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Walzer & Melcher LLP is known for its expertise in handling complex divorce cases and premarital agreements. The firm is committed to resolving contested cases by settlement. Where that cannot be achieved, the firm provides strong and effective representation in litigation.
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Even if victimized by a fake-client wire-transfer scam, lawyers will usually have recourse against a bank that failed to recognize it

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The law imposes very clear duties on attorneys who represent or oppose incapacitated clients in divorce proceedings
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Considerable uncertainty remains about when obesity qualifies as a disability under federal and state law
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As we enter the fall months, those of us with high-school-age children may be assisting them through the college application process. Since I will be assisting my third child through this process, I can report that the bar has been clearly raised since the time that many of us applied to college.

As professionals with degrees from graduate schools, lawyers are more aware of the value of college and graduate school education than the general public. We try to send our children to the “best schools,” and we guide them through their education, making sure they do their homework, do well in their classes, and take AP courses, honors courses, and other classes that will give them the best opportunity to be admitted to the “best” college.

In addition to grades, we are told by college counselors that our high school graduates should essentially resemble young Renaissance men and women. Participation in high school sports, especially as a team captain, is emphasized. Students are encouraged to engage in special community service projects and similar activities. A cottage industry has grown that offers countless summer programs, such as classes in Oxford, England, public-interest construction projects in third-world countries, language learning programs in a variety of non-English speaking countries, and the list goes on and on. Extracurricular activities in high school are also encouraged. Music programs, drama, high school clubs, and other programs are available to high-schoolers who want to show their interests in particular areas. If this is not enough, it has been suggested that an appropriate summer job would further round out a child’s college application.

There is no shortage of information on the Web on how to apply to college. Just a simple “applying to college” search on Google resulted in well over 70 pages of results. Five years ago I heard a parent comment somewhat jokingly, “I feel like it is taking Team ‘Smith’ to get my son into college.” The parent was referring to the SAT review books and courses, ACT review courses, private tutors, high school counselors, private college counselors, and who-knows-what-other support persons and resources that were going into the college application process. Alarmingly, this is not an unusual situation. Multiple college applications are then sent to “safety schools,” “match schools,” and “reach schools.” To assist high school students in choosing colleges, there are any number of college guides like the Princeton Review’s Best 377 Colleges, the nuts-and-bolts Fiske Guide to Colleges, and the College Prowler, a Web site that consists of “college reviews by students for students.” With all this information available with a click of a mouse, how could these 18-year-olds possibly narrow their college applications to a reasonable number of schools?

Many parents take their college candidates to visit the colleges, and once the applicant has been admitted, some go on overnight stays. These trips are fun for the parents, and the visits to the schools inspire the college applicant and provide a real feel for the college campuses. It is true when a college counselor says that an applicant will often choose a school based on a feeling after having visited the campus.

As I enter the college application process with my last child, I know that all will go well and that he will end up at the college “best” for him. Of course, that is all that matters. My internist said it best when he told his son, “There are many great colleges out there, and one thing is for sure, they can all teach you much more than you will ever be able to learn.”
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Preparation Is the Key to Defending Depositions

DEFENDING DEPOSITIONS can be more difficult than taking them. The defense rarely “wins” a deposition. At best, those on the defense can leave unscathed. To obtain this desirable result, preparation is everything, and should not be limited to ensuring that your witness has a comprehensive understanding of the case’s facts. The most important aspect of preparation, and your role as the witness’s lawyer, is to ensure that your witness possesses the tools necessary for succinct and persuasive testimony. This requires an approach different from traditional, subject-matter preparation.1

Witness preparation may be approached in two phases. This first is to focus on the witness’s confidence and comfort with the deposition process, and the second is to focus on the review of the relevant facts about which the witness will testify. Ideally, for key witnesses, each phase should occur on separate days. For witnesses with minor roles, however, these two phases can take place on the same day, but you should make them distinct. This division not only helps you to maintain the appropriate focus but also assists in building rapport and trust with the witness prior to reviewing the subject matter. Too often, attorneys concentrate on the second phase and neglect the first.

Phase one focuses on the deposition process itself. It is important to remember that although lawyers take depositions all the time, a witness’s familiarity with the process is probably limited to what he or she has seen on television. This creates anxiety, nervousness, and an overwhelming desire to provide the right answer. Stress and anxiety can make the witness appear untrustworthy, lack credibility, and cause the witness to forget all previous advice and preparation. A central goal of preparation, therefore, is alleviating these concerns. Assure the witness that it is normal to be nervous and that your role is to provide help and support.

From the outset, you should emphasize that, above all else, the witness must tell the truth. If your witness is covered by the attorney-client privilege, stress to the witness that your discussions are confidential, and that he or she can feel comfortable in being open with you. For witnesses not covered by the attorney-client privilege, explain that because your conversations can be asked about during the deposition, you should not discuss anything that the other side should not hear. More importantly, do not tell the witness anything that you want kept confidential.

Take some time at the beginning to explain the basic issues involved in the case. Due to the natural tendency for witnesses to elaborate on responses they believe are favorable to a case, it is important for witnesses to understand their role and why they are being deposed. Explaining the issues helps the witness avoid emphasizing harmful facts in an effort to be helpful. Additionally, the preparation must be interactive. Let the witness ask questions. The more the witness speaks, the more comfortable he or she will become. Lecturing to, or speaking at, the witness is not effective.

Another key aspect of preparation for a deposition is explaining how to answer questions. Typically, short or yes-or-no answers are best. Remind the witness throughout preparation that if he or she does not understand the question, does not know the answer to a question, or does not remember the answer, the correct response is simply to say so. Witnesses naturally feel pressure to answer every question, even if they do not know the answer, do not recall, or do not understand the question. During the first phase of the deposition preparation, it is therefore important to help the witness be ready to deal with this pressure.

Further, remind the witness to pause before answering every question so that you have an opportunity to object. The witness should not rush to answer a question but instead listen to the question, think about it, and decide whether he or she truly knows the answer to the question, think about how to answer it, and only then answer it. This analytical process is not a natural part of most interactions between people, so it is vital that you spend time practicing.

Also during the first phase of deposition preparation, an attorney should not forget to explain objections. Although commonplace for lawyers, objections interrupt the normal flow of conversation and are likely to increase the anxiety of the witness. It is therefore worthwhile to explain that the witness need not worry about objections but must still answer the question unless you instruct the witness not to. Objections also can be a good indicator that opposing counsel is entering dangerous territory. Your objections should remind the witness to think about the question and what counsel is asking before responding.

Practice makes perfect. There is no better way for a witness to master the art of answering questions than through practice. Regardless of how many times you repeat something, as soon as you ask a question, witnesses will forget what you said. Repetition solidifies advice. Practicing aggressive cross-examination is also crucial. Cross-examination is uncomfortable and tends to cause anxiety. Getting into the character of opposing counsel, although sometimes awkward for young lawyers, is essential. Witnesses only will be comfortable with the process if they believe they can answer the tough questions. Another good idea is to videotape the practice sessions. Videotaping the witness and playing the footage to illustrate your advice can be helpful, especially if the witness’s deposition will be videotaped.

Finally, although it seems obvious, before your preparation is over, remind the witness where and when to meet, what to wear, and what not to bring to the deposition. The goal of phase one preparation is to leave the witness with an understanding of the deposition process, relieve any anxiety and stress that the witness may have, and set up the witness to give persuasive and effective testimony. As long as that witness walks out of the deposition thinking “that was easier than I thought it would be,” you can consider it a win.2

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1 See generally David Malone et al., The Effective Deposition—Techniques and Strategies That Work (2007).

Emily L. Aldrich is an associate at the Los Angeles office of Hunton & Williams, LLP, and serves on the Barristers executive committee.
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Strategic Remedies for Corporate Crime Victims

COMING TO TERMS with the fact that one is the victim of a business crime such as having invested in a Ponzi scheme, being sold a phony painting, or having had one’s goods counterfeited can be difficult enough, but recovering some of the losses suffered can be even more so. Should a victim of such a crime call the local police department, the California attorney general’s office, or the FBI? Does it make sense to hire a private investigator? Would it be worthwhile to initiate a civil lawsuit or try to get the government to bring a criminal case? Or does it make sense to do nothing for fear that once a criminal inquiry has been started, it may subject the victim’s own conduct to unwanted scrutiny? These are all questions that attorneys should discuss with their business clients.

There is little doubt that crime, particularly fraud, goes underreported.1 Being the victim of a fraud is embarrassing. It can tarnish the reputation of the institution that wasted corporate assets.2 Additionally, victims often think that little can be done to remedy the situation, which creates little incentive for reporting the crime. Those who committed the fraud may be long gone or may have made themselves judgment proof. Furthermore, the authorities may be reluctant to get involved if they perceive the case to be little more than a business dispute.

Few victims of business crime consider how important time is in relation to whatever action they may take. Business crime does not typically resolve itself on its own, and the earlier a problem is identified, the more options are available to help resolve it, and the less likely a small problem will become a big one.

For this reason, the victim of a business crime should begin an assessment quickly. The first question for a business that has suffered a loss is to honestly assess whether it is actually a victim of fraud. Fraud requires acts of deceit based on affirmative acts or concealment of material facts.3 Because the definition of fraud is so nuanced, it is necessary to consider whether one is merely someone who entered into a bad business deal. For example, just because an alleged fraudulent statement is, in hindsight, clearly false, it does not necessarily follow that the alleged perpetrator knew it was false at the time it was made.

In an investigation, it can be particularly helpful to examine whether there are other victims or other examples of conduct by the alleged perpetrators that has been determined to be fraudulent. If the perpetrator has done something similar before, it is much more likely that the victim’s recent loss was not an accident.

Similarly, it is worth finding out whether the perpetrator has recoverable assets that can be used to reimburse the victim. It may be emotionally satisfying to obtain a civil judgment against the perpetrator, but turning that judgment into cash is not always possible.

In sum, the first step in determining what remedial action to take is to figure out the facts of the situation, and the best way to achieve this is to conduct an investigation. An organization that is a victim of a fraud should conduct an internal investigation. This investigation may require a private investigator, forensic accountant, or computer forensic examiner.

It is impossible to know what the investigation will reveal. For example, it could reveal complicity on the victim’s part. An individual in the organization may have received kickbacks in exchange for signing the agreements that generated the loss. Because it is not possible to know what the investigation will reveal before it has been conducted, the best course is to have an attorney undertake the investigation and thereby have the fact and the results of the investigation maintained as confidential under the attorney-client privilege. The corporate victim of fraud can always decide to waive privilege and produce the results of the investigation at the appropriate time and place but may not want to have the investigation subject to disclosure at the request of a litigation adversary or the government. Control over the information is key, and the privilege provides that control. Private investigators, forensic accountants, and computer forensic examiners may be engaged to do the investigatory work, but when engaged by the attorney as the attorney’s agents, their work product falls under the privilege.4

Strategic Options

Once the facts have been investigated, a victim of business crime has a number of options to consider. They include 1) confronting the perpetrator, 2) initiating a civil lawsuit against the perpetrator, 3) referring the matter to the government for criminal prosecution, or 4) doing nothing. Some variation of these may also be effective.

Confronting the perpetrator and asking for the situation to be remedied is an appealing option, and it is the natural inclination of most.

Mark Mermelstein is a partner at Orrick Herrington & Sutcliffe LLP in Los Angeles. He is a member of the firm’s White Collar Criminal Defense and Corporate Investigations Group.
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,

Donald B. Marks
Anthony P. Brooklier

August 4, 2011
It is direct and inexpensive but not necessarily effective. To be sure, anyone considering such a meeting must be aware of two mandates: 1) the criminal law prohibition on extortion, which is “the obtaining of property from another with...consent...induced by a wrongful use of force or fear”5 and 2) the rule of professional conduct that prohibits an attorney from threatening to “present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.”6 As a result, an attorney cannot approach the perpetrator and threaten to report his or her conduct to the police unless he or she pays money to the victim. Nevertheless, there may be opportunities to sit down with the perpetrator and convince him or her that the best course is to reverse or renegotiate the offending transaction.

Anyone engaged in prolonged negotiations with the perpetrator needs to be mindful that the perpetrator may be lulling the victim into complacency with false promises of a remedy while continuing to profit off the fraud and plan his or her exit. Even if confrontation is the option pursued, one needs to be aware of the relevant criminal and civil statutes of limitation.

Another option is to sue the perpetrator in civil court. This can be best if the perpetrator has a presence in the United States and has assets and a reputation to protect. The victim retains control and can settle later. Once suit is filed, the victim gains the ability to issue a subpoena for deposition testimony and documents from either the perpetrator or a third party. Having the ability to issue a subpoena can be extremely useful in bolstering the investigation that may have been good enough to identify a perpetrator but was insufficient to obtain evidence proving the perpetrator’s fraudulent conduct. On the other hand, civil litigation is slow and expensive, and all too often, a civil judgment is only the first step in a long process of appeals and debt collection.

Another aspect of civil litigation is the ability to sue players who are peripheral to the perpetrator. These parties may have a presence in the United States and a reputation to protect. The victim retains control and can settle later. Once suit is filed, the victim gains the ability to issue a subpoena for deposition testimony and documents from either the perpetrator or a third party. Having the ability to issue a subpoena can be extremely useful in bolstering the investigation that may have been good enough to identify a perpetrator but was insufficient to obtain evidence proving the perpetrator’s fraudulent conduct. On the other hand, civil litigation is slow and expensive, and all too often, a civil judgment is only the first step in a long process of appeals and debt collection.

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A third option is referring the matter to the appropriate authority for criminal proceedings against the perpetrator. As with a civil judgment, a defendant may be ordered to pay restitution to the victim. From the victim’s point of view, one good aspect of a criminal referral is that—unlike civil defendants, who may utilize every possible trick to avoid paying judgments—criminal defendants are often very motivated to make restitution if it can reduce their exposure to jail time. Sentencing judges in federal and state courts tend to be more lenient when the defendant has made substantial restitution. Similarly, federal and state prosecutors negotiating plea bargains tend to be more flexible on jail time when substantial restitution is part of the disposition. To avoid or minimize jail time the perpetrator may reverse the roles typical to civil litigation and eagerly offer the victim money.

A criminal referral has a number of other advantages over a civil lawsuit. First, the government has better investigatory tools than a private lawyer. It has a greater ability to convince witnesses to speak by threatening to bring criminal charges and offering immunity in exchange for testimony. It can issue subpoenas for documents but tends to get a better response than a private litigant because noncompliance with a criminal subpoena can result in charges of obstruction of justice, while the remedy for noncompliance with a civil subpoena tends to be motion practice in front of the court and perhaps a monetary sanction. The government can also gather information by executing search warrants and wiretaps.

The government also has better collection tools than a civil litigant. For example, forfeiture laws give the government the ability to seize objects that were purchased at least in part with criminal proceeds and to release that property to the victim. If the government can show that the perpetrator purchased a piece of real property or even made mortgage payments on a piece of property with the victim’s money, that property can be seized by the government for the benefit of the victim.

The difference between private and public collection tools is even more dramatic when the perpetrator or the perpetrator’s assets cannot be found in the relevant jurisdiction. In contrast to executing a civil judgment on assets abroad, which is a daunting process, the U.S. government, by obtaining a seizure warrant, has the power to seize other assets of the bank the defendant used to transfer the money offshore.

For example, in a recent prosecution stemming from the online sale of counterfeit sports apparel, the U.S. Department of Justice seized almost $1 million from the counterfeiters’ PayPal account and from interbank accounts held by Chinese banks in the United States.
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The counterfeiters had already transferred the sale proceeds to their bank in China, but because their Chinese bank—like most—internally transferred the money from PayPal through its interbank account in New York, converted the money into foreign currency, and then sent it to an account in China, the U.S. government was able to seize other Chinese bank assets in the United States.

Furthermore, through in rem proceedings, the government has seized almost 1,000 domain names of Web sites engaging in the sale and distribution of counterfeit goods. Finally, the government has its own attorneys and investigators on its, not the victim’s, payroll. The weapons in the government’s arsenal make repayment of the victim the least of the perpetrator’s worries.

One significant downside to making a criminal referral is loss of control. Once a matter has been brought to the government, the government has control as to how the case proceeds. A referral cannot be withdrawn once made. A good prosecutor will need to understand all aspects of the case, including the credibility of the victim. If the victim has what is euphemistically known as an “area of sensitivity,” it may not make sense to invite the government into the victim’s life. One cannot rule out that the government will learn about some impropriety that the victim is guilty of and use its resources to bring the victim to justice. Victims need to make sure their house is clean before they sic the government on an adversary.

Unfortunately, the biggest variable in the criminal referral process is whether the government—including the prosecuting agency and the investigative agency—will investigate and prosecute the perpetrator. Government agencies are overworked and do not have the resources to pursue every referral made to them. For example, when the FBI focuses on fraud cases (a small percentage of its docket), it investigates “significant” frauds. The FBI and the U.S. Attorney’s Office often are not interested in investigating fraud cases involving small dollar amounts or one victim. Similarly, local police forces may not have the resources to investigate complicated fraud cases, particularly if the cases compete with bloodshed crimes for a detective’s attention. Some prosecutorial offices have task forces focused on specific prosecutorial priorities, however. Attorneys advising victims of business crime may be able to match the crime to the priorities of an appropriate agency, whether it be the U.S. Attorney’s Office, the FBI, the Office of the Attorney General, the district attorney, or a local police department.

Similarly, prosecutors may have an affinity for a particular type of case. An art fraud case may be attractive to a prosecutor who...

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was an art history major and worked as a curator for an art museum. A theft of trade secrets case may appeal to the head of computer crimes at a prosecutor's office.

In addition to various offices, various jurisdictions may also come into consideration. For example, in a fraud committed principally by telephone and e-mail in which the perpetrator lives in Los Angeles and victim in Topeka, Kansas, there may be jurisdiction to prosecute in either Los Angeles or Topeka. The referring attorney should consider not only which agency within a city to refer the matter to but also which city to approach. While a single-victim, $600,000 fraud may not be seen as significant in Los Angeles, it may be in Topeka. Bringing the right case to the right prosecutor increases the odds that the case will be investigated and charges filed.

The goal of a criminal referral is to maximize the chances that the government will prosecute the case, so the attorney for the business crime victim should deliver a thorough investigation to a prosecutor. The referral should show that with limited additional investigatory effort, the case will be ready to be prosecuted. The more likely it is that a prosecutor will get bogged down in additional investigation, the less likely it is that the case will be prosecuted. Delivering a prosecutable case to the right prosecutor requires understanding which agency has the authority and inclination to proceed on a case and which prosecutor within that agency may be motivated to take the case. An attorney experienced in making criminal referrals will know what the deliverable to the government should look like and to whom to deliver it. In the appropriate circumstances, a criminal referral can be an efficient surgical strike to provide relief to the victim far more quickly and cheaply than initiating a civil lawsuit.

A criminal prosecution may be the best way to facilitate the repayment of funds to a fraud victim, but there may be other strategic considerations for the victim's attorney. Does the victim have any exposure in publicizing that it is a fraud victim? For example, a fund that invested client monies in a Ponzi scheme may find it better not to publicize to prospective clients that it performed insufficient due diligence. The attorney may advise a client that the best course may be to do nothing.

A business may also find a path between calling the police and doing nothing. For example, the matter may be referred to the government for the prosecution of someone other than the perpetrator. A financial institution may discover that its accounts have been used by an investment adviser as part of a Ponzi scheme. When the institution learns these facts, it may be concerned that if it does nothing, it may appear to be complicit. The institution may be able distance itself from the adviser by making a criminal referral about the Ponzi scheme.

In representing business crime victims, the ultimate advice as to what course of action to pursue will depend on myriad factors. A criminal referral is not to be overlooked, but the victim’s attorney should consider many other factors before advising the victim client on what to do.

3 See, e.g., PENAL CODE §484.
5 PENAL CODE §518.
6 CAL. RULES OF PROF'L CONDUCT R. 5-100(a).
7 See 28 C.F.R. §9.
9 Id.
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Among the countless emails received by every lawyer, sooner or later comes one from a potential client requesting help in collecting a debt, a settlement, or money due for some other reason. If the lawyer accepts the engagement, the debtor immediately sends what purports to be a cashier’s check for several hundred thousand dollars in payment, and the creditor instructs the lawyer to deposit the check to his or her trust account and wire transfer the proceeds, less the lawyer’s fee, to a bank in a foreign country. The check proves to be a counterfeit and is charged back against the trust account, resulting in an overdraft. If action is taken immediately, the funds may be recovered from the foreign bank. However, if the funds have been paid to the perpetrator of the fraud, recovery is unlikely—and the question then becomes, who bears the loss, the lawyer or his or her bank?

A U.S. postal inspector estimates that since 2009 law firms have been bilked out of more than $70 million as a result of these types of scams. And, in a case filed by the U.S. Attorney’s office in Pennsylvania, a pair of foreign nationals are accused of having duped 70 lawyers out of $29 million, and of having tried to steal another $100 million from 300 other lawyers.

This type of fraud originated in Nigeria and has since spread to other countries but is still commonly referred to as Nigerian fraud. It consists of two main elements: 1) the deposit of a cashier’s check for a substantial amount of money and 2) the wire transfer of the proceeds of the check, usually to an overseas bank. The scam’s success does not depend upon the target being naive, reckless, or avaricious; rather, the events happen so quickly that the target simply does not see the deception being played out. Even if the lawyer should have been alert to the fraud, the scheme succeeds because the bank fails to follow standard banking practices regarding both the deposit and the transfer of funds. The following example illustrates the factual and legal issues involved in Nigerian fraud.

The Purported Cashier’s Check
On Wednesday, a fake debtor delivers to the victim-lawyer what appears to be a cashier’s check issued by a national bank (say, The New York Bank), in the amount of $450,000 payable to the order of the lawyer’s trust account. The check appears to be a cashier’s check issued by New York Bank as the issuer/drawer, naming New York Bank as the drawee/paying bank/payor bank, and to have been issued at the request of fake debtor as the remitter, naming the lawyer’s trust account as the payee. (See Figure 1.) However, since the check is a counterfeit, New York Bank is not the issuer/drawer of the check, and the check is not a cashier’s check. Rather, the counterfeiter is the issuer/drawer of the check, and, therefore, it is the counterfeiter’s check.

By drawing the check payable to the order of the lawyer’s trust account and issuing/delivering the check to the lawyer, the counterfeiter makes the lawyer the payee of the check and therefore the holder of the check and the person entitled to enforce the check.
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latter indorses the check payable to his own bank (say, Bank USA) and hands the check to the bank’s teller for processing as a deposit to his trust account. In transferring possession of the check to Bank USA for deposit to his trust account, the lawyer makes several “transfer warranties” to Bank USA:

1. The warrantor is a person entitled to enforce the instrument.
2. All signatures on the instrument are authentic and authorized.
3. The instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor.6

In any ensuing dispute between the lawyer and Bank USA regarding the loss occasioned by return of the check unpaid, Bank USA will argue that the lawyer breached these warranties.

As to the first warranty, the lawyer is the "person entitled to enforce" the check because he is the “holder” of the check. Thus, there is no breach of this warranty.

As to the second warranty, the only signature at issue is the signature of the drawer on the check, and since the check is not New York Bank’s check but is the counterfeiter’s check, the focus is on the counterfeiter’s signature. At the outset, the signature is presumed authentic and authorized,6 and since Bank USA has the burden of proof that the warranty has been breached, Bank USA must produce evidence that the signature is not authentic. Further, the signature is effective as the authentic and authorized signature of the counterfeiter.7 It is unlikely Bank USA could ever obtain testimony from the counterfeiter that the signature is not authentic. In addition, “an unauthorized signature is [effective] as the signature of the unauthorized signer in favor of a person who in good faith pays the instru-

ment or takes it for value.”8 Thus, the counterfeiter having signed the check and his or her signature being effective, there is no breach of the second warranty.

The third warranty relates to alterations, that is, “an unauthorized change in an instrument that purports to modify in any respect the obligation of a party.”9 It is doubtful that Bank USA can point to any change in the check, authorized or unauthorized, that purports to modify in any respect the obligation of any party to the check and, therefore, there is no breach of this warranty.

The fourth warranty only applies if the check is subject to a defense of a party to the check, and since New York Bank did not issue or sign the check, Bank USA cannot claim that it is a party to the check. In addition, there is little likelihood of any evidence of any defense set forth in the Uniform Commercial Code10 that any party to the check could assert against the lawyer, whether it is procedures, and if the employees faithfully follow those procedures, the banks should be able to foil almost any Nigerian fraud scam.

For Bank USA, like any bank, its tellers are the first line of defense against fraud because they are the ones to whom the original check is presented for deposit. One of the first steps taken by the teller is to identify and inspect the security features on the check. The padlock icon on the face of the check indicates that security features are listed on the back. Depending upon the nature of a security feature, its presence or absence on a check is a red flag to a properly trained teller that the check may be altered or counterfeit.

For example, a watermark is an anticontroling technique and is a recognizable image or pattern in paper that appears as various shades of lightness or darkness and disappears when the item is photocopied. Microprinting is also an anticontroling technique and involves printing very small text, often found in the drawer’s signature line or the endorsement line. It is a line consisting of tiny letters, that may, for example, repeat the words “authorizedsignature.” Microprint can only be seen by close examination but either blurs into a solid line or appears as a dotted line when photocopied.

Often embedded within the paper are fibers, sometimes in various colors, that can readily be seen but that are not found in a photocopy of the check. Frequently there is also a security screen consisting of the words “Original Document” on the face of the check printed lightly so checks are more difficult to duplicate.

The teller is also required to determine whether the transaction is routine and customary for the customer. A teller can make this determination by reviewing the customer’s account profile and history. If the teller concludes that the deposit is an unchar-

<table>
<thead>
<tr>
<th>CASHIER’S CHECK</th>
<th>HOLD DOCUMENT UP TO THE LIGHT TO VIEW TRUE WATERMARK</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York Bank, N.A.</td>
<td>CHECK NO. 99999999</td>
</tr>
<tr>
<td>PAY: FOUR HUNDRED THOUSAND DOLLARS AND 00 CENTS</td>
<td>DATE: April 12, 2012</td>
</tr>
<tr>
<td>TO THE LAWYER’S TRUST ACCOUNT</td>
<td>$ <em><strong>400,000.00</strong></em></td>
</tr>
<tr>
<td>ORDER OF</td>
<td></td>
</tr>
<tr>
<td>REMITTER FAKE DEBTOR</td>
<td></td>
</tr>
<tr>
<td>DRAWER: NEW YORK BANK, N.A.</td>
<td></td>
</tr>
<tr>
<td>Counterfeiter</td>
<td></td>
</tr>
<tr>
<td>MP</td>
<td>SENIOR VICE PRESIDENT</td>
</tr>
</tbody>
</table>

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acteristic transaction for the customer, this too, is a red flag for possible fraud.

The teller next scans the check into the bank’s computer system. Over time banks gather information regarding cashier’s checks and program their computers to recognize cashier’s check based on certain data on the check (the ABA routing number and the account number in the MICR line). In this example, the counterfeiter encoded a nonexistent account number, and as a result, Bank USA’s computer would not find the relevant information in its database and would not recognize the check as a New York Bank cashier’s check. Consequently, the computer would treat the check as a regular check and place a hold against the deposit because of its large amount—meaning that the funds would not be available for withdrawal for a specified time. The nonrecognition by the computer of what purports to be on its face a cashier’s check is another red flag that the check might not be what it purports to be, and standard banking practice calls for further action.

In January 2007, the Office of the Comptroller of the Currency\(^1\) issued a bulletin recommending that national banks take actions to address the risks to the bank and its customers posed by fraudulent cashier’s check schemes.\(^2\) Specifically, the OCC recommended that banks adopt fraud prevention procedures directed at the processing of cashier’s checks to identify potentially suspicious items, establish criteria for placing holds on deposits, and train personnel to be aware of the increasing incidence of fraudulent cashier’s checks. In addition, the OCC advised banks to train tellers to more closely examine large-dollar checks to identify suspicious cashier’s checks and to ask appropriate questions when customers deposit the checks. The OCC has also counseled that when anyone calls the payor bank to verify the genuineness of a check, the caller should not use the telephone number provided on the instrument, as this number is generally not associated with the bank but rather with the scam artist. The recommendations of the OCC have become standard banking practice.

A bank’s second line of defense is the teller’s supervisor who reviews deposits. Bank procedures customarily require the supervisor to examine the transaction in the same manner as the teller. This is because the supervisor has more experience and training and is better able to spot a suspicious check.

In the example, assume the supervisor verifies the check by calling the number on the check and is told (by the counterfeiter) the check is good and foolishly (and undoubtedly without authority) proceeds to change the designation of the check on the computer to recognize the check as a cashier’s check, thereby automatically releasing the hold on the deposit. Setting aside for a moment what happens next in the processing of the check, the release of the hold presents an issue as to what information, if any, is communicated to the lawyer regarding the availability of funds from the deposit.

In its 2007 bulletin, the OCC recommended that banks be aware of the need to clearly and accurately explain the status of deposits to their customers in order to avoid confusion as to when funds can be safely withdrawn. Without such information, customers may conclude that a check has cleared solely because the funds are available in the depositor’s account. Here, the supervisor tells the lawyer that the check is “good” and that the funds in the account are “available,” but does not explain the actual status of the deposit and the meaning of funds availability. By failing to do so, the lawyer is left unaware that the check could still be returned unpaid. If the explanation had been given, the lawyer would have waited to wire-transfer the proceeds until the check had been paid and the proceeds collected, and there would have been no loss.

That evening, Bank USA sends the check to an intermediary bank (say, California Bank) for presentment to New York Bank for payment. California Bank truncates the check. The term “truncate” means “to remove an original check from the forward collection or return process and send to a recipient, in lieu of such original check, a substitute check or, by agreement, information relating to the original check (including data taken from the MICR line of the original check or an electronic image of the original check), whether with or without the subsequent delivery of the original check.”\(^3\) After truncating the check, California Bank sends the information regarding the check by electronic means to New York Bank as a demand for payment.

The route of the check from issuance to presentation for payment (and the notice of nonpayment sent the next day) can be diagrammed (see Figure 2)—remembering that New York Bank did not issue the check.

**The Transfer of Fund**

On Thursday, before receiving notice of nonpayment of the check and in reliance upon Bank USA’s statements that the check is good and the funds are available, the lawyer calls Bank USA’s wire transfer department and issues his payment order\(^4\) instructing Bank USA to cause China Bank in Shanghai to pay $400,000 to a nonexistent company and for Bank USA to reimburse itself for the payment by debiting the lawyer’s trust account. In this transaction, the lawyer is the “sender” (“the person giving the instruction to the receiving bank”),\(^5\) and Bank USA is the “receiving bank” (“the bank to which the sender’s instruction is addressed”).\(^6\)

A receiving bank other than the beneficiary’s bank accepts a payment order when it executes the order.\(^7\) A payment order is “executed” by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank.\(^8\) In this case, China Bank is the “beneficiary’s bank” (“the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order”).\(^9\) The nonexistent company is the “beneficiary” (“the person to be paid by the beneficiary’s bank”).\(^10\) Here, Bank USA accepts/executes the lawyer’s payment order by issuing its own payment order to China Bank to credit

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**Figure 2**

![Diagram of the check processing and funds transfer](image)

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the account of the nonexistent company in the amount of $400,000.

In this instance, Bank USA’s payment order instructing China Bank to credit the account of the nonexistent company is sent via SWIFT21 and receives almost instantaneously by China Bank. For purposes of the example, assume the payment order arrives in Shanghai on Friday at 2:00 A.M. when it is unlikely any China Bank employee would be aware of the payment order or would have taken action to accept the order.

The Commercial Code provides, “With respect to a payment order issued to a receiving bank other than the beneficiary’s bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender’s order.”23 The code establishes rules as to when the sender’s obligation to pay the receiving bank occurs, including the following: “If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.”24 Bank USA permitted the funds transfer because it made the funds in the trust account withdrawable when it removed the hold against the purported cashier’s check, and Bank USA was thus paid for the transfer when it debited the trust account. Simultaneous with the execution of the lawyer’s payment order, Bank USA also credits the account of China Bank on Bank USA’s books in the amount of $400,000, and in its payment order to China Bank notifies China Bank of the credit. The transaction up to this time can be diagrammed as seen in Figure 3.

Figure 3

Standard banking practice dictates that only collected funds are to be transferred. That is so because if the funds are not collected and a check comes back unpaid, the account is overdrawn, and an overdraft is an unsecured loan. Thus, when Bank USA’s supervisor failed to identify the transaction as potentially fraudulent and made the funds available for withdrawal, it was a colossal error that led directly to the successful completion of the fraud.

The Attempt to Cancel the Payment Order

Shortly after Bank USA issued its payment order, New York Bank notified Bank USA that the check was being returned unpaid. Bank USA immediately placed a hold against the lawyer’s trust account, which had a balance of $150,000 consisting of a $50,000 credit remaining from the counterfeit check and $100,000 belonging to the lawyer’s other clients.

Standard banking practice dictates that when a bank discovers fraud in a transaction, the bank’s payment order should be immediately canceled.25 The Commercial Code contains several provisions that pertain to cancellation (or, as some banks term it, “recall”) of a payment order. The code provides that “[a] communication of the sender of a payment order cancelling…the order may be transmitted to the receiving bank orally, electronically, or in writing.”26 The code provides further that “a communication by the sender canceling…a payment order is effective to cancel…the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.”27 In most cases the beneficiary’s bank can prevent acceptance28 by giving notice of rejection,29 and the code rules provide for a certain time period within which the beneficiary’s bank has to decide whether to accept or reject a payment order—the point being that there is generally some period after the payment order is sent within which the sender may cancel the order.

First, “[w]ith respect to a payment order issued to the beneficiary’s bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order.”30 Second, “[i]f a beneficiary’s bank accepts a payment order the bank is obliged to pay the amount of the order to the beneficiary of the order.”31 Thus, China Bank is not obligated to pay the nonexistent company until China Bank accepts Bank USA’s payment order, and Bank USA likewise is not obligated to pay China Bank until China Bank accepts the payment order. Third, the beneficiary bank’s obligation to pay the beneficiary upon acceptance of the payment order is subject to the rule that “[a] cancelled payment order cannot be accepted.”32 Thus, if Bank USA cancels its payment order before China Bank accepts the order, China Bank cannot thereafter accept the order, China Bank is not obligated to pay the nonexistent company, and Bank USA is not obligated to pay China Bank, and no loss occurs. The critical question is, what constitutes acceptance of Bank USA’s payment order by China Bank? Subject to other provisions not applicable in this example,33 a beneficiary’s bank accepts a payment order at the earliest of the following times:

1. When the bank (i) pays the beneficiary…or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order…
2. When the bank receives payment of the entire amount of the sender’s order [pursuant to U.C.C. §11403(a)(1) or (2)]…
3. The opening of the next funds transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender’s order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender.35

In this case, China Bank maintained an account with Bank USA and Bank USA credited China Bank’s account for the amount of the payment order at the time Bank USA issued the order—at 2:00 A.M. on Friday, in Shanghai, China. That being the case, under the rules, China Bank received payment of Bank USA’s order and accepted the order, “when the credit [was] withdrawn or, if not withdrawn, at midnight on the day on which the credit is withdrawable and the receiving bank [China Bank] learns of that fact.”36 China Bank was notified of the credit to its account and that it was withdrawable on Friday. Thus, China Bank will be deemed to accept Bank USA’s payment order when it withdraws the credit, or at midnight on Friday if it does not withdraw the credit before then. Consequently, if Bank USA sends China Bank a cancellation of the payment order before China Bank withdraws the credit, or before midnight on Friday if China Bank does not withdraw the credit before that time, the
cancellation would be received by China Bank before it accepts the payment order, and China Bank could not accept the payment order thereafter and there would be no loss.

In the example, Bank USA sends China Bank a cancellation of its payment order before China Bank accepts the order on Friday; however, it does not send the message directly to China Bank but routes the message through Bank USA’s agent in Mumbai, India, thus delaying receipt of the message by China Bank beyond Friday. The cancellation thus comes too late, and Bank USA’s failure to follow standard banking practice causes the loss. The matter can be diagrammed as seen in Figure 4.

The Chargeback of the Check

Upon return of the counterfeit check, Bank USA charges the check back against the trust account in the amount of $450,000, creating an overdraft of $300,000. The lawyer immediately opens a new trust account at another bank and deposits $100,000 to cover the client funds now being wrongfully withheld by Bank USA (and to avoid any problem with the State Bar), and sues Bank USA.

The lawyer has three separate grounds for obtaining an order declaring that he is not liable to Bank USA for the overdraft in his trust account based on Bank USA’s negligence in 1) accepting the check for deposit, 2) wire transferring the proceeds of the check, and 3) not promptly canceling the transfer of funds once it was discovered that the check was counterfeit. To prevail on this claim the lawyer must prove that Bank USA represented to the lawyer that an important fact was true (the statements that the check “was good” and that the funds were “available”), that the representations were not true, that Bank USA had no reasonable grounds for believing the representations were true when it made them, that Bank USA intended that the lawyer rely on these representations, that the lawyer reasonably relied on the representations, that the lawyer was harmed, and that the lawyer’s reliance on the representations was a substantial factor in causing the harm.

The right of chargeback is expressed in the Commercial Code as follows:

If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor…or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer’s account, or obtain refund from its customer, whether or not it is able to return the item, if by its midnight deadline or within a longer reasonable time after it learns the facts, it returns the item or sends notification of the facts. The code also provides that “[t]he right to charge back is not affected by…previous use of a credit given for the item.”

When a bank charges a check back against the account to which it was deposited, the debit to the account generally reverses the provisional credit given for the check, and that is the end of the matter. If the credit has been withdrawn, an overdraft is created in the account and the bank is entitled to obtain refund from its customer. Under the law, an overdraft is in effect a loan, and the bank may sue for recovery of the amount loaned.

In this case, however, the check was not deposited to the lawyer’s personal account but to the lawyer’s trust account, and the bank’s right to recoup its loss by charging the check back against the account is limited. The funds in the trust account were not the lawyer’s funds but were funds the lawyer held in trust for third parties. Consequently, Bank USA cannot recoup any loss on the check by applying those funds to the loss. The court in Chazen v. Centennial Bank expressly stated, “The bank’s right of offset, however, exists only if the depositor is indebted to the bank in the same capacity as he holds the account. Thus, a bank may not ‘apply the trust funds to a personal indebtedness of the trustees.’”

A fourth ground for declaring the lawyer not liable to Bank USA for the overdraft in the trust account is that Bank USA is guilty of negligent misrepresentation. To prevail on this claim the lawyer must prove that Bank USA represented to the lawyer that an important fact was true (the statements that the check “was good” and that the funds were “available”), that the representations were not true, that Bank USA had no reasonable grounds for believing the representations were true when it made them, that Bank USA intended that the lawyer rely on these representations, that the lawyer reasonably relied on the representations, that the lawyer was harmed, and that the lawyer’s reliance on the representations was a substantial factor in causing the harm.

Experience teaches that the lawyer may have been duped, but that does not equate to being negligent. Hindsight is great, but there must be something specific to put the lawyer on notice that there may be a fraud in the making. Financial institutions, however, are well aware of Nigerian fraud and have taken...
exceptional steps to avoid the problem, and if they fail to follow those steps they indeed are responsible for the loss.

3 The question of responsibility turns on the law of negotiable instruments and bank deposits and collections as codified in the Uniform Commercial Code (all references to the U.C.C. are to the code as adopted in California) as qualified by the Expedited Funds Availability Act (12 U.S.C. §§4001-4010) and the Check Clearing for the 21st Century Act (12 U.S.C. §§5001-5018) as implemented by Regulation CC (12 C.F.R. pt. 229), the law of funds transfers as codified in the U.C.C. (after a quick glance at the Electronic Funds Transfers Act (15 U.S.C. §§1693 et seq.) as implemented by Regulation E (12 C.F.R. pt. 205), the contract between the parties, and the principles of common law. See U.C.C. §1103(b).
4 The numbers at the bottom of the check (the “magnetic ink character recognition line” or MICR line), printed in magnetic ink, reflect the following information: the first number is the check number, the second number is New York Bank’s American Bankers Association routing number, the third number is supposedly the account number of the New York Bank account to be debited upon payment of the check by New York Bank—in this case a nonexistent or phony account number.
5 See U.C.C. §3416(a).
6 U.C.C. §3308(a).
7 U.C.C. §3401(b) (emphasis added). The Official Code Comment, ¶2, to §3401 is instructive: “A signature...may be in any name, including any trade name or assumed name however false and fictitious, which is adopted for the purpose.”
8 U.C.C. §3403(a).
9 U.C.C. §3407(a).
10 U.C.C. §3305(a).
11 The comptroller of the currency is the administrator of national banks charged with the responsibility for the examination of national banks in order to determine their soundness of operation and quality of management and their compliance with applicable laws and regulations and supervises all national banks and issues guidelines for national banks to use in their activities.
13 12 C.F.R. §229.2(d).
14 See U.C.C. §§11103(a)(1) and 11103(c).
15 U.C.C. §11303(a)(5).
16 U.C.C. §11103(a)(4).
17 U.C.C. §11209(a).
18 U.C.C. §11301(a).
19 U.C.C. §11103(a)(3).
20 U.C.C. §11103(a)(2).
21 SWIFT is an acronym for Society for Worldwide Interbank Financial Telecommunication. It was established to move funds and information among member banks.
22 Shanghai, China, is 15 hours ahead of California (16 hours ahead when California is not on daylight savings time). Thus, if the payment order is sent at 11:00 a.m. on Thursday when California is on daylight savings time, it would be 2:00 a.m. on Friday in Shanghai.
23 U.C.C. §11402(c).
24 U.C.C. §11403(a)(2).
25 The focus, of course, is on Bank USA’s payment order, not the lawyer’s payment order, since it is Bank USA’s order that China Bank will accept to complete the transfer of funds.
27 U.C.C. §11211(b).
28 Acceptance by the beneficiary’s bank can occur by passive receipt of payment. See U.C.C. §11209(b)(2) and (3) and the discussion infra.
29 With a minor exception, a beneficiary’s bank may reject a payment order “by a notice of rejection transmitted to the sender orally, electronically, or in writing.” U.C.C. §11210(a).
30 U.C.C. §11402(b).
31 U.C.C. §11404(a).
32 U.C.C. §11211(e).
33 See U.C.C. §§11209(b), (c).
34 U.C.C. §§11403(a) and (b).
35 U.C.C. §11209(b).
36 U.C.C. §§11403(a)(2).
37 This is similar to Barclay Kitchen, Inc. v. California Bank, Cal. App. 2d 347 (1962), in which the court held that a bank that permitted the depositor’s employee to submit several deposit tickets for the deposit of a single check, resulting in the inaccurate rendition of deposits on the statements of account, was the cause in fact of the depositor’s injuries, not the failure of the depositor to review his bank statements. The court in Barclay Kitchen excluded evidence of the depositor’s conduct, and the court should likewise exclude evidence of the lawyer’s conduct.
38 U.C.C. §§3302(b) and 4301(a).
39 See U.C.C.§11404(a)(10).
40 U.C.C. §4214(a).
41 U.C.C. §4214(d).
One may hope that each party entering marriage has the best interest of the other in mind. Similarly, one may hope that even in divorce each party still has the interest of the other somewhat in mind, particularly when minor children are involved. Congruent with this hope, California’s community property laws are structured to ensure fairness in the division of assets and award of support. Nevertheless, when one spouse is at a significant disadvantage, it is possible during a divorce for the other to gain the upper hand. The consequences of this can be devastating and long-lasting. When a divorcing spouse is incapacitated or otherwise suffers from mental impairment, the relatively simple process of dissolution requires careful attention to procedural considerations and due process safeguards.

Every attorney needs to be able to follow the special procedural requirements that apply when representing an incapacitated party. Divorce lawyers encounter people during some of the most stressful times of their lives, and as a result the basic signs of incapacity or mental impairment can easily be overlooked or discounted. In fact, stress can rise to the level of incapacity. A unique challenge that this situation presents to counsel is being able to identify whether a party is incapacitated or is at risk of becoming incapacitated during the proceeding.

The Due Process in Competence Determinations Act, codified at Probate Code Sections 810-813, defines capacity and offers a wide range of potential mental deficits that may support a finding of incapacity. The act is the statutory authority for determining legal mental competency in California. Under the code, a rebuttable presumption exists that all people have the mental capacity to make decisions for themselves. A California court will presume that the parties have sufficient mental capacity, and most practitioners assume that clients have sufficient mental capacity to work through their cases. In support of this presumption, the code holds that the diagnosis of a mental disorder alone does not render a person incapacitated. For example,

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ple, a person with bipolar disorder is not automatically deemed incapacitated as a result of his or her diagnosis. Counsel’s mere awareness of a client’s medical history is insufficient for making a judgment about capacity. Mental incapacity puts the practitioner in the difficult position of having to rely on his or her own assessment of a client’s mental capacity in order to determine whether a client needs additional protection. More challenging still, a client’s mental capacity may improve or deteriorate over the course of the proceeding and the attorney-client relationship.

To assist the practitioner, who is understood not to be a medical expert, in making this assessment, the Probate Code sets forth several categories of mental function and lists examples of deficits in the particular functions that may rise to the level of incapacity. The categories of each mental function generally pertain to one’s ability to understand one’s surroundings. They include but are not limited to alertness and attention, information processing, thought processes, and ability to modulate mood and affect. In determining whether a deficit in one of these areas is so substantial that the person lacks the capacity to do a certain act or make a certain decision, the court may take into consideration the frequency, severity, and duration of periods of impairment.

A deficit in mental functions may be considered only if the deficit, by itself or in combination with one or more mental function deficits, significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of action or decision in question. As it pertains to a marital dissolution proceeding, a mental deficit can manifest itself in a variety of ways, some of which may not be obvious. For example, while medical training may not be required to recognize impairment in someone with advanced Alzheimer’s disease, other syndromes—including substance abuse and even simply the stress of divorce—may be less readily apparent but still render a person incapacitated under the Probate Code. The inability to concentrate enough to give meaningful instructions to counsel or to understand the effect of certain decisions, or outbursts of unjustified anger that prevent resolution or progress toward resolution may be symptoms of an incapacitated client.

Additionally, it is important to note that a person’s mental capacity can change. A progressive infirmity may render a person incapacitated during a proceeding. In re Marriage of Straczynski is one case that addresses the necessity of a party to demonstrate the capacity to maintain a dissolution action at any point during the proceeding at which a question of his or her capacity is raised. As a fiduciary, it is the attorney’s responsibility to note anything that suggests his or her client may not have sufficient mental capacity to participate in the proceeding and to bring it to the court’s attention.

**Mental Capacity to Marry**

Mental capacity during divorce is not the only issue for an attorney to consider. The mental capacity required to get married, which is very low, is also worthy of examination. Marriage may result from love and romance, but from a legal standpoint, marriage is based squarely on the capacity to enter into other types of contracts. First, the appointment of a conservator does not in and of itself affect the conservatee’s capacity to marry, despite limiting the conservatee’s ability to contract generally. So the presumption works in support of finding capacity to marry. Second, it is within the court’s power to order a determination of a conservatee’s capacity to enter into a valid marriage.

**In re Marriage of Higgason** prescribes the rule that a proceeding for dissolution may be initiated by a spouse under conservatorship by and through a guardian ad litem, provided that the spouse is capable of exercising a judgment and has expressed a wish that the marriage be dissolved on account of irreconcilable differences.
In re Marriage of Higgason established the rule that a guardian ad litem may initiate a divorce so long as the spouse has expressed a wish that the marriage be dissolved.

True.
False.

In re Marriage of Higgason created a procedure by which a dissolution may reach its conclusion when a spouse becomes incapacitated during the proceeding.

True.
False.

1. Probate Code Sections 810-813 define mental capacity and list mental deficits that may support a finding of incapacity.
   True.
   False.

2. In re Marriage of Straczynski addresses the capacity of a party with a substance abuse problem.
   True.
   False.

3. Under Family Code Section 306(a), those with the capacity to marry also have the capacity to divorce.
   True.
   False.

4. By statute, a conservatee does not have the capacity to marry.
   True.
   False.

5. The test used by courts to determine one’s capacity to maintain a dissolution proceeding is whether the potentially incapacitated spouse is capable of articulating his or her thoughts to his or her counsel.
   True.
   False.

6. In re Marriage of Higgason established the rule that a guardian ad litem may initiate a divorce so long as the spouse has expressed a wish that the marriage be dissolved.
   True.
   False.

7. If an attorney’s client becomes incapacitated during the pendency of a divorce action, the attorney loses the ability to act on the client’s behalf.
   True.
   False.

8. An attorney representing an incapacitated spouse in a dissolution must obtain the appointment of a guardian ad litem or conservator.
   True.
   False.

9. For a spouse who is temporarily incapacitated, a conservator is generally preferable to a guardian ad litem.
   True.
   False.
One’s mental capacity can change, however, throughout the course of a dissolution. While Higgason established the rule relating to the initiation of a dissolution, until 2010 there was no case on point as to how a dissolution proceeding may be maintained and pursued to completion. In re Marriage of Straczynski extended Higgason by holding that an incapacitated individual may maintain a dissolution proceeding provided he or she remains capable, throughout the proceeding, of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences. The court explained that this interpretation is consistent with the understanding that the decision to dissolve a marriage is intensely personal, because, at any time the issue of one spouse’s capacity is raised, either through a motion brought by one of the parties or sua sponte by the trial court, that party must establish his or her current capacity to express his or her desire to dissolve the marriage.

Based on the Higgason rule alone, it would seem that an incapacitated spouse incapable of expressing a wish to divorce could be trapped in a marriage. However, for the person who cannot express a wish to divorce, alternative statutory mechanisms and other provisions exist. The well spouse may consent, by a writing filed in the proceeding, that all or part of the community property be disposed of as a part of the conservatorship estate, or part of the community property be transferred to the incapacitated spouse. In addition, a body of law enables the conservator of the incapacitated spouse to act on behalf of that client terminates in accordance with basic agency principles.

Procedural Considerations

Once the attorney is aware his or her client is incapacitated within the meaning of the Probate Code, certain procedural and due process safeguards must be implemented. If a client is incapacitated, the attorney’s authority to act on behalf of that client terminates in accordance with basic agency principles. The attorney-client retainer agreement must be confirmed by the incapacitated spouse’s surrogate (be it a guardian ad litem or a conservator of the incapacitated spouse’s estate), or the attorney will lack consent to represent the spouse with impaired judgment.

When representing a spouse with impaired judgment in a dissolution, either a guardian ad litem or conservator of the estate must be appointed. The basic difference between the two is that a guardian ad litem has a limited scope of representation that terminates upon finalization of the proceeding for which he or she was appointed, whereas a conservatorship is ongoing and applies to every facet of the incapacitated spouse’s life. Deciding which representative to appoint will depend largely upon the seriousness of the spouse’s incapacity. A guardian ad litem may be more appropriate for the individual whose capacity is momentarily affected by debilitating stress, for example. A conservator may be more appropriate if the incapacitated individual needs long-term assistance because the incapacity more broadly affects the individual’s life. A conservatorship is expensive and limits the conservatee’s civil liberties. In cases of the severely incapacitated, however, it may make sense to appoint a conservator rather than a guardian ad litem.

The selection between a guardian ad litem and conservator of the estate may depend on which spouse counsel is representing. If the lawyer for the well spouse identifies a potential capacity issue with the opposing party, he or she may seek a guardian ad litem. The guardian ad litem is sufficient to help make sure that the well client does not violate his or her fiduciary duty. At the same time, a guardian ad litem should cost less than a conservator. On the other hand, if counsel represents the incapacitated spouse, it may be prudent and safer to seek appointment of a conservator.

If a conservatorship is appropriate, the incapacitated spouse or the well spouse may petition the probate court for a conservatorship with Judicial Council form GC-310. A conservator of the estate may be appointed for any person who is “substantially unable” to manage his or her financial resources “or resist fraud or undue influence.” The court may not appoint a conservator of the estate unless it makes an express finding that granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.

Either the incapacitated spouse or the well spouse may nominate the conservator. The incapacitated spouse’s preference, which may have been expressed years before the onset of the incapacity, is given priority over the well spouse’s nomination. Moreover, a court will not consider a well spouse’s petition for his or her appointment as conservator of an incapacitated spouse if the well spouse is a party to a dissolution, legal separation, or nullity proceeding involving the
incapacitated spouse.27 Once the conservator is appointed, the family law attorney must substitute the conservator as a party to the dissolution proceeding.28 Included among the many powers of the conservator is that of employing an attorney, entering into a fee agreement, and paying family law attorney’s fees.29

If a guardian ad litem is more appropriate for the incapacitated spouse, either because the party sought a guardian ad litem or because the court determined establishment of a conservatorship to be too restrictive, the intervention of the probate court is not necessary. A guardian ad litem can be appointed in the family law court concurrently with the initial filing of a petition for divorce. A relative, friend, or any other party may petition the court for a guardian ad litem, and the court may on its own motion appoint one.30 The petition to appoint a guardian ad litem may be filed ex parte with Judicial Council form CIV-010. The application should name the desired guardian ad litem, request authority for the guardian ad litem to serve as the incapacitated spouse in the dissolution action, and request authority for the guardian ad litem to employ counsel and confirm the attorney-client fee agreement.

In theory, the appointment of a guardian ad litem or conservator should put the incapacitated spouse on equal footing with the other spouse during the dissolution. In reality, even with the one significant hurdle of the guardian ad litem’s appointment behind the incapacitated spouse, he or she still faces a stressful road ahead. As with any dissolution (and maybe more so when one spouse is already suffering from diminished mental capacity), reducing cost, time, and stress via a reasonable settlement is to be preferred to the rigors of contested trial. The conservator, guardian ad litem, or other interested party may therefore file a petition to authorize a proposed action, such as a settlement, if it would benefit the incapacitated person, via a substituted judgment proceeding in which the court is asked to approve a proposed course of conduct set forth in a petition by the conservator or other interested party.31 More specifically, the conservatee, guardian ad litem, or other interested party may petition for an action conveying or releasing the incapacitated spouse’s contingent and expectant interests in marital property as part of a marital settlement.32

Potential Complications

The confidential, fiduciary relationship of marriage “imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other.”33 It follows that the fiduciary relationship has special implications when one...
spouse is mentally incapacitated because it obliges the well spouse to take the appropriate steps to ensure that he or she is not taking unfair advantage over the incapacitated spouse because of his or her incapacity.34

A failure to acknowledge a spouse's diminished or diminishing mental capacity during a divorce proceeding, as well as a failure to protect the spouse, could amount to a breach of fiduciary duty. Further, failing to appoint a representative for an incapacitated spouse leaves the well spouse exposed to potential breach of fiduciary duty claims as well as exposing the attorney who failed to protect the well spouse from such changes to potential malpractice claims. Thus, the attorney representing the potentially unwell spouse must remain vigilant, and the opposing counsel must also be alert for signs of mental incapacity.

**Breach of Fiduciary Duty**

When a court finds that one spouse has breached his or her fiduciary duty to the incapacitated spouse, the consequences may be severe. A breach of fiduciary duty is defined as “impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate.”35 If the breach falls short of malicious and willful behavior, the consequence is “an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney’s fees and court costs.”36 Attorney's fees and costs are mandatory. In the context of incapacity, cost could also include the fees associated with a guardian ad litem or conservator. If the breach is malicious or willful, the consequence is “an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.”37

In addition to breach of fiduciary duty issues, an unprotected spouse risks having a stipulated judgment set aside under Family Code Section 2122. If parties to a dissolution proceeding have finalized their marital dissolution proceeding and it is later learned that one spouse lacked capacity at the time the judgment was executed, the judgment may be set aside so long as the action to set the judgment aside is made within two years of the date of the entry of judgment. A set-aside action is expensive and time consuming.

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The test for mental capacity is set forth in detail in the Due Process in Competence Determinations Act. Passing that test is nor-
mally no problem for a person contemplating marriage. Matters become difficult, however, when considering the mental capacity of a petitioner seeking or maintaining a marital dissolution. Issues such as spousal rights and duties, characterization of marital property, spousal and child support, and custody must be carefully considered when navigating the dissolution process. Assuming the basic tests of sufficient capacity to sue are met, the impaired spouse can be assisted by appointment of a conservator or guardian ad litem. If a mentally incapacitated person is required to respond to a petition for dissolution, the appointment of a conservator or guardian ad litem becomes mandatory. The use of a conservator or guardian ad litem not only protects the incapacitated spouse but also serves to protect the well spouse from fiduciary duty violations and to protect the attorney representing the spouse with impaired judgment from malpractice claims.

1 Prob. Code §810(a).
2 Prob. Code §811(d).
3 Prob. Code §811(a).
4 Id.
5 Prob. Code §811(c).
6 Prob. Code §811(b).
7 Crossover Issues in Estate Planning and Family Law, Incapacity Issues in Family Law and Probate Proceedings §7.60 (CEB 2011). See also, e.g., Walsh, Mental Capacity: Legal and Medical Aspects of Assessment and Treatment (1994).
12 Civ. Code §1556.
15 Id.
16 Dunphy v. Dunphy, 161 Cal. 380, 385 (1911).
18 Prob. Code §1810(b).
19 Prob. Code §1800.3(b).
21 Prob. Code §1801(b).
22 Prob. Code §1813(a).
23 Prob. Code §1813(a).
24 Prob. Code §1813(a).
25 Prob. Code §2430(a).1
26 Prob. Code §2580(a).1
28 Prob. Code §2580(a).1
29 Fam. Code §721.
30 Fam. Code §1101(a).
31 Fam. Code §1101(a).
32 Fam. Code §1101(b).
33 Fam. Code §1101(b).
34 Fam. Code §1101(b).
35 Prob. Code §1101(b).
WEIGHING THE BALANCE

The bona fide occupational qualification exception allows employers to hire only those who pass specific size and weight requirements.

RECENTLY, CITIZENS MEDICAL CENTER in Victoria, Texas, came under fire for requiring that all potential employees have a body mass index (BMI) of less than 35. A BMI above 30 is considered obese. Headlines captured the outrage over the so-called ban on fat people: “Texas Hospital Says Fat People Need Not Apply,” said MSNBC; “Battling the Bulge? Don’t Apply to This Hospital,” proclaimed another article; and “Texas: Where Everything Must Be Bigger, Except Employees,” observed a third. News sources and opinion editorials often asked whether the medical center’s decision was legal. The answer is that it depends.

In most states, including California, employers may impose height and weight restrictions if they bear a rational relation to an employee’s ability to perform a particular job. For example, an airline can require its male and female flight attendants to comport with the airline’s weight guidelines for safety reasons. By the same token, a public transit company may refuse to hire a driver whose weight keeps him or her from using a steering wheel.

An employer may also give preferential selection for employees based on weight if the employer makes a strong showing that hiring overweight employees is not reasonable. This is known as the bona fide occupational qualification exception. It allows Hooters restaurant to only hire women who fit into small or extra-small uniforms. Hooters was able to make a strong showing that female sex appeal was an integral part of its commercial identity.

Even in the absence of these exceptions, most states do not make it unlawful for an employer to factor a job applicant’s weight into hiring decisions. Michigan is the only state in which weight discrimination is specifically outlawed. Some municipalities, including San Francisco and Santa Cruz, also forbid discrimination on the basis of weight. Nevertheless, employers such as Citizens Medical Center may deny jobs to overweight applicants for a legitimate business reason.

This does not mean that job applicants or employees alleging weight discrimination in California are without recourse. Under the...
federal Americans with Disabilities Act (ADA) and California’s Fair Employment and Housing Act (FEHA), an individual may file a claim for discrimination based on a “physical disability.” The California Supreme Court has held that one’s weight can be considered a qualifying “physical disability” under FEHA if it results from a “physiological condition affecting one or more of the basic bodily systems.” The disability must also limit an individual’s ability to participate in “one or more major life activities.” A physiological condition can be anything from hypertension or high blood pressure to a thyroid disorder. “Major life activities” include caring for oneself, performing manual tasks, walking, and working.

Generally, those who are only slightly overweight will have difficulty proving their weight is a qualifying disability under FEHA. The few reported cases alleging weight discrimination involve individuals who are considered obese, which refers to the condition of a person who is 20 percent above the ideal weight. Gross or serious obesity is considered 30 to 35 percent over ideal weight, while morbid obesity is either 100 pounds above or twice the ideal weight.

Obesity with no underlying physiological cause, however, does not qualify as a disability. This means that in order to be part of a protected class, an employee must prove that a physical or mental impairment caused him or her to gain weight. There must be genetic factors or underlying physical disorders that predisposed a plaintiff to obesity. In defense of a discrimination claim, an employer can argue that the plaintiff’s obesity was related entirely to dietary habits and a sedentary lifestyle, which do not constitute an “underlying physiological cause.”

An employer can also make the argument that an obese employee is unable to or cannot safely perform “essential duties even with reasonable accommodations.” Under FEHA, an employer has the right to discharge a disabled employee on this basis. Employers, however, must make sure that the employee is actually unable to perform his or her duties. Obesity may also be considered a handicap if the employee is “regarded as disabled,” even if the obesity does not result from a medical condition or affect the employee’s life. If an employer views an employee’s weight as making him or her incapable of performing the job, but the employee can prove he or she was able to perform the job’s essential duties, the employer may be liable for disability discrimination based upon the perception of disability.

A nonprofit organization based in Philadelphia learned this lesson the hard way in 2007. Resources for Human Development (RHD) fired an employee because she was 5 feet 2 inches tall and weighed 527 pounds. The employee, who worked with children dealing with parental drug addiction, filed a charge with the Equal Employment Opportunity Commission (EEOC) for disability discrimination. Two years after bringing the claim, she died of morbid obesity. Other significant conditions contributing to her death were hypertension, diabetes, and congestive heart failure.

The EEOC filed a suit against RHD for disability discrimination. The nonprofit attempted to have the case dismissed by filing a motion for summary judgment. In its motion, RHD argued that the employee’s obesity severely limited her job performance. In response, the EEOC presented evidence that the plaintiff was able to perform her job, yet RHD continued to regard her as disabled and terminated her on that basis. The court denied RHD’s motion, and the case was scheduled to go to trial. RHD then settled with the EEOC for $125,000.

The lessons from the RHD case are significant. In order to defend a disability discrimination claim based on weight, an employer must prove that it never considered the plaintiff to be disabled, or alternatively, that the employee’s job performance was affected. This becomes difficult when an employee’s job is purely sedentary, because it is hard to prove that an employee could not do his or her job due to obesity. As a result, employers in certain industries that require constant walking, lifting, and moving may find it easier to terminate employees on the basis of their physical limitations.

**Employee Benefits Discrimination?**

On the surface, it appears that employers like Citizens Medical Center and RHD are refusing to hire employees and terminating employees for aesthetic reasons. However, their rationale may be part of a larger scheme to reduce healthcare costs, which increase with instances of obesity, high blood pressure, and diabetes. Premiums for employer health insurance plans have risen 153.5 percent since 2002. The American Journal of Preventive Medicine estimates that the cost of obesity-related medical expenditures may be as high as $147 billion per year—roughly 9 percent of all annual medical expenditures. On average, an obese person costs $1,400 more per year because of related health issues such as type 2 diabetes, heart disease, and cancer. Accordingly, a California hiring manager who interviews a morbidly obese candidate may worry about health insurance costs.

A decision not to hire a candidate due to concerns about health insurance costs may not be unlawful. The California Supreme Court has held that FEHA’s prohibition against discrimination in employment extends to hiring, discharging, suspension, and demotion, but not to the furnishing of employee benefits. Therefore, an individual may not bring a FEHA claim based solely on employee benefits discrimination; the discrimination must be linked to a disability or other enumerated factor. Moreover, the U.S. Supreme Court has made it clear that the Employee Retirement Income Security Act of 1974 (ERISA)
preempts all state laws when it comes to employer-sponsored health group plans.\textsuperscript{20} Under ERISA, an employee who utilizes his or her employer’s health insurance plan and who is ultimately terminated may bring a discrimination claim on the theory that “the employer ‘may’ have been motivated by a desire to reduce its medical benefits costs.”\textsuperscript{21} However, under ERISA, the term “employee” means any individual employed by an employer.\textsuperscript{22} It does not include candidates for employment who simply interview for a position.

Similarly, employers may discriminate against smokers in hiring due to the impact on healthcare premiums. In recent months, a number of healthcare agencies have begun implementing a nicotine test during the hiring stage in order to keep out employees who may have health problems affiliated with smoking. Because smoking is not a disability under the ADA or FEHA,\textsuperscript{23} most challenges to nicotine testing policies are made on the basis of individual rights such as privacy and freedom of speech.

Of course, if a job applicant shows up at a job interview using a cane to walk, the hiring manager’s actions will be more closely scrutinized, regardless of the concern for healthcare premiums. “At minimum, evidence that an individual requires a cane in order to walk is clearly sufficient to establish that a person is physically disabled under California law.”\textsuperscript{24}

**Employer Wellness Programs**

A number of employers throughout the state have started proactive campaigns aimed at giving employees incentives to exercise, lose weight, and eat a more balanced diet. While these “wellness programs” may be well intended, employers must be careful not to penalize nonparticipation.

For example, in 2009, government officials in Broward County, Florida, began asking employees to get a finger-stick blood test for cholesterol and diabetes. Those who participated were given the opportunity to participate in a disease management coaching program if they had asthma, hypertension, diabetes, congestive heart failure, or kidney disease.\textsuperscript{25} Workers who declined were docked $20 each pay period. In August 2010, an employee who was docked $20 from his paycheck filed a federal discrimination claim on the grounds that the county’s program violated the ADA. The trial court ruled in favor of the county, finding that its wellness program fell under the insurance safe-harbor rule of the ADA. This provision allows an employer to institute a wellness program as long as it is considered a benefits plan.\textsuperscript{26} Because the $20 payroll deduction could be seen as a penalty rather
than a benefit, Broward County stopped docking employees after the ruling came out. Despite this, the employee appealed the trial court’s ruling, arguing that using medical tests to give financial incentives could discriminate against workers with health problems. The appeal has yet to be decided.

The Future of Obesity Discrimination

According to the Centers for Disease Control and Prevention, about 36 percent of all Americans are considered obese. The American Journal of Preventive Medicine estimates that about 42 percent of the U.S. population will be obese by 2030. It was perhaps with this forecast in mind that California’s Commission on Fair Employment and Housing recently proposed exempting “obesity” from the definition of “disability.” After receiving comments and suggestions from the legal and health community, however, the commission decided to omit the proposed obesity exception. The current revised proposal aims to conform with federal law, which does not exclude obesity as a disability yet includes severe obesity as a disability.

The commission’s uncertainty with how to treat obesity reflects the continuing uncertainty over whether to deem it a disability, a concern that extends beyond the employment context to all realms of public accommodation. If one out of three Americans is considered obese, and that obesity may be due to a disability, the number of potential disability claims arising simply due to the inclusion of obesity as a protected characteristic could be monumental. For example, if obesity is a disability, will common carriers need to provide bigger seats or larger lavatories to allow ease of access? Would airlines be able to charge a higher rate for clinically obese passengers or would this constitute disparate treatment under the law? In Canada, it is unlawful to discriminate against clinically obese customers by charging them more to travel by air, rail or ferry. Will the United States follow suit?

As the girth of Americans continues to expand, employers should keep a watchful eye on this area of the law when trying to cut healthcare costs and manage the effectiveness of their workforce. While weight is not currently a protected characteristic under FEHA, California employers should always keep in mind whether there are legitimate business reasons for their decisions in light of the risks of a disability or perceived disability discrimination claim.

1 BMI is calculated from a person’s weight and height. A BMI from 18.5 to 25 is considered normal, while a BMI of 30 or more is obese. Individuals whose BMI is 40 or more are considered extremely obese.

2 Eve Tahmincoglu, Texas Hospital Says Eat People Need Not Apply, LIFEINC (Apr. 5, 2012), http://lifeinc
TAP: Expert Witness Workshop

ON MONDAY, OCTOBER 8, Trial Advocacy and the Litigation Section will host a workshop providing introductory and advanced instruction on how to use expert witnesses in civil and criminal actions, with special emphasis on expert testimony. Topics covered in the lecture portion of the program include evidentiary rules regarding expert opinions, taking and defending expert depositions, how experts can help and hurt a case, direct and cross-examination of expert witnesses, establishing and challenging expert qualifications, and advanced expert testimony techniques. In the workshop portion of the program, participants conduct direct and cross-examination of an expert witness. Written course materials will be distributed via e-mail prior to the first class. Your correct e-mail address is needed 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 lots. On-site registration will be available at 8 A.M., with the program beginning at 8:30 A.M. and continuing until 12:30 P.M. The registration code number is 011606.

$250—CLE+ member
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45th Annual Securities Regulation Seminar

ON FRIDAY, OCTOBER 26, the Business and Corporations Law Section will host its annual securities regulation seminar. Top SEC officials—including Commissioner Troy A. Paredes; Robert S. Khuzami, the SEC’s director of enforcement; Marc D. Cahn, SEC general counsel; and Meredith B. Cross, SEC director of corporate finance—together with André Birotte Jr., U.S. attorney for the Central District of California; and Jan Lynn Owen, commissioner of the California Department of Corporations, will present a comprehensive review of current events and developments in the securities field. This seminar will include an overview of judicial, regulatory, and enforcement developments, as well as recent trends in the public and private offerings of securities, mergers and acquisitions, and other matters of interest to the securities bar. The program will take place at the Millennium Biltmore Hotel, 506 South Grand Avenue, Downtown. On-site registration will be available at 8 A.M., with the program continuing from 8:30 A.M. to 5:00 P.M. The registration code number is 011728. The course offers 7.5 CLE hours, including 1 hour of ethics.
Being One’s Best Self

RABBI ZUSYA, ON HIS DEATHBED, was weeping. His students inquired why. He replied that he was afraid of what the Creator would ask him. The students said, “Are you afraid He’ll ask why you weren’t more like Moses, our Teacher?” No, he replied, “I’m afraid He’ll ask why I wasn’t more like Reb Zusya.” As Rabbi Zusya understood, the challenge for each individual is to equal his or her own potential. In a way, this is a relief. One doesn’t have to be Roger Federer to walk on to a tennis court. One doesn’t have to write a brief equal to the marvelous towering briefs of our most esteemed colleagues. And one doesn’t have to equal Jake Stein of Washington Lawyer and his columns. One can be oneself—plain, ordinary, nonspecial.

But wait. One has to be one’s best self. That’s the rub. How does one meet one’s own potential? Sportswriters say about certain ball players, “He came to play.” What do they mean? They mean that this man gave something extra. He ran out a ground ball desperately, though it seemed a sure out. Once one sees that the assignment is to be one’s best self, how does one determine that he or she has met the standard?

The problem is compounded by the fact that one has several selves. The lawyer must fulfill himself or herself as counselor to client, as partner or associate, as adversary, and as officer of the court. Further, one may be spouse, parent, son, daughter, director, officer, or other private-duty person. The constant is the need to be one’s personal best in each role. In the role of a lawyer, one faces the issue of whether to be a conquering adversary or a peacemaker. Is the lawyer to follow exclusively the training, continuing education, seminars, writings, and coaching calling us to ultimate skills in confrontation and adversity, or should the lawyer listen equally, or even more, to the voices of alternative dispute resolution teachers? How does the lawyer balance duty to a client with duty to the court? In private, non-work hours, how does a lawyer find time for physical fitness and health and social, cultural, and spiritual fulfillment? In these times of over-supply of lawyers, how does the unemployed lawyer find work and, in the meantime, maintain equilibrium?

Unless one is fully committed to maximizing one’s own potential and to Service above Self (as the Rotary motto states), the attorney cannot fulfill the highest callings of our profession. The lawyer must stand for something. He or she can, by personal example, inspire trust, confidence, and enthusiasm in coworkers and supervisees, and with them and through them influence clients, adversaries, and courts. In so doing, the lawyer makes a lasting and important mark.

A revealing example comes in the context of chapter 11 bankruptcy proceedings. The chapter 11 lawyer has starkly apparent temptations and responsibilities. As debtor’s counsel, he or she must know and instruct that bankruptcy is for the honest but unlucky (or unwise) debtor. It is for good-faith effort at rehabilitation, and specifically a “feasible,” “confirmable” plan for treating claims. Chapter 11 is not for the manipulator or concealer. As creditor’s counsel, the lawyer may be firm while being candid, civil, responsive, timely, and constructive. If client pressures make it difficult to adhere to these standards, the lawyer must still stand for something. It is gratifying that among experienced chapter 11 counsel, civility and cooperation are more the rule than the exception.

One principle can help us all and is within our control and easy to apply. Whatever the subject matter, the lawyer can increase effectiveness, realize potential, and benefit society if he or she takes care with his or her manner of speech. The power of speech distinguishes a human from an animal. Refined, restrained, elevated, civil speech raises the level of communication, promotes understanding, and improves the image of lawyers. Contemporary media, contributing to a coarsening of society and an erosion of traditional values, need a counterweight. We do well to rise to the occasion. Lawyers can provide a contemporary example of dignity. We can return the profession to the high regard it formerly enjoyed.

Another matter within our control is timeliness. Timeliness is a form of civility. It is a courtesy to the client, the adversary, and the court. A lawyer, on time with a call, a response, a paper, saves disappointment, time, and money for others who expect timeliness. Let’s be early. It obviates the need for others to follow up, and it may be the court that has to follow up.

A lawyer, bearing professional stress, may understandably expect, or hope for, some oasis, some moment of relief, release, recreation, refreshment, reward. This country invented happy hour, a time and place fervently to be desired. But is happy hour the “consummation devoutly to be wished” (apologies to Shakespeare)? Or do maturity and wisdom call for viewing our activities as one big, continuing service—giving, striving, and serving. Rest, relief, and renewal are available in traditional ways, in a wholesome family context, in connection with life’s happy milestones such as a birth, a wedding, a graduation. Respectable thinkers over millennia have thought this way and today still think so. If it is possible to lead society to better days ahead, through the multitude of challenges and obstacles, who better than lawyers, adhering to traditional values, to do the leading? And how can one lead except by example? This is the duty and the opportunity of the lawyer in society. This calls for players who “come to play.” This is what concerned Rabbi Zusya.

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