2012 Guide to Investigative Services

Los Angeles Lawyer

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As first-year law students, we learned how to “Shepardize” cases using the heavy Shepard’s citators. If we wanted to do a word search, we made an appointment to use a Lexis terminal that was then about the size of a large desk. Even with the word-search capability of Lexis, legal research often resulted in multiple stacks of casebooks that even the tallest law student could hide behind.

After the research was completed, the task of writing a moot court brief began. This entailed pages and pages of handwritten text that were sometimes written and rewritten, all pen to paper. Once the final draft was achieved, those students who could afford to hired a typing service, and those who were not so fortunate (myself included) typed the brief themselves. I always had an bottle of whiteout or correction tape on hand, because my typewriter did not have a self-correcting feature.

When I started my first job with a federal agency, I had unlimited access to a Lexis terminal. Although I still used casebooks and Shepard’s citators, the ability to use search terms to find cases was a huge time saver. I still hand-wrote briefs, but our office had a “word processing center.” What a concept: I could review a typed version of my handwritten brief, make changes, and have the corrections made in minutes!

Upon entering private practice in the late 1980s, I was introduced to dictating. I dictated briefs of all lengths, after which my secretary typed my dictation into a Mag Card computer. Soon our firm had computers for every attorney. Eventually, Windows Outlook was installed, giving us e-mail, and then the attorneys were trained to use WordPerfect. Fax machines, laptops, cell phones, Blackberries, and smart phones followed in ensuing years.

Technology has fundamentally changed the legal profession. Legal research is no longer done in libraries but rather at our desks. Document production is now reduced to CDs, thumb drives, or even digital delivery. A firm no longer stores documents in a warehouse, although some of us are still in transition. “Cloud-based storage” is now available to preserve high volumes of paperwork, converting the information into a digital format. We now have the ability to communicate instantaneously from literally anyplace on the globe. I was recently reminded of this when I received a call on a new case from a local professional. She said the client wanted to speak to me as soon as possible, but was traveling in central China. Within 30 minutes, I was having a conversation with the new client in China.

We have gone from computers that filled rooms in the 1960s to personal box computers in the 1990s. Computers were further reduced to laptops that we could carry in briefcases and desktop computers that included the computer and monitor all in one unit. The laptop is now further shrunk to the touchscreen tablet.

The nagging question is whether all these technological advances have assisted us in our daily law practices. Are we more efficient? Are we able to provide better service to our clients? Have our jobs become easier? The answer to all of these questions is clearly a matter of opinion, but I know one thing for sure, when it comes to technology, I never hear any lawyer of any age refer to the “good ole days.”
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Profound Changes in the Practice of Law Lie Ahead

AS I CONSIDER THE PRIORITIES for my coming 12 months as president of the Los Angeles County Bar Association, I cannot help but be struck by the realization that we, indeed, live in interesting times. Perhaps more than at any time in my professional career, new developments in the profession and judicial system are likely to cause profound changes in the practice of law. Three matters stand out:

1) Continued cuts to court budgets are greatly affecting the ability of our local courts to provide meaningful access to justice to all citizens. The same economic difficulties in the state budget have caused reductions in financial support for legal service organizations at a time when the numbers of people who need those services but cannot afford them is skyrocketing. That reduction, with promised supplements and savings had already reduced the spending in Los Angeles by $70 million, and the staff reductions in the last few months translate into a $30 million reduction. That reduction, with promised supplements and spending part of the court's reserves, would balance the court's budget until the 2013-14 fiscal year, based on the governor’s January 2012 draft budget, which contained no new cuts to the judiciary.

In May, however, the governor submitted a revised budget that totally changed the game. It contained a $544 million cut in general fund allocations for the trial courts. Of that, $419 million is described as a one-time cut, and $125 million is an additional ongoing cut. Those cuts are to be offset by diverting construction money and spending essentially all the trial court reserves, but it is likely that the LASC will need to reduce spending further for 2012-13.

While the judicial branch is still trying to sort out exactly how this will be accomplished if the legislature approves the governor's budget, it is already not the same court that it was just a few years ago.

2) The same economic difficulties in the state budget have caused reductions in financial support for the judicial branch has been reduced by $653 million through fiscal year 2011-12. Of that amount almost $615 million has come from trial court funding—approximately 30 percent of the 2007-08 budgeted level. Because funds from other sources (e.g., construction) were shifted and other revenues (e.g., new fees and fines) were created and many trial courts had reserves, the trial courts have yet to “operationalize” the full 30 percent in cuts from their budgets. For example, the LASC’s share of the $615 million is approximately $200 million. Prior cuts and savings had already reduced the spending in Los Angeles by $70 million, and the staff reductions in the last few months translate into a $30 million reduction. That reduction, with promised supplements and spending part of the court’s reserves, would balance the court’s budget until the 2013-14 fiscal year, based on the governor’s January 2012 draft budget, which contained no new cuts to the judiciary.

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While the judicial branch is still trying to sort out exactly how this will be accomplished if the legislature approves the governor’s bud-

3) Law schools are graduating almost twice as many new lawyers as there are new jobs for lawyers. That means a lot of new lawyers will be looking for work.

My view has always been that LACBA’s core missions are to serve the profession and the public’s access to a fair and impartial justice system. It is hard for me to imagine issues that implicate LACBA’s missions more than fundamental changes in the courts, the legal services crisis, and jobs for lawyers. Those issues demand the attention of the entire bar, and LACBA will be a leader in addressing them. Part of my role, as I see it, is to use the bully pulpit of my position to make our legal community aware of these issues.

Changes in our Courts

In mid-May, the Los Angeles Superior Court stopped providing court reporters for civil trials, and effective the beginning of this fiscal year, July 1, 2012, court reporters are available only two days a week for law and motion. In addition, the court eliminated more than 350 staff positions and closed more than 50 courtrooms. Delays and frustration levels among staff, lawyers, and litigants are rapidly rising. It is already not the same court that it was just a few years ago.

How did this happen? Starting with the economic downturn in 2008, support from the California General Fund for the judicial branch has been reduced by $653 million through fiscal year 2011-12. Of that amount almost $615 million has come from trial court funding—approximately 30 percent of the 2007-08 budgeted level. Because funds from other sources (e.g., construction) were shifted and other revenues (e.g., new fees and fines) were created and many trial courts had reserves, the trial courts have yet to “operationalize” the full 30 percent in cuts from their budgets. For example, the LASC’s share of the $615 million is approximately $200 million. Prior cuts and savings had already reduced the spending in Los Angeles by $70 million, and the staff reductions in the last few months translate into a $30 million reduction. That reduction, with promised supplements and spending part of the court’s reserves, would balance the court’s budget until the 2013-14 fiscal year, based on the governor’s January 2012 draft budget, which contained no new cuts to the judiciary.

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get, one thing is clear: LASC’s share of the $125 million additional cut is about $40 million, and about $30 million in reserves would no longer be available for 2013-14. Those two items alone would require more than twice the cuts just made—involving the closure of well over 100 courtrooms. Even closing all the civil courtrooms in Los Angeles would reduce expenses by less than $50 million.

At LACBA, we are committed to doing everything we can to allow the courts to continue to function. Our efforts will continue to focus on providing support for efforts to preserve and increase sources of funding for the courts and to assist the courts in finding ways to continue to resolve cases with fewer resources. It is very clear that the 2013-14 fiscal year will be catastrophic for justice in California if we cannot obtain considerable restoration of budget cuts.

Incoming LACBA Vice President Paul Kiesel has been cochair of the statewide Open Courts Coalition, a bipartisan group of plaintiff and defense attorneys who have been working to raise awareness in the legislature of the need for adequate funding for the courts. LACBA’s ad hoc committee on open courts has supported the Open Courts Coalition’s activities and has helped to disseminate information to affiliated bars and other local bar associations and legal service providers. This past year, outgoing LACBA President Eric Webber wrote and spoke in support of adequate funding for the courts on numerous occasions, and I plan to continue those efforts, if not increase them.

LACBA’s relations with the Superior Court leadership have never

It is hard for me to imagine issues that implicate LACBA’s missions

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crisis, and jobs for lawyers.

Richard J. Burdge Jr. is the 2012-13 president of the Los Angeles County Bar Association. He can be reached at richard@richardburdgelaw.com.
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been better—and not just because my wife is the presiding judge. Over the past few years our sections have worked creatively to assist the court in developing new procedures and proposing legislative and rule reforms to increase efficiencies in general civil and family law cases. Our members participated in the CRASH settlement program that successfully resolved a significant number of employment cases. We plan to continue those types of efforts and find new ways to make the court more efficient, such as working toward an electronic filing system for the LASC. We will be looking for help and input from the relevant sections and our members to support these efforts. If you have suggestions, please let me know.

Support for Legal Services Organizations

The prolonged economic downturn is also adversely affecting access to justice for the disadvantaged. Many traditional sources of funding for legal services have shrunk or dried up. With bank deposits earning little or no interest, IOLTA funds have experienced a dramatic and substantial decrease. Governmental funding for legal services is an easy target for those who are seeking to cut government spending. So as law firms have tightened their belts to survive the economic downturn, it is important that they continue to support pro bono service, a core obligation of the profession. As an officer of LACBA, I see the tremendous effort that our members have given to support LACBA’s own pro bono projects, including the Domestic Violence Project and the Immigration Legal Assistance Project, and, as a member of the Board of Public Counsel, I see firsthand how many of our local firms are sustaining their support for pro bono efforts—but we need to provide more.

At LACBA, we are continuing to help our members fulfill their personal obligations to perform pro bono service. Our newly appointed pro bono coordinator, Laurie Aronoff, is creating a registry in which members will be able to state the time commitments that they can make. LACBA will further help by finding appropriate opportunities at either one of LACBA’s pro bono programs or at a local legal services organization. Under the leadership of Susan Sullivan and Noah Graff, the Board of the Los Angeles County Bar Foundation has increased the Foundation’s commitment to support LACBA’s Domestic Violence and Immigration Projects, as well as other worthy legal service organizations in the community. They will be asking you to support the Foundation, and I commend it to you to consider as one of your charitable contributions.

We are also excited about the work of the new Armed Forces Committee (AFC) that was created under the leadership of Alan Steinbrecher and Eric Webber. This November it will hold LACBA’s first Armed Forces Ball to raise funds to help LACBA provide representation for our many veterans who need legal services. Working with Public Counsel, LACBA will help to support programs at the Veterans Affairs facilities in Westwood, and the AFC will help to recruit volunteers to staff them. We are grateful that many of the leaders of the committee have JAG Corps experience that they can bring to bear on some of the problems facing our veterans.

Helping Lawyers Find Work

With law schools graduating almost twice as many new lawyers this year as there are traditional jobs for lawyers, LACBA is compelled to address joblessness among recent graduates. Fortunately, we have services to offer. An often overlooked benefit of LACBA membership is its online employment bulletin board, where lawyers can look for jobs and prospective employers can look to find lawyers. This coming year we plan to devote more resources to enhance this benefit for our legal community.

Some of these new lawyers will have no choice but to open their own offices. As someone who started his own law office just last year, I know that even an experienced lawyer can feel lost in completing all the tasks necessary to do so. Working with other members who have started their own offices recently, we will create an online resource for LACBA members that not only contains a checklist of things that need to be done to start an office but also links to many of the member benefits that LACBA provides to fill new lawyer needs. Much of this information is already available on our Web site, but my goal is to consolidate this information on an easy-to-find Web page.

In the past, LACBA has hosted job fairs that provide an opportunity for lawyers seeking work to make contact with people who need to hire lawyers. Working with our sections and affiliated bar associations, we hope to have one or more such opportunities again this year.

And of course, there is the ongoing work of our 26 sections and 27 committees to serve the bar and the community. If you receive this magazine, you are already a member, and I thank you for being a member of LACBA. But if we had more members, we would have greater resources and clout to address these important tasks facing the profession. Please consider asking just one colleague to join. The membership dues are really not so much money and the discounts for CLE programs alone will pay for the membership. They can join online at www.lacba.org. Working together, we can make our way through this difficult period—hopefully to less interesting times. ■
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Carrying a Great 80-Year Tradition Forward with the Barristers

FOR OVER 80 YEARS, Los Angeles County Bar Association Barristers Section has served the professional and social interests of new and young attorneys in Los Angeles County. As president of the Barristers for the year ending June 2013, I am proud and honored to serve in a role that has been filled by some of the most prominent leaders in the Los Angeles legal community. More important, I would like to welcome new and young attorneys to join the Barristers and to contact me to discuss how you can join us in fostering fun professional development.

Even though the Barristers has a considerable history as a reputable professional association, I am often asked what it is and what it does. While it would take much more than a page to detail the contributions that the Barristers has made to the Los Angeles County legal community, I will venture a synopsis. Nearly 4,000 strong, the Barristers consists of attorneys and law students who are practicing or interested in practicing in Los Angeles County and who are under 36 years of age or who have less than five years in practice. Members of the Barristers plan and participate in enjoyable professional development in Los Angeles. Judging from past Barristers leaders, I can also safely say that we are the future leaders of the Los Angeles County legal community.

What we do is plan and participate in programs and events that provide new, young, and aspiring attorneys opportunities for networking, pro bono and community contribution, CLE, government and political relations, connecting with judges, being published, and addressing issues affecting the new and young members of LACBA. We do this with an emphasis on making our events fun and rewarding for those who plan and participate in them.

In just the last year the Barristers planned and held job-acquisition and debt-relief planning events to address the effects of the economic downturn upon new and young attorneys. In addition, we held charity and networking mixers (some featuring prominent local politicians discussing current legal issues), provided pro bono legal services to those without means to retain counsel, and hosted numerous mixers that helped hundreds of our members mingle and decompress after work.

The Barristers has been successful at endeavors such as these for over 80 years because of the new, young, and aspiring attorneys who dedicate countless extracurricular hours to planning and participating in these events. We thrive upon the youthful fervor and innovative ideas of our members and leaders. Without a doubt, our success is also a product of those who support new, young, and aspiring attorneys in developing as leaders in the legal community. These people include LACBA’s leadership and staff, judges, partners, supervising attorneys, and senior associates who offer their resources and time to help us participate in building upon the Barristers tradition of excellence in professional development and leadership.

On behalf of the Barristers Executive Committee and membership, I deeply thank those supporters for their invaluable contributions and dedication to Barristers success.

If you are interested in being part of Barristers—as a leader on its executive committee, as a participating member, or working with us to sponsor or plan an event—or even if you just have questions about doing so, I invite you to contact me.

To get a sense of what opportunities for participation we offer, here is a list of our committees with brief descriptions of what they do:

- Bench and Bar connects the courts to the newer members of the bar.
- Law Student Outreach connects young attorneys and law students and ensures that Barristers programming is relevant to law students.
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Navigating Lender Liability in the Wake of Zigner

LAST SEPTEMBER IN ORANGE COUNTY, Pacific Mercantile Bank was dealt a crushing blow. A jury not only found the bank liable to its customer and borrower Mark Zigner for the tort of conversion but also awarded Zigner sizable punitive damages.\(^5\) Zigner’s executed line of credit agreements with the bank authorized it, in the event of a default, to set off the outstanding debt by pulling funds from Zigner’s other various accounts. Without notice, the bank exercised this remedy when Zigner could not pay down the line of credit. The loss of funds from Zigner’s accounts swiftly resulted in default on many of his other financial obligations, which left Zigner with a multitude of liens and virtually no creditworthiness. Zigner responded by filing suit against the bank, alleging tortious conversion.

Zigner’s line of credit with the bank had matured and, due to tough economic times, he was unable to pay. Pacific Mercantile Bank exercised its remedies in a manner consistent with the signed borrowing agreements. The story’s surprise is its ending—$250,000 in compensatory damages and $1.8 million in punitive damages.\(^2\)

**Mitsui and the Duty of Care**

The case may seem startling, but a historical review makes it less so. Since a 1989 case, *Mitsui Manufacturers Bank v. Superior Court*,\(^4\) it has been generally accepted that lending and banking institutions owe no legal duty to their borrowers and customers, severely limiting the potential for tort liability arising from such relationships. However, the judiciary has steadily eroded this principle.

*Mitsui* established the general principle that banks owe no duty of care to their borrowers or customers. The case concerns an action by Mitsu against its borrower for payment of the borrower’s defaulted loan and the subsequent cross-action by the borrower against Mitsu for tortiously breaching the implied covenant of good faith and fair dealing by refusing to renew the loan in a manner consistent with some alleged oral representations. Mitsui moved for summary judgment on the action and cross-action, arguing that, as a matter of law, the relationship between a lending institution and its borrower is insufficient to support a tort claim. No breach of legal duty occurred because none is formed by a lender-borrower relationship.\(^4\)

The appellate court agreed, reversing the denial of summary judgment and issuing a writ of mandate to enter judgment against the borrower.\(^5\) Relying heavily on the California Supreme Court’s *Foley v. Interactive Data Corporation*,\(^6\) the *Mitsui* court concluded that the lender-borrower relationship lacked the necessary hallmarks to support a cause of action sounding in tort.\(^7\) The majority reasoned that a lender-borrower transaction is merely an “ordinary arms-length commercial transaction between two parties of equal bargaining strength” that, when breached, are “adequately remedied by ordinary contract damages.”\(^8\) Hence, tort liability need not be extended into the realm.

*Mitsui’s* holding appears to create a general rule that characterizes the lender-borrower relationship as legally insufficient, in and of itself, to support the imposition of tort damages for breach of a legal duty. This raises a question at the heart of tort law: Can a lender-borrower relationship transform into something substantial enough to support a borrower’s tort claims? While the *Mitsui* decision offers a negative answer, several post-*Mitsui* decisions have eroded that negative and established a rubric for analyzing whether and when a legal duty sufficient to support a claim in tort arises from a specific lender-borrower relationship.

Only two years after *Mitsui*, the court in *Nymark v. Heart Federal Savings and Loan Association*\(^9\) reconciled *Mitsui’s* holding with the general principles of tort by fashioning a bright-line approach tailored to banking and lending. In *Nymark*, a borrower alleged that the lending institution was negligent in preparing an appraisal of the borrower’s loan security.\(^10\) The appraisal had been performed for the primary purpose of protecting the lender’s interest in the collateral.\(^11\) In assessing whether the borrower’s negligence claim survived summary judgment, the *Nymark* court agreed that “a lender of money owes no duty of care to a borrower,” but only if the “financial institution [was] acting within the scope of its conventional activities as a lender.”\(^12\)

In affirming summary judgment against the borrower, the *Nymark* court noted that the activities of the lender that were subject to the borrower’s negligence claims were limited to only the processing, securing and extending of the underlying loan.\(^13\) As these activities fulfilled the “traditional” lending role, no duty of care was further imposed. “Accordingly, in preparing the appraisal, defendant [lender] was acting in its conventional role as a lender of money to ascertain the sufficiency of the collateral as security for the loan.”\(^14\)

However, the court went on to observe that the borrower’s complaint failed to allege “that the appraisal was intended to induce plaintiff [borrower] to enter into the loan transaction or to assure him that his collateral was sound.” Such a statement strongly implies that, if an intent to induce is demonstrated, the lender may be subject to a legal duty of due care, notwithstanding the traditional lending routine it performed by the appraisal.\(^15\) Accordingly, it follows that even when acting in a traditional role, depending on the alleged facts and evidence, the bank or lending institution may still be found to have owed to its borrower or customer a legal duty of care sufficient to support a tort claim.

Thus, to provide further guidance for ascertaining whether a bank has exceeded the scope of its conventional activities in the context of the alleged facts of a borrower’s tort claim, the *Nymark* court affirmed the application of the general test in California for legal duty to relationships arising between banking and lending institutions and their customers.\(^16\) The test “involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant’s conduct and the injury suffered, [5] the moral blame attached to the defendant’s conduct, and [6] the policy of preventing future harm.”\(^17\)

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Since Nymark, many cases have permitted banking customers and borrowers to proceed against bank or lending institutions on theories of tort, often applying the Nymark test to determine when the institution has acted beyond its conventional role, and in some instances expressly limiting the reach of Mitsui.

**Holcomb Limits Mitsui**

One recent example is *Holcomb v. Wells Fargo Bank, N.A.* In *Holcomb*, a bank customer brought several tort causes of action, including negligence and negligent misrepresentation, against his banking institution and one of its officers. The claims arose from statements allegedly made by the officer regarding the availability of deposited funds. Purportedly, the statements induced the customer’s detrimental reliance, causing the customer to write checks against deposit funds still subject to hold and not yet cleared. The trial court sustained demurrers to the negligent misrepresentation and negligence causes of action because it interpreted case law to prohibit tort causes of action brought by customers against banks.

In reversing the trial court, the *Holcomb* court severely narrowed the reach of *Mitsui*’s precedent by expressly stating that *Mitsui* did not stand for such a proposition. In fact, the *Holcomb* opinion goes so far as to declare *Mitsui*’s holding absolutely inapplicable to negligence claims not arising from the implied covenant of good faith and fair dealing. In essence, the *Holcomb* decision virtually bulldozed the barrier imposed by *Mitsui* and opened a passage for all tort claims brought by borrowers and banking customers against their lending and banking institutions, with the single exception of tortious breach of the implied covenant of good faith and fair dealing. Ultimately, the *Holcomb* court found that the complaint at issue indeed stated a cause of action for negligent misrepresentation because it did not take issue with the bank’s right to charge back the checks but rather with the statements made by the bank branch manager that allegedly induced the writing of the checks. On those grounds, the complaint against the bank survived.

Later cases have similarly eroded *Mitsui*’s potential for absolute preclusion of tort liability in the lending and banking sphere by applying the Nymark test to dispositive motions while simultaneously and emphatically rejecting the argument that “a lender never owes a duty of care to a borrower.” In applying the Nymark test, the *Sullivan v. J.P. Morgan Chase Bank, N.A.* borrowers brought an action against their lender alleging that it, in extending a loan on the borrowers’ home, directed them into an unaffordable mortgage by stating it “was the best on the market” and subsequently misrepresented that permanent modifications would be made when the borrowers’ requested a reduction in their monthly mortgage payment. In bringing a motion to dismiss the borrower’s complaint for failure to state a claim, the bank argued that the borrowers could not prevail on their negligence cause of action because, as a matter of law, the bank did not owe its borrowers any duty of care.

In applying the Nymark test, the *Sullivan* court outlined the specific contentions of the plaintiffs that 1) they were not qualified for the mortgage amount by prevailing industry standards, 2) the mortgage was “not in their best interests” based upon their income and the property’s true market value, and 3) the mortgage contained excessive fees and monthly payments that eclipsed the ability of the plaintiffs to pay. The complaint also alleged that the bank, in an effort to finalize the mortgage, appraised the property’s value too highly, falsified the plaintiffs’ actual
income, and misinformed the plaintiffs about the loan modification process. Such allegations, which reflect the common frustration of an entire population of foreclosed mortgagors, appears on its face ripe for demurrer or, depending on the forum, a motion to dismiss for failure to state a claim.

In the end, the Sullivan court cited a lack of authority supporting the imposition of duty of care, but only with respect to the bank’s alleged misinforming the plaintiffs about the mortgage modification process. Citing a very recent prior precedent, the Sullivan court went on to find that the Nymark factors did in fact establish a duty of care not to overstate property value and income on a loan application that resulted in the loss of opportunity to obtain an affordable loan elsewhere. In so finding, the Sullivan court shifted the burden to defendant bank. As the court noted, the bank “has not shown plaintiffs’ allegations that it falsified their income and the subject property’s value during the loan application process fall within its traditional role as a money lender.” On these grounds, the borrowers’ negligence claims were held to have been stated by the complaint, which survived the pleading stage.

Sullivan highlights the consequence of Mitsui’s weakening precedent for litigants in the banking and lending industry. Banks and lending institutions must be counseled and advised of the Nymark factors so that they may protect their practices and actions from the tort claims of disgruntled customers and borrowers. As demonstrated by Zigner, this is true even in cases in which authorization for a potentially tortious act appears to be granted by the potential future plaintiff. From the perspective of plaintiffs and their counsel, comprehensive understanding of the Nymark factors in artfully crafting a complaint could provide substantially stronger leverage for more favorable settlement terms.

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1 Zigner v. Pacific Mercantile Bank, Orange County Case No. 30-2010-00337433 (filed Jan. 21, 2010).
2 The punitive damages award was later reduced by the court to $950,000.
4 Id. at 729.
5 Id. at 733.
6 Foley v. Interactive Data Corp., 47 Cal. 3d 654 (1988) (No duty supporting tort liability exists in employment relationships.).
7 Mitsui, 212 Cal. App. 3d at 729-33.
8 Id. at 731.
10 Id. at 1093.
11 Id. at 1094, 1096.
13 Id. at 1096-97.
14 Id. at 1097.
15 Id. at 1096-97.
16 Id. at 1098-1100 (citing Biakanja v. Irving, 49 Cal. 2d 647, 650 (1958)).
17 Id. at 1098. (quoting Connor v. Great Western Sav. & Loan Ass’n, 49 Cal. 2d 850, 865 (1968) (quoting Biakanja v. Irving, 49 Cal. 2d 647, 650 (1958))).
19 Id. at 493-95.
20 Id.
21 Id. at 496 (trial court’s holding relied on Mitsui).
22 Id.
23 Id. at 498.
25 Kentucky Fried Chicken of Cal., Inc. v. Superior Court, 14 Cal. 4th 814, 819 (1997) (The tort element of legal duty is a question of law for the court.).
27 Id. at 1093.
28 Id. at 1094.
29 Id.
30 Id.
31 Id. at 1094.
32 Id.
33 Id.
34 Id.

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LAWSUITS ARE OFTEN WON OR LOST on the basis of expert witness testimony. The cases in which experts testify range from the very ordinary (such as traffic collisions) to truly extraordinary (such as the competitive effects of a proposed merger). Expert witnesses are plentiful, and the best of them distill complex material and connect with the jury. In criminal cases at least, jurors may suffer from the “CSI syndrome” and conclude from the exaggerated role of forensic science in television police dramas that clear scientific or technological answers exist for a trial’s factual questions. Prosecutors and civil lawyers alike lament that this growing misconception has unduly raised their burdens of proof.

But hiring an expert is not enough to resolve this issue. Counsel must carefully vet the expert and see him or her through discovery, and, in particular, deposition. Parties cannot simply rely on expert witnesses to win cases. Trial lawyers need to be adept at assessing the weight of expert testimony and assuring that the testimony clears evidentiary hurdles. To a large degree, the success of a lawyer in meeting these challenges will depend on how effectively the lawyer conducts the expert witness deposition. Both the novice and the seasoned practitioner benefit from staying abreast of the constantly evolving rules of practice and procedure relating to expert witness depositions and discovery.

Timing of Expert Discovery

Counsel must understand the procedures for expert discovery. Because this phase usually occurs close to trial, there is little room for error on counsel’s part, and the federal and state rules differ.

Under the federal rules, once a party has identified an affirmative or rebuttal expert and issued the required expert report (90 days before trial for affirmative experts and 30 days for rebuttal experts), any party may take that expert witness’s deposition. In California, by contrast, expert disclosures are not mandatory, and written expert witness reports tend to be the exception rather than the rule. Under the Code of Civil Procedure, a party must formally demand expert discovery, using precise terminology and arcane procedures. Specifically, a party must propound a formal demand for exchange of expert witness information in order to obtain discovery of expert witness identities and the subject matter of testimony. This demand also triggers the propounding party’s obligation to make reciprocal disclosures, whether the other party has issued its own request or not. The expert demand must be made at least 10 days after the initial trial date is set or 70 days before the trial date, whichever is later. In federal court, expert discovery may occur relatively early in a case, but in California there is no statutory right to serve a demand for expert witness information until the trial date is set.

The expert witness information itself must be exchanged 20 days after service of the demand or 50 days before trial, whichever is later. By contrast, rebuttal experts are disclosed via supplemental expert witness lists 20 days after the normal exchange of information occurs. Even more strange, in California the expert demand may, but need not, include a request for “the mutual and simultaneous production for inspection and copying of all discoverable reports and writings.” Although standard forms used by California counsel usually contain such requests, there is no obligation on the part of a designated expert witness to prepare and submit a written report. This anomaly of California law heightens the importance of the expert witness deposition, which is quite often the only avenue for opposing counsel to obtain detailed information about the expert’s background and opinions.

California’s deadlines for taking expert depositions and discovery also vary significantly from the federal rules. Expert depositions are exempted from the normal “discovery cutoff” 30 days before trial. Parties may depose experts from the time they are identified up to 15 days before trial, and a motion to enforce discovery regarding expert witness testimony may be filed up to 10 days before trial, including the date they are identified. In federal court, expert depositions are generally limited to the same time period as the trial itself.

How to Prepare for and Manage the Depositions of Expert Witnesses

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depositions may be heard up to 10 days before trial, instead of the normal cutoff in existence for other, nonexpert discovery motions.

Counsel should be aware that California law does grant the trial judge one avenue for requiring expert witnesses to sit for deposition earlier than the expert designation date. In one case, St. Mary Medical Center v. Superior Court, the court of appeal determined that “under the proper circumstances, the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication where there is a legitimate question regarding the foundation of the opinion of the expert.” This case remains good law but seldom is invoked. Early depositions remain relatively rare in California practice. Regardless, if an expert declaration in summary judgment papers appears vulnerable to attack, counsel should consider immediately demanding a deposition of the declarant. This way, counsel may obtain evidence that can result in the striking of the expert declaration for lack of foundation.

Preparing the Expert for Deposition

The starting point for defending expert depositions is for the lawyer to understand his or her role: to identify with precision what the expert’s specific opinions are and to prepare the expert to explain those opinions without either being rattled or committing substantive errors. This may sound easy, but like all witnesses, experts—even the most experienced and highly paid ones—require careful preparation.

Most attorneys, especially big-firm attorneys, will get a crack at defending an expert long before they are entrusted with taking the expert’s deposition. Besides, defending—or preparing—the expert is probably the more important skill, as expert failures in discovery are more often the result of inadequate preparation than cunning examination. Experts know what they are there to do, and are usually already very good at it. Nearly always, highly paid experts, who often charge $500 an hour or more, have testified many times in complex and high-profile disputes and have been deposed at least as many times. They do not need an attorney to tell them how to do their job or to teach them about the substance of their field, even if an attorney could.

Rather than teach the expert about his or her area of expertise, a lawyer should help the expert with the task of being a witness. As with a lay witness, counsel should remind the expert that the most important rule of testing is to tell the truth. This rule should be obvious to any lawyer, and experts are no exception. Problems relating to an expert’s qualifications, methodology, or physical appearance are exacerbated if the expert tries to play cat-and-mouse with the examiner or, worse yet, shades the truth.

Counsel should also explain the deposition process to the expert, even if it seems unnecessary at first. Just as with a lay witness, counsel should cover logistics, up to and including where the expert will sit at the table, and answer any questions about the deposition. If the deposition will be videotaped, counsel should remind the expert especially to be cautious about tone and facial expressions, as jurors commonly are affected by such matters, however unimportant they may be to an intellectual titan. Further, in this age of YouTube, counsel should consider obtaining a protective order to prevent the video deposition from being posted on the Internet. Acrimonious litigants will occasionally edit and post video depositions to harass and embarrass witnesses, even experts. Although it is possible to seek relief after a video deposition has been made public, the damage already done may be irreversible. Opposing counsel will usually agree to a protective order, since their own witnesses may be protected thereby as well.

Preparing an expert witness includes the normal advice counsel would give to any witness. The expert must listen to the question asked and answer only that question. Remind the expert not to guess, to go slowly enough that the court reporter does not become annoyed, and to speak in firm, assured, but not-too-eager tones. Opposing counsel will surely pose a few loaded, vague, misleading, or argumentative questions. If the expert cannot answer a question because some critical factual predicate or assumption is missing, the expert should either simply state that he or she is unable to answer the question as posed or supply the missing essential information needed to answer the question and answer the question as modified. What the expert must be careful never to do is to answer the question that he or she thinks the questioner meant to ask, or to answer the question that he or she thinks the questioner is about to but has not yet asked.

Before getting into the substance of the expert’s testimony, counsel should ask if he or she has any questions, and before going into deposition, counsel should ask the witness whether there is anything counsel should know that the expert has not already told him or her. As witnesses begin to concentrate before giving testimony, they may remember something that they forgot to mention before. The expert may remember an article that he or she wrote years earlier that does not jibe with the expert’s current testimony. The expert may remember a case in which he or she testified in which the client lost or a case from which the expert was excluded or disqualified. The expert may remember a learned treatise that contradicts his or her opinion. All such information will be crucial to the expert’s credibility and to whether the judge or jury credits his or her opinions at trial. It is better to ask early than to find out when it is too late.

Especially with videotaped depositions, counsel should remind the expert about the importance of personal appearance and demeanor. Live testimony is the focus of trial. Video depositions are essentially trial proceedings, because some and perhaps all of the deposition may be admissible at trial. Because truth at trial is always subjective, the witness’s credibility is the paramount concern for the trial lawyer. In an excellent trial treatise, author and lawyer R. Shane Read argues that jurors form an impression within minutes, and sometimes seconds, of seeing someone new; they also tend to absorb subsequent information in accordance with those powerful first impressions.

Jurors find it hard to side with people they dislike, whether those people are rude, gruff, arrogant, or unmindful of courtroom decorum. The best witnesses are likeable and charismatic. Hence, in preparing an expert witness, counsel should resist the temptation to jump into the details of the expert’s opinions and instead take the time to refocus the expert on the importance of the manner in which the expert comes across in testifying. Counsel should be mindful that many experts are impatient by nature, sometimes prone to lose their temper when their ideas are doubted by nonexperts. But, in the end, if an expert loses his or her temper in deposition, the client pays the price.

The Expert’s Report

Another step in trial preparation is to review the expert’s report with the expert. By the time the expert’s report has been disclosed, the expert already should know exactly what opinions he or she is offering in the case, and the underlying methodology, documents, and facts supporting those opinions. The expert report is the road map for the expert’s deposition, and the preparation can closely follow the report. Reviewing the report with the expert will enable counsel to determine the extent to which the expert is conversant with the facts.

In theory, by the time the expert has been retained, counsel should already be confident that the expert can testify competently and credibly about the specific opinions he or she will give in the case and the underlying reasons or methodologies supporting those opinions.

Federal Rule 26(a)(2), which was significantly amended in 2010, provides that the
report must contain:
• A complete statement of all opinions the witness will express and the basis and reasons for them.
• The facts or data considered by the witness in forming them.
• Any exhibits that will be used to summarize or support them.
• The witness’s qualifications, including a list of all publications authored in the previous 10 years.
• A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.
• A statement of the compensation to be paid for the study and testimony in the case.13

In California, the Code of Civil Procedure deals with the expert’s report:
If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings, all parties shall produce and exchange…all discoverable reports and writings…14

Additionally, the Code of Civil Procedure addresses “supplemental expert witness lists,” or rebuttal experts. The statute does not separate the basic disclosures from the expert report but rather requires late-disclosed rebuttal experts to provide both at the time they are identified to the other parties.15

Experts and Privilege
The days of waiting to designate an expert until the eve of trial are over. Experts must be hired much earlier in the life of a case, especially if they are to be properly vetted and prepared. Those who wait until the last minute often make the mistake of designating their clients or a client’s employee as testifying experts, for the sake of convenience or to save litigation funds. But this designation is extremely risky, as it may lead to a waiver of the attorney-client privilege as soon as any testimony is presented.16 Generally, since an expert witness is not a client of the trial counsel, no privilege protects their communications. This rule has been extended to situations in which the designated expert happens to be the client or an employee of the client.17 Many lawyers are not aware of this trap.

Counsel must also discuss the expert’s prior testimony in other cases and, if possible, obtain transcripts of that prior testimony. This relates to the expert’s report, since the expert is required to include cases in which he or she has testified in the last four years. At trial, the court will surely permit the other party to inquire as to any prior testimony by the expert in other cases involving similar issues.18

Counsel can either trust experts who say that their testimony in prior cases does not undermine their opinions in the instant case, or counsel may review the transcripts of the prior testimony to see what they reveal. If there is any prospect that the prior testimony may undercut the current opinion, counsel should obtain the transcript to be safe.

Before the advent of e-mail, the Internet, and electronic document repositories, it was standard practice for professional experts to discard deposition transcripts from prior engagements. Experts did so to prevent their testimony from coming back to haunt them. Today, transcripts are readily available from a variety of sources.

Even if the prior testimony does not directly undercut the expert’s credibility in the current case or involves different legal issues, counsel should still read the transcripts to better understand the expert’s style and tendencies when testifying and to fix bad habits if necessary. The transcripts will reveal ways in which the expert’s current testimony can be improved.

Next, counsel should obtain copies of everything the expert has considered or reviewed in formulating his or her opinion. This step overlaps with the review of the expert report and is always necessitated under the Federal Rule of Civil Procedure 26(a)(2) and typically but not always under Code of Civil Procedure Section 2034.250.

Naturally, an expert’s credentials are vitally important. Indeed, that is often the only thing to which the jurors will pay attention once the court permits an expert to testify. But credentials alone are not enough. Counsel must be familiar with the factual foundation for the expert’s opinion. Counsel must be satisfied that there is sufficient factual support for the opinion and, in the language of Federal Rules of Evidence, that “the witness has applied the principles and methods reliably to the facts of the case.”19

From the perspective of the examiner, the expert deposition may be conceived in terms of a physical structure, such as the tower in a game of Jenga.20 Like a player in a Jenga game, the examiner will try to remove the factual blocks that make up the structure of the expert’s opinion, hoping ultimately that once the underlying factual blocks are removed, the entire structure will topple over.

Trial consultant David Malone recommends that counsel have the expert clarify the core concepts—or pillars—supporting the expert’s opinion.21 If the challenge does not threaten the structural support for the opinion, the expert can simply testify that the challenge does not affect his or her opinion. This will help the expert from being rattled by immaterial lines of questioning and to sidestep irrelevant attacks.

Counsel cannot fully understand the strengths and weaknesses of the expert’s testimony without assessing the underlying factual support. Even if collateral questioning in deposition does not technically undermine the expert’s opinion, counsel cannot hope to effectively defuse such questioning on redirect without mastery of all the underlying support for the opinion.

Counsel must show the retained expert witness only those documents that counsel is prepared to show to the other side. While many young attorneys take it as an article of faith that a lawyer can hand a document to a friendly witness without that document ever becoming discoverable, because of an unspecified “privilege,” federal and California courts have squarely rejected this theory. Federal courts construe Rule of Evidence 612 (regarding refreshing a witness’s recollection) to require the production of any documents that are used in deposition preparation “to refresh memory for the purpose of testifying.”22

Among the most complex issues in deposition preparation is how to balance the need to familiarize deponents with the many technical issues in the case, specifically including documentary evidence, without creating discoverable material for the other side. This complexity derives from the tension between the protection afforded to the attorney’s strategy under the work product doctrine and the evidentiary rules requiring production of materials used to refresh the witness’s recollection. The federal rules codify the Supreme Court’s decision in Hickman v. Taylor stating that a party may not discover documents and tangible things prepared in anticipation of litigation or for trial by an attorney and his or her agents without a showing by the party seeking the discovery that it has a “substantial need” for the materials and cannot obtain them by other means without undue hardship.23

The present doctrine of refreshed recollection, codified at Federal Rule of Evidence 612, provides that materials used to refresh a witness’s recollection regarding events concerning which the witness once had knowledge but has had a lapse of memory must be produced to the other side.24 Failure to produce may result in the witness’s testimony being stricken.25

Courts have held that although selection of documents to prepare a witness implicates the attorney’s theory and mental impressions of the case—referred to as “core” work product—the doctrine must yield to the opposing party’s fundamental right to cross-examine adverse witnesses.26 This issue is illustrated by International Insurance Company v. Montrose Chemical Corporation. In this California case, two insurance companies were in litigation over indemnity obligations for hazardous waste pollution in several cites.27 The plaintiff, International Insurance, appealed a sanctions order against it for discovery abuse.
Richard Power, an independent claims adjuster, had analyzed Monsanto’s claim on International’s behalf.28 According to Montrose, his initial communication with International acknowledged coverage. At his deposition, Power was represented by International’s attorney at International’s expense.29 During the deposition it became apparent that International’s attorney had shown him documents to refresh his recollection.30 After establishing that Powers had spent one to two hours reviewing International’s documents in preparation for his deposition, Montrose asked International to produce the documents he had reviewed. International refused, and Power was a no-show on the third day of his deposition. Montrose moved to compel production of the documents that Power had reviewed.

The Second District Court of Appeal rejected International’s argument that in order to obtain production of the documents Montrose had to establish which “particular writing” the witness had used to refresh his recollection on a “particular subject” included in the witness’s actual testimony:

Evidence Code Section 771 requires the production of documents used to refresh [the witness’s] memory with respect to any matter about which he testifies, no more and no less. After testifying that he had no specific recollection about how he learned that International would pay for an attorney to represent him in these proceedings, [the witness] was asked by Montrose’s attorney whether, in preparation for the deposition, [the witness] had looked at documents to assist him in remembering events that took place in the past. [The witness] answered affirmatively, explaining that he spent one or two hours reviewing documents and that, after his review, he had a “fresher recollection of what had taken place” than he had prior to the session. [The witness] also explained that, without all of the documents in front of him, he could not recall which ones actually refreshed his recollection and which did not, and that “anything [he] looked at probably gave [him] some benefit of refreshing [his] recollection.”31

On the other hand, truly privileged documents that are shown to a client or other person covered by the attorney-client privilege do not lose their protection merely because they are used to prepare that person for his or her deposition.32

The risk of disclosure of documents used in deposition preparation is precisely why experienced lawyers commonly eschew written communications with their experts. As trial expert Michael Schwartz once said, although one must always produce discoverable material, one need not create it. Counsel can avoid doing so in one of two ways. First, counsel may choose to consult the otherwise nondisclosable documents themselves and question the witness based upon the documents’ contents, without referring the witness to the document.

Second, perhaps more commonly, counsel may decide not to exchange documents with the expert at all, other than the documents counsel plans to produce to the other side. This way, counsel may communicate orally with the expert, but discovery is narrowly circumscribed to the expert disclosures and whatever materials the expert reviewed on his or her own, independent from counsel (which are not privileged anyway), thereby limiting documentary discovery.

Note that in 2010, the federal rules were substantially amended to expand work product protection for certain types of communications between an attorney and a testifying expert. Before the amendment, Rule 26(a)(2)(B)(ii) required disclosure of “the data or other information” that the expert considered in forming his or her opinion, leading opposing counsel to insist on obtain-
ing attorney-expert communications and draft reports. The new language—“facts or data”—clarifies that the report need only include the factual materials relied upon by the expert, not communications with counsel and draft reports. The new rule protects any form of communication between an attorney and an expert except communications that 1) relate to expert compensation, 2) identify facts or data that the attorney provided and that the expert consulted in forming the opinion, or 3) identify assumptions that the attorney provided and that the expert relied upon in forming the opinion.

After counsel has reviewed the expert’s opinion in detail, counsel should consider conducting a mock cross-examination. Having already spent a great deal of time preparing his or her opinion and going through that opinion with counsel in preparation for his or her deposition, the expert may not wish to participate in so-called murder boards. However, experienced an expert is, expert and attorney will not be able to fully understand what needs more preparation without the test of a mock cross-examination.

In some instances, counsel can simply examine the expert briefly throughout the stages of preparation, asking a few tough questions at the conclusion of each stage. In other instances, however, particularly in a large and complex case in which the expert will testify for many hours or even days, a full simulated cross-examination is essential. Jury consultants or mock juries may be included in the process if sufficient dollars are involved, such as in a large class action case. The expert is being well compensated, so counsel should not let a desire to please the expert prejudice the client’s case by skipping this crucial final step.

At the Deposition
Any party may depose any designated expert, and the general rules governing depositions apply equally to experts. If the witness is well prepared, defending the deposition will be easy. The main responsibility will be to object to improper questions to preserve the record for trial and possible appeal.

The following three steps will help the client to get the most out of an expert’s deposition testimony. First, an attorney should prevent the expert from being an advocate. Advocacy is the attorney’s job, not the expert’s. Remind the expert immediately before the deposition to appear neutral and to avoid openly advocating for the client. The expert cannot be credible while favoring one side. It is counsel’s role to present the expert’s testimony by sequencing examination effectively. The witness’s role is merely to answer the questions and not try and narrate what the client’s precious resources.

Second, the attorney should get out of the way once the deposition starts. The attorney has already picked a qualified expert, who in turn has carefully considered the facts. The attorney has diligently prepared the expert for deposition, including with a grilling in a mock cross-examination. Once the deposition begins, however, the attorney will not help the expert or the client by interrupting.

Third, counsel must decide whether to cross-examine the expert. As an attorney would normally do on redirect at trial, the expert’s attorney should give the expert an opportunity to flesh out statements that may have been taken out of context or to cover additional facts that diminish the damaging testimony that the noticing party elicited.

Parties often move for summary judgment or summary adjudication based upon deficient expert testimony, especially in mass torts, products liability, Proposition 65, and large personal injury actions. Deposition testimony may be essential to create the genuine issue of material fact that are needed to avoid or overcome this type of motion and spare the client’s precious resources.

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sel and retained expert witnesses. All too often, counsel hire expert witnesses with minimal vetting or strategizing. This is risky. A good opposing lawyer can do serious damage at the expert deposition stage, and the damage may be irreversible. Knowledge of the complex rules of expert depositions and intensive preparation before the deposition can minimize, if not altogether nullify, the risks inherent in the expert deposition process.

3 CODE CIV. PROC. §§2034.010 et seq., §2034.230(a).
4 CODE CIV. PROC. §2034.220; see also CODE CIV. PROC. §2016.060.
6 CODE CIV. PROC. §2034.230(b). The deadlines are extended by 2, 5, or 10 days depending upon whether service is by express mail, regular mail, or is out of state.
7 CODE CIV. PROC. §2034.210(c).
8 CODE CIV. PROC. §2034.030. Experts disclosed on a so-called supplemental expert witness list may be deposed even beyond the deadline. CODE CIV. PROC. §2034.280(c).
10 Id. at 1540.
14 CODE CIV. PROC. §2034.270. See also CODE CIV. PROC. §2034.210(c).
15 CODE CIV. PROC. §2034.280(a).
17 Id.
19 FED. R. EVID. 702(3).
21 DAVID M. MALONE, DEPOSITION RULES 83 (2005).
22 FED. R. EVID. 5612(b).
23 FED. R. CIV. P. 26(b)(3). See generally Hickman v. Taylor, 329 U.S. 495 (1947) (information obtained or prepared by or for attorneys for use in litigation is protected from discovery under the work product doctrine).
24 FED. R. EVID. 5612.
25 EVID. CODE §771.
27 Id. at 1370.
28 Id.
29 Id.
30 Id.
31 Id. at 1372.
34 FED. R. CIV. P. 26(b)(4)(C).
THE FOURTH AMENDMENT to the U.S. Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹ It does not expressly provide for a civil remedy or criminal penalty for a violation of its provisions, but Congress, in performing its lawmaking duties under the separation of powers, has the power to provide legislative remedies that would deter intentional violations of the Fourth Amendment by federal government officers.

Since the adoption of the Bill of Rights in 1791, however, Congress has not enacted any effective civil or criminal remedy for persons who have been subjected to a violation of their Fourth Amendment rights by federal law enforcement officials. In the face of Congress’s failure to enact legislation, the Supreme Court, in United States v. Weeks, exercised its implied powers to adopt the exclusionary rule in criminal proceedings.² It prohibits the introduction of incriminating evidence seized by federal law enforcement officers in violation of the Fourth Amendment’s express prohibition of unreasonable searches and seizures. In addition, the Court, in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, exercised its implied powers and adopted a civil cause of action to compensate persons whose Fourth Amendment rights are violated by federal law enforcement officers.³

The question, however, remains whether the Supreme Court would continue to impose the exclusionary rule in criminal proceedings if Congress were to enact laws that provide restitution and statutory damages for persons whose rights are intentionally subjected to unreasonable searches and seizures. There is language in decisions of the Supreme Court since the exclusionary rule was adopted that strongly suggests that it might conclude that the rule would no longer be required if Congress were to enact statutes that provide internal dis-

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discipline, including discharge, for law enforcement officers who intentionally violate the Fourth Amendment, as well as criminal prosecution and civil actions that provide for an adequate civil remedy.

**Interpreting the Fourth Amendment**

In 1886, approximately one hundred years after the adoption of the Bill of Rights, the Supreme Court held in *Boyd v. United States* that a federal statute that required a person to produce documents based solely on a U.S. attorney’s belief that they would tend to prove an allegation made by the government violated the Fourth Amendment. The Court ruled that compelling the production of a person’s papers under such circumstances, without probable cause, was unconstitutional. Undoubtedly, because the federal statute referred solely to a noncriminal forfeiture proceeding under the revenue laws, the Court did not reach the question of whether an unreasonable search or seizure of a person’s property by a law enforcement officer was a violation of the Fourth Amendment requiring suppression of the evidence in a criminal proceeding.

Twenty-eight years after the *Boyd* decision was published, the Supreme Court did just that, holding in *Weeks v. United States* that the admission of evidence in a criminal proceeding seized from Weeks’s residence by a U.S. marshal without a search or arrest warrant was inadmissible because it violated the accused’s rights under the Fourth Amendment. The Court also held that because the Fourth Amendment is limited to the conduct of federal officers, it did not apply to evidence seized by local police officers who arrested Weeks without a warrant.7

But, as Justice Cardozo reasoned in *People v. Defore*, the exclusionary rule permits “[t]he criminal…to go free because the constable has blundered.” Moreover, it offers no protection to individuals subjected to a violation of their Fourth Amendment rights when no incriminating evidence is seized by state or federal officers. Rather, the exclusionary rule was adopted in *Weeks* “to deter deliberate, reckless, or grossly negligent [police] conduct, or in some circumstances recurring or systemic negligence.” Justice Cardozo correctly pointed out in *Defore* that the primary beneficiaries of the exclusionary rule are those defendants who go free because the evidence that connects them to a crime has been suppressed. The logic of this attempt to deter unreasonable searches by awarding the gift of freedom to the guilty appears contrary to common sense, especially in view of the fact that the Court has repeatedly conceded that the exclusionary rule fails to balance the interests of society in being protected from future criminal conduct by persons who are released solely because incriminating evidence has been suppressed. In 1949, the Court explained in *Wolf v. Colorado* that the exclusionary rule it adopted in *Weeks* “was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.” The Court summarized the issue before it in *Wolf* as follows: Does a conviction by a State court for a State offense deny the “due process of law” required by the Fourteenth Amendment solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States*?

The Court held in *Wolf* that the protection of the Fourth Amendment against unreasonable searches and seizures was incorporated into the due process clause of the Fourteenth Amendment. It concluded:

> [W]here a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

Ultimately, the Court held in *Wolf* that “the basic right to protection against arbitrary intrusion by [local] police [does not] demand[] the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded.”

The Court noted in *Wolf* that thirty-one states had rejected the *Weeks* doctrine, and that none of the 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations has held that evidence obtained by illegal search and seizure was inadmissible. The *Wolf* Court also stated:

> The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose persons or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge heartless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford.

In a lengthy footnote in *Wolf*, the Court set forth the various states that had provided civil actions for damages against officers who conduct illegal searches and seizures. It also noted that other states punish law enforcement officers criminally for conducting unlawful searches. The Court concluded in *Wolf* that “in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.”

The Court commented:

> Though we have interpreted the Fourth Amendment to forbid the admission of such evidence [in a federal criminal prosecution], a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded to the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own.

Twelve years after the Court held in *Wolf* that it would not extend the exclusionary rule to suppress incriminatory evidence in state prosecutions, it overruled that decision and held in *Mapp v. Ohio* that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”

The Court reasoned:

> It, therefore, plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

The Court held that “the factual considerations” that it considered in determining not to apply the *Weeks* exclusionary rule to state prosecutions—the availability of criminal prosecution, civil actions for damages, and internal disciplinary sanctions for violations of the Fourth Amendment under state laws to punish law enforcement officers who violate the Fourth Amendment—had failed. The Court supported this statement by noting that since the *Wolf* decision was
published, “more than half of those [states] since passing upon it...have wholly or partly adopted or adhered to the Weeks rule.”24  
The Court also stated: “Significantly, among those now following the [Weeks] rule is California, which, according to its highest court was ‘compelled to reach that conclusion because other remedies have completed failed to secure compliance with the constitutional provisions...’”23  

Since the Court’s decision in Mapp, Congress has not provided an appropriate punishment or deterrent for law enforcement officers who violate the Fourth Amendment that would provide an effective substitute for the Court-made rule that frees suspects caught with incriminating evidence in their possession. The Court has, however, limited the application of the exclusionary rule in criminal proceedings. In United States v. Leon, it held that incriminating evidence is admissible in a criminal proceeding if a search is conducted by law enforcement officers who are acting in good faith and in reasonable reliance upon an invalid search warrant that was issued without probable cause by a neutral and detached magistrate.26  

In Herring v. United States, the Court held that the exclusionary rule was not applicable when an officer, acting in good faith, conducted a search incident to an arrest after being erroneously informed by a police dispatcher that there was an outstanding arrest.27 The Court commented in Herring that “[t]he principal cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free—something that ‘offends basic concepts of the criminal justice system.’”28  

**Noncriminal Proceedings**  

Since Mapp, the Court has refused to extend the exclusionary rule to noncriminal proceedings. For example, in INS v. Lopez-Mendoza, it refused to suppress evidence seized without probable cause in a civil deportation proceeding. The Court held that the costs of excluding relevant and reliable evidence in deportation proceedings “outweighed the likely social benefits achievable through application of the exclusionary rule in the federal civil proceeding.”29 The Court also noted that “the deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights.”30  

In Skinner v. Railway Labor Executives’ Association, the Court refused to apply the exclusionary rule to regulations adopted by the Federal Railroad Administration, pursuant to the Federal Railway Safety Act of 1970.31 The regulations provided that after a railroad accident, the railroad was required to transport all crew members directly involved in the incident “to an independent medical facility, where both blood and urine samples must be obtained from each employee.”32 The Court held that the tests amount to searches and seizures by the federal government even though conducted by private railroads. The Court also concluded that, blood and urine tests, as well as breath-testing procedures, were searches under the Fourth Amendment.33 Relying on criminal cases involving the question of whether challenged searches and seizures are permissible under the Fourth Amendment, the Court stated that “the permissibility of a particular practice ‘is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’”34 The Court continued:  

In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.35  

The Court also stated that “[w]e have recognized exceptions to this rule, however, when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impractical.”36  

In upholding the searches permitted by the regulations, the Court held in Skinner that a showing of individualized suspicion is not a constitutional floor below which a search must be presumed unreasonable. In limited circumstances, when the privacy interest implicated by the search are minimal and when an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of individualized suspicion.37  

**Congressional Action and Inaction**  

Much of the Court’s analyses focus on The Fourteenth Amendment, which was adopted in 1868 to protect the constitutional rights of the slaves freed after the Civil War ended. In addition to granting them citizenship, it provides:  

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.38  

The Fourteenth Amendment also provides, “Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”39  

Because of the due process violations suffered by former slaves after the Civil War, including those committed by such groups as the Ku Klux Klan, Congress enacted the Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes on April 20, 1871—more commonly referred to as the Ku Klux Klan Act40 and now known as the Civil Rights Act42 (or Section 1893). In 1961, the Supreme Court held in Monroe v. Pape that a complaint that alleged that 13 Chicago police officers broke into the petitioner’s home without a search or arrest warrant violated the Fourth Amendment’s guarantee against unreasonable searches and seizures and stated a viable cause of action against local law enforcement officers pursuant to Section 1893, but the City of Chicago was not liable under the act because a municipality is not a “person.”43  

However, in Monell v. Department of Social Services of New York, the Supreme Court overruled Monroe, and held that “Congress
did intend municipalities and other local government units to be included among those persons to whom [Section] 1983 applies.”44 Subsequently, in Will v. Michigan Department of State Police the Supreme Court stated that Congress has not yet expressly exercised its power under Section 5 of the Fourteenth Amendment to override the immunity of states under the Eleventh Amendment.45 It also held in Will that a state official sued in his or her official capacity is not a person under Section 1983.46 It reasoned that “a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office.”47 Thus, under Monroe and Will, officers who act under color of state law can be sued for damages in federal court for their personal conduct that allegedly violated federal law. Officers employed by a state cannot be sued under Section 1983 in their official capacity, however, if their personal conduct did not play a part in a violation of federal law.48 An action for damages filed against an officer employed by a state solely based on his or her official capacity “is in all respects other than name, to be treated as a suit against the [state].”49 Therefore, a Section 1983 action for damages is unavailable against an officer employed by a state and sued in his or her official capacity, because a state is immune from being sued in federal court pursuant to the Eleventh Amendment.

Accordingly, local police officers or state law enforcement agents sued in their individual (but not, official) capacities are persons subject to an action for civil damages under Section 1983 in a state or federal court for violations of a person’s Fourth Amendment rights. Furthermore, a victim of such a violation may also seek suppression of incriminating evidence in a state or federal criminal proceeding under Weeks and Mapp.

Congress has not enacted legislation similar to Section 1983 to provide for a civil cause of action for persons whose Fourth Amendment rights have been violated by a federal law enforcement officer. However, In 1971, 57 years after its decision in Weeks, the Supreme Court concluded in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, that a person subjected to an unreasonable search and seizure by a federal agent “is entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the [Fourth] Amendment.”50 The Court stated that “the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation”51 and that “we have here no explicit congressional declaration that persons injured by a federal officer’s violation of Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.”52 Instead, the Court reasoned that “[t]he question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.”53

Chief Justice Warren E. Burger dissented in Bivens. In opposing the majority’s decision, he argued that it:

[[Judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrines of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power.”14

Chief Justice Burger called for the abandonment of the judicially created exclusionary rule by the Court if Congress develops “some meaningful substitute.”55 To support his view he quoted from Justice Jackson’s opinion in Irvine v. California:56

Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will, release the wrongdoing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.57

A majority of the Court rejected Chief Justice Burger’s dissenting views in Bivens. In the 41 years since Bivens was published, however, the Supreme Court has repeatedly rejected claims seeking to extend the application of that decision. In fact, it has extended it only twice:58 in an employment discrimination claim in violation of the due process clause59 and in the context of an Eighth Amendment violation by prison officials.60

In Minneci v. Pollard,61 the Court declined to apply Bivens to an action for damages against privately employed personnel of a privately managed federal prison for violation of the plaintiff’s constitutional rights under the Eighth Amendment.62 The Court held that “in the case of a privately employed defendant, state tort law provides an ‘alternative, existing process’ capable of protecting the constitutional interests at stake.”63 The Supreme Court set forth the test for determining whether a Bivens damages action may be implicated in Wilkie v. Robbins,64 in which the Court held that:

[When] a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a Bivens remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a Bivens remedy is a subject of judgment: “the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.”65

The Wilkie standard echoes Chief Justice Burger’s concern in his dissent in Bivens that “if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials,” the Court could abandon the suppression doctrine.66

**Potential Solutions**

In 1866, Congress enacted a law that provides for criminal prosecution of a person who subjected an inhabitant of any state or territory to the denial of the equal protection of the laws.67 According to a report released in 2012 by the Transactional Records Access Clearinghouse (TRAC), there were three prosecutions and two convictions for violating this act in December 2011.68 TRAC also reported that between fiscal year 1986 and fiscal year 2003, 43,331 claims were referred to federal prosecutors. Of these, prosecution was declined in 42,641 referrals. Thus, prosecution did not result in almost 99 percent of the referrals.69 In November 2000, the U.S. Commission on Civil Rights reported that “[c]riminal prosecution of police officers accused of misconduct continues to be rare.”70 The commissioner concluded in the report that “this is partly due to lack of resources and the evidentiary requirement where the accused officer’s specific intent to violate a federally protected right must be proven beyond a reasonable doubt.”71 As a result of Congress’s failure to enact legislation to deter violations of the Fourth Amendment by federal law enforcement officers, the Supreme Court felt compelled to exercise its common law judicial powers to adopt a rule that excludes incriminating evidence in its Weeks decision and to create a civil action for damages against federal officers in Bivens.

Congress has the power to create legislative remedies that would
protect society from the dangerous and unintentional effects of the exclusionary rule that lett the guilty go free because “the constable blundered,” and that would also deter intentional violations of the Fourth Amendment by government officers more effectively and logically than suppressing incriminating evidence. For example, it could consider whether the following would deter violations of the Fourth Amendment.

- Congress could enact legislation that provides for a civil cause of action that would hold state and federal officers who intentionally violate the Fourth Amendment liable for actual damages and mandatory statutory damages in a fixed amount, as well as punitive damages, reasonable attorney’s fees, and other litigation costs. This type of remedy would serve as a punishment for past intentional misconduct and a deterrent to further violations. Congress has provided such a civil remedy in the Driver’s Privacy Protection Act. An award of statutory damages would eliminate the concern that jurors will not award adequate damages against law enforcement officers who violate the Fourth Amendment in searching for incriminating evidence. To avoid frivolous lawsuits, Congress could also provide for the award of reasonable attorney’s fees to the prevailing party.

- Congress could enact legislation to make the government agency that employs a person who intentionally violated a person’s Fourth Amendment rights also liable to pay actual, statutory, and punitive damages under the doctrine of respondeat superior. Such a statute would encourage law enforcement agencies to provide proper training regarding the requirements of the Fourth Amendment, as well as disciplinary action, including termination of employment.

- Congress could amend the Civil Rights Act to provide that a state is also expressly liable for intentional violations of the Fourth Amendment by their employees in order to nullify the Supreme Court’s decision in Will.

- Congress could consider enacting legislation making an intentional violation of the Fourth Amendment a crime and providing for a mandatory minimum fine, a mandatory minimum sentence, and restitution.

These types of remedies, if adopted by Congress, might persuade the Court to abandon the exclusionary rule. In Planned Parenthood of Southeastern Pennsylvania v. Casey the Court explained that it is no longer obliged to follow the doctrine of stare decisis when “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.” It also reasoned that, it should consider “whether facts have so changed, or come to be seen so differently,
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as to have robbed the old rule of significant application or justification.” More recently in overturning *Montejo v. Louisiana*, the Court stated:

When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant “reasoning” is the weighing of the rule’s benefits against its costs. “The value of any prophylactic rule...must be assessed not only on the basis of what is gained, but also on the basis of what is lost.” We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering “society’s compelling interest in finding, convicting, and punishing those who violate the law.”) The suggested legislation might persuade the Supreme Court that the benefits, if any, of the exclusionary rule, in deterring violations of the Fourth Amendment are outweighed by the danger to society that results from precluding the presentation of incriminating evidence in state and federal criminal prosecutions. The Court may decide that it should grant a prosecutor’s appeal from an order granting a motion to suppress incriminating evidence because Congress has enacted appropriate remedies that will deter and punish law enforcement officers who intentionally violate the Fourth Amendment.

75 *Herring v. United States*, 555 U.S. 135, 137 (2009). In fact, the warrant was no longer valid. *Id.* at 137-38.
76 *Id.* at 141 (quoting *Leon*, 468 U.S. at 908).
78 *Id.* at 1045.
80 *Id.* at 609.
81 *Id.* at 615-17.
82 *Id.* at 619 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).
83 *Id.* (citation omitted).
84 *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).
85 *Id.* at 624 (citation omitted).
86 *U.S. CONST. amend. XIV, §1.*
87 *Id.* at 55.
88 *Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes*, ch. 22, 17 Stat. 13 (1871).
94 *Id.* at 71.
95 *Id.*
97 *Id.*
99 *Id.* at 396.
100 *Id.* at 397.
101 *Id.*
102 *Id.* at 411-12 (Burger, C.J., dissenting).
103 *Id.* at 415.
106 *Mormehl v. United States*, 662 F. 3d 1073, 1078 (9th Cir. 2011).
110 *Id.* at 620.
111 *Id.* at 623 (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).
112 *Wilkie*, 551 U.S. 537.
113 *Id.* at 551 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).
115 *Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication*, ch. 31, 14 Stat. 27 (1866).
118 *U.S. CONST. Amend. XIV, §1.*
Years ago, medical billing and insurance were simple and straightforward. The patient paid the provider in full for services rendered and submitted a claim to the insurer, which usually reimbursed the patient 80 percent of what the insurer deemed the “usual and customary” charge for the particular service. In recent years, however, rising costs have led to managed healthcare, in which the healthcare providers and patients both have contracts with managed care entities. In many cases the patient pays a relatively low amount (such as a copay or deductible) for a healthcare service, and the healthcare provider receives a contract payment from the managed care entity for the contract rate for services rendered.

This payment system has led to a widespread practice in which the contract rate that is actually paid to the healthcare provider is much lower than the rate that the provider claims is due. The difference between the claim and the contract rate can be dramatic. While a patient may view the lower contractual costs as a welcome relief, they prove problematic if a patient becomes a personal injury plaintiff. Lawyers for plaintiffs argue that the provider’s higher billed rate is recoverable under the collateral source rule, but defense counsel challenge the validity of the billed rate as recoverable damages and argue in favor of the discounted rate.

In 1988 the Second District Court of Mark V. Berry is vice chairman/managing partner and Joyce M. Peim is senior counsel with Bowman and Brooke LLP in Los Angeles, where they defend motor vehicle manufacturers in product liability cases.
According to one source, in California the difference between the billed rate and the negotiated rate exceeds $3 billion annually. For this reason, all eyes were on the California Supreme Court last August when it resolved the split of authority in Howell v. Hamilton Meats & Provisions, Inc. Howell has changed the landscape of personal injury litigation and currently governs the recovery of past medical expenses in personal injury litigation.

The potential for unnecessary retrials argues in favor of prohibiting admission of the full billed amount for any reason. The defense bar may point out that the admission of the billed amount could easily confuse and mislead the jury as to the proper measure not only of a plaintiff’s past medical expenses but also general damages and future expenses.

Twenty years later the First, Third, and Fourth District upset the Second District’s precedent and created a split of authority in California. The courts concluded that the discounted portion of the providers’ fees was a collateral source benefit to the plaintiff and therefore the entire billed rate was recoverable as a past medical expense. Specifically, the courts found that the plaintiff obtained collateral benefits from not having to pay the providers’ full charges, including noncash pecuniary considerations to the provider such as financial, administrative, and marketing savings that were financed by the plaintiff’s premiums. The courts reasoned that these benefits required application of the collateral source rule in favor of the plaintiff. In an apparent nod to Hanif v. Housing Authority, one court found the requisite pecuniary detriment to the plaintiff in language appearing in the written consent for treatment, which arguably obligated the plaintiff to pay the providers’ full charges under certain circumstances. Finally, the courts noted that only the legislature or the Supreme Court could carve further exceptions to the collateral source rule.


In most cases, the difference between the billed rate and the discounted rate (known as the negotiated rate differential) is significant. Howell holds that “an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial.” Howell adopts the reasoning of Hanif “that a plaintiff may recover as economic damages no more than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less.” Under Howell, a plaintiff may recover only the lesser of 1) the reasonable value of the services rendered or 2) the negotiated contract rate that the provider accepts as payment in full.

The Howell court made clear that its decision did not “abrogate or modify the collateral source rule” because the discounted medical rate “is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule.” The court declined to definitively opine on whether gratuitously rendered medical services invoked the collateral source rule but stated that a provider’s agreement to accept an insurer’s contract rate is not a gift to the patient or to the insurer. Rather, providers receive commercial benefits (such as prompt payment) by accepting the contract rate. The supreme court also stated that its ruling did not result in underdeterrence or a windfall to the tortfeasor because the “complexities of contemporary pricing and reimbursement patterns for medical providers” made it difficult to conclude that the tortfeasor was not in fact remaining liable for the true full value of the provider’s services.

Howell acknowledges that subrogation clauses in insurance policies prevented a windfall, or double recovery, to the personal injury plaintiff. Thus, if the insured plaintiff prevails at trial, he or she will recover and retain any jury verdict for past medical expenses minus the sums paid by insurance. To ensure reimbursement from the proceeds of a jury verdict the insurer usually asserts a lien against any recovery obtained by the plaintiff. However, the usual practice is for the plaintiff’s attorney to negotiate the lien. Thus, uninsured plaintiffs who incur liability for some portion (such as a copay) of their medical expenses will recover their actual out-of-pocket expenses and retain any additional negotiated portion of the insurance payment. But under Howell, a plaintiff who incurs no obligation to pay any portion of the medical expenses (such as the Medi-Cal plaintiff in Hanif or the workers’ compensation plaintiff in Sanchez v. Brooke) arguably will only retain the portion of the medical expenses that have been reduced by negotiation with the insurer. Significantly, Howell does not apply to uninsured patients, who stand to recover the full medical charges, subject to any lien asserted by the provider.

Howell makes clear that only evidence of the negotiated contract rate that was accepted as payment in full by the provider under a contract that prevented the provider from seeking any further payment from the patient is relevant and may be admissible at trial to prove past medical expenses. Conversely, the court held that evidence of the full billed amount “is not itself relevant on the issue of past medical expenses.” The court also maintained in effect the inadmissibility of
MCLE Test No. 216

1. Evidence of collateral source payments is never admissible.
   True.  False.
2. Under Howell, evidence of the reasonable value of past medical expenses is admissible:
   A. Always.
   B. Never.
   C. If the reasonable value is lower than the contract rate.
   D. None of the above.
3. A plaintiff incurs no legally cognizable detriment and therefore no cognizable damages under California law when:
   A. The contract states the provider cannot seek any payment from the plaintiff over the contract rate.
   B. The provider opts to write off the difference between the contract rate and the full price.
   C. The provider receives noncash benefits from the insurer or managed care plan.
   D. None of the above.
4. The collateral source rule does not permit a tortfeasor to benefit from a plaintiff’s prudence and thrift in investing in insurance.
   True.  False.
5. Under Howell, evidence of the provider’s contract rate is automatically admissible.
   True.  False.
6. Under Howell, evidence of the provider’s contract rate is admissible as to:
   A. General damages.
   B. Future medical expenses.
   C. None of the above.
   D. All of the above.
7. There are currently two exceptions to the collateral source rule.
   True.  False.
8. Hanif carved an exception to the collateral source rule for Medi-Cal patients.
   True.  False.
   True.  False.
10. The difference between the provider’s full rate and the negotiated contract rate has never exceeded 50 percent.
    True.  False.
11. Howell approved of the posttrial Hanif motion as the method of reducing a verdict for past medical expenses that exceeded the provider’s contract rate.
    True.  False.
12. If a jury awards past medical expenses that are greater than the provider’s contract rate the defendant may:
    A. Move to strike the excessive award.
    B. Move to reduce the excess award.
    C. Move for a new trial on the grounds of excessive damages.
    D. All of the above.
13. Under Howell, a plaintiff is only entitled to recover amounts paid under the contract, not amounts still owed.
    True.  False.
14. Howell reasoned that the healthcare provider and the healthcare insurer are the two parties with the most sophistication in determining the reasonable costs of medical services.
    True.  False.
15. State Senator David Stein proposed legislation to counter the effects of Howell.
    True.  False.
16. Howell held that evidence of the provider’s full rates would give the jury a more complete picture of the plaintiff’s injuries.
    True.  False.
17. Public policy disfavors a tortfeasor’s avoidance of paying full compensation for a plaintiff’s injuries.
    True.  False.
18. The Howell court found that the discounted medical rate is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the collateral source rule.
    True.  False.
19. According to one source, in California the difference between the provider’s billed rate and the contract rate exceeds $5 billion annually.
    True.  False.
20. Appellate review of a jury award of past medical expenses requires the jury to apportion a specific sum for past medical expenses.
    True.  False.

ANSWERS

1. □ True  □ False
2. □ A □ B □ C □ D
3. □ A □ B □ C □ D
4. □ True  □ False
5. □ True  □ False
6. □ A □ B □ C □ D
7. □ True  □ False
8. □ True  □ False
9. □ True  □ False
10. □ True  □ False
11. □ True  □ False
12. □ A □ B □ C □ D
13. □ True  □ False
14. □ True  □ False
15. □ True  □ False
16. □ True  □ False
17. □ True  □ False
18. □ True  □ False
19. □ True  □ False
20. □ True  □ False

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the fact that the payments were made by an insurance company.19

The IRS subscribes to the reasoning of the Howell and Hanif courts.20 In an Industry Director Directive, the IRS states, “Contractual allowance does not constitute bad debt, since the provider was never entitled to collect the difference under the terms of the relevant contract.”21 This is a key factor in Hanif and Howell, in which the patients had no obligation to pay the purported full rate.

Evidentiary Tactics

Notwithstanding Howell, can evidence of the full rate be admitted as evidence for reasons other than to recover past economic damages? For example, personal injury plaintiffs often seek general damages, including damages for pain and suffering, as well as future medical expenses. Howell provides no guidance on the relevancy and admissibility of evidence of the provider’s full charges as they apply to the plaintiff’s general damages and future medical expenses.22 Until this issue is resolved, every personal injury case involving recovery of medical expenses will entail a battle regarding the admissibility—for purposes other than past medical expenses—of the full billed amount. Until there is appellate guidance on this issue, courts may decide to permit introduction of the full billed amount. For example, a court may decide that the reasonableness of the full medical charges is an issue because if the full past medical charges are inflated, so too will they be in the future when a plaintiff may need remedial medical care. Should evidence of the full charges be admitted for purposes other than past medical expenses, defense attorneys may seek special jury instructions to enforce the guidance of Howell.23

Plaintiffs’ lawyers may also point to Greer v. Buegelz24 to support the view that the full billed amount of medical care remains admissible for reasons other than proving past economic damages. The court of appeal in Greer stated that Nishihama v. City and County of San Francisco25 suggests that admitting the full billed amount would give the jury a “more complete picture” of the evidence surrounding a plaintiff’s injuries. Notably, the Greer court would have followed Hanif and Nishihama and disallowed recovery of the full billed amount for past medical expenses. On that score, Greer would be consistent with Howell. However, the defendant’s failure in Greer to require that the jury apportion a specific sum for past medical expenses resulted in a forfeiture of his ability to seek, via what is known as a Hanif motion, the postverdict reduction of the excessive award.

In the post-Howell world, defense counsel should fight to prevent introduction of the full billed amount for any purpose, but it is certainly possible that some trial courts will admit that evidence as being relevant to general damages or future medical costs. Any award of past damages that exceeds the contract rate would be contrary to the explicit holding of Howell, but the remedy for an excessive award of past medical expenses is no longer the posttrial motion procedure that evolved from Hanif. Howell rejects what it calls the “non-statutory ‘Hanif motion’” as being beyond the power of the trial courts.26 Instead, Howell holds that, if the jury returns a verdict for past medical expenses in excess of the discounted contract rate, the defendant’s only remedy to reduce the award is a new trial on the grounds of excessive damages under Section 657 of the Code of Civil Procedure.

Confusion about applying Howell to the admissibility of the full amount of medical fees may result in excessive verdicts for past medical expenses and therefore an increase in successful motions for new trial. While it is true that the trial court can condition the grant of a new trial on a remittitur (that is, a new trial limited to the issue of damages will be awarded only if the plaintiff refuses to accept the negotiated contract rate as past medical expenses), Howell does not require a trial court to offer the plaintiff a remitted amount.

The potential for unnecessary retrials argues in favor of prohibiting admission of the full billed amount for any reason. The defense bar may point out that the admission of the full billed amount could easily confuse and mislead the jury as to the proper measure not only of a plaintiff’s past medical expenses but also general damages and future expenses. If the provider’s full charges are admitted as relevant to general damages and future medical expenses, and those charges are inflated or unreasonable, that evidence can easily taint the jury’s award of general damages and future medical costs. As the Howell court noted, “[I]t is not possible to say generally that providers’ full bills represent the real value of their services, nor that the discounted payments they accept from private insurers are mere arbitrary reductions.”27

Further, it should be noted that plaintiffs could potentially waive the benefits of the collateral source rule. If the provider’s full charges are introduced as relevant to general damages, the defense may attempt to introduce evidence of the plaintiff’s health insurance to establish the discounted contract rate as a more reasonable assessment of the plaintiff’s general damages and pain and suffering. The supreme court has acknowledged the danger of admitting evidence of collateral source payments but allows for its admission “upon a persuasive showing that the evidence sought to be introduced is of substantial probative value.”28 Evidence of the sharply reduced contract rate does indeed have “substantial probative value” if evidence of the full rate is admitted for any relevant purpose.29

Changes to Discovery

Howell has also affected the practice of pretrial discovery. Careful litigants will find it prudent in the post-Howell world to engage in more detailed third-party discovery with healthcare providers and insurers or managed care plans. As before, defendants will be able to ascertain through form interrogatories and basic requests for production to the plaintiff whether or not health insurance or a managed care plan is responsible for payment of the provider’s bills. The best source of this information will be the contracts of the insurers or managed care plans, which usually are not parties to the action. Therefore, barring stipulations or voluntary production, the defendant will need to issue deposition subpoenas for production of business records.22 This does not result in the production of the pertinent contracts, the defense can depose the person most qualified on behalf of the insurer or managed care plan regarding the existence of the contracts and simultaneously or thereafter seek production of the contracts identified in the deposition.

These contracts generally contain confidentiality and nondisclosure clauses, so the requesting party can expect objections that the documents sought are proprietary. The third-party insurer or managed care plan may well seek a protective order. If the plaintiff does not challenge the production, a stipulated protective order maintaining the confidentiality of the contracts will be the easier route to take. Should the contracts be produced pursuant to protective order, the terms of the protective order must be followed when the contracts are being used to enforce Howell, such as via a motion in limine.

In order to prevail on an in limine motion, the defense will need to demonstrate through competent, admissible evidence that the provider accepted discounted rates as payment in full for services rendered to the plaintiff pursuant to contracts under which the plaintiff cannot be held liable for any sums over the contract rate. Finally, the actual sum accepted by the provider under the contract, and any amount still owing under the contract, must be obtained so that Howell’s evidentiary rulings regarding past medical expenses can be realized.

To prevent a wasteful retrial, defendants should seek an order in limine to exclude any evidence of medical expenses above the negotiated contract rate. This can be accomplished by producing competent evidence that satisfies the criteria established in Howell. If granted, the motion in limine
will allow the jury to hear evidence of the discounted contract rate only regarding past medical expenses. If this happens, the jury should not return a verdict for past medical expenses in a higher amount. A special verdict form that clearly distinguishes past medical expenses is required. Conversely, a plaintiff can move in limine to exclude evidence of the negotiated contract rate if competent, admissible evidence establishes that the Howell factors are not satisfied, or if no evidence was elicited prior to the discovery cutoff.

It is possible that the effects of Howell may be short-lived. State Senator Darrell Steinberg responded to the Howell decision by proposing SB 1528, which was sponsored by the Consumer Attorneys of California. Introduced in February, this measure sought to entitle inpatient injury plaintiff “to recover the reasonable value of medical services provided by a tortfeasor to the plaintiff, undoubtedly basing its decision upon conflicting expert opinion. A contrary opinion on how to value medical services was espoused by Justice Harry Hull in his dissenting opinion in King v. Willmett, in which he notes that it makes more sense that a “determination of the reasonable cost of medical services ultimately should rest with the two parties with the most sophistication in the matter: the health care provider and the health care insurer.”

The collateral source rule reflects the public policy that a tortfeasor “should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance.” Those on the defense side would argue that Howell does not permit a tortfeasor to escape compensating a plaintiff for the full amount of past medical expenses for which the plaintiff is personally liable, because the plaintiff still recovers the full contract rate, even though the plaintiff incurred significantly less, or no, out-of-pocket medical expenses. That damages, to be recoverable, must consist of actual pecuniary detriment is deeply rooted in California jurisprudence. So too is the collateral source rule. These well-settled laws are justly harmonized under Howell.


2 Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 6 (1970). Under the collateral source rule, the injured plaintiff can recover his or her proven losses despite reimbursement for those losses in whole or in part from a source other than the tortfeasor. The rule “embodies the venerable concept” that the tortfeasor should not benefit from the plaintiff’s providence in procuring insurance or some other type of collateral payment. Id. at 9-10.


4 Civ. Code §3281, 3282, 3333, 1431.2.

5 Howell v. Hamilton Meats & Provisions, Inc., 101 Cal. Rptr. 3d 807 (2009), reversed and remanded, 52 Cal. 4th 541 (2011); Yanez v. SOMA Envtl. Eng’g, Inc., 111 Cal. Rptr. 3rd 257 (2010), vacated and transferred to First District for reconsideration under Howell; King v. Willmett, 113 Cal. Rptr. 3d 742 (2010), vacated and transferred to Third District for reconsideration under Howell.

6 See Civ. Code §3333.1 (abrogating collateral source rule in medical malpractice cases) and Gov. Code §5985 (permitting public entity to request postverdict hearing for reduction of portion of verdict representing collateral source payments greater than $5,000).


8 Howell, 52 Cal. 4th 541.

9 Id. at 566.

10 Id. at 555 (citing Hanif v. Housing Auth., 200 Cal. App. 3d 635, 641 (1988)).

11 Id. at 567.

12 Id. at 558.
THE DISTINCTIONS between enforcement of settlement agreements in litigation and in arbitration proceedings are significant, and an awareness of these differences can substantially enhance enforcement effectiveness in the arbitration context. In far too many arbitrations, a troublesome situation occurs. The parties reach a settlement before they go to hearing or an award is issued. Once informed of the settlement, the arbitrator issues a dismissal with prejudice, notifies the tribunal, and closes the file. Later, however, one of the parties contacts the arbitrator with a request that the arbitration be reopened to enforce the settlement agreement. The arbitrator’s jurisdiction ended, however, when the dismissal was entered, and the arbitrator has no authority to take action on the alleged default.

While jurisdiction is retained in some very rare cases, generally any redress requires initiating a new, costly, and time-consuming legal proceeding to enforce the settlement agreement. By the time a new proceeding is resolved, the defaulting party is likely to have become insolvent or otherwise unable to perform under the settlement agreement. It is important for practitioners to know how to avoid this outcome.

When court cases settle before trial or judgment, there are often relatively simple legal processes to assist in the enforcement of the settlement agreement. For example, the Code of Civil Procedure provides:

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement.

Parties agreeing to a settlement during arbitration should have the agreement incorporated into an arbitration award

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Similar statutes exist in other jurisdictions in the United States and abroad. Enforcing a settlement agreement in litigation is a straightforward, streamlined, well-understood, and cost-effective process, but when cases settle during arbitration the route to effective enforcement can be elusive unless two issues are considered beforehand.

One issue is enforcement of settlement agreements that are reached during the arbitration but prior to issuance of an award. (This type of award is sometimes referred to as an award on agreed terms or a consent award.) The second issue concerns incorporating a settlement agreement into an arbitration award when the agreement follows a determination that one party (almost always the respondent) is in default.

In general, it is prudent for parties to have a settlement agreement adopted and incorporated in an arbitration award. Under the rules of various arbitration tribunals, this process is laid out explicitly, although there are some differences in the language. Nevertheless, the rules of the American Arbitration Association (AAA), JAMS, the International Film and Television Alliance, and the London Court of International Arbitration (LCIA) all make clear that the incorporation of a settlement agreement in an award must be at the request of the parties. Under LCIA rules, this must be done in writing. The rules of all four organizations state that the arbitrator may incorporate the terms of the settlement agreement in an award.

California’s statutory framework for international arbitrations spells out the practice for incorporation of a settlement agreement in an award. The Code of Civil Procedure states, “If during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.”

The qualification “and not objected to by the arbitral tribunal” seems to add a subjective element. Arbitrators may be inclined to comment on or express disapproval of the terms of settlement agreements presented to them for incorporation. If they do, however, they may need to remember that arbitrators are not making findings in cases in which the parties have arrived at their own determination of the terms of a resolution.

Another problem may arise if the parties do not ask the arbitrator to incorporate the settlement agreement into the award. None of the tribunal rules provides the arbitrator with authority to do so without a request from the parties. If an arbitrator issues an award that incorporates the agreement without a request to do so from the parties (or does so over their objection), the award could be set aside.

If the terms and conditions of a settlement agreement are made part of an arbitration award, the prevailing party can quickly reduce the award to a judgment by means of confirmation proceedings in court. The party thereby becomes a judgment creditor, with all the processes available to one holding that position. In California and under the Federal Arbitration Act (FAA), the moving party can simply file a motion or petition to confirm. Under AAA Rule 48(c), the parties explicitly consent to the judicial enforcement of the settlement agreement. Although a complaining party with an agreement incorporated into the settlement will be required to demonstrate to the enforcing court that the award has been violated, this is significantly less onerous (and subject to fewer and narrower defenses) than the commencement of a new legal action or arbitration based on a contract dispute.

Code of Civil Procedure Section 1286 states, “If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made.” Likewise, Section 9 of the FAA provides:

If the parties in their agreement have

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The grounds for vacating awards are extremely narrow and challenging to establish under most state and federal statutes as well as under international treaties. The grounds address a critical defect in the arbitration process, such as fraud, lack of due process, arbitrator misconduct, or acts in excess of authority. Thus, the value of incorporation of the settlement agreement in an award that can be quickly confirmed in a state or federal court to enforce the settlement agreement leaves the aggrieved party with no alternative but to file a lawsuit in the forum for enforcement of a claim of violation. If the settlement agreement is reached as a result of mediation conducted during the arbitration, additional considerations may come into play. In California, strict mediation confidentiality applies, and the parties may need to include a specific waiver of mediation confidentiality in order for a court to make factual determinations concerning the formation and terms of the settlement agreement.

Drafting the Settlement Agreement

If the settlement agreement is reached as a result of mediation conducted during the arbitration, additional considerations may come into play. In California, strict mediation confidentiality applies, and the parties may need to include a specific waiver of mediation confidentiality in order for a court to make factual determinations concerning the formation and terms of the settlement agreement and enforce its provisions. A few rulings in other jurisdictions have refused to allow courts to interpret settlement agreement language without a provision in the agreement that authorizes the court to interpret it, requests the court to do so, or both. The mere fact that the settlement agreement was entered into in an arbitration proceeding is not a basis for establishing arbitrability. Another general rule is that the tribunal hearing the matter in which the settlement was reached has no jurisdiction once an award is rendered.

As a matter of good practice, parties drafting settlement agreements should specifically provide that they intend and agree to have the settlement agreement incorporated into an award to be rendered by the arbitrator. The agreement should also specifically request or authorize the issuance of an award by the arbitrator on the agreed terms. The settlement agreement should further state that in the event of a claimed breach the complaining party may proceed forthwith to enforce the award as provided by law in the jurisdiction in which enforcement is pursued. It may also be possible to obtain an agreement that enforcement can proceed on the basis of sworn declarations instead of a hearing, unless the applicable statute says otherwise. The idea is to make the potential enforcement as speedy and cost-effective as possible. Since most of the statutory provisions for confirmation of awards specifically state that the confirmation by the court will track the award exactly as rendered by the arbitrator, this, of course, would include the terms and conditions of the settlement agreement as incorporated in the award being confirmed.

If the settlement agreement is reached as a result of mediation conducted during the arbitration, additional considerations may come into play. In California, strict mediation confidentiality applies, and the parties may need to include a specific waiver of mediation confidentiality in order for a court to make factual determinations concerning the formation and terms of the settlement agreement.
cies among the various arbitration tribunals and the law in other jurisdictions may vary. The tribunal has to commit staff resources to monitoring cases, and it becomes burdensome to track proceedings under settlements indefinitely. In addition, the rules of many tribunals contain cutoff dates within which the proceedings are required to go to hearing, and the arbitrator is required to issue an award or a dismissal within that period. Keeping the case open to monitor performance of a settlement agreement undermines these case management principles and rules.

Thus, whether under specific rules or through administrative practices, tribunals may refuse to maintain the proceedings on an open-ended basis indefinitely to retain arbitral jurisdiction, and courts may also not be willing to take on the responsibilities of an award confirmation. Therefore, in negotiating and preparing settlement agreements, the parties and their counsel should be aware of potential limitations on keeping the proceeding open for purposes of enforcement and save themselves the annoyance of having the agreement returned to them by the arbitrator for modification or elimination of any provisions that exceed tribunal parameters.15

For a variety of reasons, including privacy issues, the parties may elect not to incorporate the settlement agreement into an award, or if the agreement is incorporated they may choose not to have the consent award confirmed in a judgment. If so, the issue arises of where to seek assistance in the event of a subsequent default. If it is the parties’ desire that any issue of default be taken back into an arbitration forum, they would be well advised to designate a mutually approved arbitrator as part of the settlement, with customary fallback parameters.16

Another recent opinion, Bowers v. Raymond J. Lucia Companies, Inc.,19 involves parties to an arbitration who reached a settlement agreement that led to a “mediation award” that the plaintiff sought to confirm in court. The Bowers court held that Section 664.6 of the Code of Civil Procedure was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit.20

As long as a court finds the terms of the settlement agreement sufficiently clear to discern the mutual intent and consent of the parties, the agreement will be capable of being reduced to a judgment under Section 664.6. The court distinguished Lindsay v. Lewandowski,21 in which a settlement agreement reached during mediation was not enforced because its terms lacked the clarity needed to effectively determine mutual consent and intent of the parties to be bound. Lastly, Bowers specifically holds that a settlement reached in an arbitration proceeding does not violate the California Bankruptcy Code.18 Under Thorpe, if a settlement agreement in an arbitration proceeding would be central to a subsequent bankruptcy action and disrupt the customary processes used by a bankruptcy court to manage all the pieces of the bankrupt’s estate, the bankruptcy court may ignore the arbitration agreement.

A recent, and potentially troublesome, wrinkle has arisen after the Ninth Circuit’s ruling in In re Thorpe Insulation Company,16 an asbestos case.17 The court took a position on when and under what circumstances a bankruptcy court may override an arbitration clause in a settlement agreement, despite the strong policy favoring arbitration under the FAA. In Thorpe, a bankruptcy court asked to enforce an arbitration award must decide whether the claims sought to be heard in arbitration are central to the matters that will be addressed in a bankruptcy proceeding, particularly if a reorganization is likely. The court held that a bankruptcy court has discretion to decline to enforce an otherwise applicable provision only if arbitration would conflict with the underlying purposes of the
Constitution’s guarantee of a trial by jury. The appellants had argued that judicial enforcement of the settlement agreement deprived them of the right to a jury trial. The court held that the protection only applies in litigated cases and does not prevent parties from choosing various forms of private adjudication or resolution of disputes.

Arbitrations in a Default Posture
Special issues arise when a settlement is reached after one party fails to appear, does not pay required fees, or otherwise places itself in default before a default prove-up hearing takes place. Normal practice requires the arbitrator to give notice to the defaulting party (which is virtually always the respondent) that the matter is proceeding as a default and that failure to cure the default as provided in the applicable rules will result in that party no longer being permitted to participate in the arbitration. If a settlement is reached when a proceeding is in a default posture, the question arises as to the arbitrator’s authority to render an award in the absence of an agreement containing an explicit provision calling for that process.

Most settlement agreements contain language to the effect that all claims are released for that process. While many parties choose not to have their rights and powers of a judgment creditor. It is also a wise practice to have a settlement agreement encompass all parties who were substantively involved in the transaction giving rise to the dispute. One of the most common problems with enforcing arbitration

Consider the Alternatives
While many parties choose not to have their settlement agreement adopted into an award, it may not be wise. In most cases the additional cost of having the terms of the settlement agreement recorded in an award are minimal in relation to what the parties have already invested. It is fairly common for arbitrators, in writing the award on agreement of the parties, to establish the background elements of the proceeding (jurisdiction to arbitrate, all procedures and notices properly followed, mutual confirmation by the parties of the terms of the agreement, etc.), recite that the award adopts the specific terms and conditions of the settlement agreement as provided by the parties, and incorporate the written agreement by reference as an attached exhibit. This requires minimal arbitrator time and cost.

The benefits of doing so are significant, even if the prevailing party feels that the additional process of incorporation and reduction to judgment is likely to be futile. The respondent may appear to be financially shaky, irresponsible, or both, but it is worth remembering that businesses recover minimal in relation to what the parties have already invested. It is fairly common for arbitrators, in writing the award on agreement of the parties, to establish the background elements of the proceeding (jurisdiction to arbitrate, all procedures and notices properly followed, mutual confirmation by the parties of the terms of the agreement, etc.), recite that the award adopts the specific terms and conditions of the settlement agreement as provided by the parties, and incorporate the written agreement by reference as an attached exhibit. This requires minimal arbitrator time and cost.

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awards effectively is the fact that defaulters have an uncanny knack for changing their business identity and returning to their industry the day after issuance of the award. Being a judgment creditor can help a client obtain the reward from a party with a new identity.

The hard work of negotiating a settlement for a client can slip away if simple steps are not taken. It is easy and cost-effective to finalize a settlement reached during arbitration by capturing the agreement in an arbitration award and carrying that through to a judicial confirmation. The alternative is likely to be renewed litigation and a loss of client confidence.

3 It remains a question whether an arbitrator has the authority to refuse to incorporate a settlement agreement into an award. See International Chamber of Commerce Rules of Arbitration, art. 26.
6 American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R-48(c) (June 1, 2009).
9 See Evid. Code §1119. See also Cassell v. Superior Court, 31 Cal. 4th 113 (2011); Foxgate Homeowners Ass’n v. Bramalea Cal., Inc., 26 Cal. 4th 1 (2001).
14 See id.
15 It is conceivable that a settlement agreement could effectively provide for retention of jurisdiction by a court in the event that the agreement is incorporated in an arbitration award that is then confirmed in a judgment. While the arbitration tribunal may not provide for retention, the court could do so under its discretionary powers or applicable statute (e.g., Code Civ. Proc. §§664.6).
17 See 11 U.S.C. §524(g) (procedural methods for addressing these cases).
18 In re Thorpe Insulation Co., 2012 WL 255231.
20 Id. (citing Weddington Prods., Inc. v. Pick, 60 Cal. App. 4th 793, 809 (1998)).
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Dear Jack:

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

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

Mr. Ramirez agreed to take a LAPD polygraph examination, to be conducted on June 1, 2011. I retained your services as a nationally known and respected polygraph examiner. You agreed to polygraph my client at Los Angeles County Men’s Central Jail, on that day prior to the LAPD examination. Further, you agreed to monitor the LAPD polygraph examination in an observation room within Parker Center (LAPD Headquarters).

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

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

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

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

Very truly yours,

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Advanced Mediation Skills Practicum

On July 20, 21, and 28, the Center for Civic Mediation will host a program offering extensive practice and coaching in advanced mediation skills. Those who attend will receive nine hours of lecture and nine hours of role-playing, observation, coaching, and feedback. Lecture topics include assessing the conflict, building consensus, problem-solving, managing multiparty agendas, legal ethics, distributive and integrative bargaining, and using case studies from a range of areas of law (e.g., personal injury, employment, contracts, real estate, and property). The advanced practicum aims to develop more advanced skill sets for practitioners as well as an understanding of key elements, principles, and strategies in mediation. Prior mediation training is required for this course, which 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 will begin at 8:30 A.M., with the program continuing from 9 A.M. to 4 P.M. each day.

The registration code number is 011652.

The price is $515.

18 CLE hours, including 12 hours general CLE, 4 hours of ethics, and 2 hours of elimination of bias

TAP: Deposition Skills Workshop

On Saturday, August 18, Trial Advocacy and the Litigation Section will host a program of introductory and intermediate instruction on how to take and defend depositions in California state court actions. The first part of the program will be a lecture with questions and answers covering the rules relating to oral depositions, how to “pin down” the deponent, how to defend a deposition, use of deposition testimony in trial, and developing a deposition strategy. The second part is a workshop in which participants practice taking and defending the deposition of a plaintiff in a civil action for negligence and receive constructive feedback on their performance.

Participants will receive an outline that organizes the deposition process into a practical format. Written course materials will be distributed via e-mail prior to the first class. 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 will be available at 8 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The registration code number is 011601.

$250—CLE+ member

$350—LACBA member

$500—all others

3.75 CLE hours

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

The Los Angeles County Bar Association and Los Angeles Lawyer magazine provide you with a unique opportunity to reach this elusive market in a special pullout section. Contact Linda Bekas at 213.896.6504 or Aaron Estrada at 213.896.6584 for additional information.
Attorney Discipline: Are We on the Wrong Path?

ALMOST A DECADE AFTER THE PROCESS BEGAN, the California Rules Revision Commission completed its assignment to thoroughly redraft the California Rules of Professional Conduct. It has renumbered the proposed new rules, using the American Bar Association Model Rules numbering system in a purported effort to harmonize California’s unique rules with the Model Rules. However, the proposed new rules contain many significant differences and departures from the Model Rules and must be seen for what they are: a completely new, different, and separate set of disciplinary rules, unlike both the current California Rules of Professional Conduct and the Model Rules in many important respects. In August 2011, the Board of Governors of the California State Bar accepted the vast majority of the recommendations of the Rules Revision Commission, and following direction provided by the California Supreme Court, the proposed new rules are now being reformatted for transmission to the California Supreme Court for consideration.

The fundamental question raised by this latest rules revision effort is whether additional and more detailed rules will have any effect whatsoever on decreasing unethical conduct. More pointedly, are the new rules even on the right path to achieve that goal? The implicit assumption is that there can never be enough rules, they will never be clear enough, they will never be enforced sufficiently, and lawyers are simply not being punished enough for violating their professional duties. Perhaps it is time to reconsider our approach.

In 1908, the ABA issued the Canons of Professional Ethics, which were succeeded by the Model Code of Professional Responsibility in 1969 and by the Model Rules of Professional Conduct in 1983. Thus, it is now more than 100 years since the American Bar Association promulgated its first rules, in which the preamble wisely stated, “No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life.” Ever since, the rules of ethics have been studied, debated, revised, criticized, reanalyzed, supplemented, refined, redrafted, and—guess what—we’re still at it.

Many commentators have analyzed the development of modern ethical laws, particularly the departure from the original case-by-case system of determining whether a lawyer has acted egregiously enough to suffer professional sanctions. In moving to a rule-based system, lawyer discipline systems largely follow the criminal law template, in which discretion and flexibility is stripped away in favor of formalized standards. Proponents argue that the imposition of disciplinary standards ensures consistency and uniformity in the lawyer discipline process. Others lament the loss of flexibility to deal with particular individual circumstances.

Proponents of rule-based discipline (e.g., minimum standards for professional sanctions, including “three strikes and you’re out”), remain convinced that it produces more ethical practitioners. But one unintended result may be that lawyers believe they can safely walk the “bright line.” Today’s lawyers are able (or so they believe) to calculate whether their particular conduct is inside or outside the specific wording of a particular ethics rule, teetering on the ethical line, so long as they don’t cross it. But ethics lawyers, including bar counsel, often reach differing interpretations of the rules. Moreover, lawyers—quite understandably—often have difficulty determining the scope of their ethical duties. So, the question is, Do increasingly stringent professional sanctions create more ethical lawyers?

Despite the long tradition of detailed prohibitions on conduct and rigid disciplinary standards, the rules of professional conduct continue to draw criticism for lacking clarity and uniformity. Indeed, we continue to devote huge amounts of time and energy to debate the adequacy of the lawyer disciplinary system and what additional measures should be taken to improve attorney ethics. Many in the legal ethics field persist in demanding ever stricter and more detailed rules of professional conduct, even harsher disciplinary standards, more truncated disciplinary systems with fewer due process rights for lawyers, and greater publicity of lawyer misdeeds (including purely personal ones).

Apparently, the legal profession’s need for more rules and stricter enforcement is insatiable, even though the California State Bar spends tens of millions of dollars on lawyer discipline each year. Our discipline rules are—and have for a century been—sufficient to delineate ethical standards for the vast majority of legal practice scenarios. Converting disciplinary rules into aspirational standards, and then imposing discipline for failures to comply, does not promote higher ethical standards. We do need a more effective disciplinary system that emphasizes remediation and reeducation over punishment.

Of course, the dishonest lawyer should be severely sanctioned and disbarred when appropriate. The large majority of disciplinary rule offenders, however, engage in minor or moderate misconduct, and they should be better educated, retrained, and monitored. It would serve the public better if we adopted an enlightened style of diversion, such as those utilized in some criminal justice systems, and impose mandatory community service or pro bono service for errant lawyers who violate the rules but who have caused little or no real harm. Hmm, Perhaps someone should appoint a committee.
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