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BY KENT A. HALKETT
In response to fraud claims by unemployed graduates, the American Bar Association has recommended that law schools publish more consumer information and ensure its accuracy.

24 Expert Judgment
BY ELIZABETH L. CROOKE AND BRIAN D. DEPEW
Rather than adopt the federal Daubert standard, California courts have developed a statutory approach to evaluating the admissibility of expert medical and scientific testimony.

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During the holiday season, many law firms send holiday cards to clients, colleagues, and others. These cards can range from humorous to serious and from Christmas-themed to holiday-themed. They can include photographs of firm members, a child's artwork from UNESCO, and statements of charitable donations.

Electronic greeting cards have also become more popular. In fact, the Web site Above the Law will have its fourth annual law firm holiday card contest this year. The site praises some of the previous finalists' cards as “devilishly clever,” and “a delightful, musically themed offering.” One firm won second place during the first year of the contest with a “beautifully executed card that actually inspired us to start this annual tradition.” If you are interested in seeing the creativity of the Web maven who dreamed up these holiday cards, I invite you to Google the contest results.

For those of us who choose the traditional paper holiday greeting, there remains a variety of options. On one Web site I was sorry to see that the “most popular” greeting card simply stated “Season’s Greetings” with an inserted picture of a brass scales of justice next to a wooden gavel. In my opinion, this was the most boring card in the selection. However, its popularity may be due to the fact it was the least expensive card at 89 cents. I guess it is the thought that counts. In the category of “cute but predictable,” there is a cartoon of Santa at counsel's table listening to his lawyer describe the jury of elves, “I think we got a break in the jury, Santa.” Elf humor seems to be a popular theme with law-oriented Christmas cards. Another card shows three elves scowling across a conference table at Santa with their lawyer saying “Mr. Claus…I represent the local elf labor union and we’re here today to discuss holiday overtime compensation.” This card received a five-star rating on the site.

No surprise that legal representation is also a popular theme. Envision a line of kids waiting to sit on Santa Claus’s lap and a single adult in the line gesturing, “It’s the kids on your naughty list, Santa, and I am their attorney.” And then there is the holiday card for workers’ compensation lawyers that shows the attorney behind the desk talking to a thoroughly exhausted reindeer saying, “So, let me understand…when Santa asked ‘won’t you guide my sleigh tonight?’ he didn’t mention all the multiple stops…hmm…I think we have a case here.”

Snowmen are also a popular theme in legal holiday cards. Picture a melting snowman at the front door of a law office telling his lawyer, “It might be time I start thinking about a Last Will and Testament.” And one of the more off-color cards shows a snowman that has been yellowed by a dog lifting his hind leg as the snowman states, “Oh, you’ll be hearing from my lawyer!” And for the litigators, there is the “attorneys’ wish list card” that pictures a lawyer sitting on Santa’s lap stating, “and sympathetic judges, evidence that is irrefutable, friendly juries, no hostile witnesses, and...”

These are but a few of the holiday cards lawyers can buy to convey holiday greetings. However you celebrate the holidays, take a minute to give thanks for what you have and wish your loved ones a happy holiday season and a healthy New Year!”
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How to Prepare for Successful Arbitration Hearings

**RECENT HIGH COURT DECISIONS** have demonstrated the judiciary’s increasing inclination to enforce arbitration agreements, and more frequently than ever, litigators are finding themselves resolving cases in arbitration rather than in court. Whatever perspective litigators may have on arbitration, the reality is that they must be equipped to navigate an arbitration hearing.

Arbitration is a process entirely distinct from protracted litigation. Instead of taking years to come to trial after extensive discovery and motion practice, an arbitration case may go to hearing in the year the claim is initiated. The hearing itself is also likely to be far shorter than a typical trial, often lasting just one or two days. The rules governing arbitration procedure and the presentation of evidence at hearing are far more flexible than in litigation. This scenario often creates the need for the arbitration practitioner to prepare for a hearing as expeditiously as possible without sacrificing effectiveness.

Representation in an arbitration hearing involves 1) preparing for the prehearing, including interviewing the client and witnesses, reviewing and identifying relevant and useful documentary evidence for presentation at the hearing, and understanding the applicable legal standards and authorities, 2) doing a thorough analysis and developing a clear theory of the case and theme, 3) presenting evidence in an understandable and persuasive fashion, 4) rebutting the evidence and theories of the opposing party, and 5) addressing the arbitrator’s concerns and questions.

**Arbitrability**

At the outset of a case that may be subject to arbitration, it is important to evaluate the source of the case’s arbitrability. In California, whether an arbitration agreement is enforceable depends on the contractual language of the relevant arbitration clause and the agreement as a whole. Whether an arbitration agreement is enforceable depends on the contractual language of the relevant arbitration clause. If a claim is clearly subject to arbitration, the party initiating the case may consider simply stipulating to the issue of arbitrability to save time and resources. Additionally, the arbitration provision itself will likely denote the applicable procedural and substantive law that will govern the case. If it does not, the parties may also consider stipulating to governing law.

Once the arbitrability of a matter is established, the parties must select an arbitrator. The arbitration agreement may provide the procedure. When the arbitrator has been selected, the parties should become familiar with the arbitrator’s procedural rules or preferences. This may occur through an initial joint status conference with the arbitrator, at which the arbitrator may request the parties to develop a proposed prehearing schedule.

**Before actually questioning witnesses, the practitioner should develop a basic set of questions that are designed to elicit clear, memorable, and credible testimony that will stand up to cross-examination.**

The arbitration procedure may provide for prehearing discovery, motion practice, and briefing, although such devices are likely to be far more limited in comparison to litigation. However, the parties may alter the prehearing proceedings, which provides more flexibility. Before the arbitration hearing, it is essential that counsel conduct a thorough interview with the client and develop a theory of the case. A clear and concise case theory is critical in light of the abbreviated scale of the hearing. The advocate should be able to express an effective theory of the case in a few concise and persuasive sentences, covering the party’s basic claim or defense and the key underlying facts, the evidence that proves those facts, the remedy sought, and the weakness of the opposition’s case. It is also a good idea to conceive of a theme that explains the fundamental legal theory and background of the case. This theme should be articulated in short sound bites that the advocate can integrate into the opening statement, questioning, and closing argument. After developing a strong theory of the case, the practitioner should evaluate what evidence is available for presentation and discard what does not further that theory.

Counsel should always identify and meet with all possible witnesses well in advance of the arbitration. A prehearing meeting with a witness should tell the advocate whether the witness’s testimony will support the case theory and whether the witness is willing to testify. It is crucial to determine at an early stage whether a witness must be subpoenaed in order to ensure the witness’s attendance. Sometimes a second meeting with witnesses should take place to inform them of intended questions and to further assess the usefulness and credibility of the testimony. Before actually questioning witnesses, the practitioner should develop a basic set of questions that are designed to elicit clear, memorable, and credible testimony that will stand up to cross-examination.

At the outset of the hearing, each party will have the opportunity to deliver a short opening statement, although this step may be

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“Carrying out the contractual will of the parties, respecting the advocacy prerogatives of attorneys and providing a Justice oriented forum superior to the public courts is the Raison D’être of arbitration.” —Reg Holmes, ABA annual meeting. Chicago, Illinois, August 2, 2012

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waived or deferred by the party without the burden of proof. An effective opening statement should introduce the case theory and present the strongest facts that support that theory.

The arbitrator may also request that the parties propose a statement of the issue. Usually the parties can stipulate to a joint statement, saving time and narrowing the focus of the hearing. Other efficiency-promoting stipulations may include undisputed facts and joint exhibits. A final useful pre-hearing stipulation is that the matter is properly before the arbitrator for decision and that the arbitrator shall retain jurisdiction over the enforcement of the award and interpretation of arbitrator’s decision.

Both parties will have the opportunity to call witnesses, present and object to evidence, and cross-examine the other party’s witnesses. However, unlike in a court trial, the arbitrator will usually exercise greater discretion over what evidence is admitted and the weight ascribed to the evidence. It is important to connect with the arbitrator over the course of the hearing and respond to the arbitrator’s questions and nonverbal cues. If the arbitrator seems confused, the advocate should clarify, and if the arbitrator seems to be losing interest, the advocate may take it as a good sign to move things along.

At the close of the hearing, both parties will have the option of presenting closing arguments orally or filing posthearing arguments in the form of briefs. The decision of whether to deliver an oral closing argument or a brief following the close of evidence is a matter of strategy. A case in which the facts are straightforward and the evidence is plain may be better submitted to the arbitrator immediately after the party rests in an oral closing, so long as that closing that brings the case together in a concise manner. A complicated and technical case that involves much analysis or a large volume of evidence may be better summarized in a brief that is written once the practitioner has access to the hearing transcript.

Finally, the parties should always consider the option of an informal settlement. This resolution may be to the benefit of both parties, and most arbitrators will gladly change their arbitrator’s hat for that of a mediator. Following these simple guidelines, any litigator ought to be able to effectively present a case at arbitration or in any short evidentiary hearing.

1 See, e.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (“The overarching purpose of the [Federal Arbitration Act]...is to ensure the enforce- ment of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”).

Implied Indemnity and Equitable Indemnity under California Law

IN LITIGATION, types of indemnity claims may include “equitable indemnity,” “total equitable indemnity,” “partial equitable indemnity,” “comparative equitable indemnity,” “implied indemnity,” and “implied contractual indemnity,” among others. While these different types of indemnity may be grouped conceptually under two categories—tort and contract—this distinction still can leave issues unresolved. California courts have crafted a strange and inscrutable doctrine to express the simple idea that they have the power to infer indemnity in contracts that do not explicitly provide for it. What the courts say, however, is far from simple and more akin to, “You need to be a joint tortfeasor to be liable for indemnity, but sometimes you only need a contract that doesn’t provide for indemnity.” While the California Supreme Court may decide to clarify the issue, for now attorneys should consider the application of these different kinds of indemnity.

Historically, “indemnity” involved full repayment of one joint tortfeasor by the other. Although there were other limited circumstances at common law in which indemnity applied (e.g., vicarious liability), it was common when there was a contract between the joint tortfeasors that shifted the risk of loss from one to the other. At common law, when a plaintiff enforced a joint and several judgment against joint tortfeasor defendants A and B, the plaintiff could enforce the entire judgment against A, and A would have no right to “contribution”—that is, receipt of B’s share of responsibility from B. The inherent injustice was that both A and B were at fault, but only A had to pay. Professor Dan B. Dobbs notes that this rule evolved at a time when joint and several liability applied only to intentional tortfeasors acting in concert. Because of this, courts refused to exercise their equitable powers to enforce loss sharing between two bad actors.

In 1957 in California, the legislature established a right to contribution between nonintentional tortfeasors. However, the California statute did not impair any right of indemnity under then-existing law, and even now, if one tortfeasor judgment debtor is entitled to indemnity from another, there is no right of contribution. It is worthy of note that contribution may be enforced only after one tortfeasor has discharged the joint judgment by payment or has paid more than its pro rata share of the judgment.

Equitable Indemnity

The legislature may have recognized the distinction between contribution and indemnity, but the courts blurred the concepts and changed the rules. The landmark decision in this area was American Motorcycle Association v. Superior Court. Until American Motorcycle, the courts applied a test to determine which tortfeasor would bear the full liability for payment of a judgment. If one tortfeasor was actively negligent and the other was passively negligent, the passively negligent tortfeasor was entitled to equitable indemnity (i.e., an indemnity obligation imposed by a court instead of the contractual relationship of the parties) from the actively negligent tortfeasor. If the judgment was enforced against the actively negligent tortfeasor, he or she had no recourse against the passively negligent tortfeasor for equitable indemnity and had to bear the burden of the judgment. In a way, the courts before American Motorcycle had revived the no-contribution rule by clothing it in the language of indemnity and active or passive negligence.

The American Motorcycle court viewed the legislature’s adoption of a contribution rule as foreclosing “any evolution of the California common law contribution doctrine beyond its pre-1957 ‘no contribution’ state.” Indemnity was the only fertile ground remaining for judicial cultivation after legislative intervention. But the American Motorcycle court had its own plan for indemnity and contribution. Since “the dichotomy between the two concepts [was] more formalistic than substantive, and the common goal of both doctrines [was] the equitable distribution of loss among multiple tortfeasors,” the court decided to reexamine the “relationship of these twin concepts.”

The court’s reexamination abolished the subjective distinction between active and passive negligence in favor of “comparative equitable indemnity.” Under this concept, indemnity rights are examined according to the comparative negligence principle. For example, A, B, and C are found to be 30 percent, 50 percent, and 20 percent liable respectively. If plaintiff enforces 100 percent of the judgment against A, A is entitled to equitable indemnity for the portion of the judgment that exceeds A’s share of liability—the 70 percent of the liability attributable to B and C.

It should also be noted that the active-or-passive distinction for negligence was only abolished as to equitable indemnity. Despite the American Motorcycle court’s conclusion that the linguistic formulation of the active-passive rule was “largely…futile,” active-passive negligence still factors prominently into the interpretation of general indemnity provisions in contracts as well as provisions that do not address whether damage caused by the indemnitee’s negligence is included in the indemnity coverage.

San Francisco Unified

Around the same time that the no-contribution rule was displaced by statute, one court of appeal was adding a new wrinkle to contribution’s “twin concept” of indemnity. In San Francisco Unified School District v. California Building Maintenance Company, a window washer was injured when the window he was washing came loose, causing him to fall. The man was employed by a maintenance company at the time. Although the maintenance company’s insurance carrier compensated the window washer for his injury, the window washer and the carrier sued the school district, alleging that it had failed to supply the worker with a safe place to work. The window washer and carrier won a $30,000 judgment against the school district that was satisfied by the school district paying $25,000. The district then sued the maintenance company to recover the $25,000.

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The school district’s theory was that the maintenance company breached its contract with the school district by permitting the window washer to work without adequate safety equipment (a stepladder) as required under the contract.14 The maintenance company raised the common law rule of non-contribution15 as an affirmative defense and was granted a nonsuit at trial.

The California Court of Appeal for the First District held that even if the contract between the maintenance company and the school district did not expressly provide for indemnity, such an agreement “would necessarily be implied” under the circumstances.18 The First District relied heavily on two U.S. Supreme Court cases for its rationale. The first was Weyerhaeuser Steamship Company v. Nacirema Operating Company. In that case, a longshoreman was injured and obtained a judgment against the shipowner. The shipowner then sued its contract-privy stevedoring company (and employer of the longshoreman) for indemnity. The Court held, “While the stevedoring contract contained no express indemnity clause,” the contract’s language implied “a contractual undertaking to [perform] with reasonable safety,” and to discharge “foreseeable damages resulting to the shipowner from the contractor’s improper performance.”19

The second was Ryan Stevedoring Company v. Pan-Atlantic S.S. Corporation.20 The underlying facts in Ryan Stevedoring were similar, but the court’s language implying indemnity was much stronger. The court held that the stevedoring company had a contract with the shipowner to stow cargo with reasonable safety “and thus to save the shipowner harmless from [the stevedore’s] failure to do so.” It stated “liability springs from an individual contractual right,” and that the shipowner’s claim was “not a claim for contribution from a joint tortfeasor”—thus not based on the violation of a tort duty to the longshoreman but a contractual obligation to the shipowner.21

The San Francisco Unified case marked the first recognition of the doctrine of implied contractual indemnity in California, and like its common law indemnity predecessor, the case completely shifted liability to the alleged indemnitor.22 Ultimately, the doctrine of implied contractual indemnity did not require joint liability (i.e., a tort duty running between the indemnitor and the underlying plaintiff), although this was present in San Francisco Unified.23 Perhaps ironically in retrospect, the San Francisco Unified court stated that there can be “no doubt that the school district and the maintenance company are joint tortfeasors,” despite that statement’s seeming irrelevance to implied indemnity based on contract.24

San Francisco Unified thus may be said to leave open the question of whether implied contractual indemnity requires that the indemnitor and the indemnitee be joint tortfeasors. In 2009, the California Supreme Court answered this question in the affirmative in Prince v. Pacific Gas & Electric.25 However, just two years earlier, the Third District, in an exhaustive opinion authored by Justice Tani Cantil-Sakauye (who is now Chief Justice of California) concluded just the opposite in Garlock Sealing Technologies, LLC v. NAC Motorcycle Club.26 As the court held in Garlock:

As our review...demonstrates, a duty to indemnify has been implied from the obligation of contracting parties to perform their promises, the reasoning being that a promise to perform includes an implied promise to perform properly....[I]mplied contractual indemnity is not based on principles of tort law, but on the contractual relationship between the parties and a breach of the contract between them.27

Prince did not expressly overrule or disapprove Garlock, and Garlock seemingly remains good law.28

Oddly, what Prince does not say is that implied contractual indemnity is equitable indemnity, even if that conclusion is Prince’s ultimate effect. While the Prince court concluded that “implied contractual indemnity has always been subject to the rule that ‘there can be no indemnity without liability,’”29 it did not explicitly put the matter to rest by making some further statement such as “therefore, all equitable indemnity is tort-based.” Justice Kathryn M. Werdegar’s concurring opinion acknowledges the Prince court’s indecision on the point.30

What are equitable indemnity, total equitable indemnity, partial equitable indemnity, implied indemnity, and implied contractual indemnity? Boiled to their essentials they are equitable indemnity (tort-based) and implied contractual indemnity (contract-based). But according to Prince, contract-based indemnity has always been tort-based, even though it is a separate and distinct theory of indemnity liability. And according to Garlock, contract-based indemnity can be tort-based but does not need to be. “Implied” indemnity law is the product of concepts that use loaded and mis-appropriated common law language to blend traditional common law ideas. This process has given California law two bases for implied indemnity: contract and tort. California courts created this confusing doctrine, and it may yet be clarified by the supreme court.

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2 Dobbs, supra, note 1.
3 See Dobbs, supra note 1, at §386.
4 CODE CIV. PROC. §875(a)-(d); Under the California statute, “the pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.” CODE CIV. PROC. §876(a).
5 CODE CIV. PROC. §875(f).
6 CODE CIV. PROC. §875(c).
7 American Motorcycle Assoc. v. Superior Court (Viking Motorcycle Club), 20 Cal. 3d 578 (1978).
9 American Motorcycle Assoc., 20 Cal. 3d at 592.
10 Id. at 591.
11 See, e.g., Jimenez v. Pacific W. Constr. Co., 185 Cal. App. 3d 102, 114 (1986). See also Gonzales v. R. J. Novick Constr. Co., 20 Cal. 3d 798, 809-10 (1978) (“While such clauses may be construed to provide indemnity for a loss resulting in part from an indemnitee’s passive negligence, they will not be interpreted to provide indemnity if an indemnitee has been actively negligent.”).
13 Id.
14 Id. at 435-36.
15 Id. at 436.
16 Id.
17 In the time between the window washer’s injury and the appeal, the legislature passed Code of Civil Procedure §875, which abrogated the common law rule. However, the provision was not retroactive.
18 San Francisco Unified Sch. Dist., 162 Cal. App. 2d at 449.
21 Id. at 130.
23 See Bear Creek Planning Comm. v. Title Ins. & Trust Co., 164 Cal. App. 3d 1227, 1237 (1985) (dis-approved by Bay Dev., Ltd. v. Superior Court (Home Capital Corp.), 50 Cal. 3d 1012, 1032 n.12 (1990) to the extent that Bear Creek held implied contractual indemnity not to be a form of equitable indemnity).
24 San Francisco Unified Sch. Dist., 162 Cal. App. 2d at 444.
25 Prince v. Pacific Gas & Elec., 45 Cal. 4th 1151, 1161 (2009) (“The principal question for us is whether or not a requirement of a joint legal obligation also applies when implied contractual indemnity is at issue. We conclude the answer is yes, based on the underlying rationale of this common law doctrine and the case law that has developed over the years.”).
27 Id. at 972-73 (2007).
28 In fact, it is strange that Prince did not even mention Garlock, considering Garlock’s recency and assiduous review of the development of the implied contractual indemnity doctrine.
29 Prince, 45 Cal. 4th at 1165.
30 Id. at 1169-1171 (Werdegar, J., concurring).
The Federal Government’s Lien Rights under the FMCRA

THE FEDERAL GOVERNMENT operates one of the largest healthcare systems in the world. In fiscal year 2007, the federal government spent $75 billion on military and veteran health programs. This is not surprising, given that all active-duty military members, some dependents, and many retirees are guaranteed medical treatment and other benefits. Given these facts, it should also not be surprising that the federal government has an interest in lawsuits that involve an active-duty military member, a veteran, or a dependent who was treated for injury or disease at the federal government’s expense or who was rendered unable to perform his or her duties as a result of an injury for which a third party is legally liable. For the benefit of taxpayers and to prevent windfalls for tortfeasors, insurers, and injured parties, Congress has created numerous methods for the federal government to recover costs and expenses that were incurred as a result of third-party negligence or the contractual obligation of another. A comprehensive understanding of the federal government’s rights of recovery is paramount for all practitioners who are involved with cases involving a service member, retiree, or service member dependent who was injured by a third party and was treated in a military hospital, or a service member who could not perform his or her duties as a result of these injuries. The federal government may also seek recompense if it paid for any private healthcare.

Before 1962, the federal government had no means to recover medical expenses incurred after a third party caused injuries or diseases to members of the military. The Federal Medical Care Recovery Act (FMCRA) was enacted in that year to create an independent cause of action to allow the federal government to recover the reasonable value of its expenses. Under the original version of the FMCRA, the federal government had the right to file claims against private persons, corporations, associations, and state and local governments. The federal government could even file claims against other federal employees, seeking recovery for its expenses incurred as a result of a third party’s malfeasance.

While recent case law is lacking, early decisions interpreting the original version of the act held that the federal government could not institute an action against a liability insurer without a prior judgment against the insured tortfeasor. However, later revisions to the act added the phrase “or that person’s insurer” in designating those against whom the government has a right to recover. Therefore, if any third-party tortfeasor is insured, it appears that the federal government may also file a claim directly against the private insurance company. Moreover, if an applicable state’s law provides a system of compensation or reimbursement for medical expenses or lost pay pursuant to a policy of insurance, contract, agreement, or arrangement, the federal government shall be deemed to be a third-party beneficiary to that policy, contract, agreement, or arrangement.

Under the FMCRA, the federal government is entitled to recover the reasonable cost of medical care and services that are provided to a member for the treatment received in a government or military hospital. The federal government is entitled to a per diem charge for the service member, retiree, or dependent’s inpatient care and to a per-visit charge for any outpatient treatment. This “reasonable value” is dependent on rates established by the Office of Management and Budget and published yearly in the Federal Register. Although these rates are subject to attack, they are generally given the presumption of reasonableness. Additionally, the FMCRA now grants the federal government the right to recover the wages it paid to a member who is unable to perform his or her duties as a result of the injury or disease. Furthermore, the federal government may also recover the reasonable costs of medical care and services that are provided to a member by a private hospital or by private healthcare providers when the government has paid for the care and treatment in accordance with a government or military insurance program. The federal government is entitled to collect the amount that it paid to the private healthcare provider.

Courts have employed different lines of reasoning to determine the independent and subrogatory rights that are afforded to the government under the FMCRA and whether they are separate or conjunctive. While the government’s right of action under FMCRA is described as “independent,” the concept of subrogation indeed offers a clear picture of the government’s position under the act.

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Subrogation applies when one person or entity substitutes in the place of another and succeeds to the rights of another. The federal government is required to provide medical care or other benefits to the member, and when a third party is responsible for the necessity of that medical care or benefit, the government has the right to recover the costs of that medical care or other benefits from that third party. The government steps into the shoes of the injured member and, in order to recover, must show that the third party caused the injury that necessitated the medical care or other benefits. Once the government becomes the subrogee, it becomes the real party in interest, bringing a claim under an independent right of action. This subrogated right of the government is limited to the reasonable value of the care, treatment, or benefits provided. It does not afford the right to seek additional damages the member may have incurred.

Furthermore, the current FMCRA provides that the United States is deemed a third-party beneficiary under alternative systems of compensation, such as a policy of insurance, a contract, or agreement. The act further elaborates that for these purposes, the government “shall be subrogated to any right or claim” that the member has under such alternative system of compensation to the extent of the reasonable value of care and treatment provided. Additionally, the act specifies that the government may enforce its rights through intervention or by bringing a separate action. This implies that the government has separate rights emerging from independent actions and subrogation actions.

Application and Enforcement

For the federal government to seek recovery under FMRCA, it must know that a third party may have caused injury or disease to a service member, retiree, or other beneficiary. While the member has an obligation to report any injury or accident that may trigger a claim, in practice it is the military facility that renders treatment or the entity that makes payments to a private hospital that makes the report.

For example, Navy regulations provide that every Naval Medical Treatment Facility (MTF) is responsible for ensuring that possible FMCRA claims are brought to the attention of a judge advocate general (JAG) designee responsible for investigating, asserting, and collecting FMCRA claims. The MTF is supposed to report within seven days of treatment for which a third party may be liable. The JAG designee is tasked with notifying the injured member (or his or her legal representative) of the government’s interest in the case and of his or her duty to cooperate in the government’s efforts to enforce its rights.

The federal government has two enforcement options. During the six-month period after the first day in which the government provides or pays for care, the government must afford the injured person an opportunity to bring an action. If an action is commenced, the government’s first option is to intervene or join in any proceeding brought against the third-party defendant, insurance carrier, or other entity responsible for the payment or reimbursement of medical expenses or lost pay. If the government chooses not to intervene, its second option is to assert its independent right to bring an action. The government may do this even if the injured person has already brought suit.

If there are not enough funds available from the tortfeasor or its insurer to cover all the damages, many jurisdictions provide that judgments are to be paid in the order of date awarded rather than in a pro rata fashion. The government has no right to recover funds unconditionally paid to the injured party through a judgment against or settlement with the tortfeasor. Therefore, the government generally intervenes rather than bring its own suit, thereby ensuring that the available funds are not extinguished before it can receive its fair share.

Another enforcement option is that a private attorney representing the injured party may assert the federal government’s claims (under the federal government’s authority) as an item of special damages. This is usually done in the form of a letter agreement between the private attorney and the federal government’s representative tasked with collecting what the federal government determines it believes is due. Asserting the federal government’s claims may be beneficial to a private attorney. For example, a private attorney cannot make a claim for the value of the medical expenses that the federal government incurs or may incur in the future by assuming the federal government’s rights, the private attorney may thus be able to present the full value of the past and future medical expenses. This procedure will streamline the process and will circumvent the government or a government lawyer’s intervention in the case. This arrangement avoids duplicate efforts and gives the case’s strategic decisions to the private attorney, facilitating settlement. Further, this option usually results in a reduction of the federal government’s financial claims. The government is generally inclined to reduce its lien if it does not have to expend significant time, money, and effort in the recovery of its lien.

The federal government’s rights under the FMCRA are not absolute. The act does not create a federal law of negligence but rather accepts state substantive law in determining whether tort liability exists. The law of the state where the injury occurred determines whether the federal government is entitled to compensation under the FMCRA. In essence, if a member would be entitled to compensation in accordance with the law in the state where the injury occurred, the federal government is also entitled to proceed with its independent cause of action for recovery.

State substantive law can limit the federal government’s right to recovery. For example, in United States v. Studvant, the court held that the federal government’s failure to comply with the requirement under New Jersey law to give notice to an Unsatisfied Claim and Judgment Fund Board was ground for dismissal. Often, the government’s claims are subject to procedural state laws that bar a tort cause of action. For example, some states have automobile guest statutes that prevent actions against a host driver except in limited circumstances. A Nebraska District Court held that when the internal law of Nebraska was adopted as the federal rule (and Nebraska’s guest automobile statute limited substantive liability in negligence), the right of the United States was barred in accordance with the guest statute. Also, no-fault automobile insurance laws that abolish tort liability in certain situations may be expected to bar the government’s claim as well. However, family immunity laws preventing family members from suing each other have been held not to bar the United States for suing the service member’s family.

The issue of contributory negligence is slightly more complicated. If state law directs that contributory negligence absolves a third party from liability, the government cannot recover, because technically there is no tort liability. However, if state contributory negligence laws merely lessen or diminish the amount of recoverable damages allowed, the law does not affect the creation of tort liability, and the government may still bring a claim.

The court in In re Dow Corning Corporation criticized the idea that the government should be exempt from any state procedural defenses. The opinion holds that procedural defenses, like all legal defenses, concern whether circumstances create tort liability upon a third party. If a negligent actor has a legal defense, whether substantive or procedural, he or she will be exempt from liability. The opinion emphasizes that the federal government should have no special exemption from these procedural defenses.

On the other hand, a defense under the statute of limitations is not applicable to FMCRA claims, because the doctrine of sovereign immunity precludes the application of any time limitation to a government claim unless Congress has provided otherwise. As a result, the period within which the federal
government can bring a cause of action under the FMCRA is three years, rather than the applicable state law’s statute of limitations. However, if the government’s three-year statute has passed and the state statute provides a longer amount of time, the government may assert a subrogated claim.

**Equity Is Equality**

There are many situations in which the potential recovery from a third-party tortfeasor will be limited. One example is a limited amount of insurance coverage. All too often, the overall damages to the injured member and the cost of the federal government’s medical treatment are well in excess of what is recovered.

The question that presents itself is how to allocate the recovery between the competing claims of the member and the federal government. The FMCRA is silent on the question of priority. However, courts have held that in keeping with the principle that equity is equality, the proper course is to distribute the limited funds on a ratable basis, so that claimants receive “a share of the fund proportionate to their share of the total judgment figure.” Additionally, the courts have limited the federal government’s right of reimbursement for the full amount of its claim for medical treatment in cases in which the federal government passively allowed the injured party to bear all the risks and costs pursuing litigation against a third-party tortfeasor.

In the recent Tenth Circuit decision, *Poche v. Joubran*, the federal government intervened in a lawsuit to recover medical costs and pay from third-party doctors who were claimed to have committed medical malpractice. The jury awarded separate damages to the Poches and to the United States, which participated in the trial. In response to a motion by the Poches, the trial court ordered the United States to pay 25 percent of the Poches’ costs and attorney’s fees. Claiming sovereign immunity, the United States appealed. The Tenth Circuit reversed the award of costs and fees on the grounds that the government participated fully in the lawsuit, and that, more importantly, the district court lacked jurisdiction to make the order.

In many cases, the federal government will work with the injured service member and the member’s counsel to fashion a suitable remedy. The JAG officer in charge of the matter may authorize a waiver or may compromise any claim that does not exceed $100,000. Waivers and compromises for figures above this amount, however, must be done with approval of the Department of Justice. A waiver and compromise is appropriate when, upon written request by the injured member, it is determined that the collection of the full amount of the claim
would result in undue hardship to the injured member.36

Right to Sue in Contract

In addition to granting the federal government the right to sue in tort, the FMCRA allows recovery under contract.37 This often comes into play with automobile insurance policies. The extent of the government's ability to recover is primarily dependent on the language of the policy. Its definition of the term “insured” often gives enough leeway for the government to be included. This is entirely dependent on the court's interpretation of each policy on a case-by-case basis. If the government is included within the definition of “insured,” it has the right to recover from the injured party’s insurer. If the government is not included within the coverage limitations, it may only recover from the tortfeasor.

In relation to uninsured and underinsured motorist coverage, which is designed to compensate persons injured by the negligence of an insolvent third party, the provisions typically require the insurer to pay the injured the damages he or she incurred. Often, the government is included in the definition of “insured.” In Government Employees Insurance Company v. United States, the appellate court held that if a contract defines “insured” to include “any person, with respect to damages he is entitled to recover because of bodily injury to which this part applies,” the government qualifies as an “insured” and is entitled to recover medical expenses.38

The federal government may also recover in states that have no-fault insurance contracts providing compensation for medical expenses that arise from an automobile accident. Prior to the amendments to the FMCRA, which required tort liability for the government to recover, it would not have been viable for the federal government to recover expense in states in which no-fault laws had been adopted. However, with the new language in the FMCRA, the government may still be able to recover under the insured’s policy.39

Further confirmation of this lies in the language of 10 USC Section 1095, which provides that the government may recover its medical expenses for a service member as a third-party beneficiary to an insurance policy held by the member.40 Included within is language defining a “third party payer” to include “an automobile liability insurance or no fault insurance carrier, and any other plan or program that is designed to provide compensation or coverage for expenses incurred by a beneficiary for health care services or products.”41 The definition of “no fault insurance” has been susceptible to several interpretations. However, the Fifth Circuit addressed this issue, adopting the Department of Defense’s definition to conclude that a

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specific form of insurance fell within the “no-fault” definition under Section 1095, and that the government was entitled to reimbursement. Of course, some no-fault statutes abolish tort liability only to a certain extent. In the case that limit is exceeded, the government will pursue the tort remedy in excess of the no-fault statute.

Although the federal government has been less than perfect in effectuating its rights to recover the money it spends as a result of third-party negligence, parties to litigation need to proactive with cases that involve an active-duty military member, a veteran, or a military member dependent who was treated for injuries or disease at federal expense, or was rendered unable to perform his or her duties as a result of an accident. 

1  Jennifer Jensen, Government Spending on Health Care Benefits and Programs: A Data Brief (CRS, June 16, 2008).
3  United States v. Standard Oil, 332 U.S. 301 (1946) (The federal government could not recover medical expenses because state tort law did not apply, and there was no federal recourse). 
5  42 U.S.C. §2651(a); United States v. Housing Auth. of Bremerton, 415 F. 2d 239, 241 (9th Cir. 1969).
7  42 U.S.C. §2651(a).
8  42 U.S.C. §2651(c).
9  42 U.S.C. §2651(a).
11  42 U.S.C. §2651(b); see also Poche v. Joubiran, 644 F. 3d 1105, 1107 (10th Cir. 2011).
12  42 U.S.C. §2651(a).
13  42 U.S.C. §2651(c)(d).
14  32 C.F.R. §757.11.
15  32 C.F.R. §757.18.
16  United States v. Merrigian, 389 F. 2d 21, 25 (3rd Cir. 1968).
17  United States v. York, 398 F. 2d 582, 584 (6th Cir. 1968); 42 U.S.C. §2651(d).
18  Merrigian, 389 F. 2d at 25.
19  Holbrook v. Andersen Corp., 996 F. 2d 1339, 1341-42 (1st Cir. 1993).
20  U.S. Servs. Auto. Ass’n v. Perry, 102 F. 3d 144, 150 (5th Cir. 1996).
23  Id. at 1312.
27  Id.
29  Id. at 334.
31  Id.
33  Cockerham v. Garvin, 768 F. 2d 784 (6th Cir. 1985); Money v. United States, 3 F. Supp. 2d 113 (D. Nev. 1998).
34  Poche v. Joubiran, 644 F. 3d 1105, 1107 (10th Cir. 2011).
35  Id. at 1110-11.
36  32 C.F.R. §757.19. In assessing undue hardship, the federal government considers the following circumstances: 1) permanent disability or disfigurement, 2) lost earnings capacity, 3) out-of-pocket expenses, 4) financial status, 5) disability, pension, and similar benefits available, 6) the amount of settlement or award from the third-party tortfeasor, and 7) other factors that objectively indicate that fairness requires compromise or waiver.
37  42 U.S.C. §2651(c).
38  Government Employees Ins. Co. v. United States, 376 F. 2d 836 (4th Cir. 1967).
39  42 U.S.C. §2651(c).
40  10 U.S.C. §1095(a).
41  10 U.S.C. §1095(b)(1).
42  U.S. Servs. Auto. Ass’n v. Perry, 102 F. 3d 144, 147 (5th Cir. 1996).
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IN RECENT YEARS, disgruntled graduates have filed actions blaming their former schools for their inability to find meaningful employment in their chosen fields. In California, this phenomena will probably not flourish, particularly for plaintiffs who advance theories of liability based on negligence, because of California’s educational malfeasance rule. Under the rule, claims of students or parents who seek to challenge the quality of education offered by a public school or the academic results produced by its programs are not actionable as a matter of law and public policy in California.1

The rule resulted from the landmark decision made in 1976 in Peter W. v. San Francisco Unified School District.2 Peter W., an 18-year-old high school graduate, alleged that he was unable “to gain meaningful employment” and suffered a “loss of earning capacity” since he could read only at a fifth-grade level. He sued the public school district, seeking to hold it financially accountable for his “permanent disability.” Peter W. affirmed the judgment of dismissal for the school district under the rationale that came to be known in California as the educational malfeasance rule.

Peter W. acknowledged the “truism” that “the public authorities who are dutybound to educate are also bound to do it with ‘care,’” but held that a person who claims to have been “inadequately educated” cannot state a tort claim against the authorities who operate and administer the public school system. It explained that allegations of “educational malfeasance” did not fit the existing judicial framework for tort liability, because “classroom methodology affords no readily acceptance standards of care, or cause, or injury,” thereby negating an actionable “duty of care.” It further reasoned that exposing persons and agencies who administer the academic phases of the public educational process to “real or imagined” tort claims would impose an unbearable burden on them and society as a result of “countless” claims by disaffected students and parents. Peter W. held that the plaintiff could not state a negligence claim against the school district, because there was

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no underlying “duty” and “the failure of educational achievement may not be characterized as an ‘injury’ within the meaning of tort law.”

A few years later, Smith v. Alameda County Social Services Agency held that the educational malfeasance rule articulated in Peter W. was “completely dispositive” in another case seeking monetary damages against a public school district under a negligence theory. Smith, a 17-year-old who spent his entire childhood in a series of foster and group homes, alleged that the school district negligently placed him “in classes for the mentally retarded” even though it “knew or should have known that he was not retarded.” He sought to impose tort liability on the school district for his inadequate education, because it allegedly provided improper remedial training to him. However, significantly, his liability theory relied upon a duty that was “essentially indistinguishable” from the claim in Peter W. that the plaintiff received an inadequate education, since the school district allegedly failed to provide proper remedial training. Smith stated that the “duty of care” allegedly breached in both cases was that of “providing appropriate education training.” The judgment of dismissal for the school district was affirmed.

Chevlin v. Los Angeles Community College District, decided 10 years after Smith, held that the educational malfeasance rule barred contract claims as well as tort claims. Chevlin, a former community college student, was dismissed from the college’s two-year nuclear medicine technology program during her second year. She sought to hold the school district financially accountable for her inability to find employment as a nuclear medicine technologist. She alleged that her dismissal was without good cause because the school district failed to satisfy its “duty of care” to adequately supervise and train her, notify her of the required learning objectives, and provide written evaluations of her performance. The school district also allegedly breached its contractual duties to her as an enrollee of the program. Chevlin held that the educational malfeasance rule precluded her negligence and breach of contract claims since the alleged “harm” was the same whether “framed as a negligence or breach of contract theory.” The judgment of dismissal for the school district was affirmed.

In 2006, nearly 30 years after Peter W., the California Supreme Court endorsed the educational malfeasance rule in Wells v. One-2-One Learning Foundation. After explaining the ruling and rationale in Peter W. in detail, Wells unequivocally states that California “courts will not entertain claims of ‘educational malfeasance.’” In Wells, several minors were enrolled in charter schools operating as “distance learning schools.” The schools promised to educate students at home via the Internet. The students and their parents sued the charter schools, their corporate sponsors, and the chartering school districts under multiple theories, alleging that the defendants “failed to deliver instructional services, equipment, and supplies as promised, and as required by law.” The lower courts decided that the educational malfeasance rule barred the plaintiffs’ claims for intentional and negligent misrepresentation and breach of contract. The defendants sought and received review of the court of appeal’s holding that the rule did not bar the plaintiffs’ statutory claim under the California False Claims Act (CFCA), alleging that “the charter school and district defendants made or facilitated fraudulent claims to obtain state ADA funds that were not provided.”

The California Supreme Court agreed “in principle” with the court of appeal’s decision that the educational malfeasance rule did not bar the plaintiffs’ statutory CFCA claim to the extent that they had alleged that the defendants “offered no significant educational services” or committed other wrongs without asserting that the “defendants provide a substandard education.” Wells noted that the gravamen of the CFCA claim was that the defendants, in operating their distance learning schools, “did little more than collect attendance forms from their ostensible pupils, while failing to provide the educational services, equipment, and supplies promised in the schools’ charters and promotional materials, and required by law.” Given that theory, Wells held that the plaintiffs’ statutory CFCA claim was not “wholly barred,” because the policy considerations underlying the educational malfeasance rule “do not apply to a claim that school operators fraudulently sought and obtained public education funds for doing nothing more than collecting attendance forms.” The plaintiffs’ statutory claim “simply obligates the court to determine whether the operator offered any significant teaching, testing, curriculum oversight, and educational resources to ostensible students.” Nonetheless, analyzing all of the plaintiffs’ individual allegations in detail, Wells also holds that the educational malfeasance rule barred the passage in their complaint seeking “to raise issues of the quality of education offered by the charter school defendants, or of the academic results produced” by their programs. Accordingly, the Wells court remanded the case for further proceedings under the CFCA, but without the allegations barred by the educational malfeasance rule established in Peter W.

In sum, California courts have consistently recognized and strengthened California’s educational malfeasance rule. Peter W. established the rule in a negligence case in the mid-1970s. Chevlin expanded the rule to cover tort and contract claims so as to prevent plaintiffs from circumventing the rule through artful pleading. The California Supreme Court confirmed the continuing vitality of the rule and the policy considerations supporting it in Wells in 2006. Wells also demonstrated that the rule bars statutory claims to the extent that the gravamen of such claims is a challenge to the educational quality or results of a public school’s programs. Peter W., Smith, and Wells applied the rule to bar claims arising from elementary through high school education, and Chevlin applied the rule to bar claims arising from collegiate education. All of those decisions applied the rule at the initial pleading stage.

Future Developments
California’s educational malfeasance rule was created and developed in the context of public education. All the reported decisions from California involve public schools or school districts (as in Peter W., Smith, and Chevlin) or publicly funded charter schools (as in Wells). California courts will likely extend the rule to private education and schools in future reported decisions.

Courts in other jurisdictions already apply their versions of the educational malfeasance rule to public and private schools. In New York, Helm v. The Professional Children’s School applied the rule to a private school in 1980. Helm decided that the courts should not entertain claims for “educational negligence” or “educational malpractice” against public or private schools, as a matter of public policy, given the “practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student” since “[f]actors such as the student’s attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning.” It also concluded that those considerations were “equally applicable to any attempt to assess the educational experience, whether in the context of public or private education.” In Ross v. Creighton University, the Seventh Circuit, addressing claims by a former student athlete against a private university, found that the educational malpractice rule was applicable to such claims under Illinois law. California courts should follow the universal rational succinctly articulated in Helm, followed in Ross, and observed in other jurisdictions.

Current Battles
Media reports from across the country suggest that many recent graduates with college or professional degrees, who are facing dismal job prospects in the current economy,
have shifted their economic aspirations from the opportunity of earning a paycheck to the hope of receiving a significant monetary settlement or award from their former schools. Reported decisions from other jurisdictions indicate that those former students, who are the vanguard of that movement, have been unsuccessful so far in large measure because of the educational malfeasance rule.

For example, in May 2012, the owner and operator of Sanford-Brown College successfully invoked the educational malpractice doctrine in Love v. Career Education Corporation in federal court in Missouri. After completing the college’s medical assistant associate program, Love alleged that an admissions representative had made a series of false representations to her during the admissions process. Love stated that “a claim cannot be couched as an education claim merely to avoid the doctrine that precludes an educational malpractice claim.” It also held that Love’s allegations concerning her “future earnings or marketability after graduation cannot form the basis for fraud as a matter of law” since mere expressions of opinion or “puffing” are not actionable representations under Missouri law. Love dismissed several of her core allegations under Missouri’s educational malpractice rule as well as common law principles.

In addition, in 2012, similar claims were dismissed under common law principles in two cases, Gomez-Jimenez v. New York Law School and MacDonald v. Thomas M. Cooley Law School. In both cases, recent law school graduates alleged that they had pursued their legal degrees as a result of misleading data published by the schools relating to their graduates’ employment prospects, employing that “an award of the difference between what they paid for their law degree and an amount representing its ostensibly lesser intrinsic worth because the degree has not suffered as an entrance ticket for the type of jobs plaintiffs hoped to obtain, is entirely too speculative and remote to be qualified as a remedy under the law.” Consistently, MacDonald decided that the plaintiffs’ statutory and common law claims failed, because their alleged reliance on the law school’s employment data and statistics was “unreasonable.” MacDonald bluntly concluded that “as put in the phrase we lawyers learn early in law school—caveat emptor.”

The American Bar Association, entering the fray arising from the epidemic of claims filed against its accredited law schools, has recommended changes to Standard 509 of the ABA Standards and Rules of Procedure for Approval of Law Schools. The proposed modifications would require accredited law schools to disclose more consumer information on their Web sites and to ensure that the information is accurate and not misleading.

Students and graduates contemplating litigation should take heed of these initial decisions. Love demonstrated that the educational malpractice or educational malfeasance rule remains a viable defense. Love, Gomez-Jimenez, and MacDonald showed that plaintiffs who attempt to avoid the rule by framing their claims in terms of traditional fraud theories face significant hurdles at the initial pleading stage.

It remains to be seen how new suits against colleges and universities will be framed and how they will fare in California in light of its educational malfeasance rule. While there are new cases that to date have not resulted in reported decisions, California’s educational malfeasance rule is alive and well after nearly 40 years of jurisprudence. Love 


\[23\] Id. at 826.


\[25\] Id.

\[26\] Id. at 942.


\[28\] Id. at 390.


\[30\] Id. at 1213.

\[31\] See California False Claims Act (codified at Gov. Code §§12650 et seq.).

\[32\] Wells, 39 Cal. 4th at 1184.

\[33\] Id. at 1210-11 (emphasis in original).

\[34\] Id. at 1210.

\[35\] Id. at 1212-13 (emphasis in original).

\[36\] Id. at 1213 (emphasis in original).

\[37\] Helm v. The Prof’l Children’s Sch., 431 N.Y.S. 2d 246 (1980).

\[38\] Id.

\[39\] Id.


\[42\] Id. at * 3.


\[44\] Gomez-Jimenez, at 12.

\[45\] Id. at *3.

\[46\] MacDonald, 2012 WL 2994107, at *11.

\[47\] See, e.g., http://www.abanow.org/2012/06/2012am103.
NEARLY 20 YEARS AGO, the U.S. Supreme Court issued a landmark decision that set the standards for admission of expert testimony in federal tribunals. In Daubert v. Merrell Dow Pharmaceuticals, Inc., the Court concluded that the so-called Frye (or general acceptance) standard for novel scientific evidence had been superseded by the enactment of the Federal Rules of Evidence (Rule 702 in particular). The Frye approach, which required a scientific technique “to have gained general acceptance” in the relevant scientific community, was deemed inconsistent with the “liberal thrust of the Federal Rules.”

Thus, in the wake of Daubert, scientific and technical testimony in federal court must now satisfy a two-prong test that focuses on relevance and reliability. Federal trial judges are to undertake a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.”

Under Daubert, federal trial courts function as “gatekeepers” to screen proffered expert testimony and evidence to determine that it “is not only relevant, but reliable.”

The Court proposed a nonexclusive list of factors to consider in evaluating the expert’s “theory or technique” that includes but does not require general acceptance in the scientific community. Because the standard is flexible, the Court naturally declined to supply a rigid framework for the trial courts but stressed that the examination should focus on the expert’s principles and methodologies, not the conclusions drawn from them.

It is now firmly established that Daubert governs federal practice. California state courts, however, are not bound to follow the federal rules. Indeed, the California Supreme Court was quick to react to Daubert. In People v. Leabu, Chief Justice Malcolm Lucas, writing for the majority, rejected the Daubert standard in favor of California’s version of the general acceptance standard for new or novel scientific evidence, which is known as the Kelly rule.

Since California courts had been applying the Kelly rule for decades, this meant business as usual for California courts, at least when new or novel science is concerned. Is California behind the times? Careful review of the recent authorities suggests it is not. Over the past two decades, California

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courts, while resisting invitations to replace California’s standards with the rule of Daubert,11 have developed an efficient statutory approach that entrusts trial courts and juries with the ability to assess and consider scientific evidence. California’s Evidence Code supplies a framework for the admissibility of scientific and opinion testimony that satisfies the same flexible goals served by the Federal Rules of Evidence. While the federal standard readily adapts to rapidly advancing technology and medicine, in California—the birthplace of much of that technology—state tribunals have been adept at meeting scientific challenges as well.

Most expert challenges in California trial courts target the expert’s opinions, their foundational underpinnings, and the expert’s reasoning processes. An understanding of the California trial court rules applicable to medical and scientific opinions can avoid costly missteps that can lead to the exclusion of a well-qualified but unprepared expert.

**Evidence Code Section 801**

The admissibility of expert opinion testimony in California is governed by Evidence Code Section 801, which provides a two-pronged test. First, an expert may express an opinion that is “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.”12 Next, the opinion must be “[b]ased on matter (including his special knowledge, skill, experience, training and education) perceived by or personally known to [the witness]...whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.”13

Despite this simple directive, courts are frequently invited to wade into technically daunting fields to determine not only whether an expert’s opinions are properly grounded but also whether the expert has correctly interpreted and applied the information at issue. The invitation to adopt this extrastatutory approach should be resisted, as it demands that the court second-guess the judgment of a trained and qualified expert who will, after all, be subject to “as penetrating a cross-examination as the ingenuity and intellect of opposing counsel can devise.”14 A series of decisions over the last decade has helped to clarify the landscape for experts testifying in the particularly challenging area of medical cause and effect, and those decisions illuminate the path for technical opinion testimony as a whole.

The threshold inquiry under Section 801(b) is whether the testimony is based on matter “that is of a type that reasonably may be relied upon by an expert” and not whether the opinion is correct or even “reliable.” In one case, *Roberti v. Andy’s Termitie & Pest Control, Inc.*,15 this concept was clarified. The plaintiff suffered from autism spectrum disorder, and his expert witnesses opined that exposure to pesticides during his mother’s pregnancy had resulted in his condition. The defendants attacked the causation opinions, which relied on medical examination of the plaintiff and on research papers and studies in the peer-reviewed literature. The scientific literature consisted primarily of animal studies.16 The defendants’ first argument for exclusion was that the opinions failed to achieve “reliability” within the meaning of the *Kelly* rule, and that the theory of causation did not enjoy general acceptance in the relevant medical community.17 The court rejected those arguments because the *Kelly* test applies only to new or novel “scientific techniques, devices, procedures or methods,”18 not medical opinion testimony. Expert medical opinions, even controversial ones, are exempt from the *Kelly* test when they are based on accepted diagnostic methods.19 Disagreement with the expert’s conclusions does not render them a “new scientific technique.”20 The court also rejected the defendants’ argument that the trial court should have undertaken a foundational analysis of the science, akin to the extensive preliminary admissibility test described in *Daubert*. The court departed from the reasoning of *Daubert*, holding that expert opinion testimony in California is not subject to a threshold screening for reliability.21 Since the inquiry in California state court is different from that in federal court, the court’s function is different as well. In the federal system, the court acts as a gatekeeper to ensure that the “reasoning or methodology underlying the testimony is scientifically valid,”22 while state courts are instructed to trust the trier of fact to reach appropriate conclusions about the opinions rendered by experts. As the *Roberti* court observed, “When a witness gives his personal opinion on the stand—even if he qualifies as an expert—the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible.”23 Because the expert had relied on studies and protocols of a type that reasonably may be relied upon by medical experts, the requirements of Section 801(b) were satisfied, and the testimony and opinions were admissible.

*Roberti* built on a theme expressed two years earlier in *People v. Bu*,24 which upheld an expert’s reliance on scientific literature, statistical data, and an epidemiological study to support the opinion that the use of methamphetamine in greater-than-therapeutic doses results in impaired driving. Because this was a method of research generally accepted in the scientific community, and because the matters relied upon satisfied Section 801(b), the testimony did not implicate the *Kelly* test. Even if the opinions were controversial, they were admissible.25

While the Section 801(b) inquiry does not impose a gatekeeper function on the court to evaluate the quality of an expert’s reasoning, the expert should, nonetheless, have some reasoning to link cause and effect, because an opinion unlinked to its foundation does not assist the trier of fact. An example of this is *Jennings v. Palomar Pom erado Health Systems, Inc.*26 During surgery, a retractor had been left in the plaintiff’s abdominal cavity. In the retrieval surgery, an abscess was found, and the plaintiff contracted a subcutaneous infection that kept him from returning to work. The defendants admitted negligence in leaving the retractor behind but denied that the retractor was the source of infection. The plaintiff’s expert on infectious disease explained that the retractor must have been the source of the infection and that the bacteria could have migrated outward through layers of tissue, finally seeding the subcutaneous tissue where the infection flourished. As the expert witness testified, this fact pattern “just sort of makes sense.” The court disagreed and excluded the expert’s explanation,27 concluding that the expert’s “because I say so” opinion had not supplied a reasoned explanation of the etiology connecting the starting point in the peritoneal cavity to the subcutaneous infection point. Therefore, said the court, the expert opinion did not assist the trier of fact on medical causation.28

**The Lockheed Litigation Cases**

Many practicing lawyers believe that the *Lockheed Litigation Cases*,29 decided the following year, went several steps too far by inserting into Section 801(b) an uncodified extra condition: that the matter on which the expert relies not only be of the type on which other experts rely but also reasonably support the expert’s opinion.30 *Lockheed* was an appeal from summary judgment rendered after the exclusion of causation opinions. The plaintiffs had been occupationally exposed to five industrial chemicals. The causation opinion relied on a meta-analysis of cancer in painters who had been exposed to over 130 different compounds, including three of those to which the plaintiffs had been exposed. The court concluded that the study supplied no reasonable basis for the expert’s opinions because it did not identify which of the many compounds was responsible for the greater incidence of cancer. Thus, according to the court of appeal, the trial court did not abuse its discretion in excluding the opinions under Section 801(b).31 The
Lockheed court arguably took a step beyond the limitation drawn by Roberti by examining not only whether the expert’s scientific data was “of a type that reasonably may be relied upon” but also whether the expert’s reliance on this type of data to reach his conclusion was, in fact, reasonable. Notably, the Lockheed court reached its result without mention of Roberti, which had been decided the preceding year. Bushling v. Fremont Medical Center was decided shortly after Jennings. The plaintiff in Bushling had undergone gallbladder surgery and soon after experienced pain in his shoulder. The plaintiff’s expert anesthesiologist and surgeon were prepared to testify that a shoulder injury probably resulted from the plaintiff being dropped or improperly positioned during surgery, although his treating physician saw no evidence of such trauma, and there was no record of repositioning during the surgery. According to the majority opinion, the experts’ opinions were properly excluded because they had done no more than to assume cause from the fact of injury. The experts’ conclusion that the injury had “more probably than not” been caused by the defendants’ negligence was speculation that was not likely to assist the trier of fact. On the other hand, one justice hearing the case observed, “We do not have to set aside our common sense so as to forget that the damage to the plaintiff’s shoulder first manifested itself on the morning following his abdominal surgery when plaintiff was in the hospital. Thus…it may be the case that ‘these things just happen’ but the thing that happened to plaintiff just happened to happen when plaintiff was in the hospital for abdominal surgery. This is, of course, a wholly remarkable coincidence.” From this point of view, the experts had “established a case of negligence premised on the doctrine of res ipsa loquitur.”

In Geffcken v. D’Andrea, the plaintiffs argued that they had been sickened by household mold and the mycotoxins that mold produces. The trial court had excluded the plaintiffs’ expert testimony on causation in domino fashion, and those rulings were affirmed on appeal. The court noted that test samples had been mishandled, and they identified only spores, not mycotoxins. Since the sampling did not answer the question of whether the plaintiffs had been exposed to mycotoxins, the evidence was excluded under Evidence Code Section 352. An immunological antibody assay and serology test fared no better, as neither test had achieved general acceptance in the relevant community, failing the Kelly rule applicable to new scientific methodologies. Since the medical expert on causation did not have sufficient foundational materials in the excluded sampling and serology, his opinions were excluded under Section 801(b) because they were not based on matter “that is of a type that reasonably may be relied upon by an expert in forming an opinion.”

The unifying theme in these cases is that an expert may appropriately base opinions on the types of matters that would be relied upon by other experts, but the opinion must assist the trier of fact. The methods must usefully (but not necessarily correctly) assimilate the data upon which the expert relies. As is also true in federal tribunals, there are no fixed guidelines or checklists. Experts typically assimilate an array of materials to arrive at reasoned conclusions about causation. In Roberti, for example, the court approved “generally accepted diagnostic methods and tests, including statistical studies that are not definitive,” as well as peer-reviewed literature (including animal studies) as appropriate predicates for the opinions. Most successful opinions linking cause and effect—and virtually all opinions doing so in the medical setting—rely upon a differential diagnosis or differential etiology, which brings data and science together in a logical sequence.

**Differential Diagnosis**

Although differential diagnosis is most commonly undertaken to arrive at opinions about human disease and its causes, the technique is also “a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated.” This process is nothing more than a thoughtful, stepwise exercise of deductive reasoning to arrive at probable causes, which has been accepted in California courts for a long time. As the court held in People v. Jackson, “An expert medical witness may give his opinion as to the means used to inflict a particular injury based on his deduction...A medical diagnosis based on probability...is admissible; the lack of scientific certainty does not deprive the medical opinion of its evidentiary value.”

As part of the differential diagnostic process, the expert assembles and evaluates a list of potential causes (or hypotheses) that may explain the outcome. The expert assimilates the medical and scientific literature and data, epidemiological data, toxicological data, case reports, and other data appropriate to the question at hand. These are all the sorts of materials upon which experts reasonably rely in the Section 801(b) metric. To this assembled knowledge base, the expert applies his or her clinical judgment and experience, using probabilistic reasoning.
1. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court held that *Frye v. United States* had been superseded by:
   A. The California Evidence Code.
   D. None of the above.

2. Following *Daubert*, federal tribunals serving as gatekeepers must determine whether novel scientific evidence has achieved general acceptance in the scientific community.
   True.
   False.

3. In assessing the admissibility of new or novel scientific evidence, California state courts follow *Daubert*.
   True.
   False.

4. In California courts, the standard in *People v. Kelly* applies to:
   A. Opinion testimony.
   B. New or novel devices, techniques, and processes.
   C. Differential diagnosis.
   D. None of the above.

   True.
   False.

6. Pursuant to Evidence Code Section 801, an expert opinion need not assist the trier of fact.
   True.
   False.

7. An expert testifying in California state courts may not base an opinion on matter that is inadmissible in evidence.
   True.
   False.

8. Controversial expert medical opinions are subject to the *Kelly* test when based on accepted diagnostic methods.
   True.
   False.

9. In *Roberti v. Andy’s Termite & Pest Control, Inc.*, the expert properly relied upon matter that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, including:
   A. Statistical studies.
   B. Animal studies.
   C. Differential diagnosis.
   D. All of the above.

10. In *People v. Bui*, the court held that the expert could not properly rely on an epidemiological study to support the opinion that use of methamphetamine in greater than therapeutic doses results in impaired driving.
    True.
    False.

11. An expert’s opinion that does not link medical cause and effect, more likely than not, does not assist the trier of fact.
    True.
    False.

12. A qualified medical expert may assume cause from the fact of injury.
    True.
    False.

13. A medical diagnosis derived by a deductive reasoning need not achieve scientific certainty to be admissible.
    True.
    False.

14. A differential diagnosis is limited to the determination of the cause of human disease and injury.
    True.
    False.

15. An expert opining on human health matters may not rely on experimental data in animal models because animal studies provide no useful data about human health.
    True.
    False.

16. When a technique, device, or process is new or novel, a California tribunal is guided by which of these factors?
    A. Reliability of the method.
    B. Properly qualified witness supplying the evidence.
    C. Proper scientific procedures were used in the particular case.
    D. All of the above.

17. A federal tribunal confronted with new or novel science would undertake a preliminary admissibility assessment that would preclude the admission of cutting-edge science that has not achieved acceptance in the scientific community.
    True.
    False.

18. Extrapolation from existing data is a common scientific technique.
    True.
    False.

19. A lack of absolute scientific certainty deprives a medical opinion of evidentiary value.
    True.
    False.

20. Inferential reasoning is always speculative and therefore inadmissible.
    True.
    False.
Because the inquiry is flexible and varies from case to case, there is no fixed checklist that defines what an expert may reasonably rely upon. It is clear, however, that the scientific data need not be conclusive and may and should be drawn from a number of sources. Experts typically rely on a broad range of materials that, taken alone, need not stand for the expert’s conclusion. The U.S. Supreme Court recently explained: “[L]ack of statistically significant data does not mean that medical experts have no reliable basis for inferring a causal link between a drug and adverse events…. [M]edical experts rely on other evidence to establish an inference of causation…. It suffices to note that… ‘medical professionals and researchers do not limit the data they consider to the results of randomized clinical trials or to statistically significant evidence.’”

Human data are sometimes scarce, as it is unethical and illegal to experiment on humans to accomplish much of the research that populates the peer-reviewed literature. Animal studies routinely supply information that supports the expert’s opinions about biological plausibility. Data from animal research, cellular research, and human studies are all appropriately considered, weighed, and assimilated by the expert, applying his or her professional judgment.

An expert need not have all the answers in order to assist the trier of fact. As one U.S. District Court explained, “Causation can be proved even when we don’t know precisely how the damage occurred, if there is sufficiently compelling proof that the agent must have caused the damage somehow.” The differential diagnosis permits the expert to establish a cause-and-effect relationship even in the absence of conclusive causal evidence.

When an expert undertakes an analysis of a spectrum of information of the type reasonably relied upon by an expert, he or she has satisfied the requirement of Section 801(b). If that opinion will assist the trier of fact, it satisfies the test posed by Section 801 and should be admissible. Any infirmities in the opinion subject its author to searing cross-examination.

Nonstatutory Motions

One approach that has recently come under judicial scrutiny in California courts is the practice of challenging expert reasoning by nonstatutory motions, such as a motion in limine, that are nominally addressed to the admissibility of evidence. Although this practice is not uncommon, a nonstatutory motion should not address the sufficiency of evidence to establish liability, as the sufficiency test is associated with a summary judgment motion. A challenge to an expert’s foundational data should not circumvent such procedural safeguards as those found in Code of Civil Procedure Section 437c.

The Black Box

As the Roberts court and others noted, an expert’s opinion is not subject to the Kelly rule, which applies only to new or novel devices and processes—the figurative black box. In that narrow class of evidence to which Kelly applies, three factors guide a court’s analysis: 1) the reliability of the method, 2) a properly qualified witness supplying the evidence, and 3) a showing that proper scientific procedures were used.

By contrast, in a federal tribunal, new or novel science is evaluated in a preliminary admissibility assessment under Daubert. The federal courts thus bear a heavy burden. The nonexclusive list of factors considered by a federal trial court permits trial judges to admit cutting-edge science even when it has not earned community acceptance. The Daubert standard also imposes a responsibility on federal courts to immerse themselves in the relevant science to make assessments of admissibility, which is an often uncomfortably daunting task.

In state courts, it is only the rare new or novel technique or device that is scrutinized under Kelly, not opinion. There is a difference between an expert’s opinion testimony and the product of a machine or process. The reason for judicial caution for novel devices and processes is the misleading aura of infallibility potentially created by a machine. If the expert’s opinion itself is what is being examined, that “black box” risk is eliminated. As one court noted, “This was not a case in which a magical device was unveiled to astound a gullible jury. It was… simply the testimony of an expert who had examined a subject and whose diagnosis might have been helpful in determining the mental state of the subject.”

The Kelly rule tests the validity of new scientific methodology, but not the degree of professionalism brought to its application. Errors in testing affect the weight of the evidence, not its admissibility. Kelly’s reach is thus quite narrow, as it applies only to that limited class of expert testimony that is based on a novel technique, and it does not condition admissibility on correctness of the conclusions produced by that technique.

The California Supreme Court recently supplied additional guidance in People v. Cowan. In that case, an expert had performed a ballistics analysis using a process that involved lasers and castings. The expert photographed his work and was prepared to explain to the jury what the images depicted. The court explained that this testimony did not implicate Kelly concerns because neither ballistic comparison nor tool mark identification is so foreign to everyday experience as to be difficult for laypersons to understand. When the expert’s work, captured in photographs, simply “isolates physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the reliability of the process in producing that result is equally apparent and need not be debated under” the Kelly rule.

Inferences and Probabilities

Medical and scientific opinions in California are expressed in terms of probabilities, not certainties. Opinions may be the product of deduction and inference and need not be expressed in terms of certainty. In People v. Mendibles, the court explained an expert was qualified “to give an opinion of the cause of a particular injury on the basis of the expert’s deduction from the appearance of the injury itself.” The court also observed, “Such a diagnosis need not be based on certainty but may be based on probability; the lack of absolute scientific certainty does not deprive the opinion of evidentiary value.”

This is nothing new to scientists, as they are trained and experienced in inferential reasoning. The Federal Judicial Center’s Reference Manual on Scientific Evidence defines inferential reasoning as the “reasoning process by which a physician assimilates the various findings on a given patient and forms hypotheses that lead to testing and further hypotheses until a coherent diagnosis is reached.” These inferences and deductions are grounded in observed and known data and thus are not speculative. Inferential reasoning allows an expert to draw inferences and conclusions after synthesizing data, just as jurors may properly draw inferences from evidence. Inferential reasoning and deduction are part of the scientific expert’s skill set, and scientists and physicians are permitted and expected to draw scientific inferences from the data.

California litigants and trial courts rely on expert testimony. Some researchers have estimated that nearly 90 percent of civil trials conducted in superior court involve expert testimony, and many of those experts testify on medical issues. Any trial is a costly proposition, and the stakes are particularly high when the investment includes medical and scientific experts. That investment can be protected by careful attention to the rules governing their admissibility.
California Evidence Code Section 801 supplies litigants and trial courts with ample and flexible guidance to assess the admissibility of scientific testimony. If the opinion will assist the trier of fact, then the driving clause of Section 801(b) instructs that the opinion is admissible if based on matter that is of a type that reasonably may be relied upon by an expert. This two-step approach to evaluating the admissibility of expert opinions ensures that expert testimony derives from scientifically appropriate matter and that it will assist the trier of fact to evaluate whether a particular expert’s reliance on a particular type of study was reasonable.

2 Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
3 Daubert, 509 U.S. at 588.
4 Id. at 589.
5 Id. at 592-93.
6 Id. at 589.
7 Id. at 594.
9 People v. Leahy, 8 Cal. 4th 587 (1994).
10 People v. Kelly, 17 Cal. 3d 24 (1976) (adopting Frye in California). Since Daubert has overruled Frye, most courts describe California’s general-acceptance standard as the Kelly rule.
12 Evid. Code §801(a).
13 Compare Evid. Code §801(b) with Fed. R. Evid. 702.
15 Roberti, 113 Cal. App. 4th 893.
16 Id. at 901.
17 Id.
18 Id. at 902.
19 Id. at 903 (citing People v. McDonald, 37 Cal. 3d 351, 373 (1984)).
20 Roberti, 113 Cal. App. 4th at 903.
21 Id. at 905-6 (citing People v. Leahy, 8 Cal. 4th 587 (1994)).
22 Roberti, 113 Cal. App. 4th at 904.
23 Id. at 900-1.
25 Id. at 1196.
27 Id. at 1120.
28 Id. at 1121.
30 Id. at 565.
31 Id. at 564-65. Another decision from the same coordinated proceedings had been poised to address closely related issues about the scope of the trial court’s review of an expert’s reasoning. That matter was dismissed pending review. In re Lockheed Litigation Cases, 23 Cal. Rptr. 3d 762, 773 (Cal. App. 2d Dist. 2005), review granted and opinion superseded, 27 Cal. Rptr. 3d 360, 110 P. 3d 289 (Cal. 2005), review dismissed, 2007 WL 5315396 (Cal. 2007).
33 Id. at 510-11.
34 Id. at 511.
35 Id. at 516 (Sims, J., dissenting).
36 Id. at 517.
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38 Id. at 1309.
39 Id. at 1310-11.
40 Id. at 1311.
42 See id. at 600-01.
44 Claussen v. MV New Carissa, 339 F. 3d 1049 (9th. Cir. 2003) (approving expert’s use of differential etiology to identify probable cause of poisoning of shellfish bed.) See also Kennedy v. Collagen Corp. 161 F. 3d 1226 (9th Cir. 1998).
45 For an example of stepwise determinations of general and specific causation, see FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 468-70 (2000) [hereinafter SCIENTIFIC EVIDENCE].
47 Claussen, 339 F. 3d at 1057-8.
48 SCIENTIFIC EVIDENCE, supra note 45, at 469.
49 Id. at 468.
50 Claussen v. MV New Carissa, 339 F. 3d 1049, 1058 (9th. Cir. 2003).
52 Roberts v. Andy’s Termite & Pest Control, Inc., 113 Cal. App. 4th 893, 901 (2003); see also AFL-CIO v. Deukmejian, 212 Cal. App. 3d 425, 438, n.7 (1989); see also Metabolicore Int’l, Inc. v. Wornick, 264 F. 3d 832, 842 (9th Cir. 2001) (Animal studies can provide “useful data about human health.”).
53 McClellan v. I-Flow Corp., 710 F. Supp. 2d 1092, 1111 (D. Or. 2010) (citing Daubert v. Merrell Dow Pharmns., Inc. 43 F. 3d 1311 (9th Cir 1995); Domingo v. T.K., 289 F. 3d 600, 607 (9th Cir. 2002) (“[I]t is not necessary to show how a particular act or event caused an injury.”).
54 See L.A. SUPER. CT. R. 3.57 (forbidding use of a motion in limine for the purpose of seeking summary judgment); see also Amtower v. Photon Dynamics, Inc. 138 Cal. App. 4th 1582, 1593-95 (2008) (decrying the practice of disposing of cases on in limine motions when the effect is to circumvent procedural protections designed into the recognized statutory motions).
56 Kelly, 17 Cal. 3d at 30.
57 See Daubert, 43 F. 3d at 1316.
59 People v. Cegers, 7 Cal. App. 4th 988, 994 (1992) (The exclusion of psychologist testimony on confusional arousal syndrome was in error.).
62 People v. Cowan, 50 Cal. 4th 401, 470 (2010).
63 Id.
65 SCIENTIFIC EVIDENCE, supra note 45, at 481.
67 See BAJ 2.00.
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The State Bar of California deadline for mandatory CLE requirements is February 1, 2013 for attorneys whose last names begin with A-G.
ON WEDNESDAY, DECEMBER 12, the Real Property Section and its Land Use Subsection will host a program on easements led by Claire Hervey Collins and Laurence L. Hummer. Recorded easements encumber many parcels of real property and can constitute a minor or significant property right. Ambiguities in the recorded document often lead to uncertainty and disputes, including disputes that may halt an acquisition. In addition, in densely populated cities, new easements are often necessary to fully use existing parcels or to allow for a changed use of a parcel. Case law is legion and often conflicting. Those who attend will learn the nuts and bolts of drafting new and effective easements and interpretive strategies for existing easements. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration and lunch will be available at noon, with the program continuing from 12:30 to 1:30 P.M. The program will also be available as a live Webcast. The registration code number is 011766. The prices below include the meal.

$25—CLE+ member
$45—Real Property Section member
$60—LACBA member
$80—all others
1 CLE hour

Rooftop Review

ON WEDNESDAY, DECEMBER 5, the Real Property Section and its General Real Property Subsection will host a discussion of rooftop leasing opportunities. Peter J. Roth and Pamela L. Westhoff will explain how sustainability and profits can go together. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration and lunch begins at noon, with the program continuing from 12:30 to 1:30 P.M. This program is also available as a live Webcast. The registration code number is 011773. The price below includes the meal.

$25 CLE+ member
1 CLE hour

Probate Notes in 2012

ON THURSDAY, DECEMBER 6, the Trusts and Estates Section will host its annual legislative update program. James R. Birnberg and Commissioner Robert Wada will summarize what probate attorneys need to know about the 2012 California legislative updates and the top 10 probate notes and how to avoid them. Those who attend will get the information they need to have their petitions recommended for approval the first time around. The program will take place at the Cathedral of Our Lady of the Angels, 555 West Temple Street, Downtown. Self parking is available for $10 cash only in the cathedral parking structure, which has an entrance on Temple.

On-site registration will be available from 11:30 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. A table will be reserved for CLE+ members who opt out of the meal. The registration code number is 011810. The prices below include the meal.

$50—CLE+ member
$65—Trusts and Estates Section member
$95—LACBA member
$125—all others
1 CLE hour
The Problem of Double-Dipping in Dissolution of Marriage

IN A DISSOLUTION OF MARRIAGE, the court deals with both property and support issues. They can be linked, but the connection is not always smooth, and one party may find himself or herself in effect paying for the same asset twice—once in the property division and again in the form of spousal support or child support. This occurs when one party pays for an asset in a property division whose value implicitly or explicitly includes the future income stream that the asset will produce, and then the same party pays higher support to the other spouse because of that higher income. This phenomenon is called double-dipping.

The double-dip is real, but most remedies proposed to abolish it tend to push the pendulum not to the middle but to the other side, giving a windfall benefit to the party who, but for the proposed remedy, would be the victim of double-dipping. If the double-dip tends to injure the higher-earning party, the proposed remedies tend to injure the lower-earning party and, depending on how they are drafted, may also result in lower child support as well.

Double dipping issues may be present in three basic categories: 1) when the valuation of a business asset includes goodwill, 2) when accounts receivables are included in the valuation of business and the postjudgment collection of these receivables counts as part of the income of the owner—a typical situation in small professional practices, and 3) when one party buys out the other party’s community property interest in the first party’s pension or annuity.

Double-dipping occurs because the same stream of income or cash flow that was used in the valuation of the business and paid to the spouse receiving support when the community property assets were divided is used again for payment of spousal support. The spouse who has been operating the business may also be in danger of a triple-dip when the issue of attorney’s fees and costs are litigated or negotiated. The confusion regarding calculation of spousal support has roots in statute.

Family Code Section 4058 defines income available for determination of child support, but there are no equivalent statutes that define income available for determination of spousal support, and there are no appellate cases that have held that Section 4058 definitions are applicable to computation of income available for spousal support. However, trial courts are likely to look to the child support definitions and apply the same statutory provisions defining income available for child support purposes in determining income available for spousal support purposes. This issue remains unresolved, and it deserves of clarification by the courts or the legislature.

In In re Marriage of Marx, the California Court of Appeal upheld the practice of double-dipping, holding that the division of community property and the determination of spousal or child support are two distinct calculations. In light of that decision, what options are available to the payor of the spousal support? One approach, of course, is ask the court to order the sale of the community property business to a third party, which will avoid a double-dip because any income the payor earns thereafter will not be from an asset for which the payor already paid a premium for expected future earnings. But selling the business or professional practice is often not a wise or practical strategy for the spouse who has been operating the business.

Two proposed amendments to Family Code Section 4320 provide a possible solution, but they are vague and it is quite uncertain how trial courts will interpret and apply them to different cases. Both proposed anti-double-dipping amendments give wide discretion to the trial court to consider the issue without much guidance. It may very well be that implementation of the proposed anti-double dipping legislation ends up leaving the party who accepts the community property business whose value includes goodwill better off financially at the expense of the other spouse than if the community property asset was just sold and everyone moved on to new jobs or businesses. Insulating the income from income-producing property acquired in a divorce from consideration in determining permanent spousal support turns a party who today would be double-dipped into a party with a “magic” property asset that is immune from being used to determine the appropriate level of permanent spousal support. That is just as bad as double-dipping—or, maybe, worse because the supported party is typically going to be the needier party and can less afford the new injustice of the anti-double-dip.

In order to avoid double dipping, the income available for spousal support should be adjusted by excluding business income other than the reasonable compensation component of the capitalization of excess earnings method for a reasonable period of time. The cash flow analysis prepared by the forensic accountant should include income available for permanent spousal support both with and without the business income. This will allow the trial court to focus on the impact of double-dipping on permanent spousal support. Given the exposure to double- and triple-dipping, there may be economic feasibility in appealing a trial court’s decision to permit double-dipping and asking the appellate court to prohibit double-dipping in the context of division of a small business.

Most remedies proposed to abolish double-dipping tend to push the pendulum not to the middle but to the other side.

Steve S. Zand is a certified family law specialist and a professor of law at the University of West Los Angeles, School of Law.
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