Crossing Borders

Los Angeles lawyer Jeff Dasteel and Natalia de la Parra Ferreiro discuss the risks that foreign attorneys face when representing clients in arbitrations in California. page 18
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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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At the approach of the holiday season, it is fitting that we lawyers consider the legal aspects of holidays in California. California law relating to holidays is a patchwork codified in the Civil Code, the Code of Civil Procedure, and the Government Code. Government Code 6700 lists the official holidays in California. Code of Civil Procedure Section 135 lists the “judicial” holidays, and Civil Code Sections 12a and 12b relate to how holidays are considered when computing time for legal acts. The law has its quirks. For example, while Sections 135 and 12a treat all of Saturday as a holiday, under the Government Code Saturday is a holiday only from noon to midnight. Good Friday is also listed as an official state holiday under Government Code 6700, but only from noon to 3 P.M. Strangely, under Civil Code Section 7.1(o) banks get to treat Good Friday as a holiday from noon to closing—yet another instance of the legislature’s curry favoring powerful financial interests. Perhaps the issue is moot, since back in 1976 in Mandel v. Hodges, the California appellate court ruled that treating Good Friday as a holiday was unconstitutional as an excessive entanglement with religion. Still, one wonders why Good Friday remains listed as an official holiday since Government Code Section 6700 and Civil Code Section 7.1 have been amended in other respects after Mandel, but no one deleted “Good Friday.” In case you were wondering, Christmas gets a pass as a legally recognized holiday since, as the U.S. Supreme Court stated in Lynch v. Donnelly, the holiday “contains both secular and sectarian elements.”

Martin Luther King Day has its quirks too. Government Code Section 6700(c) makes the third Monday in January the official state holiday—this year, it was January 21. But Government Code Section 6709 requires the governor to proclaim every January 15 as Dr. Martin Luther King, Jr., Day. So, most years we will get two King days, unless the third Monday in January of a particular year happens to be January 15.

The Government Code requires the governor to make proclamations for other days that are not quite legal holidays. These days of commemoration reveal conflicting visions of who we are as a people. For example, September 28 of each year is Cabrillo Day in California. Juan Rodriguez Cabrillo was the first European to lay eyes on San Diego harbor. Some—including the Library of Congress Web site—say he “discovered” California. Before that, he was one of Cortez’s conquistadors. However, Friar Bartolome de las Casas, who witnessed and chronicled the early years of Spanish colonization of Central America and strove to end the abuse of natives, wrote of Cabrillo that “he broke up homes,” taking the indigenous women and girls and “giving them to the soldiers and sailors in order to keep them satisfied and to bring them into his fleet.” Ironically, the day before Cabrillo Day this year was Native American Day, yet Cabrillo Day remains intact.

California’s newest day of commemoration, first proclaimed by Governor Arnold Schwarzenegger in 2010, is Ed Roberts Day. If you are unsure who Ed Roberts was, I would urge you to look him up. I think you will agree that his life is worthy of commemoration.
Strategies for Success in Professional Networking

**WHETHER A LIFE-OF-THE-PARTY** extrovert or a couch potato introvert, everyone would like to know how to take the work out of networking. Since it continues to be one of the best means to obtain clients and referrals, however, networking remains vitally important to new and experienced attorneys alike. A step-by-step strategy is advantageous to preparing a case for trial or undertaking a corporate merger, and it can make networking look easy, even if it still takes work.

When at a gathering, the first step is to find people who are alone. Even if one enjoys approaching and talking to small groups of people, it is much easier to relate with one person than with two or more. A basketball analogy may help. When passing, it is counterproductive to throw the ball to a teammate who is guarded by opposing players. Finding the open player—or in this case, the open lawyer—tends to achieve greater success. It is less challenging to engage in conversation with one person at a time. Even if one enjoys juggling dialogue with multiple people, talking to one person allows for a more focused discussion. This can be preferable to dividing one’s attention among several people, or worse, competing for attention.

Once engaged in conversation, start with the fundamentals. Make an introduction and mention the name of the firm for which you work. After that, ask where the other person works and in what area of law he or she specializes. Make small talk. This is not a deposition or a witness interview, but it is nonetheless a good opportunity to obtain basic personal and professional information. Sometimes, after exchanging the initial pleasantries, it may be difficult to know in which direction to take the conversation, but because networking is about building relationships, it is important to remain genuine. Therefore, if the other person happens to mention anything that piques an interest, start a discussion about that topic. From a hobby to children, most people have a subject that they like to discuss. It helps to ask open-ended questions since these tend to elicit more information about the other person than yes-no questions. When parting, it is important to remember to exchange business cards.

As a second step, once the other person’s basic information is in hand, follow up with an e-mail. In the message, try to include a specific detail from the initial conversation. Precise particulars will turn the e-mail from an exercise in how to copy and paste into a personal contact. Send an e-mail immediately after the event or first thing the next morning. Reaching out right away makes the right impression. To make an especially good impression, it can be preferable to send a handwritten note rather than e-mail. Taking the time to prepare a communication by hand always demonstrates greater consideration. The recipient will remember someone better after receiving a personal note card in the mail.

After establishing a first written contact, either by e-mail or regular post, it is helpful to enter the recipient’s information into your contact list and to include a photo to keep your memory of the person fresh. Use the Internet to find photographs. Nearly every lawyer has a page or something similar on a Web site that comes with a photo. Microsoft Outlook has a photo box with which you can attach the photo to the contact. This procedure makes it much easier to remember faces and names, and a photo serves to identify the person later when you reach out to him or her again. As a third step, before the next gathering, it is important to remember names, review a contact list with photos. This will help to avoid the embarrassing situa-

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**Whether you are referring an expert witness or a plumber, help people make connections. Establish relationships among your friends, family, and coworkers. Any time you hear someone say, “I need a...” be prepared to seize the opportunity to assist.**

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**Everyday Networking**

Networking does not need to occur only within the confines of preestablished events. Whether you are referring an expert witness or a plumber, help people make connections. Establish relationships among your friends, family, and coworkers. Any time you hear someone say, “I need a...” be prepared to seize the opportunity to assist. Your associates will come to you as a trusted wealth of knowledge, and possibly they will recommend you as an attorney within their own network. On a similar note, strike up a conversation with the person in front of you in line at the grocery store. Or the next time you dine at a restaurant alone, sit at the counter in order to talk to the person next to you. A valuable contact or client could materialize out of even the most random conversation.

With a plan in mind, networking can become a pleasurable and profitable experience. Every new contact may have a client, colleague, or associate who needs a lawyer who specializes in your field of law. Alternatively, the contact may have expertise that can contribute to your practice. Whatever one’s age or experience, networking is indispensable for obtaining new business.

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**Tiffany J. Howard** is an associate at Kiesel Law in Beverly Hills, where she focuses on class actions and litigating wrongful death cases.
THE PAROL EVIDENCE RULE, subject to certain exceptions, limits the interpretation of a contract to its “four corners” and excludes such extrinsic evidence as oral statements that conflict with the terms of the signed writing. The parol evidence rule and its exceptions are codified in California in Code of Civil Procedure section 1856. One well-established exception is fraud in the inducement of the agreement, but in 1935 the California Supreme Court, in Bank of America v. Pendergrass,1 held that the alleged false promise was inadmissible if it was directly at variance with what was in the written contract. Since then, with regard to allegations of false promises, parties to written contracts have been able to rely on the signed agreement as a defense. However, earlier this year the supreme court reversed course and retired the Pendergrass rule.

The court's decision in Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association2 overruled this long-standing principle of law and may not only increase and prolong litigation but also may reshape the procedures for entering into valid and enforceable written agreements. By overruling Pendergrass, the supreme court opened the door to challenges of written contracts with evidence of oral statements that conflict with the promises of performance set forth in the executed agreements. The significance of Riverisland is corroborated by the subsequent court of appeal decision in Julius Castle Restaurant, Inc. v. James Frederick Payne,3 which gave Riverisland an expansive interpretation. From a transactional standpoint, henceforth, parties that enter into sophisticated contractual arrangements need to exercise greater caution in executing agreements. From a litigation standpoint, Riverisland and its progeny will tend to make it harder to dispose of fraud claims on the pleadings. The two cases do explicitly leave the door open to pretrial challenges to a plaintiff’s justifiable reliance on promises that are at odds with those stated in the written contract, but it is nonetheless hard to underestimate the possible impact the two cases will have on the formation and enforcement of contracts in California.

The Parol Evidence Rule

The parol evidence rule prohibits the introduction of any extrinsic evidence to alter, vary, or add to the terms of a written agreement.4 Under the rule, the terms of a writing intended by the parties as a final and integrated expression of their agreement cannot be contradicted by extrinsic evidence, including prior oral statements or contemporaneous oral agreements.5 The rule is a longstanding, well-known principle that promotes fairness and predictability by encouraging parties to specify the entirety of their agreements in writing.6 As the court in Riverisland stated, “[W]hen the parties put all the terms of their agreement in writing, the writing becomes the agreement, and the written terms supersede statements made during negotiations.”7 The parol evidence rule “is based on the assumption that written evidence is more accurate than human memory and the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts.”8 Moreover, by limiting a dispute to the applicable written agreement, California courts benefit from reduced litigation. As the supreme court has noted, the parol evidence rule also protects the integrity of written contracts by making their terms the exclusive evidence of the parties’ agreement.9

Nevertheless, the parol evidence rule does not always exclude extrinsic evidence, including oral agreements. Specifically, Code of Civil Procedure Section 1856(f) states that “where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue.”10 As the Riverisland court noted, “This provision rests on the principle that the parol evidence rule, intended to protect the terms of a valid written contract, should not bar evidence challenging the validity of the agreement itself.”11 The court added, “Evidence to prove that the instrument is void or voidable for mistake, fraud, duress, undue influence, illegality, alteration, lack of consideration, or another invalidating cause is admissible as such evidence. This evidence does not contradict the terms of an effective integration, because it shows that a purported instrument has no legal effect.”12 It is an established exception to the parol evidence rule that a party

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may present extrinsic evidence to show that the agreement was tainted by fraud. However, despite this broad categorical exception, Pendergrass restricted for nearly 80 years the applicability of the fraud exception to cases of alleged promissory fraud—that is, cases in which the alleged misrepresentation is not of an existing fact but instead a promise to act (or refrain from acting) in a certain way in the future.

**Pendergrass**

The court in Pendergrass restricted the applicability of the fraud exception as a means to introduce extrinsic evidence by holding that “evidence offered to prove fraud must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing.” Thus, according to the Pendergrass court, evidence of promissory fraud based on oral agreements that conflicted with the terms of the written agreement was not admissible under the fraud exception to the parol evidence rule. This restriction, while not directly overturned, was attacked and criticized by many California courts. As the court in Riverisland noted, “The primary ground of attack on Pendergrass has been that it is inconsistent with the broad principle, reflected in Code of Civil Procedure Section 1856, that a contract may be invalidated by a showing of fraud.” Another court has observed that “One noted impact of the Pendergrass holding was that the parol evidence rule effectively immunized against liability for both prior and contemporaneous statements at variance with the written contract, and it implied that the alleged wrongdoer is innocent of fraud.” In overruling Pendergrass, the court in Riverisland abandoned this strict limitation.

**Riverisland**

In Riverisland, the plaintiffs defaulted under the terms of a loan obtained from defendant Fresno-Madera Production Credit Association (FMPCA). The plaintiffs and FMPCA agreed to a forbearance agreement whereby FMPCA agreed that it would refrain from taking enforcement action for three months. In exchange, the plaintiffs agreed to make payments and pledged eight separate parcels of real property as additional collateral. The plaintiffs initiated pages bearing the legal description of each piece of property that was being pledged; however, the plaintiffs did not read the agreement but simply signed it at the locations tabbed for signature. The plaintiffs alleged that they did not know that the document they were signing contained terms that differed from the terms that they had discussed with FMPCA’s executives.

The plaintiffs alleged that FMPCA’s vice president met with them two weeks prior to the execution of the agreement and told them that FMPCA would extend the loan agreement for two years and that two pieces of property were all that was needed for collateral. Moreover, the plaintiffs alleged that these assurances were repeated at the execution of the forbearance agreement. Although the plaintiffs defaulted under the terms of the forbearance agreement, causing FMPCA to initiate foreclosure proceedings, they ultimately repaid the loan, and FMPCA dismissed the foreclosure action. Despite this resolution, the alleged misrepresentations of FMPCA’s officer concerning the terms of the agreement were the basis for the plaintiffs’ action for fraud and negligent misrepresentation.

FMPCA moved for summary judgment, arguing that any evidence contrary to the terms of the written agreement was to be excluded pursuant to the parol evidence rule. The trial court agreed and, citing Pendergrass, ruled that the fraud exception to the parol evidence rule does not allow parol evidence of promises that are at odds with the terms of the written agreement.

The court of appeal reversed, and the supreme court affirmed the reversal, referring to Pendergrass as an “aberration” and stating that such a restriction on the fraud exception was inconsistent with the statute and settled case law.

The court noted that “although a written instrument may supersede prior negotiations and understandings leading up to it, fraud may always be shown to defeat the effect of an agreement.” In overturning Pendergrass, the Riverisland court added that Pendergrass “failed to account for the fundamental principle that fraud undermines the essential validity of the parties’ agreement.” The court continued, “When fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds.” In affirming the court of appeal’s reversal of a summary judgment based on the exclusion of the oral statements by FMPCA’s representatives, the court opined, “the parol evidence rule should not be used as a shield to prevent the proof of fraud.” Thus, it is now established law in California that, even in cases of promissory fraud, extrinsic evidence that differs from the terms of a written agreement may be admitted to support a cause of action for fraud.

Riverisland is a recent case that has not yet been widely cited by other courts. Nevertheless, in Julius Castle Restaurant the court of appeal affirmed a trial court’s admission of parol evidence in connection with alleged fraud relating to a lease agreement, citing Riverisland. Specifically, the court noted that Riverisland established that oral statements that conflicted with the lease terms were admissible under the statutory exception for fraud found in Section 1856(g). The court in Julius Castle Restaurant looked back to the Riverisland decision and provided more direction for parties making contracts in a post-Riverisland world.

The Julius Castle Restaurant court rejected claims by the defendants that Riverisland requires that the circumstances of each case and the bargaining power and sophistication of the parties to be considered in determining whether or not to admit extrinsic evidence concerning fraud. In deciding not to limit the application of Riverisland by excluding sophisticated parties the court observed, “[O]ur high court sought the opposite result, namely, to create certainty and consistency by eliminating altogether the judicially created exception to section 1856, subdivision (g).” The court similarly rejected the notion that Riverisland should only be applied to “contracts of adhesion where there is a disparity in bargaining power,” stating that the Riverisland court “did not limit its holding to contracts of adhesion and we decline to read such a limitation into the decision.” In short, the court was clear and adamant in declining “to carve out an exception to the Riverisland holding that the court itself did not endorse.”

While the court declined to carve out exceptions, it did provide some guidance to those seeking to dispose of claims that previously would have been subject to the Pendergrass rule. The key, the court indicated, lies in “addressing the heightened burden of proving fraud in a civil action” and, in particular, in focusing on the “justifiable reliance element of fraud.” As the court stated, “Among the questions to ask are: What are the plausible reasons for the alleged discrepancy between the claimed oral promises and the signed writing? Is there compatibility between the oral representations and the written document? What is the evidence relating to whether the document was read and considered before signing?” Since these questions generally implicate issues of fact, pretrial battles over promissory fraud claims that once would have been subject to Pendergrass will likely shift from pleadings to summary judgment.

**After Riverisland**

As a result of Riverisland and its progeny, companies that routinely enter into commercial contracts with their customers, vendors, clients, and strategic partners must be more careful than before. Precontractual negotiations, discussions, and other oral state-
ments are made in connection with all written agreements. The key to making deals after Riverisland is to ensure that the terms of the arrangement are documented in a written contract that is the complete integration of the agreement and that there is no need to introduce oral statements or other extrinsic evidence.

Practitioners with clients seeking to avoid fallout from Riverisland ought to advise them to take significant steps to avoid misunderstandings, confusion, and ambiguity regarding deal terms, thereby decreasing the risk that a court may undercut the enforceability of a written contract. To mitigate risk, it is recommended that attorneys and clients take the following precautionary measures: 1) develop a systematic process with respect to preparing written agreements to document and accurately reflect deal terms, 2) limit the number of company representatives that are responsible for explaining and discussing agreements with customers, 3) provide all parties with multiple opportunities for consultation with professional advisers and include written representations in the agreement to that effect, 4) provide the client or customer with execution versions of all written contracts well in advance of any scheduled signings, 5) avoid “take it or leave it” sales pressure tactics, 6) require that key contract provisions be initialed, 7) be sure that all contract agreement provisions clearly represent the terms of the deal, 8) include a clear and understandable discussion of an integration clause that puts the other party on notice that the written contract constitutes the final terms of the deal and that prior oral discussions that may conflict with the terms of the written document are not a part of the final agreement, 9) to the extent resources allow, have more than one employee present during all contract discussions and negotiations, and 10) strenuously advise that all parties read the written contract. These precautionary measures, if properly implemented, will provide clients with added reassurance that they can rely on the terms of their written agreements.

1 Bank of Am. v. Pendergrass, 4 Cal. 2d 258 (1935).
4 Id. at 1439 (citing Casa Herrera, Inc. v. Beydoun, 32 Cal. 4th 336, 343 (2004)).
6 Julius Castle, 216 Cal. App. 4th at 1439.
7 Riverisland, 55 Cal. 4th at 1174.
8 Julius Castle, 216 Cal. App. 4th at 1439.
9 Riverisland, 55 Cal. 4th at 1171-72.
11 Riverisland, 55 Cal. 4th at 1174 (emphasis in original).
12 Id. at 1174-75 (citing 2 Witkin, Cal. Evidence §97, Documentary Evidence 242 (5th ed. 2012)).
13 Riverisland, 55 Cal. 4th at 1172; Code Civ. Proc. §1856(g).
14 Riverisland, 55 Cal. 4th at 1172 (citing Bank of Am. v. Pendergrass, 4 Cal. 2d 258, 263 (1935)).
15 Riverisland, 55 Cal. 4th at 1172, 1176-77.
16 Id. at 1176.
18 Riverisland, 55 Cal. 4th at 1172.
19 Id. at 1172-73.
20 Id. at 1173.
21 Id.
22 Id.
23 Id. (citing Bank of Am. v. Pendergrass, 4 Cal. 2d 258, 258 (1935)).
25 Id. at 1181 (citing Fleury v. Ramacciotti, 8 Cal. 2d 660, 662 (1937)).
26 Riverisland, 55 Cal. 4th at 1182.
27 Id.
28 Id. at 1182 (citing Ferguson v. Koch, 204 Cal. 342, 347 (1928)).
30 Id. at 1439-40.
31 Id. at 1441.
32 Id.
33 Id. at 1442.
34 Id.
35 Id.
The CDA as a Safe Harbor for Interactive Computer Service Providers

WHEN CECILIA BARNES BROKE UP WITH HER BOYFRIEND, he went “post-all,” posting Barnes’s personal information, including nude photos, in Yahoo profiles that he created without her permission. As the court in *Barnes v. Yahoo!* observed, “The profiles contained...solicitation...to engage in sexual intercourse.”1 “The ex-boyfriend then conducted discussions in Yahoo’s online ‘chat rooms,’ posing as Barnes and directing male correspondents to the fraudulent profiles he had created.”2 The profiles included Barnes’s contact information, including her work address and phone number. “Before long, men whom Barnes did not know were peppering her office with emails, phone calls, and personal visits, all in the expectation of sex.”3

In this situation, Section 230 of the Communications Decency Act (CDA) would protect Yahoo from having to remove the content.4 The CDA protects interactive computer services such as Yahoo from liability when they publish a third party’s statements. The act establishes that interactive computer services providers are immune from liability regarding information provided to them by third parties.5

In April 2013, a false tweet from a hacked Associated Press Twitter account stated that the White House had been attacked and the president was injured.6 This actually led to a dip in the stock market.7 A Pew Research Center report found that a quarter of Americans and more than half of 18- to 29-year-olds got their news about the April 2013 Boston Marathon Bombing and its aftermath from social media.8 Twitter is most likely protected from a third party’s posts because of Section 230(c) of the CDA. Recent cases interpreting the CDA help explain the broad immunity afforded interactive service providers and what steps providers should take to avoid losing that immunity.

Section 230(c)(1) of the CDA offers service providers broad protection by precluding courts from treating them as publishers of the information on their sites: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”9

The statute defines an interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”10 Examples of immunized interactive computer services include Facebook, Twitter, Yahoo, and Reddit.

While Congress immunized providers of computer services, it did not seek to prevent tort liability for those who actually provide or write the content. The CDA defines a nonimmunized information content provider as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”11 This may include a person who posts an allegedly defamatory comment on a Web site or a reporter who publishes a news story online.

One of the first cases to interpret the CDA came in the wake of the Oklahoma City bombing. In *Zeran v. America Online, Inc.*, just days after the Oklahoma City Bombing in 1995, a message appeared on an AOL Bulletin Board advertising, “‘Naughty Oklahoma T-Shirts!!!’”12 with slogans such as “‘Visit Oklahoma.... It’s a BLAST!!!,’” “‘Putting the kids to bed...Oklahoma 1995,’” and “‘McVeigh for President 1996.’”13 Interested parties were told to call Kenneth M. Zeran, whose phone number was provided. Zeran had nothing to do with the ad.

Zeran received many angry phone calls, including death threats. Since he ran his business out of his home, he could not change his phone number. Zeran contacted AOL, which removed the offending post. The message returned with additional slogans. In addition to filing a separate suit against a radio station that aired the contents of the message, Zeran sued AOL seeking to hold it liable for the defamatory postings of a third party. AOL asserted Section 230 as an affirmative defense. Zeran claimed that he was unable to find the person who posted the messages since AOL “fail[ed] to maintain adequate records of its users.”14

Interpreting the CDA, the Fourth Circuit refused to subject computer service providers to distributor liability, holding that Section 230 of the statute preempted Zeran’s defamation claims and that AOL could not be held liable as the “publisher.”15 The court also held that AOL could not be held liable based on the fact that it had received “notice” of defamatory material because, in creating the immunity in Section 230, Congress “made a policy choice...not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”16 Imposing this type of liability for defamation, the court explained, would create an impossible burden for computer service providers who:

would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.17

Moreover, from a public policy perspective, the court was concerned about a chilling effect against the First Amendment since service providers would tend to err on the side of caution and remove messages once they receive a notification, regardless of whether they were actually defamatory. Anyone who disagreed with someone’s unpopular message could contact AOL, and service providers such as AOL would be incentivized to remove the objectionable statement in order to avoid liability. Finally, the court was concerned that dis-

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tribute-based liability would lead to less self-regulation by service providers since “[a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability.”

Courts have given wide latitude to computer service providers who have some involvement with the authors of defamatory material before considering the providers themselves “publishers.” In Carafano v. Metrosplash.com, Inc., a Ninth Circuit case, a man in Berlin created a fake profile on a dating Web site for a Star Trek actress, Chase Masterson (her legal name is Christiane Carafano), with her photo and home address. As a result of the profile created on Match.com, Masterson “found a highly threatening and sexually explicit fax that also threatened her son.” Masterson contacted the site to remove the profile, but Matchmaker.com did not remove the profile immediately, stating ironically that only profile creators can authorize the removal of a profile. The profile was eventually removed, and Masterson sued Matchmaker.com for several causes of action, including invasion of privacy and defamation. The company asserted the affirmative defense that under “[Section] 230(c)...as long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.”

Although some information in Carafano’s profile was entered in response to questions posed by the site, most of the content, such as personal details, was up to the profile creator. “Matchmaker was not responsible, even in part, for associating certain multiple search responses with a set of physical characteristics, a group of essay answers, and a photograph.”

Although the user provided Carafano’s address and other details through the Web site, they were “transmitted unaltered to profile viewers.” Matchmaker.com did not have a role in editing the responses entered. “Similarly, the profile directly reproduced the most sexually suggestive comments in the essay section, none of which bore more than a tenuous relationship to the actual questions asked.” Since a user created the content, the user rather than the interactive computer service was responsible for the content. Matchmaker.com therefore “did not play a significant role in creating, developing or ‘transforming’ the relevant information.” The court held that the dating Web site was not an information content provider but rather an interactive computer service since it allowed the public to post information on its Web site. Therefore, the court held that Section 230(c) provided a safe harbor to Matchmaker.com.

More recently, in 2011, a woman sued the dating Web site Match.com after she met and dated a serial murderer through the site who later attacked her. In Beckman v. Match.com, the court held that Match.com would not be subject to liability since it was protected by Section 230. The court applied the act’s three-part test for whether immunity applies to a Web site operator: “(1) it is an ‘interactive computer services’ provider; (2) it is not an ‘information content provider’ with respect to the conduct at issue; and (3) the plaintiff seeks to hold the website operator liable on account of information originating from a third-party user of its services.” Although the pair met through the site, the content originated from third parties who entered the profiles, not from the site. Thus, Match.com was not an information content provider. Rather, the site was a provider of interactive computer services. “The fact that a website may have created certain features that enabled a user to post the content in question is irrelevant.” In other words, Match.com was a passive forum where users could communicate and thus could not be held responsible for what happens as a result of the information exchange.

In another case, Okeke v. Cars.com, a user who paid for a truck but never received it sued Cars.com, the source site, based on three negligence theories that the site: “failed to ensure the legitimacy of users’ listings or advertisements;...failed to post adequate and proper notices and/or warnings to users about responding to listings or advertisements on the website; and...failed to promptly remove a listing after receiving notification that the listing was fraudulent.” The New York state court held that Cars.com was an interactive computer service under Section 230 and thus immune from liability since it was a forum in which consumers could make purchases. The court also held that the content originated with the users; thus, Cars.com was not an information content provider. Finally, the court held that under the CDA a site such as Cars.com is immune from the “traditional editorial functions of a publisher...such as deciding whether to publish, withdraw, postpone or alter content.” Thus, Cars.com is protected from being responsible for fact-checking postings to ensure they are accurate.

Section 230 immunity has even applied when an interactive computer service, AOL, had a contract and paid the author of the allegedly defamatory statements who even reserved the right to edit his reports. In Blumenthal v. Drudge, Matt Drudge’s site, the Drudge Report, published a story alleging that Sidney Blumenthal, an assistant to President Clinton, had physically abused his wife, Jacqueline Jordan Blumenthal, who also worked at the White House. When the article was published, Drudge had a licensing agreement with AOL whereby AOL members received the Drudge Report, and every month AOL paid Drudge a “royalty payment” of $3,000.

The court noted that to the extent that AOL contributed information to the story, as in the case where two or more authors contribute to an article, the CDA would not be a safe harbor. However, the court found that AOL did not create the information in the Drudge Report and that the information was posted “without any substantive or editorial involvement by AOL.” However, unlike the other CDA cases explored in this article, this was not just an anonymous individual with a rogue comment posted on a message board. AOL entered into a contract with Drudge and “promoted it to its subscribers and potential subscribers as a reason to subscribe.” Moreover, AOL reserved the right to remove or to ask Drudge to remove any material that it determined violated its terms of service. The contract allowed AOL to “require reasonable changes to...content, to the extent such content will, in AOL’s good faith judgment, adversely affect operations of the AOL network.” As the plaintiffs asked, “Why should AOL be permitted to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip ‘instantly accessible’ to AOL subscribers, and then claim immunity when that person, as might be anticipated, defames another?”

The court was sympathetic to plaintiffs’ argument but rejected it based on the broad language of the statute. The court explained, “If it were writing on a clean slate, this Court would agree with plaintiffs.” While the court saw AOL’s role much more like a publisher than a common carrier with no liability for what is spoken over its wires “[b]ecause it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor.” But the court could not reach its decision in a vacuum and therefore had to accede to the CDA, which immunizes interactive service providers even when they take “an active, even aggressive role in making available content prepared by others.” Thus, contemporary Drudges, bloggers paid by a Web site, would thus still face liability under Section 230(c)(1), but their sponsoring Web site likely would not.

Limitations to CDA Protections

In Fair Housing Council v. Roommates.com, the court held that the CDA did not apply as a safe harbor to an interactive online
provider who had a questionnaire alleged to have violated the Fair Housing Act (FHA). However, the provider, Roommates.com, was immune under the CDA for its “Additional Comments” section of the questionnaire because this was an open-ended essay. Roommates.com offered searchable listings for people looking for housing. In order to use the Web site, a user was required to create a profile by answering the Web site’s queries. The questions were basic, but “[e]ach subscriber must also describe his preferences in roommates with respect to the same three criteria: sex, sexual orientation and whether they will bring children to the household.”

Two Fair Housing Councils sued the company that owned Roommates.com, claiming that the site violated the FHA and the equivalent California law, which “prohibits discrimination on the basis of sexual orientation, marital status” and other protected groups. If the Web site operator creates content, “or is ‘responsible, in whole or in part’ for creating or developing content, the website is also a content provider.”

Although the court took a bold approach in carving out an area where Section 230(c) did not apply, the court was careful to show its decision was consistent with the statute, noting that “close cases...must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites.” The court compared the “Additional Comments” section to search engines since “both involve a generic text prompt with no direct encouragement to perform illegal searches or to publish illegal content.” If a Web site operator “passively displays content that is created entirely by third parties, then it is only a service provider.”

The court held that since Roommates.com created the questions and answer choices, it was the “information content provider” as to the question and could claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services.

Although the case took a bold approach in carving out an area where Section 230(c) did not apply, the court was careful to show its decision was consistent with the statute, noting that “close cases...must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites.” The court compared the “Additional Comments” section to search engines since “both involve a generic text prompt with no direct encouragement to perform illegal searches or to publish illegal content.” If a Web site operator “passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content.”

This was the function that Roommates.com served with respect to the “Additional Comments” section, because it did not edit the comments before the publication nor even instruct users what content should be included in that section. While this case is significant in that it shows that courts are willing to take a closer look at the boundaries of Section 230(c), the decision does not alter cyber-space. Most Web sites do not involve questionnaires but rather open-ended sections where people can express their thoughts. Thus, social media sites still have broad immunity for what is published online.

Another limitation on the CDA can occur when a computer service provider promises to take action in response to defamatory material on its Web site. In *Barnes v. Yahoo!* the plaintiff contacted Yahoo to take the false profile down and followed Yahoo’s policies of mailing to Yahoo a copy of her photo ID with a signed statement requesting the profiles be removed. After no response from Yahoo for a month, Barnes mailed a letter requesting removal of the profiles and, a month later, sent two letters requesting that the profile be removed. Finally, a day before a local TV news story would air Barnes’s story, Yahoo agreed to remove the profile. In fact, Yahoo’s Director of Communications notified Barnes that “she would ‘personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it.’” Yet, it was not until Barnes sued the company that Yahoo took down the profiles.

In its defense, Yahoo asserted protection under Section 230(c) of the CDA. And, consistent with other cases in which the statute was applied, the Ninth Circuit held that since plaintiff’s claim of “negligent undertaking was premised on treating defendant as a ‘publisher’ of the unauthorized profiles,” Section 230(c)(1) did preclude liability. However, the Ninth Circuit also noted that “insofar as Barnes alleges a breach of contract claim under the theory of promissory estoppel, subsection 230(c)(1) of the Act does not preclude her cause of action.” The promissory estoppel claim “derives not from defendant’s publishing conduct, but from defendant’s ‘manifest intention to be legally obligated to do something....’” This legal duty is distinct from the act of publishing, and thus falls outside of the protections offered by Section 230(c)(1).

On remand, the District Court of Oregon considered Barnes’s amended complaint alleging breach of contract based upon promissory estoppel and rejected Yahoo’s motion to dismiss. The elements of promissory estoppel under Oregon law are “1) a promise; 2) which the promisor could reasonably foresee inducing the sort of conduct which occurred; 3) actual reliance on the promise; 4) resulting in a substantial change in the promisee’s position.” As to the first prong, Barnes asserted that Yahoo promised to remove the profiles. The court reasoned that the second prong was met because Yahoo’s Communications director, in saying she “would personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it,... intended for plaintiff to react to the promise by calling the reporter and diffusing the story” before it appeared on TV. After all, Yahoo knew about the story, since the reporter also called Yahoo for comment.

For the third prong, despite the fact that Barnes never used “the term ‘reliance,’ one can infer that plaintiff called the reporter, 
informing [the reporter] defendant was indeed going to remove the profiles, in reliance on defendant’s promise to plaintiff that it would remove the profiles.”59 For the fourth prong, the court noted that despite the fact that the profiles were on the Web both before and after the alleged promise and reliance at issue in the case, “plaintiff’s position could have nonetheless substantially changed in that the profiles remained on the web longer than they would have absent plaintiff’s reliance.”60 Finally, the court held that “strangers viewed the profiles and subsequently contacted plaintiff after the profiles would have been removed by defendant (had plaintiff not called the reporter).”61 Barnes demonstrates that a plaintiff can potentially circumvent the CDA’s broad protections if the interactive service provider promises to remove content. However, had Yahoo never promised to remove the content, Barnes would not have been able to assert the breach of contract claim.

Thus, although the Internet may no longer be described as “new and burgeoning,”62 courts would likely still reject a notice-liability framework. Interactive computer service sites present opportunities not only for the evolution of technology but also of the law. Zeran described an internet that was “burgeoning”63 in 1997, but more than a decade later in Roommates.com the court said that “the Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled.”64 Nevertheless, as courts have continued to apply the CDA, in order for an interactive computer service provider to be found liable and not shielded by the CDA, it would either have to appear to elicit the objectionable information or, potentially, to make a promise to remove the offending material and then break that promise. It is noteworthy in this context that Barnes had the leverage of an impending news story depicting her experience. Thus, it is important to keep a close look at how the law can continue to incentivize interactive computer services to promote the free exchange of ideas without the costly price of defamation and invasion of privacy suits. As the law currently stands, the CDA will continue to pose a challenge to victims of online revenge postings who turn to the courts for help.

1 Barnes v. Yahoo!, Inc., 570 F. 3d, 1096 (9th Cir. Or. 2009).
2 Id. at 1098.
3 Id.
5 Id.

Zeran, 129 F. 3d at 329 n.1.
Id. at 332.
Id.
Id. at 333.
Id.
Carafano v. Metrosplash.com, Inc., 339 F. 3d 1119 (9th Cir. 2003).
Id. at 1121.
Id.
Id. at 1124.
Id.
Carafano v. Metrosplash.com, Inc., 339 F. 3d 1119, 1125 (9th Cir. 2003).
Id.
Id.
Id. at *8.
Id. at *9.
Id. at *4.
Id. at *8-9.
Id. at 46.
Id. at 47.
Id. at 50.
Id.
Id. at 51.
Id. at 51.
Id.
Id.
Fair Hous. Council v. Roommates.com, LLC, 521 F. 3d 1157, 1163 (9th Cir. 2008).
Id. at 1161.
Id. at 1162.
Id.
Id. at 1164.
Id. at 1174.
Id. at 1162.
Id. at 1173-74.
Barnes v. Yahoo!, Inc., 570 F. 3d 1096, 1099 (9th Cir. Or. 2009).
Id.
Barnes, 570 F. 3d, at 1109.  
Barnes, 2009 U.S. Dist. LEXIS 116274, at *7 (internal citations omitted).
Id. at *5.
Id. at *10, *11 n.4.
Id. at *10-11.
Id. at *13.
Id.
Id.
A FUNDAMENTAL FEATURE of private arbitration is a party’s autonomy to design an arbitration procedure suitable for resolving the dispute. A key procedural issue associated with party autonomy is the right to choose one’s representatives. Most arbitration rules expressly provide for freedom of representation without regard to whether the representative is an attorney licensed to practice law in the jurisdiction where the arbitration takes place (or anywhere else).¹ However, in California, except with respect to limited statutory exceptions, party representatives to arbitrations either must be attorneys licensed to practice law in California or out-of-state attorneys who have completed a required certificate and have gained the approval of the arbitral tribunal before which they wish to appear.

The out-of-state attorney arbitration counsel certification process is available only to attorneys licensed to practice law in the United States. The result is that, unlike all other major international arbitration jurisdictions in the world, non-U.S. attorneys are not authorized to represent parties in international arbitrations held in this state. In addition, because the out-of-state attorney arbitration counsel program was established under California’s domestic arbitration law, it is questionable whether the program extends to international arbitrations, which are governed by the California International Arbitration and Conciliation Act. The California State Bar’s implementation of the program is ambiguous on this point.

California’s Business and Professional Code makes it a misdemeanor for an individual who is not an active member of the State Bar to practice law in California.² In Birbrower v. Superior Court,³ the California Supreme Court determined that California’s attorney licensing requirement applies to representation in arbitration proceedings held in California:

We decline Birbrower’s invitation to craft an arbitration exception to section 6125’s prohibition of the unlicensed practice of law in this state. Any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law.⁴

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The attorneys in the Birbrower case did not actually participate in a California-based arbitration because the matter settled after having filed the arbitration demand but before any hearings took place. The California Supreme Court’s dicta nonetheless were read to prohibit out-of-state attorneys from representing parties in arbitrations in California unless they satisfy the statutory requirements.

The Legislative Response

In response to the supreme court’s decision in Birbrower, the state legislature enacted Code of Civil Procedure Section 1282.4(b), which provides a procedure so that “an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state.” The procedure requires the completion of a certificate to be filed with the arbitrator, opposing counsel, and the State Bar within a reasonable period after the out-of-state attorney indicates an intent to appear in the California arbitration.5 The State Bar receives about 800 certificates each year, reflecting a nontrivial level of compliance.6

The California Rules of Court also were revised to reflect the creation of the Out-of-state Attorney Arbitration Counsel program.7 Under Rule of Court 9.43, an out-of-state attorney is eligible for the program if the attorney is:

1. Not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in the course of, or in connection with, an arbitration proceeding in this state;
2. Has served a certificate in accordance with the requirements of Code of Civil Procedure section 1282.4 on the arbitrator, the arbitrators, or the arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney; and
3. Whose appearance has been approved by the arbitrator, the arbitrators, or the arbitral forum.8

The arbitrator’s decision to approve the out-of-state attorney’s certificate appears to be discretionary. Based on the information provided in the certificate, “The arbitrator, arbitrators, or arbitral forum may approve the attorney’s appearance if the attorney has complied with subdivision (d).”9 The out-of-state attorney must certify, among other things, that “the attorney is not regularly engaged in substantial business, professional, or other activities in the State of California” and “If the attorney has made repeated appearances, the certificate shall reflect the special circumstances that warrant the approval of the attorney’s appearance in the arbitration.”10

The statute provides that “[i]n the absence of special circumstances, repeated appearances shall be grounds for disapproval of the appearance and disqualification from serving as an attorney in the arbitration in which the certificate was filed.”11 Accordingly, at a minimum, the arbitrator must make a determination that the out-of-state attorney meets the requirements to participate in the program, including, apparently, a factual finding that special circumstances warrant approval in the event of repeated appearances in California arbitrations. It is unclear what recourse, if any, an out-of-state attorney has if the arbitral tribunal denies an application for a certificate.

Consequences for Failure to Comply

Attorneys or other persons who represent parties in California-based arbitrations when they either are not licensed to practice law in California or have not obtained an approved out-of-state attorney arbitration counsel certificate violate Business and Professions Code Section 6125 and are guilty of a misdemeanor punishable by up to one year in jail and a fine of $1,000.12 Under the Birbrower rule, the attorney who fails to comply with the out-of-state attorney arbitration counsel certification program also is not entitled to recover any fees for work performed while in California.13

In addition to the possibility of criminal sanctions against the unlicensed attorney, there are potentially two other categories of arbitration participants who may be vulnerable to discipline. First, to the extent the out-of-jurisdiction attorney has retained licensed co-counsel in the California arbitration, which is required by Section 1282.4(c)(11), the licensed counsel of record may be subject to discipline under the California Rules of Professional Conduct 1-300, which provides that “a member shall not aid any person or entity in the unauthorized practice of law.”

A second category of arbitration participant who may be vulnerable under Rule 1-300 is the arbitrator. If the arbitrator knowingly permits an unlicensed attorney or other person to represent a party in a California-based arbitration without completion of the out-of-state attorney arbitration counsel certificate, the arbitrator, if he or she is a member of the State Bar, also may be subject to Rule 1-300 if the arbitrator does not act under Section 1284.2(d) to disqualify the unlicensed attorney from participating in the arbitration.14 In that regard, it is not clear whether an arbitrator has the affirmative obligation to determine whether all party representatives appearing before the arbitral tribunal either are licensed to practice law in California or have completed an appropriate certificate. It appears that no cases or attorney general opinions address this issue, but it is probably best practice for arbitrators in California to confirm that, absent an exception to either the Birbrower rule or the out-of-state attorney arbitration counsel program, the attorneys who appear before them in a California arbitration either are licensed in California or have completed the appropriate out-of-state attorney arbitration counsel application.15

Because the licensing requirements for the California State Bar are designed to protect parties from being represented in legal matters by persons not qualified to do so, in the event an out-of-state attorney fails to obtain the arbitrator’s approval of an out-of-state attorney arbitration counsel certificate, there is the potential risk that any arbitration award adverse to unlicensed attorney’s client may be set aside. No California cases address this issue, but, in an analogous case, an unlicensed attorney represented a party in a court proceeding. The court of appeal set aside the judgment adverse to that party.16 On the other hand, in two unpublished opinions, the court of appeal has refused to set aside arbitration awards in which the prevailing party’s attorney failed to timely comply with the Out-of-State Attorney Arbitration Counsel Certification program.17

Statutory Exceptions

There are statutory exceptions to the requirements that party representatives in arbitration comply with Business and Professions Code Section 6125, Code of Civil Procedure Section 1282.4, and California Rule of Court 9.43. They are: 1) in an arbitration under a collective barging agreement, parties may be represented by any person, regardless of whether that person is licensed to practice law in California,18 2) any person, whether or not a licensed attorney, may represent an injured employee under the workers’ compensation statutes,19 3) an out-of-state attorney needs no certification and may engage in party representation with respect to arbitration proceedings held outside California,20 and 4) in international conciliation (a form of mediation) parties may be represented by the person of their choice.21 The Birbrower court understood this last provision to be an exception to Section 6125.22

Other than these limited statutory exceptions, the Birbrower rule, as modified by the out-of-state attorney arbitration counsel certification program, applies to all arbitrations conducted in California. When the statutory exceptions to the Birbrower rule are screened against the legislature’s response to Birbrower,
there remain two significant lacunae, whether intended or not, that limit a party’s right to select its attorney representative in arbitration. The first concerns out-of-state attorneys representing parties in international arbitrations that are based in California. The legislature’s response to the Birbrower rule does not appear to apply to arbitrations subject to California’s International Arbitration and Conciliation Act. That act applies to the following types of arbitrations:

(a) The parties to an arbitration or conciliation agreement have, at the time of the conclusion of that agreement, their places of business in different states.
(b) One of the following places is situated outside the state in which the parties have their places of business: (i) The place of arbitration or conciliation if determined in, or pursuant to, the arbitration or conciliation agreement. (ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed. (iii) The place with which the subject matter of the dispute is most closely connected.
(c) The parties have expressly agreed that the subject matter of the arbitration or conciliation agreement relates to commercial interests in more than one state.
(d) The subject matter of the arbitration or conciliation agreement is otherwise related to commercial interests in more than one state.

Once it is determined that an arbitration proceeding is subject to the International Arbitration and Conciliation Act, Code of Civil Procedures Section 1297.17 makes clear that “this title supersedes Sections 1280 to 1284.2, inclusive, with respect to international commercial arbitration and conciliation.” The necessary implication is that Section 1282.4’s out-of-state attorney arbitration counsel program (which is part of the exclusion of Sections 1280 to 1284.2) not only has not been included in the International Arbitration and Conciliation Act but has been affirmatively excluded from its provisions. This conclusion is reinforced by the International Arbitration and Conciliation Act’s limited exclusion from Business and Professions Code Section 6125 for conciliation proceedings. The limited exclusion applicable to conciliation proceedings by necessary implication does not apply to international arbitrations. Accordingly, under the current statute, out-of-state attorneys have no means to gain an exception to Section 6125 when attempting to represent a party in an international arbitration held in California. The inability of an out-of-state attorney to represent parties in an international arbitration in California probably is the unintended byproduct of the legislature’s confusion over the Birbrower court’s comments on the provisions of California’s International Arbitration and Conciliation Act. It is likely that the legislature did not realize that Code of Civil Procedure Section 1297.351, cited by the Birbrower Court as a statutory exception to Section 6125 of the Business and Professions Code, applies only to conciliation proceedings (mediation) and not to international arbitrations as well. There is no obvious policy reason to create an out-of-state attorney arbitration counsel program for domestic arbitrations but not for international ones. Nonetheless, unless the state legislature extends the out-of-state attorney arbitration counsel program to international arbitrations, as a matter of statute, only attorneys licensed in California may provide such representation.

Confusion over representation in international arbitration continued when State Bar Rule 9.43 was adopted to implement the program. Rule 9.43 does not on its face distinguish between domestic and international arbitration, nor does it require applicants to show they are seeking to represent a party solely in a domestic arbitration. It appears that the State Bar makes no distinction between domestic and international arbitrations under the out-of-state attorney arbitration counsel program. The implication is that the State Bar may consider Rule 9.43 to include both domestic and international arbitrations. The State Bar considers the applications submitted under the program to be private and not subject to review by the pub-
practice law in California. First, the attorney may qualify for, take, and pass the California bar exam. This is not a practical option for the kind of transitory representation expected in arbitrations. Second, the foreign attorney may apply to become a registered foreign legal consultant under California Rule of Court 9.44. However, even if the registration is successful, the foreign attorney is barred from representing a party as an advocate in proceedings or practicing law other than to advise on the law of the jurisdiction where the foreign attorney is licensed. This option does not permit full participation in arbitration. The result is that there is no practical means for a foreign attorney to represent a party in a domestic or international arbitration seated in California.

The exclusion of foreign attorneys from the arbitration counsel program appears to be intentional, and the reason to exclude probably proceeds from the same justifications for the limitations applied to foreign attorneys generally. California has an interest in restricting foreign attorneys to their area of legal expertise, which presumably is the law of the country where they are licensed. The presumption for a domestic arbitration held in California is that it proceeds, at least procedurally, under California law.

In contrast to domestic arbitrations, the restriction on foreign attorneys engaged in the representation of parties in international arbitrations seated in California makes little sense. If the rationale is based on the legislature’s general exclusion of foreign attorneys from practicing law in California, it proceeds from a misunderstanding of how international arbitration generally operates. The location of an international arbitration frequently is selected for its lack of relationship to the parties so that the international dispute is resolved in a neutral territory. Further, the substantive law of the dispute frequently is unrelated to the seat of the arbitration, but rather is the law of one or the other party’s home jurisdiction or international law (e.g., the United Nations Convention on the International Sale of Goods). International arbitrations are most frequently conducted under common international arbitration rule sets (e.g., UNCITRAL Arbitration Rules, ICC Rules of Arbitration, AAA’s international arbitration rules) that require specialists in those rule sets and not in the local arbitration procedures of the seat. All major international commercial arbitration jurisdictions (of which California is not yet one) have recognized that freedom of choice in the selection of representatives for international arbitrations trumps local restrictions on who may engage in the practice of law. These major international arbitration jurisdictions permit foreign attorneys, including those licensed to practice in California, to represent parties in international arbitrations held in their jurisdictions.28

There is no compelling rationale to require that an attorney be licensed to practice law in California when arbitrating a dispute under the substantive law of another country using an international arbitration rule set. Nor is there any reason to believe that a licensed California attorney has any special or greater knowledge of international arbitration rule sets or the foreign law that may be applicable to the California-based international arbitration. Parties to international arbitrations are not protected by the California licensing rule. California simply becomes a venue inhospitable to international arbitration proceedings.

Nonlegislative Solutions

Most international arbitrations held in California involve at least one party located outside California. As the law currently stands under the Birbrower rule and the legislature’s limited modification of that rule, a party located outside California does not have the right under California law to use its regular arbitration counsel to represent it in California-based proceedings. There are two potential nonlegislative solutions to this problem.

First, the parties to the international or domestic arbitration simply can agree to change the venue of the arbitration to a jurisdiction (virtually anywhere outside California) that permits freedom of representation in arbitrations. As noted above, the Birbrower rule only applies to arbitrations held in California, and there is a statutory exception to the Birbrower rule for out-of-state attorneys who render legal services in California for an arbitration held outside California.29 California has nothing to say about a party representative acting outside California with regard to an arbitration held outside California.

This solution, however, has two basic problems. First, it requires the agreement of all parties to the arbitration to change venue from what may be agreed in the arbitration agreement. Such an agreement may not be forthcoming for a number of reasons, including that an out-of-state forum may be inconvenient to one of the parties. Second, this solution does not solve the problem of a foreign attorney (as distinguished from an out-of-state attorney) rendering legal services in California with regard to an arbitration held outside California. In that case, the foreign attorney would be required to apply to become a foreign legal consultant under California Bar Rule 9.44. Even then, the scope of permitted activities may be too limited, especially if, for example, an attorney arbitration specialist licensed to practice law in the United Kingdom wished to perform legal services in California for an arbitration governed by the substantive law of France. In that event, the foreign legal consultant provisions of California law likely prohibit that attorney from rendering legal services in California.

Preemption is an alternative nonlegislative way to allow choice of counsel in an arbitration proceeding. The Birbrower court ruled that California’s attorney licensing requirements were not preempted by the Federal Arbitration Act.30 Relying on the Supreme Court’s decision in Volt Information Sciences, Inc. v. Leland Stanford Junior University, the court determined that there was no conflict between federal and state law on this issue and that the parties’ agreement expressly adopted California procedural and substantive law.31 However, as noted by the dissent in Birbrower, the majority's broad proclamation regarding lack of preemption may be overstated.

The Birbrower dissent noted that California’s attorney licensing rules should not apply if a treaty specifically permits parties to choose by whom they want to be represented. Justice Joyce Kennard’s dissent cited as an example the Inter-American Convention on International Arbitration:

For instance, the Rules of Procedure of the Inter-American Commercial Arbitration Commission, article IV provides: “The parties may be represented or assisted by persons of their choice.” By federal law, this rule applies in all arbitrations between a United States citizen and a citizen of another signatory to the Inter-American Convention on International Commercial Arbitration, unless the arbitrating parties have expressly provided otherwise.32 Preemption is possible, but not certain. As acknowledged by the language quoted above, the Inter-American Convention’s default rule permitting parties to select representatives of their choice does not preempt California’s Birbrower rule if the parties have elected to be governed by California’s rules of procedure, something permitted by Article 3 of the Inter-American Convention.33 In that event, the parties would be required to comply with California rules of procedure regarding attorney representation. Accordingly, for preemption of the Birbrower rule to work under the Inter-American Convention, the parties by selecting California as the seat of the arbitration must not be deemed to have selected the procedural law of California as the procedural law of the arbitration. To avoid the inference that they have selected the procedural law of California, the parties may expressly designate that their arbitration agreement is governed by Chapter 3 of the
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Federal Arbitration Act, including Section 306, which incorporates by reference the Rules of Procedure of the Inter-American International Arbitration Commission or the Federal Arbitration Act. Even if the Inter-American Convention is found to offer limited preemption protection, it only applies to international arbitrations governed by that particular treaty. In that regard, the Federal Arbitration Act provides that if the majority of the parties to the arbitration agreement are citizens of a nation that is neither a party to the Inter-American Convention and a member of the Organization of American States, the Inter-American Convention will apply. If those requirements are not met, Chapter 2 of the Federal Arbitration Act concerning implementation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards applies.

The New York Convention has a much broader application to international arbitrations held in the United States. However, the New York Convention does not have a default rule set for the conduct of proceedings in the same manner as the Inter-American Convention. Instead, it generally is recognized that an arbitration covered by the New York Convention is procedurally governed by the laws of the jurisdiction where the arbitration takes place or under the law of which the arbitration award is made. In that regard, the parties make the selection of the applicable procedural law either by reference in the parties’ arbitration agreement or by designation of the seat of the arbitration. When an arbitration subject to the New York Convention is held in California, it is possible for the parties to designate California’s procedural rules as the rules of procedure or for those rules to be deemed the governing rules by reason of California’s designation as the seat of the arbitration. The New York Convention is implemented in the Federal Arbitration Act through Chapter 2 and, for those arbitrations seated in the United States, those portions of Chapter 1 that do not conflict with Chapter 2 or the New York Convention. However, there is nothing in Chapters 1 or 2 of the Federal Arbitration Act that expressly conflicts with and therefore preempts the Birbrower rule.

In addition to the possibility of preemption under the Inter-American Convention, international investment treaties are another significant possible source of preemption. The United States is a party to the International Convention on the Settlement of Investment Disputes (ICSID). Under the Rules of that Convention, “Each party may be represented or assisted by agents, counsel or advocates.” As with the Inter-American Convention, parties arbitrating disputes under ICSID rely on its rule set unless the parties otherwise agree. Thus, assuming the parties have not otherwise agreed, the ICSID rule on party representation has the power of an international treaty and, therefore, should preempt California state law. Even in the absence of the ICSID rule set, the terms of ICSID likely preclude application of Section 6125. Articles 21 and 22 of the Convention grant the parties’ representatives immunity from legal process in connection with their actions in the performance of their duties with respect to any ICSID arbitration in which they participate.

Finally, the United States is a party to quite a few bilateral investment treaties. To the extent those treaties permit the parties to select arbitration rule sets for the resolution of their disputes that provide for free choice in the selection of party representatives, those treaties may also preempt California’s Birbrower rule. For example, the bilateral investment treaty between the United States and Argentina permits the parties to select the UNCITRAL Arbitration Rules, which provide, in Article 5, that “Each party may be represented or assisted by persons chosen by it.” On the other hand, as with the Inter-American treaty, if the parties to the arbitration elect, or are deemed to have elected, to be governed by California’s rules of arbitration procedure, then the parties must comply with California’s attorney representation rules.

The Legislative Solution

Since the statutory exceptions and nonstatutory means to avoid the Birbrower Rule do not provide a completely satisfactory answer to California’s prohibition against foreign or out-of-state attorneys acting as counsel in international arbitrations seated in California, a legislative solution is the best and clearest response. Toward that end, legislative solutions are being sought.

On May 10, 2013, the board of trustees of the California State Bar approved a resolution endorsing a legislative solution to the international arbitration problem: RESOLVED, that upon the recommendation of the Stakeholder Relations Committee, the Board of Trustees endorses amendments to California’s international arbitration and conciliation statute to add language to Title 9.3 of the California Code of Civil Procedure and amendments to other authorities as necessary to expressly state in an international commercial conciliation or arbitration proceeding, the person representing a party to the conciliation or arbitration is not required to be a licensed member of the State Bar, consistent with the Supreme Court’s holding in Birbrower, Montalbano, Condon & Frank v. Superior Court…and it is FURTHER RESOLVED, that upon the recommendation of the Stakeholder Relations Committee, the Board of Trustees endorses and promotes California as a favored venue for international arbitration and conciliation proceedings.

While there may be good reasons not to permit foreign attorneys to represent parties in California-based domestic arbitrations, there is no good reason to prohibit out-of-state attorneys or foreign attorneys from representing parties in international arbitrations held in California. Instead, the out-of-state arbitration counsel program either should be extended to cover international arbitrations and to foreign attorneys representing parties in international arbitrations or, as suggested by the State Bar Board of Trustees, the exception from Section 6125 for international conciliation in the California International Arbitration and Conciliation Act as recognized by Birbrower should be extended to international arbitration. However, until the California legislature affirmatively acts to permit non-California attorneys to represent parties in international arbitration, parties must either accept application of the Birbrower rule or rely on nonlegislative solutions with the attendant risks and limitations.

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2 BUS. & PROF. CODE §6125.
4 Id. at 133-34.
5 CODE CIV. PROC. §1282.4(c). The State Bar of California requires completion of the Certificate of Out-of-State Attorney Arbitration Counsel form, available at http://admissions.calbar.ca.gov/LinkClick.aspx?filekey=GuMRIC7Gq4%3d&a=766. Once approved by the arbitrator, the form must be submitted to the California State Bar with a $50 filing fee for each arbitration. See http://admissions.calbar.ca.gov/Requirements/OutofStateAttorney ArbitrationCounselOSAACFAQ.aspx.
6 According to an e-mail from the State Bar dated July 15, 2013, the State Bar received 800 certificates in 2009, 734 in 2011, and 780 in 2012. Data were not available for 2010. See R. of Ct. 9.43.
7 Although not stated in Rule 9.43, Section 1282.4(c)(6) requires that the out-of-state attorney not be a “resident of the state of California.”
8 CODE CIV. PROC. §1282.4(c)(6) (emphasis added).
9 CODE CIV. PROC. §1282-4(c).
10 Id.
11 BUS. & PROF. CODE §6126.
12 Birbrower, supra note 1, at 119.
14 CODE OF CIVIL PROCEDURE Section 1282.4(d) provides, “Failure to timely file and serve the certificate described in subdivision (c) shall be grounds for disapproval of the appearance and disqualification from serving as an attorney in the arbitration in which the
ties and the arbitral tribunal.

Instead, compliance is left to the mandatory California law for California-based arbitration proceedings. However, the next sentence in Birbrower notes that the exception is limited to compliance proceedings.

20 CODE CIV. PROC. §1282.4(c).


24 CODE CIV. PROC. §1282.4(d).

25 Some confusion is understandable because the California Supreme Court stated in Birbrower that “[t]he Legislature has recognized an exception to section 6125 in international disputes resolved in California under the state’s rules for arbitration and conciliations of international commercial disputes.” Birbrower, 17 Cal. 4th at 130-31. This statement itself does not limit the exception to international conciliation proceedings. However, the very next sentence in Birbrower notes that the exception is limited to conciliation proceedings.

26 Rule 9:43 does not distinguish between international and domestic arbitration, but it references Code of Civil Procedure §1282.4 as the source of the authority for the program and makes no mention of the International Arbitration and Conciliation Act.

27 CODE CIV. PROC. §1282.4(c).


35 Parties who elect to be governed by the Federal Arbitration Act are electing to be governed by the federal common law on arbitration. See Buckeye Check Cashimg, Inc. v. John Cardenga et al., 546 U.S. 440 (2006). See also Stephen Smerek & Daniel Whang, Preemption and the Federal Arbitration Act: What Law Will Govern Your Agreement to Arbitrate?, NEWSLETTER OF THE ABA SECTION OF BUSINESS LAW COMMITTEE ON CORPORATE COUNSEL (Mar. 2006), available at http://apps.americanbar.org/buslaw/conmittees/CL240000pub/newsletter/200603/home.shtml. However, there is no clear statement of federal common law on arbitration that grants parties the unfettered right to choose their representatives.

36 ICSID, Arbitration (Additional Facility) Rules, Art. 26(1).

37 But see id., Art. 1.


39 Resolution of the Board of Trustees of the State Bar of California, May 10, 2013.
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TWO CALIFORNIA STATUTES promote the policy of certainty and finality in the transfer of property interests to the lawful successors in interest of a person who dies. One is an expedited statute of limitations applicable to claims that could have been asserted against the decedent before death. The other policy is embodied in the Probate Code’s so-called nonclaim statutes, which require the decedent’s creditors, on actual or constructive notice of estate administration, to timely file and prosecute claims.

A competing policy legitimates the interest of creditors in obtaining satisfaction of bona fide claims from the assets of the decedent before they pass to heirs or beneficiaries. Frequently, creditors have an interest in claims that arise from a decedent’s ownership of real property. When representing the administrators and trustees of estates with real property, practitioners may consider the potential liabilities unique to real estate but may be inclined to discount them and rely on statutes of limitation or repose. For example, unwary practitioners may think that the one-year statute of limitation found in Section 366.2 of the Code of Civil Procedure, which runs from the date of death of a decedent, and the 120-day claims filing requirements of Probate Code Sections 9100 (probate estates) and 19100 (applicable to trusts, when invoked by the trustee) adequately protect an estate from liability. Unfortunately, the law provides no such assurance.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides the fed-

by Richard S. Conn

The Properties of Preemption

CERCLA may preempt state laws barring claims on the real property interests of heirs

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eral government statutory authority to recover response costs and to compel owners, operators, and other potentially responsible parties to clean up environmental contamination of real property. An owner of real property is presumptively a potentially responsible party, unless the owner can prove entitlement to the status of innocent landowner. In general, this requires a showing that an unrelated party was the sole cause of the contamination and damage and that the landowner guarded against the foreseeable acts and omissions of the responsible party. Potentially responsible parties other than landowners and operators include those who transport or dispose of hazardous materials.

Under Section 9607(a), CERCLA liability includes:
A. All costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; B. Any other necessary costs of response incurred by any other person consistent with the national contingency plan; C. Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and D. The costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Notably, in addition to empowering the government to enforce removal and remediation of contaminants, CERCLA creates causes of action in favor of private parties, including for contribution and damages. Statutes of limitation vary depending on whether the action is for contribution or for costs of responding to contamination, and whether funds have been expended for a removal action or a remedial action, some being three years and others six years. Of material consequence, the various statutory periods may run from the date of a judgment, a court-approved settlement, an administrative order, or from completion of work. The limitations periods may span decades after the contamination is caused or discovered. A viable claim for contribution or response costs may be timely asserted under a CERCLA statute of limitations years after the death or dissolution of an original responsible party.

CERCLA is not limited to establishing federal liability for specified damages and cleanup costs. Under 42 USC Section 9638, state statutes of limitation respecting recovery of damages for environmental torts may be extended. As the code states, “If the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.”

Thus, in addition to providing federal remedies, CERCLA potentially has a significant effect on rights under state law. For example, in Angeles Chemical Company Inc. v. Spencer & Jones, the court of appeal held that California’s 10-year statute of limitation for construction defect claims was preempted. Negligence and breach-of-contract claims were therefore viable even though more than 10 years had passed since the occurrence that gave rise to liability.

### One Year or More?

California’s one-year statute of limitation respecting postdeath lawsuits provides:
If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.

This language would appear sufficiently broad to bar claims for contribution and damage to natural resources, whether accruing before or after the decedent’s death. A number of decisions have applied Section 366.2 to bar claims. However, the general application of these decisions has been called into question by the more recent holding in Dacey v. Taraday. In Dacey, the court of appeal found that the administrator of an estate could not invoke the bar of Section 366.2 against a contract claim that was still contingent at the time of the decedent’s death. While the opinion may be limited to claims arising in contract, certain language in the opinion is sufficiently broad to apply to any circumstance in which the claimant could have sued the decedent for injuries sustained at the time of death. In the case of claims for contribution under CERCLA, if the contribution expenditures are incurred after the decedent’s death, Dacey raises the prospect that Section 366.2 will not bar a claim asserted against an administrator or trustee more than one year after the decedent’s death.

The application of the nonclaim statutes is subject to less doubt. Dacey, for example,
The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. Under California law, a creditor of a deceased person generally has one year from the date of death to bring an action against the deceased person’s successors.
   - True.
   - False.

2. A nonclaim statute relieves a creditor of the obligation to file a claim in a probate proceeding.
   - True.
   - False.

   - True.
   - False.

4. An owner of real property is presumptively a potentially responsible party under CERCLA unless the owner can prove entitlement to innocent landowner status.
   - True.
   - False.

5. CERCLA only creates rights in the U.S. government, a state, or an Indian tribe and does not affect the rights of private parties against one another.
   - True.
   - False.

6. Code of Civil Procedure Section 366.2 bars actions for breach of contract brought more than one year after the death of a contracting party, even if the breach had not occurred prior to the date of death.
   - True.
   - False.

7. Federal statutes always preempt state statutes addressing the same subject matter.
   - True.
   - False.

8. Federal courts have uniformly held that the CERCLA statutes of limitation preempt state nonclaim statutes.
   - True.
   - False.

9. Statutes of repose differ from statutes of limitation in that statutes of repose may bar a suit before a cause of action has accrued.
   - True.
   - False.

10. CERCLA may extend the statute of limitation for actions under state law to recover damages for environmental torts.
    - True.
    - False.

11. California’s 10-year statute of limitations for construction defects may be extended by CERCLA.
    - True.
    - False.

12. Two U.S. courts of appeal have held that CERCLA provisions that extend state statutes of limitations for environmental torts were intended to apply equally to statutes of repose.
    - True.
    - False.

13. In order for a probate administrator to be protected by California’s nonclaim statutes, he or she must serve notice of the right to file a claim on all known or reasonably ascertainable creditors.
    - True.
    - False.

14. A creditor who is not timely served with notice of the right to file a probate claim must file a claim within six months of learning of the administration of the estate.
    - True.
    - False.

15. If a creditor does not have knowledge of facts reasonably giving rise to a claim as of 30 days prior to the expiration of the claims filing period, and therefore omits filing a claim, the creditor is forever barred from pursuing recovery.
    - True.
    - False.

16. The court in Witko v. Beehuis held that any state statute of limitation running from the date of a responsible party’s death will be unaffected by CERCLA.
    - True.
    - False.

17. An administrator of a probate estate may rely on Code of Civil Procedure Section 366.2 to protect against all claims for damages based on environmental torts committed by the decedent.
    - True.
    - False.

18. Federal statutes will only preempt state statutes on the same subject matter when Congress has expressed a plain intent to preempt state law.
    - True.
    - False.

19. A court may infer preemption from federal regulation that is sufficiently comprehensive to leave no room for state regulation.
    - True.
    - False.

20. Federal law may be deemed to preempt state law to the extent it actually conflicts with federal law.
    - True.
    - False.

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19. □ True □ False
20. □ True □ False
tributees are liable for payment on a pro rata basis.\textsuperscript{14}

Patchwork as the California protections may be, do they override CERCLA statutes of limitation? While a number of reported federal decisions have addressed whether specific statute of limitation provisions in CERCLA preempt state law, they reach conflicting results. The outcome appears in part to depend on the specific cause of action and statute of limitation at issue. Without respect to federal preemption, California statutes of limitation for damage to real property may range from as short as three years for negligently caused harm to 10 years for construction defects.\textsuperscript{15}

The leading federal decision relating to CERCLA's three-year statute of limitations for contribution actions is \textit{Witco Corporation v. Beekhuis}.\textsuperscript{16} In \textit{Witco}, the court of appeal considered whether Delaware's eight-month probate nonclaim filing statute insulated the executor of a probate estate and derivative trusts from claims for contribution for environmental cleanup. Witco Corporation had owned the land in question from 1972 to 1977, been aware of the environmental issues since at least 1985, and entered into a cleanup consent decree with the EPA in 1992. The decedent, Beekhuis, had owned and operated a corporation that had merged into a Witco subsidiary, eventually constituting Witco, an owner of the contaminated property. Beekhuis was presumably deemed a potentially responsible party because of his operation of the predecessor entity and his actions as an officer of Witco. Beekhuis and his insurer had allegedly been placed on notice of their liability in 1988.

The court in \textit{Witco} cited language from \textit{California Federal Savings and Loan Association v. Guerra} as setting forth the applicable standard for a finding of federal preemption:

\begin{quote}
In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress. Federal law may supersed e state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Second, congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress “left no room” for supplementary state regulation. As a third alternative, those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because “compliance with both federal and state regulations is a physical impossibility,” or because the state law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”\textsuperscript{17}
\end{quote}

The \textit{Witco} court noted that three federal district courts have found that the CERCLA statute of limitations affirmatively preempted state nonclaim statutes on the ground that preemption is necessary to implement the overriding federal policy that those who are responsible for improper disposal of chemical poisons should bear the expense of cleanup.\textsuperscript{18} Nevertheless, the \textit{Witco} court proceeded to reach a contrary result on four grounds. First, the court found nothing in CERCLA to indicate congressional intent to preempt state law governing claims against decedent's estates, which is an area traditionally reserved to state law. Second, the court found a justifiable inference that Congress intended to leave state law respecting decedent's estates unchanged. This reasoning is based on inclusion of an innocent landowner defense in Section 9607(b)(3). Third, the court found that after the running of the eight-month nonclaim period, an executor lacks capacity to be sued, and that state law on capacity is determinative under Rule 17(b) of the Federal Rules of Civil Procedure. Last, the court found that for pragmatic reasons (i.e. certainty governing the descent of property) Congress could not have intended to preempt state nonclaim statutes.

\textit{Witco} is cited with approval in \textit{Marsh v. Rosenbloom}, which rejects a claim that CERCLA preempted Delaware's statute barring claims against a corporation that are made more than three years after completion of the corporation's dissolution. Another case, \textit{Boyle v. County of Kern}, holds that filing of a federal civil rights complaint within the claim filing period does not satisfy the nonclaim statute filing requirement.\textsuperscript{19}

**McDonald v. Sun Oil Company**

In the context of claims for contribution, \textit{Witco} makes a strong argument against federal preemption of state nonclaim statutes. This provides some reassurance to a probate practitioner, but several contrary federal decisions leave the issue unsettled. Further, the Ninth Circuit's decision in \textit{McDonald v. Sun Oil Company} puts \textit{Witco} into some doubt.\textsuperscript{20} In particular, it is doubtful that \textit{Witco} can be extended to Section 366.2, which is not specifically tied to administration of estates and would not support \textit{Witco's} argument regarding an executor's lack of capacity to be sued.

In \textit{McDonald}, the court considered whether Section 9658 preempts an Oregon statute of repose that limits the right to bring suit without respect to knowledge of accrual of a claim.\textsuperscript{21} Specifically, the court found that the Oregon statute that precluded action for negligent injury to a person or property more than 10 years from the date of the act or omission complained of was preempted by Section 9658. The court found in favor of pre-

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\textsuperscript{2} In \textit{In re Western States Wholesale Natural Gas Antitrust Litigation}, the court held that the federal Natural Gas Act was not intended to preempt state police power to enforce state antitrust laws on retail sales of natural gas.

\textsuperscript{3} Movsesian v. Victoria Versicherung AG.

\textsuperscript{4} Castro v. Collecto Inc., 634 F. 3d 777 (9th Cir. 2011).

\textsuperscript{5} In \textit{Ruling on Preemption}, Federal courts are frequently called upon to determine whether a federal statute preempts a parallel state statute. When doing so, courts typically consider three factors. First, if Congress has expressed a plain intent to preempt state law pertaining to a subject matter governed by the supremacy clause of the U.S. Constitution, this is dispositive. Second, in the absence of a clearly expressed intent, the court may infer preemption from federal regulation that is sufficiently comprehensive to leave no room for state regulation. Third, federal law may be deemed to preempt state law to the extent it actually conflicts with federal law.

\textsuperscript{6} Some recent decisions reflect the range of judicial reasoning on preemption. In \textit{In re Western States Wholesale Natural Gas Antitrust Litigation}, the court held that the federal Natural Gas Act was not intended to preempt state police power to enforce state antitrust laws on retail sales of natural gas. In \textit{Movsesian v. Victoria Versicherung AG}, the court held that a California statute vesting state courts with jurisdiction over insurance actions by Armenian Genocide victims and extending statutes of limitation for victims’ claims was preempted by the U.S. Constitution’s grant of exclusive authority in foreign affairs to the federal government. In \textit{Castro v. Collecto Inc.}, the court held that a four-year statute of limitation under Texas law was not conflict-preempted by a two-year limit in the Federal Communications Act, as applied to a claim respecting unlawful collection practices relating to cellular phone bills.—R.S.C.
emission notwithstanding a relatively minor injury to the plaintiff in the form of $70,000 in cleanup costs.

The court in McDonald explicitly rejected an argument that, as a statute of repose rather than a statute of limitation, the Oregon statute was not intended to be preempted. In holding that Section 9658 was intended to apply to both statutes of repose and statutes of limitation, the court defined statutes of limitation and repose:

Statutes of limitations and repose are distinct legal concepts with distinct effects. “A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated…On the other hand, statutes of repose are designed to bar actions after a specified period of time has run from the occurrence of some event other than the injury which gave rise to the claim.” Statutes of limitations preclude the plaintiff from recovery if the suit is filed after the limitation period has expired. Statutes of repose, on the other hand, bar the plaintiff from recovery if the cause of action could have accrued…In proper circumstances, it can be said to destroy the right itself. It is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace.

In reaching this result, the court in McDonald explicitly rejected a contrary finding by the Fifth Circuit in Burlington Northern & Santa Fe Railway Company v. Poole Chemical Company that Section 9658 was not intended to apply to statutes of repose. The holding in McDonald has subsequently been followed by the Fourth Circuit in Waldburger v.CTS Corporation, a case decided on similar facts.

McDonald is noteworthy because Section 366.2 and the nonclaim statutes are arguably statutes of repose. It is entirely conceivable that, if asked to rule on the issue of preemption pursuant to Section 9658 as applied to the California statutes, the Ninth Circuit could reach a contrary result. Nevertheless, McDonald at least may be cited as dicta to support the proposition that California state law negligence claims predicated on release of pollutants are not barred by Section 366.2 or the nonclaim statutes and that pursuant to Probate Code Section 9658, the claims are governed by a hybrid federal-state statute of limitation that runs from the date of discovery. Further, the willingness of the McDonald court to treat CERCLA preemption of statutes of repose in a manner identical to statutes of limitation raises a question as to whether the Ninth Circuit would reach a result contrary to Witco regarding claims of contribution for costs of removal or remedial action.

Practitioners representing administrators of decedents' estates routinely rely on Section 366.2 and the nonclaim statutes in providing their clients assurance that money or assets may be safely distributed without concern for later claims. Unfortunately, CERCLA casts a cloud over the ability of any executor or trustee to distribute real property with assurance that all viable claims have been satisfied or are barred. Moreover, even purely personal liabilities of the decedent may survive. That being said, it is clear that, for trustees, use of the notice to creditors mechanism set forth in Sections 19100 et seq. potentially provides significant protection. Use of this procedure would appear far preferable to passive reliance on the one-year statute of limitations of Section 366.2.

5. For a discussion of whether executors and trustees will be treated as innocent landowners, see United States v. Newmont USA Ltd., 504 F. Supp. 2d 1050, 1067 (E.D. Wash. 2007) (noting 42 U.S.C.A. §9607).
11. Id. at 983; Prob. Code §9000; Code Civ. Proc. §§338(b), 337.15.
22. McDonald, 548 F. 3d at 779-80 (citing Underwood Cotton Co., Inc. v. Hyundai, 288 F. 3d 405, 408-09 (9th Cir. 2002)).

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IN RECENT YEARS, California has become a haven for consumer class action lawsuits. This surge in class action complaints led the American Tort Reform Foundation to dub the Golden State as America’s number one “judicial hellhole.”¹ Many factors account for this spike in consumer class actions. One key reason has been several high-profile pro-plaintiff decisions that the Ninth Circuit and the California Supreme Court have issued in the past five years.

The pendulum, however, may finally have begun swinging the other way. Judges in California, especially federal judges, have taken a more skeptical view of many consumer class action lawsuits.² They have narrowly interpreted the pro-plaintiff decisions and have shown a willingness to apply common sense in dismissing many of the more dubious class action lawsuits at the pleading stage.

Over the past several years, the plaintiffs’ bar has challenged a wide swath of business practices, ranging from the sending of unauthorized text message advertisements to covert tracking of Internet web-surfing information, but most consumer class action lawsuits in California are still based on advertising. In a typical class action suit, plaintiffs’ lawyers allege that companies have deceived consumers through false and misleading advertisements or packaging on the product.

For example, Ferrero, the company that makes Nutella spread, was hit with a class action lawsuit alleging that it had misleadingly marketed its chocolate spread as “healthful.” According to the complaint, Ferrero engaged in an ad campaign of “images and videos of wholesome families and happy, healthy children enjoying Nutella for breakfast before going to school.”³ Despite the relatively scant evidence of wrongdoing, the company recently entered into a $3 million settlement.⁴ Companies as diverse as Dell and Diamond Foods have recently settled multimillion dollar false advertising lawsuits filed in California.⁵

This recent wave of consumer class action lawsuits can be attributed to several interrelated factors. First, California’s consumer protection laws—the Unfair Competition

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Law, the Consumer Legal Remedies Act, and the False Advertising Law—are generally considered to be more advantageous to plaintiffs than similar laws of many other states. For example, California, unlike many of the other states, does not have a scienter requirement for false advertising claims. Moreover, many California courts have construed these statutes broadly in favor of plaintiffs, even though the plain language of California’s statutes is not markedly different from the laws of other states. Some California courts, for instance, have held that there is no need to show reliance or damages by unnamed members of the proposed class.6

More recently, the California Supreme Court eroded the statutory standing requirement for false advertising claims. In Kwikset Corporation v. Superior Court, the plaintiff bought a lockset that was labeled with the words “Made in the U.S.A.” but a small fraction of the parts was made elsewhere.7 Although there was no allegation that the lockset was defective, the plaintiff brought a putative class action lawsuit against the maker of the lockset. The maker argued that the plaintiff had suffered no real harm because the lockset performed as advertised and as one would reasonably expect from a lockset. Nonetheless, the California Supreme Court held that labeling does matter and that the plaintiff had suffered a sufficient injury to pursue the lawsuit.

The Ninth Circuit has also played a role in making California a haven for plaintiffs’ lawyers. Its Williams v. Gerber decision, in particular, has been a boon to the plaintiffs’ bar because it contains language that can be construed as making it difficult for a defendant to prevail on a Rule 12(b) motion.8 Specifically, some have read the opinion as precluding a dismissal on the pleadings even if a product’s packaging accurately discloses all ingredients. The Ninth Circuit reversed the dismissal of a lawsuit challenging the packaging of Gerber’s Fruit Juice Snacks. Although the ingredient list accurately disclosed all the ingredients, the court held that the packaging was potentially deceptive because it depicted a picture of a fruit that was not contained in the product. The Ninth Circuit thus held that there was a factual issue that would need to be decided at a later stage.9

Moreover, the Class Action Fairness Act (CAFA) may have had the unintended effect of encouraging a different form of forum-shopping—not by state but by federal circuit. Concerned by plaintiffs’ lawyers who were forum-shopping for state courts that are notorious for certifying classes even in dubious cases, Congress passed CAFA in 2005, making it easier for defendants to remove cases to federal courts.10 Under CAFA, there is no longer a requirement for “complete diversity” (none of the plaintiffs can be from the same state as any of the defendants). Rather, “minimal diversity” (at least one plaintiff is from a state different from one defendant) is sufficient to confer federal jurisdiction as long as the proposed class has more than 100 members and the amount in controversy exceeds $5 million.11

The effect of the CAFA has served to neutralize many proplaintiff forums. For example, in Texas state court judges are often more likely to favor class action plaintiffs than federal judges, many of whom have a more probusiness bent. On the other hand, the plaintiff’s bar views California’s federal bench as more consumer-friendly, especially because California federal judges must decide cases under the penumbra of some of the Ninth Circuit’s more proplaintiff opinions. Indeed, one plaintiffs’ lawyer who is handling over 30 food labeling cases in the Northern District of California told a legal newspaper, “The law is more favorable here in than in any other jurisdictions that we’ve looked at.”12

Finally, the U.S. Supreme Court’s decision in AT&T Mobility v. Concepcion has made false advertising claims more enticing to plaintiffs’ lawyers.13 In Concepcion, the plaintiffs brought a putative class action suit against AT&T, alleging that it had falsely advertised its phones as “free” when in fact it had charged a sales tax on the full price of the phones.14 Relying on an arbitration provision in the AT&T service agreement that barred class actions, AT&T moved to compel the case to arbitration. The district court and the Ninth Circuit held that the arbitration provision was unconscionable and thus unenforceable, but the U.S. Supreme Court reversed and upheld the validity of such arbitration provisions.15 The Concepcion decision significantly reduced the power of class action lawsuits because companies can now insert arbitration provisions that bar class actions into their contracts with consumers. For most consumer goods involving claims of false advertisements, however, no written contracts (and thus no arbitration provisions) are implicated. Accordingly, many plaintiffs’ lawyers have focused their attention on products that are sold without formal contracts.

A High Burden for Dismissal

If false advertising cases can survive a motion to dismiss, settlement leverage increases dramatically. Furthermore, if a class is certified, a substantial class settlement becomes more likely regardless of the merits of the case. While a class action can be a useful and necessary device to remedy certain wrongs, a large number of the recent false advertising suits arguably lack merit. They are essentially lawyer-manufactured lawsuits in which there has been no real harm to the consumers, and the supposedly misleading statement is in reality marketing fluff that no reasonable consumer would believe.

The Nutella case is a prime example. Notwithstanding the television ads, it seems highly unlikely that most consumers believed that a hazelnut and chocolate spread is some-
how healthful. Fortunately for plaintiffs’ lawyers, it is generally difficult to prevail on a motion to dismiss under California’s consumer protection laws. On the grounds that a factual issue may exist, too many judges have declined to dismiss even highly questionable class action lawsuits at the pleading stage. Further, it is comparatively cost-efficient for plaintiffs’ lawyers to pursue a false advertising case, at least compared with other class action cases. For example, false advertising lawsuits are not likely to involve expensive expert analysis as those in mass tort cases.

Despite this tilted playing field, companies are not defenseless against these false advertising lawsuits. Defense counsel can and should vigorously contest these lawsuits at every stage, from motion to dismiss to class certification to summary judgment. But that does not mean that companies have to slog through years of attrition to defeat certification or prevail on summary judgment.

Indeed, many judges, especially at the federal level, have become more receptive to dismissing class action lawsuits at the pleading stage, often through preemption.16 Certain industries are highly regulated by the U.S. government, and many federal statutes have broad preemption provisions that displace any state law claims. For example, the Nutrition Labeling and Education Act (NLEA) sets a uniform national standard for food labeling and prevents states from enacting any law that is “not identical” to the federal standard.17 Accordingly, many federal courts have dismissed state law claims that are inconsistent with federal law. A few years ago, many plaintiffs began filing lawsuits against food companies alleging that the statement “0g trans fat” is false and misleading because the food products purportedly had trace amounts of trans fat. FDA regulations, however, expressly permit food manufacturers to make the statement, even if there are trace amounts of trans fat.18

Common Sense Analysis

When no preemption provision is available, many judges have relied on common sense to dismiss class action lawsuits based on questionable theories of liability. This increased assertiveness in disposing of class action lawsuits at the pleading stage is in keeping with the U.S. Supreme Court’s guidance in Iqbal and Twombly that federal judges must reject implausible theories.19 In Twombly, the Supreme Court—in a 7-2 decision written by Justice David Souter—affirmed the dismissal of an antitrust lawsuit because the plaintiffs had failed to allege sufficient facts that “nudged their claims across the line from conceivable to plausible.”20 The Supreme Court established this plausibility standard at the pleading stage because the court was mindful of the onerous discovery costs imposed on defendants if a baseless case is allowed to move forward.21 As the Court put it, “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases.”22 The Court in Iqbal made clear that the plausibility standard applies beyond the antitrust context.23

The policy rationale underlying Iqbal and Twombly is doubly persuasive in the class action context. Unlike most civil litigation, discovery costs in class actions are borne almost exclusively by the defendant company. A named plaintiff likely will not have substantial information or documents to produce. In contrast, that named plaintiff can demand defendant companies to spend hundreds of thousands of dollars to scour for internal documents. These discovery demands on defendants can be particularly onerous in today’s world of e-mail and other electronic materials. Further, the decision not to dismiss a class action case tilts the scale toward the plaintiffs greatly, given that class action cases rarely go to trial due to the enormous potential liability.

The Ninth Circuit recently demonstrated the increased skepticism that federal judges are applying to class action cases. In Stuart v. Cadbury Adams, the plaintiff alleged that the statement that Trident White gum “removes stains” was misleading because the company had failed to mention that a consumer must also practice oral hygiene to maintain clean teeth.24 The district court dismissed the case, ruling that the allegations “defied common sense.” The Ninth Circuit affirmed the dismissal, reasoning that “[o]nly an unreasonable consumer would be confused or deceived by Cadbury’s failure to clarify that Trident White gum works only if consumers continue to brush and floss regularly.”25

The Ninth Circuit again emphasized last year that courts need not indulge fanciful class action theories. The plaintiff in Carrea v. Dreyer’s Grand Ice Cream, Inc., argued that Dreyer had marketed its “original vanilla” ice cream as more nutritious than other brands.26 The Ninth Circuit affirmed the dismissal, holding that “it strains credulity to claim that a reasonable consumer would be misled to think that” an ice cream with “chocolate coating topped with nuts” is healthier than competing brands.27

As the California Court of Appeal has explained, a claim of false advertising can be sustained only if “it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.”28 The court must view the challenged advertisement or packaging from the perspective of a “reasonable consumer,” not “the unwary consumer” or “a least sophisticated consumer.”29

These Ninth Circuit decisions are particularly notable because they were decided after Williams v. Gerber. The Ninth Circuit in Williams refused to dismiss the case at the pleading stage, even though the product’s ingredient list had accurately disclosed all of the ingredients, but many federal courts in California have recognized that the holding in Williams is actually much narrower. The Ninth Circuit said that the case could not be dismissed at the pleading stage because there were alleged affirmative misrepresentations in the front of the packaging. Thus, Williams reaffirms the unremarkable proposition that a defendant cannot make a false statement in the front of the packaging and “then rely on the ingredient list to correct those misinterpretations [to] provide a shield for liability for the deception.”30

Many federal district court judges have taken note that they need not let a questionable case proceed merely because a plaintiff’s lawyer invokes the mantra that there supposedly is a factual dispute or that dismissals should supposedly be rare under California’s consumer protections laws. The recent case of Williamson v. Apple, Inc., is instructive.31 The plaintiff alleged that the iPhone’s glass casing cracked when dropped, despite Apple’s statements that it used “the same type of glass used in the windshields of helicopters and high-speed trains” and that it was “20 times stiffer and 30 times harder than plastic.”32

The plaintiff’s counsel insisted that the court should not decide this issue at the pleading stage and should let it proceed further. The court dismissed this case, noting that “it is a well-known fact of life that glass can break under impact, even glass that has been reinforced. This much is known to the ordinary, reasonable consumer….It seems a suspension of logic to say that [Apple’s] marketing campaign….somehow erases these images from the collective experience such that the reasonable consumer could expect that glass could not break if dropped.”33 Other courts have similarly applied common sense in dismissing false advertising cases.34

Another federal court in California recently went further in indicating that industry norms and practices should be taken into account even at the pleading stage. The putative class action complaint alleged that the product Sugar in the Raw misled consumers into believing that the product contained unprocessed and unrefined sugar.35 In dismissing the complaint, the court held that “a significant portion of the general consuming public, acting reasonably, would [not] be led to believe that they are purchasing unprocessed or unrefined sugar” because the product is made of turbinado sugar, which is
“widely marketed” as “raw cane sugar,” not unprocessed and unrefined sugar.36

As one court put it in dismissing a class action complaint, allowing a questionable action complaint, allowing a questionable case to survive a Rule 12(b) motion “would require this Court to ignore all concepts of personal responsibility and common sense.”37 That court had it exactly right. Federal judges should and must serve as guardians against junk class action lawsuits.

1 See http://www.judicialhellholes.org/2012-13/california.
3 In re Ferrero Litig., No. 3:11-CV-00205 at 27 (S.D. Cal. 2010).
7 See also, e.g., Sugawara v. Pepsico, Inc., No. 08-1335, 2009 WL 1439086, at *4 (E.D. Cal. May 21, 2009).
8 Williams v. Gerber Prods. Co., 352 F. 3d 934 (9th Cir. 2008).
9 Id. at 940.
11 Id.
14 Id. at 1744.
15 Id. at 1749-54.
17 21 U.S.C. §343-1(a) (“no State or political subdivision of a State may directly or indirectly establish…any requirement for…labeling of food…but is not identical to the requirement[s]” set forth in the NLEA).
18 Chacanaca, 752 F. Supp. 2d at 1111.
20 Id. at 1974.
21 Id. at 1967.
22 Id. (noting that “the success of judicial supervision in checking discovery abuse has been on the modest side”).
23 Iqbal, 129 S. Ct. at 1953 (noting that “Twombly expounded the pleading standard for ‘all civil actions’”).
24 Stuart v. Cadbury Adams, 458 F. App’x. 689, 690-91 (9th Cir. 2011).
25 Id. at 691.
26 Carrea v. Dreyer’s Grand Ice Cream, Inc., 475 F. App’x. 113, at *1 (9th Cir. 2012).
27 Id.
32 Id. at *6.
33 Id.
36 Id.
40 Williams v. Gerber Prods. Co., 352 F. 3d 934 (9th Cir. 2008).
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12011 San Vicente Boulevard, Suite 402, Los Angeles, CA 90049, (310) 745-8887, e-mail: djudyho@gmail.com. Web site: www.djudyho.com. Dr. Ho provides forensic evaluations used in legal settings to document a wide variety of psychologically relevant information, including personal injury, work-related emotional injury, worker’s compensation, fitness for duty for high-stress jobs, child custody, the capacity to adequately parent a minor, evaluation of feigned malingering and deception, employment discrimination and harassment, and professional licensing disputes. She provides expert testimony regarding psychological testing methods, results, and conclusions. Dr. Ho has a specialty board certification through ABPP, has published empirical studies and book chapters, provides clinical consultations, and is a tenure-track faculty member at Pepperdine University Graduate School of Psychology.

**QUESTIONED DOCUMENTS**

**SANDRA L. HOMEWOOD, FORENSIC DOCUMENT EX ENGR**
1132 San Marino Drive, Suite 216, Lake San Marcos, CA 92078, (760) 931-2529, fax (760) 510-8412, e-mail: homemoodce@globalnet.com. Contact Sandra L. Homewood. Highly skilled and experienced document examiner and expert witness in many complex and high-profile civil and criminal cases with fully equipped document laboratory. Specializes in handwriting, document handwriting identification, handwriting of the elderly in financial elder abuse cases and will contests, and examination of altered medical and corporate records. Trained in government laboratory, including specialized training by the FBI and Secret Service. Former government experience includes document examiner for the San Diego Police Department crime lab, Arizona State crime lab and San Diego County District Attorney’s office. Currently in private, criminal, and civil practice.

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**ADVISORS/EXPERTS @ MCS ASSOCIATES**
18881 Von Karman, Suite 1175, Irvine, CA 92612, (949) 263-8700, fax (949) 263-0770, e-mail: experts@mcsassociates.com. Web site: www.mcsassociates.com. Contact Norman Katz, managing partner. Nationally recognized banking, finance, insurance, and real estate consulting group (established 1973). Experienced litigation consultants/experts include senior bankers, lenders, consultants, economists, insurance underwriters/brokers. Specialties include: lending customs, practices, policies, in all types of lending (real estate, subprime, business/commercial, construction, consumer/credit/loan), loan closings/administration, trusts and investments, economic analysis and valuations/declarations, insurance claims, coverages and bad faith, real estate brokerage, appraisal, escrow, and title insurance.

**LAWRENCE H. JACOBSON, ESQ.**

**ALAN D. WALLACE, ESQ.**
14011 Ventura Boulevard, Suite 406, Sherman Oaks, CA 91423, (818) 501-0133, fax (818) 905-6091, e-mail: alan@alandwallace.com. Contact Alan D. Wallace, Esq. Expert witness and lighting consultant for commercial real estate matters, including law, custom and practice, agency, disclosure, broker malpractice, standards of care for brokers, buyers and sellers. Broker and attorney. Involved as broker in more than 3,000 real estate transactions, Department of Real Estate master instructor and author, Adjunct Professor Loyola Law School, former CAR Hotline attorney, University Law Professor in real estate. Successfully testified in dozens of cases. See display ad on page 56.

**WARONZOF ASSOCIATES, INC.**
959 North Sepulveda Boulevard, Suite 440, El Segundo, CA 90245, (310) 322-7744, fax (310) 322-7755. Web site: www.waronzof.com. Contact Timothy R. Main, CPA. Waronzof provides real estate and land use litigation support services including economic damages, lost profits, financial feasibility, lease dispute, property value, enterprise value, partnership/multiple-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 59.

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**ACCRUED FINANCIAL SERVICES, INC.**
2901 Pacific Coast Highway, Suite 101, Manhattan Beach, CA 90266, (310) 832-6700, fax (310) 832-6707, e-mail: MarkMalan@accrue.com. Web site: www.markmalantherealestate.com. Contact Mark S. Malan, MAI, SRA, Accredited Appraiser, president, divorce, commercial and residential. Mark S. Malan, MAI has been servicing Southern California with current, prospective, and historic values for over 25 years. Expert witness testimony has been honed by 15 years as a college instructor that allows him to easily and credible way to inform the trier-of-fact about the issues of the matter at hand. Additional experience as a general contract and real estate investor has added credible evidence in cases of diminution in case of undisclosed defects and sever- al types of construction losses.

**RECEIVER**

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12121 Wilshire Boulevard, Suite 600, Los Angeles, CA 90025, (310) 481-6790, fax (310) 481-6797, e-mail: rweissman@weceiver.com. Web site: www.srlaw.com. Contact Richard Weissman, Esq. Specializes in Chapter 11 bankruptcy, reorganizations, special types of construction, receivership, foreclosures, fraud, and franchise disputes. Specializes in partnership and corporate dissolutions, including law firm dissolutions, and government enforcement receivership actions, including actions brought by the California Department of Corporations, Department of Real Estate, Commodities Future Trading Commission, and Federal Trade Commission. Nationally recognized in both the lender and litigation communities as qualified to assist in complicated and commercially sophisticated liquidations, reorganizations, and ongoing business operations. See display ad on page 51.

**RETAILATION**

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**ROOFING AND WATERPROOFING**

**KGA, INC.**
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3900 Kiliroy Airport Way, Suite 100, Long Beach, CA 90814, fax (562) 427-0855, e-mail: jnuno@scesengineers.com. Web site: www.scesengineers.com. Contact Julio Nuno, VP. S.C.S. provides expert witness services related to environment studies (planning, water resource), waste management, solid waste, air quality, and industrial hygiene and safety services. We are a 43-year old consulting firm with 65 offices across the U.S. and over 800 employees. Our Long Beach office has more than 30 professional engineers, scientists, and subject matter experts available on short notice to serve asbestos, lead-based paint, and other specialty areas requiring expert witness services.

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633 West Fifth Street, 31F, Los Angeles, CA 90071-2005, (213) 553-2500, fax (213) 553-2699. Web site: www.cornerstoneresearch.com. Contact George G. Stromberg, Jr., Richard W. Dalbeck, Katie J. Galley, Elaine Harwood, Carylin Irwin, Erin McGlohan or Ashish Pradhan. For more than twenty-five years, Cornerstone Research staff have provided economic analysis in all phases of commercial litigation and regulatory proceedings.

We work with a broad network of testifying experts, including prominent faculty and industry practitioners, in a distinctive collaboration. The experts with whom we work bring the specialized expertise required to meet the demands of each assignment. Our areas of specialization include intellectual property, antitrust, securities, entertainment, real estate, financial institutions, and general business litigation.

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Citigroup Center, 444 South Flower Street, 30th Floor, Los Angeles, CA 90071, (213) 362-1000, fax (213) 362-1001, e-mail: robertrosen@rosen-law.com. Web site: www.rosen-law.com. Specializing in securities law, federal securities law enforcement, securities arbitration, and international securities, insider trading, NYSE, AMEX, FINRA, DOC disciplinary proceedings, broker-dealer, investment company and investment adviser matters, liability under federal and state securities laws, public and private offerings, Internet securities, and law firm liability. AV rated. Former chair, LACEBA Business and Corporations Law Section, LLM, Harvard Law School. Forty years practicing securities law, 12 years with the U.S. Securities and Exchange Commission, Washington, DC. Published author/editor of securities regulations, including shell and multiple-entity. See display ad on page 53.

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1726 Palisades Drive, Pacific Palisades, CA 90272, (310) 454-2988, fax (310) 454-4516. Contact Marcia Haight, SPHR—CA. Human resources expert based in Los Angeles, California. 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/discrimination, other Title VII and FEHA discrimination and harassment, retaliation, FMLA/CFRA, safety, and sexual harassment. 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 employees’ complaints. Expert witness on sexual harassment of employer investigations. Assist counsel via preliminary case analysis, discovery strategy, examination of documents, and expert testimony.

TRAFFIC ENGINEERING
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1111 Town and Country Rd, Orange, CA 92868, (714) 973-5838, fax (714) 973-8821, e-mail: bill@kunzman-engineer.com. Web site: www.kunzman-engineer.com. Contact William Kunzman, PE. Traffic expert witness since 1973, both defense and plaintiff. Auto, pedestrian, bicycle, and motorcycle accidents. Largest plaintiff verdicts: 1) $12,200,000 in pedestrian accident case against Caltrans, 2) $10,300,000 in case against Los Angeles Unified School District. Largest defense verdicts: 1) $2,000,000 in vehicle accident case against Caltrans. Best defense verdict: $0 while defending Caltrans and opposition sought $16,000,000. Before becoming expert witness, employed by Los Angeles County Road Department, Riverside County Road Department, city of Irvine, and Federal Highway Administration. Knowledge of governmental agency procedures, design, geometry, signs, traffic controls, maintenance, and pedestrian protection barriers. Hundreds of cases. Undergraduate work—UCLA, graduate work—Yale University.

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1726 Palisades Drive, Pacific Palisades, CA 90272, (310) 454-2988, fax (310) 454-4516. Contact Marcia Haight, SPHR—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/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 employees’ complaints. Assist counsel via preliminary case analysis, discovery strategy, examination of documents, and expert testimony.
How to Use an iPad to Manage and Present Trial Exhibits

IN ONE FORM OR ANOTHER, technology has permeated and improved virtually every aspect of both my personal and my professional life. Until recently, however, I had not yet had an opportunity to experience what happens when technology does the same with trial practice.

In a recent case, opposing counsel hired a trial presentation vendor. If you are thinking Elmo, which I did when opposing counsel first proposed the idea, you can imagine my surprise when I found out that the vendor would be bringing 10 computer monitors into the conference room where the matter was being heard—one for the judge, another for the witness, and the six lawyers in the room would share the rest.

For what purpose? All the trial exhibits—and there were over 2,000—had been imaged and loaded into a software program on opposing counsel’s laptop computer. Whenever he wanted to examine a witness about a particular document, his associate would call up the document on the laptop and it instantaneously appeared on the monitors in front of everyone. Then, at his direction, she would manipulate the exhibit—highlighting key language, blowing up small but critical text, or electronically displaying the exhibit next to another for comparison—so as to complement and emphasize the lawyer’s examination of the witness.

Contrary to my expectations, it was not distracting. Instead, it was effective and sped the examination along smoothly.

So, of course, I had to master this technique myself. Opposing counsel was using Trial Director software on a Windows-based laptop, but, after some quick research, I decided to try an application called TrialPad for the iPad (version 3.0.11). It worked like a charm. So, here is what you need to know.

Capabilities. As far as I could tell, the TrialPad app had virtually the same capabilities as the competing software used by opposing counsel. For any given exhibit, I could zoom in on all or part of the document, highlight, underline, or circle parts of it, create a cutout that popped out of the screen at the viewer, or even use my finger to create a laser pointer on the screen to direct the viewer’s attention. I could also display two different exhibits side by side.

Display Flexibility. My vendor’s setup tethered the iPad to the monitors with a cable. This was not problematic for us, but it may pose logistical issues depending upon the room configuration. If tethering is a problem, it may be possible to attain greater flexibility by utilizing an Apple TV and a Wi-Fi network to take advantage of the iPad’s native wireless display capabilities. The Apple TV serves as an intermediary between the iPad and the display by routing the data in real time over the Wi-Fi network. With this alternate setup, you can move about the room while manipulating documents live on screen.

Ease of Use. The functions were easy and intuitive to use—just like the iPhone or iPad in general—all at the touch of a finger and without the nuisance of repeated mouse clicks. Further, thanks to its flash memory and efficient operating system, the iPad has the benefit of being always on, so it is ready to use in the blink of an eye. Compare that to the multiminute boot-up we are all accustomed to with the PC. Even launching apps on the iPad typically happens in mere seconds instead of the tortoiselike launch of its counterparts.

While, at times, the display on the monitors lagged, my understanding is that the lag is a function not of the application but instead of the connection, which in my case was VGA rather than HDMI. Neither the app nor the iPad ever crashed or had any fatal errors during trial, unlike opposing counsel’s Windows-based laptop. In the rare event of a crash, relaunching the app and returning to where you left off takes seconds, in contrast to the cumbersome, time-consuming, and therefore frustrating crashes experienced on a laptop. In my experience, iPad app crashes, besides being rare, are less likely to result in data loss than is the case with a laptop. I also appreciated the lightweight nature of the iPad when I was carrying it to and from trial along with several heavy boxes.

Cost. The application costs only $89.99. In addition, we used an iPad 4 with 128 gigabytes of memory and a VGA adapter that also contained a power cable input, so the device could be simultaneously plugged in for power and connected to the monitors. The vendor charged the parties a collective total of $1,000 per week for the setup, rental, and takedown of the 10 computer monitors.

Dependency on Internet Connection. There are other iPad trial apps in which the trial exhibits are stored in the cloud and accessed and displayed via an Internet connection to that cloud-based database. I was reluctant to use those applications because I was told that the Wi-Fi Internet connection at my trial’s location was not reliable. With TrialPad for iPad, in contrast, the trial exhibits are loaded onto the iPad itself and accessed and displayed in the application without the need for an Internet connection. Thus, the location’s unreliable con-
connection was not a problem. It is worth noting, however, that in order to load the trial exhibits onto the iPad in the first place, we used an Internet connection from our office computers to upload the exhibits to a Dropbox account and then we used the iPad’s Internet connection at a location with more reliable Wi-Fi to download the exhibits from Dropbox to the iPad.

**Limitations.** The content of the exhibits is not searchable via the application. Even though the documents that we had loaded were, in their native form, OCR-searchable PDF files, the TrialPad application did not have a way to search the content of the exhibits, only the file names.

To correct this issue, we additionally loaded all the exhibits into a free iPad application called Documents by Readdle, which does feature content searching as one of its main functions. Although Documents could not display and manipulate the exhibits for presentation purposes as TrialPad does, it proved a useful backup application for searching content to locate a trial exhibit.

**Transcripts.** I also used the iPad to display written deposition transcripts electronically on the same bank of computer monitors for impeachment and other purposes. However, the application I used for this purpose was not TrialPad but TranscriptPad (version 1.5). TranscriptPad, which uses text, rather than PDF, files of deposition transcripts, allows a user to run key word searches within one or more transcript files in order to locate and then display the desired testimony. The testimony can also be highlighted or flagged; otherwise, the application is fairly limited in the options offered for manipulating what is displayed. The transcript can also be set to automatically scroll downward on the screen at a predetermined speed so that large portions of text can be read by everyone at once.

Because the input is an unformatted text file, the display lacks the look and feel of an original deposition transcript. In order to show the original transcript in all of its formatted glory, you can use a PDF image of the transcript and display it using TrialPad just as you would display a trial exhibit. However, because TrialPad does not allow a file to be searched for content, it is necessary to know in advance the pages of the transcript that you plan to display. My trial did not feature any videotaped deposition testimony and therefore I cannot offer any advice on features relating to displaying media files.

The bottom line is that whatever we needed to be able to do, there seemed to be an application for it, and each one was easy to use. My experience was wholeheartedly positive, and I encourage attorneys to check out the iPad as an excellent option for trial presentation.
TAP: Deposition Skills Workshop

ON MONDAY, NOVEMBER 11, Trial Advocacy and the Litigation Section will host a workshop to provide instruction on how to take and defend depositions in California state court actions. The first part of the program will be a lecture covering the rules relating to oral depositions as well as how to “pin down” the deponent, defend a deposition, use deposition testimony in trial, and develop a deposition strategy. The second part is a workshop in which participants practice taking and defending the deposition of a plaintiff in a civil action for negligence and receive constructive feedback. Participants receive a deposition outline that organizes the deposition process for ease of reference. Course materials will be distributed via e-mail prior to the first class, so a correct e-mail address is needed at the time of registration. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration begins at 1 P.M. with the workshop continuing from 1:30 to 5:30. The registration code number is 011862.

$250—CLE+ member
$350—LACBA member
$500—all others
3.75 CLE hours

TAP: Evidence Skills Workshop

ON MONDAY, NOVEMBER 11, Trial Advocacy and the Litigation Section will host the evidence skills workshop, which is based on the premise that the best way to learn the rules of evidence is to argue them in an evidentiary hearing. In this workshop, participants argue the admissibility of evidence in 21 different evidentiary vignettes based on a breach-of-employment-contract fact pattern. No preparation is necessary for this unique program. Within five minutes participants are on their feet arguing the admissibility of evidence. The evidentiary vignettes include witness competency, foundations for exhibits, chain of custody, authenticity, relevance, undue prejudice, the secondary evidence rule, the better evidence rule, the reliability of scientific evidence, nonhearsay, hearsay, party admissions, prior inconsistent deposition testimony, business records, judicial notice, lay opinion, expert qualifications, expert opinion, and cross-examination of experts on treatises. Written course materials will be distributed via e-mail prior to the first class. Please provide a correct e-mail address at the time of registration. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration will begin at 8:00 A.M. with the program continuing from 8:30 A.M. to 12:30 P.M. The registration code number is 011973.

$250—CLE+ member
$350—LACBA member
$500—all others
3.75 CLE hours

Federal Practice in the Central District

ON TUESDAY, NOVEMBER 12, the Litigation Section will present Southern California’s signature event on practicing law in federal district court. Highlights include a candid two-part panel in which local district and magistrate judges reveal likes and dislikes and what it takes to win at critical junctures of a case. In addition, the event will include the judges’ report card on the Patent Pilot Program. Three years after this program began, the district judges most involved in the Patent Pilot Program will report on its progress and prognosticate on the future of patent litigation in the Central District. On-site registration will begin at 3:30 P.M. with the program continuing from 4 to 6:30, followed by a meal and reception. The event will take place at the Hilton DoubleTree Hotel, 120 South Los Angeles Street, Downtown. Valet parking is available for $10. The prices below include the reception. The registration code number is 012134.

$65—CLE+ member
$160—Litigation Section member
$185—LACBA member
$220—all others
2.5 CLE hours
Honoring 100 Years of the Los Angeles Public Defender

IT IS A WELL-KNOWN ADMONITION: “You have the right to the presence of an attorney before and during questioning, and if you cannot afford an attorney, one will be appointed for you free of charge.” This warning only dates back to the 1960s, but the concept of providing defense attorneys who are paid by the state can be traced back to the Roman Empire, when the papal government appointed a pauperus procurator to act as counsel for indigents. In the late 1400s in Spain an advocate for the poor was provided at public expense. In the early years of the twentieth century, Los Angeles judges commonly appointed what were called jail lawyers, attorneys who made themselves available by hanging around the courts.

Clara Shortridge Foltz, who served as the first woman prosecutor for the Los Angeles County district attorney in 1911, provided the rationale for public support of defendants in her description of how defense in criminal cases was handled at the time:

In criminal trials, as at present conducted, counsel for the defense is an absolute essential to the just examination of a case. The unfortunate prisoner is not denied counsel; he is told that he may supply himself with this essential to justice if he wishes, and if he pleads poverty and announces himself a pauper it is the duty of the court to appoint counsel for him.

Now, without detracting from the able men who sometimes do offer their services in behalf of a penniless prisoner, the rule is that the court appointees are wholly unable to cope with the public prosecutor. Those whose ability commands a law practice are seldom chosen. The appointees come from the failures of the profession who hang about the courts for a stray fee from the unfortunate, or youths just admitted to the bar and anxious for practical experience. They have no money to spend in a proper investigation of the case and come to trial wholly unequipped either in ability, skill or preparation to cope with the man hired by the state to marshal the evidence for the prosecution. This system works untold evil.

This dismal state of affairs moved Los Angeles County voters in 1913 to approve a county charter that created the Office of the Public Defender, a law firm to be paid for by the public. The charter was ratified by the California Legislature, and in January 1914 the nation’s first public defense law firm paid for by taxpayers opened its doors on the 11th floor of the old Hall of Records on Broadway, just west of where the Clara Shortridge Foltz Criminal Justice Center now stands. Walton J. Wood was the first appointed public defender, and his entire original staff consisted of four deputies and a secretary.

The charter spelled out the scope of the public defender’s duties, which included representation in some civil matters:

Upon request by the defendant or upon order of the Court, the Public Defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged, in the Superior Court, with the commission of any contempt, misdemeanor, felony or other offense. He shall also, upon request, give counsel and advice to such persons, in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in a reversal or modification of the judgment of conviction.

He shall also, upon request, prosecute actions for the collection of wages and other demands of persons who are not financially able to employ counsel, in cases in which the sum involved does not exceed $100, and in which, in the judgment of the Public Defender, the claims urged are valid and enforceable in the courts.

He shall also, upon request, defend such persons in all civil litigation in which, in his judgment, they are being persecuted or unjustly harassed.

In June 1915, the Los Angeles City Council created the City Police Court Defender and appointed James H. Pope to handle the defense in misdemeanor cases. The City Public Defender handled Municipal Court filings, including felony preliminary hearings, while the County Public Defender handled felony cases in Superior Court. The City Public Defender merged into the County Public Defender Department in 1965. In 1993 the Los Angeles Board of Supervisors appointed Bruce Hoffman to head a new Alternate Public Defender Office to represent criminal defendants in cases in which a conflict of interest prevented the public defender from undertaking the representation.

Today, Los Angeles County Public Defender Ronald L. Brown heads a law office of 1,100-plus attorneys, paralegals, investigators, social workers, secretaries, and administrative staff. The office provides superior, cost-effective representation and is an innovative, award-winning national leader in defense advocacy on behalf of adults and children in the criminal, juvenile, and mental health justice systems.

The public defender is proud of its 100 years and its status as the preeminent publicly funded criminal defense office in the United States. Its lawyers and staff strive to exemplify the public defender’s motto: “To enrich lives through effective and caring service.”

Now retired, Alan H. Simon was a bureau chief of the law office of the Los Angeles County Public Defender.
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▲ Statistics & econometric modeling

To avoid mistakes, follow the online advice at www.fulcrum.com, or call us at 213-787-4100 for a free consultation.