Los Angeles lawyer Sa’id Vakili describes the conflicts inherent in shareholder derivative lawsuits.
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n my first column in the July/August 2011 issue of Los Angeles Lawyer, I drolly suggested that if you wanted to read wonderfully written and thoughtful columns from the Editorial Board chair...you should check out previous years’ issues on the LACBA Web site. That was supposed to be funny, but since some of my so-called friends have thanked me for the tip and apparently avoided my columns like the plague (now really, how often do you find yourself not actually being read, even at the time of the plague?—I followed my own advice.

I started at the beginning. Well, not a James Michener beginning—like when the supercontinent Pangaea first begins continental drift, and, a few million years later, the Los Angeles County Bar starts publishing a magazine. More like the beginning in March 1978, when the first issue hit the mailboxes.

In its early days, the magazine had a much different look and editorial feel. For one thing, it included classified ads, some of which were better reading than the actual articles. From one: “3 Academy Award Winners need financing for a motion picture.” Really? This was the best they could do? It was either that or ask doctors, which takes all the sport out of it, because doctors will invest in anything.

Another classified advertised karate instruction, perhaps appealing to those who needed a way to manage disgruntled clients. Someone recently offered me karate lessons, but they were advertised as Christian karate, so I passed. Nothing against religion; I just didn’t see how getting a black belt in turning the other cheek was going to help me defend myself.

Editorial Board chair columns did not actually start until 1989. Before that time the space was taken up by letters to the editor. Oh, sure, you would probably like that, seeing this space filled with your mindless drivel instead of my own. Wait….I’m not sure that came out right.

The magazine also gave a column to the Los Angeles County Bar president. So, for a while, we had the President’s Page and From the Chair. Sadly for you, the columns written by a president are gone, and all you get is one written by a piece of furniture. I would like to be called the president of the Editorial Board—a nice way to dress up an office that otherwise carries little prestige and no power. Plus, it sounds better than being a chair.

Actually, I’m thinking of renaming the column Keeping the Seat Warm, since the chair is only seated for a year. (Yes, I intended that pun. You can send your complaints to management via the e-mail address below. That’s my e-mail address, so you can be confident your missives will be ignored.)

The editorial board column did not start until 1992. Before that time, the space was taken up by the Los Angeles County Bar president. So, in one, the president’s page and from the chair. Sadly for you, the columns written by a president are gone, and all you get is one written by a piece of furniture. I would like to be called the president of the Editorial Board—a nice way to dress up an office that otherwise carries little prestige and no power. Plus, it sounds better than being a chair.

I have to say that comparing those early issues to today’s highly stylized and hip glossy publication makes me proud to be associated with the magazine. Now if only I could do something about all that legalese in the middle.

Ken Swenson is in-house counsel for Bank of America in Los Angeles. He is the 2011-12 chair of the Los Angeles Lawyer Editorial Board. He can be reached at swensonatatl@aol.com.
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How to Get Along with Opposing Counsel in Litigation

Many of us grew up watching reruns of Perry Mason and The Practice in which the protagonist attorneys use a take-no-prisoners approach with their opponents and wrap up a case in 60 minutes, including the commercials. However, as young lawyers, we quickly realize that day-to-day litigating is not so sensational. The reality is that most cases last months, sometimes years, and throughout that time, attorneys must work with opposing counsel to accomplish the necessary steps of a case. Litigating a case as a war may ultimately cause opposing counsel to back down but also may backfire, and it will almost certainly cause stress and chaos. It behooves opposing attorneys to work cooperatively from the outset.

Opposing counsel are not the enemy. Learning early in practice that it is acceptable to compromise and that being reasonable is not the equivalent to losing will benefit your blood pressure and your clients.

One way to start dealings with opposing counsel is to call to introduce yourself personally. An early initial conversation provides an opportunity to set the tone of the case and discuss preliminary matters. For example, opposing counsel may agree to voluntarily dismiss a particular defendant rather than oblige you to file an expensive demurrer. Discussion, rather than motion, saves significant time and money. Sometimes opposing counsel may agree to your request in exchange for something that benefits his or her client but has little or no impact on yours, resulting in a win-win situation. For example, opposing counsel may agree to dismiss your client’s parent company, which is not a proper defendant, in exchange for your acceptance of service on behalf of your client. You save the opposing party money by accepting service, and your client is relieved of the expense of moving to dismiss the parent company or defending it at trial. The initial conversation is also an opportunity to sense how opposing counsel evaluates the case and may even result in an early settlement.

Similarly, once the judge schedules the case management conference, initiate scheduling the meet-and-confer discussion. Consider sending an e-mail message or making a call to mention a checklist of topics that the local rules or judge’s order require you to cover. Opposing counsel will often appreciate that you have cut down on the thinking that he or she must do, and it will help you to better understand what to expect in the case regarding future discovery and motions. A confirming letter after the conversation, including a request that opposing counsel reply immediately with any disagreement, is an important record to keep opposing counsel accountable for commitments he or she made. Taking this initiative will also encourage you to be better prepared in planning your case.

Planning is particularly crucial at the discovery stage. Screaming matches and childish name-calling at depositions and nasty letters make for entertaining stories but waste client resources. Attorneys commonly, but often unnecessarily, battle about the timing and scope of discovery. Although getting what you want is an ego boost, it is important to consider the big picture.

In a deposition, it is typically not worth arguing about an objection. If you are taking the deposition, allow opposing counsel to intercept the objection and, unless he or she is instructing the witness not to answer or is improperly coaching the witness, move on to the next question. If opposing counsel is instructing the witness not to answer, confirm with the witness that he or she is following counsel’s instruction, ask the court reporter to mark the question, and move on. It may work to ask the question a different way or to return to it near the end of the deposition to test if the attorney will maintain the instruction. Losing your temper makes it less likely that you will rationally think around the obstacle. Remember that it is your deposition, and it is in your client’s best interest to maintain control and get the best testimony. Typically, a court will recognize only egregious behavior by opposing counsel as warranting suspension of a deposition. Thus, if you react too aggressively, you may lose your opportunity to depose that witness.

With written discovery, it is often beneficial to grant opposing counsel’s request for an extension. Consider that you may later need an extension on your client’s responses or another compromise. Once you receive the opposing party’s responses, draft a respectful, concise letter addressing any deficiencies in the responses, considering it may later be used as an exhibit to a motion, and offer to schedule a call to discuss. Often a thorough meet-and-confer discussion aids in efficient resolution of discovery issues. Letter wars take more time and expense and are not nearly as productive. Many courts require a discussion before a discovery motion is filed. Thus, it is makes sense to initiate it at the outset in the event a motion is necessary.

When planning a mediation, consider using a mediator proposed by opposing counsel. Opposing counsel will be more likely to trust a mediator with whom he or she is familiar, potentially leading to a favorable resolution for your client. Being reasonable early in a case may allow you to gain opposing counsel’s trust and ultimately get what you want.

Learning early in practice that it is acceptable to compromise and that being reasonable is not the equivalent of losing will benefit your blood pressure and your clients.

Christiane A. Roussell, a member of the Barristers Executive Committee, is a labor and employment attorney at Hunton & Williams LLP in Los Angeles.
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A debtor who files for Chapter 7 bankruptcy relief must state an intention to retain or surrender personal property—usually a car. After the passage of the Bankruptcy Abuse Prevention Consumer Protection Act (BAPCPA) in 2005, the options available to the debtor wanting to keep a car were greatly restricted.1

Prior to the passage of BAPCPA, five circuits—including the Ninth—allowed debtors who wanted to keep their cars to carry out this intention by selecting from three options:2

1) A redemption agreement, which allowed the debtor to pay the creditor the present value of the vehicle soon after filing bankruptcy.3
2) A reaffirmation agreement, which imposed personal liability on the debtor if the debtor later defaulted on the car loan.4
3) The “ride-through” option,5 which allowed a debtor to continue making payments on the vehicle without requiring a reaffirmation agreement to be filed with the bankruptcy court.6

The other circuits rejected the ride-through option and only recognized a debtor’s right to indicate an intention to redeem or reaffirm.7

In the five circuits that permitted it, the ride-through option was extremely popular, because debtors could retain their vehicles without having to assume personal liability for the car loans.8 The ride-through option also prevented creditors from impinging on a debtor’s right to a fresh start because it did not impose personal liability on the debtor for the car loan. When a debtor selected the ride-through option a creditor still retained the right to repossess the vehicle if the debtor later defaulted on the loan.9

After BAPCPA, key provisions in Bankruptcy Code Sections 362 and 521 restricted a debtor’s ability to state a ride-through intention when filing for Chapter 7 bankruptcy relief.10 A debtor who seeks to retain a vehicle after filing for Chapter 7 relief is now required to state a permissible intention—which after BAPCPA is either an intention to reaffirm or redeem.11

Failure of a debtor to indicate a permissible intention may allow a creditor to exercise nonbankruptcy options, such as to invoke an ipso facto clause,12 a contract provision that permits a creditor to declare the contract in default by virtue of the other party’s insolvency or bankruptcy.13 However, courts have held that a creditor is not permitted to exercise an ipso facto clause when a debtor complies with the newly adopted BAPCPA provisions under Sections 362 and 521 in the reaffirmation agreement process.14 As such, even if a bankruptcy judge denies a reaffirmation agreement, a creditor is not permitted to exercise an ipso facto clause unless the creditor demonstrates that the debtor failed to comply with Sections 362 and 521.

Debtor Compliance

When a debtor files for bankruptcy, the automatic stay is triggered and prevents a creditor from repossessing a vehicle without permission from the court.15 Generally, ipso facto clauses in installment contracts are unenforceable as a matter of law.16 The bankruptcy code has afforded the debtor protections upon filing for bankruptcy pursuant to Bankruptcy Code Sections 365(e)(1)(B)17 and 541(c)(1)(B),18 which generally restrict or render unenforceable ipso facto clauses.

However, under a new BAPCPA provision, Bankruptcy Code Section 362(h)(1)(A), the automatic stay can now be terminated in a Chapter 7 bankruptcy case when a debtor fails to timely file a statement of intention pursuant to Section 521(a)(2)(A), which requires a debtor retaining a vehicle with a secured loan to indicate either an intention to redeem or reaffirm. If a debtor fails to state an intention to redeem or reaffirm, the secured creditor has the right to take whatever action is permissible under nonbankruptcy law pursuant to Section 521(a)(6).19 Accordingly, when a secured creditor has a permissible ipso facto clause in the loan agreement, a debtor’s failure to comply with Sections 362 and 521 can trigger the ipso facto clause.

Magdalena Reyes Bordeaux is a senior staff attorney with Public Counsel and specializes in consumer bankruptcy litigation.
and leave the debtor vulnerable to repossession of his or her vehicle.

However, debtor compliance with newly adopted Sections 362 and 521 does not require the debtor to ensure the agreement is approved by the court. Courts have consistently held that compliance under Sections 362 and 521 only requires a debtor seeking to reaffirm a car loan to: 1) file a statement of intention indicating an intent to reaffirm, 2) cooperate with the creditor in filing a reaffirmation agreement with the bankruptcy court, and 3) act upon the intention to reaffirm by attending the reaffirmation hearing set by the bankruptcy court.20

Some courts have allowed a debtor to cure the failure to indicate an intention to reaffirm when a debtor timely executes a reaffirmation agreement.21 Nevertheless, a debtor's failure to comply with Sections 521 and 362 is risky and could leave the debtor vulnerable to repossession of his or her vehicle by the secured creditor.22 After a debtor has complied with Sections 521 and 362, the final determination of whether the reaffirmation agreement is legally enforceable is governed by Bankruptcy Code Section 524(c).

Approval of Reaffirmation Agreement
Pursuant to Section 524(c), a reaffirmation agreement is unenforceable unless the agreement is approved by the bankruptcy court. Provisions under Section 524(c) grew out of concerns about the long history of coercive and deceptive actions by creditors to secure reaffirmation agreements of discharged debt.23 Section 524(c) provides two ways that a debtor can request approval of a reaffirmation agreement by the bankruptcy court.

First, an attorney can certify the agreement does not pose an undue hardship on the debtor or a dependent of the debtor and that he or she provided the debtor with disclosures regarding the reaffirmation agreement, including that the agreement is voluntary.24 Alternatively, a bankruptcy judge can determine that the reaffirmation agreement does not pose an undue hardship on the debtor or a dependent of the debtor and that the agreement is in the best interest of the debtor.25 After debtors have complied with Sections 362 and 521, they can file a reaffirmation agreement approved by the bankruptcy court by asking their attorneys to sign a declaration along with the reaffirmation agreement.26 The attorney declaration must state that the attorney: 1) informed the debtor that the agreement is voluntary, 2) informed the debtor about the consequences of reaffirming a discharged debt, and 3) determined the agreement does not pose undue hardship on the debtor or a dependent of the debtor.27 If a debtor's attorney certification is not filed with the court or one is not filed because the debtor is unrepresented, the debtor must seek approval of a reaffirmation agreement from the bankruptcy court.

When a debtor requests that a bankruptcy judge approve a reaffirmation agreement, the request is made directly at a reaffirmation hearing.28 At a reaffirmation hearing, a bankruptcy judge has the duty to carefully examine the debtor's financial circumstances and ensure that the reaffirmation agreement: 1) does not pose an undue hardship on the debtor or a dependent of the debtor, and 2) is in the best interest of the debtor.29 Moreover, a presumption of undue hardship arises when the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of the agreement is less than the scheduled payments on the reaffirmed debts.30 When Congress passed BAPCPA, new Bankruptcy Code Section 524(k) expanded consumer debtor protections in the reaffirmation agreement process by requiring creditors to provide additional disclosures to the debtor in a timely manner so as to ensure the debtor is fully aware of the consequences of entering into a contract imposing personal liability of a discharged debt.31 Congress, however, did not seek to eliminate or restrict subsequent review and approval by a bankruptcy judge of a reaffirmation agreement.32 More importantly, Congress did not include any language when it passed BAPCPA and amended Section 524 that an ipso facto clause would be triggered if a bankruptcy court denied a reaffirmation agreement. If Congress had wanted to give a secured creditor the right to exercise an ipso facto clause upon denial of a reaffirmation agreement, it could have done so by inserting such language in Section 524, since Congress had already amended that section when it passed BAPCPA.

During the reaffirmation agreement hearing, a debtor is unable to compel a judge presiding over the reaffirmation hearing to approve a reaffirmation agreement.33 In fact, the bankruptcy court has held that a debtor's concern over a creditor-relied provision, such as an ipso facto clause, if the court disapproves the reaffirmation agreement is not warranted, and is not sufficient to overcome a presumption of undue hardship.34 Thus, a debtor can comply with Sections 362 and 521 and still not have an enforceable reaffirmation agreement because the bankruptcy judge has ruled, pursuant to Section 524, that the agreement poses either an undue hardship and/or is not in the best interest of the debtor. However, some creditors have tried to impose an additional obligation on debtors by advising them that if they are unable to get a reaffirmation agreement approved by the bankruptcy judge, an ipso facto clause in the contract will be triggered and leave them vulnerable to repossession of their cars.35

Ipso Facto Clauses
The bankruptcy code explicitly restricts the enforceability of ipso facto agreements pursuant to Bankruptcy Code Sections 362, 541(c)(1)(B), and 365(e)(B). Since the overriding purpose of a Chapter 7 bankruptcy relief is to provide the honest but unfortunate debtor with a fresh start, courts view ipso facto clauses as unenforceable as a matter of law.36 After BAPCPA, Congress created a carve-out for secured creditors to exercise an ipso facto clause. However, the ability of a creditor to exercise the clause can only be triggered under very limited circumstances. The secured creditor's right to exercise an ipso facto clause can be further limited if a creditor refuses to provide a debtor with a reaffirmation agreement or file such an agreement with the bankruptcy court.37 Thus, a secured creditor can lose the ability to exercise an ipso facto clause if the secured creditor thwarts a debtor's ability to carry out a debtor's intention to reaffirm pursuant to Bankruptcy Code Section 362(h)(1)(B).38

Bankruptcy courts have held that a creditor does not have the right to exercise an ipso facto clause when a debtor complies with Sections 362 and 521, but the bankruptcy judge denies the agreement at a reaffirmation hearing.39 More importantly, courts have recognized that the provisions under Section 521(d), which can trigger an ipso facto clause, when working in concert with other sections of the code, can only be invoked by a debtor's failure to comply with Sections 362 and 521.40 The bankruptcy courts have rejected the position argued by creditors that the language of Section 521(d) allows a secured creditor to exercise an ipso facto clause when a debtor has complied with Sections 362 and 521.41 Courts have further held that when a debtor complies with Sections 362 and 521, the debtor may retain possession of the collateral after the entry of discharge and the closure of the case without fear that the secured creditor will exercise an ipso facto provision and repossess the collateral, so long as the debtor remains current.42 Since a secured creditor is not entitled to exercise an ipso facto clause after the bankruptcy court has denied a reaffirmation agreement, a creditor cannot thereafter repossess the vehicle without violating the automatic stay or discharge injunction when there is no payment or insurance default.43 In fact, the bankruptcy court has found a secured creditor in violation of the discharge injunction and awarded compensatory damages along with return of the vehicle pursuant to Bankruptcy Code Section

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105 after the creditor repossessed a vehicle when a debtor complied with Sections 362 and 521 and the bankruptcy judge denied the reaffirmation agreement at a reaffirmation hearing.44 The passage of BAPCPA brought many sweeping changes to the bankruptcy code, especially as they relate to consumer debtors, and it also created a limited carve-out for such as a vehicle, without stating a permissible change was elimination of a debtor's ability to retain personal property securing a debt, such as a vehicle, without stating a permissible intention to either retain or redeem as required by Bankruptcy Code Sections 362 and 521. BAPCPA also created a limited carve-out for creditors to exercise an ipso facto clause under Bankruptcy Code Section 521 when the debtor failed to comply with Sections 362 and 521—provided the clause is permissible under applicable non-bankruptcy law.45 Debtor compliance with Sections 362 and 521 does not require a debtor to get approval of the reaffirmation agreement. Sections 362 and 521 only require the debtor to enter the reaffirmation agreement.

When a bankruptcy court denies a reaffirmation agreement under Section 524(c) and the debtor has complied with Sections 362 and 521, bankruptcy courts have consistently held that a creditor cannot exercise an ipso facto clause. Since the approval of a reaffirmation agreement is out of the control of the debtor, courts have held that Section 521(d), which allows creditors to exercise a permissible ipso facto clause, is not triggered.

If a creditor exercises an ipso facto clause after the debtor has complied with Sections 362 and 521 in entering into a reaffirmation agreement that is denied by the judge, the creditor may be in violation of the automatic stay or discharge injunction. In such cases, the court may award compensatory and punitive damages against the secured creditor.

5 In re Dumont, 581 F. 3d 1104, 1109 (9th Cir. 2009).
7 “Ride-through was not limited to automobile loans. However, as the name implies, ride-through was used most frequently to allow debtors to hold on to an automobile.” Id. at 1109.
8 Id.
9 Id. at 1108.
11 In re Dumont, 581 F. 3d at 1108 n.3 (“Ride-through was not limited to automobile loans. However, as the name implies, ride-through was used most frequently to allow debtors to hold on to an automobile.”).
12 Id. at 1109.
13 Id.
14 Id. at 1108.
16 In re Dumont, 581 F. 3d at 1117.
17 Id. at 1114.
19 In re Dumont, 581 F. 3d at 1118-19 (The court held that courts have allowed the ride-through after BAPCPA when there has been substantial compliance with §§362 and 521 by the debtor.).
20 11 U.S.C. §362(a)(2) provides “a petition filed...operates as a stay, applicable to all entries of judgment, against the debtor or against property of the estate.”
21 In re Jones, 591 F. 3d 308, 312 (4th Cir. W. Va. 2010) (citing Rigggs Nat. Bank of Washington, D.C. v. Perry, 729 F. 2d 982, 984-85 (4th Cir. 1984) (explaining that “[i]n this matter [the] court must look at the entire bankruptcy case...to determine if an entry of judgment is appropriate.”)
22 In re Dumont, 581 F. 3d at 1115.
23 Id. at 1116.
24 11 U.S.C. §521(a)(2)(A) provides: “[i]f the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under Section 362(a) is terminated with respect to the property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable non-bankruptcy law.”
25 11 U.S.C. §§524(c), 524(i). If a creditor exercises an ipso facto clause under Bankruptcy Code Section 521 when the debtor fails to comply with Sections 362 and 521—in entering into a reaffirmation agreement that is denied by the judge, the creditor may be in violation of the automatic stay or discharge injunction. In such cases, the court may award compensatory and punitive damages against the secured creditor.
How to Create and Maintain a Medicare Set-Aside Trust

THE CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS) possesses an absolute right to reimbursement for any medical treatment that a personal injury plaintiff receives that is due to the alleged negligence of a third party. Severe penalties await attorneys and parties who do not protect Medicare’s reimbursement interests. Unfortunately, attorneys need extreme patience and perseverance to properly follow the complex, evolving rules governing Medicare reimbursement through a set-aside trust account created to hold settlement proceeds for future medical expenses.

Until recently, CMS had no formal position regarding reimbursement for future medical expenses that it may be required to provide to Medicare recipients who sustain injuries as a result of the negligence of a third party. The general consensus was that attorneys representing these recipients did not have to make provisions for future treatment and care covered by Medicare when negotiating a settlement of a claim against a third party. However, CMS recently issued a formal position paper making it clear that this practice can no longer continue. Out of economic necessity, CMS has become more expansive and aggressive in enforcing its right to reimbursement for medical care for an injured plaintiff. This new approach was previously confined to the workers’ compensation arena, but now CMS has expanded the obligation to create a Medicare set-aside.

Medicare was created when the Social Security Act of 1965 was signed into law by President Lyndon B. Johnson as amendments to existing Social Security legislation. At the bill signing ceremony, President Johnson enrolled former President Harry S. Truman as the first Medicare beneficiary and presented him with the first Medicare card. According to the Federal Medicare Trustees annual report, there are currently over 47.5 million Americans covered by Medicare, of whom 39.6 million are aged 65 and older, and 7.9 million are disabled. Total benefits paid in 2010 were $516 billion. As it exists today, Medicare provides health insurance for 1) people 65 or older, 2) people of any age with End-Stage Renal Disease (ESRD) (permanent kidney failure requiring dialysis or a kidney transplant), and 3) people under 65 with certain disabilities. In 2010, $486 billion, and expenditures were $523 billion.

As it exists today, Medicare provides health insurance for 1) people 65 or older, 2) people of any age with End-Stage Renal Disease (ESRD) (permanent kidney failure requiring dialysis or a kidney transplant), and 3) people under 65 with certain disabilities. In order to qualify for coverage under the third category, known as Class III, an individual must submit an application showing that he or she is 18 years old or older, has worked in jobs covered by Social Security, and has a medical condition that has prevented the applicant from working (or is expected to prevent the applicant from working) for at least 12 months or end in death. Applications for Medicare are submitted to the Department of Social Security. Once coverage is approved for Medicare benefits, the administration is turned over to CMS, which is a branch of the U.S. Department of Health and Human Services. This federal agency administers Medicare, Medicaid, and the Children’s Health Insurance Program, and it enforces Medicare reimbursement regulations.

At inception, Medicare was defined as the primary payer for services except those covered by workers’ compensation. In 1980, Congress expanded the definition of “primary payers,” establishing that Medicare would be the secondary payer in circumstances in which there was a potentially responsible third party. The purpose of enacting this change in Medicare was to shift costs from the Medicare program to private sources of payment. The Medicare set-aside trust has evolved out of these changes. (Although called trusts, Medicare set-aside trusts are not related to other common estate planning instruments. In establishment and administration, they more closely resemble a blocked minor’s account.)

The law prohibits Medicare from making payment if payment has been made or can reasonably be expected to be made by a third party, including “workers’ compensation insurance, any liability or no-fault insurance, or an employer group health plan.” The Medicare rules further state that if payment has not been made, or cannot be expected to be made promptly by a third-party payer, then Medicare may make a conditional payment. However, it further requires reimbursement to CMS for any payments made on behalf of an injured person.

CMS has the option to initiate recovery on its own from any identifiable third-party payer. The Code of Federal Regulations expressly states that CMS “may initiate recovery as soon as it learns that payment has been made or could be made under workers’ compensation, any liability or no-fault insurance, or an employer group health plan.” This is created as a direct right of action by CMS to recover any liability or no-fault insurance, or an employer group health plan. The Medicare rules further state that if payment has not been made, or cannot be expected to be made promptly by a third-party payer, then Medicare may make a conditional payment. However, it further requires reimbursement to CMS for any payments made on behalf of an injured person.

Cox v. Shalala

In Cox v. Shalala, the court considered an appeal by the heirs of a wrongful death victim. The heirs opposed Medicare’s efforts to recover a conditional payment for medical treatment on the decedent’s behalf. The matter had informally resolved for $800,000. Medicare had conditionally paid the amount of $181,187.75 in medical expenses prior to the decedent’s death. As discussed by the court, when the government has information that medical care is needed because of an injury or illness that was caused by another party, a conditional payment can be made. When a conditional payment is made for medical care, the government has a direct right of recovery for the entire amount conditionally paid from any entity responsible for making primary payment. The court ordered the heirs to repay the

Sean M. Novak is senior partner of The Novak Law Firm, P.C., in Beverly Hills who specializes in catastrophic personal injury litigation, employment discrimination, and civil litigation.
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entire amount, which was deemed owed to Medicare with interest from the date on which notice of the debt was mailed.\textsuperscript{25}

The duty to protect the interests of CMS does not fall just on plaintiffs. On July 1, 2009, the Medicare, Medicaid and SCHIP Extension Act (MMSEA) went into effect.\textsuperscript{26} The act created affirmative obligations on the part of a defendant to determine whether a plaintiff has received Medicare benefits and to notify CMS of its right to possible recovery from the plaintiff.\textsuperscript{27} The punishment for a defendant who fails to comply with these obligations can include a penalty of $1,000 per day.\textsuperscript{28} Double damages and interest can also be recovered against the defendant.\textsuperscript{29} As a result, there is strong incentive on both sides of a matter to ensure that the government's rights have been protected.

Medicare is always the secondary payer to workers' compensation and other insurance such as no-fault and liability insurance. Accordingly, CMS has long maintained that all beneficiaries and claimants must consider and protect its interest when settling any workers' compensation case.\textsuperscript{30} This is deemed to include past and future interests. The result has been the necessity to create workers' compensation Medicare set-aside trusts.

Set-aside trusts must be used in the workers' compensation arena, and CMS is aggressive in its enforcement of this requirement. As a result, attorneys practicing in the workers' compensation field have long been exposed to the frustrations surrounding the creation of these trusts. Fortunately, significant lessons can be learned from their experiences. The first of these is that CMS ultimately determines how much must be placed into a set-aside trust against a future claim. There are no appeal rights to a CMS determination of the appropriate amount of a set-aside trust.

In seeking to balance the interests of clients against their Medicare reimbursement obligations, attorneys have tried to argue that the following passage in the Code of Federal Regulations justifies reduction in the amount needed to be placed in the set-aside trust:

If it is not necessary for CMS to take legal action to recover, CMS recovers the lesser of the following:

(i) The amount of the Medicare primary payment.

(ii) The full primary payment amount that the primary payer is obligated to pay under this part without regard to any payment, other than a full primary payment that the primary payer has paid or will make, or, in the case of a primary payment recipient, the amount of the primary payment.\textsuperscript{31}

Attorneys have argued that Section 411.47c requires CMS to negotiate to accept less than the actual payments made by Medicare for medical treatment if CMS is not forced to take legal action by the client to establish the set-aside. CMS, however, issued an opinion on September 29, 2011, that the compromise language in Section 411.47c only addresses conditional past Medicare payments. However, the right of CMS to determine the amount of the set-aside trust does not mean that the attorney and client are powerless. If it is believed that a CMS determination contains obvious mistakes or a failure to discount for procedures or treatments, a petition to CMS can be made for a determination for a correction of the errors.\textsuperscript{32} If an attorney believes that CMS has misinterpreted the evidence or disagrees with the CMS determination for some other reason, the attorney can submit a revised application for reevaluation. Additional evidence and documents may be included.

Furthermore, a petition can be made after the set-aside trust is established if the treating physician concludes that the client's medical condition has substantially improved.\textsuperscript{33} The client or client's representative may submit a new proposal covering future expected medical expenses. However, these proposals must justify at least a 25 percent reduction in the outstanding funds in the set-aside trust.\textsuperscript{34} In addition, the proposal may not be submitted until at least five years after a previous CMS approval letter for the set-aside trust.\textsuperscript{35}

**Liability Medicare Set-Aside Trusts**

Until recently, CMS issued statements indicating that it did not consider establishment of a liability Medicare set-aside trust to be necessary in most instances. Specifically, statements from CMS and other federal entities make clear that CMS did not require set-asides for liability claims, such as those arising from injuries from an automobile accident. However, this position appears to have changed. On September 29, 2011, CMS published a liability Medicare set-aside memorandum stating that liability Medicare set-asides (LMSAs) are a definite component of CMS's Medicare set-aside process and equation:

Where the beneficiary's treating physician certifies in writing that treatment for the alleged injury related to the liability insurance (including self-insurance) “settlement” has been completed as of the date of the “settlement,” and that future medical items and/or services for that injury will not be required, Medicare considers its interest, with respect to future medicals for that particular “settlement,” satisfied. If the beneficiary receives additional “settlements” related to the underlying injury or illness, he/she must obtain a separate physician certification for those additional “settlements.”

CMS's position makes it clear that, when a treating physician certifies in writing that necessary treatment for a Medicare recipient injured by a third party has been completed and/or services are not required, no LMSA is necessary. However, CMS indicates that it would consider a LMSA necessary in instances in which the treating physician certifies ongoing treatment is necessary and/or future services will be required. CMS has implied that a set-aside trust is the appropriate means of ensuring that Medicare's interests have been considered.

Unfortunately, the memo from CMS advises all settling parties that, in situations in which treatment has been completed or services are not required, CMS will not provide confirmation that CMS's interest with respect to future medical bills for that settlement has been satisfied. As a result, the beneficiary and his or her attorney are encouraged to save the physician's certification as proof if CMS seeks reimbursement later.

If a set-aside trust is required, Medicare will look to the client's primary treating physician (PTP) for assessment of future medical needs. This requires that the primary treating physician list all anticipated future services and treatment related to the injuries the client suffered as a result of a third party's misconduct. CMS will then set the required amount for the set-aside trust based upon the outline from the PTP. There is no appeal right for the determination by CMS of the amount of the set-aside trust. Considerable work is involved in administering a Medicare set-aside account. This includes the necessity for an annual auditing to see that any payment from the set-aside trust was made according to Medicare fee schedules or the settlement fee schedule.

**Trust Administration**

The set-aside trust is not the same as an instrument used for estate planning or asset management. A Medicare set-aside arrangement can be established, however, to make payments on a defined schedule to cover expenses projected for future years.\textsuperscript{36} In a structured Medicare set-aside arrangement, monies are apportioned over fixed or definite periods of time.\textsuperscript{37} The seed money for the Medicare set-aside arrangement must include an amount equal to the amount calculated to cover the first surgery procedure and two years of treatment.\textsuperscript{38} In a structured Medicare set-aside arrangement, if funds are not exhausted during a given period, the excess funds must be carried forward to the next.\textsuperscript{39}

If a client dies before the funds in the set-aside trust are exhausted, the remainder passes to the client's heirs pursuant to state law.\textsuperscript{40} However, CMS and the contractor responsi-
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Trust. In light of the complexities involved is completely separate from the set-aside come from some other payment source that these costs. The payment of these costs must establishing the trusts cannot be charged to attorney costs specifically associated with administration of the set-aside trusts and clear that administrative fees and expenses for clients from the burden.

Additionally, the beneficiary of the trust can only use money in the trust for treat-ment that is in the future medical award. This requires a CMS determination regarding whether a treatment is medically necessary to cure or relieve the effects of injuries caused by the third party. Furthermore, Medicare will not make any payment until the trust account, the third party. Furthermore, Medicare will not make any payment until the trust account, the benefits of working with experienced experts can handle establishment and administration of the Medicare set-aside trust and potentially free the attorneys and clients from the burden.

It should be noted that CMS has made it clear that administrative fees and expenses for administration of the set-aside trusts and attorney costs specifically associated with establishing the trusts cannot be charged to the set-aside arrangement. The CMS will no longer be evaluating the reasonableness of these costs. The payment of these costs must come from some other payment source that is completely separate from the set-aside trust. In light of the complexities involved in establishing and administering a set-aside trust, the benefits of working with experienced experts are significant.

Economic pressure is forcing the government to seek new sources of revenue on a daily basis. Compounding this problem is the political pressure being placed on the Medicare system. As a result, it is not surprising to see Medicare expanding its scope of requirements for future set-aside trusts to include third-party liability matters. Being prepared in advance for the potential need for creation of set-aside trusts is the best way for attorneys to protect clients and themselves from liability.

4 Id.
5 Id.
6 Id.
8 See also 42 U.S.C. §1395y; 42 C.F.R. §411.24(b)(6).
9 MSP MANUAL, supra note 9.
10 Id.
11 See 42 C.F.R. §411.24(b).
12 Id.
13 See 42 C.F.R. §411.24(b).
14 See 42 C.F.R. §411.24(e).
15 See 42 C.F.R. §411.24(g).
16 Id.
19 Cox, 112 F. 3d 151.
20 See id.
21 See id. (citing 42 U.S.C. §1395y(b)(2)(B)(ii); 42 C.F.R. §411.24(e)(i)).
22 Id. (citing 42 U.S.C. §1395y(b)(2)(B)(ii); 42 C.F.R. §411.24(e)).
23 Id. at 155-56 (citing 42 U.S.C. §1395y(b)(2)(B)(ii); 42 C.F.R. §411.24(e)).
24 Id. at 155-56.
26 Id.
27 Id.
28 See also 42 U.S.C. §1395y.
31 42 C.F.R. §411.24(c)(1).
33 Id.
34 Id.
35 Id.
37 Id.
38 Id.
39 Id.
40 Id.
42 Id.
43 Id.
45 Id.
46 Id.
The potential for conflicts of interest in shareholder derivative lawsuits is high, leading to complex issue for courts and attorneys to resolve.

SHAREHOLDER DERIVATIVE LAWSUITS have not diminished. Indeed, in industries such as finance and technology, the number of these lawsuits is growing. A shareholder derivative suit is typically an action by one or more shareholders against some or all of the officers or directors of a corporation to redress corporate mismanagement. While the corporation itself is usually named as a defendant, its status as defendant is nominal. In practice, the interests of the shareholder and the corporation are considered aligned, and the plaintiff benefits only as a shareholder. Even through the plaintiff may be the plaintiff named in the lawsuit, any recovery goes to the corporation rather than to the plaintiff-shareholder. These dynamics give rise to significant conflicts of interest. Among the most important are the potential conflicts between the shareholder and the corporation, between the plaintiff shareholder and other shareholders, and between the corporation and its counsel. Some of these potential conflicts may also pose ethical challenges to the attorneys involved.

Although myriad acts can underlie a claim, shareholder derivative actions usually emerge as a result of breaches of fiduciary duties by officers or directors. These duties, long recognized at common law, have been codified in Corporations Code Section 309. Pursuant to these authorities, each director owes a fiduciary duty of care to the corporation and its shareholders, and he or she must serve “in good faith in a manner such director believes to be in the best interest of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.” In addition to the duty of care, directors also owe a fiduciary duty of loyalty to the corporation they serve. “Loyalty” means placing corporate and shareholder interests ahead of any other business or personal interests. Discharging these obligations requires the exercise of sound business judgment. Courts
have ruled that this obligation includes managing proactively: “A director cannot close his eyes to what is going on about him in the conduct of the business of the corporation and have it said that he is exercising business judgment.”6 Similarly, “the [business judgment] rule does not immunize a director from liability in the case of his or her abdication of corporate responsibilities.”7

Officers also have fiduciary duties to the corporation. These duties include a “duty, not only affirmatively to protect the interest of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation.”8 Here, the courts can impose a higher standard of care on an officer, as compared to a director, because officers are often more closely involved in running the corporation and have more direct responsibility for the preparation of “information, reports, or statements on corporate affairs.”9 Finally, an officer who participates in corporate management and who exercises some discretionary authority owes a fiduciary duty of loyalty to the corporation, even if the officer’s authority falls short of having control over the corporation.10

In establishing what the appropriate exercise of these duties entails, courts have held, for example, that unreasonable salaries or other compensation paid to management may be challenged as a waste of corporate assets, and that, even when approved by a “disinterested” board, “unreasonably” large payments to officers and directors may constitute a “waste” of corporate assets and thus violate a director’s fiduciary duties to the corporation.11 It has also been held that directors or officers may not seize a corporate opportunity for themselves without first offering it to the corporation.12 For example, a fiduciary may not acquire property in which the corporation has an interest or tangible opportunity for themselves without first offering it to the corporation.13

Conflicts between Plaintiff and Corporation

A derivative action commenced by a plaintiff shareholder against the officers and directors of the corporation does not give rise to a conflict between that plaintiff shareholder and the corporation. Viewed from another angle, the interests of the plaintiff shareholder and the corporation are considered aligned, and the shareholder only benefits through the corporation. As such, the primary mechanism for eliminating a conflict between the plaintiff and the corporation, despite the fact that the officers and directors of the corporation are being sued, is the straightforward requirement that the plaintiff be a shareholder.

Corporations Code Section 800(b)(1) sets the prerequisites for bringing a shareholder derivative action under California law.14 A derivative plaintiff will qualify to initiate an action on a corporation’s behalf if 1) the plaintiff is a shareholder of record, holder of a beneficial interest, or holder of a voting trust certificate, 2) the plaintiff was a shareholder when the wrong to the corporation that gave rise to the action took place (the contemporaneous-ownership rule), and 3) the plaintiff made a reasonable effort to inform the corporate directors about the action and induce them to commence suit against the responsible parties, unless such efforts would have been “useless” or “futile.” Section 800(b)(1) also provides that the court has discretion to waive the contemporaneous ownership requirement if it finds that there is no one else to enforce the claim on the corporation’s behalf and that defendants would otherwise retain the benefits derived from their willful breach of fiduciary duty unless the action is permitted to proceed.15

One federal court has permitted shareholders to act as plaintiffs in a derivative action despite positions adverse to the defendant directors in an earlier relationship. In Tyco Laboratories, Inc. v. Kimball,16 the plaintiffs who brought the derivative action owned a substantial interest in the corporation and may previously have been in a position adversarial to the defendant directors regarding control of the corporation. But the court found that this did not disqualify the plaintiffs from representing the corporation’s shareholders in a derivative action, because the plaintiffs were pursuing common interest with the corporation by seeking redress for alleged breaches of fiduciary duties and other violations of state and federal laws on the corporation’s behalf, and because any recovery would inure to the corporation’s benefit and not to the plaintiffs in their individual capacities.17

Indeed, the conflict between the plaintiff and the corporation is governed under California law regardless of where the company is incorporated. In Valtz v. Penta Investment Corporation,18 a 5 per-
cent shareholder in a Delaware corporation invoked his absolute right to inspect under California law. The corporation argued that because of its place of incorporation, the more limited Delaware law, which allows inspection only for a proper, investment-related purpose, should be applied. The court found, however, that by locating a principal executive office in California and keeping its books and records here, a corporation brings disputes regarding inspection of the records into California courts and renders California public policy applicable. The court reasoned that full faith and credit need not be given under the laws of another state when doing so would violate California public policy. Moreover, the court in Valtz held that California places no proper-purpose restriction on a shareholder’s right of inspection, and that the California courts must enforce that policy despite the fact that the corporation was incorporated in Delaware.

These rules also apply to a “nominally foreign corporation.” Pursuant to the Corporations Code, a “nominally foreign corporation” is any foreign corporation doing intrastate business in California if, during the previous year, 1) the average of what is termed the “property factor,” the “payroll factor,” and the “sales factor” within California is more than 50 percent, and 2) more than half of its voting securities are held by persons with California addresses as shown by the corporation’s books. In short, California law applies if the corporation conducts more than 50 percent of its business in California, and if California residents own most of the stock. At least one California court has relied upon the U.S. Supreme Court to interpret this statute. In Wilson v. Louisiana-Pacific Resources, the Third Appellate Department wrote, “Every state is entitled to enforce in its own court its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.”

The Corporations Code does not specify the number of past years for which records must be made available. However, Section 17058 requires limited liability companies (LLCs) to maintain all tax returns and financial statements of the past six years, and books and records related to internal affairs of the LLC for at least the past four years. Finally, if a corporation refuses to honor the lawful demand of a shareholder to inspect the records, and if good cause can be shown, Section 1603 vests courts with the authority to appoint an independent inspector or accountant “to audit the books and records kept in this state and investigate the property, funds and affairs of any domestic corporation or any foreign corporation keeping records in this state.” When appointed, inspectors have much broader rights than shareholders, as they are able to inspect all books and records of a company, without limitation to other shareholders when the plaintiff shareholder simultaneously brings a direct claim against a corporation.

Even in this context, however, California courts have held that a shareholder may maintain separate direct and derivative actions and that nothing in California state law pro-

Conflicts between the Plaintiff and Remaining Shareholders

In order to avoid conflicts between the plaintiff shareholder and other shareholders, the federal counterpart to Corporations Code Section 800 provides an additional requirement—that a “derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.” This suggests that there can be disqualifying conflicts between a plaintiff shareholder and other shareholders. While California’s Section 800(b) contains no such requirement, given the nature of a shareholder derivative suit, a conflict arguably arises between a plaintiff shareholder in a derivative action and the plaintiff from initiating a derivative lawsuit if he or she also happens to be wronged in an individual capacity. Moreover, in the case of closely held corporations with a small number of shareholders, the distinction between direct and derivative actions may blur if the acts of one or a few officer/shareholders directly affects both the corporation and the other shareholders. The fact that shareholders may also have other individual claims does not preclude them from bringing a derivative action.

By contrast, at least under federal law, cases of clear conflict between a direct and a derivative action brought by the same shareholder can be problematic. For example, in Zarowitz v. Bank America Corporation, the plaintiff, a former bank employee, was fired after the bank attributed substantial investment losses to decisions made by the plaintiff and other employees. Two sets of litigation ensued: The bank sought damages against the plaintiff and other former employees for its losses, and the plaintiff sued individually for wrongful termination and defamation. Meanwhile, a series of four class
actions and a dozen derivative actions were filed against the bank’s officers and directors. With the single exception of this plaintiff, all the other plaintiffs reached a comprehensive settlement agreement with the bank’s insurers. The plaintiff attempted to block two of the settlements, however, because he thought they would have an adverse effect on his damage action for wrongful termination. Under these facts, the court agreed that the plaintiff had a conflict of interest with the other shareholders and thus had no standing to object to the settlement of the derivative action.43

Conflicts in Legal Representation

While the typical shareholder derivative action is brought against the officers and directors of a corporation, it also names the corporation as a defendant. As such, the question arises as to whether an attorney can simultaneously represent the officers and directors on one hand and the corporation on the other. If the case involves allegations of wrongdoing against the officers or directors, the answer is an emphatic no. Indeed, both general principles of legal ethics and established California precedent appear to require per se disqualification if a lawyer attempts to represent both the company and its individual officers and directors in a derivative action.

Every relevant codification of rules of legal ethics—the Model Rules of Professional Responsibility, the Model Code of Professional Responsibility, and the California Rules of Professional Conduct—prohibit the simultaneous representation of conflicting interests or concurrent adverse representation.44 In applying this prohibition to shareholder derivative actions alleging misconduct by corporate officers or directors, a leading treatise on corporations states, “Dual representation of the corporation and individual defendants in a derivative proceeding which asserts a claim of serious wrongdoing by those in control of the corporation is considered improper because a potential conflict of interest exists between counsel’s duty to the corporate entity and counsel’s relationship with the individual defendants.”45 The treatise advises that the corporation retain independent counsel whenever the corporation decides to take an active role in the litigation. He concludes that, except in patently frivolous cases, allegations of fraud, intentional misconduct, or self-dealing by officers or directors require separate counsel.46

Other commentators have been arriving at similar conclusions for decades, with one stating that the possibility for conflicts of interest in shareholder derivative actions is “universally recognized.”47

In California, Rule 3-310 of the Rules of Professional Conduct expressly prohibits conflicts of interest.48 Section 3-310(C) provides that a lawyer shall not, without the informed written consent of each client, “[a]ccept representation of more than one client in a matter in which the interests of the clients potentially conflict, or “[a]ccept or continue representation of more than one client in a matter in which the interest of the clients actually conflict.”49

The seminal California case addressing Rule 3-310(C) in a shareholder derivative action is Forrest v. Baeza.50 In Forrest, a lawyer was simultaneously representing both several corporations and their corporate directors who were accused of embezzling from, and subjecting the corporations to, penalties for tax fraud. The court reasoned that, in such suits, the corporation, while nominally a defendant, is actually a plaintiff; if the allegations are proved, the corporation stands to benefit from recovery for the wrongful actions of the directors.

The court then reviewed California precedent and held, “Current case law clearly forbids dual representation of a corporation and directors in a shareholder derivative suit, at least where the directors are alleged to have committed fraud.”51 The Forrest court concluded, “In all but a few instances, the rule of disqualification in simultaneous representation cases is a per se or ‘automatic’ one.”52 Many subsequent cases have cited Forrest. For example, in La Jolla Cove Motel and Hotel Apartments, Inc. v. Superior Court, the court wrote that “where a shareholder has filed an action questioning its management or the actions of individual officers or directors, such as in a shareholder derivative action, corporate counsel cannot represent both the corporation and the officers, directors or shareholders with which the corporation has a conflict of interest.”53

Moreover, the conflict of interest cannot be covered by the traditional means of written consent or partial withdrawal, because the exception cannot be applied when there is no disinterested party that can provide the consent. That is precisely the situation in most shareholder derivative actions, because, typically, all the directors and officers of the corporation are named as individual defendants.

Indeed, Rule 3-600(E) specifically recognizes this eventuality.54 It allows a lawyer to represent a company and its officers and directors subject to the requirement of informed, written consent found in Rule 3-310(C) but goes on to state unequivocally, “If the organization’s consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.”55 In other words, the officers and directors named as individual defendants cannot give valid consent on behalf of the corporation for their own lawyer to represent the corporation.56

The court of appeal in Forrest also addressed this issue and held that the officers and directors could not give valid consent to have counsel represent both them and the company in a derivative action. The court described reliance on consent as “ill founded” in the context of derivative litigation. The court reasoned, “This consent rationale seems peculiarly inapplicable in a derivative suit, because the corporation must consent through its directors, who are the individual defendants.”57 The court concluded that “it would be meaningless in derivative litigation to allow the consent of the parties defendant to exculpate the practice of dual representation, for most often it would be the defendant directors and officers who would force the corporation’s consent.”58

Nor does partial withdrawal seem to be a viable strategy. It is well established that a law firm may not play “hot potato” with its clients to avoid disqualification for concurrent adverse representation. In Truck Insurance Exchange v. Fireman’s Fund Insurance Company, a law firm was counsel of record for the plaintiff, Truck Insurance Exchange, while at the same time representing the defendant, Fireman’s Fund Insurance Company, in another, unrelated action. The law firm sought to avoid disqualification in the case involving Truck Insurance by withdrawing as counsel in the unrelated case involving the defendant. The court held that a law firm could not avoid disqualification by withdrawing from the representation of the less favored client before a hearing on a motion for disqualification.59

In reaching this decision, the court cited a series of cases for the proposition that an attorney who is simultaneously representing one client against the interest of another client should not be able to avoid the rule of per se disqualification by simply dropping one of the clients when a disqualification motion is filed. The court stated that it saw no reason to depart from the “well-established principle requiring automatic disqualification” when a law firm seeks to avoid disqualification simply by dropping one client like a hot potato. If this were not the case, the court noted, a law firm could always convert a present client into a former client when faced with disqualification.60 The same policies and rationale would appear applicable in shareholder derivative cases and operate to prevent a lawyer from curing this conflict by simply withdrawing as counsel for the corporation.

The very nature of the shareholder deriv-
ative action engenders conflict between the shareholders and the corporation, among shareholders, and for the attorneys involved. Some of these conflicts are proving intractable. Future courts will likely be called upon in the continuing effort to reach ultimate resolutions.

1 ZURICH AMERICAN INSURANCE COMPANY, RECENT DEVELOPMENTS IN SHAREHOLDER DERIVATIVE SUITS 2 (Advisen MSC Ad., 2009).
2 COUNSELING CALIFORNIA CORPORATIONS §3A.17, at 474 (CEB 3d ed. 2011).
3 CORP. CODE §309.
5 1 CAL. PRACTICE GUIDE: CORPORATIONS ¶6:252 (Rutter 2010).
8 Bancroft-Whitney Co. v. Glen, 64 Cal. 2d 327, 345 (1966).
9 1 BALLENTINE & STERLING, CALIFORNIA CORPORATION LAW §102.02 (4th ed. 2010).
11 1 CAL.PRACTICE GUIDE: CORPORATIONS, supra note 5, ¶6:421.
15 CORP. CODE §800(b)(1).
16 Id.
18 Id. at 299.
19 CORP. CODE §1601.
20 CORP. CODE §1601(a).
21 Id.
22 CORP. CODE §1601(b).
23 CORP. CODE §1601.
26 Id.
28 Id.; Homestake Mining Co., 11 Cal. App. 2d 488; CORS. CODE §§1600 et seq.
30 Id. at 808.
31 CORP. CODE §2115.
33 Id. at 222 (quoting Alaska Packers Assoc. v. Industrial Accident Comm’n, 294 U.S. 532 (1935) (holding that California laws that mandate cumulative voting are not preempted by Utah laws that only provide for straight voting unless otherwise stated)).
34 CORP. CODE §§1500 et seq.; CORP. CODE §§1600 et seq.
35 CORP. CODE §17058.
36 CORP. CODE §1603.
38 Food R. Civ. P. 23.1.
39 CORP. CODE §300(b).
42 Zarowitz v. BankAmerica Corp., 866 F. 2d 1164 (9th Cir. 1989).
43 Id. at 1166.
44 MODEL RULES OF PROF’L CONDUCT R. 1.7; MODEL CODE OF PROF’L RESPONSIBILITY DR 5-105.
45 13 FLETCHER, CYCLOPEDIA OF CORPORATIONS §6025.
46 Id.
48 CAL. RULES OF PROF’L CONDUCT R. 3-310.
49 CAL. RULES OF PROF’L CONDUCT R. 3-310(C).
51 Id. at 74.
52 Id.
54 CAL. RULES OF PROF’L CONDUCT R. 3-600(E).
55 Id.
58 Id. (quoting Comment, Independent Representation for Corporate Defendents in Derivative Suits, 74 YALE L.J. 524, 528 (1965)). See also Developments in the Law, supra note 47, at 3341.
60 Id. at 1054-58.

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Justice was delayed for many in 2011. California’s budget woes continued to take their toll as the state’s trial courts saw their budgets reduced last year by $350 million, leading to layoffs and dark courtrooms and resurrecting memories of the era when cases were dismissed if not brought to trial within five years. The reductions were described by Governor Jerry Brown as “debilitating.” More cuts are expected in 2012 as the Los Angeles courts face a $161 million budget gap. These severe cuts, however, did nothing to reduce the number of developments in legal ethics in 2011.

Budget problems also did not prevent the state from acting decisively to shut down lawyers preying on desperate homeowners hurt by predatory lending and the collapse of the real estate market. Attorney General Kamala Harris and the State Bar charged Philip Kramer, Mitchell J. Stein, and their law firms and associates with fraudulently inducing borrowers to join lawsuits that had no chance of success. The lawyers’ practices were placed in receivership and their assets frozen. Meanwhile, the State Bar’s backlog of disciplinary cases, which stood at more than 1,500 in July, was substantially reduced by year end, due to additional staffing and a willingness to settle cases on more lenient terms, according to defense attorneys. Jayne Kim took over as chief trial counsel after John W. Amberg is a partner in the Los Angeles office of Bryan Cave LLP, and Jon L. Rewinski is a partner in the Los Angeles office of Locke Lord LLP. Both are former chairs and current members of the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee. Amberg is also a former chair and Rewinski is a former member of the California State Bar’s Committee on Professional Responsibility and Conduct.
the unexpected resignation of James E. Towery and the firing of four senior managers.6

While the State Bar treated lawyers with some leniency, a private company sought a significant punitive award from an attorney. After a former Toyota lawyer provided thousands of company documents to the plaintiffs in rollover suits, contending that the documents showed the auto manufacturer had conspired to destroy evidence, Toyota brought an arbitration claim against the lawyer for breach of his confidentiality agreement. Without ruling on the underlying contentions, the arbitrator awarded Toyota $2.6 million, including punitive damages.7 A former Morrison & Foerster attorney was sentenced to jail for a scheme to bilk the San Francisco Unified School District and the law firm’s insurer by billing for phony services for his autistic son.8 Central District Judge James Otero, reflecting concern over the severity of the punishment in comparison to the crime, rejected a plea deal that would have sent Los Angeles attorney Pierce O’Donnell to jail for six months for violating campaign finance laws again, and the government responded by insisting on taking the case to trial, putting O’Donnell’s law license in jeopardy.9

The Atlanta law firm King & Spalding drew national attention when, after criticism by corporate clients and employees, it backed out of its engagement by the U.S. House of Representatives to defend the constitutionality of the Defense of Marriage Act (DOMA), which denies federal benefits to same-sex couples. The firm denied it had abandoned a corporate client and blamed partner Paul Clement, a former U.S. Solicitor General, for signing the retainer agreement without management approval, prompting Clement to bolt the firm.10 The contract with the Republican House would have prohibited all the lawyers and employees of the law firm, not just those working on the case, from advocating against DOMA, in violation of the law of several states, including California, that prohibit employers from regulating their employees’ political activities.11

Conflict of Interest and Disqualification

Rule of Professional Conduct 3-310(C) ordinarily prohibits a lawyer from representing clients with conflicting interests unless both clients provide informed written consent, but the conflict may be waivable, and what looks like a conflict may be no conflict at all. In consolidated class actions, Kellar v. Foot Locker Retail, Inc., lawyers for parties objecting to the proposed class action settlement that in that case also represented the plaintiffs in two overlapping putative class actions who sought to participate in the settlement.12 Foot Locker moved to disqualify the plaintiffs’ lawyers based on a conflict of interest, but the First District declined to do so. It noted that since no class had been certified yet, an attorney-client relationship did not exist between the lawyers and members of the putative class. Also, it held that there was no conflict because preventing the settlement might be in the best interests of class members who would be likely to obtain a better recovery by pursuing the litigation. Though the putative class members favoring the settlement were adverse to the objects, their common interest in the outcome of the litigation was unaffected by that disagreement.13

Appellate courts issued writs of mandate to reverse orders disqualifying counsel in two cases. In Banning Ranch Conservancy v. Superior Court,14 the Fourth District held that an open-ended retainer agreement did not create a current attorney-client relationship. Banning Ranch Conservancy sued the City of Newport Beach, challenging the city’s plan to build a four-lane highway through its coastal property. The city moved to disqualify the plaintiff’s lawyers, arguing it was a current client of the firm based on a 2005 retainer agreement under which the lawyers had agreed to provide legal services “as requested” by the city. The firm had performed 1.2 hours of work and sent its final invoice five years before. Since then, the city had hired 10 different law firms. The appellate court held that the retainer agreement called for representation on a matter-by-matter basis and did not mean the firm currently represented the city. There was no need to terminate the agreement because it was not “self-effectuating,” and was distinguishable from a “class retainer agreement” in which clients pay a fee and the lawyers commit themselves to future legal representation.15

In In Re Shared Memory Graphics, LLC,16 the Federal Circuit Court of Appeals vacated Northern District Judge Maxime M. Chesney’s order granting Nintendo Company of America’s motion to disqualify the law firm representing Shared Memory Graphics in its patent infringement suit against Nintendo. Nintendo contended that one of the opposing firm’s partners, a former in-house lawyer for Applied Micro Devices, had received confidential information in a prior suit pursuant to a joint defense agreement. The Federal Circuit rejected the argument since the joint defense agreement expressly recited that “nothing in this Agreement...shall be used to disqualify the respective counsel of such party in any future litigation,” which it construed as an enforceable advance waiver of conflicts.17

Usually, only clients have standing to disqualify counsel based on a conflict of interest, but there are some exceptions. In a custody dispute over an infant, the mother obtained an order disqualifying the paternal grandfather from representing his son, the father of the child, though she was never the lawyer’s client. In Kennedy v. Eldridge,18 the Third District held that a nonclient has standing to disqualify if continued representation threatens cognizable injury or would undermine the integrity of the judicial process.19 In a loosely reasoned opinion, the appellate court found that a substantial relationship existed between the current custody dispute and an earlier custody fight involving the mother as a young girl, in which the firm had represented the mother’s father. It held that the father and daughter should be treated as “a single entity for purposes of determining whether an ethical conflict exists” and upheld disqualification, based on a presumption that the firm had obtained confidential information in the prior representation that could be used to gain an unfair advantage over the mother in the current dispute.20 Additionally, the court applied ABA Model Rule of Professional Conduct 3.7, which prohibits advocates from also being witnesses, though the ABA Model Rules do not apply in California and this state’s counterpart, Rule of Professional Conduct 5-210, applies only to jury trials. Finally, it justified the result based on the “appearance of impropriety,” although this standard has never been adopted in California.21

Central District Judge Josephine Staton Tucker disqualified attorney Mark Holmes after he sued his own clients in O.A. Ventures LLC v. Stoffal.22 Represented by attorney Holmes, plaintiff O.A. Ventures (OVAL), the owner of a motorboat, sued the defendants for engine damage. When one of the defendants cross-claimed against OVAL’s manager Marciniak, Holmes answered the cross-complaint for Marciniak and filed cross-claims by Marciniak against OVAL and by OVAL against Marciniak for “intentional acts, gross negligence, recklessness and negligence.” Holmes then announced a settlement of the cross-action between his two clients and moved to dismiss the defendant’s cross-complaint. He argued that any conflict of interest had been resolved by his clients’ settlement. Holding that the defendant had standing to disqualify because Holmes’s ethical breach was designed to obstruct his claim, and that the court had inherent authority to order disqualification given Holmes’s “manifest and glaring” ethical breach, Judge Tucker ruled that the conflict was so patently improper that it could not be waived by the clients or permitted by the court.23

Duty to a Former Client

In Oasis West Realty LLC v. Goldman,24 the California Supreme Court addressed the duty that a lawyer owes to a former client.
Nearly 80 years ago, the court held in Watch- unmna Water Company v. Bailey that a lawyer owes a former client a continuing duty of confidentiality and a more limited duty of loyalty. An attorney may not do anything that will injure the former client “in any matter in which he formerly represented” the client. However, the limits of the duty of loyalty when the lawyer is acting on his or her own behalf remained undefined.

Kenneth Goldman and his law firm Reed Smith were retained by developer Oasis West Realty to help obtain approval for a hotel and condominium project in Beverly Hills. After two years, Goldman and the firm resigned the engagement. Two years later, Goldman publicly supported a public referendum to overturn the city council’s approval of the project, and the developer sued its former lawyer for breach of fiduciary duty, professional negligence, and breach of contract. Goldman filed a motion to strike under the anti-SLAPP statute, Code of Civil Procedure Section 425.16, on the ground that his activities were in furtherance of his constitutional rights of petition and free speech. The court of appeal found Goldman had not disclosed any of his former client’s confidential information and was acting as an individual citizen, not as a lawyer for a new client with a conflicting interest. The court concluded that the plaintiff failed to demonstrate a probability of prevailing on its claims.

The supreme court reversed, evidently offended by the specter of a lawyer fouling his nest. It ruled that Oasis had presented a prima facie case that Goldman used confidential client information when he opposed the project he had previously supported. Though there was no direct evidence that Goldman had relied on confidential information, the court held it was reasonable to infer he did so. It noted that a lawyer’s duty not to misuse a former client’s confidential information does not depend on whether the lawyer is serving a new client or his own interests, though in this case the interests were not mercenary. The lawyer’s freedom of expression is limited by his duty not to misuse confidential information, and since the court concluded that a prima facie case existed that Goldman did use confidential information to the detriment of his former client, the First Amendment would not protect “such duplicity.”

The court’s reasoning is troubling because it suggests that almost any position taken contrary to a former client may be presumed to be an improper use of confidential information, undermining the purpose of the anti-SLAPP statute, though the court claimed any intent to announce “a broad categorical bar” on attorney free speech. The opinion is also disappointing because by conveniently focusing on the lawyer’s presumed breach of the duty of confidentiality, it missed an opportunity to define the duty of loyalty to a former client in the novel circumstance in which there is no new client.

Finally, the court stated that it could be inferred that Goldman’s opposition to the project had developed during the representation. It explained that Goldman was obligated by Rule 3-310(B) to disclose to Oasis any personal interest that could substantially affect his professional judgment “but never did so.” However, though Rule 3-310(B)(4) requires disclosure of a lawyer’s legal, business, financial, or professional interests, it does not mention “personal interest,” and as professionals, lawyers have never been obliged to share the personal views of their clients. Professor James Fischer of Southwestern Law School blogged: “[T]he implications of the Supreme Court’s disclosure holding are potentially staggering. Does Rule 3-310(B) now require a lawyer to disclose that the lawyer does not share the client’s objectives of the representation?”

Confidentiality

It is an ethics violation for a lawyer to use without permission another person’s confidential information or to disclose a former client’s secrets, as a couple of 2011 appellate cases illustrate.

In 2007, in Rico v. Mitsubishi Motors Corporation, the supreme court explained the ethical duty that a lawyer owes when the lawyer comes into possession of apparently privileged materials belonging to opposing counsel. Adopting a standard first articulated in State Compensation Insurance Fund v. WPS, Inc., the court stated: “When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged.”

The penalty for violating this ethical rule may be disqualification. But Rico left some practical questions unanswered, including how much a lawyer could or should read “to ascertain if the materials are privileged.”

In 2011, the Fourth District looked at this issue in Clark v. Superior Court. Its analysis essentially suggests that once a lawyer sees the label “Attorney-Client Privileged,” “Prepared at Request of Counsel,” or “Highly Confidential” on a document belonging to an opponent, the lawyer should stop reading, put the document aside, and call opposing counsel. By reading and using the document’s content, the lawyer risks disqualification.

Prior to his termination, the plaintiff in Clark had been the chief administrative officer of defendant VeriSign, Inc., a provider of Internet infrastructure services, and had signed a nondisclosure agreement prohibiting him from removing or using VeriSign’s confidential and privileged information following the termination of his employment. Shortly after his termination, Clark sued for wrongful termination, breach of contract, and securities fraud. During pretrial skirmishing, defense counsel suspected that Clark’s lawyer possessed confidential VeriSign materials, including an email message that a VeriSign senior vice president had transmitted to VeriSign’s general counsel. (This message was called the “Bond memo.”) Defense counsel’s suspicions were confirmed when the plaintiff’s lawyer produced during discovery copies of several VeriSign documents marked “Attorney-Client Privileged,” “Prepared at Request of Counsel,” and “Highly Confidential.”

Claiming that many of the disputed documents were not privileged, the plaintiff’s lawyer nevertheless sequestered them and met and conferred with defense counsel, but he disregarded the defense counsel’s demand that the disputed documents be returned. After the plaintiff conceded in his deposition that he used the Bond memo as the basis for his securities fraud claim, defense counsel moved to disqualify the plaintiff’s lawyer. The trial court granted the motion. The Fourth District affirmed, rejecting the plaintiff’s argument that the trial court erred in disqualifying the plaintiff’s lawyer without conducting an in-camera review of the disputed documents to determine whether they were in fact privileged. Pursuant to Evidence Code Section 915 and Costco Wholesale Corporation v. Superior Court, a court cannot order an in-camera inspection of documents claimed to be privileged. The court must ascertain the “dominant purpose of the relationship” between the communicators. If the dominant purpose is an attorney-client relationship, the court said, the communication is protected by the privilege. The court criticized Clark’s lawyer for reviewing the content of the disputed documents and for using the Bond memo to craft the securities fraud claim. No doubt, the criticism was appropriate. One wonders, however, whether the court’s approach would adequately address a situation in which a lawyer claims a communication is not privileged because of the crime-fraud exception.

In Fremont Reorganizing Corporation v. Fagin, the Second District criticized a lawyer for improperly disclosing his former
MCLE Test No. 212

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

1. A member of the California bar cannot represent clients with conflicting interests unless both clients provide informed written consent.
   True.
   False.

2. A lawyer may represent potential class action plaintiffs who favor and who oppose a proposed settlement without violating the rule against representing parties with conflicting interests if the class has not been certified yet.
   True.
   False.

3. A retainer agreement under which a lawyer agrees to provide legal services as requested by the client creates a continuing attorney-client relationship.
   True.
   False.

4. Ordinarily, only clients have standing to disqualify a lawyer based on a conflict of interest.
   True.
   False.

5. A court has inherent authority to disregard a client’s choice of counsel and to disqualify an attorney for ethical breaches.
   True.
   False.

6. Lawyers do not breach their duty to a former client when exercising their right of free speech as a private citizen and their motives are not mercenary.
   True.
   False.

7. A lawyer’s duty of zealous advocacy for a client obligates him or her to read and use documents, even if they contain confidential information from the opposing party.
   True.
   False.

8. A lawyer may read and use confidential documents from the opposing party unless they come into his or her possession by accident.
   True.
   False.

9. When it is disputed whether documents are protected by the attorney-client privilege, a court must conduct an in camera inspection of the documents before ruling.
   True.
   False.

10. If the “dominant purpose” of the relationship between the communicators is an attorney-client relationship, their written communications are privileged.
    True.
    False.

11. An in-house lawyer can be sued for breach of fiduciary duty to a client after blowing the whistle on the potentially illegal actions of the lawyer’s employer.
    True.
    False.

12. A client’s e-mail communications with his or her lawyer using the client’s employer’s computer are privileged if the client uses a private password.
    True.
    False.

13. Communications among lawyers in a law firm may be privileged although the client is not a party to the communications.
    True.
    False.

14. Work product, whether written or not, that consists of an attorney’s mental impressions, conclusions, opinions, and legal theories is entitled to absolute protection.
    True.
    False.

15. A retainer agreement cannot require the lawyer’s consent before the client settles a lawsuit.
    True.
    False.

16. In a legal malpractice suit arising out of a mediation, the mediation privilege excludes any evidence of communications between the lawyer and client related to the mediation.
    True.
    False.

17. A client suffers actual injury to start the running of the statute of limitations for legal malpractice when paying the lawyer’s bill.
    True.
    False.

18. Rule of Professional Conduct 2-100 prohibiting contact with a represented party does not create a statutory or constitutional right not to be contacted by opposing counsel.
    True.
    False.

19. A lawyer’s consent to an opposing lawyer’s contact with his or her client can be an implied one.
    True.
    False.

20. Failure to comply with Rule of Professional Conduct 3-300 will bar a lawyer’s enforcement of a contract with his client and quantum meruit recovery.
    True.
    False.

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the $20 testing fee ($25 for non-LACBA members) to:
   Los Angeles Lawyer
   MCLE Test
   P.O. Box 55020
   Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
5. For future reference, please retain the MCLE test materials returned to you.

ANSWERS

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

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client’s confidential information. For many years, Alan L. Faigin served as an in-house counsel, and for a time as the general counsel, of Fremont General Corporation. In this capacity, he also provided legal services to several of Fremont’s subsidiaries, including Fremont Reorganizing Corporation and another subsidiary that became insolvent. The relationship between Faigin and his employer soured, and Fremont ultimately fired him. The very next day, Faigin informed the insurance commissioner, the liquidator of the insolvent subsidiary, that two Fremont entities were planning to auction certain artwork belonging to the subsidiary in liquidation. A disclosure that resulted in litigation by the insurance commissioner against those Fremont entities. The Fremont entities ultimately resolved the insurance commissioner’s litigation by handing over the proceeds of the art auction plus $5 million. In the meantime, Faigin sued Fremont for wrongful termination. Fremont cross-claimed, claiming that Faigin’s disclosure to the insurance commissioner constituted a breach of his legal, ethical, and fiduciary duties.

Faigin moved to strike the cross-complaint pursuant to the anti-SLAPP statute, Code of Civil Procedure Section 425.16. Although the trial court granted the motion, the Second District reversed. It concluded that Fremont demonstrated a reasonable probability of prevailing on its claim against Faigin for breaching his legal, ethical, and fiduciary duties. In response to Fremont’s claims, Faigin could not rely on the litigation privilege. “[T]o allow litigation attorneys to breach their professional duties owed to their own clients with impunity from civil liability would undermine the attorney-client relationship and would not further the policies of attorney-client privilege. “[T]o allow litigation attorneys to breach their professional duties owed to their own clients with impunity from civil liability would undermine the attorney-client relationship and would not further the policies of attorney-client privilege. In Fireman’s Fund Insurance Company v. Superior Court (Front Gate Plaza L.L.C.), the Second District held that communications among the lawyers in a law firm may be protected as privileged communications even though the client is not a party to the conversation, and that an attorney’s mental impressions, conclusions, opinions, and legal theories are entitled to absolute work product protection, whether or not they are reduced to written form. After Front Gate Plaza sued Fireman’s Fund for bad faith in handling a claim, a whistle-blower provided accounting records from Front Gate to the insurer’s lawyers that allegedly showed the insured had submitted fraudulent claims. The superior court adopted the discovery referee’s recommendation that the Fireman’s Fund lawyers be ordered to answer deposition questions regarding their handling of the whistle-blower’s information, and they petitioned the court of appeal for a writ of mandamus on the grounds that such information was privileged and work product. The appellate court granted the writ, holding that the attorney-client privilege is not limited to communications directly between the client and the lawyer because Evidence Code Section 952 contemplates disclosure to those “reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.” The court said this surely included other lawyers in the law firm representing the client. The opinion also considered the history and meaning of Code of Civil Procedure Section 952 to codify the work product doctrine in California. Noting a dichotomy between the absolute privilege granted to writings that reflect an attorney’s opinion work product in subdivision (a), and the qualified privileged for all other work product in subdivision (b), Justice Croskey concluded that the statute was intended to provide absolute protection to written opinion work product and qualified protection to written nonopinion work product, “with the implicit understanding that unwritten opinion work product is already entitled to absolute protection.” He wrote: “Is it patently absurd to provide a greater protection for written opinion work product than unwritten opinion work product? In our view, the answer to that question is yes.”

Engagement Letters
Can a lawyer enforce a client’s promise to prosecute a claim to trial or settlement as part of an agreement to switch from an hourly fee to a contingent fee? No, according to the Second District’s decision in Lemmer v. Charney. A clause in a retainee agreement prohibiting a client from settling a lawsuit without the lawyer’s consent is void against public policy. “[T]he law does not recognize a tort cause of action for damages for the client’s decision to abandon [a claim], because that would equally constrain defendant to keep his lawsuit alive just for his attorney’s profit, despite his own fears and desire to abandon the case.

Once a lawyer and client form a relationship, the lawyer owes the client various fiduciary duties. When a lawyer leaves one law firm to join another, does the lawyer have a fiduciary duty to explain the differences between the new firm’s and the old firm’s engagement letters? No, at least if the client is a sophisticated businessperson, according to the First District’s decision in Desert Outdoor Advertising v. Superior Court. After a lawyer switched law firms, his clients, a corporation and one of its employees, signed an engagement letter with the new firm so the lawyer could continue to handle pending litigation. Unlike the engagement letter with the lawyer’s first firm, the new engagement letter included a mandatory arbitration clause for any future disputes. The president of the corporate client signed the new engagement letter without reading it and then balked at the new firm’s attempt to send the clients’ malpractice claim into arbitration. The president offered numerous excuses for not reading the engagement letter, including a lawyer’s fiduciary duty to disclose significant developments. The courts disagreed. “A cardinal rule of contract law is that a party’s failure to read a contract, or to carefully read a contract, before signing it is no defense to the contract’s enforcement.”

Malpractice
As in prior years, 2011 saw its share of published opinions in legal malpractice actions. In one of those cases, Cassel v. Superior
The Ninth Circuit affirmed the conviction of former Orange County Sheriff Michael Carona for witness tampering, rejecting his appeal based on the ground that prosecutors had violated Rule of Professional Conduct 2-100, which prohibits a lawyer from direct or indirect communication with a represented party.
Conduct 2-100, which prohibits a lawyer from direct or indirect communication with a represented party. Though prosecutors knew Carona was represented by counsel, they arranged for a cooperating witness to show the defendant fake grand jury subpoenas and to secretly record their conversation, during which Carona coached the witness to lie. The district court ruled the meeting violated Rule 2-100 but allowed the incriminating tape to be played to the jury. On appeal, Carona argued the tape should have been suppressed and the lead prosecutor disqualified. The Ninth Circuit held there was no violation of Rule 2-100 because the witness was not the alter ego of the prosecutor, and the meeting did not resemble an interrogation, though these are not the standards for an ethical violation. Stating that deception and trickery are acceptable government tactics, the appeals court held it would be antithetical to the administration of justice and a perversion of the rule against ex parte contacts to permit Carona to immunize himself “simply by letting it be known he has retained counsel.”

While Rule 2-100 governs attorney conduct, the disciplinary rule does not create a statutory or constitutional right not to be contacted by opposing counsel, and the court held that discipline could adequately deter future violations, though the State Bar took no action against the prosecutors in this case.

Two ethics opinions showed similar flexibility in applying the “no contact” rule. In Formal Opinion No. 2011-181, the State Bar’s Committee on Professional Responsibility and Conduct (COPRAC) advised that although the consent of the other lawyer is required under Rule 2-100, such consent can be implied. The lawyer’s implied consent can be inferred from the circumstances, including whether the other attorney is present during the communication, the lawyer facilitated the communication, the relationship is trans- actional or adversarial, or the parties have a common interest. Consent to contact with a represented party should not be inferred if the communication would interfere with the attorney-client relationship or if the lawyer expressly withheld consent or the other lawyer not to communicate with his client.

In Formal Opinion 11-461, the ABA Standing Committee on Ethics and Professional Responsibility construed the “no-contact” rule under ABA Model Rule 4.2, the counterpart to Rule 2-100, and concluded that although a lawyer may not use an intermediary to communicate with a represented person, he may take the initiative by suggesting that his client communicate directly with the other party, and may even assist his client regarding the substance of the communication. However, the lawyer cannot overreach by helping the client obtain confidential information, admissions against interest, or an enforceable obligation from the represented party.

Getting Paid

As in years past, 2011 provided several important lessons to lawyers interested in getting paid.

First, a failure to comply with ethics rules that go to the heart of a lawyer’s fiduciary duty may preclude a lawyer from collecting a fee. Thus, in Fair v. Bafshiz,

a lawyer and his existing client formed three highly successful real estate investment businesses. The lawyer neglected to obtain the client’s written consent and to advise the client in writing of his right to seek the advice of an independent lawyer, as required by Rule 3-300. Although the businesses thrived, the relationship soured, and the parties fell into litigation. Because he had failed to comply with Rule 3-300, the lawyer was unable to enforce agreements concerning profit distributions. He was also unable to pursue a quantum meruit claim to recover the fair value of his legal services. “[V]iolation of a rule that constitutes a serious breach of fiduciary duty, such as a conflict of interest that goes to the heart of the attorney-client relationship, warrants denial of quantum meruit recovery.”

Second, when a lawyer’s lien for fees is at issue, the lawyer is an indispensable party. Thus, a court may not dispose of the attorney lien without giving the attorney an opportunity to be heard.

Third, greed may be bad for business. In In re Bluetooth Headset Product Liability Litigation, the Ninth Circuit reversed an order by the district court awarding class counsel $800,000 in legal fees when the settlement fund for the class was only $100,000. “[T]he disparity between the value of the class recovery and class counsel’s compensation raises at least an inference of unfairness, and...the current record does not adequately dispel the possibility that class counsel bargained away a benefit to the class in exchange for their own interests.”

Fourth, generally law firm and attorney litigants who represent themselves in litigation cannot recover fees for their own legal services.

As the U.S. Supreme Court has noted, “The adage that ‘a lawyer who represents himself has a fool for a client’ is the product of years of experience by seasoned litigators.”

Lawyer-litigants, however, are entitled to compensation for other lawyers they retain to represent them in the litigation. Hence, the Second District’s 2011 decision in Carpenter & Zukerman v. Coherent holds that the trial court properly struck a cost bill that included attorneys’ fees for an associate of the prevailing law firm-litigant. On the other hand, the Fourth District’s 2011 decision in Dzownikowski v. Spinella held that the trial court properly denied a sole practitioner’s (Dzownikowski’s) motion for attorney’s fees as the prevailing party in a fee dispute with a former client (Spinella) over services provided in a probate matter because the fees were incurred by another sole practitioner retained by Dzownikowski. The fact that the second sole practitioner was also of counsel to Dzownikowski, and from time to time provided legal services on a contract basis to Dzownikowski’s clients, including Spinella in the underlying probate matter, did not preclude the fee award.

Rules Revision

In October 2011, the California Supreme Court issued an order, requested by the State Bar, withdrawing the previous submission of proposed Rules of Professional Conduct, so that the State Bar could submit all 67 of the proposed new rules in a single comprehensive petition. The resubmission of the proposed Rules is expected during the first six months of 2012.


3 Trial courts anticipate tougher times, supra note 1.


5 Defense attorneys say clients benefited from bar’s efforts to reduce backlog, L.A. Daily J., Jan. 6, 2012.


7 Toyota Wins Case Arguing Ex-Employee Broke Pledge, NEW YORK TIMES, Jan. 6, 2011.


9 Fighting to keep his law license, NAT’L L. J., Nov. 29, 2011.

10 At Uneece, ABA J., July 2011.


13 Id. at 1205-07.


15 Id. at 916-17.

16 In re Shared Memory Graphics, 659 F. 3d 1336 (Fed. Cir. 2011).

17 Id. at 1341.


19 Id. at 1205.

20 Id. at 1207-08.

21 Id. at 1210.


23 O.A. Ventures, No. 10cv01624 at 9.

24 Oasis West Realty LLC v. Goldman, 51 Cal. 4th 811
(2011).

27 Oasis West, 51 Cal. 4th at 822.
28 Id. at 822-23.
29 Id. at 824-25.
30 Id. at 825.
31 Id. at 822.
32 James Fischer on Oasis West Realty, “May a lawyer publicly oppose a former client’s project?” Legal Ethics Forum, June 13, 2011.

37 Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725, 731-32 (2009).

39 Id. at 1173-74.
41 EVID. CODE §952 states, in pertinent part: “[C]onfidential communication between lawyer and client’ means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons.”

44 Id. at 1274.
45 Id. at 1278.
46 Id. at 1281.
48 Id. at 105.
50 Id. at 872.
51 Cassel v. Superior Court, 51 Cal. 4th 313 (2011).
54 Cassel, 51 Cal. 4th at 136.
55 Id. at 138.
56 Callahan, 194 Cal. App. 4th 557.
57 Smith, 199 Cal. App. 4th 1381.
58 U.S. v. Carona, 630 F. 3d 917 (9th Cir. 2011).
59 Id. at 923.
61 ABA’s Standing Committee on Ethics & Professional Responsibility, ABA Formal Op. No. 11-461.
63 Id. at 1161 (internal citations omitted).
66 Id.

(11).

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Something NEW under the Sun

The Patent Reform Act of 2011 represents the first major overhaul of patent law since 1952

AFTER PASSING CONGRESS with bipartisan support, the Leahy-Smith America Invents Act, also known as the Patent Reform Act, was signed by President Barack Obama on September 16, 2011. The new law significantly reforms the way inventors protect their inventions and advances the harmonization of global patent laws, but until many details of implementation are settled, the costs of patent litigation may not decrease.

The U.S. Patent Office was founded in 1790, and few significant revisions to patent law have been made since. The last major reform occurred in 1952, with the enactment of the patent laws encompassing Title 35 of the United States Code. The first steps toward modernizing U.S. patent laws were taken in 2004, when academics began to push for reform, which moved slowly until debate began on the House floor last June.

The Patent Reform Act contains many important changes, including:

- Giving the patent right to the first person to file a patent application rather than the first to invent.
- Eliminating the esoteric interference practice in which owners of applications for the same invention litigated who was the first to conceive of the invention and reduce it to practice.
- Expanding defenses to patent infringement claims to include the defense of prior commercial use of the patented invention.
- Increasing the means for challenging patents, including making it easier for competitors to submit invalidating prior art to the Patent Office and providing for new ways to challenge patents after they issue.
- Providing a method by which patent owners can cure potentially invalidating mistakes made by the applicant during the processing of a patent application.
- Eliminating lawsuits targeting companies for mistakenly marking products with the wrong patent number and

Rod S. Berman practices intellectual property law with Jeffer, Mangels, Butler & Mitchell LLP in Los Angeles.
making it more difficult to file multidefendant lawsuits.

• Eliminating patents on tax strategies.
• Providing a new method for expediting the issuance of patents.

The most significant change in the Patent Reform Act is the conversion from a “first to invent” system to a “first to file” system, thereby conforming the U.S. patent laws to the laws of most industrialized countries. This change becomes effective on March 16, 2013. Presently, even if an applicant is the first to file a patent application in the United States, a second applicant to file could own the rights to the invention if the second applicant was the first to conceive and reduce the invention to practice. This provides a disincentive to file patent applications, since the first to invent generally trumps the first to file. Most of the world acts differently—the first to file trumps the first to invent. Now, under the Patent Reform Act, on or after March 16, 2013, in general the one who is first to file a patent application will own the patent rights.

Inventors need to rethink their strategy for filing patent applications. No longer will they be able to wait to develop their inventions and create a workable mode of making and using them. There will now be a rush to file a patent application before a competitor does. The filing of less-than-perfect patent applications and more provisional patent applications will likely increase. Inventors will be pressed to gather data quickly and file a separate patent application at each stage of product development. The first-to-file rule will likely favor large companies that have the resources to quickly prepare and file patent applications. Most of the world has already accepted this fact. The United States is just catching up.

The first-to-file reform also will eventually eliminate the esoteric “interference” practice. In interference proceedings, companies wage an expensive war over who was the first to invent the subject matter of competing patent applications. Specially trained attorneys have typically handled these proceedings, frequently delaying the effectiveness of a patent for many years. During these proceedings, doubt about who owns the patent rights significantly affects investor interest.

Although reform has eliminated interference practice, it will be replaced with derivation practice. In a derivation proceeding, a petitioner asks the new Patent Trial and Appeal Board to invalidate a patent if it was based upon or derived from another inventor’s patent or patent application. However, this proceeding must be requested within a year of the date of publication of the first filer’s patent application and must be supported by substantial evidence. Entities should therefore monitor their competitors’ applications for derivation issues. Even derived inventions, however, typically include novel features. Moreover, inventors who derive their inventions from others may be more likely to keep their inventions secret, thereby frustrating the fundamental constitutional purpose of the Patent Act—full disclosure of an invention to the public in return for a limited period of market exclusivity.

Reexaminations
The Patent Reform Act also makes major changes in the manner in which third parties can challenge patents outside of court proceedings. Previously, aside from litigating the validity of a patent, the only ways to challenge the validity of an issued patent were to seek ex parte or inter partes reexamination before the Patent Office. This procedure required the requester (the patent owner or the challenger of the patent) to ask the Patent Office to declare that prior art submitted in the form of patents or printed publications created a substantial new question about the patentability of the claims of the patent.

Effective September 16, 2012, a new procedure called Post Grant Review will affect applications filed on or after March 16, 2013. PGR will allow a third party, typically a competitor, to convince the Patent Office’s Patent Trial and Appeal Board that the patent should not have been granted due to prior art that the Patent Office was either not aware of or did not properly consider when the application was initially examined. The standard for the Patent Office to grant a PGR petition is whether the information presented in the petition “if not rebutted...would demonstrate to the Patent Office Examiner that it is more likely than not that at least one of the claims challenged is unpatentable” or that the petition “raises a novel or unsettled legal question that is important to other patents or patent applications.” PGR has been available for many years in a number of foreign jurisdictions, but to U.S. applicants, it presents a significant reform.

To some, PGR provides a competitor with the chance to delay the effectiveness of a patent, since the patent cannot be enforced while it is under review. Those opposed to this provision of the Patent Reform Act also asserted that only large entities with financial resources will be able to afford the proceedings, and that the proceedings would unduly burden the Patent Office. To others, PGR provides an opportunity for the Patent Office to vet patents under the scrutiny of those whom the patent would be enforced against and presumably to increase the quality of the patents. A likely result is narrower patents, particularly in technical fields with significant patent prior art, as the applicant will initially want to seek patent protection for claims that can readily be distinguished from the prior art. PGR can be based upon any legal challenge to the patent but can only be filed within nine months after the grant of the patent or broadening reissue. One significant limitation to PGR is that the petitioner is estopped from asserting the same grounds that it asserted in its PGR
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already filed a civil action for patent invalidity. Any civil action for patent invalidity is automatically stayed in favor of a PGR filing until the patentee successfully lifts the stay, the patent owner files a civil action or counterclaim for infringement, or the petitioner moves the court to dismiss the civil action. Companies will need their patent counsel to monitor competitors’ patent filings. Any person or entity seeking to avoid PGR should file a patent application before March 16, 2013.

The Patent Reform Act also establishes a supplemental examination system for patent owners that allows inequitable conduct to be cured prior to patent infringement litigation. Prior to the Patent Reform Act, the Federal Circuit referred to claims of inequitable conduct as being a plague upon patent litigation because they were so often asserted—at great cost to defendants—but made few patents unenforceable. These claims also poisoned patent transactions by reducing the value of patent assets. This problem resulted when the validity or enforceability of a patent involved in a transaction was called into question by the buyer due to mistakes made by the patent applicant or newly discovered evidence related to the patent.

The new supplemental examination procedure, like the former ex parte reexamination, can result in inequitable conduct being purged and unenforceability and invalidity challenges to patents avoided—or at least the risk of a finding of invalidity or unenforceability reduced. The supplemental examination procedure becomes effective on September 16, 2012, for patents issued on or after that date. While advantageous to those who wish to assert patent validity, the procedure is limited to issues of validity or unenforceability related to patents and printed publications raising a substantial question of patentability, and the procedure may only be initiated by the patent owner.

This procedure should give patent owners an opportunity to cure obvious prosecution problems that could result in a claim of inequitable conduct being asserted against the plaintiff patent owner in patent infringement litigation. On the other hand, those opposed to this reform believe it will encourage patent applicants from disclosing key prior art to the Patent Office, with the hope that the lack of disclosure will result in the issuance of the patent, with the only risk being the possibility of having to file a request for supplemental examination.

For plaintiffs, supplemental examination may result in some added expense and delay but also may provide security. This procedure may be helpful in patent purchase transactions in which a buyer questions a key valuable patent as being potentially unenforceable and therefore of little value.

Another way reformers believe the quality of patents will improve is that on or after September 16, 2012, third parties can submit to the examiner handling a patent application prior art in the form of patents and printed publications or statements of the patent owner made in federal court or before the Patent Office that reflects the owner’s position on the scope of any claim that the third party believes impacts the patentability of the invention.

**Tax Patents**

There is even reform of interest to taxpayers, entrepreneurial accountants, and tax lawyers. The media has reported a plethora of objections to providing a patent “monopoly” for methods for complying with tax codes. No more patents will issue on tax strategies for reducing, avoiding, or deferring tax liability in any federal, state, local, or foreign jurisdiction when the patents could subject taxpayers to royalty fees for using the patented strategy when filing tax returns. Significantly, this tax patent ban applies to patent applications pending as of September 23, 2011, or those patents issued on or after this date. But the reforms only go so far—patents related solely to financial services management software or tax return preparation and filing software are not affected. Notably, in addition to certain tax patents, patent claims directed to or encompassing a “human organism” are banned for applications filed on or after September 23, 2011.

Prioritized application processing is another feature of the Patent Reform Act. Since September 26, 2011, the Patent Office has allowed applicants to pay $4,800 to have their application prioritized, provided the application contains no more than four independent claims and no more than 30 total claims, which is achievable for most inventors with clever patent attorneys. In other words, entities that can afford paying an extra $4,800 will speed up the processing of their patent applications without having to conduct a preexamination search. This is a welcome patent reform for those who can afford it and whose inventions are in the telecommunications, biotechnology, computer software, and electronics arts, in which the average pendency of a patent application is three to four years. With prioritized examination, the Patent Office is required to provide the patent applicant with a final disposition from the Patent Office within a year of the grant of prioritized status. For inventions that have a short market life, or for those who want a patent to issue as soon as possible for either enforcement or sale, this reform should be of great benefit, since patent rights only arise upon the issuance of a patent and end 20 years after the effective filing date. There are few downsides to prioritized examination. Probably the most significant one is that the Patent Office is limiting prioritized applications to 10,000 annually.

The Patent Reform Act has also expanded the prior commercial user defense to patent infringement so that it is no longer limited to patents directed to methods of doing business. The expansion of this defense is a significant patent reform and can be used with respect to patents issued on or after September 16, 2011. To prove this defense, the defendant must demonstrate by clear and convincing evidence that it commercially used the patented technology in the United States more than a year before either the effective filing date of the asserted patent or a public disclosure by the inventor of the invention. Notably, the defense may only be asserted by the commercial user. If the defense is unreasonably asserted, the patent-owner plaintiff may have a solid basis to seek an award of its attorney’s fees. In addition, the defense can only be assigned as part of the sale or transfer of the entire business of the patent challenger. This reform, unfortunately, may encourage entities to keep innovations secret, contrary to the constitutional purpose of the Patent Act.

**Patent Marking**

Peaky qui tam false marking lawsuits have also been virtually eliminated under the Patent Reform Act. In these suits, plaintiffs and even law firms allege that the defendant entity intentionally sold products marked with expired patent numbers or unrelated patent numbers in an attempt to reduce competition and deceive the public. Now these claims will be limited to lawsuits filed by the U.S. government or those filed by competitors who can show competitive injury, and they may seek only compensatory damages. This is great news to businesses and bad news to those who have scoured retail stores to find products with incorrect or out-of-date patent notices. While considered a statutory patent law reform, this is really a reform of a decision by the Federal Circuit, which ruled that the $500 false marking penalty applied to each falsely marked item, not just each patent. So, if, for example, a company mistakenly left an expired patent number on billions of once-patented drinking cups, the litigant could seek billions of dollars of damages. For manufacturers, one of the benefits of this legislative reform is to remove from actionable conduct the marking of a product with an expired patent number, provided the patent at one time did cover the product marked.
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,

August 4, 2011

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MARKS & BROOKLIER, LLP
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SUITE 300
LOS ANGELES, CALIFORNIA 90067
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will not need to spend the resources to eliminate patent numbers in costly molds once the patent has expired. Not surprisingly, those opposed to this reform believe it will encourage companies to retain patent markings on products in order to deceive competitors into believing the product is still covered by the patent.

Other litigation reforms include limitations on so-called nonpracticing entity patent plaintiffs—those who buy patents for the only purpose of seeking royalties. In the past, patent plaintiffs could add numerous defendants to the same complaint, provided all the defendants were alleged to infringe the same patent. Often, 20 or more party defendants would be pleaded in order to realize economies of scale by suing multiple defendants with the time and expense of filing a single action, including reduced attorney and expert fees. This created significant problems for defendants because while the cost of suing multiple defendants was only marginally more than suing a single defendant, defendants often had to bear significant costs, particularly in discovery, that usually dwarfed a plaintiff’s proposed settlement. It also allowed plaintiffs to sue defendants in plaintiff-friendly venues, such as the remote Eastern District of Texas. In addition to the cost of defending claims, defendants often faced the prospect of discovery of their highly confidential business information in the same case that also may involve a direct competitor. As a result, this type of litigation often made defendants willing to pay to settle the claims for an amount that was less than the cost of a defense budget.

Now, for all lawsuits filed on or after September 16, 2011, multiple defendants may only be included in the same complaint if all the defendants participated in the same alleged act of infringement and there are common questions of fact—generally meaning they all sold the same product. This should be of great benefit to those have been sued, since it reduces the patent plaintiff’s economy of scale in litigating these cases. The question remains, however, whether a court confronted with a plethora of patent claims involving different alleged infringing products and different defendants will consolidate them, even if only for pretrial proceedings, thus reducing the hoped-for cost benefits.

Despite its mechanisms to conform the U.S. patent process with that of other industrialized nations, the Patent Reform Act’s uncertainties will likely cause patent litigation to become even more expensive, at least at the outset. For example, the Patent Trial and Appeal Board will need rules to handle discovery. Time will tell how much the Patent Reform Act actually saves businesses money.

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7 For more information, see Ben M. Davidson, Reexamining Reexaminations, Los Angeles Lawyer, Dec. 2011, at 26.
8 35 U.S.C. §321(a), (b).
9 35 U.S.C. §324(a), (b).
10 Another procedure for challenging issued patents, inter partes review, effective September 16, 2012, allows a petitioner to challenge a patent nine months after the patent issues based upon limited prior art: 35 U.S.C. §§311(b), 314(a).
16 H.R. 1249 §14(a).
17 H.R. 1249 §14(c).
23 Forest Group Inc. v. Bon Tool Co., 590 F. 3d 1295 (Fed. Cir. 2009).
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The Los Angeles County Bar Association cordially invites all new LACBA members and all attorneys newly admitted to the State Bar of California to join us for a grand night of fabulous food, great drinks, and networking with the most well-known and influential members of the Los Angeles legal profession.

Mingle with prominent attorney members from all practice areas, meet LACBA’s leadership team, build your contacts in the legal community, and check out the many benefits of membership in the largest metropolitan voluntary bar association in the nation!

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On two Saturdays—March 17 and April 14—Trial Advocacy and the Litigation Section will host a course covering an innovative and practical seven-step method for analyzing the admissibility of potential evidence. Participants receive a written summary of key rules of evidence, including key definitions and evidentiary presumptions, hearsay objections, and the rules regarding the admissibility of character evidence and 1101(b) evidence of specific instances of conduct. Written course materials will be distributed via e-mail prior to the first class, making a correct e-mail address necessary at the time of registration. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration will be available at 8:00 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The registration code number is 011597.

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$250—LACBA member  
$350—all others  
7.5 CLE hours

California Rules of Evidence: TAP Seminar Series

Introductory TAP (i-TAP)

Beginning on Tuesday, March 13, Trial Advocacy and the Litigation Section will host a six-evening course providing introductory trial advocacy instruction, emphasizing participant mock trial performance and constructive feedback. Those who attend will receive instruction on basic trial skills and perform a jury trial. They will also learn to mark exhibits, lay evidentiary foundation, deliver opening statements, conduct witness direct and cross exam, and deliver closing arguments.

The course will take place on Tuesday and Thursday nights from 5:30 to 8:30 P.M. at the LACBA/Executive Presentations Mock Courtroom. Course instructors are seasoned prosecutors with local prosecutorial agencies. There are no prerequisites or interviews for course admission. Successful completion of this course meets the prerequisites for admission to the five-week Traditional TAP course taught annually in the fall. Completion and certification from Traditional TAP qualifies attorneys for a pro bono practicum with a local prosecutorial agency trying criminal cases.

Course materials will be distributed via e-mail prior to the first class, requiring a correct e-mail address at the time of registration. Enrollment is limited to 14 people per 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 parking lots. The registration code number is 011530.

$995—LACBA member  
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16.5 CLE hours, including 1 hour of legal ethics

Fourth Annual Symposium on Family-Based Immigration

On Saturday, March 3, the Immigration Law Section will host a full-day examination of complex issues in family-based immigration law by leading national authorities. Gail Pendleton, Charles Wheeler, Tiffany Markee, Louisa Lau, and Mary Mucha will discuss U visas and the Violence Against Women Act, derivation of citizenship, retention of priority dates, adoptions, ethical issues in dual representation of spouses, and current procedures at the LAFO. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration will begin at 8 A.M., with the program starting at 9 A.M. and continuing to 4:30 P.M. The registration code number is 011574.

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To Kill a Mockingbird: When Lawyers Were Heroes

THIS YEAR MARKS THE 50TH ANNIVERSARY of the release of the classic movie To Kill a Mockingbird, considered by many critics to be the greatest movie ever made about a trial lawyer. The character of Atticus Finch not only won Gregory Peck an Academy Award for Best Actor but was also named by the American Film Institute as the top-ranking hero in 100 years of film history.

The occasion of the movie’s silver anniversary demands that we reflect on the status of our profession over these five decades. In the 1960s the legal profession was not only respected but widely viewed as a noble calling. Lawyers fought for grand causes and were seen as solid contributors to society’s progress: They were at the forefront of the Civil Rights movement, assisted the underprivileged classes, and fought on behalf of the unfairly discriminated against.

Atticus, the incisive country lawyer, powerfully and courageously fights for justice by defending a black man wrongly accused of raping a white woman. He is a man of morality and compassion who nurtures his children with love and teaches life lessons to help them cope with the stresses of their young lives, even as they learn the harsh reality of racial hatred. His brilliance in the courtroom is admired today, even though the members of the all-white male jury cannot overcome their innate prejudice and ultimately convict an innocent man.

As with many other trends in modern American society, the Watergate scandal of the 1970s can be viewed as a decisive turning point. Lawyers, including the attorney general of the United States, were convicted and thrown in jail for perjury, fraud, and obstruction of justice. In the ensuing 40 years, we have seen lawyers lying, conspiring with, and defending corrupt financial institutions as they swindled their shareholders and the American public. We have experienced the recent spectacles of lawyers operating in the shadows in tacit approval behind the scandals of Keating, Enron, Countrywide, Madoff, and Big Tobacco. In government we see lawyers and judges, not the people, deciding who will be our president and executive branch lawyers approving torture.

Our image as lawyers has suffered in recent years as sharks and shysters are charged with overbilling of clients, creating undue delays in discovery and litigation, and refusing to create expedient solutions to client matters for the sake of the attorneys’ own financial gain and law firm interests. One concerned individual complained to me recently of her family lawyer billing her a substantial sum for the bare act of giving her the name of another attorney for a personal injury case. Even after acknowledging that these are tough times for many lawyers to make a living, what has become of the legal profession’s tradition of pro bono, of law firms providing help to those clients in need of lawyers but who cannot afford one? Such work is in our rules, our customs, and traditions. Altruism is, 50 years after To Kill a Mockingbird, still heroic, and there is a place for it in our practice of law.

Certainly there are lawyers who still take public service seriously, but increasingly they are not the models who are driving our profession’s culture. Today, attorneys brag about themselves as “the trial firm of the century” or advertise the enormous size of their jury verdicts. Do we judge ourselves by the size of our wallets or by the character of our practices?

Of course there are conscientious lawyers who handle business cases for the disadvantaged, the bankrupt, the tenant, the consumer, the personal-injury victim, and the shareholders in our recent economic downturn. Some clients can only get justice because a lawyer will take a case on contingency fee. These lawyers go unheralded but should be our example.

We need to recapture our professional character as heroic actors fighting for justice for the common men and women of our times. We few, we precious few, we band of brothers and sisters in the law, by doing the great deeds of our heritage, can rehabilitate our image with the public and to continue once again to make the commonwealth a more just and better place to live. Our integrity as lawyers is a moral imperative.

We are today, 50 years later, still inspired by the message of Atticus Finch’s closing argument: “Now, gentlemen, in this country our courts are the great levelers. In our courts, all men are created equal. I’m no idealist to believe firmly in the integrity of our courts and of our jury system. That’s no ideal to me. That is a living, working reality!”

Atticus’s message, one he skillfully instills in his children, is the necessity in a civilized society of the values of tolerance and fairness, of respect and dignity for others, no matter what a person’s color. As he teaches them, “You never really understand a person until you consider things from their point of view…until you climb into his skin and walk around in it.”

This is a film that should be seen by parents with their children, as it ennobles and inspires us to be better people. But underlying the narrative is the story of America itself: learning to overcome our history of prejudice and racism and hardening back to the country’s ideals of equal justice under the law. This is the unfinished business of our society, and the film still motivates us to continue that work.

Jeffrey A. Shane is a Los Angeles lawyer who practices in the areas of personal injury, accidents, and business law.
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