Los Angeles lawyer Michael J. Vogler explains how studios can effectively comply with the FCPA page 14
ANNOUNCING
AN EXTRAORDINARY INVESTMENT
IN THE FUTURE
THE DALE E. FOWLER
SCHOOL OF LAW
AT CHAPMAN UNIVERSITY

The president and trustees of Chapman University are honored to announce that the School of Law has received a $55 million gift from Orange County businessman and Chapman alumnus Dale E. Fowler. The extraordinary donation is the second largest single reported gift to a law school in United States history.

“It gives me great pleasure to announce that now and forevermore the law school will be known as the Dale E. Fowler School of Law.”

PRESIDENT, JIM DOTI

“With this extraordinary gift, we now reinforce our commitment to practical legal training, to hiring new professors from the top ranks of academics and practitioners across the country, and to helping make the cost of law school more affordable for our students.”

DEAN TOM CAMPBELL

DALE E. FOWLER SCHOOL OF LAW
When there’s a lot to lose, we have a lot to offer.
Your best referrals come from other lawyers. We host business development meetings exclusively for attorneys. With TEN, you can develop 50, 75, 100 or more of your peers as effective referral sources.

Annual Membership: $450*

New Members: 10% Discount through September 30

Become a member today at: www.TENesquire.com

Over 20 monthly meetings, including:

- Downtown LA
- Pasadena
- Century City
- Hollywood
- Westwood
- Ventura
- Santa Clarita
- Glendale
- Sherman Oaks
- Encino
- Woodland Hills
- Westlake Village
- Beverly Hills
- Burbank
- Tarzana

Specialty Groups
- 2 Women’s Groups
- Litigators Group
- Wine Tasting Group
- Business Lawyers
- New Lawyers Group
- Hiking Lawyers
- Golfing Lawyers

www.tenesquire.com
www.fb.com/tenesquire@esquienetwork

* Members may attend any or all meetings subject to space availability by RSVPing to the moderator.
14 Foreign Practices
BY MICHAEL J. VOGLER
Analysis of whether a studio has violated the FCPA can be extremely fact-intensive

21 Secret Preemption
BY SA’ID VAKILI AND ROBERT M. ZABB
Uniformity of trade secret law should be legislated, not adjudicated
Plus: Earn MCLE credit. MCLE Test No. 227 appears on page 25.

30 Dissolution of Goodwill
BY WARREN R. SHIELL AND JB RIZZO
The goodwill of a business may be determined by converting past results to a present value

Special Pullout Section
Corporate Counsel’s Guide to California Law Firms and Attorneys

8 Sam Lipsman—1949-2013

10 Barrister’s Tips
What attorneys can do to help the overburdened court system
BY MEGAN KNIZE

12 Practice Tips
Disclosure requirements for offshore assets in divorce
BY STEVE S. ZAND

38 Computer Counselor
The mobile office continues to evolve
BY GORDON K. ENG

41 By the Book
The Man Who Seduced Hollywood
REVIEWED BY NEVILLE L. JOHNSON

44 Closing Argument
On the anniversary of Gideon, an argument for free civil representation
BY JUDGE MARK JUHAS

42 Index to Advertisers

43 CLE Preview
Los Angeles Lawyer

46th Annual
Securities Regulation Seminar

FRIDAY, OCTOBER 4, 2013 • 8:00 AM – 5:00 PM
Millennium Biltmore Hotel, 506 S. Grand Ave., Los Angeles

Sponsored by the Los Angeles County Bar Association, Business and Corporations Law Section, and U.S. Securities and Exchange Commission

LUNCH-speaker Daniel M. Gallagher
Commissioner, Securities and Exchange Commission

TOPICS
• SEC Update - Parts 1 and 2
• Enforcement Developments
• Ethical Considerations for the Securities Lawyer

For information about the program, break-out sessions or registration, visit www.lacba.org/businessandcorps

REGISTRATION – Program Code 012059

For phone registration with Visa, Mastercard or American Express call 213.896.6560, M-F 9am-4pm. You may also register online at www.lacba.org/businessandcorps

• Early Bird Individuals (through September 13): $325.00
• Early Bird Group* (through September 13): $1,750.00
• Business and Corporations Law Section Member: $385.00
• Corporate Law Section Member: $385.00
• LACBA member: $405.00
• All Others: $465.00
• At the Door: $490.00

*GROUP RATE buy 5 tickets at reduced rate, get 6th complimentary (all 5 tickets must be purchased together to receive special offer) $1,850.00

Government employees, law students and CLE+ Members, please call Member Services at 213.896.6560 or send email to msd@lacba.org for special rates.

NO REFUNDS AFTER SEPTEMBER 30, 2013
“Industry Specialists For Over 25 years”

Witkin & Eisinger we specialize in the Non-Judicial Foreclosure of obligations secured by real property or real and personal property (mixed collateral). When your clients need a foreclosure done professionally and at the lowest possible cost, please call us at:

1-800-950-6522

We have always offered free advice to all attorneys.

TRUST DEED FORECLOSURES

&

WITKINEISINGER, LLC

RICHARD G. WITKIN, ESQ. ♦ CAROLE EISINGER

Law Firms 4 Sale

Want to retire? Want to plan for your life after law!

See Ed Poll’s website www.lawbiz.com for the tools you need to make a transition.

Want to buy a practice?
Ed can help!
Call today 800.837.5880


Huron law group combines winning trial experience in business and real estate litigation with unparalleled personal attention and client support.

Huronlaw.com  |  310.284.3400

VIGOROUS
STATE BAR DEFENSE

JAMES R. DIFRANK
A PROFESSIONAL LAW CORP.
TEL 562.789.7734
www.BarDefense.net
E-MAIL DiFrank98@aol.com

• Disciplinary Defense
• Reinstatements/Admissions
• Malpractice Defense
• Bankruptcy
• Criminal Defense
• Representation within the State of California

Former:
State Bar Sr. Prosecutor
Sr. State Bar Court Counsel

Home of Sir Winston
Pictured Above
The stern-looking, somberly attired gentleman peered down from above his reading glasses at the assembled crowd. With an authoritative voice, he inquired, “Is there anyone present who can translate from Spanish into English?” Many in the crowd remained silent, unable to comprehend; most ignored the request; some looked at one another quizzically; and a few raised their hands, tentatively—and they were the ones chosen for the task.

You might think this scene played out at Ellis Island before an overworked immigration official. Actually, this happened earlier this year in an unlawful detainer courtroom in Los Angeles, with volunteers ending up as unpaid interpreters in complex court proceedings, serving pro se litigants who could neither afford legal counsel nor understand English very well.

According to the 2010 census, 43 percent of Californians aged five and older speak in a language other than English at home either sometimes or always. This means that almost 16 million Californians—the highest percentage of non-English speakers for any state in the union—may need to use interpreters in order to have their day in civil court. While criminal defendants routinely get interpreters, the U.S. Department of Justice has recognized the problem on the civil side, and the DOJ has been actively “encouraging” state courts that receive federal funds to comply with federal laws relating to court access for non-English speakers in civil cases. These laws include Title VI of the Civil Rights Act of 1964 and the Omnibus Crime Control and Safe Streets Act of 1968. In Lau v. Nichols, the U.S. Supreme Court held that failing to take reasonable steps to ensure meaningful access—in that case, educational access in the California public schools for non-English speakers—is a form of national origin discrimination. Lau thus reflects the idea that language is so closely intertwined with national origin that language-based discrimination can serve as a proxy for national origin discrimination.

The DOJ has determined that, like school systems, civil court systems that directly or indirectly receive federal financial assistance must provide meaningful access to non-English-speaking persons in order to comply with Title VI, the Safe Streets Act, and their implementing regulations. Sadly, this appears to be an aspiration not presently within reach. As far back as 2005, the California Commission on Access to Justice issued a report that addressed the “unfortunate reality” that “courts are caught in an impossible position.” Why? Because “limited court resources and the lack of qualified interpreters make it functionally impossible to provide interpreters in the vast majority of civil proceedings.”

The good news is that significant progress has been made since the commission’s 2005 report: more court forms are becoming available in more languages; certification and testing of court interpreters is being expanded; bar leaders, bar associations, and law libraries are working to address the problem; and the Access Commission continues to make language access a priority. But the biggest hurdle remains funding—that is, the money to pay the interpreters. Unfortunately, it cannot be said that the financial situation has improved since the commission’s report in 2005.

When even one litigant is unfairly denied access to the courthouse, we all lose. California lawyers who are committed to equal justice should do their part to take action to improve language access in our halls of justice, the California courts.

Paul S. Marks is the chair of the Editorial Board of Los Angeles Lawyer magazine and a partner with Neufeld Marks, a boutique law firm located in Little Tokyo. He serves as a commissioner on the California Commission on Access to Justice.
Lawyers’ Mutual Insurance Company

California’s Pioneer Since 1978
Insuring Our State’s Lawyers for 35 Years

Extensive FREE Online MCLE Library – Over 50 hours!
Always at no charge for our members

Solo Practice Resources

Virtual Law Practice Guidance

Lawyer-to-Lawyer Loss Prevention Hotline

Specialty Practice Rates
ADR, Appellate, Criminal,
   Immigration, Insurance Defense

Easy Renewal Process

Member Dividends*

LMIC thanks you for 35 years of member support

www.LMIC.com or call (800) 252-2045

* Dividends are paid at the sole discretion of the Company’s Board of Directors and past dividends do not guarantee the payment or amount of future dividends.
Los Angeles Lawyer | September 2013

We are deeply saddened by the loss of Sam Lipsman, Director of Publications and editor and publisher of the Los Angeles County Bar Association’s award-winning Los Angeles Lawyer magazine. The LACBA community and the world lost too soon a great man, a true gentleman, and a scholar. Sam will always be remembered for his brilliance, his wit, and his compassion. He brought great style and passionate dedication to the magazine, and he enriched the lives of the many of us fortunate to have crossed paths with him.

Patricia Egan Daehnke, president of the Los Angeles County Bar Association

On my first day as LACBA’s executive director, I was a bit overwhelmed meeting staff and getting acquainted with the complexity of LACBA. Sam came in to introduce himself, took a seat, and proceeded to tell me how things should be done. That was our Sam, and it was the first of many conversations about what was best for LACBA—at least in his view. I enjoyed going into his office to let him know that we wanted to do something differently with our publications—he would listen, give me a half-smile, and say, “I’ll think about it and get back to you.” I could always count on him to come back with his thoughts and some good ideas. Our Sam. We miss him deeply, and LACBA will never be the same without him. I know I was fortunate to have the opportunity to work with him.

Sally Suchil, Executive Director, Los Angeles County Bar Association

I worked with Sam at Los Angeles Lawyer for 18 years. Throughout that time, his humor and wry wit infused every encounter and was his trademark until the very end. Sam was able to coax better writing and storytelling from authors, myself included, for he was willing to take as much time as necessary to make good articles great. He took no credit, but deserved much. Sam’s dedication to the profession, the magazine, and LACBA was unmatched, and he is sorely missed.

Jerry Abeles, former chair of the Los Angeles Lawyer Editorial Board

Describing Sam as an “editor” is like describing Los Angeles as a “town.” He was far beyond our summations of him. He was a mentor, a teacher, a wise man. His knowledge was vast yet he was always approachable. I miss him.

Eric Brown, member of the Los Angeles Lawyer Editorial Board

I had the immense pleasure of working with Sam on the Los Angeles Lawyer magazine Editorial Board for four years. Sam was one of the most intelligent people I have had the pleasure of knowing. He was such a positive force and a true pleasure to work with. He will be extremely missed.

Caroline Bussin, member of the Los Angeles Lawyer Editorial Board

Sam Lipsman was an amazing, brilliant, unforgettable guy in the thick of the anti-war movement back then, an idealist among a lot of us who were just going through an idealism phase. I last saw him a number of years back at a college reunion and deeply regret not getting a chance to say goodbye.

Christopher Connell, Princeton classmate

Sam was and continues to be an inspiration. Words cannot describe how sad I am at his passing.
passing. He left us far too soon.

Chad Coombs, former chair of the Los Angeles Lawyer Editorial Board

Sam was a very thoughtful and generous person. I’m glad I had the chance to get to know him. I will miss him.

Ben Davidson, member of the Los Angeles Lawyer Editorial Board

Sam was a great leader for Los Angeles Lawyer magazine. Our authors and editorial board are volunteers, so it requires strong motivational and organizing skills. Sam would welcome the new editorial board each year with a guide he called “The Care and Feeding of Authors.” It was filled with his stories of some articles that are born great, some that are made great, and some that never made it into print. It has been a memorable way to remind the Editorial Board members of how closely tied the success of magazine is to its authors. I will miss Sam.

Gordon K. Eng, member of the Los Angeles Lawyer Editorial Board

As the editor in chief, Sam was uncompromising in his demand for high quality that significantly contributed to the discussion of the law. As a friend, he was insightful, loyal, and both liberal with smiles and reasons to smile back. He leaves a legacy of both that will endure in all of us who knew him.

Michael Giebelson, former chair of the Los Angeles Lawyer Editorial Board

Sam was smart, witty, and truly a pleasure to work with. I’m very glad that I got to work with him on a special issue so soon after he invited me to be on the board. I learned so much from him and will miss him.

Sharon Glancz, member of the Los Angeles Lawyer Editorial Board

Sam had such warmth and enthusiasm for his work. He was a true leader and will be sorely missed.

Amy Messigian, member of the Los Angeles Lawyer Editorial Board

One thing I know for sure after working with Sam for more than 18 years at Los Angeles Lawyer: Sam loved publishing. And publishing loved him back.

Sam knew a lot about a lot of things, but he was a true master of publishing, in all its facets. He understood the architecture of editing. He knew when an article needed to be built out, expanded, and when an article needed to be recast, reframed, cut. He knew when to go Baroque and when to go Minimalist. He was a genius at constructing issue after issue of Los Angeles Lawyer magazine from compelling but sketchy ideas to the blueprint of articles in progress to the polished edifice of the final product. He relished his interactions with the lawyers who served on the magazine’s Editorial Board and who wrote the articles published in Los Angeles Lawyer’s pages. Sam insisted on impeccable research and top-flight analysis, and he was proud of the lawyers who regularly delivered both. Plus, he knew how to elicit and encourage beautiful, memorable illustrations and cover photographs and the production of state-of-the-art page layouts to surround the challenging text. He enjoyed his role of bringing forth legal ideas and expertise into a format that was elegant, entertaining, and, most important to Sam, as helpful as possible to lawyers in their daily practices.

Examples of his excellence abound, but the special issues are a true window into his skills. He could take compelling but seemingly impossibly broad themes—such as the aftermath of 9/11, the increasing intersection of criminal and civil law, the changing landscape of entertainment law and international law and real property law, and the workings of the Los Angeles Superior Court—and, in collaboration with the lawyers on the Editorial Board and the writers and the staff, orchestrate a pitch-perfect collection of impressive articles. His ability to bring order out of the inevitable chaos of initial plans and brainstorming is justifiably legendary.

Sam understood, and enjoyed, the business of publishing. He was an able steward of the magazine and the Publications Department. He became expert at the complex economics of publishing in a changing world, and he managed the magazine with brilliance during good times and bad. He was always deeply aware of the advertising side of the ledger and appreciated each and every one of the magazine’s loyal and new advertisers.

Sam was looking forward to his well-deserved retirement. He would have been the world’s best eminence grise, a constant source of expertise and guidance to the staff and the lawyers serving on future editorial boards. It is tragic and sad that he left us way too soon. But that expertise, that guidance, will always reside in the pages of the many issues of the magazine that bear his stamp.

Lauren Milicov, Senior Editor of Los Angeles Lawyer from 1980 to 2012

Sam was a brilliant, insightful, and truly caring person. His wit and charm made him a joy to be around. He was the kind of person who made a difference in the lives of those around him. Both his family and his colleagues will miss his presence in our lives, but we will cherish the fond memories we have of him.

David Schnider, cousin and former chair of the Los Angeles Lawyer Editorial Board

When I became the chair of the Los Angeles Lawyer’s Editorial Board, Sam said, “You need to write the From the Chair column, but can write about anything you want.” “Anything?” I asked. Perhaps sensing my unconventional side, Sam smiled. “You can write about cooking or your childhood, if that’s what strikes your fancy.” So, I wrote about many things, few having to do with the law and most of them (intended to be) humorous. Far from discouraging this behavior, Sam actually encouraged me, even touted my columns to the board and enjoyed the bit of fan mail the columns generated. My entire time on the board was marked by Sam’s encouragement of me, trust in me, and respect for me. And not until now do I realize what it meant to me. So, although I didn’t come to know Sam as well as so many of you who might read this, I know that he was a special person whose influence made my life richer. My sadness at Sam’s passing is made more so because I have waited too long to tell him that he made a difference.

Ken Swenson, former chair of the Los Angeles Lawyer Editorial Board

I had the honor of working with Sam as one of the contributors and editors of Los Angeles Lawyer. Sam was the best and he will be missed by all who knew him and everyone who benefited from his great work for the Los Angeles legal community.

Steven Toscher, member of the Los Angeles Lawyer Editorial Board
What Attorneys Can Do to Help the Overburdened Court System

NEWS OF CONSOLIDATION AND EMPLOYEE FURLoughS in Southern California courts has left many attorneys feeling frustrated. They are not alone. Judges and their law clerks are frustrated too, as they must adjudicate a growing docket despite a diminishing budget.1 But many new and young lawyers may not realize that they can play a vital role in helping judges render decisions more quickly. If attorneys are efficient in their filings, the workloads of judges and law clerks will be more manageable, which may, in turn, secure a favorable result.

New attorneys can be part of the solution in two ways. First, new attorneys can commit to writing clearly and accurately so that the judge and law clerk spend less time trying to understand what the attorney is trying to convey. Second, new attorneys can thoroughly review local rules and become familiar with a judge’s practice requirements to focus arguments and avoid unnecessary motions.

Most judges in state and federal trial court rely on the services of “elbow clerks,” whose job it is to work alongside the judge. Most law clerks are assigned between three and five motions each week. The law clerk reads the briefs and provides research and writing support in the form of an oral presentation, a memo, or a draft order or opinion. The judge will also read all of the motions briefs and discuss the case with the law clerk prior to a hearing or prior to issuing an order. Therefore, briefs should be written for two people: someone who has very little experience with the law (the law clerk) and someone who has much more (the judge). When filing motions, attorneys must first persuade the law clerk, who will then persuade the judge. Writing clearly is the best way to accomplish this task.

Clear and Accurate Writing
When organizing a brief, it is most effective to analyze the winning argument first. Make clear which arguments are dispositive and do not expect the court to do that job or understand nuances. An oft-cited statement reminds litigants that “[j]udges are not like pigs, hunting for truffles buried in briefs.”2 Before making a presentation to the judge, a law clerk needs to understand and articulate the arguments of all the parties. When drafting a motion or writing a response brief, be sure to constantly ask why it is important to include a particular case or anecdote. Every sentence counts.

Law clerks also spend considerable time checking and verifying exhibits and citations. Assume that every piece of paper filed with the court will be read and relied upon by the law clerk or judge. Exhibits should be legible. Also assume that every single case cited will be reviewed. When the wrong party name or reporter is cited for a case, the law clerk must spend considerable time determining what the attorney meant to cite. An attorney who does the proper vetting of content and form will enable the law clerk, and, later, the judge, to evaluate arguments more efficiently.

While clear writing is vital, following the local rules is just as important to effective persuasion.3 The local rules are intended to help attorneys file clear, concise, and organized motion briefs. These rules also help parties reduce the need to file unnecessary motions, especially in federal court. In the Central District, Rule 7-3 requires “conference of counsel prior to filing of motions.” The rule states that except for motions filed in certain types of cases and for certain types of motions, “counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution.”4 If the parties cannot resolve the need for the motion, the moving party must include a statement to this effect: “This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on (date).”

Some judges may have a generous view of what constitutes a thorough discussion. For example, a judge may find that the parties complied with Rule 7-3 based on evidence of an exchange of text messages. Compliance with Rule 7-3 is important because the budget crisis facing the judiciary leaves judges with much less time for each case. Parties need to resolve smaller or less controversial motions themselves so that the judge is available to handle larger, more substantive motions.

Review the Requirements
Attorneys can also increase their efficiency in court by carefully reviewing the Judges’ Requirements page on the Central District’s Web site. Each judge has a page of helpful information, including motion calendars, biographies, and appearance information. Additionally, some judges post tentative orders on their pages. The purpose of the tentative order is to provide a view of the court’s thoughts so that the parties focus their remarks during oral argument. Being aware of each judge’s practice will assist in impressing and persuading the court.

In sum, each attorney who practices in state and federal trial court can help during this time of crisis in an overburdened court system. We can be mindful of our audience and write clearly and accurately, and we can thoroughly prepare for filings and appearances by knowing the local rules and each judge’s preferences. These simple steps will go a long way in helping our busy courts weather this fiscal storm.

2 United States v. Dunkel, 927 F. 2d 955, 956 (7th Cir. 1991).

Megan Knize is an attorney who has clerked for two years in state and federal trial courts in Southern California.
THE CORRECT WAY TO ACCEPT PAYMENTS!

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

✓ Separate earned and unearned fees
✓ 100% protection of your Trust or IOLTA account
✓ Complies with ABA & State Bar Guidelines
✓ Safe, simple, and secure!

Reduce processing fees and avoid commingling funds through LawPay.

Process all major card brands through LawPay

866.376.0950
LawPay.com/lacba

NOW AVAILABLE EXCLUSIVELY THROUGH
THE LOS ANGELES COUNTY BAR ASSOCIATION

AffiniPay is a registered ISO/MSP of BMO Harris Bank, N.A., Chicago, IL
Disclosure Requirements for Offshore Assets in Divorce

FAMILY LAW ATTORNEYS REPRESENTING CLIENTS who are divorcing and who have offshore income and assets need to be well versed in the disclosure requirements of the federal tax code as well as California’s Family Code. Attorneys and clients who are unaware of these disclosure rules run the risk of incurring hefty criminal and civil fines and even jail time. The duty to disclose assets in dissolution proceedings, juxtaposed with the civil and criminal penalties for failing to disclose offshore assets to the IRS, creates a legal mine field for unwary lawyers and their clients. The disclosure duties in divorce compels parties to deal with any previous failure to report offshore assets and income to the IRS.

Regarding disclosure, two key misconceptions are common. The first is that only U.S. citizens are subject to these disclosures. In IRS jargon, however, a “U.S. Person” has a definition much broader than the term would suggest. A “U.S. Person” is generally defined as a U.S. citizen, resident alien, or domestic entity (corporation, partnership, estate or trust).1 The second erroneous belief is that only income earned in the United States is subject to U.S. taxes. The truth is that a U.S. person is taxed on worldwide income.

The problem is not limited to the wealthy and sophisticated. Recent immigrants to the United States face significant IRS issues when they leave money and reportable assets behind in their homelands. They often fail to file appropriate disclosures with the federal government. The IRS has been quite successful in its pursuit of taxpayers with offshore bank accounts, and it has recently expanded its program for disclosure of specified foreign financial assets held by U.S. persons. Starting with 2011 tax returns, the IRS has instituted an additional reporting requirement that is separate from and exceeds previous requirements for the Report of Foreign Bank and Financial Accounts (FBAR).

Attorneys representing dissolution clients with foreign assets must understand that two distinct reporting requirements come into play for offshore assets. The first reporting requirement is for Specified Foreign Financial Assets (SFFA). These assets include ownership in bank and financial accounts, stocks and securities, financial instruments or contracts, or ownership of foreign entities. For example, real property directly owned by a client in a foreign country need not be reported, in contrast to any interest in a foreign corporation, partnership or trust, which must be disclosed to the IRS. Filing requirements are subject to monetary thresholds. For a single individual, the SFFA, in aggregate, must reach a value of more than $50,000 at the end of the calendar year, or reach $75,000 at any time during the year. Nondisclosers could face criminal and civil penalties. The civil penalty is up to $10,000, with an additional $10,000 for each 30 days of non-filing after IRS notice of a failure to disclose, with a maximum penalty of $60,000 for each occurrence. For taxpayers hoping that the statute of limitations will eventually give them safety, it is sobering to note that if they fail to file the newly required SFFA Form 8938, the statute of limitations for the tax year remains open. No clock starts running until Form 8938 is filed.

The second reporting requirement is the FBAR, specified for taxpayers with offshore financial accounts who file U.S. tax returns. These taxpayers must disclose their offshore accounts and report the income on Schedule B of their federal returns. Taxpayers with an interest in offshore bank accounts must also file IRS Form TDF 90-22.1 no later than June 30 of each year. There are no extensions to this deadline. If a taxpayer with an interest in a foreign bank account fails to file the disclosure, he or she is exposed both to criminal tax penalties as well as civil ones. If charged criminally, the taxpayer faces fines of $250,000 and five years in prison.2 Civil FBAR penalties for not filing are also severe, with fines amounting to the greater of $100,000 or 50 percent of the balance in the account for failure to file TDF 90-22.1.3

Reporting offshore bank accounts on a TDF 90-22.1 does not satisfy the taxpayer’s reporting obligation under SFFA on IRS Form 8939. Another layer of rules and penalties arises when the offshore assets are found in countries subject to U.S. sanctions. The Treasury Department’s Office of Foreign Assets Control (OFAC) administers and enforces U.S. economic sanctions and embargoes targeting certain disfavored countries. OFAC operates comprehensive sanctions programs against Cuba, Iran, Myanmar, Sudan, and Syria. Other non-comprehensive programs target the Western Balkans, Belarus, Cote d’Ivoire, the Democratic Republic of the Congo, Iraq, Liberia, Libya, North Korea, Somalia, and Zimbabwe.

U.S. persons may not engage in prohibited transactions with sanctioned countries. Prohibited transactions include financial and other dealings unless authorized by OFAC. Would-be deal makers must first obtain OFAC licenses prior to division of assets, transfer of

Steve S. Zand is a certified family law specialist and a full-time professor of law at the University of West Los Angeles School of Law.
funds, or other financial transactions in sanctioned countries. Violating these rules can result in substantial fines. Depending on the program, criminal penalties can include fines from $50,000 to $10 million, along with imprisonment ranging from 10 to 30 years for willful transgressions. Civil penalties can range from $250,000 or twice the amount of each underlying transaction to $1,075,000 for each violation.

An individual who has failed to comply with all the foregoing IRS reporting requirements is faced with the disclosure demands of a California dissolution proceeding. Divorcing parties have a fiduciary duty to disclose all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has an interest and to provide equal access to all information, records, and books that pertain to the value and character of those assets.

Therefore, under penalty of perjury, the parties must mutually disclose all material facts and information relating to the existence and character of all assets, regardless of the contended character of the asset as community or separate property, and all information relating to the value of said assets and amounts.

The court in Schnabel v. Superior Court held that each spouse is entitled to complete disclosure of all information sufficient to permit an independent analysis of the financial status of the spouses. The parties have a fiduciary duty and obligation pursuant to Family Code Section 721 to provide the identity of all assets and any unreported income.

Section 2107(c) of the Family Code provides for the mandatory award of attorney’s fees and costs (including forensic accounting fees) and monetary sanctions for the breach of duty of disclosure. The court of appeal in In re Marriage of Feldman affirmed the trial court’s order for sanctions against the husband for his failure to honor his postseparation disclosure obligations. The appeals court affirmed sanctions in the amount of $250,000 as well as an attorney’s fee order in the amount of $140,000 under Sections 2107(c) and 271(a).

Failure to disclose foreign bank accounts and reportable assets also exposes the non-disclosing spouse to an award of 100 percent, or an amount equal to 100 percent of any undiscovered asset. Thus, the significant penalties for failing to disclose foreign bank accounts and assets in dissolution of marriage proceedings make nondisclosure simply not an option. Disclosure of these offshore assets exposes the taxpayer going through divorce to civil and criminal penalties. The IRS’s relentless pursuit of foreign bank accounts and reportable assets has practically ended the era of secret bank accounts and offshore holdings. With the new Foreign Account Tax Compliance Account (FATCA) reporting requirements being currently implemented, the IRS will have additional tools at its disposal for uncovering offshore holdings. FATCA exponentially increases the risks of discovery of offshore accounts. Taxpayers with unreported offshore assets must either voluntarily disclose their offshore funds or face the increasingly likely dire consequences.

Divorcing parties with offshore accounts find themselves between Scylla and Charybdis. If they fail to disclose an offshore account, they have committed perjury and may lose the asset. They also face severe sanctions. On the other hand, if they disclose, they risk civil and criminal penalties imposed by the IRS.

The OVDP

One option is for the parties to disclose their offshore bank accounts without contacting the IRS criminal investigation branch. This may be done by simply amending previous tax returns. Still, there is no assurance that federal tax authorities will not fully prosecute these cases. Another option is for the parties to enter the Offshore Voluntary Disclosure Program (OVDP), which was started in 2012 after the expiration of earlier programs in 2009 and 2011. Although the program is currently open-ended, the IRS may decide to terminate the OVDP program at any time. This could be the last opportunity for individuals with undisclosed offshore income and bank accounts to become compliant with IRS regulations. The 2012 OVDP allows taxpayers to voluntarily disclose the foreign accounts before the IRS discovers them itself. Most taxpayers who enter the OVDP pay substantial fines, but they avoid criminal prosecution, a benefit that outweighs any financial pain.

The option that is clearly not available is for the attorney to help the client conceal the offshore assets. This can cause the attorney to become the subject of a federal prosecution. Taxpayers who have failed to report their specified offshore assets and who are going through divorce are left with only one viable option: enter the OVDP program, pay the hefty fines, and avoid criminal prosecution and financial ruin. Those who do not heed the advice and fail to disclose their foreign assets and income to the IRS face jail time and financial ruin.

1 I.R.C. §7701(a)(30).
4 FAM. CODE §1100(c).
6 FAM. CODE §52100, 2120.
8 FAM. CODE §1101(h).
IN FEBRUARY, THE NEW YORK TIMES reported that the Department of Justice (DOJ) and the SEC began a confidential inquiry into possible violations of the Foreign Corrupt Practices Act (FCPA) by people or companies in Hollywood involved in the film trade with China.1 Earlier, Reuters reported that the SEC contacted five major studios regarding the FCPA, including 20th Century Fox, Disney, and DreamWorks Animation. It is likely that several smaller studios were also contacted or made aware of the ongoing investigation.2 The potential liability associated with an FCPA violation is not lost on Hollywood executives.

With explosive market growth in Russia, China, Brazil, and South Korea, the focus on foreign markets is changing the way studios assemble their feature film slates.3 Three of the five top grossing films in 2012—Skyfall, The Hobbit: An Unexpected Journey, and Ice Age: Continental Drive—did more than 70 percent of their business overseas, while the number one grossing film, The Avengers, earned 60 percent of its $1.5 billion in receipts from foreign box offices.4

In 2012, China surpassed Japan as the number two box office market in the world, with expectations that it may surpass the United States in gross revenues within the next eight years. As foreign box office sales become more important, foreign themes and locations will have greater importance in decisions about which movies will be made.5 The lower production costs associated with shooting in emerging markets also mean that Hollywood will produce movies and television programming in foreign locations with increasing frequency. While this may be good for Hollywood’s bottom line, many foreign countries have a history of bribery of public officials to secure business.

The FCPA
Enacted in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies, the FCPA prohibits corrupt payments to foreign officials for the purposes of procuring or maintaining business. The two enforcement components to the FCPA consist of antibribery provisions and accounting provisions. The antibribery provisions make it unlawful for a citizen or business of the United States to make a corrupt payment or give anything of value to a foreign official.6

U.S. entertainment companies operating abroad need to develop comprehensive plans to avoid FCPA violations

by Michael J. Vogler

Michael J. Vogler is an attorney and film production consultant who has worked on more than 40 feature films and television productions.
cial for the purpose of obtaining or retaining business. The accounting provisions require companies whose securities are listed in the United States to make and keep books and records, to devise and maintain an adequate system of internal accounting controls, and prohibit individuals and businesses from knowingly falsifying books and records, or knowingly circumventing or failing to implement a system of internal controls.6

A company that fails to take FCPA compliance seriously exposes itself to substantial risk. For each violation of the antibribery provisions, corporations and other business entities are subject to a fine up to $2 million.7 Individuals, including officers, directors, stockholders, and agents of companies are subject to a fine of up to $100,000 and imprisonment for up to five years.8 For each violation of the accounting provisions, corporations and other business entities are subject to a fine of up to $2.5 million.9 Individuals are subject to a fine of up to $5 million and imprisonment for up to 20 years.10

The antibribery provisions of the FCPA apply not only to “issuers” (defined as companies with a class of securities registered under Section 12 of the Exchange Act11 or companies required to file periodic and other reports with the SEC under Section 15(d)12) but also to “domestic concerns”13 as well as foreign nationals or businesses or agents thereof.14 Domestic concerns include any citizen, national, or resident of the United States and any corporation that has a principal place of business in the United States or is organized under the laws of any state.15 Liability also attaches to foreign nationals and businesses if they commit acts in violation of the provision while in the territory of the United States.16

To violate the antibribery provisions of the FCPA, an issuer, domestic concern, or a foreign national or business acting in the United States must act in furtherance of either an offer, payment, a promise to pay, or an authorization to pay any money, or an offer, gift, promise to give, or authorization of giving anything of value.17 The offer, payment, promise, or authorization must be given to any foreign political party or party official, any candidate for foreign political office, or any foreign official (defined as any officer or employee of a foreign government or public international organization acting on behalf of that government or organization)18 or to any person that the entity knows will pass the payment offer, promise, or authorization on to any of the above.19

The act must be made by an issuer or a domestic concern and make use of any means or instrumentality of interstate commerce. Moreover, the act must be made by a national of or entity organized under the law of the United States outside the United States, or the act must be made by any other person, foreign national or business, inside the United States, but not necessarily using a means of instrumentality of interstate commerce.20

The entity must act for a corrupt purpose of influencing an official act or decision of that person, inducing that person to do or omit doing any act in violation of his or her lawful duty, securing an improper advantage, or inducing that person to use his or her influence with a foreign government to affect or influence any government act or decision.21 The act must be to assist the company in obtaining, retaining, or directing business.22

It is important to note that the DOJ can also bring charges of conspiracy to violate the antibribery provision of the FCPA under the general conspiracy statute. A prosecutor need only prove an agreement by two or more persons to commit an FCPA violation with knowledge of the conspiracy and by actually participating in the conspiracy, as long as at least one coconspirator commits one overt act in furtherance of the conspiracy.23 Additionally, under federal law, individuals or companies that aid or abet a crime, including an FCPA violation, are guilty as if they had directly committed the FCPA violation themselves.24

Although no Hollywood company has yet been subject to an enforcement action by either the SEC or the DOJ, a film executive and his wife have. In 2009, Gerald and Patricia Green were found guilty of substantive violations of the FCPA and U.S. money laundering laws in relation to a sophisticated bribery scheme that enabled them to obtain a series of Thai government contracts, including valuable contracts to manage and operate Thailand’s yearly film festival.25 They were sentenced to six months in prison and ordered to pay $250,000 in restitution.

On a corporate level, in 2008, Siemens was charged with bribery, conspiracy, and records violations, resulting in multiple guilty pleas and the largest monetary sanction—$1.6 billion—even imposed on a single entity case under the FCPA.26 In 2010, the DOJ’s criminal division secured a combined $1 billion in judgments and settlements through enforcing the FCPA.27

While the FCPA does not specify a statute of limitations, the general five-year period under 18 USC Section 3282 applies to substantive violations. However, under a conspiracy theory the government can reach beyond the limitations period by proving that one act in furtherance of the conspiracy occurred during the limitations period, thus enabling it to prosecute bribes paid or accounting violations occurring more than five years prior to the filing of formal charges.28 Also, in a criminal case, the government may seek a court order suspending the statute of limitations for up to three years in order to obtain evidence from foreign countries.29

For civil actions brought by the SEC, the statute of limitations is also five years.30 However, the SEC may seek equitable remedies such as an injunction or the disgorgement of ill-gotten gains for conduct predating the five-year statute of limitations period, and if individuals are not residents of the United States, the statute is tolled for the period in which the defendants are outside the Unites States.31

What Are Corrupt Payments?
From large studios to independent contractor companies, the impact on Hollywood of stringent FCPA enforcement could be profound. Anyone who has ever established a foreign production or coproduction or shot on location, particularly in third-world or emerging market countries, has probably experienced some sort of “payment” expectation. In many countries, bribery is a common means of doing business, particularly if various permits, equipment importation, and local government support (such as obtaining work permits and visas for nonlocal crew) is necessary. For example, production records for the movie Sahara, shot mostly in Morocco, indicate that 16 “gratuity” or “courtesy” payments were made. Six of them were listed as “local bribes,” including a political payment and a fee to delay a sewage project that may have interfered with production. Sahara is by no means unique. Fortunately for the producers, the records did not catch the eye of the DOJ.

It is important to remember that FCPA liability attaches to the corrupt payment to government officials, not private individuals. However, in some foreign locations the distinctions between public and private may be blurred, particularly in countries in which state-operated enterprises are common. These include Brazil, China, France, Germany, India, Russia, Spain, and Turkey. As an example, the DOJ and SEC may consider doctors, laboratory technicians, and other personnel in state-run hospitals to be foreign officials for purposes of FCPA enforcement.

In practical terms, this means that if the line producer is negotiating a locations contract to shoot at a state-run hospital, and he or she makes a corrupt payment to the person who has the discretion to say yes or no, the producer has run afoul of the antibribery provisions of the FCPA. The producer and the U.S. production company have FCPA exposure. However, if a producer sends a bouquet of flowers or a bottle of wine in gratitude after securing the location, it is unlikely any vio-
lation has occurred. An analysis of exposure is highly fact-specific.

Often, U.S. studios and production companies will hire local production services companies or location managers to oversee and manage the day-to-day operations of shooting in a foreign location. This makes sense because these companies are familiar with local rules and customs regarding labor hiring, permit requirements, and production support. Local companies usually have established relationships with local officials who have the power to hinder production. These production companies know the cost of doing business in their countries and may include bribes in their fees without ever disclosing them to the U.S. producer.

That a local production services company makes corrupt payments and not the U.S. producer may not be sufficient to protect the U.S. producer from FCPA exposure, particularly if the producer takes an “I-don’t-want-to-know-about-it” position. This is known as conscious avoidance of knowledge, and it will not shield the producer or production company from FCPA liability if the producer knows or should know that there is a high probability that an FCPA violation has occurred or is likely to occur. During prosecution, a “conscious avoidance” instruction may be given to a jury. The U.S. producer and production company have a duty of reasonable due diligence when hiring a local production company to ensure, to the best of their ability, that corrupt payments do not occur. The U.S. producer may avoid or mitigate FCPA exposure by investigating the reputation of the production services company and by including language requiring FCPA compliance in all contractual agreements.

One Exception, Two Affirmative Defenses

This does not mean that all payments to foreign officials run afoul of the FCPA. After all, it takes business sense, money, and many contacts in private business and in government to build a successful international business. Congress recognized this reality by providing one exception and two affirmative defenses to the antibribery provisions of the FCPA.

The exception allows for “facilitating or expediting payments” to foreign officials for the purpose of expediting or securing the performance of a routine governmental action. These types of facilitating or expediting payments include payments to obtain permits, licenses, or other official documents to do business in a foreign country, or to expedite perishables or camera equipment through customs. So long as the payment is reasonable to expedite actions that are ordinarily and commonly performed by a foreign official, and not one that involves a discretionary act (such as awarding a contract or business venture), no FCPA liability attaches. However, the line between antibribery violations and exempted “facilitating or expediting payments” is often unclear. Therefore, care must be taken when making business decisions involving these types of payments.

The two affirmative defenses are the “local law” defense and the “bona fide business expenditures” defense. It is important to remember that these are defenses and not exceptions. To be relieved of liability, the defendant must prove that the payment in question conforms to the statutory affirmative defense requirements.

The local law defense applies when the defendant can prove that the payment, gift, or promise of anything of value that was made was lawful under the written laws and regulations of the foreign official’s country. The theory behind this affirmative defense is that a payment that conforms with local law should not be criminalized even though it might not be allowed under U.S. law. Proof of an absence of illegality is not sufficient. The defendant must be able to point to a written law expressly permitting the payment in question.

The bona fide business expenditures defense allows for payment, a gift, or promise of anything of value if it is a reasonable and bona fide business expenditure. Gifts or payments must be directly related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency. For example, the FCPA allows for travel and lodging expenditures normally made for product demonstrations, facility tours, or contract performances. Similarly, reasonable dinner expenses and...
as a pseudogovernmental entity. However, it is almost certain that the bona fide business expenditure defense would never apply if the travel included a deviation from the Hollywood premiere to a resort in Las Vegas for the government official and his or her family. Similarly, the defense would not apply to payments or gifts to third parties who have no legitimate business connection with the studio or production company.

**FCPA Compliance and Education Programs**

Because there is little case law to help guide attorneys through the FCPA's complex, fact-intensive compliance requirements, several steps should be taken by U.S. production companies and producers to avoid or mitigate liability. Companies with interests in foreign countries, including motion picture and television production, must develop a comprehensive compliance program from the top down. A well-designed, enforced program will ensure that transactions are properly documented and that the company detects and remediates FCPA violations should they occur.

An effective program begins with developing policies and procedures that address the risks specific to the company and its operations outside the United States. For example, a film production company should create a guide for a line producer shooting in high-risk countries. A distribution company should include guidelines on acceptable client development and marketing practices that do not run afoul of the FCPA. These guidelines should include termination policies for employees or contractors who violate the FCPA as well as other corrective and remedial measures. FCPA compliance clauses should be included in every employee deal memo or contract, including independent contractor agreements and coproduction agreements.

Any production services agreements should include FCPA compliance provisions, as well as audit rights and some reasonable level of oversight. These agreements should contain compliance warranties, indemnity language, and breach-of-contract penalties in the event that the company fails to comply with the FCPA. U.S. companies should also develop educational programs in which managers and employees receive training in FCPA awareness and compliance with certificates of attendance issued following completion of that training.

Developing an effective compliance program includes risk-based due diligence related to hiring, appropriate oversight of managers and partners, and creating meaningful and enforceable policies and procedures. The DOJ will look to these compliance measures
when assessing the level of wrongdoing by a company and in deciding whether or not to pursue prosecution. Be advised, however, that a company that maintains only a “paper program” that is not actually enforced will receive little consideration.41

Accounting and Internal Control
The accounting provisions of the FCPA consist of two primary components. The books and records component requires issuers to make and keep accurate books, records, and accounts in reasonable detail.42 The second provision concerns internal controls, which must be sufficient to assure management’s control, authority, and responsibility.43 These provisions apply only to companies (or issuers, in the language of the act) with securities registered with the SEC and companies that are required to file reports to the SEC, regardless of whether they operate outside the United States.

Under the books and records provisions, issuers are required to ensure that they accurately and fairly reflect the transactions and disposition of the assets of the issuer with accepted accounting methods of recording economic events that effectively prevent off-the-books slush funds and payments of bribes.44 Although the standard is one of reasonable detail, it is never appropriate to mischaracterize transactions in a company’s books or records.45

Bribes are often concealed under the language of legitimate payments. These include commissions, consulting fees, or gratuities. In instances in which not all the elements of a violation of the antibribery provisions are met—for example, no use of interstate commerce—companies may still be liable if the improper payments are inaccurately recorded.46 Examples of mischaracterization of production costs include unused expendables (gels, gaffer’s tape, and Duvateen), location fees (fake fees for loss of business), transportation costs, and fuel (a bribe may take the form of frequent filling of an official’s gas tank from production fuel supplies). Receipts and expenses must be carefully inspected and properly approved.

The internal controls provision requires issuers to devise and maintain a system of internal accounting controls that are sufficient to provide reasonable assurances that transactions are executed in accordance with management’s general or specific authorization and are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain accountability for assets. Furthermore, access to assets is permitted only in accordance with management’s general or specific authorization, and the recorded account of assets must be compared to existing assets at reasonable intervals and appropriate action taken with respect to any difference.47 Any violation of either the books and records or the internal controls provisions will give rise to civil liability unless shown to be based on an inadvertent mistake.48 A company or individual could be criminally liable, however, through an aiding or abetting theory.49

Film production, especially in remote foreign locations, can often be difficult and chaotic. Faced with long hours, difficult environmental conditions, and unreliable service and support, a production crew may adopt a just-get-it-done attitude. It is common for this mentality to begin at the top, often with the line producer, whose job it is to get the film made, keep talent and studio executives happy, and deliver the footage on time and on budget. In this high-pressure environment, producers or executives may ask an accountant to misclassify an expense, thus giving rise to FCPA liability.

Effective compliance programs take these issues into account. The DOJ and SEC recognize there may be issues peculiar to an issuer and advise in crafting a compliance program accordingly:
An effective compliance program is a critical component of an issuer’s internal controls. Fundamentally, the design of a company’s internal controls must take into account the operational realities and risks attendant to the company’s business, such as: the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with high risk of corruption.50

Effective Compliance
As Hollywood production companies and producers look for new ways to develop and exploit business opportunities in booming foreign markets, particularly those of Asia, where bribery can often be an expected means of securing business, production companies may have significant liability associated with the FCPA. It is important that each company take an honest look at its foreign business practices and develop a comprehensive set of policies, procedures, and controls to ensure effective compliance with the FCPA. In particular, companies should:
• Exercise due diligence by investigating the background and history of any prospective foreign employee or foreign service provider who may be in a position to make a corrupt payment to a government official or have the means to do so.
• Require employee, producer, and manager training and certification of FCPA rules and compliance.
• Include termination clauses in employee,
producer, and management contracts for FCPA violation or noncompliance.
- Include FCPA compliance, warranty, and indemnification clauses in all contracts with foreign service entities and coproduction companies, including breach-of-contract language in the event of noncompliance.
- Enforce strict accounting procedures, including oversight responsibilities and prior corporate approval of any payments that may involve government officials.
- Create a notification protocol for employees to report FCPA violations to higher-ups without fear of producer or studio executive retribution.

These recommendations are by no means exhaustive. Each company has its own unique business plan and should develop comprehensive FCPA protocol to fit its specific needs. Studios, indies, and their producers must take these issues seriously, particularly in light of the ongoing DOJ and SEC investigations targeting Hollywood’s foreign business practices.

---

25 Press Release, Department of Justice, Office of Public Affairs, Film Executive and Spouse Found Guilty of Paying Bribes to Senior Thai Tourism Official to Obtain Lucrative Contracts (Sept. 14, 2009).
33 United States v. Kozeny, No. 09-4704-cr(L) (2d Cir. 2011).
34 United States v. Ferrarini, 219 F. 3d 145, 154 (2d Cir. 2000).
38 United States v. Castle, 925 F. 2d 831, 835 (5th Cir. 1991).
46 See RESOURCE GUIDE, supra note 6, at 39.
50 See RESOURCE GUIDE, supra note 6, at 40.
TRADE SECRET LAW is rooted in state law, so original jurisdiction in trade secret claims is generally reserved to state courts, while federal trade secret claims arise with supplemental or diversity jurisdiction. Uneven development of trade secret misappropriation law among states, however, led to the introduction of the 1979 model Uniform Trade Secrets Act (UTSA), which was drafted to provide “a legal framework for improved trade secret protection.” California codified its version of the UTSA as the California Uniform Trade Secrets Act (CUTSA).

The UTSA defines “trade secret” broadly and contains a preemption clause intended to preempt duplicative trade secret claims made under common law. The preemption clause, however, was clearly not intended to render the CUTSA “a comprehensive statement of civil remedies.” When codifying the UTSA in 1984, the California Legislature purposely deleted the UTSA’s preemption clause with the objective of extending protection to commercially valuable information that does not qualify as a trade secret under the UTSA’s definition.

The lack of a preemption clause in the CUTSA, however, has led courts to look to the act’s two savings clauses in order to infer what preemption the CUTSA may allow. Courts appear to overlook, however, that although the CUTSA includes the UTSA’s savings clauses verbatim, it does so not to limit preemption but as a protection against preemption. In 2012, a court in the Northern District of California acknowledged the discordance in California case law as “to whether the CUTSA’s savings clause applies only to claims that allege misappropriation of trade secrets, or whether it also applies to other common law claims alleging misappropriation of confidential information that does not enjoy trade secret protection.”

Case law offers differing views as to the extent to which the CUTSA preempts other claims. One view is that the CUTSA can be read to preempt common law trade secret claims while preserving other causes of action.

Silvaco ignores principles of statutory interpretation and California trade secret law

Sa’id Vakili is an attorney with Vakili & Leus, LLP with a practice emphasis in business and employment litigation. Robert M. Zabb is an attorney with the law firm of Motley Rice, LLC, with a practice in securities and complex business litigation.
Selecting A Top-Tier Neutral

California’s Foremost Mediator

The Academy is pleased to recognize over 60 neutrals across Southern California, including...

At [www.CaliforniaNeutrals.org](http://www.CaliforniaNeutrals.org) you can search by subject matter expertise, location and preferred ADR service in just seconds. You can also determine availability by viewing many members’ ONLINE CALENDARS, finding the ideal neutral for your case in a way that saves both time and money.

The National Academy of Distinguished Neutrals, is an association of over 800 mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes.

All members have been recognized for their accomplishments through the Academy’s peer nomination system and extensive attorney-client review process.

Membership is by invitation only and is limited to individuals who devote substantially all of their professional efforts to ADR practice.

To access our FREE National Directory of over 800 trusted mediators & arbitrators, please visit [www.NADN.org/directory](http://www.NADN.org/directory)
The National Academy of Distinguished Neutrals, is an association of over 800 mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes.

All members have been recognized for their accomplishments through the Academy's peer nomination system and extensive attorney-client review process. Membership is by invitation only and is limited to individuals who devote substantially all of their professional efforts to ADR practice.

To access our FREE National Directory of over 800 trusted mediators & arbitrators, please visit www.NADN.org/directory

Daniel Ben-Zvi  
(310) 201-0010

Lee Jay Berman  
(310) 203-0700

Kenneth Byrum  
(661) 861-6191

Michael Diliberto  
(310) 201-0010

Max Factor III  
(310) 456-3500

William Fitzgerald  
(310) 440-9090

Kenneth C. Gibbs  
(310) 309-6205

Michael J. Bayard  
(213) 383-9399

Greg Der in  
(310) 552-1062

Steve Mehta  
(661) 284-1818

Deborah Rothman  
(800) 616-1202

Leonard Levy  
(310) 201-0010

Viggo Boserup  
(310) 309-6205

Jeffrey Palmer  
(626) 795-7916

George Calkins  
(310) 309-6206

R.A. Carrington  
(805) 565-1487

William Fitzgerald  
(310) 440-9090

Ernest C. Brown  
(800) 832-6946

Kenneth Byrum  
(661) 861-6191

George Calkins  
(310) 309-6206

R.A. Carrington  
(805) 565-1487

Steve Cohen  
(310) 315-5404

Kenneth C. Gibbs  
(310) 309-6205

Reginal Holmes  
(626) 432-7222

Laurel Kaufer  
(818) 888-4840

Joan Kessler  
(310) 552-9800

Linda Klibanow  
(626) 204-4000

Barry Ross  
(818) 840-0950

Deborah Rothman  
(800) 616-1202

Henry Silberberg  
(310) 276-6671

John Leo Wagner  
(800) 488-8805

Ivan Stevenson  
(310) 540-2138

To find the best neutral for your case, visit our California members at www.CaliforniaNeutrals.org

Need a top-rated mediator/arbitrator outside of California? Visit www.NADN.org
A second is that the statute can be read as preempting non-trade secret common law claims that are based on the same facts as trade secret claims, but only if the CUTSA definition of “trade secret” is met. This second view preserves actionability under the CUTSA or common law. A third view, found in *Silvaco Data Systems v. Intel Corporation*, is that the CUTSA preempts broadly.10

**Silvaco**

In *Silvaco*, a software company sued a manufacturer of integrated circuits, alleging misappropriation of trade secrets. The defendant, Intel, prevailed on summary judgment. The trial court found, and the appellate court affirmed, that the CUTSA claim against Intel was fallacious because Intel merely purchased and used software that utilized source code that the plaintiff’s former employees had stolen and that Intel never possessed or had access to the source code itself. The plaintiff’s claims that were not actionable under the CUTSA were dismissed on preemption grounds at the pleading stage. *Silvaco* discusses the preemption issue and reaches the conclusion that there can be no property rights for otherwise commercially valuable information that does meet the CUTSA’s definition of a trade secret. The court specified that the CUTSA claims preempt “the field,” so if a claim is based on intellectual property that is conceptually a trade secret but does not meet the CUTSA’s definition, the claim is not actionable.

The reasoning of *Silvaco* is puzzling. Its reading of the CUTSA’s savings clauses overlooks a far simpler one—namely, that the CUTSA preempts trade secrets claims under common law but preserves other intellectual property rights. Unfortunately, this commonly accepted interpretation predating *Silvaco* has been shunted aside. *Silvaco*’s radical decision has shifted the terms of debate from whether or not the CUTSA granted preemption of non-trade secret claims (such as conversion) to whether claims are preempted for anything that could be conceptually categorized as a trade secret.

An alternative reading of the CUTSA upholds uniformity of result while preserving a much broader scope of intellectual property rights. The CUTSA preemption applies only if the CUTSA definition of “trade secret” is found to apply to the intellectual property in question. Under this approach, even if common law claims are preempted, an injured party could maintain an actionable claim, either under CUTSA or under pre-CUTSA common law. *Silvaco* ignores the California Legislature’s purposeful deletion of the preemption clause from the UTSA. *Silvaco* has led courts to shift the debate from whether non-trade secret common law claims are preempted to whether they are always preempted even if there is no trade secret, forcing the decision’s opponents into a weaker position.

**Before and after Silvaco**

Originally, preemption involved determining whether there was any preemption of non-trade secret claims and not whether the definition of “trade secret” under the CUTSA had to apply. The first decision to address this question was a federal case. In *Callaway Golf Company v. Dunlop Slazenger Group Americas, Inc.*, the court concluded that “all state law claims based on the same nucleus of facts as the trade secrets claim are preempted under California’s UTSA.”11 Following *Callaway*, other cases, such as *Digital Envoy v. Google, Inc.*, discuss whether the CUTSA preemption covers only common law trade secret claims or other state law claims. In *Digital Envoy*, the plaintiff asserted that preemption “is limited to a common law claim for trade secret misappropriation and that the decision does not apply to alternative claims for relief, such as those it has pled for unfair competition and unjust enrichment.”12 Purporting to follow *Callaway* and distinguishing prior Ninth Circuit precedent as unpersuasive, *Digital Envoy* holds that preemption is broad.13

The issue was first taken up in a California state court action in *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.*, in which the court takes note of the “two views…on UTSA preemption.”14 One, the “broad view,” extends preemption to other non-trade secret causes of action based upon the same facts as the trade secrets claim.15 Taking the “broad view,” *K.C. Multimedia* explains that the non-trade secret causes of action at issue were based on underlying trade secrets. This was grounds for dismissal. *K.C. Multimedia* left unanswered whether a fact pattern not meeting the CUTSA’s definition of “trade secret” is still actionable under other state law.16

**Cases after Silvaco**

*ThinkVillage-Kiwi, LLC v. Adobe Systems* holds that in the CUTSA preemption cases, including *K.C. Multimedia*, “the proponent of the common law claim either alleged common law trade secrets misappropriation or had a viable claim under CUTSA. The court finds no authority holding that CUTSA preempts common law claims….”17 By “trade secret” the *ThinkVillage-Kiwi* court meant intellectual property falling within the CUTSA definition. The non-trade secret claim may proceed “so long as the confidential information at the foundation of the claim is not a trade secret as defined in CUTSA.”18 Under this ruling, when the CUTSA definition of “trade secret” is not met, but a protectable interest actionable under California common law exists, there is no preemption.19 The holdings in *ThinkVillage-Kiwi* and in *First Advantage Background Services Corporation v. Private Eyes, Inc.*,20 diverge from *Silvaco*’s conclusion that no actionable claim exists when it is based on information having protectable value beyond that of a trade secret as defined in the CUTSA. *Leatt Corporation v. Innovative Safety Technology, LLC*—one of the first decisions subsequent to *Silvaco*—directly rejects the view that the CUTSA preempts the field.21

Other decisions have not resolved the debate. For example, *MedioStream, Inc. v. Microsoft Corporation* notes that “while it is clear that the CUTSA preempts certain claims related to the misappropriation of secret information…the preemptive scope of the statute remains a somewhat unsettled area of California law.”22 This was noted as recently as December 2012, when a Northern California district court commented, “There has been some dispute among courts with regard to whether the CUTSA’s savings clause applies only to claims that allege misappropriation of trade secrets, or whether it also applies to other common law claims alleging misappropriation of confidential information that does not enjoy trade secret protection.”23 This divergence of authority bears on the issue of whether common law state claims may be dismissed at the pleading stage or later.

For example, *Amron International Diving Supply, Inc. v. Hydrolinx Diving Communications, Inc.*, appears to hold that the preemption issue cannot be addressed at the pleading stage under any circumstances.24 This embraces the least severe concept of preemption, i.e., failing to meet the CUTSA definition of trade secret will allow non-trade secret common law claims to be asserted.25 Other cases hold that, on a preemption challenge, courts can decide at the pleading stage depending on whether a complaint includes allegations of other non-trade secret facts. This would be permissible under a somewhat weaker reading of preemption.26 Under this view, failure to allege non-trade secret facts eliminates a plaintiff’s right to proceed past the pleading stage, even if there is a factual issue of whether the claims could be and were pleaded.27

Cases that follow *Silvaco* find that the issue must be decided at the pleading stage. This is premised on *Silvaco*’s ruling that there is no protection for information-based property not encompassed by the CUTSA’s trade secret definition. Whether the information in question is a CUTSA-defined trade secret is irrelevant to the preemption issue. For example, *Sunpower Corporation v. Solarcity Corporation* approved that “[w]ith regard
MCLE Test No. 227

SECRET PREEMPTION

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. Trade secret law is a traditional province of the federal government rather than the states.
   True.
   False.

2. The model Uniform Trade Secrets Act was drafted to provide more consistent trade secret protection among the states.
   True.
   False.

3. Silvaco Data Systems v. Intel Corporation holds that a plaintiff may make a trade secret claim under the California Uniform Trade Secrets Act (CUTSA) or California’s laws protecting proprietary customer lists.
   True.
   False.

4. Silvaco holds that if an alleged trade secret does not fall within the CUTSA’s definition of “trade secret,” a factual determination may be made regarding whether the trade secret claim may be preserved.
   True.
   False.

5. Under Silvaco, the CUTSA’s preemption of trade secret claims also preempts other statutory or common law claims.
   True.
   False.

6. Silvaco does not specify whether trade secret claims may be preserved if the CUTSA’s definition of “trade secret” is not met.
   True.
   False.

7. Under Silvaco, there can be no property rights for otherwise commercially valuable information that does meet the CUTSA’s definition of a trade secret.
   True.
   False.

8. Silvaco’s holding on the scope of CUTSA preemption of common law and statutory remedies rests on analysis of the policy underlying the CUTSA and its express savings clauses.
   True.
   False.

9. Silvaco holds that preemption under the CUTSA is a fact-specific issue.
   True.
   False.

10. Silvaco holds that preemption under the CUTSA depends on whether the act’s definition of “trade secret” is met.
    True.
    False.

11. ThinkVillage-Kiwi, LLC v. Adobe Systems as well as First Advantage Background Services Corporation v. Private Eyes, Inc., agree with Silvaco that no actionable claim exists when it is based on information having protectable value beyond that of a trade secret as defined in the CUTSA.
    True.
    False.

    True.
    False.

13. MedioStream, Inc. v. Microsoft Corporation notes that the scope of the CUTSA’s preemption “remains a somewhat unsettled area of California law.”
    True.
    False.

14. Amron International Diving Supply, Inc. v. Hydrolinx Diving Communications, Inc., arguably holds that the preemption issue cannot be addressed at the pleading stage.
    True.
    False.

15. Cases that follow Silvaco’s reasoning should find that the preemption issue must be decided at the pleading stage.
    True.
    False.

16. Reeves v. Hanon may be cited to argue that misappropriation of trade secrets can form the basis of an intentional interference claim without being limited by any preemption.
    True.
    False.

17. Silvaco arguably does not limit the application of Business and Professions Code Section 17200.
    True.
    False.

18. Silvaco arguably undermines case law concerning proprietary interest in customer lists.
    True.
    False.

19. Under Silvaco, a plaintiff may be left without remedy for conversion of confidential business information.
    True.
    False.

    True.
    False.

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

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

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

ANSWERS

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

1. [ ] True [ ] False
2. [ ] True [ ] False
3. [ ] True [ ] False
4. [ ] True [ ] False
5. [ ] True [ ] False
6. [ ] True [ ] False
7. [ ] True [ ] False
8. [ ] True [ ] False
9. [ ] True [ ] False
10. [ ] True [ ] False
11. [ ] True [ ] False
12. [ ] True [ ] False
13. [ ] True [ ] False
14. [ ] True [ ] False
15. [ ] True [ ] False
16. [ ] True [ ] False
17. [ ] True [ ] False
18. [ ] True [ ] False
19. [ ] True [ ] False
20. [ ] True [ ] False

Los Angeles Lawyer September 2013 25
to the breach of confidence claim, CUTSA preempts other claims based on misappropriation of confidential information, regardless of whether the information ultimately meets the statutory definition of a trade secret,” so further factual development of the claim was not necessary, and the court ordered immediate dismissal.28

Circular Reasoning
Silvaco goes beyond K.C. Multimedia by holding that even falling short of the CUTSA’s trade secrets definition does not avoid preemption. A review of these two cases exposes their circular reasoning. Both interpret the breadth of the savings clauses but fail to employ their plain meaning. Instead, the cases presume legislative intent to foster uniform law in order to draw presupposed conclusions.

The court in Silvaco acknowledged that the perplexing nature of the CUTSA stems from its deletion of the UTSA’s preemption clause and simultaneous inclusion of a savings clause. “This language is all the more puzzling since part of it replaces language...in the proposed Uniform Trade Secrets Act, which would have affirmatively declared the Legislature’s intent to ‘displace[] conflicting tort, restitutionary, and other law of this State’ with respect to civil remedies.”29 The court then logically concludes that there must be some preemption or there would be no savings clause.30

In K.C. Multimedia, the court reasoned that when preserving claims “not based upon trade secret misappropriation,” the term “based upon” must be understood factually. The court rejected the plaintiff’s argument for “a narrow interpretation of preemption,” instead sharing the view that the CUTSAs breadth suggests a legislative intent to “occupy the field.”31 The court concluded that the statutory language “would appear...meaningless if...claims...based on trade secret misappropriation are not preempted.”32

Citing Callaway and Digital Envoy, the K.C. Multimedia court holds that “the determination of whether a claim is based on trade secret misappropriation is largely factual.”33 The K.C. Multimedia court assumed that the statute’s “based upon” language requires “a factual inquiry.” That assumption is necessary to conclude that the statute’s language would be “rendered meaningless” by a narrower preemption rule.34 Silvaco takes the opposite tack. Instead of viewing “based upon” broadly, Silvaco interprets it narrowly. Silvaco also interprets the savings clauses according to the presumed legislative intent rather than their plain language. Claiming to enshrine precedent, the court held, “We thus reaffirm that CUTSA provides the exclusive civil remedy for conduct falling within its terms...”35 Silvaco’s reach is radically beyond that of prior case law, however. Silvaco specifies that even when the CUTSA definition of “trade secret” is not met, the CUTSA still preempts common law claims based on intellectual property secrets. The logic is that “trade secret,” as used in the CUTSA savings clause, addresses all legal actionability for intellectual property.36

This is circular reasoning. The court conceptualized the term “trade secret,” as used in the CUTSA savings clause, to include all potential intellectual property rights, whether or not they are recognized under law as trade secrets. Only with this unstated assumption could the Silvaco court find that the wording of the savings clause connoted such a broad preemptive effect. The plaintiff’s counterargument—that actionability survived for a claim if CUTSA’s definition of “trade secret” did not apply—was harshly dismissed as “a priori sophistry.”37

Flawed Methodology
Silvaco’s holding is based upon statutory interpretation rather than any pretense of applying the scanty pre-existing case law. Silvaco’s errors include, most conspicuously, its starting point. By looking first at the meaning of the CUTSAs savings clauses, the case ignores the legislature’s deletion of the CUTSAs express preemption clause. That omission shows an affirmative intent to limit preemption. Silvaco, however, never asks why the omission was enacted. Silvaco should have attempted to harmonize the savings clauses with the legislature’s express intent to delete the UTSA’s preemption clause.

The deletion eliminated “language [that] would have affirmatively declared the Legislature’s intent to ‘displace[] conflicting tort, restitutionary, and other law of this State’ with respect to civil remedies.”38 By removing an overt elimination of conflicting remedies, the legislature implicitly intended to preserve, rather than preempt, alternate remedies.

Case law offers differing views as to the extent to which the CUTSA preempts other claims. One view is that the CUTSA can be read to preempt common law trade secret claims while preserving other causes of action. A second is that the statute can be read as preempting non-trade secret common law claims that are based on the same facts as trade secret claims, but only if the CUTSA definition of “trade secret” is met.

**Circular Reasoning**

Silvaco goes beyond K.C. Multimedia by holding that even falling short of the CUTSAs trade secrets definition does not avoid preemption. A review of these two cases exposes their circular reasoning. Both interpret the breadth of the savings clauses but fail to employ their plain meaning. Instead, the cases presume legislative intent to foster uniform law in order to draw presupposed conclusions.

The court in Silvaco acknowledged that the perplexing nature of the CUTSA stems from its deletion of the UTSA’s preemption clause and simultaneous inclusion of a savings clause. “This language is all the more puzzling since part of it replaces language...in the proposed Uniform Trade Secrets Act, which would have affirmatively declared the Legislature’s intent to ‘displace[] conflicting tort, restitutionary, and other law of this State’ with respect to civil remedies.”29 The court then logically concludes that there must be some preemption or there would be no savings clause.30

In K.C. Multimedia, the court reasoned that when preserving claims “not based upon trade secret misappropriation,” the term “based upon” must be understood factually. The court rejected the plaintiff’s argument for “a narrow interpretation of preemption,” instead sharing the view that the CUTSAs breadth suggests a legislative intent to “occupy the field.”31 The court concluded that the statutory language “would appear...meaningless if...claims...based on trade secret misappropriation are not preempted.”32 Citing Callaway and Digital Envoy, the K.C. Multimedia court holds that “the determination of whether a claim is based on trade secret misappropriation is largely factual.”33 The K.C. Multimedia court assumed that the statute’s “based upon” language requires “a factual inquiry.” That assumption is necessary to conclude that the statute’s language would be “rendered meaningless” by a narrower preemption rule.34 Silvaco takes the opposite tack. Instead of viewing “based upon” broadly, Silvaco interprets it narrowly. Silvaco also interprets the savings clauses according to the presumed legislative intent rather than their plain language. Claiming to enshrine precedent, the court held, “We thus reaffirm that CUTSA provides the exclusive civil remedy for conduct falling within its terms...”35 Silvaco’s reach is radically beyond that of prior case law, however. Silvaco specifies that even when the CUTSA definition of “trade secret” is not met, the CUTSA still preempts common law claims based on intellectual property secrets. The logic is that “trade secret,” as used in the CUTSA savings clause, addresses all legal actionability for intellectual property.36

This is circular reasoning. The court conceptualized the term “trade secret,” as used in the CUTSA savings clause, to include all potential intellectual property rights, whether or not they are recognized under law as trade secrets. Only with this unstated assumption could the Silvaco court find that the wording of the savings clause connoted such a broad preemptive effect. The plaintiff’s counterargument—that actionability survived for a claim if CUTSA’s definition of “trade secret” did not apply—was harshly dismissed as “a priori sophistry.”37

**Flawed Methodology**

Silvaco’s holding is based upon statutory interpretation rather than any pretense of applying the scanty pre-existing case law. Silvaco’s errors include, most conspicuously, its starting point. By looking first at the meaning of the CUTSAs savings clauses, the case ignores the legislature’s deletion of the CUTSAs express preemption clause. That omission shows an affirmative intent to limit preemption. Silvaco, however, never asks why the omission was enacted. Silvaco should have attempted to harmonize the savings clauses with the legislature’s express intent to delete the UTSA’s preemption clause.

The deletion eliminated “language [that] would have affirmatively declared the Legislature’s intent to ‘displace[] conflicting tort, restitutionary, and other law of this State’ with respect to civil remedies.”38 By removing an overt elimination of conflicting remedies, the legislature implicitly intended to preserve, rather than preempt, alternate remedies.
based upon trade secrets" as defined in the CUTSA were to be left intact, as Section 3426.7(a) of the Civil Code plainly states.

Fourth, another glaring error in Silvaco is that the centerpiece of its holding is dictum. The plaintiff's claims concerned Intel's use of software that incorporated the plaintiff's source code, which was a trade secret as defined in the CUTSA. The case did not present any issue of preemption to which CUTSA's definition of "trade secret" was not applicable.41

Soon after Silvaco, the court in Leatt Corporation held that “[a] careful reading of the Silvaco decision reveals that it does not under- mine the conclusion that the UTSA only pre- empts additional claims that depend on the misappropriation of a trade secret....”42 Likewise, Sunpower Corporation v. SolarCity Corporation states, “In Silvaco there does not actually appear to have been any allegation by plaintiff that the information plaintiff was seeking to protect was not a trade secret and therefore not subject to trade secret law.”43

Inconsistent Precedent
Silvaco does not write on an entirely blank slate, as the opinion implies.44 The two California Supreme Court cases that are applicable also signify that CUTSA's pre-emption extends only to common law claims for misappropriation of trade secrets when the CUTSA is definitionally applicable, and not for other types of claims. Cadence Design Systems, Inc. v. Avant! Corporation holds that a plaintiff is required to bring a common law action for pre-CUTSA trade secret misappropriation and a CUTSA claim for sub- sequent wrongful trade secret abridgment.45 Reeves v. Hanon suggests that misappropri- ation of trade secrets can form the basis of an intentional interference claim without being limited by any preemption.46 While Reeves does not directly consider the preemption issue, the supreme court could not reasonably be viewed as oblivious to that important facet of CUTSA. The overall picture pre- sented by these two supreme court cases is that only the pre-CUTSA action for common law trade secret misappropriation is preempted by CUTSA.

Other California cases predating Silvaco are also inconsistent with its broad sweep. Courtesy Temporary Service, Inc. v. Camacho holds that if a trade secret is infringed under CUTSA, the court can issue an injunction against the infringement.47 ReadyLink Heathcare v. Cotton also finds that a CUTSA trade secret claim is actionable under Section 17200 of the Business and Professions Code.48

Federal Cases
In federal court, decisions under California law are also inconsistent with Silvaco, although unlike the state court precedent, these cases undermine Silvaco only to the extent it preempted non-CUTSA claims not sharing the same factual basis as trade secret claims. In City Solutions v. Clear Channel Communications, Inc., the Ninth Circuit rejected the defendant’s argument that, because the jury did not find it liable on the UTS claim, it could not have found it liable for unfair competition.49 Rather, the circuit concluded that an intellectual property claim that was not actionable as a trade secret was the basis of an unfair competition claim.50 By finding that an unfair competition claim was based on property rather than trade secrets and therefore actionable, City Solutions is in direct conflict with Silvaco. “Once the jury found that Eller misappropriated CSI's proprietary rights, it may have awarded damages to compensate CSI for its worry regarding Eller’s mis- use of its confidential information.”51

District court cases preceding Silvaco also allowed claims not factually grounded in trade secrets to go forward. Sunpower Corporation v. SolarCity Corporation52 cites three: First Advantage Background Services Corporation v. Private Eyes, Inc.,53 Ali v. Fasteners for Retail, Inc.,54 and Terarecon, Inc. v. Fovia, Inc.55

Against Settled Expectations
According to the reasoning of Silvaco, a statute that is silent on preemption nevertheless nullifies non-CUTSA informational property rights. The CUTSA's definitional requirements for preservation of a trade secret are specific and not necessarily required under common law.56 For example, Silvaco’s ruling is inconsistent with California law, which regards customer lists as protected information that is not a trade secret. The court in ReadyLink Heathcare found that customer information was not a trade secret because it was public, but that it was protected under Section 17200 of the Business and Professions Code as the product of substantial time, effort, and expense.57 The court similarly held that customer lists that are not trade secrets under the CUTSA must be protected. The reasoning of these cases reflects long-standing California law holding that cus- tomer lists are protectable because of the effort involved in their compilation, not necessarily because they are nonpublic.58

Silvaco’s narrowing of a cause of action under Section 17200 of the Business and Professions Code is also highly questionable. The purpose of the California’s unfair com- petition law (UCL) is to give courts equi- table powers to stop deceptive practices that have not necessarily been anticipated and thus do not fit within any statutory defini- tion.59 Lack of coverage by another statutory scheme cannot remove conduct from the UCL’s oversight. As the court in Barquis v. Merchants Collection Association, Inc. observed, the UCL “undeniably established only a wide standard to guide courts of equity….the Legislature evidently concluded that a less inclusive standard would not be adequate.”60

Silvaco is a troubling decision. Its con- cept of legislative intent assumes that uni- formity of law was desired, rather than begin- ning with the primary principles of statutory interpretation: plain meaning and express changes from the UTSA. It is implausible that the legislature would leave businesses having pre-CUTSA rights without remedy, contrary to settled expectations under California law. Yet Silvaco derives that result by negative implication, from a savings clause, ignoring that the express preemption clause was deleted in California’s version of the statute. The elaborate reasoning in Silvaco is unnecessary. The desire of the intellectual property bar for nationwide uniformity should be addressed legislatively and not accomplished by court rulings that conflict with the plain meaning of the law.

5 “Except as provided in subsection (b), this [Act] dis- places conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.” See Id., §7 cmt.
6 Civ. Code §3426.7(a). “Except as otherwise expressly provided, this title does not supercede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets.”
7 Civ. Code §3426.7(b). The CUTSA savings clause reads: “(b) This title does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropria- tion of a trade secret.”
9 Civil Code §§3426, 3426.11.
13 Id.
15 Id. at 957, n.7.
16 Id.
18. Id. at *6, 7 (citing First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 942 (N.D. Cal. 2008)).
32. Id. at 958.
33. Id.
34. Id. See also Civ. Code §3426.7(b).
36. Id.
37. Id. at 237 (italics in original).
38. Id. at 233.
41. See id. at 238, 240-41.
A SUCCESSFUL LEGAL CAREER BEGINS WITH MEMBERSHIP IN THE LOS ANGELES COUNTY BAR ASSOCIATION

California Attorneys trust us for the latest news, best practices, networking, and practice area discounts.

We are proud to provide quality publications and digital media that our members rely on to build their practices.

Our practice area sections engage our members with valuable continuing legal education, networking events, newsletters, social media, and online practice-related discussion forums.

Join or renew today!

www.lacba.org / 213.896.6560
IN A DIVORCE, a business valuation is unlike most others.\(^1\) Financial valuations traditionally define the value of an investment as the present value of a future income stream, or its expected benefits divided by risk.\(^2\) However, in a family law valuation, the court may not value the future earnings of the spouse who owns the business, as they are separate property.\(^3\) This difference in valuation theory is most notable in the valuation of goodwill, which can be the most valuable asset of a medical practice.

Warren R. Shiell is a certified family law specialist with a practice in Los Angeles, and JB Rizzo is a forensic accountant specializing in family law analyses and business valuations with offices in Southern California and Southern Nevada.
A brief definition of “goodwill” is “the expectation of future patronage.”4 Business valuation professionals define goodwill more precisely as “that intangible asset arising as a result of name, reputation, customer loyalty, location, products and similar factors not separately identified.”5 Family courts measure goodwill by “any legitimate method of evaluation that measures its present value by taking into account some past result,” so long as the evidence “legitimately establishes value.”6

Lawyers sometimes choose a standard of value that is not applicable in a dissolution in California. In a marital dissolution, the standard of value is not “fair market value,” as the term is traditionally used for a hypothetical sale between a willing buyer and a willing seller. In a dissolution, however, the buyer (also known as the in-spouse, the spouse inside the business, or the operating spouse) is under a compulsion to buy out the other spouse's interest in the business.7 Appraisal reports should therefore clearly state and define the standard of value that is being applied.8

Professional Practice Valuations

Business valuation theory recognizes three general approaches. First, asset-based approaches seek to adjust the balance sheet items of a business to market value. Second, income-based approaches arrive at a business's value by calculating the present value of a benefit stream (earnings) that a business is expected to provide. Methods under this approach include the capitalization of benefits (or earnings) method and the discounted cash flow method. Third, market-based approaches seek to value a business by comparison to sales of similar businesses. Methods include the guideline public company market and market data transactions method. Family law valuations often combine all three approaches. Courts have emphasized that there is no set approach for valuing goodwill, which can be measured by “any legitimate method of evaluation.”9

So-called rules of thumb are not recognized as legitimate valuation methods, although CPAs use rules of thumb as a check for reasonableness.10 A rule of thumb is an industry-specific mathematical formula for deriving value based on experience, observation, hearsay, or a combination of these. For a medical practice, a rule of thumb is that the value of the goodwill equals gross receipts for the most recent three months. These approaches may be applied to a hypothetical case.

A Case Study

Dr. Elaine J. is a general surgeon at a university hospital. Elaine was in a 20-year marriage to plastic surgeon Dr. Jerry J., who owns 90 percent of a cosmetic surgery practice. Structured as a California regular C corporation, it is a community property business employing a receptionist, a nurse, and another surgeon, who is the 10 percent shareholder.

Attorneys for the divorcing parties agree that the date of valuation should be the date of separation, which is December 31, 2012, instead of the date of trial.11 However, they are unable to agree to a joint forensic accountant under Section 730 of the Evidence Code.12 They hire experts, who value Jerry’s practice according to the different methods described above.

With the capitalization of earnings method (an income-based approach), the earnings for a representative single period are converted to value through division by a

A Caveat in Evaluating Goodwill

A medical practitioner may have no interest in a practice’s goodwill that can be valued for divorce purposes. Corporate governance documents may provide that the partners or shareholders are not entitled to receive an interest in receivables, work in progress, or goodwill.1 In Marriage of Nichols, the stock purchase agreement of the husband, a lawyer, provided that he had no interest in the law firm’s accounts receivable, work in progress, or goodwill. The court rejected the wife’s contention that the stock purchase agreement merely measured a shareholder’s contractual withdrawal rights and that therefore the agreement was inapplicable because the husband was not withdrawing from the firm. The court of appeal held that, although the trial court was valuing the husband’s contractual withdrawal rights, it had discretion as to whether to use the stock purchase agreement to determine the community interest in the business.

In assessing whether to use a formula set forth in a buy-sell agreement, the court of appeal stated that the courts should consider 1) the proximity of the date of the agreement to the date of separation to ensure that the agreement was not entered into in contemplation of marital dissolution, 2) the existence of an independent motive for entering into the buy-sell agreement, such as a desire to protect all partners against the effect of a partnership dissolution, and 3) whether the value resulting from the agreement’s purchase price formula is similar to the value produced by other approaches. In Nichols and Marriage of Iredale and Cates, the courts decided that, even though there was no professional goodwill in the law firms in question, there remained personal goodwill. That result, however, may be in question since Marriage of McTiernan and Dubrow decided that there is no goodwill in a person apart from a business.2

Marriage of Slivka illustrates how one of the first steps that a valuator must take is to examine employment contracts and corporate governance documents.3 In Slivka, the husband was employed with Kaiser Permanente as a radiologist. He became a class three partner in Southern California Permanente Group (SCAPE), a medical group partnership. The Kaiser Foundation Health Plan, Inc., was a health maintenance organization that contracted with SCAPE to perform medical services. The husband testified he made no capital contribution to the medical group on becoming a partner and had no assets to take with him on withdrawal from the partnership. He would receive no payment on his departure and could not sell his partnership interest. The medical group’s only practice came by contract with Kaiser; there was no other patient base. The partners were prohibited from earning outside income. The husband saw only patients who used Kaiser, and the compensation he earned was from the medical group for the work he did at Kaiser. It consisted of a base salary, extra pay for extra hours, and incentive bonuses and accruals. The court likened his situation to an employee who has no ownership interest and is paid for services rendered. The court found that the husband therefore had no goodwill in the practice that could be valued in the divorce, professional or otherwise.—W.S.&J.B.R.

---

capitalization rate, which is also known as a cap rate. The resulting value is for the business as a whole (i.e., net tangible and intangible assets). Another income-based approach, the capitalization of excess earnings method (also known as the formula method) was created by the IRS in 1920 to compensate owners of breweries and distilleries confiscated during Prohibition. This method finds a value for goodwill. The IRS subsequently criticized this method, however, most notably in Revenue Ruling 68-609, which indicates that the excess earnings method "may be used only if there is no better basis available for estimating the value of intangible assets." This method requires highly subjective judgments on variables such as rates of return on net tangible assets, capitalization rates, and reasonable compensation.

Despite these criticisms, many California cases discuss the excess earnings method. As described in Marriage of Rosen:

"Pursuant to this method, one first determines a practitioner's average annual net earnings (before income taxes) by reference to any period that seems reasonably illustrative of the current rate of earnings. One then determines the annual salary of a typical salaried employee who has had experience commensurate with the spouse who is the sole practitioner or sole owner/employee. Next, one deducts from the average net pretax earnings of the business or practice a 'fair return' on the net tangible assets used by the business. Then, one determines the 'excess earnings' by subtracting the annual salary of the average salaried person from the average net pretax earnings of the business or practice remaining after deducting a fair return on tangible assets. Finally, one capitalizes the excess earnings over a period of years by multiplying it by a factor equal to a specific period of years, discounted to reflect present value of the excess earnings over that period. The period varies according to factors such as the type of business, its stability, and its earnings trend." 

Both the excess earnings method and the capitalization of earnings method require the normalization of earnings. Normalizing the practice's earnings lets the valuators make adjustments to reflect the actual economic benefits compared with opportunities in the market for an outside investor. This is based on the economic theory of opportunity cost, or the cost of foregoing the next best alternative investment opportunity. In order to normalize earnings, valuators must remove or adjust unique nonrecurring expenses and

### Table 1

<table>
<thead>
<tr>
<th></th>
<th>Jerry's Valuator</th>
<th>Elaine's Valuator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Previously adjusted earnings</td>
<td>235,000</td>
<td>235,000</td>
</tr>
<tr>
<td>Add-back owner-determined salaries:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10% shareholder salary</td>
<td>400,000</td>
<td>400,000</td>
</tr>
<tr>
<td>Jerry's salary</td>
<td>550,000</td>
<td>550,000</td>
</tr>
<tr>
<td>Less: RVOS 10% shareholder salary</td>
<td>(220,000)</td>
<td>(320,000)</td>
</tr>
<tr>
<td>Less: RVOS Jerry's salary</td>
<td>(450,000)</td>
<td>(320,000)</td>
</tr>
<tr>
<td>Adjusted earnings</td>
<td><strong>$435,000</strong></td>
<td><strong>$565,000</strong></td>
</tr>
</tbody>
</table>

Note: This case study assumes that the practice earnings are equal to its equity net cash flow and excludes analysis of net cash flows and taxes.

### Table 2

<table>
<thead>
<tr>
<th>BUILD-UP METHOD FOR CAPITALIZATION RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk free rate</td>
</tr>
<tr>
<td>Equity risk premium</td>
</tr>
<tr>
<td>Size premium</td>
</tr>
<tr>
<td>Company-specific risk premium</td>
</tr>
<tr>
<td>Discount rate</td>
</tr>
<tr>
<td>Long-term growth rate</td>
</tr>
<tr>
<td>Capitalization rate</td>
</tr>
</tbody>
</table>

Note: This cap rate is applicable to earnings, not excess earnings. The cap rate on excess earnings is generally believed to be greater than a traditionally derived cap rate.

Elaine's valuator learned that Jerry was engaged in a romantic relationship with the 10 percent shareholder. Elaine believes the relationship began a few years before, when the shareholder received her 10 percent of the practice and an increase in salary from $300,000 to $400,000. Survey data indicates that $400,000 is well above the median salary for someone with the 10 percent shareholder's experience level.

On the other hand, Elaine’s valuator believes a premium of approximately 40 percent over an employee-level salary is reasonable and comparable to available survey data concerning Jerry’s specialty, work hours, production, marketing, and other responsibilities.

However, the difference between the adjusted earnings in Table 1 is primarily attributable to the use of two different standards that have emerged in the case law to measure reasonable compensation: the "similarly situated professional" and the "average salaried person." Jerry’s valuator used the "similarly situated professional" standard, and Elaine’s valuator used the "averaged salaried person" standard. The "similarly situated professional" standard employs the annual salary of a replacement with experience commensurate with the professional spouse who is divorcing. The "average salaried person" uses the cost to hire a nonowner employee to perform similar services. The average salaried person standard is typically a lower amount, as it implies the compensation of a nonowner rather than an owner. For medical practices, the courts tend to use the "similarly situated professional" standard. In Marriage of Iredale v. Cates, the court used the "similarly situated professional" standard because it concluded that the compensation of an average salaried person failed to account for the nonbillable hours expended by the in-spouse. Nor would an associate have the same client base.
as the in-spouse.

A business valuation expert often considers compensation surveys to assist in a reasonable compensation analysis.23 There are risks, however, in solely relying on compensation surveys. The case of Marriage of Ackerman is illustrative.26 In Ackerman, the husband, a plastic surgeon in Newport Beach, based his reasonable compensation opinion on statistical data from the American Medical Association’s surveys. The wife’s forensic accountant used a different industry survey.27 The husband’s forensic accountant also used, at the court’s request, an informal survey of surgeons in Newport Beach.28 Even so, the court criticized both the wife’s and the husband’s surveys as not “sufficiently fine-tuned and honed to our area here to be particularly valuable,” and suggested that it would have been helpful if both had employed a vocational rehabilitation specialist familiar with the local market or a medical head hunter, or an economist, to supplement the surveys.29 Even though the wife’s data was more specific, the court ultimately selected reasonable compensation that was closer to the husband’s methodology, which considered evidence of his actual business situation, talent, training, expertise, and reputation. The trial court reasonably determined that a plastic surgeon in Newport Beach would generate a greater income than the national average.

In light of Ackerman, Jerry’s valuator should be careful to render an opinion based on a number of factors, including the rates for other plastic surgeons practicing in a similar specialty in a comparable geographic location, with similar credentials and work experience, working a comparable number of hours, taking comparable holidays and time off and with comparable gross collections and marketing responsibilities as Jerry. Further, consideration of compensation data from any surveys should take into consideration revenues generated by the practitioner (the professional element) and those generated by equipment and ancillary services (technical element), if possible, and also employ any additional analyses based on the available case facts and circumstances, such as the salaries of others within the practice.

Capitalization

Under an income-based approach, the evaluator applies a cap rate to normalized earnings (or to normalized excess earnings). A cap rate converts an earnings stream into a numerical value based on the risk of receiving the earnings stream. It can be thought of as a quantification of an investment’s risk. (The equation is PV = E/C; PV is present value, E is expected income, and C is the cap rate.)30 Due to market and company-specific factors, the evaluators may estimate that Jerry’s practice carries more risk than other available investments because an investor would expect to pay less to invest in Jerry’s practice than in a more secure investment.31

In the case study, the investor is Jerry, who must buy out his former wife’s interest in his practice. To calculate what Jerry should pay, the evaluator applies a cap rate to the practice’s normalized earnings.

The build-up method is a way of calculating the discount rate by adding published rates of return expressed as percentages of risk. These rates of return represent the opportunity cost of investing. In other words, an investor would demand a higher rate of return to invest in Jerry’s practice than in a more secure public company. As shown in Table 2, the build-up method for Jerry’s practice produces a cap rate of 31 percent. A valuator selects a practice-specific rate based on his or her judgment. No objective source of data fully quantifies company-specific risk and benefit.32 While presentations and calculations vary, company-specific risk assessment includes such factors as business risk, operating risk, asset risk, market risk, and regulatory risk. These risks are affected by such conditions as the general economy as well as the specifics of the practice and its location, market barriers, competition, and management.

As shown in Table 3, the two valuators divide the normalized earnings by the capitalization rate33 to derive an indicator of value.

A variation of this method is the capitalization of excess earnings method. Table 4 shows how a capitalization rate is applied to excess earnings after separating the earnings attributable to the net tangible assets from intangible assets.

No empirical data supports the selection of the 15 percent rate of return on net tangible assets or the 2.75 multiple. These inputs vary by valuator and the analyses that support them. Understandably, the excess earnings method has been criticized as more subjective than other valuation methods. Generally speaking, rates of return on net tangible assets can range from 8 percent to 20 percent, more or less, depending on the subject’s mix of assets. An excess earnings multiple range can be from .3 to 3, more or less. The 2.75 selected multiple equates to a 36 percent cap rate. As expected, the cap rate for excess earnings, which carries greater risk, is greater than the traditionally derived cap rate of 31 percent that is based on empirical data.

A market data transaction method, such as using a number of transactional databases of the sales of companies,34 requires the
Table 5
THE GOODWILL REGISTRY MARKET-BASED METHOD (SIMPLIFIED)

<table>
<thead>
<tr>
<th>Practice revenues</th>
<th>2,000,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goodwill Registry</td>
<td></td>
</tr>
<tr>
<td>% of revenues multiple for the value of goodwill</td>
<td>30%</td>
</tr>
<tr>
<td>Goodwill, or intangible asset value, rounded</td>
<td>600,000</td>
</tr>
<tr>
<td>Net tangible value</td>
<td>670,000</td>
</tr>
<tr>
<td>Practice value</td>
<td>$1,270,000</td>
</tr>
</tbody>
</table>

Table 6
SAMPLE ANALYSIS TO DETERMINE COLLECTIBLE ACCOUNTS RECEIVABLE

<table>
<thead>
<tr>
<th></th>
<th>Accounts Receivable per Practice’s Internal Billing System</th>
<th>Amount Collected</th>
<th>Percent Collected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Month 1</td>
<td>8,500,000</td>
<td>150,000</td>
<td>1.76%</td>
</tr>
<tr>
<td>Total Month 2</td>
<td>9,000,000</td>
<td>175,000</td>
<td>1.94%</td>
</tr>
<tr>
<td>Total Month 3</td>
<td>9,500,000</td>
<td>200,000</td>
<td>2.11%</td>
</tr>
<tr>
<td>Date of value</td>
<td>7,900,000</td>
<td></td>
<td>1.94% (average)</td>
</tr>
<tr>
<td>Times rounded percent</td>
<td>2% (rounded)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rounded</td>
<td>160,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax-adjusted</td>
<td>$120,000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 7
VALUATION OF NET TANGIBLE ASSETS

<table>
<thead>
<tr>
<th>Practice’s 12/31/12 Balance Sheet Information</th>
<th>Unadjusted</th>
<th>Adjustments</th>
<th>Adjusted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash in bank</td>
<td>250,000</td>
<td></td>
<td>250,000</td>
</tr>
<tr>
<td>Accounts receivable</td>
<td></td>
<td>120,000</td>
<td>120,000</td>
</tr>
<tr>
<td>Equipment</td>
<td>500,000</td>
<td></td>
<td>500,000</td>
</tr>
<tr>
<td>Accumulated depreciation</td>
<td>(475,000)</td>
<td>275,000</td>
<td>(200,000)</td>
</tr>
<tr>
<td>Shareholder loan</td>
<td>500,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total assets</td>
<td>775,000</td>
<td></td>
<td>670,000</td>
</tr>
<tr>
<td>Less: liabilities</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Net tangible assets</td>
<td>$775,000</td>
<td></td>
<td>$670,000</td>
</tr>
</tbody>
</table>

Valuation of Net Tangible Assets

The Foster method is an income approach based on a rule of thumb. In Marriage of Foster, it should be noted, the court sanctioned the expert’s use of “three months gross” to value goodwill. In the case study, the practice’s financial statements use cash-basis accounting, making adjustments necessary because the balance sheet includes no receivables or payables. For most professional practices, the major assets typically not shown on tax returns are receivables and works in progress. If, after considering the terms of any partnership or buy-sell agreement, the court determines that the community has an interest in such assets, the valuator should make an adjustment based on past collection rates.

Further, a medical practice valuation should consider that payments from the government and private insurance companies are often less than the amounts billed. When valuing a practice, a valuator should analyze all the practice’s detailed accounts receivable reports to determine the appropriate collectible net accounts receivable. The valuator can quantify accounts receivable and work in progress to convert the balance sheet from a cash basis to an accrual basis. As seen in Table 6, the valuator determines that for Jerry’s practice, the tax-adjusted collectible accounts receivable on an accrual basis is $120,000.

During a visit to the practice site, the valuator noted that the equipment appeared to be in excellent, like-new condition. However, the practice used an IRS Section 179 depreciation deduction, which allows for an immediate depreciation deduction for a piece of equipment (up to $500,000 in 2013). The valuators adjust the equipment purchased for $500,000 because its book value on the balance sheet was only $25,000. In some cases, an equipment appraiser may need to be engaged. In other cases, a valuator may be able to estimate the value of equipment based on an estimate of the actual time for which the equipment will be useful. This is known as the equipment’s economic life. In the case study, the valuators estimate that the economic life of the equipment is five years. It was purchased two years before. Applying depreciation of $100,000 per year, the valuator adjusts the value of the equipment to $300,000.

Finally, valuators determine that a shareholder loan represents past amounts that Jerry had taken out of the business that are unlikely to be repaid. As seen in Table 7, after
these adjustments, the practice's adjusted net tangible assets are $670,000.

Other Considerations

Valuators should also consider additional factors listed in Marriage of Hewitson, which draws upon the IRS Valuation Guidelines in Revenue Ruling 59-60. They are:

(a) The nature of the business and the history of the enterprise from its inception.
(b) The economic outlook in general and the condition and outlook of the specific industry in particular.
(c) The book value of the stock and the financial condition of the business.
(d) The earning capacity of the company.
(e) The dividend-paying capacity.
(f) Whether or not the enterprise has goodwill or other intangible value.
(g) Sales of stock and the size of the block of stock to be valued.
(h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.41

In the case study, for example, a consideration under factor “a” is that the practice has a relatively long history of performing facial reconstructive surgery as well as cosmetic surgery. Under factor “b,” the patient base is stable, as it is either affluent or covered by insurance. Jerry’s interest (factor “g”) is a little more complicated. Elaine’s attorney took the position, based on Jerry’s relationship with the 10 percent shareholder, that the valuation should cover 100 percent of the business, not 90. Jerry acquiesced.

Reducing normalized earnings by a hypothetical income tax, also known as tax-affected earnings, is a complex issue.42 In the case study, the valuators did not tax-affected the practice's earnings.43

As shown in Table 8, the three different approaches to the valuation of Jerry’s med-
ical practice yield different results. Jerry’s valuator subjectively weighs the reliability of the different valuations, placing more reliance on the goodwill registry market method and the capitalization of earnings method. Many valuators present an opinion based on a weighted average. Elaine’s valuator may expect cross-examination regarding the significant divergences in the values, which place more reliance on the capitalization of excess earnings method and less on the goodwill registry market method. Jerry’s valuator contends that the market approach is more objective and accurate because it is less impacted by valuator’s adjustments and judgments, and because in the market in question there is significant data for comparable plastic surgeries. The court agrees and adopts a value of $1.3 million.

1 See AICPA, STATEMENT ON STANDARDS FOR VALUATION SERVICES No. 1: VALUATION OF A BUSINESS, BUSINESS OWNERSHIP INTEREST, SECURITY, OR INTANGIBLE ASSET (2007) [hereinafter STANDARDS]. CPAs requested to value a business practicing in California must comply with this statement. Its standards allow two types of engagements: a valuation engagement (comprehensive) and a calculation engagement (limited). There is, however, a litigation exception.

2 GARY TRUGMAN, UNDERSTANDING BUSINESS VALUATION: A PRACTICAL GUIDE TO VALUING SMALL TO MEDIUM SIZED BUSINESSES (4th ed. 2012) [hereinafter TRUGMAN].


4 BUS. & PROF. CODE §14100.

5 INTERNATIONAL GLOSSARY OF BUSINESS VALUATION (2010).

6 MEDIUM SIZED BUSINESSES (4th ed. 2012) [hereinafter STANDARDS].

7 “Fair market value” applies to a buyer and a seller acting at arm’s length in an open market, not a dissolution.


9 See Marriage of Lopez, 38 Cal. App. 3d 93, 109 (1974); Marriage of Foster, 42 Cal. App. 3d at 584.

10 Paul French Ill, Determining Enterprise Value, in FAMILY LAW SERVICES HANDBOOK: THE ROLE OF THE FINANCIAL EXPERT, 158, 162 (Wiley 2010) [hereinafter French].

11 Community assets and liabilities will ordinarily be valued “as near as practicable to the time of trial” unless (as is the case with smaller medical practices) it can be shown that the value of the practice develops largely from the personal skill, industry, and guidance of the operating spouse, as opposed to the underlying capital. Marriage of Green, 213 Cal. App. 3d 14, 20-21 (1989); Marriage of Aufmuth, 89 Cal. App. 3d 446, 463-65 (1979). Another relevant factor is a partnership agreement that provides for payment upon withdrawal. Marriage of Fonstein, 17 Cal. 3d 738 (1979); Marriage of Green, 213 Cal. App. 3d at 21.


13 See GLOSSARY, supra note 5.

14 See TRUGMAN, supra note 2, at 426. The capitalization of earnings method is sometimes called capitalization of benefits, capitalization of income, single-period capitalization, or similar terms.


19 See GLOSSARY, supra note 5. Normalized Earnings are “economic benefits adjusted for nonrecurring, non-economic or other unusual items to eliminate anomalies and/or facilitate comparisons.”


25 Id. at 325-26.


27 See http://www.mgma.com/physcomp. The AMA survey cited in Marriage of Ackerman is no longer published.

28 In Marriage of Ackerman, the wife objected to the informal survey, and the trial court stated that it gave little weight to the survey. See also Korsak v. Atlas Hotels, Inc., 2 Cal. App. 4th 1516 (1992).

29 Marriage of Ackerman, 146 Cal. App. 4th at 202.


31 See TRUGMAN, supra note 2, at 444.

32 Id. at 406; see also HITCHNER, supra note 20, at 206.

33 The case study assumes that the practice earnings are equal to its equity net cash flow and excludes analysis of net cash flows and taxes.

34 Among these databases are Pratt’s Stats, BIZCOMPS, IBA, and Done Deals.

35 Older data should not immediately be discounted unless there have been fundamental changes in the industry. See French, supra note 10, at 162.

36 The valuation multiple of 30% was arrived at to avoid publishing proprietary data. Valuators may also use the earnings multiple published by the Goodwill Registry.


40 See STANDARDS, supra note 1 (recommending site visits).


42 For more information regarding tax-affecting earning in a divorce, see Mark Luttrell, et al., Tax-Affecting Corporations for Business Valuations in a Marital Dissolution: A Rebuttal, 31 FAMILY LAW NEWS 2, at 20 (2009).

43 A valuator may tax-affect the earnings for California taxes if an entity paid tax. In the case study, tax-affecting earnings is deemphasized for simplicity.
The Mobile Office Continues to Evolve

WHEN LAWYERS ARE ON THE ROAD, they must bring as much of their office capability with them as possible. Based on my nonscientific survey, lawyers over 40 prefer to travel with a laptop that has the same software as their computer at the office, and, before leaving, they copy or synchronize their data files. When they return to the office, they synchronize again.

To manage the synchronizing of files, it helps to have the data files on the office computer and the laptop in one or two easily located directories. Unfortunately, software companies are not uniform regarding where their programs store data by default. Different programs may store data in a library directory, a program data directory, or a subdirectory buried many levels below the main directories. Fortunately, most programs (including Microsoft Word, for example) allow the user to designate a location for data to be stored.

Synchronizing data can be as easy as copying and pasting the data directory and its subdirectories from the office computer to the laptop and back. Synchronization software can also be used. Laplink has been a top performer in this area for some time. The latest version, Laplink PCsync, is relatively fast and easy to use. Some free alternatives include SyncToy (which is available from Microsoft as a download), SyncBack (which has a free and professional version), and FreeFileSync. Synchronization software performs faster than manually copying over the entire data directory since many files typically do not need to be copied.

External Storage

A variation on synchronizing data to a laptop is using an external memory device, for example an external hard drive or a USB drive (also known as a thumb drive). Users still need a laptop to read and work on files, but it is a reasonable approach to use an external storage device when carrying information that will be used on another computer. The capacity of USB drives is growing all the time.

USB drives are also smaller and lighter than external hard drives, but for users who require very large storage capability, the external hard drive is still a step ahead. Seagate offers an interesting alternative. The company sells the Wireless Plus, a portable external hard drive that is about twice the size of a cell phone and holds one terabyte of storage. For most users this is enough to carry the office files and home movies and photos for the past 10 years. This device also has wireless capability, allowing it to act as a local storage device for up to eight other users (or four if they are streaming video). The external drive can be accessed by Wi-Fi enabled devices with a Web browser or with an iOS or Android app. Wi-Fi access to the device can be password-protected using the WPA protocol. Although it is intended for customers who want to watch multimedia on computers, phones, tablets, or televisions, the Seagate device can be used for mobile work groups that need to share data and may be used for client presentations. It is supposed to run 10 hours on its internal battery.

Updating and sharing data is only a part of mobile computing. It becomes more secure if a free storage offer comes with a string that leads to additional storage or services for pay. One benefit of the cloud is that it eliminates the need to synchronize documents between the office and mobile computers. The cloud also lessens the need for local storage, so it becomes feasible to use devices such as smart phones and tablets, which are more portable than laptops. While it may be debatable as to how effective smart phones or tablets are for producing sophisticated documents, the lighter devices are perfectly suitable for reviewing content and producing text-based messages such as e-mail.

Laptops or Smaller Devices

Younger mobile lawyers tend to gravitate towards a smartphone or smartphone-and-tablet solution. The cloud (another name for the Internet) becomes the file storage solution for lawyers who use smaller devices such as tablets or phones. This laptop-free approach requires the user to connect to the relevant data remotely.

The best cloud-based solution for a firm with a strong IT department is for the firm to use its own dedicated server that is connected to the Internet. Access can be controlled with password and other authentication procedures. Each cell phone, tablet, and computer has an identification serial code that can be put on the guest list for access to the server. To prevent unauthorized access to the data that is transmitted back and forth from the server to the user, encryption can be added to the connection. For example, users contact their banks online through a secure connection, which is an “https” (not just an “http”) address. Even more secure is a virtual private network, or VPN.

For firms without the resources for a dedicated server, an alternative is online storage. Drop Box was a pioneer in the field and is still a top choice. Box is a competitor with a strong focus on corporate clients. Sky Drive is Microsoft’s solution, and Google Drive is Google’s. These are not the only providers. Since everyone wants unlimited storage for free, some of these providers once offered tremendous amounts of space for free. Box, for example, had a promotion for 50 gigabytes of free storage. Users should not be surprised if a free storage offer comes with a string that leads to additional storage or services for pay.

One benefit of the cloud is that it eliminates the need to synchronize documents between the office and mobile computers. The cloud also lessens the need for local storage, so it becomes feasible to use devices such as smart phones and tablets, which are more portable than laptops. While it may be debatable as to how effective smart phones or tablets are for producing sophisticated documents, the lighter devices are perfectly suitable for reviewing content and producing text-based messages such as e-mail.

On the other hand, without Internet access, the utility of cloud-based productivity tools is severely limited. Drop Box, Box, and Sky Drive allow users to keep versions of cloud-stored documents on a local hard drive, which allows users to temporarily save a document to a mobile device and synchronize the revised document later. The drawback is that the user has to remember which version of a doc-
Meet your mandatory CLE requirements for 2014

2014 CLE-in-a-Box

The easiest and most convenient way to meet your CLE requirements with the best content available.

**CLE BOX**
25-Hour Audio Pack
LACBA Member Price: $224
Nonmember Price: $274

**CLE BUNDLE**
6-Hour Required Subjects Audio Pack
LACBA Member Price: $149
Nonmember Price: $199

Available as a CD set or on-demand • Free Ground Shipping within the continental United States
The 25-hour audio pack includes the CLE Bundle Required Subjects.

To order, go to [www.lacba.org/clebox](http://www.lacba.org/clebox) or call Member Services at 800.456.0416

The State Bar of California deadline for mandatory CLE requirements is February 1, 2014 for attorneys whose last names begin with N-Z.
Professional Liability

Confidentiality requirements can be met with cloud storage. Formal Opinions 2012-184 (2012) and 2010-179 (2010) of the State Bar's Standing Committee on Professional Responsibility and Conduct address the issue. The 2010 opinion reads:

Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store privileged or confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client’s instructions and circumstances, such as access by others to the client’s devices and communications.

In other words, it is a balancing test.

The mobile office can work if attorneys can take their data with them. Documents in electronic format are stored on a drive or in the cloud. However, a complete case file likely includes paper documents, correspondence, and notes. This makes a document scanner a necessary component to a mobile office.

Fujitsu has been producing durable and capable desktop scanners at an affordable price for years. The ScanSnap iX500, with its 50-page document tray and 25-page-per-minute scan rate, is a great example. The output is in Adobe PDF format with searchable text (as opposed to just an image file). This text may also be copied and pasted into other documents. The iX500 can also scan different sizes of paper without fuss. It can also duplex scan (i.e., both sides of a page at the same time) and will automatically delete blank pages. This model also has a means to alert the user when more than one page feeds at a time. This is a far more reliable way to catch scanning errors than waiting for a paper jam. This alert feature also has a manual override, which is useful when the user has attached a Post-it note to a document so that the user wants two pages to scan on top of one another. In my testing this feature was very accurate. Another novel feature is that the scanner can be configured to upload scanned documents to cloud-based storage services such as Dropbox. It is also possible to scan and wirelessly transmit a document to an Android phone or iPhone. Most users should find this scanner and its deluxe software package to be a complete scanning solution.

The Neat Company offers a different approach with their Neat Desk scanner. Like the Fujitsu model, the Neat Desk scanner has a speed of about 25 pages per minute and can scan both sides of a page at the same time. However, the scanner’s software is designed to capture the numbers in receipts and bank statements and drop them into templates (such as expense reports) or export them to Excel, QuickBooks, Quicken, or TurboTax. It is surprising how the software can scan a receipt and drop the numbers into an expense report. The scanner’s accuracy is high but not perfect, but it still can beat the time it would take to enter the information with a keyboard. The compatibility with QuickBooks may be attractive for some law offices. The Neat Desk also comes with a free trial for Neat’s proprietary cloud storage.

Mobile computing has become much more effective and easier than it was even a few years ago. Thanks to widely available Wi-Fi, lawyers may even elect to travel without a laptop. Storage and scanning devices have continued to shrink while increasing in capability.
The Man Who Seduced Hollywood

GREGSON BAUTZER, the legendary entertainment attorney and superb legal strategist, is the deserving subject of a new biography. During his heyday from the 1940s through the 1980s, Bautzer built and maintained a stellar law practice that set the standard for entertainment law. Bautzer also commanded an impressive client list in the business arena. Howard Hughes, Kirk Kerkorian, Joan Crawford, Ginger Rogers, Clark Gable, Rita Hayworth, Lana Turner, Ingrid Bergman, Ava Gardner, and many more sought Bautzer as their legal representative.

While business biographies are often dreary and tedious, and few people really care about the legal squabbles of yesteryear, this book is engaging because it concerns Bautzer who was a rambunctious, dashing, dapper, and charming rake as well as a brilliant attorney, and a bad boy who was attractive to women. Bautzer could and did seduce them, including many clients. Bautzer’s romances provide interesting gossip because they are intertwined with legal cases involving names that are still widely remembered.

The attorney had style, which he assiduously perfected. For example, he borrowed $5,000 (in 1936, enough to buy a house) to spend on clothing and meals at top restaurants where he could be seen, woo potential clients, and promote himself. The undergraduate debate champion and law school graduate from USC aggressively charmed and pursued Hollywood. His career is a handbook on how to grow a practice. Bautzer marketed himself tirelessly, all the while having a good time oiling, maintaining, and testing the star-making machinery of the motion picture industry. He solved problems for talent and studios alike.

He was not without his faults. His alcoholism got him into much trouble because he was belligerent when soused. For example, Bautzer once challenged Humphrey Bogart to fisticuffs. Bogart deftly dealt with the drunk Bautzer by suggesting that he step outside first as the star would be noticed if he preceded him, then Bogart did not follow. Instead, he had a laugh with Bautzer after the latter returned, and the two became friends. Bautzer’s addiction to alcohol, however, had no apparent effect on the quality or amount of his work until the final years of his life, but by then he was winding down his practice.

Although Bautzer’s labors as an attorney involved much more than an office and a desk, many other great Hollywood attorneys worked behind the scenes at Bautzer’s firm. Students of the legal history of Southern California will recognize the names of his protégés, including Patricia Glaser, Terry Christiansen, Louis “Skip” Miller, and Ernest Del. A theme in Gladstone’s biography is how Bautzer cultivated power. He socialized with Hollywood’s top dogs in entertainment, business, and politics. His friends—often poker buddies—ran the studios. No one since has maintained a more impressive client list, and certainly not for four decades. One example of his clout concerns a producer who could not get 5,000 troops for a movie. Bautzer got the troops, probably with the help of his good friend, Secretary of State Alexander Haig.

Howard Hughes relied heavily upon Bautzer, who helped Hughes take over Las Vegas. Bautzer’s services to Hughes went beyond law to include serving as paymaster to Hughes’s many girlfriends, who were often aspiring actresses. (Hughes owned RKO Pictures.) Bautzer also dealt with issues relating to the Spruce Goose airplane, until Bautzer resigned after refusing to cross an ethical line as Hughes wished. Reclusive Kirk Kerkorian heard of the famous lawyer who represented Howard Hughes, however, and Bautzer helped Kerkorian grow his business and acquire MGM more than once. As was typical for Bautzer, he was also good friends with his client, and they palled around Europe on Kerkorian’s DC-9. Bautzer married his fourth wife in the air on that jet, presided over by Judge Mariana Phaelzer, his former law partner.

Gladstone, the author of this biography, is an entertainment attorney at Lionsgate Entertainment. He must be lauded for not only mining the usual sources (books, newspaper articles, and lawsuits of public record) but also obtaining the cooperation of people who knew Bautzer. Many were willing to waive attorney-client privilege to provide a complete story. Gladstone gained the confidences of Bautzer’s third wife (former actress Dana Wynter), son, former secretary, and many former clients and colleagues.

Bautzer emerges as a loyal friend with a big heart and a ladies’ man still admired by his former wives and lovers. Bautzer was also a ruggedly handsome athlete who won tennis tournaments, a tremendous lawyer, and, when he needed to be, a righteous professional capable of staring down not only the mobster Bugsy Siegel, who threatened him over a Las Vegas matter, but also Joan Crawford. Hollywood is poorer without Greg Bautzer.

Neville L. Johnson is a founding partner of entertainment law firm Johnson & Johnson LLP in Beverly Hills and the author of The John Wooden Pyramid of Success.
## INDEX TO ADVERTISERS

| Affiniscape Merchant Solutions, p. 11 | Tel. 866-376-0950 www.lawpay.com |
| American Language Services, p. 40 | Tel. 310-829-0741 www.ALSglobal.net |
| CMM, LLP, p. 36 | Tel. 818-986-5070 e-mail: cmmcpas@aol.com |
| Chapman University School of Law, Inside Front Cover | Tel. 877-CHAPLAW (877-242-7529) www.chapman.edu/law/ |
| Lawrence W. Crispo, p. 6 | Tel. 213-926-6665 e-mail: judgecrispo@earthlink.net |
| Greg David Derin, p. 19 | Tel. 310-552-1062 www.derin.com |
| Gerber & Co., p. 19 | Tel. 310-552-1600 http://gerberco.com |
| Girardi Keese, Inside Back Cover | Tel. 213-977-0211 www.girardikeese.com |
| Harriett Buhai Center for Family Law, Back Cover | Tel. 213-388-7505 www.hbcff.org |
| Huron Law Group, p. 5 | Tel. 310-284-3400 www.huronlaw.com |
| James R. DiFrank, PLC, p. 5 | Tel. 562-789-7734 www.bardefense.net e-mail: difrank@aol.com |
| Kantor & Kantor, LLP, p. 6 | Tel. 877-789-9707 www.kantorlaw.net |
| Krycler, Ervin, Taubman & Walheim, p. 36 | Tel. 818-995-1040 www.ketw.com |
| LawBiz Management, p. 5 | Tel. 800-817-5880 www.lawbiz.com |
| Lawyers’ Mutual Insurance Co., p. 7 | Tel. 800-252-2045 www.lawyersmutual.com |
| MCLE4Lawyers.com, p. 13 | Tel. 310-552-5382 www.mcleglawyers.com |
| Michael Marcus, p. 4 | Tel. 310-201-0010 www.marcusmediation.com |
| Noriega Clinics, p. 28 | Tel. 213-716-3744 |
| RJA, CPA/ABV, p. 37 | Tel. 310-378-6666 www.afusocpa.com |
| Anita Rae Shapiro, p. 40 | Tel. 714-529-0415 www.adr-shapiro.com |
| The Esquire Network (“TEN”), p. 2 | Tel. 818-268-5929 e-mail: davidfleck@tenesquire.com |
| Walzer & Melcher, p. 1 | Tel. 818-591-3700 e-mail: al@walzermelcher.com |
| Witkin & Eisinger, LLC, p. 5 | Tel. 818-845-4000 |
| Woodard Mediation, p. 18 | Tel. 626-584-8000 www.woodardmediation.com |

### Don’t Miss *Los Angeles Lawyer*’s

**Corporate Counsel’s Guide to California Law Firms and Attorneys**

*A SPECIAL PULLOUT SECTION IN THIS ISSUE!*

Also available online and in tablet format at [ccguide.lacba.org](http://ccguide.lacba.org)
ON TUESDAY, SEPTEMBER 10, the Domestic Violence Project (DVP) will host its volunteer training program. Volunteers for the DVP provide a valuable service to a vulnerable population and gain expertise in the area of family law. LACBA membership is required to volunteer for the DVP. Program attendees will receive substantial materials, and dinner is included as part of a comfortable learning atmosphere. DVP volunteers make a difference every day when they assist victims of domestic violence. Last year, the DVP helped more than 10,000 persons. During a shift, a volunteer can help as many as three victims seek protection from their abusers. For two three-hour sessions per month for seven months, volunteers interview victims on a one-on-one basis, gathering information with which to complete complicated legal documents. This allows the victims to file for restraining orders with professionally prepared petitions. The training 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 5:15 P.M., with the program continuing from 6 to 9:15. The registration code number is 012057.

$85—LACBA member
$100—all others
3 CLE hours

2013 Legal Ports Conference
ON THURSDAY, SEPTEMBER 26, the International Law Section will host a conference featuring experts from the Port of Los Angeles, representatives of local state and federal government agencies, and experienced international trade attorneys, who will discuss the current legal and business developments in global trade that affect Southern California businesses. The conference will take place at the law offices of Kessal Young & Logan, 400 Oceangate, 14th floor, Long Beach. On-site registration will be available starting at 8 A.M., with the conference continuing from 8:45 to 4:45 P.M. A cocktail reception will follow until 6 P.M. The registration code number is 012060.

$100—CLE+ member
$175—International Law or Environmental Law Section member
$200—LACBA member
$230—all others
6.75 CLE hours

Discovery in International Antitrust
On Wednesday, September 11, the Antitrust and Unfair Business Practices Section will host a program to examine large antitrust cases, and in particular cartel cases, which often have an international component. Antitrust law violations are frequently alleged to span countries and continents, complicating discovery and other issues for plaintiffs, defendants, and prosecutors. Panelists Ben Bradshaw, Robert E. Lutz, and Marc M. Seltzer will address such questions as: How does an antitrust litigant most effectively seek (or combat) discovery from a foreign entity? How do differing privilege laws in the United States and foreign countries affect discovery requests? May submissions to foreign regulatory authorities be discovered? What is the effect of a conflict between U.S. and foreign rules? The panelists will also describe the basic U.S. legal framework that governs requests for discovery from a foreign entity and how to defend against such requests. 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 and lunch will be available at noon, with the program continuing from 12:30 to 1:30 P.M. The registration code number is 012062. The prices below include the meal.

$20—CLE+ member
$40—Antitrust, International Law, or Litigation Section member
$60—LACBA member
$80—all others
1 CLE hour
On the Anniversary of *Gideon*, an Argument for Free Civil Representation

This year our nation is celebrating the 50th anniversary of the historic *Gideon v. Wainwright* decision, in which the U.S. Supreme Court guaranteed indigent citizens the right to state-paid legal counsel for most criminal prosecutions. *Gideon* is well known to the American public, though not necessarily by name. Its fundamental holding makes up part of the famous *Miranda* warning that arrestees have the right to an attorney, and that if they cannot afford an attorney, one will be appointed at no cost.

The anniversary of this influential decision has led to renewed debate about the efficacy of the public defender system, with many commentators decrying the uneven provision of legal services, especially in this era of underfunded government programs. Today, with more than 10 times the number of inmates incarcerated than when *Gideon* was handed down, many believe that the good intentions of *Gideon* have not been fulfilled and that indigent criminal defendants are not getting equal access to justice.

*Civil Gideon*

However one may view the legacy of *Gideon* for criminal defendants, they at least have an established constitutional right to paid counsel. Another group of citizens who are unable to afford legal counsel may have even more to worry about: those who are on the brink of being deprived of such vital needs as food, shelter, and parental visitation rights.

With them in mind, what is often called the “civil *Gideon*” movement has been born. In 2007, the American Bar Association’s House of Delegates unanimously called for free legal counsel, paid for by the government, to “low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody,...”

Just over two years ago, California’s legislature passed the nation’s first civil *Gideon* law, the Sargent Shriver Civil Counsel Act. The Shriver Act became the first step toward a comprehensive plan for providing government-paid lawyers to qualifying litigants in civil cases, just as *Gideon* requires government-paid defense counsel in criminal cases.

At the time of the enactment of the Shriver Act, Assemblyman Mike Feuer framed the issue as follows: “How ironic that you can be arrested for stealing a small amount of food—a box of Twinkies from a convenience store—and you’re entitled to counsel. But if your house is on the line, or your child is on the line, or you’re being abused in a domestic relationship, you don’t have the same right to counsel.”

It is ironic, indeed, that the words “Equal Justice Under Law” grace many of the finest courthouses in this wealthiest of nations while millions of poor citizens are denied the right to legal counsel in life-altering civil cases.

A poor person without a lawyer often fares much worse in the legal system than those who do have lawyers. Sitting judges recognize that the unrepresented poor are much more likely to experience uneven results in the civil justice system. However, judges are almost powerless to do anything about it, lest they be accused of advocating for one side and against another in a civil dispute.

The need for reform is unquestionable, but there are many who object to the government’s getting involved in the way envisioned by the Shriver Act, especially in this age of high taxes and imbalanced budgets. While these critics may understand the need for taxpayer funding for criminal defense lawyers, they assert that civil *Gideon* laws will unfairly skew the system in favor of the poor and will lead to increased costs in a judicial system that is already teetering on the brink of insolvency. Let us analyze this argument.

Consider housing cases. Landlord-tenant laws are notoriously complex, and even specialists in the field sometimes make serious errors in court. Residential landlord-tenant laws provide procedural and substantive protections for tenants. Given the law’s complexity and its appreciation of tenants’ rights, there are undoubtedly cases in which landlords succeed in evicting unrepresented tenants who simply do not know how to raise viable defenses that may otherwise prevail. In other cases, evictions can occur when landlords have not followed proper legal procedures, but no one apprised the court of the technical defects because the tenant defaulted for financial reasons. Critics of civil *Gideon* would claim that a free lawyer for tenants in these situations would allow them to game the system, leading to clogged courtrooms and increased societal costs. Is that argument sound?

First, the argument suggests that following legal procedures in eviction cases is voluntary instead of mandatory. In truth, everyone should follow the law, including landlords. If tenant families are being evicted pursuant to incorrect legal procedures, should not that practice be ended? If that practice continues because poor families cannot afford legal counsel, would not a fairer approach help solve a grave problem?

Second, in terms of effects on the system, most judges would prefer a contested case in which the adversaries are skilled professionals who can spot and frame the real issues in the case, as compared with a case in which one party is almost totally clueless about legal procedures and legal rights. Cases involving pro se litigants often take much more court time than cases staffed by attorneys. An unrepresented party’s unfamiliarity with court procedures tends to clog court calendars, leading to much less efficient courtrooms.

Third, providing free counsel for qualifying tenants would, in the long run, motivate landlords to follow the law and respect tenant rights, thus better assuring that the laws that are in place are followed.

The civil *Gideon* movement can be a critical component of the entire legal aid system, not just housing cases. The future success or failure of initiatives such as the Shriver Act will speak volumes about whether this nation and its people truly support the concept of equal justice under law. All California lawyers should educate themselves about the civil *Gideon* movement and about the benefits that will accrue to our justice system when indigent civil litigants enjoy the right to counsel in a meaningful way.

Mark Juhas has served as a judge on the Los Angeles Superior Court since 2002. He was recently appointed as a commissioner with the California Commission on Access to Justice.
— EXPERIENCED TRIAL LAWYERS —
We handle tough, complex cases against formidable opponents.

PROFESSIONAL NEGLIGENCE, PERSONAL INJURY, PHARMACEUTICAL AND MEDICAL DEVICE LITIGATION, PRODUCT LIABILITY, ENVIRONMENTAL TORTS, INTELLECTUAL PROPERTY, CLASS ACTIONS, ANTITRUST AND EMPLOYMENT LITIGATION

AT GIRARDI | KEESE we put great stock in personal relationships. From today’s leading lawyers who began their careers as Tom Girardi’s law students to the hundreds of law clerks who have worked in the firm over the last 35 years, attorneys throughout California and the nation know GIRARDI | KEESE is the firm to handle their most important asset, their client’s case.

Almost 90% of our cases are referred by other lawyers who know GIRARDI | KEESE. We will take a meritorious case even when other lawyers have declined for financial considerations. Many of these same firms will refer these cases to us because they know that if a case has merit, we have the will and resources to take it on.

Our referrals aren’t just limited to mass torts or complex litigation. We constantly receive calls from attorneys who are pleased to learn we have the time, interest and expertise to handle the claims of the family injured in the auto accident, the single mom coping with a child wounded by medical negligence or the elderly resident hurt by the neglect of a nursing home.

GIRARDI | KEESE WELCOMES THE OPPORTUNITY TO TALK TO YOU AND YOUR CLIENT ABOUT YOUR CASE AND HOW WE CAN HELP YOU SEEK JUSTICE.

GIRARDI | KEESE
TEL 213.977.0211 / FAX 213.481.1554
1126 WILSHIRE BOULEVARD, LOS ANGELES, CA 90017
www.girardikeese.com
With grateful appreciation, we recognize the following firms and individuals in our community for their commitment to making a difference in the lives of domestic violence victims and children living in poverty, and ensuring equal access to the courts.

**LEADER**
Harris - Ginsberg LLP

**Sustainer**
CMM, LLP
Law Offices of Judith R. Forman, P.C.
Jaffe and Clemens
Mayer Hoffman McCann P.C., CPAs

**Partner**
Angels Foundation
Leah M. Bishop and Gary M. Yale
California Community Foundation
Gursej | Schneider LLP
Kolodny & Anteau
Meyer, Olson, Lowy & Meyers LLP
Honorable Jill S. Robbins, Ret. and Robert W. Eifelder
Susan R. Stockel
Sorrell and Linda Trope
Wasser, Cooperman & Carter, P.C.

**Benefactor**
Anonymous
Diane and Noel Applebaum
Black Woman Lawyers Association of Los Angeles
Feinberg, Mindel, Brandt & Klein, LLP
Jacobson Scully Shebby LLP
Vivian Landau
The Morrison & Foerster Foundation
Phillips Lerner, A Law Corporation
Sacks, Glazier, Franklin & Lodise, LLP
Judge John H. Sandoz, Ret.
and Ms. Beverley Morgan-Sandoz
Wasserman Foundation
White, Zuckerman, Warsavsky, Luna & Hunt LLP
Young, Spiegel & Lee, LLP

**Patron**
Adelman & Seide, LLP
Greg and Susan Aker
Ron J. Anfuso, CPA, ABV, CFF, CDFA, FABFA
Johnna K. Boylan, Esq.
Law Office of Kappy K. Bristol
Kalyani Chirra and Peter Simon
Judge Isabel R. Cohen, Ret. and Paul F. Cohen
Law Offices of Emily Shappell Edelman
Donald S. Eisenberg
David and Susan Ettinger
Fox Rothschild LLP
Freid & Goldsman
Mercy Fresno
Hargrave & Hargrave, CPAs
Horvitz & Levy LLP
Law Office of Paula Kane
Law Offices of Mark Vincent Kaplan
Denise, Sheldon and Jason Kravitz
Alexandra Leichter, Ariel Leichter-Mirako, and Jenna C. Spatz
Christopher Moore and Moore Bryan & Schroff LLP
Paula and Aaron Nordwind
Joan Patsy Ostroff and James R. Biaser
QDRO Counsel Inc., APC - Louise Nixon, Esq. President
Donald and Suzanne Randolph/ Randolph & Associates
Law Offices of Lynette Berg Robe, APC
Karen and Charles Roslin
Cori B. Steinberg, Esq.
Law Office of Christine V. Twining
Jessica Uzcategui and Carlos Singer
Venable LLP
Walter & Melcher LLP
Stevie Wonder

The Harreitt Buhai Center for Family Law is a not-for-profit organization providing free family law assistance and legal education to very poor persons in Los Angeles through the contributions of volunteer lawyers and law students.

The Century Campaign, launched in 2013, helps ensure the Center’s future for generations to come.

To join our effort, please contact
(213) 388-7505 ext. 317 or century@hbcfl.org.
For more information about the Harreitt Buhai Center, please visit www.hbcfl.org.