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EARN MCLE CREDIT

2013 Ethics Roundup
page 27

What Makes a Franchise
page 10

The Decline of the Jury Trial
page 15

PLUS

Employee Class Actions
page 34

Cleanup Act

Los Angeles lawyer
Sudhir Lay Burgaard reviews
AB440’s new processes for redeveloping blighted properties
page 20

Guide to Expert Witnesses
PAGE 41
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To whom it may concern,

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

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

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

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

Warm regards,

Alison Triessl
20 Cleanup Act
BY SUDHIR LAY BURGAARD
AB 440 authorizes local governments, the DTSC, and the CEPA to compel cleanup of contaminated properties

27 2013 Ethics Roundup
BY JOHN W. AMBERG AND JON L. REWINSKI
Legal ethics issues involving conflicts of interest, disqualification, malpractice, and loss of fees continue to affect attorneys in California
Plus: Earn MCLE legal ethics credit. MCLE Test No. 234 appears on page 29.

34 The Conscience of Arbitration
BY STEVEN G. PEARL
Courts continue to address the application of Concepcion to PAGA, UCL, and CLRA claims

41 Special Section
Semiannual Guide to Expert Witnesses
Judge Michael D. Marcus (Ret.)
Daily Journal “Top Neutral” 2013
- Super Lawyer, Dispute Resolution 2008 - 2014
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Our profession makes liberal use of the language of Caesar. We argue about what is de jure versus what is de facto; we volunteer our time pro bono publico; if our client is having a bad day, we may enter a plea of nolo contendere; if our client is having a bad range of years under a court’s sentence, we may need to make a habeas corpus petition; we convey property to bona fide transferees. Indeed, we lawyers begin learning Latin words right at the start of law school—ab initio, if you will.

An occasional word in our legal lexicon derives from one of the nations Caesar vanquished—France (or Gaul, as he knew it). In jury trials, we decide which jurors to select (really, to deselect) by using a process called voir dire; if we don’t like the allegations of a pleading, we may bring a demurrer; and if a war, a hurricane, a labor action, or civil unrest prevents an agreement from being performed, such a force majeure will often relieve the parties of liability.

Cy pres is a French term many of us probably have not heard since law school. Cy pres is the abbreviated form of the phrase Cy pres comme possible, meaning “as near as possible.” The cy pres doctrine allows probate courts to interpret trust documents as closely as possible to the trustor’s intent, if the original objective has become impossible or illegal to perform. For example, a cy pres bequest might be made to the Audubon Society if the testator had designated a different wildlife charity that is no longer in existence.

The cy pres doctrine has found application in the class action arena. Many class action settlements result in settlement funds that cannot be distributed to individual class members because proof of claims is burdensome or too costly or because many class members fail to submit claims. Courts approving class action settlements have several options for handling residual funds, including pro rata payments to class members, reversion to the defendant, escheat to the government, or cy pres distributions.

Proponents of cy pres distributions in class actions argue that they support important charitable and social causes. Supporters point out that such awards can serve the purpose of deterrence and voluntary compliance when, for example, the parties cannot agree on a beneficiary of settlement funds. Defendants can benefit as well, with cy pres awards operating as charitable contributions resulting in favorable tax consequences.

California is among several states providing for cy pres distributions by statute or rule. Code of Civil Procedure Section 384 encourages the payment of class action residuals to “nonprofit organizations providing civil legal services to the indigent.” Federal law contains no similar statute, and the tide may be turning against cy pres awards. Late last year, in a case involving Facebook’s Beacon program, Chief Justice John Roberts signaled that the U.S. Supreme Court was keeping its eye on cy pres distributions. Defendants can benefit as well, with cy pres awards operating as charitable contributions resulting in favorable tax consequences.

In this era of underfunded legal aid programs, the cy pres doctrine can provide a valuable source of funding for those who cannot afford legal help when they most need it. Counsel representing plaintiffs and defendants in class action cases can work with California’s Campaign for Justice to ensure that the neediest Californians gain access to our justice system. The Campaign for Justice provides detailed information on cy pres awards at http://www.caforjustice.org/about/cypres.
Steps for Taking a Deposition in Japan

IN A VIBRANT GLOBAL ECONOMY, it is common for a foreign entity to find itself engaged in litigation in the United States. While most depositions take place in the United States, sometimes it is necessary to take the depositions of foreign witnesses in the countries where they reside. Arranging for a deposition abroad can be time-consuming because the additional rules and regulations that govern the deposition process in a foreign country must be observed. Japan, in particular, has strict rules governing depositions.

With very rare exceptions, depositions in Japan must take place at the U.S. Embassy in Tokyo or the U.S. Consulate General in Osaka. These facilities have three rooms dedicated for depositions—one room in Tokyo and two in Osaka. The availability of these deposition facilities is limited because the U.S. Embassy and Consulate General observe U.S. holidays and a majority of Japanese holidays. As a result, the deposition rooms are usually booked months in advance. Without plenty of lead time, a significant risk exists of not being able to reserve a room for a deposition before the close of discovery, thereby losing the opportunity to depose a witness.

Although a court order is not required when timely reserving a deposition room, it is important to apply for and obtain an order. The original or certified copy of the court order must be sent to the U.S. Embassy or U.S. Consulate General six weeks before the deposition. Failure to provide the court order in a timely manner will result in the cancellation of the deposition room reservation.

A deposition visa is required for attorneys based in the United States to take or defend depositions in Japan. The deposition visa must be applied for at least three weeks prior to the deposition. The application must also be submitted to the Japanese Embassy or Consulate in the United States that is located closest to the applicant. The application should be submitted once a deposition is scheduled. The application must include photocopies of the court order for deposition and confirmations for flight and hotel reservations.

For security reasons, cell phones and smart phones are not allowed inside the U.S. Embassy or Consulate General. While computers are allowed, they are subjected to network connectivity restrictions. If a computer is necessary for a deposition, it must be registered with the U.S. Embassy or Consulate General at least two weeks prior to the deposition. For example, if a computer is needed to demonstrate source code during a technical deposition, the make, model, and serial number of that computer must be disclosed.

Interpreters
A foreign witness often has limited English ability or may be uncomfortable testifying in English. Accordingly, the preparation of a foreign witness and the deposition itself are often conducted with help from qualified interpreters. Retaining the right interpreter can thus be essential to a successful deposition. Doing extra research to identify an interpreter with suitable experience would likely enhance the efficiency and quality of the witness preparation session. For a technical deposition, it may be helpful to retain an interpreter with a technical degree or an interpreter who has worked on cases with similar or related technologies. While translation from one language to another is seldom, if ever, perfect, retaining an interpreter with the right experience could improve the efficiency and quality of witness preparation. On the other hand, a qualified interpreter without relevant prior experience may require more time to become familiar with the key terminologies.

As with preparing an English-speaking witness, it is important to go over key documents and legal concepts with a foreign witness. This is also a good opportunity for the interpreter to become familiar with potential exhibits, understand what types of questions may be asked during the deposition, and determine how best to translate them. A good interpreter can often provide insights into how certain terms may be ambiguous and open to different interpretations.

Conducting a simulated deposition session can also be helpful to a foreign witness and the interpreter. A simulation provides the witness and the interpreter a chance to become familiar with the setting as well as the pace of the deposition. Finally, interpretation is a highly demanding task that is mentally and physically draining. It is important to take breaks during witness preparation and the deposition to allow the interpreter sufficient time to rest. This helps the interpreter to remain focused.

Time Management
Time management during a deposition is essential, and deposing a foreign witness often presents unique time management challenges. For example, an interpreter needs to translate all questions to another language and translate all responses into English. A check interpreter may also question or seek clarification of the translation performed by the primary interpreter. Naturally, translation increases the time required for each question and response and can also disrupt the flow of questioning.

Japanese depositions have additional time constraints. The U.S. Embassy and Consulate General have strict office hours for depositions, including a mandatory lunch break. In Tokyo, the deposition room is available from 8:45 in the morning to 1:00 in the afternoon and from 2:00 to 4:00 in the afternoon. The deposition must stop to allow sufficient time for all parties to leave. Taking into account the time required for a court reporter and a videographer to set up and put away their equipment and the time needed for translation, the actual time dedicated to questioning a witness is quite limited.

While an international deposition is not as straightforward as a deposition in the United States, with advanced planning and extra attention, attorneys can avoid many potential problems. With proper planning and preparation, taking or defending a deposition abroad can be a very exciting and rewarding experience.

Andrew Y. Yen is a managing associate at Orrick, Herrington & Sutcliffe LLP, where he focuses on patent litigation. He serves on the executive committee of the Barristers and as a director with the Los Angeles County Bar Foundation.
Analyzing What Makes a Business Arrangement a Franchise

DETERMINING WHETHER A CLIENT’S BUSINESS is involved in franchising may involve analysis that goes beyond the title of the contract. In one Commissioner’s Opinion, the California Department of Corporations (now known as the Department of Business Oversight) has held that what was labeled a distributorship contract was in fact a franchise subject to California’s Franchise Investment Law (FIL). To be a franchise, a business needs to meet three statutory elements, and those elements can be present in what the parties understood was a nonfranchise arrangement. Exculpatory clauses are void, and the fee that is a required element of a franchise agreement may be found outside the contract document. It is unlawful to establish a franchise without first registering with the state and providing an offering circular to the franchisee. Controlling members who materially aid in acts by an entity guilty of violations may be held jointly and severally liable. Violations can result in strict and substantial civil liability, rescission, injunctive relief, and even criminal penalties.

What may typically arise is commercial litigation involving distributor or licensee terminations and nonrenewals. This can result after a manufacturer terminates a distributor or notices its intent to so terminate and the distributor seeks damages or an injunction to prevent termination. California’s franchise law forbids termination, cancellation, nonrenewal, or other interference with franchisees without proper reason and limits the freedom of parties to draft contract terms that are inconsistent with the requirements of the California Franchise Relations Act (FRA).

To avoid these outcomes, counsel should become familiar with the FIL and FRA and review applicable regulations, releases, guidelines, and interpretive opinions of the Commissioner of the Department of Business Oversight. The opinions constitute prima facie evidence of the scope and extent of coverage of the definition of a franchise.

What Is a Franchise?
The FIL defines a franchise as a contract by which a franchisee 1) is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, 2) is substantially associated with the franchisor’s trademark or other commercial symbol, and 3) pays a fee.

In order to apply the three elements of a franchise agreement to a client’s contracts and business operations, it is imperative to understand the policy behind the law. The FIL begins with the following pronouncement: “California franchisees have suffered substantial losses where the franchisor or his representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between franchisor and franchisee, and the prior business experience of the franchisor.” The intent of the FIL is “to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered and to prohibit the sale of franchises where such sale would lead to fraud or a likelihood that the franchisor’s promises would not be fulfilled.”

The sweeping breadth of the FIL has been upheld in court. In Gentis v. Safeguard Business Systems, the appellate court held, “As a general matter, remedial or protective statutes such as the [FIL] are liberally construed to quell the mischief at which they are directed.... With regard to the statutory definition of ‘franchise,’ this means each element should be construed liberally to broaden the group of investors protected by the law....” The FIL’s preamble and Gentis should be kept in mind when reviewing a business arrangement for the three elements that create a franchise.

The First Element
The first definitional element is that a marketing system be prescribed. This element is described in Corporations Code Section 31005(a): “A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor.” If an agreement does not grant the right to engage in business, it is not a franchise.

This is true even if the grantee is described as a franchisee. The court in Gentis focused on whether Safeguard had granted Gentis and others the right to engage in the business of “offering, selling or distributing goods or services.” Safeguard argued that Gentis was not a franchisee because it lacked authority to enter into binding sales contracts on behalf of Safeguard, did not transfer title to goods, and did not regularly deliver products to customers. Neither the language of Section 31005 nor the legislative history of the FIL demonstrated intent to limit the law’s reach.

Affirming the lower court’s holding, the appellate court observed that the lower court had found that the plaintiffs were more than sales representatives who simply solicited orders without the authority to

John M. Adsit practices business-related law in Southern California.
A business arrangement that involves substantial association with the grantor’s trademarks fulfills the second element indicative of a franchise. As Release 3-F puts it, the second element is present when “the operation of the franchisee’s business… is substantially associated with the franchisor’s trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate.” Release 3-F goes on to state that “if the franchisee is granted the right to use the franchisor’s symbol, that part of the franchise definition is satisfied even if the franchisee is not obligated to display the symbol.” An agreement does not create a franchise, however, if the agreement prescribes a detailed marketing plan or system for the operation of the business authorized thereby, but the business is not substantially associated with a commercial symbol of the franchisor or its affiliate. Courts have, however, generously interpreted the circumstances that establish substantial association with a franchisor’s symbol.

In Kim v. Servosnax, Inc., Servosnax was in the business of contracting with office complexes to run employee cafeterias. It licensed the right to operate the cafeteria to people such as Kim for fees that included an initial cash payment, promissory note payments, and 10 percent of net sales. Servosnax built out cafeteria spaces, provided initial training to licensees, acted as a liaison between the licensee and the office complex, carried out inspections of the cafeteria to ensure that quality standards were met, and controlled menus and prices. The jury found Servosnax to have violated the FIL and awarded Kim $45,000 in damages.

On appeal, Servosnax did not dispute that it had granted Kim the right to operate under its marketing system nor that the company had required Kim to pay a fee for that right. Servosnax argued that Kim’s operation of the cafeteria was not substantially associated with Servosnax’s trademarks because no name, logo, or symbol identified the cafeteria with Servosnax and that Kim was not permitted to use the Servosnax name in the operation of the cafeteria.

In affirming the jury verdict, the appellate court found that Servosnax had two categories of customers: 1) the cafeteria’s customers and 2) the office complexes. Focusing on the latter, the court concluded, “The key association with the name and goodwill of [Servosnax] occurs in the selection process when a host employer…selects [Servosnax] from among other competitors to set up the facility and provide an operator to run it. This person, the franchisee, thus is intimately associated with [Servosnax] in the mind of the location owner. It is this association that benefits the franchisee, who then operates the facility pursuant to a license agreement.” Servosnax has an unusual fact pattern in that the trademark element is usually the easiest to identify. Nevertheless, the decision shows how broadly the elements may be interpreted.

The Third Element

The third element of a franchise agreement is a fee. An agreement that does not expressly require payment of a fee to engage in business does not mean that no fee requirement exists or that the payment of a franchise fee is not required. The fee need not be paid up front and may be paid at any time during the relationship. The fee, however, must be for more than an ordinary business expense. Release 3-F points out that Section 31011 of the Corporations Code defines “franchise fee” broadly as “any fee or charge that a franchisee is required to pay or agrees to pay for the right to enter into a business under a franchise agreement…regardless of the designation given to, or the form of, such payment.”

Release 3-F emphasizes substance over form: “Whether or not a fee or charge is ‘required’ and whether it is made ‘for the right to enter into business,’ is a mixed question of fact and law.”

Whether a franchise fee is payable in a lump sum or in installments, whether payments to the franchisor depend on gross receipts or net profits, whether the fee takes the form of a royalty, or whether the fee is based on units of merchandise ordered or sold by the franchisee, Release 3-F holds that a franchise fee is a franchise fee. A fee may also “be contained in the price charged by the franchisor or an affiliate of the franchisor for goods or services supplied to the franchisee or in the rental fee payable by the franchisee for business premises or equipment rented from the franchisor or an affiliate of the franchisor.”

Release 3-F also provides examples of franchise fees, including a payment for training and school expenses; charges for sales kits, brochures, programs, forms, decals, shirts, displays and announcements; and payment for services, such as consulting or management fees. Section 1.4.3 of the release dis-
discusses the “bona fide wholesale price of goods” exception, which essentially states that the purchase price of goods for an amount not exceeding their bona fide wholesale price is exempted from the definition of “franchise fee.” This exception is based on the rationale that “no substantial prejudice will come to a person buying a business and paying only the bona fide wholesale price for merchandise which that person proposes to sell in the business.”

The bona fide wholesale price exception is applicable only to the purchase of goods which the franchisee is authorized to distribute by the franchise agreement and the exception does not apply to payments which the franchisee is required to make under the franchise agreement in return for benefits other than goods, such as payment for real estate or services or rental payments. Furthermore, the exception is not applicable to fixtures, equipment or other articles which are to be utilized in the operation of the franchised business, such as display cases, tools, equipment, and, in the case of a restaurant franchise, such as table linen, napkins, flatware and other service utensils.

Section 1.4.5 of Release 3-F further qualifies the bona fide wholesale price exemption by rendering it inapplicable to requirements to buy quantities of goods in excess of what a reasonable businessperson would normally purchase or to maintain an inventory. Section 31115 of the Corporations Code places the burden of proving an exemption or an exception from a definition upon the party claiming it.

Section 1.4.4 of Release 3-F discusses Commissioner’s Rule 310.011, which exempts from the registration requirement of Section 31110 of the Corporations Code agreements that obligate the franchisee to pay a sum not exceeding $1,000 “annually on account of the purchase price or rental of fixtures, equipment or other tangible property to be utilized in, and necessary for, the operation of the franchised business....” Similarly, Commissioner’s Rule 310.011 exempts from the registration requirement a nominal annual fee that does not exceed $500. Release 3-F adds that this payment may be made “for any purpose.”

Section 1.4.7 of the release discusses the fact that the payment of a franchise fee must be required by the terms of the agreement rather than being optional or voluntary. However, “a payment by a franchisee, though nominally optional, may in reality be essential; this is especially so if the franchisor intimates or suggests that the payment is essential for the successful operation of the
business.” Section 1.4.8 clarifies that even if payments are made to third parties for the purpose of advertising and promotion to enhance the goodwill of the franchisor’s business, those payments may be deemed made for the account of the franchisor and thus qualify as a franchise fee.48

Determining whether a client’s business is involved in franchising can require considerable investigation and analysis. Contracts, program and training materials, and correspondence between the grantor and grantee are all potential sources of marketing plans and required fees. Where a marketing plan that originates with the grantor is found, the elements of substantial prescription, trademark association, and payment of fees are often found as well. If the grantor is extracting payments from the grantee for items the grantee cannot resell, a fee may be present.

The purpose of California’s franchise legislation should be kept in mind. Franchising is a question of control and sometimes adhesion. The more control exercised by the grantor, especially in sales and marketing, the more likely it is that a franchise is being created.

3 CORP. CODE §31011.
4 CORP. CODE §§31110, 31119.
7 The California Franchise Relations Act, codified at BUS. & PROF. CODE §§20000 et seq.
8 The Franchise Investment Law, codified at CORP. CODE §§31000 et seq.
13 See CORP. CODE §31005(a); BUS. & PROF. CODE §20001.
14 CORP. CODE §31001.
15 Id. See also WITKIN, SUMMARY OF LAW, CORPORATIONS §287.
17 Release 3-F, supra note 10, at 1.2.1.
19 Gentis, 60 Cal. App. 4th at 1297.
20 Id. at 1300.
21 Id. at 1303.
23 Id. at 595.
24 Id.; see also Commissioner’s Op. 71/25F.
25 Release 3-F, supra note 10, at 1.2.2.5.
26 Id. at 1.2.2.4.
27 Id. at 1.2.2.3.
28 Commissioner’s Op. 71/61F.
29 Release 3-F, supra note 10, at 1.2.7.
30 Commissioner’s Ops. 72/11F, 73/17F.
31 Commissioner’s Ops. 72/45F, 73/25F, 73/30F.
32 Commissioner’s Ops. 72/45F, 73/25F, 73/30F.
33 Commissioner’s Ops. 73/5F, 73/47F.
34 Commissioner’s Ops. 73/20F.
35 Release 3-F, supra note 10, at 1.3.
37 Id. at 1357.
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AS COURTS ARE WORKING HARDER THAN EVER and with more limited resources, more cases are being resolved short of trial or tried by courts without juries. Indeed, we may be entering an era of the vanishing jury trial. Los Angeles Superior Court statistics indicate that the number of jury trials in general jurisdiction civil cases (over $25,000) has been shrinking during the past decade. Last year, jury trials in these cases were down more than 25 percent from 10 years ago. Meanwhile, nonjury trials have increased almost threefold from 1,199 annually in 2003 to 3,386 in 2012. Although civil case filings in Los Angeles have fluctuated over the years, most recently they ended up somewhat higher than 10 years ago (52,501 in 2003 to 55,956 in 2012).

One of the principal factors that has led to such a marked decline in verdicts rendered by juries is that the traditional rules for civil litigation have been significantly revised in recent years. In particular, the revamping of the rules of civil procedure and judicial practices for pretrial discovery and summary judgment have greatly altered litigation tactics. Pretrial strategies for determining the proverbial search for truth have shifted gears.

Fact-gathering for a trial is becoming less and less the end game of litigation. Pretrial motions, summary judgment, and mediation are the focal points of today’s litigation. The main objective is to employ discovery to knock out or defend against an adversary’s case at a pretrial stage or prepare for a mediation, not to marshal evidence for trial purposes. The emphasis of this new era is to convince judges and private arbitrators or mediators, not persuade jurors, about the strengths or weaknesses of a case.

Contemporary civil rules encouraging pretrial disclosure of information through interrogatory responses, document production, depositions, and expert disclosures have taken much of the factual guesswork out of litigation and trials. Given the broad latitude of pretrial discovery—aided by computer investigation and research—counsel are better equipped than ever to determine the factual gist of a case. Consequently, it is easier to ascertain whether a matter can be resolved by summary proceedings, settlement, or a bench trial without a laborious fact determination by a jury.

Moreover, civil rules emphasizing civility, ethical conduct, and meet-and-confer courtesies between opposing counsel are gradually transforming the nature of litigation. Besides promoting professionalism, the rules stressing professional communication to resolve differences encourage counsel toward conditions that enable them to better assess one another’s cases and foster relationships that can lead to improved prospects for case resolution short of trial. The notorious swearing matches between attorneys are becoming less prevalent because counsel are compelled to work out their disagreements. The prospect of a jury trial is lessened when there is such open dialogue and attorneys consider alternative methods to conclude their clients’ cases.

ADR Alters the Playing Field
The dramatic growth of private alternative dispute resolution (ADR) is another reason for the decline in jury trials. Seeking to avoid a courtroom at all costs, many parties to consumer, employment, real property, and other contracts often specify mandatory private arbitration or mediation. The redirection of dispute resolution into ADR has received a generally warm reception from judges. At the same time, privatization of traditionally public judicial functions is allowing many cases to be decided in arbitration or mediation conducted by a second judiciary behind closed doors.

Some parties prefer adjudication through private arbitration over the exposure and scrutiny of the public judicial system. Arbitration advocates contend that it is less expensive, with greater convenience, comfort, and informality. They also submit that arbitration infuses flexibility, eliminates unpredictability, allows for budgeting litigation expenses, avoids backed-up courts, permits selection of neutrals with known reputations or specialized expertise or experience, and provides a more expeditious way to obtain earlier justice. Most important, the arbitration process dodges the jury system.

Alternatively, arbitration detractors charge that many arbitration agreements are one-sided and that the costs of private ADR favor the
powerful and affluent over the underrepre-
resented and poor. They also argue that proce-
dures and rules dictated by some mandatory
arbitration provisions or followed by some
providers are not well defined, that results are
uneven, that appeals from arbitration are
extremely limited, and that decisions rendered
without public scrutiny lack the fairness and
transparency afforded by an open adjudication
process. Nevertheless, the current momentum
is behind arbitration as a practical alternative
to court proceedings and juries.5

Private mediation also has increased as a
preferred case resolution method, especially
after court funding cutbacks have curtailed
court mediation programs and settlement
conferences by judicial officers. For parties
who can afford it, there are plenty of retired
judges and trained mediators begging for the
opportunity to act as either neutral, “hands
off” mediators facilitating settlement discus-
sions or settlement officers actively seeking
to achieve results.

Virtually everyone agrees that private
ADR relieves pressure from an underfunded
and overtaxed judicial system by channeling
cases out of public courts. For the most part,
the judiciary has not stood in the way of pri-
ate ADR. Indeed, when arbitration clauses
have not been found to be unconscionable,
courts have heartily endorsed private ADR
procedures. If the parties to a lawsuit want to
arbitrate or mediate privately, they usually go
with the judiciary’s blessing.6

ADR has become deeply ingrained in the
litigation process and is an ordinary expec-
tation of both litigants and counsel.6 It is
part of the curriculum in most law schools
and constantly touted to lawyers. Today’s
younger attorneys have taken ADR courses
in law school and learned that negotiation,
arbitration, and mediation are regular litiga-
tion practices. Some of the newer gener-
ation of lawyers now refer to mediation and
settlement conference interchangeably. By
becoming mediators and holding themselves
ready to resolve cases, many practitioners
realize that private ADR has an important
place in a future of litigation with fewer jury
trials. Moreover, some ADR companies offer
private trials to complement their offerings of
mock trials and focus groups that have
become more common in high-stakes cases.

Costing Out Jury Trials

Cost is the main reason that litigants are opt-
ning out of jury trials. Because jury trials cost
too much, either settlement or a bench trial
has become the necessary destiny of many
cases that make it through pretrial motions.

High costs of trial are no stranger to either
side of the aisle. Even while plaintiffs’ attor-
neyes complain that defendants, or their insur-
ance carriers, are too cheap in settlement,
they lament that their clients cannot afford the
expense of a jury trial. Plaintiffs’ lawyers who
envision themselves as latter-day Clarence
Darrow argue that a jury cannot avoid the
temptation of in-hand settlement money.
Moreover, defendants’ counsel bemoan that
they cannot get enough trial experience
because their clients refuse to endure the
attorneys’ fees, anxiety, and other unknowns
of a jury trial.

Recent economic forces have been diffi-
cult for attorneys—not to mention their
clients—filing and defending civil lawsuits.
Attorney and paralegal time, expert fees,
reporters, and jury costs have considerably
increased while clients’ litigation budgets
have greatly diminished. Attorneys constantly
grumble about how much time and money
it costs to file or answer a complaint, conduct
pretrial discovery, bring motions, pay court
reporter and expert fees, and keep up with
a myriad of constantly mounting litigation
outlays. Since many attorneys operate their
law offices on very low budgets, they cannot
afford the weighty operating expenses of
protracted lawsuits, let alone spend long
days in a jury trial.

As pretrial litigation has become more
complicated—often exacerbated by costly
electronic discovery—lawyers have been chal-
lenged to practice in a more cost-effective
manner. In particular, while the rules of civil
procedure allow liberal pretrial document
requests for evidence admissible at trial, this
comes at a great cost. Tasks such as plowing
through bulky computerized financial records
maintained by today’s businesses, strain
ning to make sense out of endless e-mail chains,
and responding to nitpicking meet-and-
confer letters preparatory to the discovery
motions churned out by competing law firms
can rapidly consume a case budget. Further-
more, sorting through mountains of pro-
duced materials often yields only a molehill
of evidence for trial.

Out-of-pocket expenditures often drive
output and sometimes results. By the time
counsel have trudged through expensive
paper discovery, suffered high-priced depo-
sitions, managed the onerous summary judg-
ment gauntlet, ponied up for private medi-
arion or settlement conferences, and endured
exorbitant expert hourly rates, litigation
funds—or, worse yet, the bank account of
an attorney advancing the upfront costs—
may be depleted. Having strained capital
resources, parties on either side of the aisle
may want to avoid the costs and risks asso-
ciated with a jury trial.

These recent recessionary years have
greatly exacerbated cost factors. With law
firms barely hiring, greater numbers of
younger attorneys are hanging out their own
shingles, usually with little capital funding.
Even when they have a case with potential
jury appeal, these barristers seldom have the
deep pockets necessary to endure long-term
litigation through a jury trial, let alone the
background and confidence to comfortably
stand before 12 deciders from the community.

It is not surprising that so many cases
settle short of the selection of a jury or pro-
ceed to a bench trial. In many situations,
plaintiffs’ attorneys are not willing to gamble
on a jury trial when there is money on the
table. Even lowball offers start to look attrac-
tive when the odds on scoring big with a
jury start to pale as trial costs and hours of
trial preparation begin to mount. A jury’s
returning a large plaintiffs’ verdict—which
likely will be appealed and might never be col-
lected—can be more hope than reality.
Defendants’ counsel face the dilemma that
their clients may be unwilling to pay “blood
money” to a plaintiff but are also reluctant
to foot a considerable bill for a jury trial.
Moreover, there are also contractual pro-
visions and a growing host of statutes that
shift attorneys’ fees and court costs to the los-
ring party that may give pause, for example
California’s employment and discrimination
laws.7 Broad judicial interpretations of offers
of compromise also pose irresistible chal-
lenge to counsel bent on taking a case all the
way through to trial.8 When such an offer is
on the table, the threat of paying an oppo-
nent’s costs after a trial can loom large for a
party who comes out on the short end of a
jury verdict.

It is an attorney’s ethical obligation to
advise clients on the consequences of losing
a trial. Such advice by itself can be enough to
force some litigants to seriously consider set-
tlement over summoning a jury.

Court Case Management

The remarkable drop in jury trials in Los
Angeles state courts in the past 10 years,
accompanied by a dramatic tripling of bench
trials without juries, may in large measure be
attributed to better case management by trial
courts. In superior court, the individual case
calendar system assigns cases directly to the
trial courts. This permits counsel to know
when trial judge has been selected and to bet-
ter assess whether a case should be tried
without a jury to this judge. Without a master
calendar that requires counsel to wait in
line for an open trial court, there is a far
greater probability of trial date certainty.

Bench trials often bring litigation eco-
nomics into more realistic focus. They are
shorter, give the parties greater assurance
that sufficient trial time will be available,
ensure that the case will be decided by a
knowledgeable judicial officer, and lower the
apprehension that accompanies educating 12
lay people on the issues. Bench trials also
reduce the concern that defendants have of a runaway jury that might award exorbitant damages—for example the award in the infamous and often mischaracterized McDonald’s hot coffee case—or that plaintiffs may harbor about a biased jury (as when jurors are fearful that a large judgment may raise insurance frequency).

On the other hand, even though courts are much better about providing predictable trial dates, these dates are moving further into the future due to court closures and consolidations. Among plaintiffs’ trial attorneys, the consensus that “justice delayed is justice denied” can now translate into “even a bad settlement today is better than a good trial or uncollectible judgment tomorrow.” When trial dates are pushed too far ahead, there is a definite incentive to settle by taking an offer on the table rather than waiting for a jury trial.

A New Case Mix

Today’s jury trial docket is markedly different from a generation ago. As the nature of legal disputes changes, so does what is tried to juries. For instance, the number and magnitude of automobile accident cases, one of the biggest categories of cases that have gone to trial over many decades, have dropped markedly. Motor vehicle accident personal injury filings in the Los Angeles Superior Court have declined more than a quarter over the past 10 years—from 14,406 in 2003 to 10,335 in 2012. Filings of these actions have been affected by better auto safety, improved medical emergency and trauma care, enhanced highway engineering, fraud crackdowns, tighter insurance company claims practices, and closer court docket management. Many of the ordinary fender-bender cases have been relegated to limited jurisdiction courts, in which reduced potential damages, tough insurance company settlement offers, and trial cost considerations render these smaller cases unlikely candidates for jury trials.

Other classes of cases that once were typical jury trial candidates also have fallen out of favor. The potential for medical malpractice cases going to a jury has been dampened by the MICRA statutory cap on noneconomic damages—$250,000 in noneconomic damages is not as viable as it might have been when they were capped in 1975. Insurance bad faith and high potential punitive damages cases, which once brought many cases before juries, have been tempered by judicial determinations eliminating or limiting such damages.

In order to make up for the loss in opportunity resulting from the changes in various types of cases, many attorneys have discovered California Labor Code wage and hour violations and employment discrimination as fertile areas for their practices. While these cases can furnish steady income for attorneys on both sides of the counsel table, the overwhelming majority are resolved without a jury trial. When defendants’ counsel are not successful in eliminating these claims by motion, most settle due to employers’ realization that their labor practices may not be compliant, terminated employees needing a payday sooner rather than later, or the cases are just too expensive to justify the costs of a jury trial.

As the mix of cases that might be tried to juries has changed, there also has been a shift in juror sophistication. Even jurors who have never been in a courtroom before have seen actual trial situations on television and have a better grasp of judicial proceedings than in the past. They are less susceptible to persuasion without solid evidence, view experts with skepticism, and cannot be bullied. Sensible attorneys realize that today’s jurors cannot be underestimated, since they are better informed, better educated, and more analytical.

Although contemporary jurors can be generous with damages—when credible evidence is presented—they also can see through a smoke screen and are quick to sit on their wallets when a case is thin. Lawyers, recog-
nizing that these factors are in play, may question whether a jury trial is the best way to proceed.

**Mentoring Young Lawyers**

Attorneys used to say that it takes two dozen jury trials for lawyers to figure out on which side of the courtroom the jury box is located. Veteran lawyers have a saying that “litigators are not trial lawyers.” Whether or not there is any truth in such conventional wisdom, there is general agreement that actually trying cases to jurors is the only way that most lawyers can gain the skills necessary to be very good at persuading juries.

Younger attorneys in recent years have found it difficult to gain the experience they need to effectively represent clients in a jury trial. As the costs have risen and jury trials are fewer and farther between, large and small law firms have turned to their most experienced attorneys to handle jury trials—to the detriment of younger attorneys who might have been given greater opportunities in former times. Furthermore, recent economic trends have caused more senior lawyers not to retire as early as before. They often continue to shoulder trial responsibilities without yielding trials to a new generation of trial advocates. This makes it harder for younger attorneys to elbow their way to the trial counsel table.

The high cost of presenting a jury trial also has taken a large toll on the traditional mentoring process that has long allowed younger lawyers to second-chair trials. Fewer clients are able or willing to pay for more than a single principal lawyer to try a case. Regrettably, a lack of mentoring and trial opportunities is depleting the stable of jury-ready counsel for civil cases.

This situation is compounded by the major impact that the decline in the attorney job market has had on new law graduates attempting to gain footholds as litigators. Law firms and government employers have cut back hiring and training programs. Newly admitted attorneys, especially sole practitioners, are struggling to find paying clientele, and fewer all the time have the experience, guidance, or capital to take on a jury trial.

The longer that lawyers must wait to get jury trial experience, the less likely they are to become proficient trial attorneys. As much as one might try to offset the lack of actual trial time through reading up about trials or taking MCLE classes, there is nothing that can take the place of looking into the eyes of 12 jurors and asking for a verdict.

The future of our civil jury system could be at risk if there are not enough lawyers who can credibly try a case to a jury. Without lawyers who can effectively and persuasively present cases to jurors, it is an open question how the jury system in civil cases will fare in the future.

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2. The statistics cited in this article are derived from internal Los Angeles Superior Court tracking reported annually to the Administrative Office of the Courts for fiscal years ending June 30.
7. See, e.g., 42 U.S.C. §2000e-5(k); Gov’t Code §12965(b).
9. See note 2, supra.
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COMMUNITIES SADDLED with abandoned warehouses, decommissioned gas stations, and deserted factories now have a renewed means to remediate and redevelop these and other contaminated properties. Signed into law in 2013, AB 440 can now be found in the California Health and Safety Code commencing with Section 25403 and replaces the Polanco Redevelopment Act, which had been in effect for 22 years. The new law essentially shifts the powers that redevelopment agencies once had to cities and counties, as well as to housing authorities that assume the functions of a former redevelopment agency in which the property was transferred from that successor agency to the housing authority. It authorizes local governments to compel cleanup of contaminated properties while minimizing exposure to liability.

The Polanco Act was created in 1990 to help redevelopment agencies respond to brownfield, properties where hazardous substances are present or potentially present and therefore difficult to redevelop or reuse. The Polanco Act was used to promote cleanup and reuse of sites that might otherwise remain idle. Many communities in Los Angeles—including Hollywood, Little Tokyo, Exposition Park, and the Pacific Corridor—in addition to communities in other cities, including San Diego’s Gaslamp Quarter and Pasadena’s Old Town, benefitted from the Polanco Act. It promoted cleanup not only by allowing a redevelopment agency to obtain property in a redevelopment project area by eminent domain, purchase, or lease but also by giving the agency the power to order responsible parties to clean up contamination. If the responsible party failed to do so, the redevelopment agency could clean the property or arrange for a third party to conduct cleanup and then seek to recover cleanup costs from the responsible parties. The act also provided redevelopers, subsequent purchasers, and lenders with immunity from liability for contamination.
that was addressed as part of the cleanup. As an incentive, redevelopment agencies could use a portion of the property taxes to help pay for improvements.

This latter power led to the demise of the Polanco Act and the redevelopment agencies because, at the height of the 2011 budget crisis, Governor Jerry Brown and others pushed to eliminate redevelopment agencies, arguing that the state could no longer afford them. The redevelopment agencies had collected about $5 billion annually that would otherwise have gone to local government services but contributed only $1.1 billion in return to support local police, firefighters, road maintenance, parks, and libraries. The state was obligated to make up the difference by paying local school districts approximately $1.8 billion to meet minimum funding requirements. Proponents of the redevelopment agencies argued that they generated about 300,000 jobs annually and approximately $2 billion in state and local tax revenue. Ultimately, however, California’s redevelopment agencies were officially dissolved on February 1, 2012.

The dissolution of redevelopment agencies delayed cleanup of contaminated properties and, in some instances, brought it to a halt, eliminating a vital tool to address urban decay and foster commercial and residential growth in communities. Buildings contaminated with asbestos, lead-based paint, metal dust, and mold remained neglected. Subsurface soils and groundwater sat polluted with hazardous wastes, including those discharged from dry cleaners, metal finishing shops, machine shops, electronics manufacturers, auto repair facilities, and industrial manufacturing. Hundreds of city workers and thousands of construction workers were laid off. Many argued that a program was needed to address brownfields and foster redevelopment, growth, and renewal in order to continue the work that redevelopment agencies had started.

**AB 440**

The passage of AB 440 revives many of the powers provided under the Polanco Act but instills those powers in local agencies instead of redevelopment agencies. It authorizes cities, counties, and housing authorities to take any action similar to that under the old act—with some differences—that the local agency determines is necessary, and, consistent with other state and federal laws, to investigate or clean up a release on, under, or from blighted property that the local agency has found to be in a blighted area within the local agency’s boundaries. A blighted property contains the presence or perceived presence of a release or releases of hazardous material that contributes to the vacancies, abandonment of property, or reduction or lack of proper utilization of property. A blighted area is one in which the local agency determines there are vacancies, abandonment of property, or a reduction or lack of proper utilization of property, and the presence or perceived presence of a release or releases of hazardous material that contributes to the vacancies, abandonment of property, or reduction or lack of proper utilization of property.

While AB 440 mirrors the Polanco Act, it transfers many powers that the redevelopment agencies once had to local agencies. For instance, a local agency may require the site owner or operator to provide it with all existing environmental information pertaining to the site, including the results of any phase I or phase II environmental site assessment, or any assessment conducted pursuant to an order from, or agreement with, any federal, state, or local agency, and any other environmental assessment information. If environmental assessment information is not available, the local agency may require the owner of the property to conduct, and pay the expenses of conducting, an assessment in accordance with standard real estate practices for conducting phase I or phase II environmental assessments. The assessments must comply with the requirements adopted by the American Society for Testing and Materials for Standard Practice for Environmental Site Assessment. A local agency conducting a phase I or phase II environmental assessment due to the owner or operator’s failure to provide this information has the right, upon reasonable notice, to enter the property and conduct an environmental assessment. The local agency may recover the costs of conducting the assessment.

Additionally, local agencies can compel responsible parties to clean up contamination. The local agency, or the Department of Toxic Substances Control (DTSC), a regional water quality control board (regional board), the California Environmental Protection Agency (CEPA), or another designated government agency must provide the responsible party with notice, giving it 60 days to respond and propose an investigation plan and cleanup schedule prepared by a qualified independent contractor.

The responsible party may appeal a 60-day notice issued to it to the local agency’s governing body by making a written request to the clerk of the local agency within 30 days of receiving the notice. The responsible party may challenge the decision of the local agency’s governing body only as part of a cost recovery or injunctive proceeding initiated by the local agency, but the local agency’s decision shall be upheld if it is supported by substantial evidence. The defenses available to a responsible party are some of the same defenses provided for under the federal Comprehensive Environmental Response, Compensation, Liability Act (CERCLA), which include an act of God, an act of war, an act or omission by a third party, and the bona fide prospective purchaser defense. This last defense, although often used in CERCLA, also often fails without a negotiated and approved prospective purchaser agreement with the appropriate agencies. To be a bona fide prospective purchaser, a party must conduct all appropriate inquiry into existing contamination before acquiring contaminated property, exercise all appropriate care, and take reasonable steps to stop continuing releases and prevent future releases of hazardous substances. The nature and extent of the appropriate inquiry is all too often open to attack, and parties seeking to assert the defense should consult with an attorney to ensure that they meet the required standards.

Alternatively, local agencies may conduct cleanup themselves if they cannot identify any responsible party or if the responsible party fails to propose or implement an investigation plan and a cleanup schedule that are approved by DTSC, a regional board, or the appropriate local agency. If the responsible party fails to respond to a notice letter or does not implement the investigation or cleanup plan, the local agency may submit a cleanup plan and applicable documents required pursuant to the California Environmental Quality Act to DTSC or a regional board for approval to conduct cleanup itself.

It is important that the cleanup plan be consistent with the intended schedule for redevelopment and use of the property. For example, a project redevelopment for a school or hospital will likely have more stringent cleanup standards than those for commercial or industrial purposes because the level of exposure to contaminants will be higher for the former uses. Remediation methods inconsistent with redevelopment schedules may be precluded from implementation or require revisions. A local agency may set deed restrictions that limit the use of the property to protect human health and the environment by, for instance, prohibiting the use of groundwater as potable water or banning the storage of hazardous wastes or excavation below a certain depth. Local agencies may also determine future land uses independently or with the cooperation of developers.

Furthermore, AB 440 allows a local agency to designate another agency in lieu of DTSC or a regional board to review and approve a cleanup plan and to oversee the cleanup of hazardous materials from a specific hazardous material release site if the agency is designated as the administering agency by the Site Designation Committee, a committee within CEPA that is responsible for designating a single state
or local agency to oversee a site investigation and remedial action. A local agency may also designate another agency to review and approve the cleanup plan for an underground storage tank site and oversee the cleanup at the site if the designated agency consents to the designation and is certified under California’s Certified Unified Program, a program that consolidates, coordinates, and makes consistent the administrative requirements, permits, inspections, and enforcement activities of six environmental and emergency response programs. However, an agency may not consent to the designation unless it determines that it has adequate staff resources and the requisite technical expertise and capabilities available to adequately supervise the cleanup. The lack of sufficient resources in this age of budgetary restrictions could prevent many agencies, which may be the best agencies to handle a redevelopment project, from conducting or overseeing cleanups.

Despite similarities, the new law also differs significantly from the former one, mostly because of the distinct functional characteristics between redevelopment agencies and cities, counties, and other local agencies. For example, under the Polanco Act, redevelopment agencies could acquire access to properties only by eminent domain, purchase, or lease. In contrast, the new law allows local agencies to enter and access contaminated properties for site assessment and cleanup upon providing notice to owners. This expanded authority provides local agencies with a means to access brownfields in a manner more expeditious and affordable than those provided under the Polanco Act.

Additionally, the jurisdiction of AB 440 differs from that under the Polanco Act, in which redevelopment agencies could exercise authority over contaminated properties only within a redevelopment area. But under the new law, local government agencies can remedy or remove a release of hazardous substances within the boundaries of the local agency, thus allowing it to address a broader geographic range of brownfields.

AB 440 also provides for a dispute resolution process between local agencies and DTSC, or a regional board, that was absent under the old act. If DTSC or a regional board exercises oversight authority over an existing cleanup occurring under CERCLA or state laws, the local agency must provide advance notice to DTSC or the regional board of its intent to issue notices to responsible parties under AB 440. DTSC or the regional board has 30 days to object to the local agency’s intent to issue notice letters to responsible parties. If the local agency and DTSC, or a regional board, have competing interests and cannot reach a resolution as to which agency shall oversee the cleanup, the matter is to be submitted to CEPA’s Site Designation Committee, which is charged with resolving the matter impartially by majority vote.

Furthermore, AB 440 introduces an extensive public participation process. When preparing the cleanup plan, the local agency is required to provide an opportunity for other public agencies and the public to participate in decisions regarding the cleanup plan. To accomplish this, 30 days before submitting the cleanup plan for approval, the local agency must notify all other appropriate public agencies of the proposed cleanup plan, including DTSC or the regional board, if neither is required to approve it. A notice must be placed in a newspaper of general circulation in the area of the property, including a community-based newspaper, and a notice of the proposed cleanup plan posted on the property. The local agency must also make available to the public the proposed cleanup plan, property assessment, addenda, and any other supporting documentation at the local agency and local repositories, as well as provide a reasonable opportunity to comment on the plan and related documents. If a public meeting is requested, the local agency must hold a public meeting in the area of the property to receive comments. At the conclusion of this process, the local agency has to inform the public regarding the process by which decisions about the property are made and the recourse that is available for those who may disagree with an agency decision.

Incentives to Clean

Perhaps the most appealing provision of the new law to local agencies is that it provides immunity to local agencies from contamination addressed as part of the cleanup. The new law provides that DTSC, a regional board, or the designated agency must determine and approve the completion of the cleanup and notify the local agency within 60 days that it is immune from liability for contamination addressed as part of the cleanup. This immunity extends to developers, lenders, and subsequent purchasers for the release or releases specifically identified in the approved cleanup plan, but not for any subsequent release or any release not specifically identified in the approved cleanup plan.
Under the new law, local agencies must reimburse DTSC or the regional board for costs incurred in reviewing or approving investigation plans and cleanup plans. These costs will undoubtedly be passed on to responsible parties. If costs are disputed, the local agency must pay any undisputed costs and confer with DTSC or the regional board to resolve disagreements over the disputed costs. The parties may take advantage of any review processes maintained by DTSC or the regional board to resolve any remaining disputed issues.

Also appealing is the provision that local agencies can recover the full cleanup costs, including attorneys’ fees, staffing costs, and interest, from responsible parties who in turn must reimburse a local agency for costs incurred to investigate or clean up a release of hazardous material or costs incurred in requiring others to investigate or clean up. A local agency may recover these costs by commencing a cost recovery action, but it must do so within three years after completion of the cleanup. If the local agency brings a civil injunctive action to compel a responsible party to remediate contaminated property, the responsible party is liable to the local agency for costs incurred in the action. The immunities under the law and the ability to recover costs provide local agencies with leverage and incentive to compel or conduct cleanups.

Using Polanco Cases to Interpret AB 440

AB 440 clearly states that it should be interpreted by applying case law that previously interpreted the Polanco Redevelopment Act. Specifically, AB 440 instructs that it is “the policy successor to the Polanco Redevelopment Act…[and] that any judicial construction or interpretation of the Polanco Redevelopment Act” shall also be applied to it.

For example, the case of City of Modesto Redevelopment Agency v. Dow Chemical Company demonstrates how AB 440 may be used broadly to compel a range of responsible parties to act. The court interpreted a responsible party as any person who is liable under CERCLA or Section 13304(a) of the California Water Code. The court found that parties who took affirmative steps directed toward discharge of hazardous wastes could be subject to liability under the act. In particular, dry cleaning solvent and equipment manufacturers and distributors who manufactured a system designed to dispose of wastes improperly, or who instructed dry cleaners to dispose of wastes improperly, were found to have taken affirmative steps towards the dry cleaners’ discharge of solvent wastes into the public sewer system or onto the ground, and could be subject to liability for environmental contamination cleanup costs. However, those who merely placed solvents in the stream of commerce without adequately warning of the dangers of improper disposal were not liable under the Polanco Act.

Applying this ruling to AB 440, local agencies can seek to compel cleanup or recover cleanup costs not only from direct dischargers of pollutants into waters of the state but also from anyone who affirmatively takes steps directed toward discharge of hazardous wastes, such as manufacturers and distributors of engine oil, pesticides, or fireworks who provide improper instructions regarding disposal of hazardous wastes. Local agencies may also compel past and current owners and operators of facilities from which hazardous substances were released to remediate contaminated properties or pay for remediation.

A New Tool to RemEDIATE Contaminated Groundwater?

AB 440 may also be a powerful tool for local agencies to remediate and treat contaminated groundwater. AB 440 authorizes cities, counties, and housing authorities to investigate or clean up a hazardous materials release on, under, or from blighted materials release on, under, or from blighted property that the local agency has found inside a blighted area

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<thead>
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<tr>
<td><strong>Members Under Age 50</strong></td>
<td>• You can apply for up to $1,500,000 of coverage using our Standard Issue process</td>
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<tr>
<td>applying for up to $150,000</td>
<td>• Living benefits are available if a terminal illness is diagnosed²</td>
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<tr>
<td><strong>Members age 50-59</strong></td>
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<td>applying for up to $100,000</td>
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within the local agency’s boundaries.39

Local water agencies charged with providing water to the public may contend that the release of hazardous materials into groundwater contributes to the reduction or lack of proper utilization of their water rights, which are considered real property in California.40 The water provider’s property has become blighted because the water provider can no longer exercise its water rights to the extent necessary to provide for the beneficial needs of its constituents. Local water agencies may seek to require responsible parties to remediate contaminated groundwater or conduct remediation themselves and seek cost recovery.

It remains to be seen whether courts will allow AB 440 to be used in this manner, but the new law unquestionably provides a vital tool for local agencies to require responsible parties to remediate contaminated property or to conduct effective, expeditious environmental cleanups. Local agencies may also seek to require remediation or remediate or seek to recover remediation costs under common law claims, such as nuisance and negligence, or under other state and federal statutes such as the Hazardous Substances Account Act, the California Water Code, and CERCLA. But AB 440 provides immunities not provided by common law or those statutes, and since it does not exclude petroleum, AB 440 may be used in ways that CERCLA cannot. With the ability to apply the law broadly to brownfields within their jurisdictions, local agencies now have a powerful means to effectively enhance and foster urban growth and redevelopment.

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1 HEALTH & SAFETY CODE §25403(a).
3 See Prah supra note 2.
4 Id.
5 Id.
7 HEALTH & SAFETY CODE §25403.1(b).
8 HEALTH & SAFETY CODE §25403.2(b).
9 HEALTH & SAFETY CODE §25403.2(c).
10 HEALTH & SAFETY CODE §25403.4.
11 Id.
12 Id.
13 HEALTH & SAFETY CODE §25403.4.
14 HEALTH & SAFETY CODE §25403.5.
15 Id.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
38 HEALTH & SAFETY CODE §2532.5, 33459. AB 440 adopts the same definition of “responsible party.” See HEALTH & SAFETY CODE §25403(a).
39 Id.
THE YEAR 2013 saw the California judicial system continue to buckle under budget cuts. Eight Los Angeles County courthouses shut their doors, the superior court’s nationally recognized Alternative Dispute Resolution Department closed, trial dates extended out into future years, and court reporters were eliminated. Governor Jerry Brown slashed an increased allocation to the judicial branch. “2014-2015, that’s when we’re going to fall off the cliff,” warned Curt Soderlund, Chief Administrative Officer for the judicial branch.1 As legal jobs became scarcer, law school applications fell nearly 18 percent.2

The California Supreme Court acknowledged a new state law that allows undocumented immigrants to become lawyers and granted the request of the Committee of Bar Examiners to admit Sergio C. Garcia to the State Bar.3 The court took a more hostile view of the application of Steven Glass, who fabricated 42 articles written for The New Republic in the 1990s before he changed careers and passed the California bar exam. In January this year, the court unanimously denied Glass’s application, finding that he “failed to carry his heavy burden of establishing his rehabilitation and current fitness.”4

The Supreme Court unanimously held that there is a public right of access to information regarding the State Bar admission process if the identity of applicants is not disclosed. Richard Sander, a UCLA law professor, sought data regarding bar exam scores, law schools attended, grade point averages, LSAT scores, and race or ethnicity to test his theory that racial preferences in law school admissions result in a “mismatch” between minority students and law schools.5 A guideline requiring each accredited law school in the state to post its bar exam pass rate was upheld by District Judge James V. Selna against a First Amendment challenge.6

Last year, prominent ethics cases involved the duty of loyalty and confidentiality as well as advertising and solicitation
Conflict of Interest

Last year produced its share of cases illustrating risks arising from conflicts of interest, including disqualification, malpractice claims, and loss or disgorgement of fees. Two disqualification cases are especially noteworthy.

In *Khani v. Superior Court*, plaintiff Behnam Khani bought a 2008 Lincoln Navigator from Galpin Motors. Claiming the Navigator was defective, Khani, represented by attorney Payam Shahian, sued Ford and Galpin under California’s lemon law. The defendants moved to disqualify Shahian because between 2004 and July 2007, he had worked at the law firm of Bowman and Brooke, Ford’s corporate counsel. There he had represented Ford in 150 cases, including lemon law cases. Shahian was “privy to confidential client communications and information” relating to Ford’s defense of lemon law cases, as well as Ford’s “pre-litigation strategies, tactics, and case handling procedures.” The trial court granted the disqualification motion.

The court of appeal reversed. In the case of successive representation of clients with adverse interests, a court must balance the current client’s right to counsel of its choosing against the former client’s right to ensure that its confidential information will not be divulged or used by its former counsel. The former client has the burden of showing that the subjects of the successive representations are “substantially related,” which requires a test comparing not only the “legal issues involved in successive representations, but also of the evidence bearing on the materiality of the information the attorney received during the earlier representation.” Ford provided no evidence that Shahian had worked on any lemon law cases involving allegedly defective 2008 Navigators or Galpin’s repair history. The successive engagements involved similar legal issues but not similar factual issues. The appellate court held that the trial court also “incorrectly assumed that Shahian’s exposure to playbook information in prior lemon law cases was sufficient to disqualify him in this case without any showing of its materiality.”

Unlike Khani, *Havasu Lakeshore Investments, LLC v. Fleming* involved an attorney’s concurrent representation of clients allegedly with conflicting interests. In concurrent representation cases, the lawyer’s duty of undivided loyalty is center stage. In *Havasu*, a limited liability company was formed to develop a recreational mobile-home park near Lake Havasu. The Flemings were minority members of the LLC. They held a put option giving them a right to force Jean Victor Peloquin, the general partner of the LLC’s managing member, to purchase their membership interest. In litigation over whether the Flemings properly exercised their put option, the law firm Hart, King & Coldren (HK&C) represented jointly the LLC, the LLC's managing member, and Peloquin. Citing *Gong v. RFG Oil, Inc.*, the Flemings moved to disqualify HK&C. In *Gong*, the superior court abused its discretion in denying a motion by a minority shareholder to disqualify a law firm jointly representing the corporation and its majority shareholder in litigation concerning a buy-sell agreement. Persuaded by the Flemings’ argument, the superior court disqualified HK&C. The court of appeal reversed.

What is the difference between *Gong* and *Havasu*? In *Gong*, there was an actual conflict between the corporation and majority shareholder because the minority shareholder asserted a derivative claim for corporate waste against the majority shareholder and sought dissolution. In *Havasu*, on the other hand, there was no actual conflict based on the Flemings’ claims. At best, there was a potential conflict—the same potential conflict that exists whenever a lawyer jointly represents multiple parties in a single lawsuit. A potential conflict is insufficient to justify disqualification.

Confidentiality and the Attorney-Client Privilege

A client accused his former lawyer of disclosing confidential information to a business rival in *Castleman v. Sagaser*. Following an acrimonious dispute with his law partner Timothy Jones, attorney Howard Sagaser resigned from his Fresno law firm. Before his resignation was effective, Sagaser remotely accessed the firm’s computer system and reviewed client files regarding real estate deals between two clients, Bratton and Castleman, who had compensated Jones for legal services by granting him a percentage interest in their real estate development projects. After reviewing the client files, Sagaser met with Bratton and his new lawyers, who subsequently sued Castleman, Jones, and Sagaser’s former firm for conspiracy and fraud. Sagaser filed an arbitration claim against Jones, contending that Jones’s ownership interest in the deals should have gone to their law firm, entitling Sagaser to a share worth millions of dollars. Deposited in Bratton’s suit against Castleman, Sagaser asserted the attorney-client privilege for his communications with Bratton and Bratton’s lawyers. Sagaser denied revealing client information and filed a motion to strike under the anti-SLAPP statute, Code of Civil Procedure Section 425.16, arguing that his communications with Bratton and his lawyers were constitutionally protected speech and petitioning activity in connection with litigation. The superior court denied the motion and the court of appeal affirmed, holding that Sagaser’s role in Bratton’s litigation was collateral to the principal thrust of Castleman’s lawsuit. The complaint charged that Sagaser had aligned himself with his former client’s adversaries in violation of the Rules of Professional Conduct. The causes of action against the lawyer did not arise from protected activity under the anti-SLAPP statute, the appellate court held, but from alleged breaches of his ethical duties of loyalty and confidentiality.

Confidential information shared with an expert gave rise to a disqualification motion in *DeLuca v. State Fish Co., Inc.* During the trial of a suit between State Fish, a seafood business owned by the DeLuca family, and John DeLuca, a dissident family member, State Fish offered the expert testimony of real estate broker Leo Vusich regarding the value of a fish processing plant claimed by both sides. Following remand, Vusich switched sides and proposed to testify for DeLuca at the retrial. State Fish objected and moved to disqualify DeLuca’s counsel on the ground that he had gained access to its lawyer’s confidential “impressions, conclusions, opinions and theories,” which had been disclosed to the expert before the first trial. Vusich claimed no memory of the lawyer’s mental impressions, but the superior court found the lawyer was more credible than the expert and disqualified DeLuca’s counsel.

The court of appeal reversed. A party moving to disqualify opposing counsel for improper contact with the moving party’s expert must prove the expert possesses confidential information material to the proceedings. If this showing is made, a rebuttable presumption arises that the information has been disclosed to opposing counsel. While State Fish was not required to disclose the work product information conveyed to the expert, it had to provide the court with the nature of the information and its material relationship to the proceedings, which State Fish had failed to do. Neither the attorney-client privilege nor work product doctrine protects statements to a testifying expert such as Vusich. Even if he had access to work product related to nontestimonial subjects, State Fish failed to show that its lawyer’s impressions, conclusions, opinions, and theories remained confidential after the first trial, during which the court assumed, his strategy had been revealed.
1. A conflict of interest can result in an attorney’s disqualification, malpractice claims, and disgorgement of fees.
   True. False.

2. When an attorney represents successive clients with adverse interests, the new client’s right to counsel is weighed against the former client’s right to confidentiality.
   True. False.

3. Exposure to a client’s playbook information will always result in an attorney’s disqualification if he or she is adverse to the client in a later representation.
   True. False.

4. When an attorney concurrently represents clients with conflicting interests, he or she must be concerned about the duty of loyalty.
   True. False.

5. An attorney’s disclosure of confidential client information in connection with litigation is constitutionally protected speech and petitioning activity under the anti-SLAPP statute.
   True. False.

6. If an expert who possesses confidential information material to the proceedings is contacted by opposing counsel, a rebuttable presumption arises that the information was disclosed.
   True. False.

7. The attorney-client privilege and work product doctrine always protect statements to experts from discovery.
   True. False.

8. The crime-fraud exception requires independent evidence before an attorney can use a privileged document.
   True. False.

9. The litigation privilege protects an attorney from liability for false statements to the press.
   True. False.

10. A demand letter that couples a demand for money with a threat to report conduct to criminal and government authorities if payment is not made violates the Rules of Professional Conduct.
    True. False.

11. A demand letter that couples a demand for money with a threat to file a lawsuit if payment is not made violates the Rules of Professional Conduct.
    True. False.

12. A lawyer for an employer may defend an employee’s deposition but must advise the employee of any potential conflicts of interest.
    True. False.

13. A law firm can compel a former client to arbitrate their dispute even if the client cannot afford the arbitrator’s charges.
    True. False.

14. It is not reasonable to doubt whether an arbitrator could be impartial because of a reference to an attorney in a 10-year-old resume.
    True. False.

15. Malicious prosecution requires proof of termination in favor of the plaintiff, lack of probable cause, and malice.
    True. False.

16. A voluntary dismissal is presumed to be a favorable termination on the merits.
    True. False.

17. Malice can be inferred when a lawyer sues the defendant to put pressure on another party.
    True. False.

18. A lawyer who deceives a federal court can only be reported to the district’s disciplinary committee.
    True. False.

19. A court has discretion to deny recovery of legal fees by a lawyer who obstructs discovery of his or her time records.
    True. False.

20. The California Supreme Court has approved new Rules of Professional Conduct.
    True. False.

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Seven years ago, in *Rico v. Mitsubishi Motors Corporation*, the California Supreme Court considered what to do when privileged, work product, or otherwise confidential documents are inadvertently received by opposing counsel. Adopting language from the Second District Court of Appeal’s opinion in *State Compensation Insurance Fund v. WPS, Inc.*, the court held that the lawyer receiving the document should refrain from examining it any more than essential to ascertain if it is privileged and should immediately notify the sender. The court left unan-
camer review is not available to determine whether an exception applies, absent independent prima facie evidence.

**Advertising and Solicitation**

Lawyers and courts continue to wrestle with applying longstanding ethics rules in an increasingly connected world. Many lawyers regularly tweet, post, and blog, instantaneously disseminating statements across the globe. There are risks to doing this. Having recently filed a shareholder lawsuit in federal court against Los Angeles-State Fund, Patton Boggs LLP partner Richard J. Oparil and others. About a week later, Oparil tweeted: “GetFugu runs an organization for the benefit of its officers and directors, not shareholders and employees. The RICO suit was not frivolous. The 500K lawsuit is frivolous, however, so buyer be wary.” In an amended complaint, the GetFugu parties added Oparil’s tweet to the defamation claim. Oparil and Patton Boggs persuaded the

A party moving to disqualify opposing counsel for improper contact with the moving party’s expert must prove the expert possesses confidential information material to the proceedings. If this showing is made, a rebuttable presumption arises that the information has been disclosed to opposing counsel. While State Fish was not required to disclose the work product information conveyed to the expert, it had to provide the court with the nature of the information and its material relationship to the proceedings, which State Fish had failed to do.

swered what the lawyer should do if the document reveals the existence of a crime or fraud, which could vitiate the privilege under Evidence Code Section 956. Is he or she obligated to notify the other side or to return the evidence of wrongdoing and thereby risk its disappearance or destruction? In 2013, the California State Bar’s Committee on Professional Responsibility and Conduct (COPRAC) tackled that issue in Formal Opinion No. 2013-188. Citing the deference paid to the privilege in California, COPRAC concluded that the ethical duties in *Rico* and *State Fund* apply whether the document is received through inadvertence or intentionally from a whistleblower, and the duties would bar use of the document unless independent evidence of a crime or fraud exists.

“The mere assertion of a crime or fraud is insufficient to trigger the exception—there must be a prima facie showing by the proponent through non-privileged information that the allegation that the attorney’s services were sought or obtained to enable the planning of a crime or fraud has some foundation in fact.” The lawyer receiving the document may seek court guidance, but in

based Getfugu, Inc., and some of its officers, Patton Boggs LLP partner Richard J. Oparil issued a press release through Investment Wire titled “FBI SAID TO BE INVESTIGATING GETFUGU’S CARL FREER.” According to the press release, Oparil’s clients, the plaintiffs, “were pleased about a report by the Copenhagen Post that the FBI and Danish authorities are investigating Freer’s involvement in the Danish IT Factory scandal.” The release went on, “[a]ccording to the article, the FBI is following what is said to be a complex international money trail that allegedly links GetFugu and Freer to several failed ‘pump and dump’ investments....” The release described a criminal conviction against one GetFugu officer in a German court and the fraud conviction against another GetFugu officer. Citing their clients’ federal complaint, the press release stated that the SEC was investigating GetFugu and its officers. The release invited readers to send investigative leads to an e-mail address.

After the press release was issued, the Copenhagen Post retracted its article. The federal court dismissed the state law claims without prejudice, and later dismissed the superior court to strike the defamation claim under the anti-SLAPP statute. The court of appeal agreed that Oparil’s tweet was not actionable. It merely reflected his opinion. The court of appeal reversed, however, the dismissal of the defamation claim based on the press release. The issuance of the press release constituted protected petitioning activity in a matter of public interest within the meaning of the anti-SLAPP statute. This shifted the burden to GetFugu and its officers to prove a probability of prevailing on their defamation claim. GetFugu’s president subsequently submitted a declaration stating that, contrary to Oparil’s press release, neither he nor GetFugu had ever been under investigation by the FBI, the SEC, or any other governmental agency. This declaration was enough to defeat the attorneys’ motion to strike. Oparil and Patton Boggs could not rely on the litigation privilege codified in Civil Code Section 47(b) to insulate their press release from the defamation claim. The litigation privilege does not encompass statements that are published to the general public through the press.
issue an order restricting an attorney’s free speech rights during trial to prevent potential jury contamination. On her firm’s Web site, attorney Simona A. Farrisse touted verdicts for $1.6 million and $4.3 million against Ford Motor Company and others in personal injury litigation alleging illnesses caused by exposure to asbestos. On the eve of a jury trial on similar claims asserted by Farrisse’s clients against Ford and Volkswagen Group of America, the trial court ordered Farrisse to remove from her Web site the descriptions of the two earlier verdicts pending the completion of trial. The appellate court found that the trial court’s order constituted an unlawful prior restraint on Farrisse’s constitutional right to free speech. Without deciding whether the trial court’s order should be analyzed under a strict scrutiny standard or the intermediate scrutiny standard generally applicable to prior restraints on commercial speech, the court in Steiner reasoned that even under the intermediate scrutiny standard, the trial court’s order was unlawful. The trial court had already admonished the jury not to Google trial counsel. “[I]t must be assumed that a jury does its duty, abides by cautionary instructions, and finds facts only because those facts are proved.” The court’s order was more restrictive than necessary, thereby unable to withstand even intermediate scrutiny. In addition, the appellate record contained no evidence on which to conclude that attorney Farrisse’s statements were subject to restraint as misleading advertising.

Demand Letters

Overbearing demand letters can come back to haunt the lawyers who write them. In Mendoza v. Hamzeh, the lawyer’s demand letter went too far, subjecting the lawyer to claims for civil extortion, emotional distress, and unfair business practices. In Malin v. Singer, on the other hand, the litigation privilege shielded a lawyer from claims for civil extortion and emotional distress based on his acerbic but not extortionate demand letter.

In Mendoza, lawyer Reed Hamzeh wrote a demand letter advising the addressee, a former manager at Hamzeh’s client’s business, that Hamzeh and his client were investigating a substantial fraud and “if your client does not agree to cooperate with our investigation and provide us with a repayment of such damages caused, we will be forced to proceed with filing a legal action against him, as well as reporting him to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud....” In Malin, lawyer Martin Singer wrote a demand letter advising the addressee, a former business associate of Singer’s client, that Singer and his client intended to sue the addressee and others for “embezzling and stealing money” from Singer’s client, for engaging “in insurance scams designed to defraud” various insurers, for attempting to hide assets from creditors and taxing authorities in offshore accounts, and for “using company resources to arrange sexual liaisons with older men” including a retired judge of the superior court—“unless this matter is resolved to my client’s satisfaction within five (5) business days....” Even though Singer’s letter was in many ways more offensive that Hamzeh’s, Hamzeh’s letter coupled a threat to report conduct to criminal and governmental authorities with a demand for money. That constitutes a violation of Rule of Professional Conduct 1-500 and “criminal extortion as a matter of law.” Singer’s letter concluded with a demand for money, but without a threat to report the recipient’s conduct to governmental authorities. Therefore, it did not constitute extortion as a matter of law. That Singer’s letter insinuated that the recipient’s failure to pay money in settlement would expose third parties to potential public humiliation was not enough.

Malpractice

A lawyer for Union Pacific Railroad was sued for malpractice by an employee of the railroad in Yanez v. Plummer after he defended the employee in a deposition that went terribly wrong and the employee was fired. Union Pacific employee Michael Yanez was present when a coworker was injured on the job and wrote two witness statements. In the first, Yanez wrote that the coworker slipped and fell on an oil-soaked floor, and in the second, he wrote that he saw the coworker slip and fall. Attorney Brian Plummer was retained to defend the coworker’s suit against Union Pacific under the Federal Employers Liability Act, and when Yanez was deposed, Plummer represented both the railroad and Yanez. Meeting with Plummer before the deposition, Yanez expressed concern because his testimony conflicted with the statement. It was Plummer who highlighted his client’s testimony that he did not see the coworker slip, introduced the contradictory written statement, and then got him to admit that his testimony conflicted with the statement. Since the employer had had the two contradictory written statements for nine months without charging Yanez with dishonesty, the court concluded that it was the deposition that led to his dismissal. It rejected the lawyer’s argument that the appeal would bar a lawyer for an employee from ever representing an employee and held the case merely raised a triable issue of fact regarding causation.

Arbitration

In Roldan v. Callahan & Blaine, Justice William F. Rylaarsdam wrote a groundbreaking opinion for the Fourth Appellate District imposing conditions on a law firm’s right to enforce a mandatory arbitration provision in their retainer agreement. The former clients, alleging that the law firm improperly coerced them into settling toxic mold cases, sued the law firm for elder abuse, conversion (for not promptly forwarding settlement proceeds), and breach of fiduciary duty. The law firm petitioned to compel arbitration. The former clients alleged that they could not afford to pay the upfront charges imposed by the arbitrator. Reasoning that “all litigants have access to the justice system for resolution of their grievances, without regard to their financial means” and that if the former clients could not front the costs of arbitration, they might be effectively deprived of access to any forum, Justice Rylaarsdam gave the law firm a choice. Upon a showing that the former clients lacked the financial means to pay the upfront arbitration costs, the law firm could pay the former clients’ share of the costs or waive its right to arbitrate the dispute.

In Mt. Holyoke Homes L.P. v. Jeffer Mangels Butler & Mitchell, LLP, the court of appeal reversed an arbitration award issued by retired superior court judge Eli Chernow in favor of Jeffer Mangels on a legal malpractice claim. Before being selected, Judge Chernow had disclosed that he had known one of the Jeffer Mangels lawyers for years and that the Jeffer Mangels defendants’ counsel had mediated a case before him within the last five years. After receiving Judge Chernow’s unfavorable award, the claimant found on the Internet a 10-year-old resume in
which Judge Chernow had named named-partner Robert Mangels as a reference for his mediation services. Although Mangels had appeared before Judge Chernow as a judge, mediator, and arbitrator, he and Judge Chernow had never had a professional or personal relationship. The court of appeal concluded that the arbitration award had to be vacated because a reasonable person aware of the facts could reasonably entertain a doubt that Judge Chernow could be impartial in the arbitration.

**Malicious Prosecution**

Limited partners sued for malicious prosecution in *Jay v. Mahaffey* after they were dismissed from a cross-complaint filed by the owners of an Anaheim mobile home park against a limited partnership in which the limited partners were passive investors. In a campaign to break a 50-year lease with the partnership so the property could be redeveloped, the owners unsuccessfully tried to buy off the limited partners, failed to foment a condemnation suit by the city, and then sued the partnership but lost at trial. Undaunted, their lawyer Douglas Mahaffey threatened to tie up the partnership in expensive litigation for five years and filed a new cross action in which he named 45 limited partners, although they were not parties to the lease and had no involvement in the partnership’s business. Mahaffey offered to dismiss the limited partners if they would hire him to file a derivative action against the partnership and proposed to pay a finder’s fee to their current counsel. When this was rejected, he voluntarily dismissed the limited partners. Twelve of them sued Mahaffey and his clients for malicious prosecution.

The superior court denied the defendants’ motion to strike the cross-complaint under the anti-SLAPP statute, and the court of appeal affirmed. To prevail on a malicious prosecution claim, a plaintiff must show the prior action was pursued to vindicate a legal right but to use them as battletestations to sanction lawyers for manipulating the legal system in *Ingenuity 13 LLC v. Doe* and four related cases. The lawyers represented a “porno-trolling collective” comprised of shell corporations that owned copyrights to pornographic movies. They traced download activity of the movies, subpoenaed the identity of subscribers from Internet service providers, and sent cease and desist letters offering to settle each copyright infringement claim for about $4,000. Most recipients settled to avoid embarrassment and the cost of litigation, but if they refused, the lawyers filed vexatious lawsuits. Although copyright owners have the right to protect their intellectual property rights, the court found a pattern of deception and ordered the lawyers to pay attorney’s fees and costs for their “brazen misconduct and relentless fraud.” The judge also referred them to their respective state and federal bar associations, the U.S. Attorney for the Central District, the Criminal Investigation Division of the Internal Revenue Service, and the district court’s Standing Committee on Discipline.

A lawyer’s application for legal fees following the settlement of a class action was forfeited by her unprofessional conduct in *Ellis v. Toshiba American Information Systems, Inc.* Two law firms brought a class action on behalf of purchasers of a Toshiba laptop computer with an electrostatic discharge problem, which was settled by giving each member a 12-month repair warranty extension and either $25 cash or a $50 voucher for replacement of the defective part. Caddell & Chapman was awarded slightly over $1 million in fees and expenses, but Toshiba opposed the request by the cocounsel, Lori Sklar of the Sklar Law Offices (SLO), a sole practitioner admitted in California but working from a home office in Minnesota, who sought $12,079,534.69 in fees for herself (originally $24 million) and $908,752.72 in expenses for SLO. After Sklar obstructed Toshiba’s discovery and violated court orders by wiping her electronic time records and refusing to let experts inspect her computer, Judge Anthony J. Mohr awarded discovery sanctions of $165,000.

Ultimately, Judge Mohr denied Sklar’s entire fee request, and his detailed findings were affirmed by the Second District Court of Appeal. The superior court found that Sklar’s billing records were unusable to calculate the lodestar because they contained “troubling inconsistencies and omissions” and numerous inaccurate and contradictory entries, which destroyed her credibility. The total hours were excessive, showing her working almost 11 hours every day, including weekends and holidays, for five years. Sklar’s accusations of unethical behavior against the court and other parties were inappropriate and unprofessional and justified a denial of fees.

Judge Mohr did not believe Sklar’s evidence concerning her time spent working on the class action, and the court of appeal declined to reassess her credibility, which is uniquely the province of the trial court. The court affirmed the denial of any fees to Sklar and directed the clerk to send the opinion to the State Bar pursuant to Business and Professions Code Section 6086.7, which requires the State Bar to investigate the appropriateness of disciplinary action against an attorney.

**Rules Revision**

The State Bar continued to send proposed new Rules of Professional Conduct to the California Supreme Court for its adoption or modification. After two proposed rules were submitted in 2012, 12 more proposed rules were submitted in 2013, but the Court did not take action on any of them.

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3 Immigrant in U.S. Illegally May Practice Law, California Court Rules, N.Y. TIMES, Jan. 2, 2014; see also In re Sergio C. Garcia on Admission, 58 Cal. 4th 440 (2014).
9 Id. at 919.
10 Id. at 920.
11 Id. at 921.
12 Id. at 922.
16 Id. at 486.
17 Id. at 487.
19 Id. at 495.
21 Id. at 487.
22 Id. at 495.
23 Id. at 496.
26 Id. at 682-83.
27 Id. at 691.
28 Id. at 693.
30 Id.
31 Id.
35 Malin, 217 Cal. App. 4th at 1288-89.
37 Malin, 217 Cal. App. 4th at 1299.
38 Id.
39 Id. at 183-84.
40 Id. at 184.
41 Id. at 185.
42 Id. at 189.
43 Id. at 190.
45 Id. at 94.
46 See id. at 89-90.
48 Id. at 1314.
50 Id. at 1531.
51 Id. at 1532.
53 Id. at 1540-41.
54 Id. at 1542.
55 Id. at 1545.
56 Id.
58 Id. at *5-6.
60 Id. at 867-68.
61 Id. at 872-73.
62 Id. at 872.
63 Id. at 884.
64 Id. at 890-91.
65 California Supreme Court docket, Case No. S206123 (Rules of Professional Conduct), eff. 01/02/2014.
The Conscience of Arbitration

Lower courts have held that unconscionability analysis survives the U.S. Supreme Court’s holding in Concepcion

IN RECENT YEARS, the U.S. Supreme Court has issued a number of opinions strengthening federal arbitration law and limiting the ability of employees to bring class actions. Lower courts, including the California Supreme Court and Courts of Appeal, continue to deal with the implications of these decisions, as various questions remain. Specifically, the California Supreme Court has granted review in more than a dozen cases that raise these issues.

Analysis of this area of law begins largely but not entirely with the Federal Arbitration Act (FAA) and its state analog, the California Arbitration Act (CAA). The FAA incorporates a strong federal policy of enforcing arbitration agreements, including agreements to arbitrate statutory rights. Section 2 of the FAA reflects a “liberal federal policy favoring arbitration.”2 The FAA’s purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.3

Two years after the FAA was enacted in 1925, California adopted its first modern arbitration statute and declared arbitration agreements to be irrevocable and enforceable, identical to the terms of Section 2 in the FAA.4 Since that time the California courts and legislature have “consistently reflected a friendly policy toward the arbitration process.”5 The policy has been expanded and clarified in the CAA, which was created in 1961. Therefore, arbitration agreements are valid, irrevocable, and enforceable under federal and California law, except upon grounds in law or equity for the revocation of any contract.6

Historically, California law on arbitration has been relatively protective of employee rights and hostile to mandatory arbitration. In 2000, the California Supreme Court in Armendariz v. Foundation Health Psychcare Services, Inc.,7 considered whether an employer may enforce a mandatory employment arbitration agreement that an employer imposes on an employee as a condition of employment.8 The court held that an employer may enforce such an agreement, provided that it does not require the employee to forfeit his or her unwaivable statutory rights—such as the rights established by the Fair Steven G. Pearl is a full-time mediator with ADR Services, Inc., specializing in resolving individual and class action employment lawsuits.
Employment and Housing Act—and is not unconscionable.\textsuperscript{10}

A mandatory arbitration agreement does not require the forfeiture of unwaivable statutory rights if it meets five minimum procedural requirements: 1) a neutral arbitrator;\textsuperscript{11} 2) no limitation on statutorily imposed remedies such as punitive damages and attorney’s fees;\textsuperscript{12} 3) the right to conduct adequate discovery;\textsuperscript{13} 4) a written arbitration decision that reveals the essential findings and conclusions on which the award is based;\textsuperscript{14} and 5) no type of expense that the employee would not be required to bear in court.\textsuperscript{15}

The court further held that an arbitration agreement must not be unconscionable, whether the claims being arbitrated may be waived or not.\textsuperscript{16} Unconscionability has two components: procedural and substantive. An agreement will be enforced unless both components are present, though they need not be present in equal measure. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude that the contract is unenforceable, and vice versa.\textsuperscript{17}

An arbitration agreement is procedurally unconscionable if it is imposed as a condition of employment and if there is no opportunity to negotiate.\textsuperscript{18} It is substantively unconscionable if it lacks at least a “modicum of bilaterality.”\textsuperscript{19} In other words, the agreement should require both parties to arbitrate their claims, and an agreement that is unilateral must state some reasonable justification based on “business realities.”\textsuperscript{20}

Class Action Arbitration Case Law

In Discover Bank v. Superior Court,\textsuperscript{21} the California Supreme Court considered the validity of a provision in an arbitration agreement between Discover Bank and a credit cardholder forbidding classwide arbitration. The court held that the class action waiver was unconscionable and unenforceable: “[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another....”\textsuperscript{22}

Under these circumstances, such waivers are unconscionable under California law and should not be enforced.\textsuperscript{23}

In Gentry v. Superior Court,\textsuperscript{24} the California Supreme Court turned its attention to the unwaivable statutory right to be paid overtime compensation.\textsuperscript{25} The court held that the ability to bring a class action should be included in the Armendariz list of necessary minimum requirements for the arbitration of unwaivable rights, at least when the following factors are present: 1) individual awards “tend to be modest,”\textsuperscript{26} 2) an employee suing his or her current employer is at risk of retaliation,\textsuperscript{27} 3) some employees may not bring individual claims because they are unaware that their legal rights have been violated,\textsuperscript{28} and 4) even if some individual claims are sizeable enough to provide an incentive for individual action, it may be cost effective for an employer to pay those judgments and continue not to pay overtime, and only a class action will compel the employer to properly comply with the overtime law.\textsuperscript{29}

In stark contrast to California case law, recent federal case law has strongly supported mandatory arbitration. In 2010, in Stolt-Nielsen S.A. v. AnimalFeeds International Corporation, the U.S. Supreme Court issued the first in a series of recent decisions affecting the ability of employees to prosecute class actions. In Stolt-Nielsen, a case involving large shipping companies and their commercial customers, the Court held that an arbitrator does not have discretion to impose class arbitration when the parties to the arbitration agreement stipulate that the agreement is silent as to whether class arbitration is allowed.\textsuperscript{30}

The following year, in AT&T Mobility LLC v. Concepcion, the Court overruled the California Supreme Court’s decision in Discover Bank, holding that class arbitration, “to the extent it is manufactured by Discover Bank rather than consensual, interferes with fundamental attributes of arbitration.”\textsuperscript{31} The switch from bilateral arbitration to class arbitration sacrifices arbitration’s informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.\textsuperscript{32} Class arbitration also greatly increases the risks to defendants.\textsuperscript{33}

In 2013, in American Express Company v. Italian Colors Restaurant,\textsuperscript{34} the Court considered whether to enforce a contractual action waiver in an antitrust action, even though enforcement of the class action waiver likely would mean that no plaintiff could pursue the case. The Court held that the waiver was enforceable, even when “the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”\textsuperscript{35}

The Court found no “contrary Congressional command” that would require it to depart from the normal rules and invalidate the class action waiver.\textsuperscript{36} Moreover, the Court held that federal antitrust laws “do not guarantee an affordable procedural path to the vindication of every claim” and that Congressional approval of Federal Rule of Civil Procedure 23 does not entitle class proceedings for the vindication of statutory rights.\textsuperscript{37}

The class action waiver at issue in the plaintiffs’ effective vindication theory was found not to forbid the assertion of statutory rights or to require payment of fees prohibiting access to the forum.\textsuperscript{38} It merely made proving the statutory violation impractical, which did not “constitute the elimination of the right to pursue that remedy.”\textsuperscript{39}

Unconscionability Analysis

These developments in the U.S. and California Supreme Courts lead to a number of unanswered questions. Perhaps the most basic question is whether unconscionability analysis survives Concepcion. Most lower courts considering the issue have held that unconscionability analysis does survive.

The California Supreme Court has accepted review in one case concerning unconscionability analysis, Sanchez v. Valencia Holding Company, LLC.\textsuperscript{40} In Sanchez, a putative consumer class action under the Consumers Legal Remedies Act (CLRA), the Unfair Competition Law (UCL), and other California statutes, the court of appeal held that Concepcion does not prevent courts from applying unconscionability analysis. The Court concluded that the arbitration agreement at issue was unconscionable and unenforceable, but it did not base its decision on the presence of a class action waiver. The California Supreme Court has granted review in a number of other cases presenting this issue.\textsuperscript{41}

The court denied review in another case presenting the same issue. In Samaniego v. Empire Today LLC,\textsuperscript{42} the court of appeal considered the issue in the context of a putative wage and hour class action and held that Concepcion does not prevent courts from applying traditional unconscionability analysis.\textsuperscript{43} The court went on to hold that the arbitration agreement at issue was unconscionable and unenforceable because it was mandated as a condition of employment and included a shortened statute of limitations and other provisions that unfairly favored the employer.

A second question that has drawn mixed results in the California courts of appeal is whether the California Supreme Court’s decision in Gentry survives Concepcion. In Iskianian v. CLS Transportation L.A., LLC,\textsuperscript{44} a putative wage and hour class action, the court of appeal concluded that Concepcion overturned Gentry. First, the court held that invalidation of the class action waiver at issue would result in class arbitration since the decision in Concepcion has rejected the concept that class arbitration procedures should
be imposed on a party who did not agree to them. Second, although the court agreed that Gentry is grounded in a public policy rationale, and “not on Discover Bank’s unconscionability rationale,” Gentry may still fall within the scope of the Concepcion decision. Third, the court found that Iskanian’s bringing a “class action to ‘vindicate statutory rights’ is irrelevant in the wake of Concepcion.” The sound policy reasons identified in Gentry for invalidating certain class waivers are insufficient to trump the far-reaching effect of the FAA, as expressed in Concepcion.”

The court of appeal reached the same result in Truly Nolen of America v. Superior Court, a putative wage and hour class action. The court held that Concepcion “implicitly disapproved the reasoning of the Gentry court,” but lower courts should adhere to Gentry until the U.S. Supreme Court rules on the issue. The parties in Truly Nolen did not petition for review.

In Franco v. Arakelian Enterprises, Inc., the court of appeal arrived at the opposite result. This case concerned another putative wage and hour class action, and the court held that Gentry remained good law since, as required by Concepcion, “it does not establish a categorical rule against class action waivers but, instead, sets forth several factors to be applied on a case-by-case basis to determine whether a class action waiver precludes employees from vindicating their statutory rights.” The California Supreme Court granted review and deferred briefing pending its decision in Iskanian.

A third question is whether Concepcion applies in actions brought under the Private Attorneys General Act of 2004 (PAGA), which allows employees to recover certain penalties that, prior to 2004, only the Labor Commissioner could recover. This issue is particularly important because the California Supreme Court has held that employees may bring PAGA representative actions on behalf of themselves and their coworkers without meeting the requirements for class certification.

In Brown v. Ralphs Grocery Company, the plaintiff brought a putative class and PAGA representative action for alleged Labor Code violations. The court concluded that Concepcion does not apply to actions under PAGA, in which the employee filing suit acts as “the proxy or agent of the state’s labor law enforcement agencies” because even if a PAGA claim were subject to arbitration, “it would not have the attributes of a class action that [Concepcion] said conflicted with arbitration, such as class certification, notices, and opt-outs.” Accordingly, the court declined to compel arbitration. The California Supreme Court denied review of Brown, leaving it as a citable authority.

Iskanian v. CLS Transportation L.A., LLC, reached the opposite conclusion. The court disagreed with Brown, holding that Concepcion decided the case. The court also held that the public policy concerns underpinning the PAGA, although they may be valid, did not justify disregarding a binding arbitration agreement and that the FAA preempted “any attempt by a court or state legislature to insulate a particular type of claim”—including a claim under PAGA—from arbitration. The California Supreme Court has granted review in Iskanian and at least one other case that addresses this issue.

A fourth question is whether claims for public injunctive relief are subject to arbitration. The California Supreme Court replied in the negative before Concepcion, but since, the Ninth Circuit and at least one California Court of Appeal have gone in the opposite direction.

In Broughton v. Cigna Healthplans, the California Supreme Court held that claims for injunctive relief under California’s Consumer Legal Remedies Act (CLRA) may not be ordered to arbitration because they are “beyond the scope of an arbitrator to grant or properly enforce.” In Cruz v. PacificCare Health Systems, Inc., the court extended this holding to claims for injunctive relief under California’s UCL.

The court of appeal in Hoover v. American Income Life Insurance Company, followed Cruz in finding that the UCL injunctive relief claims at issue there were not arbitrable, but the court did not discuss Concepcion or its impact on the Broughton-Cruz rule.

The court of appeal reached the opposite conclusion in Nelsen v. Legacy Partners Residential, Inc., holding that Broughton-Cruz has been abrogated in the wake of Concepcion. “Since Broughton-Cruz prohibits outright the arbitration of claims for public injunctive relief, it is in conflict with the FAA.”

The court of appeal in Vasquez v. Greene Motors, Inc., followed this logic, holding that Concepcion forecloses any argument that claims for injunctive relief under the CLRA cannot be ordered into arbitration. The California Supreme Court granted review in Vasquez and deferred briefing pending Sanchez.

An en banc panel of the Ninth Circuit appeared ready to address this issue in Kilgore v. Keybank, N.A., but instead ruled on narrower grounds, finding that the plaintiffs did not seek the type of broad injunctive relief that would implicate Broughton-Cruz. Instead, the injunctions at issue related only to past harms and would benefit only the approximately 120 putative class members.

Subsequently, a three-judge panel of the Ninth Circuit in Ferguson v. Corinthian Colleges, Inc., held that the FAA preempts the Broughton-Cruz rule. However, even this decision explicitly raises a number of important questions, including: 1) what court remedy, if any, the plaintiffs may have if an arbitrator determines that they lack the authority to issue a requested injunction, 2) how further court action for injunctive relief should be handled, 3) how to handle motions to confirm arbitration awards that include injunctive relief, and 4) whether district courts may enforce the injunctions.

A fifth question is whether the National Labor Relations Act (NLRA) prohibits class
and collective action waivers. In In re D.R. Horton, Inc., the National Labor Relations Board (NLRB) held that an employer violates Section 8(a)(1) of the NLRA when it requires, as a condition of employment, that covered employees sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, whether arbitral or judicial. The NLRB reasoned that the filing of a class or collective action constitutes protected “concerted activity” under Section 7 of the NLRA and that an arbitration agreement prohibiting concerted activity violates Section 8 of the act.

The Fifth Circuit reversed on appeal with the premise that the FAA requires courts to enforce arbitration agreements according to their terms, unless one of two exceptions applies: 1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA’s “saving clause,” or 2) application of the FAA may be precluded by another statute’s contrary congressional command. The NLRB’s interpretation of the NLRA did not fit within the saving clause because—although facially neutral—its effect would be “to disfavor arbitration.” The court then held that neither the text of the NLRA nor its legislative history evidences a “congressional command to override the FAA.” Finally, the court affirmed the NLRB’s holding on the limited basis that the arbitration language at issue violated the NLRA because it would lead employees to a reasonable belief that they were prohibited from filing unfair labor practice charges with the board.

A number of California appellate courts have also held that the NLRB erred in its decision in D.R. Horton. Of these, Nelsen v. Legacy Partners Residential, Inc., and Truly Nolen of America v. Superior Court stand as citable authority, while the California Supreme Court has granted review in Iskanian v. CLI Transportation L.A., LLC, and Reyes v. Liberman Broadcasting, Inc.

A more fundamental challenge to D.R. Horton has been raised in Noel Canning v. NLRB in which the U.S. Court of Appeals for the D.C. Circuit held that President Barack Obama lacked constitutional authority to use recess appointments to name members to the board. The Supreme Court granted certiorari in 2013 and heard oral argument on January 13, 2014. A decision invalidating NLRB recess appointments would invalidate D.R. Horton and a host of other NLRB decisions.

A sixth question is whether an arbitration agreement can require employees to waive their right to proceed before an administrative body, in one case the Division of Labor Standards Enforcement (DLSE). In 2011, in Somic-Calabasas A, Inc. v. Moreno, the California Supreme Court answered this question in the negative, holding: 1) an employee’s statutory right to a wage hearing before the DLSE, known as a Berman hearing, “is itself an unwaivable right that an employee cannot be compelled to relinquish as a condition of employment,” 2) waiver of an employee’s right to seek a hearing is a substantively unconscionable contract term, and 3) the FAA does not preempt the court’s holdings on points one and two. The U.S. Supreme Court disagreed, granting review, vacating the decision, and remanding for further consideration in light of Concepcion.

On remand, the California Supreme Court reversed its earlier position. After Concepcion and a change of personnel on the court, it held that although the Berman statute provide important benefits to employees, the FAA as construed by Concepcion preempts the earlier holding that the waiver of a Berman hearing is, in and of itself, unconscionable and contrary to public policy. Although waiver of Berman hearing procedures is not unconscionable per se, “waiver of these protections in the context of an agreement that does not provide an employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability.” Finally, the court remanded to the trial court “to examine the totality of the agreement’s substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided” and thus unconscionable.

A final question is how to proceed if the court finds a valid arbitration agreement that is silent as to class arbitration. In Kinecta Alternative Financial Solutions, Inc. v. Superior Court, a wage and hour action, the defendant moved to compel individual arbitration and to dismiss the class allegations. The trial court denied the motion to strike class allegations and ordered the parties to arbitrate the entire dispute. The court of appeal reversed, holding that the trial court should have stricken the class allegations. The court reasoned that the trial court could not order the parties to conduct a class arbitration when the arbitration provision was limited to disputes between the plaintiff and defendant and when the plaintiff cited “no evidence that despite the language of the arbitration provision, the parties agreed to arbitrate disputes of classes of other employees, employee groups, or employee members of classes identified in the complaint.”

The court in Nelsen v. Legacy Partners Residential, Inc., noting that Kinecta had decided almost an identical issue, reached the same conclusion. However, the court in Franco v. Arakelian Enterprises, Inc. arrived at a different result, holding that Gentry remained good law and construing Stolt-Nielsen to mean that when a class action waiver is unenforceable under Gentry, the plaintiff’s claims must be adjudicated in court, where the plaintiff may file a putative class action.

Plainly, in a case where Gentry applies—to invalidate a class action waiver—the parties have not agreed in any fashion to allow class arbitration. Consequently, under Stolt-Nielsen, the remedy under Gentry should be the denial of the motion or petition to compel arbitration, permitting the case to be heard in court, where the plaintiff may seek to certify a class.

With so many cases involving these issues on the dockets, it likely will be years before the dust settles. The parties have completed briefing in some of these cases, but not in others, and even after the courts rule, more questions undoubtedly will arise. Counsel for employers and employees will need to follow these cases to remain up-to-date on the application of arbitration law to employment class actions.

The court went on to hold that the arbitration agreement at issue was unconscionable and unenforceable because it was mandated as a condition of employment and included a shortened statute of limitations and other provisions that unfairly favored the employer.
8 Id. at 90.
9 Id. at 99-100.
10 Id. at 113.
12 Armendariz, 24 Cal. 4th at 103.
13 Id. at 104.
14 Id. at 107.
15 Id. at 111.
16 Id. at 113.
17 Id. at 114 n.11.
18 Id. at 114-15.
19 Id. at 117.
20 Id. at 117-18.
22 Id. at 162-63 (citing Civ. Code §1668).
24 Id. at 455.
25 Id. at 457.
26 Id. at 459.
27 Id. at 461.
28 Id, slip op. at 1.
31 Id. at 1752.
33 Id., slip op. at 1.
34 Id., slip op. at 4-5.
35 Id., slip op. at 4.
36 Id., slip op. at 6.
37 Id., slip op. at 7.
41 Id., slip op. at 12.
43 Id., slip op. at 8 (citing Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1775 (2010)).
44 Id., slip op. at 9.
45 Id., slip op. at 9-10.
47 Id., slip op. at 21-24.
49 Franco, 211 Cal. App. 4th slip op. at 3.
50 LAB. CODE §§2698 et seq.
51 Arras v. Superior Court, 46 Cal. 4th 969 (2009).
53 Id., slip op. at 13.
56 Id., slip op. at 17.
59 Civ. Code §§1750 et seq.
60 Broughton, 21 Cal. 4th at 1067.
62 BUS. & PROF. CODE §§17200 et seq.
64 Id., slip op. at 1209.
66 Id., slip op. at 20-21.
67 Id., slip op. at 22.
69 Vasquez, 214 App. 4th at 1199.
70 Kilgore v. Keybank, N.A., ___ F. 3d ___ (9th Cir. 2013).
71 Id., slip op. at 16.
72 Id., slip op. at 17.
73 Ferguson v. Corinthian Colleges, Inc., ___ F. 3d ___ (9th Cir. 2013).
74 Id., slip op. at 17.
75 29 U.S.C. §§151 et seq.
76 In re D.R. Horton, Inc., 357 NLRB No. 184 (2012).
77 Id., slip op. at 1.
78 Id., slip op. at 3.
79 Id., slip op. at 4.
81 Id., slip op. at 20.
82 Id., slip op. at 22.
83 Id., slip op. at 26-28.
85 Noel Canning v. NLRB, 705 F. 3d 490 (D.C. Cir. 2013).
86 Id. at 514.
89 LAB. CODE §§98-98.8.
90 Sonic-Calabasas, 57 Cal. 4th at 1139.
91 Id. at 1146.
92 Id.
94 Id. at 518-19 (citing Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1776 (2010)).
96 See also Truly Nolen of Am. v. Superior Court, 208 Cal. App. 4th 487 (2012).
98 Franco, 211 Cal. App. 4th at 361.
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42

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Contact Barbara Luna. Expert witness issues analysis, damage testimony experience. Prior Big Four accountants. Specialties include accounting, breach of contract, breach of fiduciary duty, business interruption, business dissolution, construction defects, delays, and cost overruns, fraud, insurance bad faith, intellectual property (including trademark, patent, and copyright infringement, and trade secrets), malpractice, marital dissolution, personal injury, product liability, real estate, securities, tax planning and preparation, IRS audit defense, tracing, unfair advertising, unfair competition, valuation of business interests, and wrongful termination. See display ad on page 45.

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11980 San Vicente Boulevard, Suite 507, Brentwood, CA 90049, (310) 820-0123, e-mail: jaygrossmandds@gmail.com. Web site: www.djaysdds.com. Contact Jay Grossman. Dental malpractice expert testimony. Have been deposed over 80 times; reviewed over 400 cases for both defense and plaintiff including peer review, accidents, and malpractice. 60% plaintiff / 40% defense. Have qualified in Superior Court over 30 times. Published and have been written about in print, radio, and TV over 116 times. Expert on issues including: standard of care, cosmetics, lasers, extractions, nerve damage, valuation, informed consent, antibiotic coverage, TMJ, orthodontics including Invisalign, sleep apnea, treatment planning, occlusion and vertical dimension, electrosurgery, abscess, resorption, implants, crowns, root canal, veneers, periodontics, and patent infringement. Licensed in 42 states to opine on standard of care, with specific license in California, Nevada, and the Northeast as well as a Florida Expert Certification. Graduated NYU 1988; Lieutenant, United States Navy 1989-91; private practice Brentwood, CA since 1991; faculty: Staff, attending—UCLA. Professor of Dental Medicine: Western University, Health Sciences College of Dental Medicine.

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800 South Figueroa Street, Suite 710, Los Angeles, CA 90017, (213) 817-7775, fax (213) 617-8372, e-mail: info@rmhinc.com. Contact Mark C. Higgins, ASA. The firm has over 30 years of litigation support and expert testimony experience in matters involving business valuation, economic damages, intellectual property, loss of business goodwill, and lost profits. Areas of practice include business disputes, eminent domain, bankruptcy, and corporate and marital dissolution. See display ad on page 51.

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515 South Flower Street, 41st Floor, Los Angeles, CA 90071, (213) 350-4950, e-mail: patrick.chylinski@mcgladrey.com. Web site: www.mcgladrey.com. Contact Patrick Chylinski. McGladrey is the 5th largest accounting and consulting firm in the United States. Our litigation consulting and financial forensics practice focuses on assisting counsel and clients in the areas of business and commercial litigation, forensic analysis, fraud investigations, contract compliance, and royalty inspection matters. We have extensive experience in the areas of damages, lost profits, and forensic analysis as they relate to contract, post-closing, real estate, and fee disputes. Our experience includes testifying at deposition, arbitration, and at trial in state and federal courts. Degrees/Licenses: CPAs, MBAs, JDs, CFEs, CVAs, ASAs, CFFs. See display ad on page 43.

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3215 East Foothill Boulevard, Pasadena, CA 91107, (626) 288-2000, fax (626) 288-2001, e-mail: christenson@cbiz.com. Web site: www.mcfadden-morrison.com. Contact Karl J. Schulze, president. We are one of the region’s leading firms in forensic business analysis services, accounting, lost profits, economic damages, expert testimony, discovery assistance, business valuations, corporate recovery, financial analysis, and modeling. Member of major professional organizations, experience across a broad spectrum of issues in the areas of business issues. Licenses/Licenses: CPA, CVA, CFE, ABV, PhD-Economics. See display ad on page 51.

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400 Continental Boulevard, Sixth Floor, El Segundo, CA 90245, (310) 322-7744, fax (424) 285-5380. Web site: www.warnozof.com. Contact Timothy R. Lowe, MAI, CRE. Warnozof provides a broad base of litigation support services including economic damages, lost profits, financial feasibility, lease dispute, property value, enterprise value, partnership interest and closely-held business valuation. See display ad on page 46.

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8391 Beverly Boulevard, Suite 167, Los Angeles, CA 90036, (800) 748-5440, fax (923) 939-5481, e-mail: tsetec@setecinvestigations.com. Web site: www.setecinvestigations.com. Contact Todd Stefan, Setec Investigations offers unparalleled expertise in computer forensics and enterprise investigations providing person-alized case-specific forensic analysis and litigation support services for law firms and corporations. Setec Investigations possesses the necessary combination of technical expertise, understanding of the legal system, and investigative experience to analyze electronic evidence, collection, investigation, and production of electronic information for investigating and handling computer-related crimes or misuse. Our expertise includes computer forensics, electronic discovery, litigation support, and expert witness testimony.

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Los Angeles, California 90071-2039
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CLINTON E. MILLER, JD, BCFe INSURANCE BAD FAITH EXPERT
502 Park Avenue, San Jose, CA 95110, (408) 279-1034, fax (408) 279-5662, e-mail: cmiller@cspact.com.

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5707 Corona Avenue, Suite 106, Westlake Village, CA 91362, (818) 707-7085, fax (818) 735-9992, e-mail: crolin@rolin.com. Web site: www.chrisrolin.com. Contact Christopher Rolin. Christopher Rolin is a highly effective trial attorney with over 46 years in civil litigation. He is a certified specialist in legal malpractice. His practice focuses as an expert witness on the applicable community standard of care for practicing attorneys in the litigation and business areas. He has been retained as an expert by both plaintiffs and defendants in legal malpractice cases. Also tests on issues of professional ethics and fee disputes.

LITIGATION

ROBERT C. ROSEN

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

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ROBERT C. ROSEN

His practice focuses as an expert witness on the applicable community standard of care for practicing attorneys in the litigation and business areas. He has been retained as an expert by both plaintiffs and defendants in legal malpractice cases. Also testifies on issues of professional ethics and fee disputes.

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515 South Flower Street, 41st Floor, Los Angeles, CA 90071, (213) 330-4605, e-mail: patrick.chylinski@mcgladrey.com. Web site: www.mcgladrey.com. Contact Patrick Chylinski, McLeod is the 5th largest accounting and consulting firm in the United States. Our litigation consulting and financial forensics practice focuses on assisting counsel and clients in the areas of business and commercial litigation, forensic analysis, fraud investigations, contract compliance, and royalty inspection matters. We have extensive experience in the areas of damages, lost profits, and forensic analysis as they relate to contract, post-closing, real estate, and fee disputes. Our experts have experience testifying at deposition, arbitration, and at trial in state and federal courts, Degrees/Licenses: CPAs, MBAs, and JDs.

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2000 Pacific Avenue, Suite A-321, San Francisco, CA 94941, (415) 381-3135, fax (415) 381-3131, e-mail: jsrutchik@neoma.com. Web site: www.neoma.com. Jonathan S. Rutchik, MD, MPH is a physician who is board certified in both Neurology and Occupational and Environmental Medicine. His evaluations and treatment, including electromyography, of individuals and populations with suspected neurological illness secondary to workplace injuries or chemical exposure. Services include medical record and utilization review and consulting to industrial, legal, government, pharmaceutical, and academic institutions on topics such as metals and solvents, pesticides, mold exposures, product liability, musicians’ injuries, and others. Offices in SF, Richmond, Petaluma, Sacramento, and Eureka/Arcata. Licensed in CA, NY, MA, NM and ID. See display ad on page 59.

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Graham A. Purcell, MD, MC. Assistant Clinical Professor Orthopedic Surgery, UCLA.

3860 Wrightwood Drive, Studio City, CA 91604. (818) 985-3051, fax (818) 985-3049, e-mail: gpurcelmd@gmail.com. Web site: gpurcelmd.com. Contact Graham A. Purcell, MD. Dr. Purcell is a board certified orthopedic surgeon, subspecialty in spinal disorders affecting adults and children. Examples of spinal disorders treated by Dr. Purcell include disc diseases, stenosis, infections, tumors, injuries, and deformities including scoliosis. He possesses 34 years of orthopedic and 26 years of med-legal experience, including defense, plaintiff, insurance carriers, United States Attorney General’s office, CA Attorney General’s office and Public Defender’s office. Expert testimony pertains to med-ical, personal injury, and workers’ compensation cases. As a qualified medical evaluator, Dr. Purcell has extensive experience in performing QMEs, AMEs, IMEs, WC evals. See display ad on page 57.

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4X Forensic Engineering Laboratories, Inc.

5262 Oceanus Drive, Huntington Beach, CA 92649. (714) 450-8500, fax (714) 450-8599, e-mail: phil @4xforensic.com. Web site: www.4xforensic.com. Contact Phil Van Herle. 4X Forensic Engineering Laboratories is a full-service forensic engineering laboratory. We provide expert witness and analytical and testing services in the following areas: fires and explosions; electrical and gas product defect investigations, thermal and fire modeling and laboratory testing; water loss; materials, corrosion and failure analysis of plumbing products; failure analysis: metallurgy, product testing, and computerized stress analysis; accident reconstruction: automotive, trucks, construction equipment, and premises liability. See display ad on page 51.

Chemical Accident Reconstruction Services, Inc.

9121 East Tanque Verde Road, Suite 105, Tucson, AZ 85749. (800) 645-3369, e-mail: service@chemaxx.com. Web site: www.chemaxx.com. Contact Dr. Michael Fox. Comprehensive chemical accident investigation—specializing in complex industrial chemical accidents and chemical related consumer product injuries, chemical fires and explosions, chemical labeling, chemical packaging, handling and shipping, burns, warnings, labels, MSDSs, disposal, safety, EPA, OSHA, DOT, propylene, natural gas, hydrogen, flammable liquids, hazardous chemicals, aerosols (hairspray, spray paint, refrigerants), DOT certified (hazardous materials shipment), Certified fire and explosion investigator, OSHA process hazard analysis team leader. PhD physical chemistry. Extensive experience in metallurgy, corrosion, and failure analysis.

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**MARC J. FRIEMAN, MD**

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3600 Wightwood Drive, Studio City, CA 91604, (818) 985-3051, fax (818) 985-3049, e-mail: gpurcellmd@gmail.com. Web site: gpurcellmd.com. **Contact Graham A. Purcell, MD.** Dr. Purcell is a board certified orthopedic surgeon, subspecialty in spinal disorders affecting adults and children. Examples of spinal disorders treated by Dr. Purcell include disc disease, trauma, infections, tumors, injuries, and deformities including scoliosis. He possesses 34 years of orthopedic and 26 years of med-legal experience, including defense, plaintiff, insurance carriers, United States Attorney General’s office, CA Attorney General’s office and Public Defender’s office. Expert testimony pertains to med-mal, personal injury, and workers’ compensation cases. As a qualified medical evaluator, Dr. Purcell has extensive experience in performing QMEs, AMEs, IMEs, WC evals. See display ad on page 57.

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<td>Noriega Clínica, p. 26</td>
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<td>MSNBC Services, LLC, p. 12</td>
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<td>Graham A. Purcell, M.D., Inc., p. 57</td>
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<td><a href="mailto:expert@gpurcellmd.com">expert@gpurcellmd.com</a></td>
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<td>Schulze Haynes Lovenguth &amp; Co., p. 53</td>
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<td>URS, p. 65</td>
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<td>Walzer &amp; Melcher, p. 47</td>
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<td>White, Zuckerman, Warsavsky, Luna &amp; Hunt LLP, p. 45</td>
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<td>Woodard Mediation, p. 12</td>
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<td>626-584-8000</td>
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<td>Zivetz, Schwartz &amp; Saltzman, p. 47</td>
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6th Annual Symposium on Family-Based Immigration

ON SATURDAY, APRIL 5, The Immigration and Nationality Law Section will host the sixth annual symposium on family-based immigration law. Experts Gail Pendleton, Kristen Jackson, Vera Weisz, Javier Pineda, Lance Gallardo, and Mary Mucha will share their knowledge and experience with the most relevant legal issues faced by immigrants and their families.

The program will take place at LACBA, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration will begin at 8:30 a.m., with the program continuing from 9 a.m. to 4 p.m. The registration code number is 012274.

$100—CLE+ member
$150—Immigration Law Section member
$199—LACBA member
$215—all others
6 CLE hours

Restrictive Practices in Retailing and Distribution

ON WEDNESDAY, APRIL 30, the Antitrust and Unfair Business Practices Section will host a program that focuses on distribution practices, including vertical price and nonprice restraints. Our distinguished panelists are leading antitrust practitioners Don Hibner Jr., Benjamin Klein, Roxane A. Polidora, and Ronald C. Redcay. The panel, moderated by Eric P. Enson, will discuss recent developments in this highly active and dynamic area of the law, including the FTC’s February 2014 decision involving a “full support program” instituted by the nation’s largest iron pipe fittings supplier, McWane, Inc. The program will cover de facto exclusivity, loyalty discounts, and most favored purchaser agreements, to be followed by a lively discussion. The program will take place at Jones Day, 555 South Flower Street, 50th floor, Downtown. On-site registration and lunch will begin at noon, with the program continuing from 12:30 to 1:30 p.m. The registration code number is 012278. The prices below include the meal.

$25—CLE+ member
$45—Antitrust Section member
$65—LACBA member
$85—all others
1 CLE hour

Lunch at the Ninth Circuit: Tips from Judges on Getting Your Just Desserts

ON THURSDAY, APRIL 10, the Appellate Courts Section and its counterparts with the California, Orange County, Riverside, and San Diego Bar Associations will host a program featuring three Ninth Circuit judges, who will share their unique insights into federal appellate practice gained through their many years of experience on the bench. This program provides the opportunity for attendees to get to know the judges and learn what matters most to federal judges when they review appeals and hear oral arguments. The panel discussion will be followed by 15 to 20 minutes of questions and answers. Prior to the program, a catered lunch, including the featured judges’ “just” desserts will be served. During lunch, attorneys will have an opportunity to network with the judges and other lawyers interested in appellate practice. The names of the speakers, visiting Ninth Circuit judges, will be announced one week before the program. The program will take place at the Richard H. Chambers Courthouse, 125 South Grand Avenue in Pasadena. Free parking is available in the lot across the street from the courthouse, and parking is also available on the street. On-site registration and lunch will be available beginning at noon, with the program continuing from 12:30 to 2 p.m. The registration code number is 012252. The prices below include the meal.

$25—CLE+ member
$55—Appellate Courts Section member
$75—LACBA member
$90—all others, including at-the-door registrants
1.5 CLE hours, with appellate law specialization credit
The Ninth Circuit Rejects First Amendment Arguments in Favor of SOCE

Despite the Recent Advances toward marriage equality, lesbian, gay, bisexual, and transgender (LGBT) people continue to face significant hurdles to attaining full equality. LGBT people have often been subjected to attempts to change their sexual orientation or gender identity. Often promoted or even mandated by governments and the parents and families of LGBT children, reparative therapy, gay conversion therapy, and sexual orientation change efforts (SOCE) have until recently been ignored as a civil rights issue.

The law is starting to catch up, however, and a trend to protect LGBT youth from forced SOCE is emerging. California lawmakers recognized this with the enactment of SB 1172, the first law in the United States to bar licensed mental health providers from applying SOCE to minor patients. SB 1172 gives California’s mental health providers who wish to perform SOCE a choice. They can wait until their patient becomes an adult or be disciplined for unprofessional conduct. Other states have followed California’s lead. Massachusetts, New Jersey, New York, Pennsylvania, and Washington have all introduced or enacted legislation similar to SB 1172.

In enacting SB 1172, the California Legislature acknowledged that California has an obligation to protect LGBT youth from the serious harm that SOCE inflicts. Children who undergo SOCE are more likely than their peers to experience alcohol and drug dependence, have unprotected sex, be averse to other forms of therapy, become homeless, and develop long-term mental health problems. Not surprisingly, SOCE survivors are significantly more likely to commit suicide than LGBT youth who are not subjected to SOCE therapy. SOCE survivors often have difficulty developing a healthy sexual identity and internalize anti-LGBT stigma and animus.

Notwithstanding the clear and well-documented dangers of SOCE, two groups of plaintiffs filed suits challenging SB 1172 to enjoin its enforcement on First Amendment and other constitutional grounds. In Welch v. Brown,1 one federal judge held that SB 1172 is subject to strict scrutiny because it constitutes content and viewpoint restrictions. The court granted a preliminary injunction against enforcement of the law on the grounds that SB 1172 is unlikely to survive heightened scrutiny. In Pickup v. Brown,2 a different judge went in the other direction. Reasoning that SB 1172 bars treatment and not discussions of treatment, the court applied rational basis review. The court denied a preliminary injunction, finding that the plaintiffs were unlikely to show that SB 1172 violates the speech rights of SOCE practitioners. The orders resulted in two appeals to the Ninth Circuit, which were consolidated.

The Ninth Circuit upheld SB 1172.3 Pickup is significant for at least three reasons. First, the court clarified that the First Amendment does not insulate medical professionals from giving negligent advice to patients. The state has a clear interest in protecting minors from demonstrably harmful forms of psychotherapy that have been rejected by the mainstream medical community.

Second, the Ninth Circuit acknowledged the overwhelming consensus that SOCE is harmful and ineffective—an important precedent. Third, the Pickup decision and the battle surrounding SB 1172 highlight California’s evolution from a state that once suppressed LGBT identity into a state at the forefront of advancing LGBT rights. Pickup documents extreme SOCE methods, including shock therapy and castration, that once were employed in California with the state’s knowledge and sanction.

With the enactment of SB 1172 and its defense in court, California now stands at the forefront in advancing equality for LGBT people.

California same-sex couples can legally marry, California employees are protected from discrimination on the basis of sexual orientation and gender identity, California’s antibullying statute specifically protects sexual orientation and gender identity, and transgender students can use the restroom of the gender with which they identify. LGBT people in California enjoy legal safeguards that do not exist in other states. SB 1172 and Pickup are significant additions to those safeguards.

Pickup also demonstrates one of the primary strategies opponents of LGBT rights are employing to challenge LGBT rights legislation. Opponents are now arguing that legislation such as SB 1172 violates their First Amendment rights to freedom of speech, association, and religion. These arguments are made to oppose laws or to enact religious and other First Amendment-based exemptions that actually undermine the effectiveness of the proposed laws. The Ninth Circuit rejected those arguments in Pickup, which may be used in future cases as precedent to reject similar arguments.

The battle over SB 1172 is not over. The challengers filed petitions for rehearing en banc, which the Ninth Circuit denied over the dissent of three of its members. Review by the U.S. Supreme Court remains an open question. But even though the appellate process is not exhausted, SB 1172 and Pickup represent another step forward in the struggle for LGBT equality.

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3 Pickup v. Brown, 728 F. 3d 1042 (9th Cir. 2013).

Brad Seiling is a partner at Manatt, Phelps & Phillips, LLP, where Justin Jones Rodriguez is an associate. They filed amici briefs in Pickup and Welch as cooperating counsel with Lambda Legal.
Petillon was a securities attorney and legal expert on corporate financing for small businesses. He drafted seven bills passed by the California Legislature that supported small business growth. He authored several important books about securities and corporate law, including the widely used Representing Start-Up Companies. He frequently lectured at law schools and business schools and was a popular speaker at legal events and conferences.

Petillon also was a longstanding and beloved member of the LACBA’s Business and Corporations Law Section. Among other honors he received the Section’s prestigious Marvin Greene award in 2005. Section members have fond memories of working with him.

“Lee epitomized the skilled, ethical, and perceptive lawyer we all wanted to be,” said Roz Tyson, a longtime member of the Section. “He was also known throughout the bar for his personal warmth and geniality. His passing truly marks the end of an era.”

Another longtime Section member, Allen Matkins partner Keith Bishop, remembered Petillon’s proactive approach to legal issues: “Although esteemed as a lawyer’s lawyer, Lee wasn’t content to deal with the law as it was. He constantly thought about how the law could better meet the needs of small business. He then put those thoughts into action. Combining his keen intellect with pragmatism, enthusiasm, and persistence, Lee achieved impressive results and made many friends in the process.”

Born in Gary, Indiana in 1929, Petillon received a degree in economics from the University of Minnesota, and then served as an officer in the U.S. Air Force. One assignment during his service was working in the Air Force Judge Advocate General’s (JAG) office, which sparked his interest in law. After the Air Force he moved to California and worked briefly as a stock analyst before entering law school and earning his law degree from Boalt Hall, U.C. Berkeley.

During his long legal career, Petillon worked as in-house counsel for a mutual fund and a venture capital fund and as an investment banker before entering private practice and forming his own firm. When not practicing law or donating his time to organizations, Petillon traveled throughout the world with his wife of 53 years, Mary. He also hiked and fished throughout the Sierras with his sons, Andrew and Joe. He enjoyed music of all kinds and loved to read, paint, and spend time with his granddaughters, Emily and Kate. He had boundless energy, even into his 80s, and was constantly working on projects and engaging friends to exchange ideas.

“Lee was an inspiration to clients and colleagues alike,” said his longtime law partner, Mark Hiraide. “This was due in part to his amazing legal abilities, but also due to his personal qualities. He was kind, enthusiastic, encouraging, had an infectious sense of humor, and thought the best of people. People typically had a good day when they spent time with Lee. He was a great lawyer and a great man.”
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