Los Angeles lawyers Marcellus A. McRae, Antonio Raimundo, and Katherine V.A. Smith assess the factors that affect the confidentiality of communications with former employees.

Scope of Employment

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To whom it may concern,

My name is Alison Triessl. I am a criminal defense attorney specializing in murder, third strike and drug cases. Without a doubt, Jack Trimarco’s polygraphs have been an invaluable asset to my practice.

I recently represented USTA Tennis official Lois Goodman who was accused of murdering her husband. She did not commit the crime and Jack Trimarco’s polygraph was instrumental in negotiations with the District Attorney which resulted in a dismissal of all the charges.

Whenever I consider whether to have a client take a polygraph, there is only one name in the conversation – Jack Trimarco. His level of credibility, professionalism, and experience is unparalleled in the field and garners the respect of prosecutors and defense attorneys alike.

I have worked with Mr. Trimarco for over twelve years and simply put, I adore him. Not only is he the best in the field, he is an absolute pleasure to work with. He is a hardworking, dedicated professional with unquestioned qualifications and integrity.

Warm regards,

Alison Triessl
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House Speaker John Boehner recently stated that a comprehensive tax reform bill should be a top priority in the upcoming congressional session. We can only hope that reform equals simplification. Since 1980, 56 major pieces of tax legislation have been signed into law.

Since the Tax Reduction and Simplification Act of 1977, however, we have not seen a simplification of the Tax Code, unless the titles of subsequent tax acts have modestly neglected to mention how those acts have simplified the Tax Code. Since then, tax practitioners have seen the Internal Revenue Code increase by over 2,500 pages.

The frequency of major tax legislation has definitely increased over the years. From 1960 to 1969, there were just five tax acts passed. In the following decade there were just five new pieces of tax legislation as well. However, during the 1980s and again during the period from 2000 to 2010, there were 22 pieces of major tax legislation enacted.

Who is responsible for all these new laws that have added so much complexity to the tax code that even the brightest tax minds find some of the statutes almost incomprehensible? Although Congress plays the major role in any new tax legislation, since 1980 two Republican presidents have signed the highest number of new tax bills into law. President Ronald Reagan signed 18 new tax acts and President George W. Bush signed 17 pieces of new tax legislation during their respective two terms. Democratic President Bill Clinton, on the other hand, signed nine new tax acts during his terms.

How do politicians sell this new tax legislation to the American public? Well, it is hard to top the wordsmithing that takes place in Washington, D.C. In the last 20 years, the titles of new tax legislation have included the words “Tax Relief” 10 times and “Job Creation” or “Job Growth” on seven occasions. Presidents Reagan and Clinton used the terms “Budget Reconciliation” on six pieces of major tax legislation during their administrations, and two tax bills signed by George W. Bush were tax increase prevention acts. Given the recent debates to avoid the fiscal cliff and sequestration, we have to ask ourselves if any of these past tax acts really reconciled anything, much less the U.S. government’s budget.

With all these new tax laws, it is almost impossible to know whether we are paying more or less in taxes than prior generations of taxpayers. However, there is no question that tax rates have changed over the years. Shockingly, the Revenue Act of 1945 reduced the maximum individual income tax rate from 94 to 86.45 percent! Taxpayers started to catch their breath with the Revenue Act of 1964, which reduced top individual income tax rates from 91 to 70 percent, and then by the time we experienced an almost complete overhaul of the tax code with the passing of the Tax Reform Act of 1986, the top individual income tax rate had been lowered to 28 percent. Of course also in 1986, real estate deductions were substantially curtailed, some deductions were subjected to phaseouts, and other adjustments were made to the Tax Code to maintain the “net” taxes that Americans paid, at levels that may have not been too much different from the prior years of super-high tax rates.

The bottom line is that as taxpayers we want to pay as little in tax as legally possible. Putting that aside, the real problem with our tax system is complexity. That is a direct result from the 56 tax acts since 1980, and that is why I am hoping that the 57th piece of tax legislation results in simplification with a capital “S.”

Dennis L. Perez is a principal in Hochman, Salkin, Retig & Perez, PC. He is the 2012-13 chair of the Los Angeles Lawyer Editorial Board.
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How to Conduct a Witness Interview

AT THE OUTSET OF A CASE, lawyers are much like journalists—trying to get to bottom of the who, what, where, when, and why. Our goal is to get the facts and then determine how to use them to best represent our client. A critical element of fact investigation is talking to the people involved.

A fruitful witness interview begins with preparation. First, consider what this person may know that is relevant to your case, which is typically based on such factors as what has been alleged in a pleading, what your client has said the person likely knows, the person’s relationship to a party or other witness, and documents you have reviewed. Based on what you know, prepare an outline or a list of the topics and questions you would like to cover with the witness. Preparing this cheat sheet in advance and having it with you during the interview will help keep you focused and ensure that you do not forget key issues.

Consider what you want to tell the witness about who you are and why you are interviewing him or her. For example, if the witness is aware of the lawsuit, you can usually simply tell the witness that you are your client’s lawyer and are speaking with him or her to gather information. If the witness is not aware of the lawsuit, you may have reason not to say who you represent or even that there is a lawsuit. If the witness is not a party or potential party, it may be appropriate to say that the interview is part of an investigation.

Before you go to the interview, consider who you are interviewing and the interview setting. It is important that you begin to gain the witness’s trust from the moment you meet, and you want to be inconspicuous. Just because you are a lawyer does not mean that you have to wear a suit and carry a laptop. What you wear and have with you during an interview of a machine operator at a manufacturing plant will likely be different than when you interview a corporate executive at a skyscraper office. The suit and laptop may be appropriate for your interview of a witness who is aware of the lawsuit, you can usually simply tell the witness that you are your client’s lawyer and are speaking with him or her to gather information. If the witness is not aware of the lawsuit, you may have reason not to say who you represent or even that there is a lawsuit. If the witness is not a party or potential party, it may be appropriate to say that the interview is part of an investigation.

Before you go to the interview, consider who you are interviewing and the interview setting. It is important that you begin to gain the witness’s trust from the moment you meet, and you want to be inconspicuous. Just because you are a lawyer does not mean that you have to wear a suit and carry a laptop. What you wear and have with you during an interview of a machine operator at a manufacturing plant will likely be different than when you interview a corporate executive at a skyscraper office. The suit and laptop may be appropriate for your interview of the corporate executive. However, jeans and a paper notepad may be better for your interview of the machine operator.

At the beginning of the interview, introduce yourself politely to the witness with a warm smile. Regardless of the allegations against the person or any negative information you may have about the witness, treat the witness cordially and with respect. Unlike a deposition, the purpose of a witness interview is not to trap or cross-examine the witness. The witness has information that you want, and you are much more likely to get it if the witness perceives you as non-judgmental. You may be gathering information that you will use against the witness or another person later in the case, but the witness should not be able to sense that from you during the interview.

Despite your friendly demeanor, be aware that the witness may not want to speak with you. Many witnesses say if they have to speak with you. Be honest that it is ultimately the witness’s choice whether and to what extent to speak with you. Even if witnesses say that they do not want to talk to you, you may be able to engage them by telling them that it is their choice, but it would be very helpful if they spoke with you. Witnesses also tend to be more willing to talk if you tell them that, if at any time they feel uncomfortable or do not wish to answer your questions, they may end the interview. Then they know they have a way out if they change their mind. If the witness is a party or potential party in the lawsuit, ask whether he or she is represented by a lawyer. This question is particularly important in the course of a class action lawsuit. At times it is easy for a witness to mistakenly believe that an interviewing lawyer is the witness’s own lawyer. For example, an employee witness may think that the lawyer for the employer is also the lawyer for the employer’s employees. It is crucial to disclose that you are not the witness’s lawyer.

Once the witness is engaged, take notes during the interview. Although you are taking notes, try to maintain solid eye contact so that your interview flows like a conversation as much as possible. Naturally, some people are more talkative than others. Some cannot wait to tell you everything they know. Others are more reserved and may need a bit of prodding. Use of open-ended questions with pointed follow-up questions to get details is often a productive interview style. When you follow up, inquire whether what the witness has told you is based on personal knowledge (something he or she personally said, saw, or heard) or on what someone else told the witness. Rumor can be valuable, but it is important for you to know the source of the information. Also, your witness may begin to discuss issues that appear to be off topic. Be flexible to let that happen to an extent because the witness may disclose relevant information. Just be sure to ultimately cover all of the topics you planned as you were preparing for the interview.

Before you finish, ask the witness if there are others with whom the witness suggests you speak. Also, request that the witness keep your conversation confidential, with the understanding that people talk anyway, but hopefully your request will limit chatter. After your interview, document your impressions of the witness (personality, demeanor, believability) and your thoughts on how a jury may react to the witness.

Witness interviews are an invaluable mechanism for fact-gathering, testing legal theories, and assessing the strength of potential trial witnesses. As such, the more thorough your interviews, the better the position you will be in to litigate your case.

Christiane A. Roussell is a senior HR business partner at Broadcom and a member of the Barristers Executive Committee.
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Steps for Taking an Expert’s Deposition

**LITIGATION RELIES UPON expert testimony.** Winning at trial depends, in large part, on counsel’s ability to take a successful deposition of the other side’s expert, and that success is measured by 1) getting the expert to express all the opinions, and each fact that supports those opinions, that the expert intends to testify to at trial, and 2) developing facts to later argue that the expert’s bias, lack of credibility, or knowledge means that the opinions must be rejected.

Regarding the first goal, “Under the rules of impeachment, a foundational fact underlying an expert’s opinion is treated differently than the opinion itself. As explained by McCormick, ‘We use the word [opinion] as denoting a belief, inference, or conclusion without suggesting that it is well or ill founded....’ For this reason, the law does not accord to the expert’s opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert’s opinion is no better than the facts on which it is based.”

Regarding the second goal, showing the jury facts that demonstrate the expert’s bias for the retaining party or the expert’s lack of credibility is the most effective way to persuade the jury to disregard the expert’s testimony.

The first step toward a successful deposition is to properly notice the expert’s deposition and demand the production of his or her entire file. (A suggested document demand list appears in the sidebar.) One court has held that an expert is required to provide a numerical estimate for the past three years regarding the number of times he or she has been retained by a plaintiff or defendant and the amount of income generated from such activity, broken down into categories and analyze each portion of the expert’s file. Areas for examination typically include 1) key underlying materials, 2) depositions, 3) correspondence, 4) e-mail, 5) time sheets and billing records, and 6) work-up notes, which typically include a listing of the expert’s opinions and conclusions. Each category of these documents should be attached as separate exhibits to the deposition.

The expert should identify each specific document. What the attorney is looking for is whether the expert was provided with all the key and relevant information by the adverse party. What is material depends upon the nature of the action. If key information is there, the attorney should have the expert acknowledge that fact on the record. If key information is not there, the attorney should not emphasize the absence during the deposition. In order not to alert the expert and opposing counsel, the attorney should not mention omissions until cross-examination at trial.

As explained in *Kennemer*, “[T]he rationale for permitting impeachment by contradiction is that by showing the falsity of a fact asserted by the expert, his entire testimony is brought into question....[W]here the facts underlying the expert’s opinion are proved to be false or nonexistent, not only is the expert’s opinion destroyed but the falsity permeates his entire testimony; it tends to prove his untruthfulness as a witness.”

For example, in *Moody v. Peirano*, the plaintiff sued for breach of warranty in the sale of seed. The defendant testified that he sold the same seed to two other individuals, Main and Myall, on the same conditions, without warranty. Main, however, testified that he bought seed from the same lot with a warranty. This was held to be proper contradiction on a relevant factual matter. Main’s testimony tended to show that the defendant had lied or his memory was faulty. Although this case involves the testimony of a party, its holding is equally illustrative for experts.

Next, have the expert read into the record the names of all people who were deposed. If a deposition was taken but not provided to the expert, the attorney should have the expert add that fact to the record. This does not mean, however, that the attorney should draw attention to the failure of opposing counsel to provide a deposition to the expert. If the deponent is a key witness, the attorney should wait until trial to draw attention to the omission.

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**The Curriculum Vitae and File**

The expert’s curriculum vitae is also worthy of close examination. After making sure to attach it as exhibit one at the deposition, the attorney should inquire whether the curriculum vitae is up-to-date. If not, the attorney should inquire what additional information would be necessary to make the curriculum vitae current. Next is a check for deficiencies in the expert’s background that would make him or her incompetent to render an expert opinion. Under Evidence Code Section 801, an expert is permitted to render an opinion only “based on matter (including...special knowledge, skill, experience, training and education)...that reasonably may be relied upon by an expert witness....” If a deficiency exists, the attorney can move to exclude the expert from testifying at trial by an in limine motion or an Evidence Code Section 402 hearing.

After the curriculum vitae, the attorney should next separately segregate and analyze each portion of the expert’s file. Areas for examination typically include 1) key underlying materials, 2) depositions, 3) correspondence, 4) e-mail, 5) time sheets and billing records, and 6) work-up notes, which typically include a listing of the expert’s opinions and conclusions. Each category of these documents should be attached as separate exhibits to the deposition.

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As this article was being prepared for press, Scott A. Marks passed away. He was a member of the law firm of Engstrom, Lipscomb & Lack in Los Angeles, where he practiced insurance, tort, and business litigation.
The attorney should read through the expert’s correspondence to identify any themes relating to bias or credibility. For example, did the opposing lawyer instruct the expert to focus only on certain facts, issues, or themes in the case—to the exclusion of other facts, issues, or themes?

Next, the attorney should review the expert’s time sheets and billing records. How much does the expert charge per hour? Did the expert recommend to the lawyer that additional work be done, but the lawyer indicated this additional work should not be completed? If so, why? How many hours did the expert spend on the case? Have the expert’s bills been paid by opposing counsel? If not, is the payment of the outstanding bills contingent upon testifying favorably for the adverse party?

Communications

Once a party designates an expert under Code of Civil Procedure Section 2034, the attorney-client privilege is waived, and the adverse party may inquire into communications between the lawyer and the expert. Inquire when the expert was first contacted regarding this case, who made the contact, and what was discussed. What was the scope of the assignment given to the expert at the moment of his or her initial retention in the matter? Did the scope of that assignment change? If the scope of the assignment changed, what were the reasons for this change? Was the expert instructed by the retaining lawyer to focus on only certain matters, to the exclusion of others?

For example, in Laguna Salada Union School District v. Pacific Development Company, a condemnation proceeding, the retaining lawyer did not advise the expert that one of the condemnees had lost 800 lots due to foreclosure in the area adjacent to the lots at issue. Over objection by counsel, the trial court permitted the adverse party to cross-examine the expert on that subject. The expert admitted he did not know that fact. In affirming the trial court’s ruling, the appellate court held, “whether the lots were valuable for development might be affected by the fact that they were being foreclosed, and hence the question was relevant. Whether the witness knew of such a large transaction would be proper impeachment.”

Credibility and Bias

Evidence Code Section 722(b) provides, “The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony.” The percentage of an expert’s practice devoted to litigation matters is discoverable. As noted in the Law Revision Commission Comments regarding Section 722(b), “The tendency of some experts to become advocates for the party employing them has been recognized…. The jury can better appraise the extent to which bias may have influenced an expert’s opinion if it is informed of the amount of his fee—and, hence, the extent of his possible feeling of obligation to the party calling him.”

An expert is required to provide the following information for the preceding three years: 1) a numerical estimate of defense and plaintiff work, depositions, and court testimony, and 2) a numerical estimate of the amount of income generated from litigation, broken into plaintiff and defendant work. If the expert takes the position that it would be too burdensome to obtain this information, “[T]his information can…be gathered by [the expert’s] voluntary use of a third party, [and that] third party may compile the information [with] the costs…borne [by the adverse party].”

Given the scope of Section 722, it would appear that at time of trial, evidence that an insurance company is the source of an expert’s compensation is properly admissible. Under Evidence Code Section 351, all relevant evidence is admissible. Evidence Code Section 1135, which precludes giving evidence that a defendant had liability insurance as a means of proving negligence or other wrongdoing, would not apply to bar presentation of this evidence at trial if the evidence is being used for a different purpose. For example, it may be introduced to prove bias based by the fact that a large portion of the expert’s annual income is derived from repeated retention by an insurance company.

In addition to inquiring into the expert’s file and communications, the attorney should inquire into how many times the expert has previously been retained by the same lawyer, his or her firm, and the insurance company that pays the expert’s bills. How many times has this expert previously been retained by the adverse party? How many times has this expert rendered an opinion that was adverse to the adverse party in prior cases? Also, the examining attorney should inquire into the names of other lawyers who have previously deposed or cross-examined the expert. The attorney should contact those other lawyers to read the expert’s deposition taken then. Reviewing the expert’s Web site and investigating him or her on social media may also yield valuable information for cross-examination.

Work Completion

After examining the expert’s files and communications, the next step is to examine the expert’s work on the case. Has the expert completed all work on the case? If not, the attorney should inform opposing counsel that under the expert witness deposition statute, the expert is obligated to provide the attorney with all the expert’s opinions and conclusions during the deposition.

Depending upon the circumstances, if the work is not complete at the time of the deposition, it may be best to finish the deposition to the extent possible and arrange for a second session. On the other hand, if the circumstances do not warrant that accommodation, consider seeking judicial relief in the form of an in limine motion to preclude the expert from testifying in court about anything that the expert was not ready to testify to at the deposition.

A follow-up question is whether the expert would have liked to do certain work on the case but did not. If the answer is yes, the attorney should carefully inquire into the reasons why the work was not done. They will be highly instructive, and the questioning attorney will be able to use that information to the client’s benefit during cross-

A DOCUMENT DEMAND CHECKLIST

A suggested document production would include: 1) all documents the expert reviewed, 2) all written communications by and from the deponent to anyone concerning the case, 3) all documents prepared by the expert or at the expert’s request, 4) all time sheets, records, billings, and other writings that reflect the amount of time the deponent spent on the matter, 5) all bills, invoices, and other writings that reflect the amount the deponent billed, or will bill in the future, to opposing counsel or another party, 6) the entire file maintained by deponent, 7) a copy of his or her current curriculum vitae, 8) all materials, books, reference materials, treatises, publications, or any other type of documents that embrace, embody, or reflect the expert’s opinions and conclusions, 9) all documents regarding all cases in which the expert has testified as an expert in trial or at arbitration within the last three years (including the full case name, the case number, the specific jurisdiction in which the case was or is pending, and the party or parties on whose behalf the expert testified), 10) all documents regarding cases in which the expert has been consulted or retained by any attorney employed by the firm that retained the expert in pending matter in the last three years (including the full case name, the case number, the specific jurisdiction in which the case was or is pending, and the party that retained the expert’s services), 11) all documents regarding cases in which the expert has been retained as an expert on behalf of the party for whose benefit the expert was retained, 12) all total gross billings earned by the deponent in consultation or retention by any attorney employed by the firm which retained the expert in pending matter in the last three years, 13) all total gross billings earned by the deponent in consultation or retention by the adverse party in the last three years, and 14) all total gross billings earned by the deponent from consultation and expert work in litigation cases in each of the past three years.—S.A.M.
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examination at trial. If the expert states he or she wanted to complete a test or examination and that the results of that work could further confirm the validity of an opinion, the failure to complete that task calls into question the validity of that opinion.

The Key Questions

Next comes the most important part of the deposition. The attorney should have the expert express his or her opinions and conclusions for the case and their basis. After the expert has identified his or her opinions and conclusions, the questioning attorney should always be sure to ask, “Are there any other opinions or conclusions that you have reached in this matter that you intend to testify to at time of trial?” This question should be asked each time the expert identifies new opinions and conclusions. Eventually, the expert will say that he or she has no other opinions and conclusions.

The most important answer is yes in response to the question, “Have you now told me all of the opinions you expect to testify to at time of trial?” That answer commits the expert to his or her testimony and provides the evidentiary basis for an in limine motion to limit the expert’s testimony at trial to the opinions given at deposition. During the deposition, the questioning attorney should write down each one of the expert’s opinions and conclusions. After that, the attorney should ask about the factual basis for each opinion and conclusion. The attorney should not forget the follow-up question, “Are there any other bases for this particular opinion or conclusion that you have not yet told me?”

The examining attorney should determine what documents, deposition testimony, and other information supports each opinion or conclusion. The attorney should compare these items to any deposition testimony, information, and documents in the record that do not support or are contrary to that opinion or conclusion. For each possible discrepancy, the attorney should ask the expert why he or she chose not to consider that item.

Before concluding the deposition, the attorney should carefully review the opposing party’s declaration. Code of Civil Procedure Section 2034.260(c)(2) requires that the declaration include “a brief narrative statement of the general substance of the testimony that the expert is expected to give.” The attorney should read this part of the declaration to the expert and inquire whether it is accurate and whether there are any other subject matters the expert intends to testify to at trial. Opposing counsel’s designation should be added as an exhibit to the deposition.

If at trial the expert attempts to testify to a subject matter not identified in the declaration, the attorney should be prepared to object and cite the California Supreme Court decision in Bonds v. Roy.15 Having the expert’s deposition, with the attached designation, should make it easy for the judge to rule against the unexpected testimony.

After the deposition has been completed, the attorney should provide a transcript to the attorney’s own expert for analysis. After the expert has read through the deposition, he or she should be able to assist the attorney with understanding the weaknesses of the opposing expert’s opinions and conclusions. Additionally, the attorney’s own expert can assist in drafting the appropriate hypothetical questions to be asked of the opposing expert at time of trial.

The Kennemur Motion

The attorney should next prepare, file, and serve a motion in limine precluding the opposing expert from testifying to any opinions and conclusions not expressed in the deposition. This type of motion is called a Kennemur motion.16 The court should be provided with the deposition excerpts that state the expert’s opinions. “Motions in limine, to the extent that they rely upon a factual foundation, are no different than any other pretrial motion and must be accompanied by appropriate supporting documents.” Absent an appropriate factual showing to support the motion, the court should not entertain the motion.”17

The goal is to gather information and lock the expert into the opinions and conclusions he or she intends to testify to at time of trial, including the bases for those opinions and conclusions. There is no reason to cross-examine the expert on any issue such as a failure to review and consider relevant information, documents, or deposition testimony. Doing so may educate the opposition.

1 Stony Brook I Homeowners Ass’n v. Superior Court, 84 Cal. App. 4th 691, 701 (2000).
3 Stony Brook I, 84 Cal. App. 4th at 698-99.
5 Kennemur, 133 Cal. App. 3rd at 923-24 (emphasis in text).
9 Id. at 475.
10 Allen, 151 Cal. App. 3rd at 453.
12 Id. at 700.
13 CODE CIV. PROC. §2034.260(c).
16 Kennemur, 133 Cal. App. 3rd at 923.
**Proving Wilfullness in Civil FBAR Cases**

**SINCE 2003, THE IRS HAS** had the authority to enforce compliance with the foreign bank account reporting requirements of the Bank Secrecy Act. Only recently, however, have practitioners been getting guidance from the courts regarding the fundamental issue of what the government must prove to establish willfulness and sustain the penalty for the willful failure to file what is commonly known as the FBAR form.

Officially designated Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, the FBAR is filed with the Department of the Treasury and discloses that the filer has a financial interest in, or signatory authority over, one or more financial accounts in a foreign country with an aggregate value exceeding $10,000 at any time during the taxable year. The few reported cases dealing with the failure to file the FBAR have been criminal cases. There has been little if any litigation regarding the imposition of civil FBAR penalties. That has now changed with international tax enforcement matters becoming a priority for both the IRS and the Department of Justice, Tax Division. The Fourth Circuit’s recent unpublished decision in United States v. Williams and the recent district court decision from the Tenth Circuit in United States v. McBride raise a number of important questions in analyzing a taxpayer’s exposure to the civil penalty for willfully failing to file an FBAR. This is important, given what some say is a draconian civil penalty for the willful failure to file the FBAR form. Williams is unpublished, and McBride is a district court decision, so neither case is binding, but they offer guidance on what proves willfulness.

**The Civil FBAR Penalty**
The obligation to file an FBAR is part of the Bank Secrecy Act and is set forth in 31 USC Section 5314, which requires “a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency.” The civil penalty for failure to file the FBAR has been in the law since 1986.

In 2004, Congress increased the maximum penalty for the willful failure to file the form from $100,000 to up to 50 percent of the balance in the account at the time of the violation, which is the due date of the FBAR. The position of the IRS is that this penalty applies to each unreported account, not to each unfiled FBAR, for each year for which there was no FBAR filed. Although agents are expected to exercise discretion in imposing FBAR penalties, this creates the potential for an FBAR penalty that is many times the value of the foreign account.

This maximum penalty only applies if the taxpayer’s failure to file an FBAR was willful—Congress has enacted a penalty of up to $10,000 per violation for cases in which the taxpayer was nonwillful. As a result, a critical inquiry in a civil FBAR case brought by the government is whether the failure to comply with the FBAR requirements was willful.

The Fourth Circuit’s decision in Williams and the district court’s in McBride analyze some important questions concerning the government’s obligation to prove willfulness in a civil FBAR case. These issues include 1) the government’s ability to establish willfulness by proving recklessness, 2) the government’s ability to prove willfulness by demonstrating willful blindness, and 3) the government’s burden of proof in a civil FBAR case.

Prior to the Fourth Circuit’s decision in Williams and the district court decision in McBride, the general consensus was that the government would encounter substantial difficulties in being able to demonstrate that the failure to file the FBAR form was willful. In a Chief Counsel Office Memorandum (CCA) released in 2006, the IRS concluded the willful standard in the civil context has the same meaning and interpretation as the willful standard under the criminal penalty statute.

In 2010, the District Court for the Eastern District of Virginia held in Williams that the government failed to meet its burden of establishing that the defendant had willfully failed to disclose his assets in

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In Williams's allocution, and the district court entered judgment against him.24

The court defined the willfulness standard as a “voluntary, intentional violation of a known legal duty,” citing the tax case Cheek v. United States,38 and explained that “[w]illfulness may be proven through inference from conduct meant to conceal or mislead sources of income or other financial information.”39

This definition is consistent with the IRS definition of willfulness in both the civil and criminal contexts. The Internal Revenue Manual states that, for application of the civil FBAR willfulness penalty, “the test for willfulness is whether there was a voluntary, intentional violation of a known legal duty.”40

The manual further explains that willfulness is shown by the person’s knowledge of the reporting requirements and the person’s conscious choice not to comply with the requirements.41 The only thing that a person need know is that he or she has an FBAR reporting requirement.42 If a person has that knowledge, the only intent needed to constitute a willful violation of the requirement is a conscious choice not to file the FBAR.43

Williams and McBride conclude that the willfulness standard can include willful blindness to the FBAR requirement. This position is consistent with the IRS definition of willfulness for purposes of the civil FBAR penalty. The Internal Revenue Manual explains that “willfulness may be attributed to a person who has made a conscious effort to avoid

When one reads the facts of Williams and McBride, it becomes clear that the evidence of willful tax misconduct was overwhelming. The court’s discussion of a lesser standard of proof, such as recklessness or willful blindness, was not necessary for these decisions and could be properly construed as dictum. Nevertheless, the court’s discussion of these issues is important. The decisions reflect a typical government litigation strategy, which is to establish principles of law with egregious factual patterns and then attempt to apply the favorable law to less egregious situations.

**Facts of Williams and McBride**

It is important in analyzing these issues to understand the facts of the Williams and McBride cases so the court’s decisions and statements regarding the principles of law can be placed into an appropriate context. In Williams, the government brought the FBAR case after Williams had already pleaded guilty to conspiracy and tax evasion related to two Swiss bank accounts that he held in the name of a British corporation holding more than $7 million.16 In his allocution, Williams admitted he chose not to report the income from the foreign accounts on his returns for the purpose of evading taxes.17 He further stated that he knew that he had the obligation to report the Swiss accounts to the IRS or the Department of the Treasury and chose not to in order to assist in hiding his income from the IRS.18

The IRS subsequently assessed an FBAR penalty against Williams for the year 2000 and brought a civil action to collect the penalty.19 In early 2001, after the government had already become aware of Williams’s accounts and had them frozen, Williams nonetheless marked a box answering no on a tax organizer that he completed for his accountant in response to the question regarding whether he had an interest in a foreign account.20 The same box was also checked in response to question 7a on Schedule B of his Form 1040 filed for tax year 2000, and Williams did not file an FBAR for the year 2000 by the deadline.21

Williams used the fact that the government was already aware of the accounts at that time to convince the district court that he did not intend to conceal the accounts from the IRS in 2000.22 He testified at trial that he was not aware of the FBAR form and that he focused on only the numerical calculations on his return.23 Finding Williams to be credible, the district court entered judgment in his favor.24

On appeal, because Williams had admitted in his plea allocation that he knew he had to report the accounts to the government and chose not to, and because he had signed his return containing Schedule B under penalty of perjury, the Fourth Circuit held that the district court clearly erred in finding that the government had not met its burden of proving that his failure to file an FBAR was willful.25 Circuit Judge G. Steven Agee dissented from the opinion and stated that he would have affirmed the lower court’s decision, noting that there was no mention of the Section 5314 reporting requirements or the FBAR in Williams’s allocation, and the district court judge had found Williams’s testimony to be credible.26

In McBride, the taxpayer set up a complex financial scheme with the help of a financial management firm, through which approximately $2.7 million in profits of a company he co-owned were funneled through the company’s Taiwanese manufacturer to nominee offshore companies and financial accounts.27 The district court found that the offshore companies and financial accounts were established for the benefit of and were controlled by McBride.28 The taxpayer then funneled the funds back to himself through a sham line of credit from the entities and benefited from the funds by directing that they be used for personal uses.29 Merrill Scott, the financial management firm retained by McBride, held itself out as a financial management firm that employed strategies that would allow its clients to avoid or defer the recognition of income for tax purposes and protect client assets from creditors.30

McBride stated under penalty of perjury that he read a pamphlet that Merrill Scott provided to him that included the following: As a U.S. taxpayer, the law requires you to report your financial interest in, or signature authority over, any foreign bank account, securities account, or other financial account....Intentional failure to comply with the foreign account reporting rule is a crime and the IRS has means to discover such unreported assets.31

However, McBride failed to file an FBAR reporting the account and question 7a on Schedule B of his Forms 1040 were marked no.32 McBride never informed the accountant who prepared his 2000 tax return about the foreign accounts, because he “thought that was the purpose of Merrill Scott because...if you disclose the accounts on the form, then you pay tax on them, so it went against what [he] set up Merrill Scott for in the first place.”33

McBride proceeded to lie to the government during the IRS investigation stemming from his participation in Merrill Scott programs. He even denied during an IRS interview that he had utilized the offshore components set up by Merrill Scott and denied knowledge of any wire transfer from the offshore accounts.34 The IRS assessed a civil FBAR penalty for 2000 and 2001 relating to four offshore financial accounts held on behalf of McBride.35 Finding that McBride’s failure to file an FBAR was willful, the district court entered a judgment against him.36

**The Willfulness Standard**

In the criminal context, the definition of willfulness that has developed is a voluntary, intentional violation of a known legal duty. United States v. Sturman upheld the defendant’s criminal conviction on a count of willfully failing to maintain records and file reports as required under Section 5314.37

The court defined the willfulness standard as a “voluntary, intentional violation of a known legal duty,” citing the tax case Cheek v. United States,38 and explained that “[w]illfulness may be proven through inference from conduct meant to conceal or mislead sources of income or other financial information.”39

This definition is consistent with the IRS definition of willfulness in both the civil and criminal contexts. The Internal Revenue Manual states that, for application of the civil FBAR willfulness penalty, “the test for willfulness is whether there was a voluntary, intentional violation of a known legal duty.”40

The manual further explains that willfulness is shown by the person’s knowledge of the reporting requirements and the person’s conscious choice not to comply with the requirements.41 The only thing that a person need know is that he or she has an FBAR reporting requirement.42 If a person has that knowledge, the only intent needed to constitute a willful violation of the requirement is a conscious choice not to file the FBAR.43

Williams and McBride conclude that the willfulness standard can include willful blindness to the FBAR requirement. This position is consistent with the IRS definition of willfulness for purposes of the civil FBAR penalty. The Internal Revenue Manual explains that “willfulness may be attributed to a person who has made a conscious effort to avoid
learning about the FBAR reporting and recordkeeping requirements.”

The willful blindness charge in criminal cases originates from United States v. Jewell, a controlled substance case that held that “deliberate ignorance and positive knowledge are equally culpable.” In United States v. Stadtmueller, the court concluded that the general rule that willful blindness may satisfy a knowledge requirement applies in criminal tax prosecutions.

Willful blindness is a high bar to meet. To constitute willful blindness, the taxpayer must intentionally avoid or deliberately evade learning of his or her tax obligations. It is a state of mind of “much greater culpability than simple negligence or recklessness, and more akin to knowledge.”

Recklessness

Departing from the IRS’s definition of willfulness, Williams and McBride hold that the definition of willful in the civil context is different from the definition of willful in the criminal context. Both cases conclude that the willfulness standard in a civil case may be satisfied by recklessness. Despite making findings supporting that the taxpayers had knowledge of the Section 5314 reporting requirements or were willfully blind of their reporting requirements, both courts concluded that the taxpayers were willful on the basis that their conduct was at a minimum reckless.

The court in Williams relied on Safeco Insurance Company of America v. Burr in determining that the willfulness requirement in the FBAR statute may be satisfied by reckless conduct. In defining the standard for willfulness, the Williams court stated, “Importantly, in cases where willfulness is a statutory condition of civil liability, [courts] have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.”

The Supreme Court in Safeco interpreted willfulness in the context of the Fair Credit Reporting Act and noted that “‘willfully’ is a word of many meanings whose construction is often dependent on the context in which it appears.” In defining willfulness to include recklessness in the FBAR context, the courts’ decisions are inconsistent with long-established precedent defining willfulness in tax and Bank Secrecy Act cases, and with the IRS position as expressed in the CCA and the Internal Revenue Manual.

The CCA released by the IRS concluded, based on rules of statutory construction, that “willful” has the same meaning in the civil context as it has in the criminal context—a voluntary intentional violation of a known legal duty. The IRS concluded that because the same word—“willful”—is used in Section 5321(a)(5) (the civil penalty for violating section 5314) and Section 5322(a) (the criminal penalty for violating section 5314), “willful” should have the same meaning under both sections based on the statutory construction rule that “the same word used in related sections should be consistently construed.”

The Supreme Court has stated that the definition of “willful” depends on the context in which it appears. Congress has chosen to impose the same intent requirement for the civil FBAR penalty as for the criminal FBAR penalty. The context here makes clear that “willful” means a voluntary intentional violation of a known legal duty and not any lesser standard.

The Burden of Proof

In most tax cases, the assessment of the IRS of additional taxes is presumed to be correct, and the burden is placed upon the taxpayer to demonstrate that the IRS is incorrect. However, penalties—especially penalties involving willfulness—occupy a different category, and the burden has fallen on the IRS to prove that the taxpayer is subject to penalties for willfulness.

The IRS took the position in its CCA of January 20, 2006, that it expects that “a court will find the burden in civil FBAR cases to be that of providing ‘clear and convincing evidence,’ rather than merely a ‘preponderance of the evidence.’” In reaching this conclusion, the IRS compared the burden of proof for the civil FBAR penalty with the burden of proof for the civil fraud penalty under Code Section 6663, because both penalties require the government to prove a taxpayer’s intent. Courts have established that civil tax fraud must be proven by clear and convincing evidence.

The recent Williams and McBride decisions have impressed a less onerous burden on the government and require the government to prove willfulness for civil purposes by only a preponderance of evidence. The court in McBride held that preponderance of the evidence is the correct standard of proof because “particularly important individual interests or rights” are not at stake in civil FBAR penalty cases, given that the penalties at issue only involve money. The court explained that in such cases, the preponderance of the evidence standard applies unless a statute states otherwise. However, although the civil FBAR penalty is only a monetary penalty, McBride fails to consider that the FBAR penalty can be disproportionate compared to the conduct—the potential severity of the penalty should exact a higher standard of proof.

The court in McBride ignores the burden of proof in the analogous civil tax fraud penalty cases, which is established by case law to be clear and convincing evidence even though the civil tax fraud penalty involves only money. The rationale for the higher burden of proof in civil penalty cases involving a question of intent is well explained by the IRS in its CCA. The IRS reasons that the higher burden of proof is appropriate in such cases because “just as it is difficult to show intent, it is also difficult to show a lack of intent.” The clear and convincing evidence standard “offers some protection for an individual who may be wrongly accused of fraud.” For the same reason, it is important for this higher burden of proof to be applied in civil FBAR cases, especially given the draconian nature of the civil FBAR penalty.

Signing the Return

A critical question raised by the willfulness standard is what constitutes knowledge of the FBAR reporting requirements. In Williams, the court applied the rule that a taxpayer’s signature on a return is “prima facie evidence that the signer knows the contents of the return,” in order to establish that the taxpayer had constructive knowledge of the FBAR requirements because Schedule B of a Form 1040 contains a question asking whether the taxpayer has a financial interest in a foreign account and directs the taxpayer to see the instructions for the FBAR filing requirements. The court in Williams, reasoning that because Williams signed a Form 1040 with a Schedule B under penalty of perjury but never consulted a Form TD F 90-22.1, his conduct constituted willful blindness to the FBAR requirement.

The court in Williams cited United States v. Mohnsey in support of this conclusion. In Mohnsey, the court in fact held that while the signature is prima facie evidence that the signer knows the contents of the return, a taxpayer’s signature on a return “does not in itself prove his knowledge of the contents”—only that knowledge may be inferred from the signature along with the surrounding facts and circumstances. Consistent with this rule, the IRS’ position, as set forth in the Internal Revenue Manual, is that “[t]he mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, by itself, to establish that the FBAR violation was attributable to willful blindness.” Most taxpayers do not read their return carefully, especially language on a schedule that does not relate to any numbers on their return.

Contrary to the IRS’s position, and inconsistent with established case law on defining willfullness in the tax and FBAR contexts, the district court in McBride took the position that in civil FBAR penalty cases, signing a return with a Schedule B is enough to constitute knowledge of the FBAR reporting
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1 A REPORT TO CONGRESS IN ACCORDANCE WITH §361(b) OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 (USA PATRIOT ACT), Exhibit C, Secretary of the Treasury (Apr. 24, 2003).
5 Pub. L. No. 99–570, tit. 1, §§1356(c)(1), 1357(a)–(f), (h) (Oct. 27, 1986).
7 I.R.M. 4.26.16.4.7 (July 1, 2008).
8 See FAQ #8, Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers, available at http://www.irs.gov/Individuals/International-Taxpayers-/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers (showing how a $3,825,000 FBAR penalty could apply to a bank account opened with $1,000,000 in 2003). See also Steven Toscher & Barbara Lubin, When Penalties Are...


Id.


Id.


Id. at *6-7.

Id.

Id. at *7.

Id. at *3-4.

Id. at *4.

See id. at *8.


See id.


Id. at *15-23.


See id. at *41-44.

See id. at *17-21.

See id. at *3-6.

Id. at *8.

Id. at *27-28.

Id. at *31.

Id. at *32-34.

Id. at *33-34.

Id. at *75-76.


Sturman, 951 F. 2d at 1476 (citing Spies v. United States, 317 U.S. 492 (1943)).


I.R.M. 4.26.16.4.5.3 at ¶5 (July 1, 2008).

Id.

I.R.M. 4.26.16.4.5.3 at ¶6 (July 1, 2008).

United States v. Jewell, 532 F. 2d 697, 700 (9th Cir. 1976).

United States v. Stadtmauer, 620 F. 3d 238 (3rd Cir. 2010).

Id. at 256; see also United States v. Anthony, 545 F. 3d 60, 64-65 (1st Cir. 2008) (explaining that deliberate avoidance undermines a claim of good faith); United States v. Dean, 487 F. 3d 840, 851 (11th Cir. 2007) (A jury instruction of willful blindness is appropriate when the defendant “intentionally insulated himself from knowledge of his tax obligations.”).

Stadtmauer, 620 F. 3d at 256 (quoting United States v. One 1973 Rolls Royce, 43 F. 3d 794, 808 (3d Cir. 1994)).


Id.

Bradford v. Commissioner, 796 F. 2d 303, 307 (9th Cir. 1986); Stone v. Commissioner, 56 T.C. 213, 220 (1971). In criminal cases, the standard of proof is beyond a reasonable doubt.

United States v. McBride, 2012 U.S. Dist. LEXIS 161206, at *2-34 (D. Utah 2012). Although it was not discussed in the appellate opinion, the district court in Williams had applied a preponderance-of-the-evidence standard. United States v. Williams, 2010 U.S. Dist. LEXIS 90794, at *17 (E.D. Va. 2010). The court did not state its reasoning for applying a preponderance-of-the-evidence standard, but a higher burden of proof would not have changed the lower court’s decision, because the lower court held that the government had not met even a preponderance-of-the-evidence standard.


Id.


Mohney, 949 F. 2d at 1407.

I.R.M. 4.26.16.4.5.3 at ¶6 (July 1, 2008).


Id.

Id.

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ATTORNEYS PROSECUTING or defending lawsuits involving corporate entities often find themselves at a crossroads when a former employee has key information, but it is not known where that employee’s allegiance lies. Under these circumstances, it can be difficult to assess how best to approach the employee witness, or (if the attorney represents the employer) how to protect conversations with the witness from disclosure. Plaintiff and defense counsel must navigate the uncertain waters surrounding a former employee first by answering the question of whether communications between the employer’s counsel and the former employee are privileged or otherwise protected. Commentators often cite the Supreme Court opinion in *Upjohn Company v. United States*¹ as a leading authority regarding whether corporate counsel’s communications with former employees are privileged or otherwise protected.² Ironically, the majority in *Upjohn* explicitly declined to address whether communications between former employees and a corporation’s counsel are privileged.³ Instead, the court restricted its analysis to the question of when discussions between a corporation’s attorneys and its current employees will be privileged.⁴ Articulating what is now known as the subject matter test, the court held that such communications are privileged if 1) the communications were made by a current employee to the corporation’s counsel, acting as such, 2) the communications were made at the direction of corporate superiors for the purpose of securing legal advice from counsel, 3) the communications concerned matters within the scope of the employee’s corporate duties, and 4) the employee was sufficiently aware that he or she was being questioned in order for the corporation to obtain legal advice from its counsel.⁵

While the *Upjohn* majority declined to comment on whether and when communications with former employees are privileged, Marcellus A. McRae is a partner in the Los Angeles office of Gibson, Dunn & Crutcher and is a member of the firm’s White Collar Defense and Investigations practice group. Katherine V.A. Smith is an associate in the firm’s Los Angeles office and practices with its Labor and Employment Department. Antonio Raimundo is an associate in the Los Angeles office who practices in the firm’s Litigation Department.
Justice Warren Burger showed no such restraint. In his concurring opinion, Burger extended the majority’s opinion: “Because of the great importance of the issue, in my view the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment.”

It is from this concurring opinion that a body of case law was born. Numerous courts have followed Burger’s lead and extended the privilege to postemployment communications. One of the most notable cases following Burger’s concurrence is Peralta v. Cendant Corporation, in which a Connecticut district court explicitly applied the reasoning of Upjohn to communications with former employees, articulating the relevant test as:

“Did the communication relate to the former employee’s conduct and knowledge, or communication with defendant’s counsel, during his or her employment? If so, such communication is protected from disclosure by defendant’s attorney-client privilege under Upjohn. As to any communication between defendant’s counsel and a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness’s testimony, consciously or unconsciously, no attorney-client privilege applies.”

Other courts have reached similar conclusions. For example, in Sarles v. Air France, the Southern District of New York ruled that communications with a former employee are privileged “if they are focused on exploring what the former employee knows as a result of his prior employment about the circumstances giving rise to the lawsuit.”

In United States ex rel. Hunt v. Merck-Medco Managed Care, LLC, the Eastern District of Pennsylvania ruled that “if the communication sought to be elicited relates to a former employee’s conduct or knowledge during her employment...or if it concerns conversations with a corporate counsel that occurred during her employment, the communication is privileged.”

However, the protections articulated by these courts are not without limit. Peralta specifically cautioned that while communications between corporate counsel and a former employee about facts within the scope of employee’s former job are protected from discovery, communications about postemployment matters—including the litigation itself—are not.

Other courts have rejected Burger’s approach and enforced the distinction between current and former employees. As a result, there is not a consistent rule across jurisdictions regarding the confidentiality of postemployment communications, as not all federal courts follow a Peralta-style rule. For example, in Clark Equipment Company v. Lift Parts Manufacturing Company, an Illinois district court explained:

“The reasoning of Upjohn does not support extension of the attorney-client privilege to cover post-employment communications with former employees of a corporate party. Former employees are not the client. They share no identity of interest in the outcome of the litigation...It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit.”

Similarly, in Infosystems, Inc. v. Ceridian Corporation, a Michigan district court ruled that “communications with a former employee of the client corporation generally should be treated no differently from communications with any other third-party fact witness.”

Nor do all states follow the same approach that Peralta does. For example, at least one federal court has concluded that postemployment communications are not protected by the attorney-client privilege under California law. In Connolly Data Systems, Inc. v. Victor Technologies, Inc., the U.S. District Court for the Southern District of California, applying California law, held that a former employee’s communications with counsel were not privileged because 1) the former employee was not the “natural person to speak for the corporation,” 2) the former employee was not required to speak to the corporation’s attorney, and 3) the former employee was not the only person with the relevant knowledge. It is worth noting, however, that no California court has expressly agreed or disagreed with Connolly’s assessment of California law.

But all hope is not lost for defense attorneys interviewing former employees in jurisdictions that decline to extend the privilege to postemployment communications—the attorney work product doctrine will sometimes offer protection where the attorney-client privilege does not. For example, while the district court in Connolly held that the attorney-client privilege would not shield postemployment communications under California law, the court went on to hold that the work product doctrine would protect such conversations where revealing their content “may tend to divulge the mental impressions, opinions, and theories” of the employer’s attorney.

Nevertheless, not all courts permit work product protection in similar scenarios. In the Clark Equipment case, the Illinois district court concluded that postemployment communications with former employees were not protected by the attorney-client privilege or the work product doctrine because “[i]f counsel, in discussions with third parties [i.e., the former employees], reveals his mental impressions, etc. to such third parties, any claim of work product privilege is waived by such nonprivileged disclosure.”

Which Jurisdiction’s Law Controls?

Given the variance in law across and even within jurisdictions, attorneys should carefully consider which law will govern before presuming that their conversations with former employees will be protected from disclosure. The Restatement of Conflict of Laws states that the law of the state with the “most significant relationship to the communication” should control. Under the restatement, this will generally mean that the law of the state where the postemployment communication occurs will control. However, if an attorney interviews a former employee in Florida about events that took place during the individual’s employment in Michigan, in preparation for a deposition in a lawsuit pending in California, which state’s law will control may be less than obvious. Accordingly, it is important to research and confer with local counsel regarding the attorney-client privilege law of each jurisdiction that may have a significant relationship to the postemployment communication and, when in doubt, assume the conversation will not be privileged.

The Pragmatic Plaintiff Counsel

For plaintiffs’ attorneys, the former employees of a defendant are often unknown quantities. Will they be loyal to their former employer? Their coworkers? Did they experience what the client experienced? In deciphering this mystery, the most valuable resource is often the client, who can identify the former employees with valuable information, steer counsel to those who will be willing to help, and provide important information for deposing those who will not. Ideally, the client will help identify former employees who can buttress the client’s story.

In meeting and working with former employees, there is some cooperation that is helpful and some that is not. Indeed, there are several exceptions to the general rule that counsel can interview former employees at counsel’s pleasure and about anything. For example, the interviewing counsel does not want privileged information, even if the witness offers it. Counsel also does not want electronic information taken from the employer without authorization; this could expose counsel and the former employee to criminal prosecution under the Computer

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Fraud and Abuse Act,20 among other liabilities. Finally, counsel does not want to violate ethical rules prohibiting solicitation and conflicts of interest.21 Plaintiffs’ attorneys should preface meetings with former employees by clearly stating the purpose of the meeting, securing an acknowledgment that the meeting is voluntary, and laying down ground rules about how the meeting will proceed. If possible, it is also prudent to have a witness to meetings with former employees who could competently testify about what transpired. If counsel does consider representing the former employee upon his or her request, careful consideration must be given to whether the individual’s interests align with those of the current client.

**Defense Counsel**

For defense counsel, a former employee can be friend or foe (or, in some cases, a complete nonstarter). Generally, counsel should not court a negative witness unless absolutely necessary or without some indication he or she will switch sides. Neutral witnesses are always worth consideration, but the energy required to build and maintain a working relationship with them may not be worth the effort if they do not have unique and useful information.

A friendly former employee, on the other hand, can be incredibly valuable and fill several important and distinct roles. The friendly former employee can identify other witnesses and documents as well as testify to the lack of credibility of the plaintiff and the absence of plaintiff’s complaints or claims before the lawsuit was filed. He or she can humanize the defendant’s management and, in some cases, even be the face of the company. Most important, he or she can be a credibility booster, because he or she is not being paid by the employer. Thus, counsel are well advised to work closely with the defendant to identify potentially friendly former employees.

Moreover, when it comes to cooperating with former employees, a good defense starts with a strong offense. Employers should be proactive, encouraging a positive human resources department and corporate culture, conducting exit interviews, and maintaining good relationships with former employees. At the onset of litigation, an employer should consider reaching out to former employees to notify them of the litigation and reminding them to maintain the privilege of any conversations they had with counsel during their employment. It can only help the situation to have them first hear about the litigation from defense counsel rather than from plaintiff’s counsel.

Defense counsel meeting with a former employee should exploit the natural advantage, i.e., easy access to the client’s information and documents. With this access, there is no excuse to not come prepared with the former employee’s position at the company, the dates of employment, any privileged communications that he or she had with counsel, and reasons for termination and terms on which the employment relationship terminated. There should also be some understanding of what the individual will know about the lawsuit and what documents he or she may have seen.

In the meeting, remind the former employee that communications he or she had with counsel during his or her employment remain privileged. Depending on the jurisdiction, it may be appropriate and advisable to inform the individual that the current communication is privileged and to ask that he or she keep the conversation confidential. While former employees should not be told not to speak with opposing counsel,22 they may be told that they will likely be contacted by an attorney for the other side and that it is up to them whether or not to speak with that attorney. Counsel for the employer can also request (but not demand) to be present for any conversation that the former employee has with opposing counsel.23 While discussing legal strategy or any facts that counsel has learned in litigation with the former employee may enhance the chance that a court would find the conversation to be privileged, it also risks the disclosure of confidential attorney work product.

Often, defense counsel’s most extensive interaction with a former employee will be in preparation for deposition. If the former employee is willing to do so, it can be very useful to both the witness and the client to meet with the witness before his or her deposition. However, the value of these meetings may be significantly limited if they are not protected from disclosure by the attorney-client privilege or work product doctrine. Thus, it is extremely important to research the law in the applicable jurisdiction, as the law of privilege and attorney work product can vary greatly between states and courts.

Some attorneys attempt to circumvent this issue by representing the witness for the sole purpose of preparing for and defending his or her deposition. Assuming there is no conflict of interest, defense counsel generally may represent former employees at deposition. However, as an Illinois district court observed, outside counsel may “create an appearance of impropriety” by offering to represent a former employees free of charge, “because such an offer may encourage a former employee to seize on the opportunity of free representation without evaluating the advantages of independent counsel.”24 Thus, generally, counsel should not offer to represent the witness but instead may consider accepting the representation only if the witness first requests it.

However, even representing a former employee for the purposes of his or her deposition is not an absolute guarantee that pre-deposition communications will be entirely shielded. As one New York district court cautioned, this representation makes “no difference to the application of Peralta[,] [t]he mere volunteered representation by corporate counsel of a former employee should not be allowed to shield information which there is
no independent basis for including within the attorney-client privilege," such as discoverable facts and "matters that may have affected or changed the witness’s testimony." Therefore, defense counsel should use caution in disclosing any new facts to a former employee witness because the disclosure may be discoverable.

Because there is significant legal ambiguity as to whether communications between the employer’s counsel and former employees are privileged, and because the allegiances of former employees are often unknown, communicating with, deposing, and defending the depositions of these witnesses can be a strategic minefield for plaintiff and defense counsel alike. However, regardless of on which side of the “v” the client’s name appears, with careful thought and research, counsel can explore, neutralize, and perhaps leverage the unknown quantity of a former employee.

3 Upjohn, 449 U.S. at 394 n.3.
4 See id. at 394-95; See also ROGERS, supra note 2, at 159.
5 Upjohn, 449 U.S. at 394-95; EPSTEIN, supra note 2, at 143; ROGERS, supra note 2, at 159. Note that Illinois courts have refused to follow Upjohn and continue to enforce the “control group” test that the Supreme Court rejected in Upjohn. See, e.g., Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 517-18 (N.D. Ill. 1990).
6 Upjohn, 449 U.S. at 402-03 (Burger, J., concurring).
8 See, e.g., Surles v. Air France, No. 00 Civ. 5004 (RMB) (FM), 2001 U.S. Dist. LEXIS 10048, at *17 (S.D.N.Y. July 19, 2001); In re Coordinated Pretrial Proceedings in Petroleum Prods Antitrust Litig., 658 F. 2d 1355, 1361 n.7 (9th Cir. 1981); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 41-42 (D. Mass. 1987); In re Allen, 106 F. 3d 582, 605-06 (4th Cir. 1997); ROGERS, supra note 2, at 159-60.
11 Peralta, 190 F.R.D. at 41-42; see also Pastura v. CVS Caremark, No. 1:11-cv-400, 2012 U.S. Dist. LEXIS 94084, at *6 (S.D. Ohio July 9, 2012) (While Upjohn applies to former employees, the privilege is limited to communications relating to information obtained during the course of employment and does not protect communications containing information that a former employee obtained after their employment ended.).
14 Connolly Data Sys., Inc. v. Victor Techs., Inc., 114 F.R.D. 89, 94 (S.D. Cal. 1987); see also Peralta, 190 F.R.D. at 40 (discussing Connolly); Allen, 106 F. 3d at 606 n.14 (citing Connolly as a case that “denied the privilege to communications between the client’s attorney and former employees”).
15 Connolly Data Sys., 114 F.R.D. at 96; see also Peralta, 190 F.R.D. at 42.
17 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §139 (1971).
18 See id. §139(2) and cmt. e.
19 Smith v. Kalamazoo Ophthalmology, 322 F. Supp. 2d 883, 890 (W.D. Mich. 2004) (“Attorneys also have a responsibility to refrain from inquiring into areas that may be subject to the attorney-client privilege or the work product doctrine.”).
20 See MODEL RULES OF PROF’L CONDUCT R. 1.7, 7.3.
21 MODEL RULES OF PROF’L CONDUCT R. 3.4(f).
THE YEAR 2012 was the 40th anniversary of Watergate, the political scandal and constitutional crisis wrought by lawyers (including an attorney president) that ushered in a new era of heightened sensitivity to legal ethics in law schools, bar examinations, and continuing legal education. Unfortunately, the lesson was lost on some. A California State Bar audit last year of 2,600 attorneys for compliance with Minimum Continuing Legal Education (MCLE) requirements found that 13.4 percent were scofflaws, exposing them to suspension, discipline, and warnings.1

Separately, the California Supreme Court sent an unprecedented message to the State Bar by returning 24 attorney discipline cases “for further consideration of the recommended discipline” and later returned another 18 cases.2 No observer thought the court was saying the bar’s recommended punishment and plea bargains were too severe.

California courts continued to suffer crippling budget cuts last year, with the public paying the price in closed courtrooms, fewer services, and delayed justice. The civil caseload increased 30 percent from 2006 to 2010, civil trials doubled since 2007, and the judicial branch saw its share of the state budget cut by $900 million over the past two fiscal years.3 Forced to reduce its 2012-13 budget by $30 million, the Los Angeles Superior Court laid off staff, closed 56 courtrooms, and ceased providing court reporters for trials, among other forced economies.4 “Make no mistake,” wrote Richard J. Burdge Jr., president of LACBA, “these changes present access to justice issues for all people.”5 Access will be further denied when the superior court closes entire courthouses this year.

Despite these hardships, some people still want to be lawyers. The California Supreme Court began considering whether an undocumented immigrant, Sergio C. Garcia, can become a member of the State Bar. Brought to this country by his parents when he was 17 months old, Garcia eventually went to law school and passed the bar exam in 2009. He has been waiting for his green card for 18

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by John W. Amberg and Jon L. Rewinski
years. His admission to the bar is supported by the State Bar and a resolution of the California legislature, and is opposed by the federal government.  

Another anniversary was marked in 2012—sadly, it was the third year since the murder of attorney Jeffrey A. Tidus, a respected trial lawyer and member of LACBA’s Professional Responsibility and Ethics Committee, who was shot outside his Rolling Hills Estates home by a still unknown assailant. Strongly suspecting the crime was work-related, his family and friends have offered a $100,000 reward for information leading to his killer.

Conflict of Interest

Because an attorney owes duties of loyalty and confidentiality to the client, Rule of Professional Conduct 3-310 mandates that lawyers avoid conflicts of interest. As several cases illustrated in 2012, violation of the rule can lead to disqualification and forfeiture of fees. In Beltran v. Avon Products, Inc., a putative class action alleging false advertising by a cosmetics company, Avon was defended by the Paul Hastings law firm. Avon moved to disqualify the plaintiffs’ lawyer, Jason M. Frank, because he had previously represented Avon as an associate with Paul Hastings. Avon contended that Frank had acquired material confidential information about its business practices while working on Avon cases, and that his acquisition of confidential information also was presumed under the substantial relationship test, due to similar factual and legal issues. It moved to disqualify not only Frank but also his entire law firm and his cocounsel in a separate firm, on the ground his knowledge was imputed to the other lawyers.

In a sworn declaration, Frank stated “with a 100 percent certainty” that he had never possessed any confidential Avon information relevant to the lawsuit, and in response to the motion to vicariously disqualify the law firms, he pointed to an ethical wall that screened him from the other lawyers. However, after in camera review of Frank’s associate time records revealed he had billed 336 hours to Avon over six years, District Judge Cormac J. Carney ruled that Frank’s statements were “simply implausible” and “not credible,” and disqualified him. The court also disqualified Frank’s law firm and his cocounsel who ignored relevant California law to reach this result.

On remand, District Judge Manuel L. Real held that the conflict of interest tainted the representation, resulting in forfeiture of the attorneys’ fees to McGuireWoods and other class counsel. McGuireWoods argued that under Pringle v. LaChapelle, a court may not deny all fees where a client suffered no injury as a result of an ethical violation. McGuireWoods also pointed out that the class representatives did not settle for just $10 million, the mark for the maximum incentive award, but had achieved a $49 million settlement. The Ninth Circuit held, however, that the district court’s denial of the fees was not an abuse of discretion, because the lawyers had knowingly inserted the conflict into the retainer agreement at the outset and took no steps to disclose it to the court or the class.

Attorney-Client Privilege and Work Product

The year 2012 provided an excellent illustration of how federal courts applying federal privilege law approach the attorney-client privilege entirely differently from California state courts. The illustration comes from a sideshow in epic litigation over rights to the lucrative Superman franchise. Unsatisfied with progress in negotiations in the main copyright action, D.C. Comics and Warner Brothers filed in federal court a separate lawsuit against a producer-lawyer (Marc Toberoff) and others for interfering with the studios’ contracts with the heirs of Superman’s creators. In In re Pacific Pictures Corporation, the Ninth Circuit addressed whether documents that Toberoff produced in response to a grand jury subpoena in a criminal investigation lost whatever attorney-client privilege the documents may have had and therefore were discoverable in the lawsuit asserting contract interference. The Ninth Circuit concluded that Toberoff waived the privilege. In so holding, the Ninth Circuit joined the First, Second, Third, Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits in rejecting the so-called selective waiver doctrine, which first gained traction in the Eighth Circuit in 1978.

The Ninth Circuit applied federal law on privilege, which places the search for truth above the attorney-client privilege. “The privilege stands in derogation of the public’s right to every man’s evidence and as an obstacle to the investigation of the truth, and thus it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.” This is the federal court view.

Did the choice of law make a difference? It may well have. In 2008, in Regents of the University of California v. Superior Court, the California Court of Appeal adopted the selective disclosure doctrine. The court reasoned that because the disclosure of attorney-client documents was coerced by subpoenas issued by a government agency, those producing the documents did not waive the privilege because waiver implies voluntary consent. Had the district court in Pacific Pictures applied California law, the ruling with respect to the documents Toberoff produced to the grand jury may well have been different.

The year 2012 also saw an important California Supreme Court case concerning the attorney work-product doctrine. The Code of Civil Procedure distinguishes between work product reflecting a lawyer’s “impressions, conclusions, opinions, or legal research or theories,” which is entitled to absolute protection, and all other attorney work product, which is entitled to qualified protection. Work product receiving qualified protection may be subject to disclosure if the party seeking it can establish that denial of the discovery would unfairly prejudice the party in preparing his or her claim.
MCLE Test No. 223

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

1. Rule of Professional Conduct 3-310 governs conflicts of interest between a California lawyer’s clients.
   - True.
   - False.

2. A conflict of interest can result in an attorney’s disqualification or forfeiture of fees.
   - True.
   - False.

3. A lawyer’s acquisition of confidential client information can be presumed under the substantial relationship test without evidence of actual knowledge.
   - True.
   - False.

4. One lawyer’s knowledge can be imputed to an entire firm, resulting in the firm’s vicarious disqualification.
   - True.
   - False.

5. California law recognizes that an ethical wall may insulate one lawyer’s knowledge of confidential information and prevent vicarious disqualification of an entire firm.
   - True.
   - False.

6. If a lawyer’s ethical violation does not harm a client, the lawyer cannot be denied his or her fees.
   - True.
   - False.

7. Under the law in the Ninth Circuit, documents produced under the compulsion of a grand jury subpoena do not lose their privileged nature.
   - True.
   - False.

8. Federal law and California law are consistent on the subject of selective waiver of the attorney-client privilege.
   - True.
   - False.

9. Witness statements taken at a lawyer’s request are always entitled to absolute work product protection.
   - True.
   - False.

10. A form interrogatory 12.3 seeking the identification of witness statements always must be answered.
    - True.
    - False.

11. Rule of Professional Conduct 2-200 requires informed written consent of a client to a fee-sharing arrangement among lawyers, unless one of the lawyers prevents compliance with the rule.
    - True.
    - False.

12. An agreement under which a lawyer is paid with a share in his or her client’s business is unenforceable unless the client is advised to consult independent counsel.
    - True.
    - False.

13. Under federal habeas corpus law, the negligence of defense counsel does not constitute cause for a prisoner’s failure to meet state procedural requirements.
    - True.
    - False.

14. The anti-SLAPP statute does not bar a client’s lawsuit against his or her attorney for malpractice in handling litigation.
    - True.
    - False.

15. A claim by one attorney against another attorney for equitable indemnity for a legal malpractice claim is not entitled to protection by the anti-SLAPP statute.
    - True.
    - False.

16. An attorney’s breach of the standard of care is not per se actionable.
    - True.
    - False.

17. In the absence of substantial evidence of causation and damages, a client cannot fire his or her lawyer, settle his or her claim, and then sue the lawyer by claiming the settlement would have been larger.
    - True.
    - False.

18. In the absence of a partnership agreement, income from unfinished business belongs to the lawyer who completed the work, not the law firm.
    - True.
    - False.

19. In bankruptcies of law firms, bankruptcy courts have held that some joint waivers are fraudulent transfers.
    - True.
    - False.

20. The California Supreme Court has not approved any of the revised California Rules of Professional Conduct.
    - True.
    - False.
or result in an injustice.28

The supreme court’s decision in Coito v. Superior Court29 arose in litigation following the tragic death of a 13-year-old boy who drowned while swimming with six other kids in the Tuolumne River near Modesto. The boy’s mother sued Modesto and several state agencies, including the Department of Water Resources (DWR), for wrongful death. The DWR’s lawyers sent two investigators to interview the youths after the city had noticed the work product privilege.”32

Legislatively declared policy or the history of a conclusive manner without discussing the supreme court, had “address[ed] the issue in appellate court decisions that, according to the legislative history of the work product doctrine

Based on a close analysis of the origins and legislative history of the work product doctrine in California, the supreme court concluded that witness statements recorded at the request of a party’s lawyers are entitled as a matter of law to at least qualified work product protection. Whether such recordings are entitled to absolute protection must be determined on a case by case basis. An attorney resisting production of work product claimed to be absolutely protected “must make a preliminary or foundational showing that disclosure would reveal his or her ‘impressions, conclusions, opinions, or legal research or theories.’”30 In so holding, the supreme court expressly disclaimed a contrary holding in its 1961 decision, Greyhound Corporation v. Superior Court,31 and disapproved several published appellate court decisions that, according to the supreme court, had “address[ed] the issue in a conclusory manner without discussing the legislatively declared policy or the history of the work product privilege.”32

The supreme court declined to conclude that information responsive to form interrogatory 12.3, seeking the identification of witness statements, is automatically entitled to some level of protection as work product. Unless the responding party can make a preliminary showing that answering the interrogatory would reveal the attorney’s tactics, impressions, or evaluation of the case or result in opposing counsel taking undue advantage of the attorney’s industry or efforts, form interrogatory 12.3 must be answered.33

**Fee-Sharing**

Rule 2-200 permits an attorney to share legal fees with another lawyer only with the client’s informed written consent. Numerous cases over the years have demonstrated that a failure to comply with all requirements of Rule 2-200 generally results in a forfeiture of fees. It is bad business for a lawyer to ignore Rule 2-200.

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their depositions. The investigators taped four of the interviews. During discovery, the deceased boy’s mother propounded to the DWR form interrogatory 12.3, seeking the identification of witness statements, and requests demanding production of the recordings. The DWR objected, citing the attorney work product doctrine.

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Finding that it was undisputed that the Barnes firm had failed to obtain written client consent to the fee-splitting arrangement as required by Rule 2-200, the trial court entered judgment for Ringler and the other defendants following opening statements at trial. The Fourth District reversed. The superior court should have allowed trial to proceed on the Barnes firm’s contention that defendants were equitably estopped from claiming the contract was unenforceable due to noncompliance with Rule 2-200. Under the unique circumstances of the case, the parties’ noncompliance with Rule 2-200 did not preclude the Barnes firm from enforcing the fee-splitting agreement.

**Doing Business with a Client**

Rule 3-300 precludes a California lawyer from entering into a business transaction with a client unless four requirements are met: 1) the transaction and its terms are fair and reasonable to the client; 2) the transaction and its terms are fully disclosed to the client in writing in a manner that should reasonably have been understood by the client; 3) the client is advised in writing that the client may seek independent legal advice and is given an opportunity to do so, and 4) the client thereafter consents in writing to the transaction.

In Gurney v. Legend Films, Inc.,36 the U.S. District Court in San Diego cited Rule 3-300 in a lawsuit by a lawyer (Amy Gurney), who was a member of the California and New
York bars, over compensation that a startup business (Legend Films) and its two founders allegedly owed Gurney. Before the creation of Legend Films, Gurney had represented the founders in various legal matters. Gurney alleged that after the founders created Legend Films, they asked her to serve as its general counsel. Gurney’s employment agreement was drafted but not fully executed. In addition to promising Gurney a base salary and severance pay in the event of a termination of her employment, the agreement purported to give Gurney an equity stake in Legend Films. Gurney did not comply with Rule 3-300.

About a year later, the founders terminated Gurney’s employment. Having not received her salary, severance pay, or equity stake, she sued. The district court granted the defendants’ motion for summary judgment and denied Gurney’s cross-motion. The court relied primarily on applicable statutes of limitation. It noted, however, that the purported employment agreement would also be unenforceable for failure to satisfy Rule 3-300 and comparable ethics rules in New York and New Jersey (where Gurney resided during various relevant times). Gurney had a pre-existing lawyer-client relationship with the founders. The unsigned employment agreement gave Gurney an equity interest in Legend Films. It memorialized a business transaction between Gurney and her clients within the meaning of Rule 3-300. It appeared that the founders never signed the agreement, and there was no evidence that Gurney had advised them in writing of their right to seek independent counsel of their choosing. Gurney had not complied with Rule 3-300, and for this reason, among others, she could not claim her equity stake in the business.

Abandonment

A client’s life was endangered when he was abandoned by his pro bono lawyers. In 
*Maples v. Thomas,*37 two associates at Sullivan & Cromwell in New York, Jaasi Munanka and Clara Ingen-Housz, filed a post-conviction petition for Alabama death row inmate Cory Maples, who had been convicted of murdering two people. While the petition was pending, the lawyers left the law firm for new jobs that disabled them from continuing to represent Maples. They did not inform Maples, did not seek leave to withdraw, and did not move for substitution of new counsel. When the petition was denied a year later, notice of the court’s order was mailed to counsel of record at Sullivan & Cromwell, whose mail room returned the mailings, unopened and marked “Return to Sender—Attempted, Unknown” and “Return to Sender—Left Firm,” to the Alabama trial court, which attempted no further mailings. The time to appeal ran out.38 After Maples was informed by an Alabama assistant attorney general, his mother called Sullivan & Cromwell, and new lawyers tried unsuccessfully to resurrect the case. The trial court denied a motion to reissue its order, the Alabama Court of Criminal Appeals denied a writ of mandamus, and the Alabama Supreme Court affirmed. A petition for federal habeas relief was denied by the federal district court and the Eleventh Circuit because of the failure to timely appeal the petition in state court.39

The U.S. Supreme Court reversed, holding there was cause to excuse the procedural default, because Maples had been abandoned without notice by his counsel. “In these circumstances, no just system would lay the default at Maples’ death-cell door,” Justice Ruth Bader Ginsburg wrote.40 Federal courts are barred from reviewing a state prisoner’s habeas claim if the prisoner failed to meet a state procedural requirement unless the prisoner can demonstrate cause and actual prejudice. Cause exists when something external to the prisoner impeded his or her efforts to comply with the procedural requirement. The negligence of counsel does not constitute cause, because the attorney is the prisoner’s agent, and the principal bears the risk of negligence by the agent.41 The Court distinguished the situation, however, from one in which an attorney abandons a client, such as Maples, without notice, and severs the agency relationship. Maples could not be charged with the omissions of an attorney who has abandoned him, the Court concluded, and cannot be faulted for failing to act on his own when he lacks reason to believe his attorneys are not representing him.42 The Court remanded for consideration of prejudice.

Lawyers Behaving Badly

Lawyers who violate the ethics rules are subject to discipline in the State Bar Court. In 
*In the Matter of Chance Edward Gordon,*43 a lawyer named in a State Bar Court proceeding alleging 30 counts of violations of the California Business and Professions Code and the California Rules of Professional Conduct tried to remove the disciplinary case to federal court because the disciplinary charges were similar to claims asserted against him by the Consumer Financial Protection Bureau in a pending federal case and, therefore, involved federal questions. The District Court remanded the disciplinary proceeding to the State Bar Court. The State Bar prosecutors did not assert claims raising federal questions and a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption.44

In other cases, the Ninth Circuit excoriated a prosecutor who intentionally misquoted the defendant’s prior testimony in an attempt to win a conviction for drug trafficking.45 The Ninth Circuit instructed the district court to consider disciplinary options. The State Bar Court Review Department recommended disbarring a 54-year-old lawyer who became romantically involved with an 85-year-old client who was suffering from emphysema and terminal cancer and misappropriated $340,000 of his savings after his death.46

Malpractice

After Hillel Chodos and his cocounsel Hugh John Gibson obtained a settlement for a client in a marital dissolution and related *Marvin* action, they sued her for $3.5 million in fees, and she sued them for malpractice. Not trusting Chodos while he was representing her, his client had retained other counsel to review his work. In 
*Chodos v. Cole,*47 Chodos filed a cross-complaint for equitable indemnity against the lawyers, contending that while concurrently representing the client, they had independently reviewed and approved the proposed settlement. The superior court struck the cross-complaint on the ground it was barred by the anti-SLAPP statute,48 but the Second District Court of Appeal reversed. Justice Richard M. Mosk rejected the argument that the indemnity claim arose from protected activity. Citing authority that the anti-SLAPP statute does not bar client lawsuits against lawyers for malpractice in handling litigation, Mosk held that a claim by an attorney against another attorney for equitable indemnity in connection with a claim of attorney malpractice “is not distinguishable from a client’s claim against an attorney for malpractice.”49 The cross-complaint concerned conduct constituting a breach of professional duty, not statements or filings made in litigation. The appellate court concluded, “Because a client’s action against an attorney for a breach of duty by an act of malpractice is not subject to the anti-SLAPP statute, logically Chodos’s action based on a breach of duty by an act of malpractice likewise should not be subject to the anti-SLAPP statute.”50 Because protected activity was not implicated, the Court held it did not need to consider whether the litigation privilege barred the claim.51

Reversing a verdict against a lawyer, the First District Court of Appeal underscored the difficulty of proving causation and damages in a “settle and sue” malpractice case. In 
*Filbin v. Fitzgerald,*52 James and Carolyn Filbin hired their lawyer, Herman H. Fitzgerald, and hired a new lawyer to represent them in eminence domain proceedings against San Luis Obispo County, which wanted their property for the regional airport. After settling their claim with the county, they sued Fitzgerald, contending they would have received more but for his malpractice. An appraiser hired
by Fitzgerald had valued the land at $4.535 million, but Mr. Filbin believed it was worth $12 to $15 million. When Fitzgerald erroneously advised the Filbins that the Code of Civil Procedure required their mandatory settlement offer to be less than the appraiser’s expected testimony at trial, they rejected his advice and fired him. During the subsequent condemnation trial, the Filbins accepted the County’s offer of about $2.6 million. In the malpractice case, the trial court held that Fitzgerald’s misstatement of the law fell below the standard of care and awarded the Filbins $574,000, offset by $242,000 in fees.53

The appellate court held there was no substantial evidence of causation or damages. Noting that attorney breaches of the standard of care are not per se actionable, the court found that nothing Fitzgerald did or did not do caused detriment to the Filbins. Rather than following his erroneous advice, they stuck to their guns and refused to lower their demand below the appraisal. Moreover, when the Filbins decided to settle two and a half months later, no past decision by Fitzgerald hobbled them. “[T]hey were free agents...Nothing prevented their new counsel from giving them impartial advice.”54 The court added it was “supremely ironic” that the former clients tried to use Fitzgerald’s history of success in prior condemnation cases and his own appraiser’s opinion against him and concluded that no evidence showed that a greater settlement could have been reached.55

Getting Paid
It is a fact of modern practice that lawyers depart and firms dissolve. The continuing fight over who is entitled to revenue from valuable unfinished business, however, often binds former partners together. Nearly 30 years ago, in the seminal case of Jewel v. Boxer,56 the First District Court of Appeal held that in the absence of a partnership agreement, income from unfinished business belongs to the partnership, to be allocated to the former partners according to their respective interests, and does not belong to former partners who took the business and finished it. As a result, Jewel waivers—under which partners relinquish rights to unfinished business—began appearing in partnership agreements. In Greenspan v. Paul Hastings Janofsky & Walker LLP,57 District Judge Charles R. Breyer considered a Jewel waiver that the former partners of Brobeck, Phleger & Harrison LLP added to their partnership agreement shortly before the firm was forced into involuntary bankruptcy in 2003. When former Brobeck partners took unfinished business to Paul Hastings, the bankruptcy trustee brought an adversary proceeding in the bankruptcy court challenging the Jewel waiver as a fraudulent transfer.

Because Bankruptcy Judge Dennis Montali had ruled that new firms would be liable as immediate transferees despite a Jewel waiver,58 Paul Hastings sought to convince the District Court to withdraw the reference from Montali. It argued that non-bankruptcy federal issues were raised by the Jewel waivers issue—freedom of association, the right to counsel, and the right to practice one’s profession—and mandated withdrawal. The district court noted it had denied a previous motion to withdraw the reference in the Heller Ehrman LLP bankruptcy59 and rejected the new arguments. First, it held that while state law issues may be unresolved, the alleged constitutional rights were not significant, open, and unresolved. Second, it noted that the alleged right to practice one’s profession has been interpreted strictly and requires something akin to complete prohibition to state a constitutional claim. Finding no significant and unresolved questions of federal law, the court denied the motion.60

As law firm bankruptcies proliferated, other courts grappled with Jewel issues last year. Thus, in Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP,61 the U.S. District Court for the Southern District of New York held that unfinished business, whether billed hourly or on a contingent fee, belonged to the dissolved Coudert Brothers firm, and in Huber v. Etkin,62 the Pennsylvania Superior Court similarly held that contingent fees must be shared as partnership assets. In Geron v. Robinson & Cole LLP,63 another federal district judge in New York held that California law and New York law are different, so profits earned by Robinson & Cole LLP belonged to the bankrupt Thelen firm, but Seyfarth Shaw LLP could retain its fees because they would bestow an unjust windfall on Thelen and clash with New York’s Rules of Professional Conduct and public policy favoring client autonomy and lawyer mobility.

Rules Revision
The State Bar’s Board of Governors approved revised Rules of Professional Conduct two years ago, but none can take effect until approved by the supreme court. The State Bar has submitted the new rules to the supreme court twice—its initial submission of 67 rules was deemed too voluminous and withdrawn in 2011, and a new petition in October 2012 contained a test batch of just two rules.64

1 MCLE Audit Results Encouraging, but Some Attorneys Still Face Discipline, CAL. BAR J. (Dec. 2012).
2 Justices Return 24 Discipline Cases to State Bar, L.A. DAILY J., June 25, 2012; Supreme Court Returns

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THE CHILDREN OF Shari’a

In matters of child custody and spousal support, Islamic nations apply civil and Islamic legal traditions differently

THERE ARE TWO SOURCES of Islamic law, or shari’a. One source is the Koran and Hadith. The second is the application of *ijma’a* (consensus), *qiyas* (comparison), and *aql* (reason) to the source. After Muhammad’s death, two sects (Sunni and Shi’a) of Islam emerged. Sunni jurisprudence includes the Hanafi, Maliki, Shafi’i, and Hanbali schools, and Shi’a jurisprudence includes the Zaid-ayyah, Jafari, and Isma’iliyah schools. Different Islamic nations apply Islamic laws of custody, visitation, and child and spousal support differently, and the laws are changing. Practitioners who work with Muslim clients can benefit from an understanding of how shari’a applies to family law issues, including child custody.

Under shari’a, those who have custody of younger children are obliged to raise them as Muslims; give them religious, moral, and physical education; allow them access to good friends; and give them financial support. This responsibility is held mostly by the mother, especially if the father remarries and the mother remains unmarried. However, fathers are in control of legal custody and may directly control the movement of their children (including change of residence, choice of employment, travel abroad, and obtaining a driver’s license or passport). Fathers also have indirect control the flow of financial support to mothers.

Regarding physical custody, Koranic verses provide that mothers have custody of children during nursing and up to the age of two or two and a half. Verses also provide that fathers and mothers should consult each other in raising their children. Muhammad has been quoted as saying that divorced mothers who remain unmarried have a greater right to raising a child.

Islamic jurisprudence differentiates between custody of male and female children. Under Shi’a law, custody typically reverts to the father when boys reach the age of two, while for Sunnis the age limit is seven, at which time a boy may choose to remain with his mother or live with his father. With girls, Shi’a custody reverts to the father at the age of sexual maturity, while Sunni rules vary. They include leaving the decision to the girl, continuing custody with the mother, and reverting custody to the father. Sunnis and Shi’as also differ as to the age of termination of custody. Most traditions agree that upon sexual maturity, children should be given freedom of choice. Table 1 summarizes physical custody rules under five schools.

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In Islamic jurisprudence, a person's age is calculated by lunar year. To calculate age in lunar years, reduce the age in solar years by 6 percent or by a ratio of 336 to 365.

Legal Custody

Under shari’a, the father is the head of the family and in charge of the children until termination of custody. The preference for granting physical custody to mothers during a child’s tender years does not change this general rule. In addition, because mothers and fathers are mandated to raise their children as Muslims, a Muslim mother who converts to another religion is not permitted to keep custody of a Muslim child. Fathers must approve of their children’s education, including the places and types of schools attended, and the type of education received.

Although custodial mothers are restricted from remarrying, in some jurisdictions, a father’s petition for custody based on a mother’s remarriage may be waived if the petition is not raised in a timely manner. Employment of custodial mothers may be substantially curbed if the father disapproves. The father’s obligation to provide a suitable residence for his children limits the freedom of custodial mothers to change their residence or their children’s residence. Only fathers can apply for their children’s passports, and in the majority of jurisdictions, children cannot leave a country without their father’s permission or a court order. In some jurisdictions, unpermitted foreign travel by a custodial mother is a crime.

Financial guardianship is vested in fathers and grandfathers unless transferred by agreement or assigned by the court to mothers or third parties. Fathers are the recipients of a child’s earnings after divorce and are authorized to purchase, sell, encumber, and manage a child’s properties. This right is especially significant if children receive inheritances or gifts during the marriage. This rule also is relevant when children receive public assistance or private insurance benefits. For example, upon the death of a father, his children’s paternal grandfather may receive the death benefits, but the children’s mother has the burden of physical and legal custody.5

Child Custody by Nation

Table 2 summarizes the status of legal and physical custody in 15 Islamic nations representing five Islamic legal traditions. The table shows how custody law in Islamic countries departs from tradition. The laws of Bangladesh, a former colony of England, show the influence of common law. The country’s marriage and family laws, however, are numerous, overlapping, inconsistent, and confusing. Simply making list offers an explanation: the Divorce Act of 1869; the Christian Marriage Act of 1872; the Special Marriage Act of 1872; the Married Women’s Property Act of 1874; the Births, Deaths and Marriages Registration Act of 1886; the Guardians and Wards Act of 1890; the Foreign Marriage Act of 1903; the Anand Marriage Act of 1909; the Child Marriage Restraint Act of 1929; the Parsi Marriage and Divorce Act of 1936; the Arya Marriage Validation Act of 1937; the Muslim Personal Law (Shariat) Application Act of 1937; the Dissolution of Muslim Marriages Act of 1939; the Hindu Married Women’s Right to Separate Residence and Maintenance Act of 1946; the Muslim Family Laws Ordinance of 1961; the Public Servants Marriage with Foreign Nationals Ordinance of 1976; the Dowry Prohibition Act of 1980; and the Family Court Ordinance of 1985. The Supreme Court of Bangladesh has assumed a very active role in modernizing Hanafi principles.7 Divorcing couples are first directed to an arbitration council before coming to court. The court considers the child’s preference, welfare, education, and religion in its decision. The law considers the best interest of the child as the paramount factor and provides the courts with flexibility in awarding custody. A mother’s remarriage results in loss of custody. In Md. Abu Baker Siddique v. S.M.A. Bakar,8 the Supreme Court of Bangladesh granted custody of an eight-year-old boy to his mother, finding that the country’s custody rules were not based on the Koran or Hadith. No consensus has been established among Bangladeshi courts, however.7

A Dutch colony until 1945, Indonesia operates under civil law that was promulgated during the colonial period. Sources of law include Dutch law, customary law (known as adat), and Islamic law. The country has the largest Muslim population of any nation in the world, but Islam is not the official religion. Custody of children is subject to the nation’s civil code, which is influenced by Dutch law and Shafi’i jurisprudence. In the absence of parental agreement, a child’s custody must be ordered by the court as part of a divorce decree. Custody of children under the age of 12 is awarded to the mother, while the father has the responsibility to maintain the children. After 12, the children are free to choose to remain with their mother or to go to their father. Remarriage of the mother is ground for loss of custody.

Iran is the most populous Shafi’i country. Iranian family law statutes include the Mar-

<table>
<thead>
<tr>
<th>SCHOOL</th>
<th>TRANSFER TRIGGER</th>
<th>NEXT ELIGIBLE CUSTODIAN</th>
<th>NEXT ELIGIBLE CUSTODIAN</th>
<th>NEXT ELIGIBLE CUSTODIAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hanafi</td>
<td>Boy: 7, Girl: 9, Marriage</td>
<td>Boy: Either parent, Girl: Father</td>
<td>Maternal grandmother or paternal grandmother</td>
<td>Mother’s sister</td>
</tr>
<tr>
<td>Shafi’i</td>
<td>Boy: 7, Girl: 7</td>
<td>Choice of either parent</td>
<td>Maternal grandmother or paternal grandmother</td>
<td>Mother’s sister</td>
</tr>
<tr>
<td>Maliki</td>
<td>Boy: 15, Girl: Marriage</td>
<td>Grandmother</td>
<td>Maternal grandmother or mother’s sister</td>
<td>Paternal grandmother</td>
</tr>
<tr>
<td>Hanafi</td>
<td>Boy: 7, Girl: 7</td>
<td>Choice of either parent</td>
<td>Maternal grandmother or paternal grandmother</td>
<td>Mother’s sister</td>
</tr>
<tr>
<td>Jafari</td>
<td>Boy: 2, Girl: 7</td>
<td>Father</td>
<td>Paternal grandfather</td>
<td>Paternal next of kin</td>
</tr>
</tbody>
</table>

Notes: Mothers are granted physical custody of small children in most cases, but custody transfers to the father at the ages shown in the Transfer Trigger column.

The influence of common law. The country’s marriage and family laws, however, are numerous, overlapping, inconsistent, and confusing. Simply making list offers an explanation: the Divorce Act of 1869; the Christian Marriage Act of 1872; the Special Marriage Act of 1872; the Married Women’s Property Act of 1874; the Births, Deaths and Marriages Registration Act of 1886; the Guardians and Wards Act of 1890; the Foreign Marriage Act of 1903; the Anand Marriage Act of 1909; the Child Marriage Restraint Act of 1929; the Parsi Marriage and Divorce Act of 1936; the Arya Marriage Validation Act of 1937; the Muslim Personal Law (Shariat) Application Act of 1937; the Dissolution of Muslim Marriages Act of 1939; the Hindu Married Women’s Right to Separate Residence and Maintenance Act of 1946; the Muslim Family Laws Ordinance of 1961; the Public Servants Marriage with Foreign Nationals Ordinance of 1976; the Dowry Prohibition Act of 1980; and the Family Court Ordinance of 1985. The Supreme Court of Bangladesh has assumed a very active role in modernizing Hanafi principles.7 Divorcing couples are first directed to an arbitration council before coming to court. The court considers the child’s preference, welfare, education, and religion in its decision. The law considers the best interest of the child as the paramount factor and provides the courts with flexibility in awarding custody. A mother's remarriage results in loss of custody. In Md. Abu Baker Siddique v. S.M.A. Bakar,8 the Supreme Court of Bangladesh granted custody of an eight-year-old boy to his mother, finding that the country’s custody rules were not based on the Koran or Hadith. No consensus has been established among Bangladeshi courts, however.7

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riage Act of Non-Shi’a Muslims of 1933, the Ordinance on Marriage of Iranian Women to Foreign Nationals of 1967, the Divorce Modification Ordinance of 1993, the Divorce Explanation Ordinance of 1994, the Family Courts Act of 1994, and the Ordinance of Marriage of Iranian Men to Foreign Nationals of 2003. The Iranian Civil Code of 1928-1935 was promulgated by a committee of Iranian jurists with backgrounds in the civil law of France, Belgium, and Switzerland. These jurists, with the assistance of Shi’a scholars, incorporated the general principles of Islamic marriage, divorce, guardianship, and probate law into the civil code, leaving marriage, divorce, paternity, guardianship, and custodial rights of war widows were substantially expanded. In 2003, the age of custodial transfer for boys was raised to seven, at which time custody may revert to the father unless determined otherwise by the court. In making a ruling, the court must consider the child’s best interest. A family court may sanction a father’s violation of the custodial rights of a mother if he sends their children out of the country, but the court is not authorized to enjoin the child’s departure.8

The family law of Morocco, a former colony of France, is influenced by the Napoleonic Code. Under the Moroccan constitution, Islam is the state religion. The Islamic provisions of the law are inspired by Maliki jurisprudence. The Personal Status Law was amended in 1992, 1993, and 2004 in order to increase gender equality. In the event of divorce, children up to the age of 15 stay with their mother, and thereafter may choose to stay with the mother or father. A custodian must be an adult of good character who is able to safeguard the health and moral education of the children and who is free from contagious diseases. Subject to conditions, children remain in the custody of their mother even if she remarries. The children always spend the night at the custodian’s house unless a judge decides otherwise. The court may resort to the assistance of a social worker to prepare a report on the custodian’s home and the extent to which it meets the material and moral needs of the children.

Saudi Arabia is the only Islamic country that does not have a promulgated family code. Religious courts follow Hanbali tradition to decide issues of custody. Mothers have custody of children to the age of seven. (On the other hand, Qatar, also a Hanbali jurisdiction, favors award of custody to the mother of sons up to the age 11 and daughters up to 13.) The mother must be an adult and of sound mind in order to be granted custody. The mother may lose custody if she remarries someone who is outside the prohibited degree of relationship to the children, or if she does not raise a Muslim child as a Muslim. The emphasis placed upon an Islamic upbringing in an Islamic environment makes it difficult for a non-Muslim or foreign mother to obtain custody of her Muslim children.9

Visititation and Access

The traditional views of right of access or visitation are reflected in a hadith that states, “If anyone separates a mother and her child, Allah will separate him and his loved ones on the Day of Resurrection.” Under various Shi’a and Sunni legal traditions, noncustodial parents enjoy the right of visitation, but length and frequency vary. Islamic privacy rules create a special problem regarding visitation. Under Islamic law, men and women belong to one of two groups: nonmarriageables and marriageables. Women and men who are nonmarriageables can freely visit in person, with or without others present, without hijab, and may travel together. This is not so with marriageables, which generally includes former spouses. Under these circumstances, visitation may violate privacy rules.

In Bangladesh, Sections 41-45 of the Divorce Act of 1869 provide the court with

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### TABLE 2 Age of Transfer, Discretion, Maturity, and Marriage in 15 Islamic Countries

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>SECT/SCHOOL</th>
<th>TRANSFER AGE</th>
<th>DISCRETION AGE</th>
<th>MATURITY AGE</th>
<th>MARRIAGE AGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan</td>
<td>Sunni/Hanbali</td>
<td>7</td>
<td>9</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Azerbaijan</td>
<td>Shi’a/Jafari</td>
<td>N/A</td>
<td>N/A</td>
<td>BIC</td>
<td>BIC</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>Sunni/Hanafi</td>
<td>N/A</td>
<td>7</td>
<td>9</td>
<td>18</td>
</tr>
<tr>
<td>Egypt</td>
<td>Sunni/Hanbali</td>
<td>N/A</td>
<td>15</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Sunni/Shafi’i</td>
<td>N/A</td>
<td>12</td>
<td>12</td>
<td>18</td>
</tr>
<tr>
<td>Iran</td>
<td>Shi’a/Jafari</td>
<td>7</td>
<td>7</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>Iraq</td>
<td>Shi’a/Jafari</td>
<td>N/A</td>
<td>10</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>Jordan</td>
<td>Sunni/Shafi’i</td>
<td>N/A</td>
<td>15</td>
<td>15</td>
<td>18</td>
</tr>
<tr>
<td>Morocco</td>
<td>Sunni/Maliki</td>
<td>N/A</td>
<td>15</td>
<td>15</td>
<td>18</td>
</tr>
<tr>
<td>Nigeria</td>
<td>Sunni/Maliki</td>
<td>N/A</td>
<td>7</td>
<td>9</td>
<td>15</td>
</tr>
<tr>
<td>Pakistan</td>
<td>Sunni/Hanbali</td>
<td>N/A</td>
<td>7</td>
<td>9</td>
<td>18</td>
</tr>
<tr>
<td>Qatar</td>
<td>Sunni/Hanbali</td>
<td>N/A</td>
<td>11</td>
<td>13</td>
<td>18</td>
</tr>
<tr>
<td>Sudan</td>
<td>Sunni/Maliki</td>
<td>N/A</td>
<td>7</td>
<td>9</td>
<td>18</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>Sunni/Hanbali</td>
<td>N/A</td>
<td>7</td>
<td>9</td>
<td>18</td>
</tr>
<tr>
<td>Turkey</td>
<td>Sunni/Hanbali</td>
<td>N/A</td>
<td>N/A</td>
<td>BIC</td>
<td>BIC</td>
</tr>
</tbody>
</table>

Notes: “BIC” indicates best interest of the child. “PUB” indicates puberty. 
1 The age at which the custody right of the mother transfers to the father.
2 The age at which the child’s custody may be transferred from one parent to another, or to a qualified third party, based on the discretion of the child and the court.
3 The age at which children are recognized as adults.
4 The age at which children may marry without a court order. In many jurisdictions, age of marriage may be reduced by a year of two. Regardless of age, females cannot get married without the consent of a guardian, normally the father or other paternal next of kin.
the jurisdiction to make pendente lite and postjudgment orders. The Guardians and Wards Act of 1890 applies to the issues of custody and visitation. The Muslim Family Law Ordinance of 1961 provides that disputes not resolved by arbitration will be decided by a court. In Indonesia, the Civil Code of 1847 authorizes nonappealable pendente lite orders. Following the judgment granting divorce, the court determines the issue of visitation. The parent who has not been appointed guardian or who has been denied visitation may oppose the ruling and appeal. The court, upon showing change of circumstances, may amend its ruling.

The father is the head of the family and in charge of the children until termination of custody. The preference for granting physical custody to mothers during a child’s tender years does not change this general rule.

The Iranian Civil Code provides for right of visitation of the child by the noncustodial parent, and, absent parental agreement, a court must provide for the time and place of visitation. Failure of a custodial parent to provide the child for visitation is an offense that may result in imprisonment until compliance. After reaching the age of discretion (15 for boys and 9 for girls), children cannot be forced to visit the noncustodial parent.10

In Morocco, the 2004 Family Code dictates the visitation right of noncustodial parent. Visitation is a right, and its terms may be reached by an agreement included in the custody decree. Otherwise, it will be determined by the court on a case-by-case basis. The visitation order may be modified if it becomes detrimental to the child or the parents. Violation of a visitation decree or deception in its execution is ground for modification. Upon death of one parent, the surviving parent must arrange for the visitation of the children with the parents of the deceased. The best-interest-of-the-child rule applies.

In Saudi Arabia, according to the Reunite International Child Abduction Centre, a nonprofit in the United Kingdom:

Although Islamic law confirms that a child should have access to both parents, this cannot be guaranteed in practice in Saudi Arabia. An access order is very hard to implement and the system of sponsorship for entry into Saudi Arabia makes it difficult for a non-Saudi parent to obtain a visa to enter the country for contact visits with their child. It is particularly difficult for a non-Saudi mother who was not married to the father of her child to obtain a visa for entry into Saudi Arabia to visit a child abducted there.12

Child Support
In several verses, the Koran calls on Muslim fathers to support their children after dissolution of marriage. Sunni and Shi’a jurisprudence agree that during and after termination of the marriage, the father must maintain the children whether the wife is poor or rich. In Bangladesh, the Divorce Act of 1869 provides for maintenance of wives but is silent regarding child support. Accordingly, the general principle of Muslim law regarding the duty of fathers to support children is applicable. In Indonesia, the civil code provides that upon separation from bed and board or divorce, the parents are obliged to support their minor children as decided in court. The duty to support continues if the court grants custody to a third party or if the child is placed with a public or private guardian.

In Iran, the maintenance of the children is the duty of the father. On his death or incapacity for maintenance, this duty devolves upon the paternal grandfather, and then upon the mother, maternal grandfather and grandmother, and paternal grandmother, with preference going to the nearer kin of the father. If the grandparents are similar in degree of kinship, they must pay maintenance expenses equally. The court has power to enforce support against a third party.

Moroccan law differentiates between the expenses of a custodian’s salary, the child’s accommodation, breast feeding, and child support. All are payable by the father if he is responsible for the child’s maintenance. Children may not be evicted from their parents’ conjugal home until the judgment is entered, and upon entry of the judgment, the court must determine the amount and the manner of rent to be paid and define the measures and procedures that will guarantee the execution of the judgment by the father concerned. Maintenance of children shall include cost of food, clothing, medical care, education, and other necessary expenses. If a father is unable to support all the persons he is legally required to support, precedence shall be given to the wife before the children.

Spousal Support
The Koran provides for the support of wives after divorce. This support is defined and limited to the period of iddah, which is three months or the termination of a pregnancy. During the iddah, a husband must support his wife according to his means, which includes residency in the family residence. After iddah, support may continue in the form of compensation for breast feeding.

In Egypt, the Decree-Law No. 25 of 1929 provides for two types of alimony: iddab and enjoyment. The law limits iddab alimony to one year, even if the court orders a longer time. However, if a marriage is consummated and the wife is divorced without her consent or fault, she is entitled to another two years of support, at the rate of iddab alimony. In ordering the additional support, the court must consider husband’s financial situation, reason for divorce, and the length of the marriage. Enjoyment alimony may be paid in installments.

Indonesia applies fault-based divorce. The civil code authorizes a wife to claim support for her maintenance during pendency of litigation, provided she remains in the family residence or leaves with the court’s permission. Upon death of the guilty spouse, the innocent spouse will inherit all benefits granted to him or her by the other. In the absence of income, support may be satisfied by transfer of assets from one spouse to another. Support terminates upon the death of either spouse.

Iranian Civil Code provides for payment of support by a husband to his former wife, and she is entitled to support during iddab.

In Farsi, the word is iddeh.) The Iranian Civil Code also provides for settlement of any unpaid brid al gift or dowry (known as a mahr). If she is pregnant, she is entitled to support until the child is born. Iddab lasts for three menstrual periods or three months. The wife’s support takes precedence over support of the husband’s other relatives, and the wife’s claim for unpaid support takes precedence over third-party creditor claimants. In the event of the husband’s bankruptcy, the wife’s claim must be satisfied first.

The Moroccan family code requires sup-
port for duration of iddah and adds housing accommodation. The law requires the deposit of a sum (decided by the court) by the husband within 30 days of filing for divorce to discharge the support that is due to the wife and dependent children. The amount due to the wife considers any delayed bride price or dowry, maintenance for the period of iddah, and the consolation gift, which is assessed based on the length of the marriage, the financial means of the husband, and the reasons for divorce. During iddah, the wife may remain in the conjugal home or another suitable home, depending on the financial situation. Failing this, the court fixes an amount of money to cover housing expenses. The court-ordered maintenance of the wife starts from the date the husband has ceased to pay the maintenance expenses incumbent upon him. The wife may lose her right to maintenance if she refuses a court-ordered return to the conjugal home. In Saudi Arabia, according to one source, “In all cases, the husband is required to pay the wife a one-off payment, pre-agreed at the time of the marriage.”

Modern shari'a law reflects the social, economic, and political values and goals of millions of Muslims. In particular, the family law of various countries reflects not only 14 centuries of shari’a law but also its more contemporary manifestations.

1 See, e.g., http://www.thefreedictionary.com/hadith (“a tradition based on reports of the sayings and activities of Muhammad and his companions”).
7 See Judicial Activism, supra note 5.
10 Consultive Op. No. 7-4905 (1379/05/31, Aug. 21 2000).
14 Qanun-I Madani [Iranian Civil Code], arts. 1078-1101 (marital gift by husband to the future wife).
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999 North Sepulveda Boulevard, Suite 440, El Segundo, CA 90245, (310) 522-7744, fax (310) 322-7755. Web site: www.waronzof.com. Contact Timothy R. Lowe, MAI, CRE. Waronzof provides real estate and land use litigation support services including economic damages, lost profits, financial feasibility, lease dispute, property value, enterprise value, partnership interest and closely-held share value, fair compensation, lender liability and reorganization plan feasibility. Professional staff of five with advanced degrees and training in real estate, finance, urban planning, and accounting. See display ad on page 61.

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1700 California Street, Suite 410, San Francisco, CA 94110, (415) 294-6839, fax (415) 294-6838, e-mail: katemcelroy@gmail.com. Web site: hamptonhealth Ltd.com. Contact Kate McElroy, PA-C. Services available: board certified in internal medicine, geriatrics, hospice, palliative medicine, addiction medicine, and home health certification, licensed medical review officer. Expertise: Medicare fraud cases for the government, toxicology/DUI, elder abuse including criminal defense of lay caregivers accused of homicide of debilitated relatives during end-of-life phase. Hospital, ambulatory/outpatient, PI, medical malpractice, and LTC. Medical/hospice directorships. Testified over 200 times and testified more than 1,000 cases in the last 12 years. See display ad on page 55.

PRINCETON-SOMERSET GROUP, INC.

TRAFFIC ENGINEERING

WILLIAM KUNZMAN, PE
1111 Town and Country #34, Orange, CA 92868, (714) 973-8383, fax (714) 973-8821, e-mail: bill@traffic- engineer.com. Web site: www.traffic-engineer.com. Contact William Kunzman, PE. Traffic expert witness since 1979, both defense and plaintiff. Auto, pedestrian, bicycle, and motorcycle accidents. Largest verdicts: 1) $7,000,000 in pedestrian accident case against Caltrans, 2) $10,300,000 in case against Los Angeles Unified School District. Largest settlement: $2,000,000 solo vehicle accident case against Caltrans. Before becoming expert witness, employed by Los Angeles County Road Department, Riverside County Road Department, city of Fullerton and Federal Highway Administration. Knowledge of governmental agency procedures, design, geometrics, signs, traffic controls, maintenance, and pedestrian protection barriers. Hundreds of cases. Undergraduate work—UCLA, graduate work—Yale University.

WASTEWATER

JOHN SHAW CONSULTING, LLC
P.O. Box 4259, Truckee, CA 96160, (530) 550-1576, fax (530) 579-3388, e-mail: john@jshaweng.com. Web site: www.shaweng.com. Contact John Shaw, PE. Water/wastewater/sewer industry—unique combination of operations and engineering background. Sanitary engineering including water (potable) and wastewater (industrial and domestic) treatment, conveyance, hydraulics, storage, reuse, master planning, operations, maintenance, and expert witness and forensic (mode of failure and standard of care analysis, engineering analysis, product suitability and construction detect issues). Wastewater treatment plants, disposal/reuse facilities, storm sewer lift station design, sewer collection systems, and sludge treatment. Water treatment plants, pipelines, and swimming pools.

WORKERS’ COMPENSATION

GRAHAM A. PURCELL, MD, INC.
ASSISTANT CLINICAL PROFESSOR ORTHOPEDIC SURGERY, UCLA
3600 Wightwood Drive, Studio City, CA 91604, (818) 985-3061, fax (818) 985-3069, e-mail: gpurcelmd@gmail.com. Web site: gpurcelmd.com. Contact Graham A. Purcell, MD. Dr. Purcell is a board certified orthopedic surgeon, subspecialty in spinal disorders affecting adults and children. Examples of spinal disorders treated by Dr. Purcell include disc diseases, stenosis, infections, tumors, injuries, and deformities including scoliosis. He possesses 33 years of orthopedic and 25 years of med-legal experience, including defense, plaintiff, insurance carriers, United States Attorney General’s office, CA Attorney General’s office and Public Defender’s office. Expert testimony pertains to med-mal, personal injury, and workers’ compensation cases. As a qualified medical evaluator, Dr. Purcell has extensive experience in performing GMES, AMES, IMEs, WC evts. See display ad on page 59.

WRONGFUL TERMINATION

HAIGHT CONSULTING
1726 Palisades Drive, Pacific Palisades, CA 90272, (310) 454-2988, fax (310) 454-4516. Contact Marcia Haight, SPFHR—CA. Human resources expert knowledgeable in both federal and California law. Twenty-five years’ corporate human resources management experience plus over 20 years as a Human Resources Compliance Consultant in California. Specializations include sexual harassment, ADA/disability discrimination, other Title VII and FEHA discrimination and harassment, retaliation, FMLA/CFRA, safety, and wrongful termination. Courtroom testimony and deposition experience. Retained 60 percent by defense, 40 percent by plaintiff. Audit employer’s actions in preventing and resolving discrimination, harassment, and retaliation issues. Assess human resources policies and practices for soundness, for comparison to prevailing practices, and for compliance. Evaluate employer responsiveness to complaints and effectiveness of employer investigations. Assist counsel via preliminary case analysis, discovery strategy, examination of documents.
Breakfast at the Bar: 110 Days to Trial
ON TUESDAY, APRIL 30, the Litigation Section and the Los Angeles Paralegals Association will host a program about the critical 110 days before trial. Speakers Kevin K. Callahan and Judge Michelle R. Rosenblatt will address the many tasks that must be accomplished, and the time frames that apply, in order to get a case ready for trial in state and federal courts. Topics will include final nonexpert discovery, expert designations and depositions, motions for summary judgment, motions in limine, working with and preparing witnesses, and organization of documents. 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 starting at 7 A.M., with the program continuing from 7:30 to 8:30. The registration code number is 011931.
$20—CLE+ member (with breakfast)
$45—Litigation Section member
$75—LACBA member
$100—all others
1 CLE hour

Forty-fifth Annual Family Law Symposium
ON SATURDAY, APRIL 27, the Family Law Section and the Los Angeles Superior Court will host the 45th Annual Family Law Symposium. Topics to be covered in detail include depositions, analyzing business valuation reports, ethics in the electronic age, using tax returns effectively in court, attorney’s fees, and strategies for getting paid. In addition, the Family Law Section will donate $5 from every paid registration to support the work of LACBA’s Domestic Violence Project at the Mosk and Pasadena Courthouses. The symposium will take place at the Universal City Hilton, 555 Universal Hollywood Drive in Universal City. Self parking costs $10 and valet parking $15. On-site registration will be available starting at 8 A.M., with the program continuing from 8:30 A.M. to 4:30 P.M. The registration code number is 011726.
$110—CLE+ member
$220—Family Law Section member
$245—LACBA member
$280—all others, including at-the-door registrants
6.25 CLE hours of Family Law Legal Specialization credit and 1 hour of ethics credit

Public Counsel’s CARES Program
ON WEDNESDAY, APRIL 17, the Corporate Law Departments Section, Senior Lawyers Section, and Public Counsel Law Center will host a program to prepare volunteers to assist clients with shelter, food, health, transportation, and social services needs. Connecting Angelenos to Resources and Essential Services (CARES) is a collaborative, limited legal advocacy project of LACBA, Public Counsel, and LACBA’s Corporate Law Departments and Senior Lawyers Sections. Volunteers who participate will be covered by Public Counsel’s malpractice insurance. Volunteers can make a tangible difference in the lives of some of the neediest people in Los Angeles, prevent homelessness, and help people move toward self-sufficiency. The time commitment is basic: attendance at the 2.5-hour training program and a commitment to spend 4.5 hours on April 19 or April 26 from 1:30 to 6:00 p.m. to provide advocacy at offices of the Department of Social Services in West Los Angeles or Downtown. Registration and a light dinner will be available starting at 5:30 p.m., with the public benefits overview (providing 1 hour of CLE credit) to follow. From 7 to 8:30 p.m., those who attend with receive training on advocacy procedures. 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. The registration code number is 011896.
1 CLE hour

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

AS VOLUNTEER LEADERS of the Legal Services Trust Fund Commis- 

dison, we are eyewitnesses to an alarming increase in the number of 

people who need to resolve civil legal matters that affect access to basic 

life necessities. Unfortunately, however, the majority of these people 

are unable to protect their interests on their own, nor are they able 

to afford professional assistance.

The legal problems facing poor people are dire. Failure to access 

the judicial branch of our democracy can mean hunger, homelessness, 

loss of medical care or supportive services, and even serious injury 

or death. Families can be separated and livelihoods lost. If the poor 

cannot obtain protection under the law, unjust outcomes become inevitable.

While effective self-help tools are an impor-

tant means to improve access to justice, many 

who use these materials require additional 

guidance. In addition, self-help resources do not 

address the inherent disadvantages that a poor, 

self-represented litigant faces when competing 

against an opposing attorney. Language issues, 

physical or mental disabilities, or a lifetime of economic disadvantage 

adds to the hopelessness of these situations, irrespective of complicated 

legal or factual issues that require legal representation.

Court-based self-help centers and legal assistance organizations pro-

vide these required additional services at no cost to the most needy. 

Sadly, funding cuts have led to the closure of self-help centers at many 

courthouses, and those that remain are understaffed. As a result, self-

represented litigants consume a disproportionate share of court-

house resources.

Without the ability to engage effectively with the judicial branch, 

low-income litigants are unable to secure the protections of our jus-

tice system. From common defects in pleadings to complex issues of 

law, the unrepresented have no meaningful way to pursue their cases 

and achieve justice. Instead, they clog the courts, force judges and clerks 

to do extra work, and still too often fail to resolve the problems that 

brought them to court.

Exacerbating this crisis, at a time when the poor need help more 

than ever, decreased funding is preventing our legal aid infrastructure 

from providing the requisite information and assistance. The State Bar 

of California’s Legal Services Trust Fund Program has been a bulwark 

in sustaining legal services in California, but its funding is now at 

unprecedented risk. The Legal Services Trust Fund Program distrib-
utes grants from IOLTA funds (the interest on small or short-term 

deposits to attorneys’ pooled trust accounts). Historically, these 

funds provided meaningful support for legal services programs 

throughout this state’s 58 counties. Grants are allocated through a 

formula that considers the size of each recipient organization and the 

impoverished population each program serves. These grants have and 

will save countless families from unjustly becoming homeless, ensure 

that thousands live safely and have access to medical care, and pre-

serve the safety net that protects our democracy.

In recent years, plummeting interest rates have reduced IOLTA rev-

enue to 25 percent of previous levels. The meager $5 million in 

IOLTA receipts for 2012—less than 75 cents for each indigent 

Californian served by legal assistance lawyers—is plainly inadequate 

to support the legal services that Californians need.

We urge you to help solve this problem by contributing to the 

Justice Gap Fund. The legislature created the Justice Gap Fund in 2006 
to augment financial assistance to legal services programs, because gov-

ernment grants and existing state programs proved inadequate to sup-

port legal assistance attorneys working on behalf of indigent clients.

The State Bar distributes 100 percent of individual Justice Gap 

Fund donations directly to legal services providers.

The State Bar distributes 100 percent of individual Justice Gap Fund 
donations directly to legal services providers that meet the bar’s 

stringent quality control guidelines and oversight requirements, witho-

ut any deduction for administrative or overhead charges. These 

private contributions play a crucial role in financing California’s 

statewide legal assistance infrastructure for the millions of people in 

need of legal assistance.

Legal assistance organizations must be adequately funded to pro-

vide the level of service needed to forge a path to justice for those who 

are unable to advocate on their own behalf, ensuring that legal assis-
tance programs have the resources necessary to assist the poorest lit-

gants who face the gravest consequences.

Sadly, the Justice Gap Fund is underutilized. Fewer than 5 lawyers 

out of 100 participate. Your generous donation to the Justice Gap Fund 

will have a huge impact on achieving access to justice. While $100 
is the suggested level for individual gifts, even smaller gifts make a 

big difference. You can donate online through the Campaign for 

Justice at www.CAforJustice.org. The Campaign for Justice was 

organized to educate our communities about the impact of legal ser-
vices, and to increase funding to make those services more broadly 
available.

The key to solving this crisis is your contribution. Justice obliges 
us to take this small step. Without the active involvement of the legal 

profession, a terrible injustice steadily worsens. You have the power 
to rectify it. Please take this opportunity and give generously. Justice 
is most precious when all have access to it.

David Lash serves as the managing counsel for Pro Bono and Public Interest 

Services at O’Melveny & Myers LLP. Jeffrey Ball is the founder, president, and 

chief executive officer of Friendly Hills Bank, a community bank based in 

Whittier. The views expressed in this article are those of the authors alone.
THE CORRECT WAY TO ACCEPT PAYMENTS!

Trust your credit card transactions to the only merchant account provider recommended by 32 state and 48 local bar associations!

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