into any hearing unprepared. Understand the facts of your case, and know the law. It is important to read the papers and be ready to respond to questions from the judge. The judge will not be satisfied if you say you cannot answer his or her question because you are only making an appearance for another lawyer, either in your firm or as an accommodation to cover a conflict for a colleague. Additionally, if the hearing is to schedule a future hearing or trial date, make sure you know the schedule for all attorneys, experts, and other witnesses whose appearance will be necessary for the hearing or trial.

As you read on, you will see that this principle of being prepared manifests itself in many of the practices that make a successful trial lawyer.

**KNOW YOUR JUDGE.** Every judge is different and likes his or her courtroom run in particular ways. If at all possible, visit the courtroom in advance of your hearing and watch the judge in action. Find out how he or she likes things done. If you do so, you will know the layout of the courtroom and where to stand, which will increase your comfort level at your hearing. If you will be in trial before that judge, watch a trial in action in that courtroom. At the break, talk to the lawyers about their experiences in front of the judge and ask about the judge’s likes and dislikes.

For example, different judges have different styles in terms of presentation—some like lawyers to present argument from behind counsel desk or a podium, others let you move about. In trial, in some courtrooms, you have to ask to approach the witness. Other judges do not require you to ask, you can simply approach the witness.

Other judges do not require you to ask; you do things a way the judge does not like, you will hear about it and have an opportunity to modify your behavior, but it is far better for the judge to see that you are doing things right from the start and to develop credibility with the judge that you may need later.

In addition, if the judge is not on the bench when you visit the courtroom and court staff is free, consider introducing yourself to the court staff. They can be of great assistance to you while your case is pending before that judge, so it is helpful to be pleasant to them from the inception of your case. For example, if you intend to use any audio-visual equipment during your hearing or trial, you can talk to court staff about how and what equipment you need to bring in and when and where it should be set up. In all our courts, the courtroom personnel in every position are critical components of the operation of the court. The judges value them highly and respect them. You should too.

There are a number of sources available to help you conduct some research about your judge. The Los Angeles County Bar Association has online biographies of many judges. Additionally, the Daily Journal has published biographies of most of the judges, and many other local bar associations have profile information available.

**ALWAYS BE PROFESSIONAL.** Many believe that in our aggressive and competitive profession “Rambo tactics” are effective and civility is a luxury they cannot afford. But that could not be further from the truth. Law is a profession with professional standards—different from other businesses. You are bound to the high ideals of the profession and you can be professional and assertive at the same time, always demonstrating respect for others and for the justice system. Practicing professionalism and civility does not mean giving up being an advocate for your client; indeed, it enhances your advocacy. A reputation for civility will benefit your client in the long run. Treating opposing counsel with the utmost professionalism and courtesy will enhance your reputation with the judicial officer hearing your case and will make it easier to settle.

Judges do not want to become involved in personal fights between lawyers over discovery scheduling issues, such as the start times and locations of depositions. Nor is the court interested in reviewing countless nasty e-mails and letters exchanged between counsel over issues that could have been resolved if the lawyers had just picked up the phone. In your written papers and oral advocacy before the court, avoid hostile attacks on your opposing counsel—simply stick to the facts and issues which will help the court resolve the legal problem at hand.

Remember that your professional reputation is at stake. Always treat the court, court staff, and opposing counsel with respect and
dignity. You should prefer to have the judge remember you for your professionalism rather than your incivility. Remember too that if you come into court and are disrespectful to court staff, the judge will assuredly hear about it.

Of course, civility is not just a one-way street. Civility is required of all participants in the system—not just advocates, but also litigants, witnesses, court staff, and judges. Indeed, judges may have the highest obligation to act civilly in order to set the tone and to insist on civility in matters before them.

Finally, a part of being professional is dressing appropriately for your appearances in court. Today many firms have a policy of informality at work, which may be fine in the office, but is not fine when appearing in court. This applies to both men and women.

**Provide the courtroom with courtesy copies of papers filed shortly before the hearing.** This is a practice tip that is optional, strongly encouraged by the court, and may help you succeed. Budget cuts and substantially reduced resources to run the system often result in delays that cause papers filed shortly before the hearing from being delivered to the courtroom in time for the judge to read them beforehand. Accordingly, it is advisable to deliver a file-stamped courtesy copy of pleadings filed during the last seven days prior to a hearing immediately after they are filed, so that the judge can be fully prepared.

**Be brief.** Unfortunately it usually takes more time to make your arguments brief, but it is worth it. Be concise and clear about what you are seeking. A succinct argument that gets the judge’s attention is more likely to be successful. This is truer now than ever before. Due to recent budget cuts—which resulted in layoffs of court staff and closure of some civil courtrooms, even as case filings were rising—the caseloads of Los Angeles Superior Court judges have grown. As a result, there are more matters heard on the daily law and motion calendars, and there is often a massive amount of reading for the judge to prepare for each day’s calendar. Keep that in mind as you prepare your papers.

In your pleadings, include only the argument and evidence that are absolutely necessary to the result you are trying to obtain. Organize it in a way that will be easy for the judge to find, follow, and understand.

The same is true with oral argument. Get to the point, be respectful, and address your comments to the court rather than opposing counsel.

**Be on time.** Be respectful of the time of court, court staff and opposing counsel by being on time. And never keep a jury waiting. Because you cannot anticipate the delays you will encounter in traffic, in parking, and in long security lines, the better approach is simply to plan to arrive early. That way, you will have the opportunity to address any last-minute issues that may arise, have a cup of coffee, relax on a court bench, and be fully prepared to address the matter to be heard by the court. If you are going to be late, and it is simply unavoidable, at a minimum you should give the court and counsel a phone call, and it should be a very good excuse.

**Los Angeles Superior Court Litigation Program.** Twice a year on a Saturday, typically in March and August, a number of judges of our court present a day-long program for young lawyers who have recently passed the bar. The program is cosponsored by the Los Angeles Superior Court Judges Association as well as the Los Angeles County Bar Association and its Litigation Section. Attendees meet at the Stanley Mosk Courthouse downtown and hear from judges about the civil litigation process in the Los Angeles Superior Court, including presentations about how and where cases are filed, a discussion of alternative dispute resolution, law and motion, pretrial appearances, and trial. Written materials are provided, covering information on virtually every aspect of civil cases. I can assure you the speakers will elaborate on some of the tips I have discussed in this short article. Information and registration for this program appear regularly at http://www.lacba.org/calendar.

**Welcome to our courtrooms.** Each year the court welcomes hundreds of new lawyers to our courtrooms. While it sometimes is frustrating to deal with the mistakes caused by inexperience, judges generally are more than willing to help new lawyers with procedures and practices that take time to learn. After all, we were all new lawyers at one time. However, these tips to success can be mastered by the newest lawyer and should be heeded by the most experienced. Your inexperience is not an excuse for not following them. If you don’t follow them, you can quickly wear out your welcome; but if you follow them starting right now at the beginning, you will build a strong professional reputation in the courthouse, and you will be serving your clients well.
Litigation Tips for Tight Times

By Judge Michael L. Stern

Attorneys entering the legal profession are no doubt hearing from their more seasoned colleagues that the recent changes in trial court operations, client imperatives, and law office economics have been a seismic jolt to the legal landscape. Compared to previous decades when the economy was robust, attorneys now must work harder than ever to earn a decent living. They must adjust their litigation practices to meet client challenges and maintain an edge over the competition.

During their student days, new attorneys began to read the unhappy news, which has continued to dominate legal headlines, about venerable large law firms crashing, merging, laying off attorneys, and cutting back on new hires. The economic downturn has affected law firms of all sizes. Indeed, firms continue to struggle as longstanding clients—businesses and individuals—become “slow pays” or “no pays,” simply unable to muster the funds to pay lawyers to litigate. At the same time, rivalry for clients is stiff, and rewards seem harder to reap.

Major developments in California’s trial courts are also having an impact on the manner in which cases are litigated. The economic downturn has caused the number and complexity of new court filings to dramatically increase, after many years at a fairly constant level. The result is that civil trial courts are busier than ever, with more pretrial matters, settlement conferences, and jury and bench trials. Meanwhile, the number of courtrooms devoted to civil matters has shrunk. Courts have laid off employees, implemented hiring freezes, and introduced monthly furlough days during budgetary crunches.

There are no indications that court workloads will be reduced soon or that additional funding is forthcoming. Simply put, the fiscal woes currently experienced by the courts translate into more crowded calendars and greater difficulties in adjudicating civil cases. These conditions directly affect the ability of attorneys not only to resolve their cases promptly but also to ensure that they are properly compensated.

Under these changed circumstances, can attorneys assist the courts, their clients, and themselves to more economically expedite civil cases to resolution? The answer is yes. New attorneys as well as more experienced practitioners need to examine and tighten their litigation practices to realize efficiencies for all. A variety of practical tips may lead to more cost-effective and successful litigation.

Truly Responsive Pleadings

For years, rumblings have echoed in various quarters that too much attorney time and client money is spent on initial pleadings. Certainly a well-conceived demurrer or motion to strike by a defendant challenging the adequacy of a complaint or claim can define the scope and direction of a lawsuit. In an era of longer court calendars and precious client resources, however, attorneys should take more thoughtful precautions regarding the filing of these types of pleadings and their responses. With increasingly longer waiting periods for a court hearing, counsel must reevaluate whether some of these calendar-clogging motions are fully worthwhile.

For plaintiff’s counsel, avoiding the possibility of a demurrer means carefully drafting a complaint that neither pleads nonessential causes of action nor offers a litany of every possibility. Attorney time is too valuable to be squandered producing slapdash complaints that are easily demurred. For that matter, few clients are impressed by—or want to pay for—a complaint that throws in the kitchen sink along with more well-considered claims. Attorneys faced with a demurrer or motion to strike should swallow their pride and file a first amended complaint using the defendant’s suggestions as a recipe for improvements or simply seek a stipulation for an order for a further pleading.

On the defendant’s side, certainly a demurrer or motion to strike that hits a home run is worth the effort. Many are not. So why draft these pleadings when their only purpose is to educate the opposition about the problems of the case? If some claims in a complaint will plainly survive a demurrer, a defendant’s counsel can save a lot of bother—and the client’s treasury—by moving the litigation process forward with an answer rather than taking potshots at the complaint in the form of nondispositive demurrers or motions. If the facts or legal theories seem deficient, devote the client’s budget to pretrial discovery in anticipation of filing a motion that might actually put the case to rest.

Timing is Everything

As the fiscal ax falls more heavily on civil courts, it will take longer for cases to come to trial or reach other types of dispositions. This can lead to procrastination by counsel in their pretrial preparations. Delay, however, is a poor strategy. Knowledge is essential to successful litigation. Counsel will improve their chances of winning by obtaining key documents and testimony as early as possible while crucial information is still available.

Old-timers—those who practiced in the days before the institution of streamlined, expedited, trial-setting procedures—like to tell their younger counterparts that it is a mistake to wait until the trial bell rings (perhaps five years after filing a complaint) to start conducting pretrial discovery. Too many
veterans learned the hard way that early discovery makes sense because parties and witnesses move, relationships change, and memories cloud. In addition, while a case lingers in limbo, concerned clients may be wondering if their attorney is actually on the job prosecuting or defending their case.

Whether counsels objective in conducting pretrial discovery is finding out what happened or preserving testimony for summary judgment or trial, those who have waited for trial in the long lines of yesterday advise that it is good practice to start discovery early. This also avoids those last-minute races to the courthouse to file motions compelling long-delayed discovery or seeking a trial continuance. Get the most bang for the discovery buck by focusing, before the evidence trail cools, on the principal actors in the case for deposition testimony.

**More Action, Less Motion**

Targeted written discovery is an integral part of a well-conceived pretrial discovery plan. Preparing and responding to written discovery takes a lot of time. Since time is money, practitioners should consider making a strategic judgment to dispense with nonessential form and special interrogatories. Indeed, this type of discovery may elicit responses more often from attorneys rather than parties.

Notwithstanding the high costs of litigation, certain attorneys seem to spendordinate amounts of time churning paper in the discovery process. This species of advocate appears to have perfected the art of preparing vague written discovery requests designed more to make the other side labor than obtain admissible evidence. These practitioners are known to propound written discovery by the inch and, inevitably, after their wishes for feeble responses come true, they seem to delight in filing motions to compel by the pile. Attorneys on the receiving end of oppressive discovery requests should not hesitate to seek protective orders placing limits on such nonproductive make-work.

When discovery responses are incomplete, evasive, or simply not forthcoming, a meaningful meet-and-confer process should lead to a reconciliation of differences. A motion to compel ought to be a last resort and avoided at all costs. Moreover, counsel should take notice that some judges are offended by discovery motions. Indeed, judges presume that counsel are professionals who are capable of resolving discovery disputes on their own—especially when the differences involve simple matters such as setting deposition dates or responding to form interrogatories. It is best not to lean upon a court’s time with a motion to compel discovery until all avenues for resolution have been exhausted. If a motion to compel becomes necessary, counsel are required to prepare a thorough, and preferably, joint, statement.

**Alternative Dispute Resolution**

Judges frequently ask, “What have the parties considered for ADR in this case?” Given that counsel hold the destinies of their clients within their grasp, the responses to this inquiry can be exasperating. Attorneys too often tell judges, “We haven’t gotten there yet,” “We’re going private,” “Panel please,” or perhaps just stare back at the court with a deer-in-the-headlights expression. Most everyone appreciates the value of ADR programs and mechanisms, but too often the determination of what form of ADR would be appropriate is made with insufficient thought.

In today’s dollar-conscious legal world, attorneys have the responsibility to understand the nature of all the different ADR alternatives and how each might best apply to their cases. ADR is not a one-size-fits-all proposition.

Judges anticipate that counsel will personally discuss ADR before a case management or settlement setting conference. It also is a good idea to know in advance about a particular judge’s procedures and preferences.

One way to determine what to expect is to contact the judge’s clerk in advance of the conference to find out whether the court automatically sets mandatory settlement conferences, waits for counsel to make a request, or refers counsel to another judge for settlement purposes. Surprisingly, this method of finding out the what and when of court procedures is seldom employed. It should be—but not on the day that the hearing is set. Discussing this information by telephone or in person with opposing counsel before an initial hearing—not just sending a pro forma e-mail or letter—can ensure that the appropriate ADR route is selected.

Most California courts have different but similar in-house ADR programs available to meet the requirements of litigants. These programs would not be in place if judges did not believe them to be cost-effective methods for resolving cases. Knowing in advance how these in-house programs work is time-saving, and perhaps even client-saving.

Aside from a traditional settlement conference with the trial judge, these programs may include mediation through a court-administered ADR office, voluntary early neutral evaluation by experienced attorneys, a judicial officer (other than the trial judge) conducting a settlement conference, “crash” settlement programs using attorneys to conduct settlement conferences, or even referral to a volunteer retired judge. It is an attorney’s responsibility to know how to take best advantage of these no-fee court ADR services.

With client funds at stake, practitioners should thoroughly investigate the feasibility of using an alternative known as the Second Judiciary: firms of retired judges, attorneys, and independents who arbitrate, mediate, and work as referees for a fee. In considering the selection of a nonjudicial ADR provider, ask these critical questions: Will the client actually save time and money by opting for private adjudication? What is best for the case the convenience, informality, and privacy offered by nonjudicial ADR or the force of the judiciary’s imprimatur and procedures in a public forum?

**Expedited Jury Trials**

Word is finally getting around about California’s recently enacted provisions for expedited jury trials. Under these proce-
The greater difficulty in scheduling court hearings and trials under the new budget constraints is no excuse for attorneys to lower their standards for acting professionally with one another. The duty to act ethically with opposing counsel does not diminish because the court system is congested. New strains on attorneys and their clients require heightened cooperation among counsel to ensure that litigation is accomplished in a responsible manner. Experience indicates that open lines of communication yield better results.

Most importantly, judges expect counsel to truly behave as officers of the court. Judicial officers are not interested in petty bickering or nonessential differences between attorneys or their clients. Those who use quarrelsome or stonewalling tactics to secure advantages or stonewalling tactics to secure advantages or their clients. Those who use quarrelsome or nonessential differences between attorneys officers are not interested in petty bickering truly behave as officers of the court. Judicial Officers are not interested in petty bickering. Experience indicates that open lines of communication yield better results.

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Counsel may make confidential high-low agreements, in South Carolina, they are a hallmark of the program.20 Parties to a suit enter these agreements, which specify a minimum amount of damages guaranteed to the plaintiff and the maximum damages that a defendant will be liable for, regardless of the jury’s verdict. Usually insurance policy limits serve as the high. Court reporters are not needed under EJT rules, since the parties waive the right to appeal.21 If you want a court reporter, you pay for one.

There are a host of suggestions within the EJT rules for additional stipulations between counsel. These are calculated to help the parties complete the EJT within the time allotted. Some notable suggested stipulations concern modifications of time limits, limits to the number of witnesses, evidentiary matters, exhibits and video depositions.22

Most likely, the EJT process will primarily be used by parties when there are small damages, the issues are limited, or the parties just want a jury to decide the issue. But even if the jury award has the potential to be very large, parties may still opt for a cost-effective EJT.

EJTs will serve as a way for lawyers to gain trial experience, especially younger and less experienced counsel. Further, since lawyers must actually work together on the stipulations required for an EJT, the process should foster civility between counsel. EJTs allow the courts to move cases through the system faster and with much less expense. Thus, judges will be able to increase efficiency and accomplish more. Finally, jurors should be pleased to know that—except for their unlimited deliberation time—the whole trial should take just a single day.

1 CODE CV. PROC. §630.11—630.12.
2 CODE CV. PROC. §630.03(a).
3 Id.
4 CAL. R. CT. 3.1550.
5 CODE CV. PROC. §630.03(c).
6 Id.
7 CAL. R. CT. 3.1547(a)(1); see also CODE CV. PROC. §630.03(a).
8 CODE CV. PROC. §630.03(d).
9 CAL. R. CT. 3.1548(b).
10 Id.
11 CAL. R. CT. 3.1546(f).
12 CAL. R. CT. 3.1546(g).
13 CAL. R. CT. 3.1550.
14 See generally CODE CV. PROC. §630.03.
15 CAL. R. CT. 3.1551.
16 CODE CV. PROC. §630.04; CAL. R. CT. 3.1549.
17 CAL. R. CT. 3.1549.
18 CODE CV. PROC. §630.07(b).
19 CAL. R. CT. 3.1547(b)(4).
20 CODE CV. PROC. §630.06(d).
21 See CODE CV. PROC. §630.09(a).
22 Id.

All you need is 40 people to level the playing field against corporate America. If this sounds too good to be true, you are probably right. Having enough people to form a class merely establishes one of the four mandatory prerequisites for class certification. A class proponent must also demonstrate commonality, typicality, and adequacy. Popular culture suggests a distinct image of class action litigation. In addition to legal technicalities, the predominating perceptions are of big players and big settlements. Nevertheless, despite its reputation, class action litigation is replete with risk for plaintiffs. While small individual claims can be transformed into a supersized class action lawsuit, substantial expense and difficulty can await inexperienced counsel. For those who are about to undertake their first class action litigation, here is a road map for success.

If this is your first time at the dance, bring a date. Traditionally, society runs on the concept of “first come, first served.” In the legal community, this is known as the first-to-file rule. The more appropriate slogan for a class action filing is “approach with caution.” This is because the first lawyer to file suit will not automatically attain lead counsel status. Rather, the mere sign of class activity will easily fuel a lawyer lineup, in which many await the opportunity to expand on your ideas and potentially nullify your efforts as lead counsel.

When the courts designate lead counsel, they are looking for someone with dedication, knowledge, and—more importantly—staying power. If you are working in a small office, have few resources, and have little experience in class actions, it is always best to find a partner and associate with a firm that has the necessary resources and experience to prosecute complex litigation.

Every team needs a strong captain. Behind every class representative stands a large group of people, who will learn that the class is only as good as its representative. As
a precautionary measure, conduct thorough due diligence when determining the suitability of a prospective representative. First and foremost, confirm the person’s ability to handle a long-term strategy. If the person is in the action for the duration, whatever that may be, the person’s cooperation will see the matter through, and he or she will potentially serve as a good witness. It is also essential to verify the individual’s capability of making rational decisions on behalf of purported class members. Psychiatric problems, memory loss, and a lack of common sense likely signal an unsuitable class representative.

**ONE AND THE SAME.** To satisfy the requirement of typicality, a class representative’s claims must be similarly situated to the claims of other class members. In some circumstances, it may appear that a potential representative is suffering the effects of an unlawful common scheme. However, only verification through coworkers, common knowledge, or Internet research can reveal if the potential representative’s claim simply results from a singular bad experience. Beware of disgruntled employees masquerading as victims of a collective wrong.

**A REAL CLASS ACT.** Do not assume that a large number of injured individuals equates with class action status. Mass tort litigation is not at all like class action litigation.

The media regularly analogizes class action litigation to the battle of David versus Goliath. This reflects the ability of the class to provide strength and validity to a host of individual damage claims too small to bring by each individual plaintiff.

Mass tort litigation, unlike the class concept, often combines large individual damages in one trial. Therefore, in a mass tort setting, aggregate damages and class action prerequisites are usually rendered unnecessary.

**DO CLASS MEMBERS HAVE SOMETHING IN COMMON?** A class may sue or be sued only when there are questions of law or fact common to the class. The analysis should focus on the defendant’s conduct and its consequences.

The individual’s capability of making rational decisions on behalf of purported class members. Psychiatric problems, memory loss, and a lack of common sense likely signal an unsuitable class representative.

**POWER IN NUMBERS.** When battling the corporate giant, how does one quantify the magic number for the size of the class? According to Rule 23(a) of the Federal Rules of Civil Procedure, the proposed class must be “so numerous that joinder of all members is impracticable.” Courts decode this rule to mean that, generally, the “numerosity” of a class is at least 40 members. However, class actions against big businesses may require even bigger numbers. For example, Wal-Mart had been facing the possibility of a class of 1.5 million members. Recently, however, the U.S. Supreme Court denied certification, arguing that the class members did not share commonality. Only the circumstances of each case will determine whether the numerosity requirement has been satisfied.

**CAPA MAY COME FIRST.** In 2005, Congress enacted the Class Action Fairness Act, which expanded federal jurisdiction over class action lawsuits. Federal courts now have jurisdiction to hear class actions in which the amount in controversy exceeds $5 million and any class member has diverse citizenship from any defendant. In practice, this means you should be prepared to litigate in federal court, irrespective of your position as a plaintiff or defendant. While this act originally received criticism as a boon for big business, in practice plaintiffs often choose the federal forum. This is because the force of a nationwide class is unlike any other.

**ANTICIPATE YOUR WEAKNESSES.** Consumers, shareholders, and employees have long championed the class action as the go-to remedy for corporate wrongdoing. Still, class actions are not free from disadvantages. In AT & T Mobility LLC v. Concepcion, the U.S. Supreme Court recently held that consumer arbitration agreements may include class action waivers. Such a ruling has many proponents seriously questioning the viability of this litigation method. Further, large actions mean added costs, and more likely than not, class counsel will advance these costs on a contingency basis. In addition, the class representative must learn to put others first. Many representatives have difficulty understanding that the needs of many outweigh the needs of one, especially when the defendant offers to settle.

**A CASE OF THE GOTCHA.** The gotcha system of liability occurs when statutory damages substantially outweigh any actual harm. What is the appropriate remedy? On the one hand, class certification is denied because the defendant should not have to compensate plaintiffs for enormous statutory damages. On the other hand, nothing good can come from turning a blind eye to statutory misconduct.

**CROSS YOUR T’S AND DOT YOUR I’S.** As class action lawsuits are a unique method of litigation, counsel pursuing this type of litigation will likely face significant ethical challenges. From beginning to end, your representation must always conform to the California Rules of Professional Conduct. Do not let your quest for the perfect class representative steer you into the unethical realm of client solicitation. Remember that as class counsel you are acting on behalf of a large group of victims who have come to you not only seeking relief but also, more importantly, protection. It is your continuous duty to provide them with competent and ethical representation.

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2. See id.; 47 F.3d at 483.
4. See id.; 47 F.3d at 483.
Having the last word on an issue is valuable. This is especially true in a close case. So why do lawyers often treat reply briefs like an afterthought? Lawyers may paint a masterpiece in their opening brief—whether it is in support of summary judgment, an appeal, or a simple discovery issue—but when it comes time to compose a reply brief, they use broken paintbrushes and leftover paint. By following 10 simple guidelines you can master the art of writing an effective reply brief and in the process increase your chances of prevailing in any given case.

1. **FILE A REPLY BRIEF UNLESS THERE ARE STRATEGIC REASONS NOT TO DO SO.** Given that reply briefs are optional, the threshold consideration is always whether to file one at all. Most judges and lawyers agree that the opportunity to have the last word on an issue should not be squandered absent extraordinary circumstances. So unless the answering brief suffers from serious deficiencies or is simply incomprehensible—meaning that responding to it might give opposing counsel’s arguments more credit than they deserve—you should almost always file a reply brief.

2. **FOCUS ON RESPONDING TO OPPOSING COUNSEL’S ARGUMENTS.** Believe it or not, lawyers sometimes forget the basic purpose of a reply brief. A reply brief is not a condensed version or executive summary of the opening brief. The focus of any reply brief should be to respond to opposing counsel’s arguments. You should get to the heart of the matter as quickly as possible. The overarching goal of an effective reply brief is to boil the factual and legal issues down to their bare essentials, fairly present both sides’ positions, and—in an ideal world—leave the court wondering why opposing counsel is fighting you over such an obvious issue.

   If opposing counsel conceded any significant issues in the answering brief, point that out for the court. If opposing counsel did not address an issue raised in the opening brief, highlight that fact and consider arguing waiver. If the circumstances warrant such a discussion, unmask the misguided policy underlying opposing counsel’s arguments and explain to the court why your position is sounder.

   But always remember the difference between attacking opposing counsel’s arguments and attacking opposing counsel. Having the last word on an issue does not give you free rein to take a cheap shot at opposing counsel. In most instances, this will hurt your cause more than it will help it, even if opposing counsel is in fact a liar and a cheat.

3. **LEAVE OUT WEAK ARGUMENTS.** Your reply brief should highlight the strength of your case. Focus on the important, winnable issues. Recite only the crucial facts and leading authority supporting your position. Weak arguments undermine your credibility. In the immortal words of U.S. Supreme Court Justice Oliver Wendell Holmes, “Strike for the jugular, and let the rest go.”

   Sometimes a misguided lawyer will throw every conceivable issue and argument into an opening brief and hope that something sticks. That is bad enough, but do not make matters worse by revisiting one of your flimsy arguments in the reply brief. Some judges, such as Judge W. Eugene Davis of the U.S. Court of Appeals for the Fifth Circuit, may interpret this as a signal that your entire case is weak. Or, as cautioned by U.S. Supreme Court Justice Ruth Bader Ginsburg, because busy judges “work under the pressure of a relentless clock,” a “kitchen-sink presentation may confound and annoy the reader more than it enlightens her.”

4. **MAINTAIN CREDIBILITY.** Having the last word on an issue imposes a heightened duty of candor. While you should always

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strive to maintain credibility with the court by being fair with the facts and the law, this is a particularly momentous duty in reply briefs. Expect close scrutiny of what you say, as courts are usually extra cautious about believing what is asserted in a reply brief. Simply put, aggressively represent your client’s interests, but if one of your contentions does not pass the straight-face test, leave it out of your reply brief.

5. embrace a theme. Although this is important in all legal writing, it is critical for a reply brief to have a theme, otherwise known as a theory of the case. The theme should take center stage in the beginning of the reply brief and should be woven throughout the brief in your presentation of arguments and facts. The theme should present the court with your client’s fundamental view of the motion or appeal. It should be a simple, commonsense, and, if at all possible, emotive message that radiates the righteousness of your position. At the end of the day, a busy court might not remember anything else about your case except your theme. Make it count.

6. Do not be afraid to give your reply brief some flavor. If adding a touch of personal flavor to your case is a must, as it is for many lawyers and clients, then the reply brief presents a perfect vehicle for doing so. The opening brief is the time to gain credibility with the court through rock-solid reasoning and careful analysis. Make no mistake, the reply brief still needs to show lucid analysis of opposing counsel’s arguments. But with your credibility already established, you can use your reply brief as an opportunity to inject a punchy phrase, colloquialism, or metaphors into the case that supports your view. To get the most bang for your buck, the best place to add this flavor is generally in the reply brief’s introduction or conclusion.

Of course, you should always take heed of your audience and determine whether the risk of using such a tactic is worth the possible reward. Sometimes rhetoric will drive a point home, but other times it may do more harm than good.

7. make the reply brief a stand-alone document. An effective reply brief will make your case comprehensible to the court as a stand-alone document. A little-known fact about the judicial process is that a number of judges and law clerks read reply briefs before reading any other brief to get a sense of what the case is about and what issues are paramount. Even when the briefs are read sequentially, your reply brief may be read days or weeks after the other briefs have been read, meaning that the court may not remember much about your case.

Always keep in mind that judges are generalists who deal with a diverse array of legal issues. Law clerks, especially at the federal level, are often fresh out of law school and may have no experience whatsoever in your case’s subject area. With that audience in mind, your reply brief needs to convey the legal principles necessary to adjudicate the dispute. At the same time, however, your reply brief should not discard any superfluous legal principles. Knowing exactly what information to put into the reply brief and what to keep out can be a delicate balancing act.

As one obvious example of what not to do, Ninth Circuit Chief Judge Alex Kozinski has poked fun at the following sentence that was contained in a brief he read: “LBE’s complaint more specifically alleges that NRB failed to make an appropriate determination of RTP and TIP conformity to SIP.” The lesson here is that if you absolutely have to use acronyms or abbreviations in your reply brief, be sure to reintroduce what those space savers stand for before using them. A judge should not have to jump back to your opening brief to figure out what you are talking about.

Almost as bad as inundating the court with acronyms and abbreviations is using unnecessarily complicated jargon. The court should not have to refer to your opening brief or look up the words you use to understand your case. As astutely noted by Seventh Circuit Judge Richard Posner, “Lawyers should understand the judges’ limited knowledge of specialized fields and choose their vocabulary accordingly.”

6. write a reply brief that is no longer than necessary. Just like knowing that the sky is blue and the grass is green, many lawyers seem to believe that every reply brief needs to fill the maximum number of pages allowed. Do not accept this as your mantra. A reply brief should only be as long as it needs to be to persuade the court that your side should prevail.

Court rules generally prescribe a maximum length of 10 to 20 pages for reply briefs. In addition, a judge’s “local local” rules may impose even stricter page limits, so be sure to read them. Sometimes the maximum number of pages is necessary. Other times four pages will suffice. On rare occasions, such as with a very complex case, you may correctly decide to request to file an oversized brief. And, once in a blue moon, a pithy one-paragraph reply brief will strike a nail into the coffin of opposing counsel’s case. Do not shy away from filing a short reply brief if it will get the job done. A short reply brief tells the court that you are confident about your position, and the points that you do make will likely receive greater attention than these arguments would receive if they were contained in a brief overloaded with unnecessary text.

9. Pay attention to details. When drafting a reply brief, it is common for lawyers to paraphrase arguments or facts from their opening brief. There is nothing wrong with this practice, assuming that you reexamine the cited authorities and record before filing. By paraphrasing, you may have subtly changed the meaning of your previous arguments or factual statements, thereby leaving your assertions unsupported, lacking in precision, too aggressive, or not aggressive enough.

Do not underestimate the harm that can befall your credibility and ultimately your case if you mess up a case or record citation or otherwise engage in sloppy cite checking. As an obvious example, the cases that you relied on in your opening brief may no longer be good law.

10. Tell the court exactly what you want. A surprising number of litigants conclude briefs without stating specifically what they want the court to do. Do not expect the court to read your mind. Should summary judgment be granted on all claims as to all parties, or just some? Should the complaint be dismissed with or without prejudice? Is a straight reversal in order? Is a remand, perhaps with instructions to the lower court, necessary? Is any alternative relief requested?

If you have a decent case and follow these 10 guidelines when drafting your reply brief, the court should be prepared to give you what you want by the time it reads your conclusion. Do not forget to be specific about what exactly that is.
It’s hard enough learning how to try a case without having to think about what happens after the trial. But practitioners must never forget that what happens next may depend entirely on how well they preserve the record for appeal. In learning how to do this, new lawyers should pay particular attention to the areas in which even very experienced trial lawyers make mistakes.¹

**MAKING A RECORD.** The court of appeal has “at least three immutable rules” for appellate law practitioners: “First, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.”²

If there is no reporter present, there is no record. But simply ensuring that a reporter is recording the proceedings does not guarantee that the words on the printed page of the reporter’s transcript will make sense to the court of appeal. Descriptions that may be clear to those watching whoever is speaking—“about this big,” “coming from that direction,” “please compare that document to this one”—are unintelligible to someone who was not in the courtroom observing what took place. Practitioners should use words, and witnesses should use words, to make all indications precise on the page. If witnesses are not specific, practitioners should add the words themselves—for example, “let the record reflect that the witness is indicating about two feet.”

Ensure that your exhibits are both identified and admitted. You should confirm the status of exhibits with the clerk, the reporter, and opposing counsel at the end of every trial day, and with the court before the jury begins deliberations.

**VIDEO DEPOSITIONS.** Video depositions and other sound recordings pose a special problem, because ordinarily the reporter does not transcribe them. Comply with Rule 2.1040 of the California Rules of Court and submit a transcript. If you do not, the testimony “did not happen.”³

**EVIDENTIARY OBJECTIONS AND OFFERS OF PROOF.** Most practitioners know that an objection not made is waived. Here is another truism: In many situations, an objection not ruled on is also waived.³ Be sure the court rules—and does so as promptly as possible.

A fundamental principle of appellate practice is that a trial court’s error cannot support reversal unless it was prejudicial.⁴ When an error results in the admission of evidence, the record will generally show the error’s impact. But the exclusion of evidence poses a problem: There is no way the appellate court can gauge prejudice without knowing what the evidence would have shown. If this is not obvious from the record, you must make an offer of proof.

The requirements are strict. The offer “must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued.”⁵ The best way to do this is by a written submission that includes all the documents and testimony the party is offering. If possible, draft the offer of one of the first places an appellate lawyer looks to for a basis for reversal. But trial lawyers often do not spend enough time preparing the instructions, and they also fail to keep track of what happens to them. Complicating the situation is the fact that waiving instructional errors is extremely easy. Here are some basics:

- By statute, all jury instructions are “deemed excepted [i.e., objected] to.”⁶ However, because there are many exceptions to this rule, it is a mistake to rely on this automatic objection.⁷ State your position clearly on the record.
- It is essential that the record reflect the origin of each instruction, including any changes made to it. The appellant cannot challenge a jury instruction that the appellant requested, so “[i]f the record does not show which party requested an erroneous instruction, the reviewing court must presume that the appellant requested the instruction and therefore cannot complain of error.”⁸
- If the court requires you to settle jury instructions off the record, be sure to state your

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position on the record regarding any instructions as to which the record is not already clear. This is particularly important when the court crafts its own language.

- Be sure to make every instruction you offer part of the record, either by filing it or reading it into the record.
- Answers to questions from the jury during deliberations are effectively supplemental instructions. The same rules about making a record apply.

**SPECIAL VERDICTS.** In a special verdict, the jury only finds facts, and the court enters judgment based on those facts.9 Special verdicts can be valuable. They explain the jury’s verdict and may provide ways to attack or support the verdict in posttrial motions and on appeal. However, they are also fraught with risks. The most important is the possibility that the special verdict may fail if it omits an indispensable finding.

The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. The possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings.10

Another risk is inconsistencies. A general verdict with special findings “will not be set aside unless there is no possibility of reconciling the general and special verdicts under any possible application of the evidence and instructions.” However, “there is no such presumption in favor of upholding a special verdict.”11

To achieve the desired results from a special verdict, you should:

- Review a proposed special verdict carefully for omissions and inconsistencies.
- Be sure that no answer to a question can trigger uncertainty about how the jury should answer other questions.
- Scrutinize the verdict as rendered to be sure there are no omissions or inconsistencies. Problems sometimes do not become apparent until the verdict has been rendered.
- If there is a problem, speak up before the jury is discharged. Failure to do so may waive any error.

**STATEMENTS OF DECISION.** Few trial lawyers—and surprisingly few judges—understand statements of decision. Most lawyers see them as an opportunity to reargue the case, but they are not. Their one purpose is to nail down the basis of the trial court’s decision in a bench trial for purposes of appellate review.

Statements of decision involve the doctrine of implied findings, a principle of appellate law that “requires the appellate court to infer the trial court made all factual findings necessary to support the judgment.”12 According to the court of appeal:

The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intentions and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.13

If there is no statement of decision, the appellate court will presume that the trial court relied on whatever properly admitted evidence and legal analysis support the judgment and that it rejected all contrary evidence and argument. But if the appellant properly requested a statement of decision and objected to any omissions or ambiguities in a proposed statement of decision, the court of appeal may not presume unfavorable findings as to those issues.14 Moreover, a statement of decision may reveal that the trial court did not actually rely on certain evidence, relied only on inadmissible evidence, or reached its decision by an erroneous legal analysis.

For these reasons, only the appellant wants a statement of decision, the respondent is better off without one. So except for one-day trials, for which you must request a statement of decision “prior to the submission of the matter for decision,”15 wait to see what the court decides.

A statement of decision is available “upon the trial of a question of fact” and in certain other proceedings.16 They generally are not available for motions except when the motion is more akin to a fact-finding trial—in which case the one-day-trial requirement governs.17 Always check the governing statutory scheme and case law.

The request should seek the factual and legal basis for the court’s decision “as to each of the principal controverted issues at trial.”18 It should not reargue the case. The statement-of-decision process presupposes that you have lost and that your goal is simply to have the trial court explain why. Likewise, the primary reason for you to respond to opposing counsel’s proposed statement of decision is to identify omissions—such as failures to address principal controverted issues—or ambiguities.

**NOTICE OF APPEAL.** Timing is everything. The deadline for filing a notice of appeal is jurisdictional. Missing the deadline means that your client’s appellate rights are absolutely, irrevocably gone. Because posttrial motions can extend the deadline for filing the notice of appeal, it is crucial to review every applicable statute and rule carefully and to calculate, and recalculate, the time.19

And remember: unlike almost every other trial-level litigation deadline, the deadline for filing a notice of appeal (as well as most post-trial motions) runs from the date of mailing of the notice of entry of judgment—with no extension for service by mail.20
The Practice of Law: Your Job, Your Career, or Your Calling?

After seven years as a hospice volunteer and four years as an integral coach to the legal community, I have witnessed tremendous suffering—remarkably, more among those "living" in our legal communities than those dying in our public hospitals. What is it about our work that brings about such outcomes?

In 2002, a middle-aged partner of a prominent San Francisco law firm was exiting the UCSF Cancer Center after a quarterly check-up. It had been 10 years since his original prognosis when he was told that he might only have two years left to live. As he reached the street door of the center, which also gave access to the adjacent hospital, he ran into a founding partner of his firm, a man 15 years his senior whose cancer was metastatic and highly advanced. They had seen one another at the office that morning, but this would be the last time that they would meet. The senior partner died three days later. The surviving partner then vowed that his last day in life would not be in the office, unless his work became his calling.

It is said that one’s work is either a job, a career, or a calling. A job is something that you do for money and little more. A career may have been offered a job—not necessarily traction. Having run that tortuous gauntlet, you are here to do? What is your purpose? What is your calling? What gives your life meaning?

Imagine that you are 95 years old. Your life has gone exactly as you had wished. You are fulfilled, happy, and at peace. As you look back from that place, imagine what your life would have to have been to deliver you there. How important were your contributions to your community? How significant were your relationships with family and friends? Did you leave time to follow your passions? If so, what were they? Did they include travel, music, art, further education, public service, or charitable works? Is the life that you are leading now likely to take you to that place of fulfillment, happiness, and peace? If not, why not, and what are you going to do about it?

Recognize that the answer lies in pursuing a path. Outcomes flow from the journey itself, not from reaching the destination. Awareness is fundamental. Can’t you find a precious few moments each day for quiet introspection? It may be meditation, a yoga practice, prayer, or playing music. The object is to create space for silence, to allow you to drop deeper into
As you learn to create space in your mind, you will find that your awareness grows. With your growing awareness, you can open your curiosity and find new perspectives that shift your beliefs and judgments about how life should be. You become aware of your inherent goodness and generosity. You learn the significance of human relationships.

From this awareness, you acquire an initial inkling of what your purpose in life might be. It doesn’t come all at once. As you proceed further down the path of awareness, your purpose evolves and becomes more elaborate. As your purpose takes shape, something extraordinary happens. You find an ability to identify goals and set priorities which support your purpose. Other to-dos, largely creatures of your habitual thinking imbedded from your culture and upbringing, can fall by the wayside, since they are not truly yours.

As you pursue your goals by following your priorities, you find relationships that sustain and nurture you. Your life becomes balanced because there is an alignment between who you are and what you do. You will find yourself in the company of those who naturally support you because you are following your passions and are generous, open, and forthcoming. This all takes time. It doesn’t happen at once. In fact, it can’t, because you are continuously evolving, discovering, and modifying your life to fit the ever-changing circumstances of the world in which you live. But this time is neither futile nor frustrating, because you are pursuing your path and not that of someone else.

So how does all of this fit into where you find yourself now? First, you cannot begin to consider what to change until you know where you might be going. Take time to be with yourself. That time exists in your life, right now—even if you think otherwise. As you begin to pay attention to the subject of purpose, you will find it beginning to emerge from what you are reading, or listening to, from conversation, and from inspiration.

Second, what parts of your current life support what you anticipate your purpose might be? Observe yourself, keep a journal. Try to expand those elements of what you do to see if more is truly better. Second, what parts of your current life support what you anticipate your purpose might be? Observe yourself, keep a journal. Try to expand those elements of what you do to see if more is truly better. Third, study your relationships. Spend time with people who inspire, support, and nurture you. Avoid those who are toxic to you. You know who they are. Fourth, take care of your body. Take up a slow movement practice such as yoga or Qi Gong to learn where and how you carry stress in your body so that you may find ways to discharge it. It will make for better health and mental clarity. Fifth, listen—truly listen—to others. While giving others the gift of your attention, you allow them to go deeper into their own thoughts and allow yourself to become acquainted with the sources of your reactions. You will learn that there are minds that operate quite differently from your own. You will create a capacity for understanding those differences and develop tools for reconciling them, always of help in effective lawyering.

All along you are building capacity to attain that fulfilled, happy, peaceful life you seek. You will make choices that feed your passions. You will build relationships that nurture you as you increase your capacity to nurture others. You will bring your life into balance. And, if you find that your current work is not allowing you to follow your path, you may elect to change your workplace, your specialty, or even your career. Remember, if it isn’t your “calling” then it’s just work. You deserve much more, as does the world from you.

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