Getting Involved

Los Angeles lawyer Linda Curtis is LACBA’s 2014-15 president.

Los Angeles Lawyer
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EARN MCLE CREDIT

The FEHA and Volunteers
page 25

Settlement Enforcement
page 12

CUTSA Preemption
page 15

Wine Law
page 18

PLUS

Capacity in Divorce
page 32
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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

Jack Trimarco was recently recognized by the California Association of Polygraph Examiners (CAPE) as the 2013 Distinguished Service Award winner.
FEATURES

18 Bottles of Law
BY ELISABETH FRATER
Agencies that enforce laws and regulations affecting California’s wine industry include the TTB, the FDA, the IRS, and the FTC

25 Employees Only
BY SCOTT E. BOYER
To avoid exposure to discrimination claims, employers should not misclassify volunteers as employees
Plus: Earn MCLE credit. MCLE Test No. 237 appears on page 29.

32 Undoing Capacity
BY HOWARD S. KLEIN AND MEGAN E. GREEN
Should a court consider the complexity of a divorce when evaluating a person’s mental capacity to divorce?

Special Section
38 2014 Guide to Investigative Services

DEPARTMENTS

8 President’s Page
Ten things you might not know about LACBA
BY LINDA L. CURTIS

10 On Direct
Erwin Chemerinsky
INTERVIEW BY DEBORAH KELLY

11 Barristers Tips
Joining the Barristers Section helps new and young attorneys
BY DEVON MYERS

12 Practice Tips
Assessing statutory enforcement of settlement agreements
BY KEN D. KRONSTADT

15 Practice Tips
Evaluating potential claim preemption in CUTSA cases
BY SHAUNT T. AVREVIAN

49 Computer Counselor
Cost-efficient ways to improve desk space productivity
BY GORDON K. ENG

52 Closing Argument
The need for a reliable test of software patentability
BY DAVID HOFFMAN

51 Index to Advertisers
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The California Supreme Court’s recent adoption of a civility provision is the first major change to the attorney oath since it was codified in 1872. Rule 9.4 of Title 9, Rules on Law Practice, Attorneys and Judges of the California Rules of Court mandates that the attorney oath set forth in Section 6067 of the California Business and Professions Code conclude with a civility pledge. Effective May 23, 2014, lawyers seeking admission to the California Bar must swear or affirm to support the Constitutions of the United States and California, to discharge faithfully the duties of an attorney and counselor at law to the best of one’s ability, and to “strive to conduct myself at all times with dignity, courtesy, and integrity.”

The California State Bar and the California chapter of American Board of Trial Advocates partnered to advocate for the attorney civility oath rule change. In the July 2013 edition of the California Bar Journal, then State Bar President Patrick Kelly argued that civility makes a lawyer a much better advocate and that incivility jeopardizes a lawyer’s professional responsibility. Under the auspices of zealous advocacy, he noted, lawyers often “cross the civility line” with activities such as “needless and ineffective histrionics during depositions,” blanket refusals of requests for extensions, confirming in writing positions that were never taken, and “trying to bully the judge in his or her courtroom.” Litigating against these attorneys is anything but civil.

The Supreme Court’s press release includes Kelly’s rationale for the civility pledge: It creates an “added reinforcement for attorneys entering the bar in California to remember the principles of professionalism that brought them to practice in the first place and in particular in their dealings with clients, other attorneys and judges.”

Bar associations and civil and criminal lawyers objected to an earlier formulation of the civility provision, called the Attorney Pledge, in part because it resembles a loyalty oath. Proposed by the California State Bar’s Attorney Civility Task Force in May of 2007 and adopted by the State Bar’s Board of Governors that July, the Attorney Pledge requires the attorney “to commit to these Guidelines of Civility and Professionalism” and to “be guided by a sense of integrity, cooperation and fair play.” The Attorney Pledge also includes the attorney’s agreement to abstain from rude, disruptive, disrespectful, and abusive behavior and to act with dignity, courtesy, and candor with opposing counsel, the courts, and the public. In 2009, the State Bar included the Attorney Pledge as part of its “Civility Toolbox” publication.

Proponents of Rule 9.4 contend attorneys still can advocate strongly for their clients without resorting to personal attacks. As an aspiration, Rule 9.4’s civility pledge avoids the troublesome comparison to loathsome loyalty oaths yet serves as a reminder to new Bar admittees that their admission to the legal profession obliges them to act at all times with dignity, courtesy, and integrity. Critics, however, argue that because Rule 9.4 is an aspiration to strive to conduct oneself with integrity, dignity, and courtesy to others, it is unenforceable and therefore ineffective to control “louche lawyers,” as they are aptly dubbed by Erin Coe of Law360. Other opponents fear the civility provision may be misused as a sanctions weapon to prevent legitimate advocacy.

But even if the oath is not a solution, most agree it is worth a shot. Acting courteously, with dignity and integrity, yields results and promotes professionalism, which makes civility a worthwhile practice.
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Ten Things You Might Not Know about LACBA

IF YOU ARE READING THIS, you probably are a member of the Los Angeles County Bar Association and likely know that LACBA offers many quality continuing legal education programs at reasonable prices. You also may know that LACBA offers pro bono opportunities. You may even be involved in one or more of LACBA’s sections or committees.

LACBA, however, is like the elephant in the parable of the blind men and the elephant. The blind man who touched the elephant’s tail thought that an elephant is like a rope, while the blind man who touched the elephant’s leg thought that an elephant is like a pillar. Each person’s experience of LACBA depends upon his or her particular perspective, so there are widely different views of what LACBA is and what it does among various constituencies. I would like to take this opportunity to remind you of a few of the great things about LACBA and to encourage you to take a fresh look at increasing your involvement in LACBA.

LACBA is like the elephant in the parable of the blind men and the elephant. LACBA is diverse. With over 20,000 members, LACBA is one of the largest voluntary bar associations in the United States. When it was founded in 1878, LACBA members were white males. Today, LACBA’s membership and its leadership is incredibly diverse, in terms of gender, race, sexual orientation, practice area, practice setting, and even location. LACBA’s members are not limited to downtown law firms—we have hundreds of solo practitioners and lawyers who practice with private companies and public agencies. We have hundreds of law student members and numerous members in other states and in foreign countries.

LACBA can help improve your skills as a lawyer. Thanks to its 26 practice-area sections, LACBA offers over 240 CLE programs every year. Some of these programs, such as the annual Securities Regulation Seminar sponsored by the Business and Corporations Law Section, draw speakers and participants from far beyond Los Angeles. No matter what your practice area, you can find subjects of interest. LACBA also provides resources applicable to numerous practice areas, such as the Daily EBriefs, the Searchable Civil Register, and Daily Case Filing Alerts.

LACBA can help your career. Whether you are a young lawyer or a senior partner, LACBA provides extensive opportunities for networking and practice development. LACBA offers a job board for job seekers. Our very active Barristers Section addresses the needs of younger lawyers. For lawyers who already have practices, LACBA provides an easy way to resist the temptation to sit in your office and interact with the world solely through your computer. By attending CLE seminars, committee and section meetings, and other events, you can actually get out of your office and meet an array of different people, including potential clients and referral sources.

LACBA supports the courts. This support has grown in importance as the crisis in court funding in California continues. As former State Bar president and former LACBA president Patrick Kelly has said, “Courts are in a crisis mode, and members of the judiciary are our heroes in trying to maintain access to justice for clients in California.” In the past three fiscal years, the Los Angeles Superior Court (which is the largest state court system in the country) has had to absorb a recurring budget shortfall of $187 million. Since 2008, the Los Angeles Superior Court has cut 25 percent of its staff. The members of LACBA’s Ad Hoc Committee on Adequate State Court Funding and Operations, and President-Elect Paul Kiesel, in his capacity as cochair of the statewide Open Courts Coalition, have worked tirelessly to restore adequate funding to the courts. This will be an ongoing project for LACBA for the next bar year and for the foreseeable future.

LACBA has well-established public service programs. For almost 30 years, LACBA—through its AIDS Legal Services Project—has provided direct one-on-one pro bono legal representation to thousands of people living with HIV and AIDS who have an HIV-related legal problem. LACBA also has provided domestic violence victims with pro bono legal representation through its Domestic Violence Project. LACBA’s Immigration Legal Assistance Project provides immigration legal assistance and counseling to all categories of low-income persons. LACBA’s Center for Civic Mediation provides mediation and conflict resolution training, education, and coaching that prepares people with the skills to constructively address disputes in personal, community, work, and school settings. These established LACBA projects are supported in part by the LACBA Foundation, and all rely extensively on LACBA attorney volunteers to provide critical services to people in need.

LACBA has a new public service program. LACBA also has a new public service program: the Veterans Project at Patriotic Hall. Los Angeles County is home to the largest veteran population in the country—some 330,000 strong—with thousands of these veterans falling into poverty, unemployment, and homelessness. LACBA offers legal services, clinics, and self-help workshops to veterans and will now be doing so as part of its new Veterans Project in the newly renovated Patriotic Hall in downtown Los Angeles. The Veterans Project was spearheaded by Alan Steinbrecher, a former LACBA president, and his colleagues on LACBA’s Armed Forces Committee. My father was a veteran of the Korean War, so this new

Linda L. Curtis is the 2014-15 president of LACBA. She is a partner in, and a cochair of, the global finance practice group at Gibson, Dunn & Crutcher LLP.
project has a special personal resonance for me. One of my main goals this year is to see that the Veterans Project at Patriotic Hall gets off to a strong start.

LACBA serves the public as well as lawyers. LACBA offers low-cost referrals to qualified, prescreened lawyers through its Lawyer Referral Service—the largest and oldest service of its type in the United States. It offers mediation of fee disputes through its Attorney-Client Mediation and Arbitration Services program. Through its Indigent Criminal Defense Program, LACBA provides private attorneys to represent indigent criminal defendants in the Los Angeles Superior Court system when a public defender is unavailable or has a conflict. LACBA also serves the public through its numerous committees involved in judicial evaluations.

LACBA promotes diversity in the legal profession. One way that LACBA helps attorneys is by promoting diversity in the legal profession. LACBA does so through its Diversity in the Profession Committee and through its numerous relationships with specialized bar associations. For example, LACBA teamed up with the Women’s Lawyers Association of Los Angeles to create a joint Task Force on the Retention and Promotion of Women. One of my first experiences with LACBA was my involvement with the 2007 Diversity Summit, which focused on diversity pipeline issues. More recently, Immediate Past President Patricia Egan Daehnke created a President’s Advisory Committee on Women (chaired by Judge Lee Edmon and Margaret Stevens). The advisory committee held a number of well-attended “lean in” sessions with women lawyers of varying seniority and with law students. I plan to continue the Advisory Committee this year and, ideally, to make it permanent.

LACBA’s affinity partners offer practice-related products and services. Another way that LACBA helps attorneys is with its affinity partners program, which offers practice-related products and services. LACBA has partnered with a number of product and service providers in the insurance, financial, office technology, and other areas, and in some cases has negotiated discounts for LACBA members. Through these LACBA affinity partners, members are able to obtain better pricing on these products and services than they may otherwise.

LACBA provides ethics opinions. Since 1917, LACBA’s Professional Responsibility and Ethics Committee has been publishing formal opinions in response to member inquiries. Any member of LACBA may request an ethics opinion. The members of the committee have extensive experience in legal ethics, and although the opinions are not binding on the courts or State Bar, they are quoted, used, and commented upon across the country.

LACBA’s mission statement is “to meet the professional needs of Los Angeles lawyers and advance the administration of justice.” Not all of its programs and benefits are mentioned in this summary, but I hope it has convinced you to take another look at what LACBA has to offer. I would like to specifically mention an upcoming event this year: the LACBA Foundation’s 50th anniversary gala. The event will be held on October 23 at the Bel Air Bay Club and will honor Los Angeles legal community icons Shirley and Seth Hufstedler. The Foundation works closely with LACBA in supporting LACBA’s pro bono projects, so your support of this event will go a long way toward helping the deserving beneficiaries of all of the LACBA projects.

If you are not yet a member of LACBA, please consider joining us. If you already are a member, please reach out and find a way to increase your participation. Our Web site at lacba.org is a comprehensive source of information. Please feel free to contact me or our Chief Executive Officer Sally Suchil if you would like to explore ways to get more involved. I look forward to seeing you at a LACBA event this year!
What is the perfect day for you? A day I get to be with my family and children and get a lot of work done too.

What is overrated in the academic profession? That we get summers off. Law professors work very hard over the summer on their scholarships. The summer is as busy as the semesters.

What is underrated? Teaching ability.

Why did you choose to become a law school dean? Being a dean of a law school is a chance to have an impact on shaping the institution.

What is the biggest misconception about your job? That I have much authority.

What was your best job? This one.

What was your worst job? Lifting large automotive gears, spraying them with oil and kerosene, wrapping them with wax paper, and moving them. For eight hours a day.

What characteristic do you most admire in your mother? My mother is very nonjudgmental, very loving, and giving.

If you were handed $1 million tomorrow, what would you do with it? I’d probably give some of it to the school for scholarships, and save some of it. I still have kids in college.

Who is on your music playlist? Taylor Swift, Madonna, Led Zeppelin, some Karla Bonoff, lots of Norah Jones, Cat Stevens, Journey, John Lennon, Michael Bublé, Pink.

What book is on your nightstand? I am just now finishing the new Jeffrey Archer book, Be Careful What You Wish For. I read The Goldfinch, which I hated, but everybody else loves.

Which fictional hero would you like to be? Atticus Finch.

Which magazine do you pick up at the doctor’s office? Sports Illustrated.

When were you most scared as a lawyer? The first time I ever went into court. Each time I’ve argued in the Supreme Court.

You became a law school dean for the first new public law school in California in 40 years—what concerned you the most? Could we recruit top faculty and top students to come to a new law school?

You defended freedom of speech from the heckler’s veto—what does that mean? Freedom of speech doesn’t give you the right to silence somebody else. Otherwise, anybody could be silenced, just by people shouting them down.

What is something that you have written that you wish everyone would read? I wrote a book a few years ago called The Conservative Assault on the Constitution.

What is your favorite vacation spot? Far enough away that no one could drive back to their office—and in another country so the kids couldn’t afford to be on their cell phones very much. Paris for a week.

What do you do on a three-day weekend? The ideal for me is always going to be a mix of family time and also time to get work done.

What is your favorite hobby? Being a professional sports fan.

What are your retirement plans? I don’t have them.

Are you still teaching classes? I teach a full load. It’s my favorite thing to do.

What is your favorite sport as a participant? I’m a terrible athlete. I was the one that they fought over to not have on the team.

Which is your favorite spectator sport? Baseball. When I grew up, Sandy Koufax was my favorite baseball player.

Which television shows do you DVR? I don’t know how to use a DVR.

Do you have a Facebook page? No, I’ve never been on Facebook.

Are you on Twitter? No.

Do you have a favorite radio station? I tend to listen to KNX for news and traffic. Listen to the sports radio stations.

Which person in history would you like to take out for a beer? My father. I’d like another hour to be with my dad.

If you had to choose only one dessert for the rest of your life, what would it be? Anything chocolate.

What are the three most deplorable conditions in the world? Poverty. Slavery. How we are changing the climate in a way that’s going to affect the planet forever.

Who are your two favorite U.S. presidents? Abraham Lincoln and Franklin Roosevelt.

What is the one word you would like on your tombstone? Mensch.
Joining the Barristers Section Helps New and Young Attorneys

IT IS A TOUGH MARKET TODAY FOR NEW ATTORNEYS. Large law firms are not hiring as they did when the market thrived. The companies that are hiring want experienced attorneys whose skills match the open position perfectly. Applications number in the hundreds for every job. The California Bar may impose a new regimen of volunteer and training requirements for law students and new attorneys. Newly employed attorneys apply skills that often feel foreign and underdeveloped. Employers emphasize billable hours. Facing these challenges, it is easy to become discouraged.

While I cannot offer solutions to all of these obstacles, I can suggest one way to develop your skills and make essential connections: the Barristers of LACBA—the section for new and young attorneys in Los Angeles. You are eligible if you are 36 years or younger or have been in practice for five years or less. You may have seen Barristers events in LACBA announcements. These events generally divide into two categories: educational development or networking opportunities. The educational events usually focus on building attorney skills through continuing legal education or seminars about the legal market. For example, the Barristers recently provided a CLE event concerning ethics and the Internet. This seminar not only provided legal ethics credit but also covered practical issues, such as when a tweet becomes advertising and the ethical ramifications of LinkedIn endorsements. This coming year, the Barristers CLE committee will provide more of these timely and essential programs.

Another recent educational event was a panel for finding employment in employment law. The panelists advised about the necessary skills and connections to secure a job. Law Day, another recent event, presented a chance to earn free CLE credit, bolster legal skills, and give back to the community. The training ranged from wills and trusts to federal court practice. A lunchtime seminar offered a credit in elimination of bias and provided tools for advising clients—in particular, clients with mental disabilities. Earlier, the Barristers trained and sent 20 volunteers on a bus to Lancaster to assist veterans with their legal problems. Some attorneys want pro bono cases; others want to volunteer for a day. The Barristers provides opportunities for both.

The Barristers also understands that connections are often what put a resume at the top of a pile or open the door for an interview, which is why we offer a variety of networking events. We have monthly free mixers, known as Thirsty Thursdays, which are the first Thursday of every month Downtown and the Westside. Attending these mixers is a way to make connections in an unstructured, informal setting. There is usually a healthy mix of regulars and new attendees. The Barristers also hosts an annual mixer with members of the judiciary. This offers a rare chance to speak with judges outside of court and is always well attended by members of the judiciary because they support the mission of the Barristers.

Barristers provides access to the diverse legal field of this city and tools to refine professional skills.

The Barristers also has a committee that focuses on access to members of the Los Angeles government. A few years ago, before Eric Garcetti became the mayor, he shared his platform with an intimate group at the Cork Bar. This past year, District Attorney Jackie Lacey and City Attorney Mike Feuer discussed their agendas. Those in attendance could ask questions and introduce themselves. In a year in which the offices of the District Attorney and City Attorney are hiring, this event offered a moment to make a connection that could lead to a job.

Another way to become involved is as a liaison to another section of LACBA. I was a liaison to the Litigation Section for two years. Because that section combines bench members and some of the biggest names in the Los Angeles litigation scene, I learned from far more experienced practitioners about being a lawyer. These were people I otherwise would not have met. The liaison positions expand a person’s network to include some of the most experienced and respected practitioners in Los Angeles.

The Barristers also provides two other significant networking avenues. It works with local law schools to assist with mock interviews and campus events, which is an avenue for finding a mentee or staying involved with your law school. Barristers has fun too. Our annual Summer Bash with live music takes place in iconic locations around Los Angeles. The rooms are packed, a few of the drinks are free, and the vibe is relaxed. The Summer Bash is a way to celebrate summer and make connections.

As the incoming president, I understand the challenges facing new practitioners and believe that Barristers offers resources to make us all better attorneys. Barristers provides access to the diverse legal field of this city and tools to refine professional skills. I encourage you to tell us about your ideas for programs you would like to see, and I encourage you to get involved.

If you are interested, the first step is to visit the LACBA Web site and become a member of the Barristers. If you really want to make connections, join a committee. You can learn more from the Barristers Section page, which is part of the LACBA site. You may also send a message to Danielle Jones at djones@lacba.org and let her know which committee interests you or an event you would like us to hold. I hope to see you at an event soon.

The new Barristers president, Devon Myers, is an associate at Scheper Kim & Harris LLP who handles civil litigation and white collar matters.
CODE OF CIVIL PROCEDURE Section 664.6 creates a summary procedure by which a trial court may enforce the terms of a settlement agreement reached by stipulation, either in writing signed by the parties outside of court or orally before the court, without requiring that a second lawsuit be filed. However, litigants who fail to adhere rigidly to the requirements of Section 664.6 are forced to spend significantly more time and money enforcing their settlement because they are unable to rely on the statute’s protections and expedited procedure. Parties commonly bring motions pursuant to Section 664.6 to enforce a settlement that was entered into in a prior action or before litigation was initiated, or to enforce a settlement agreement after having failed to properly request that the court retain jurisdiction over an action. Nevertheless, under these circumstances courts consistently refuse to allow litigants to rely on the summary procedures of Section 664.6. Instead, courts require new lawsuits to be filed bringing summary judgment motions to enforce settlements, which obviously necessitates greater expense of time and money than a motion under Section 664.6. To avoid this result, attorneys for parties to a settlement agreement need to understand the contours and limits of Section 664.6 before advising a client to sign a settlement agreement based on the assumption that the client will be able to rely on it to enforce the settlement agreement if it is not performed fully.

Section 664.6 provides:

If parties to a pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.1

The intent and effect of the section is to provide “a summary procedure by which a trial court may specifically enforce an agreement settling pending litigation without requiring the filing of a second lawsuit.”2 Settlement agreements not enforceable under Section 664.6 are governed by general contract principles.3 A party may file a motion for summary judgment or a separate action,4 but these alternatives are considerably more time-consuming and costly than filing a motion under Section 664.6.

Prior to enactment of Section 664.6, California appellate court decisions were in conflict as to the appropriate procedure for enforcement of an agreement to settle pending litigation, and expeditious enforcement of a settlement agreement was not always possible.5 One line of authority suggested that the proper procedures for enforcement were limited to a motion for summary judgment, a separate suit in equity to enforce the agreement, or, if the defendant was attempting to enforce settlement, an amendment to the pleadings, asserting the settlement as an affirmative defense.6 Another line of authority recognized that courts have inherent power to enforce, by way of a non-statutory motion for entry of judgment, a settlement agreement presented by the parties in court, or as a result of, judicially supervised settlement proceedings.7 With enactment of Section 664.6, the legislature not only endorsed the latter procedure but expanded it beyond the context of judicially supervised settlement conferences.8

Pending Litigation

While Section 664.6 provides a streamlined procedure for the enforcement of a settlement agreement, its reach is limited and courts strictly adhere to its limitations. First, by its plain terms, Section 664.6 applies only to “pending litigation.”9 Therefore, a party cannot rely on the section to enforce a settlement reached before litigation was initiated,10 such as a prelitigation settlement agreement or release.11 Nor may a party bring a Section 664.6 motion in a second action to enforce a settlement made in a prior action.12 The rationale for this rule is that the summary, expedited procedures of Section 664.6 are only available “when certain requirements that decrease the
Court of Appeal explained that motion in a new action to enforce the terms Wood had breached the terms of set-
tlement agreement stipulated that upon execution of the agreement, it must retain jurisdiction to enforce the terms of the agreement, even if the parties did not request that the court retain jurisdiction under Section 664.6 to enforce the terms of the agreement—before the case is dismissed—because Hagan failed to anticipate what would happen if the settlement agreement was breached.20 If a party breaches the settlement agreement, the non-breaching party may seek summary enforcement of the terms of the settlement agreement.21

Normally, a court retains jurisdiction over the parties and subject matter of a suit until final judgment is entered.16 When the parties voluntarily dismiss their entire action, either with or without prejudice, the court’s jurisdiction over the parties and subject matter terminates once the clerk enters the dismissal.17

After dismissal, a superior court has “no subject matter jurisdiction to grant relief other than costs and fees as appropriate.”18 As a result, if parties to a settlement agreement do not request that the court retain jurisdiction under Section 664.6 to enforce the terms of the agreement—before the case is dismissed—the court is powerless to help them: “Since subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel, the court cannot ‘retain’ jurisdiction it has lost.”19

When first enacted in 1981, Section 664.6 did not confer upon the trial judge continuing jurisdiction to enforce the settlement.20 This jurisdictional problem was solved by a 1993 amendment that, among other things, added a second sentence: “If requested by the parties [to a stipulated judgment], the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.”21

Even after this amendment, however, the court can only retain jurisdiction to enforce the terms of the settlement “if the parties have requested this specific retention of jurisdiction.”22 Moreover, the amendment directs that the request, as with enforcement of the settlement agreement, must be made: 1) during the pendency of the case (not after the case has been dismissed), 2) by the parties themselves (not an agent or attorney), and 3) either in a writing signed by the parties or orally before the court.23 If, after a suit has been dismissed, a party brings a Section 664.6 motion for a judgment on a settlement agreement but cannot present to the court a request for retention of jurisdiction that meets all of these requirements, then enforcement of the agreement must be left to a separate lawsuit.24

Moreover, the parties may not confer continuing jurisdiction to enforce the terms of a settlement agreement on the court simply by including language to that effect in their agreements. They must ask the court to retain jurisdiction and direct their request to the court; otherwise, the settlement language is a nullity.25 If a settlement agreement provides that the court may retain jurisdiction to enforce the settlement, but the dismissal fails to provide for retained jurisdiction, the plaintiff’s remedy is to move to vacate or modify the dismissal for “mistake, inadvertence or excusable neglect” under Section 473(b) of the California Code of Civil Procedure.26 If 473(b) relief is denied, the plaintiff must file a new action to enforce the terms of the settlement agreement.27

Other than holding that language in a settlement agreement alone is insufficient, courts have not provided specific guidance as to the form by which parties should request that the court retain jurisdiction. However, the leading treatises suggest that the parties file a stipulation to a judgment of dismissal, signed by the parties, specifically requesting that the court retain jurisdiction under Section 664.6 to enforce the settlement agreement, followed by a noticed motion for entry of judgment pursuant to the terms of that stipulation in which the parties again request that the court retain jurisdiction under Section 664.6, along with an order that specifically provides that the court will retain jurisdiction under Section 664.6 to enforce the settlement until performance of its terms in full.28 Alternatively, the parties can file a stipulation and order to request that the court enter judgment pursuant to the parties’ stipulation and retain jurisdiction to enforce the terms of the settlement agreement without filing a noticed motion.29

As with the rules requiring pending litigation, courts are unwilling to enforce a settlement obligation that was breached after dismissal unless the parties properly requested that the court retain jurisdiction to enforce the settlement agreement, even if the parties’ settlement contemplates that the court will do so. In Hagan Engineering v. Mills, Hagan dismissed an action against Mills with prejudice under a settlement agreement that provided the trial court shall “retain jurisdiction to enforce this Agreement pursuant to the provisions of [Section] 664.6.”30 The parties did not, however, direct a request to the court to retain jurisdiction. Believing Mills had violated the settlement agreement, Hagan later filed a motion under Section 664.6 to enforce the agreement.31 Although the trial court granted the motion, the court of appeal reversed, stating that “Hagan could have bargained for a settlement which called for a conditional dismissal under California Rules of Court, rule 225(c),” the predecessor to the current rule 3.1385(c).32 The court stressed that while Hagan “most likely will [need to] file a new action for breach of the settlement agreement, this is necessary because and only because Hagan failed to anticipate what would
happen in the event of a breach...”

Filing a separate action to enforce a breached settlement agreement is significantly more costly and time-consuming than the summary procedures of Section 664.6, and the suggested procedures to obtain an order, by stipulation or motion, retaining jurisdiction. These added costs could come as a shock to a client seeking to enforce a settlement agreement, particularly if their counsel assured them that they could rely on Section 664.6 in the event the settlement agreement was breached.

It is therefore critical that counsel for parties entering into settlement agreements fully understand the statutory limits and assess the client’s need to potentially rely on Section 664.6 in the event of a breach. For example, if the settlement requires only a lump-sum payment prior to dismissal of the case, there may not be a need for court enforcement, and Section 664.6 may not be of much utility. However, if settlement payments will be made over time, a settling party may have to enforce the agreement well beyond the time of settlement. In this circumstance it is important to follow the rules and requirements of Section 664.6 and the cases interpreting it. An outright dismissal as part of the settlement agreement may not always be appropriate. Instead, counsel should consider a conditional dismissal and, if the client may need to rely on Section 664.6 to enforce the agreement in the future, ensure that the client properly requests that the court retain jurisdiction to enforce the agreement before it files a dismissal.

1 CODE CIV. PROC. §664.6.
6 In re Marriage of Assemi, 7 Cal. 4th at 904. (citing Gopal v. Yoshikawa, 147 Cal. App. 3d 128, 132-33 (1983)).
9 Kirby, 78 Cal. App. 4th at 845.
10 Kirby, 78 Cal. App. 4th 845-46; (quoting Levy v. Superior Court, 10 Cal. 4th 578, 585 (1995)).
11 Kirby, 78 Cal. App. 4th 845-46 (quoting Levy v. Superior Court, 10 Cal. 4th 578, 585 (1995)).
13 Kirby, 78 Cal. App. 4th 845-46 (quoting Levy v. Superior Court, 10 Cal. 4th 578, 585 (1995)).
14 Viejo, 217 Cal. App. 3d at 203-04.
15 Kirby, 78 Cal. App. 4th at 845.
Evaluating Potential Claim Preemption in CUTSA Cases

TRADE SECRET LITIGATION IN CALIFORNIA is filled with trap doors that even seasoned litigators can fall through. One such trap has resulted from the inclusion in the California Uniform Trade Secrets Act (CUTSA) of a preemption provision. It is anything but a model of clarity. Courts have struggled to define the scope of CUTSA preemption, with serious consequences for the types of causes of action available to CUTSA plaintiffs. Therefore, it is important to understand the subtle nuances of CUTSA preemption and how to avoid the many pitfalls associated with it.

CUTSA is premised on the proposed Uniform Trade Secret Act (UTSA), which represents an attempt to replace the disparate common law and statutory provisions governing trade secret liability with a uniform and consistently applied standard. Thus, CUTSA was meant to be the beginning and end of the analysis on trade secret liability. Unfortunately, the act includes a preemption provision that is hopelessly opaque. Instead of specifying what is preempted, as the UTSA does, CUTSA specifies what is not preempted. In particular, CUTSA states that it “does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon a misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropriation of a trade secret.” This language has led courts to struggle with determining what is preempted. It is ironic that in attempting to simplify trade secret litigation in California, CUTSA replaced the previous confusion over the web of overlapping laws regulating trade secrets with confusion over what is preempted by CUTSA’s oblique language.

After years of litigation, the general consensus in the civil context is that CUTSA preempts all noncontract causes of action “based on the same nucleus of facts as trade secret misappropriation.” This standard, however, raises more questions. For example, what if the court ultimately determines that the misappropriated information does not constitute a trade secret? Should the CUTSA plaintiff add an alternative cause of action, say for conversion, just to be on the safe side? Also, what if there is wrongdoing related to the trade secret misappropriation that independently gives rise to liability? How should these causes of action be alleged so as to avoid preemption? The California Court of Appeal decisions in Silvaco Data Systems v. Intel Corporation and Angelica Textile Services, Inc. v. Park provide important guideposts in navigating these issues.

No Alternative Pleading

Although it may seem unfair to plaintiffs, it is generally not permitted to plead alternative causes of action based on the same conduct underpinning a CUTSA cause of action. For years, courts were split on the issue. Numerous decisions held that plaintiffs should be permitted to plead causes of action in the alternative pending a determination on whether the misappropriated information constitutes a trade secret. At some level, this makes intuitive sense. If the information is determined to be a trade secret, the alternative cause of action is preempted. If not, the CUTSA cause of action fails, and the plaintiff is free to pursue the alternative cause of action.

In Silvaco, however, the California Court of Appeal unambiguously rejected alternative pleading in the trade secret context. Silvaco involved a dispute between a plaintiff software company and a defendant semiconductor manufacturer over the defendant’s alleged use of software from a third party that incorporated the plaintiff’s stolen source code. The plaintiff claimed that the stolen source code was trade secret information. The plaintiff also alleged claims for trade secret misappropriation, conversion, conspiracy, unfair competition, and unfair business practices. On CUTSA preemption grounds, the trial court sustained the defendant’s demurrer to all the non-CUTSA causes of action. Later, the trial court granted the defendant’s motion for summary judgment on the CUTSA cause of action on grounds the information at issue did not constitute a trade secret.

The plaintiff appealed, arguing that the trial court erred in sustaining the demurrer to the conversion cause of action because the information at issue was not a trade secret and, as a result, CUTSA did not apply. The plaintiff claimed that the ruling on demurrer was premature because the court had not yet determined whether the misappropriated information constituted a trade secret.

The California Court of Appeal affirmed the trial court’s decision and rejected the plaintiff’s argument. Setting a bright-line rule, the court of appeal held that CUTSA preempts causes of action premised on the same trade secret misappropriation, even when pleaded in the alternative. The proper focus of inquiry, the court reasoned, is the property right claimed, not the appropriate timing for resolution of the issue. In other words, if a plaintiff cannot identify a property right in the misappropriated information that is separate from trade secret law, the plaintiff has no other remedy besides a CUTSA cause of action. This makes it immaterial whether the alternative conversion claim is decided at the pleading stage or later. After Silvaco, alternative pleadings in the trade secret context are likely to fail, although it should be noted that courts have held that it may be more appropriate to resolve questions of preemption at summary judgment due to the highly factual nature of the analysis. Consequently, although it may seem counterintuitive, CUTSA plaintiffs should avoid including any alternative causes of action premised on the trade secret misappropriation.

Pleading Related Causes of Action

Apart from avoiding pleading in the alternative, CUTSA plaintiffs should also be mindful of preemption when pleading causes of action that are related to the trade secret misappropriation but based on wrongdoing independent of the misappropriation. These related

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Most importantly, *Angelica Textile* sets out key guidelines for pleading causes of action that are related to the trade secret misappropriation. The court observed that related causes of action survive CUTSA preemption if they “have a basis independent of any misappropriation of a trade secret.”29 The court reviewed each cause of action in turn. The court held that the fiduciary duty cause of action survived because it was based on the defendant’s competition with the plaintiff while still in the plaintiff’s employ—a clear breach of the duty of loyalty.30 Similarly, the unfair competition and interference with business relations causes of action survived because they were based on the defendant’s violation of the noncompetition agreement and breach of the duty of loyalty.31 These claims were independent of any trade secret misappropriation. The remaining breach of contract and conversion causes of action were also reinstated for other reasons.32

Applying *Angelica Textile*’s analysis, a useful rule of thumb for CUTSA plaintiffs pleading related causes of action is to see if they can allege each element of a related cause of action without referencing any aspect of the trade secret misappropriation. Typical related causes of action may include claims for breach of fiduciary duty, interference with contractual relations or prospective economic advantage, and unfair business practices under Business and Professions Code Section 17200. If CUTSA plaintiffs can allege any of these or other related causes of action without referencing the trade secret misappropriation, these claims will likely survive preemption. If they cannot, however, CUTSA plaintiffs should avoid alleging them. And no matter how tempting it may be, CUTSA plaintiffs should absolutely resist the urge to strengthen any related causes of action by including a reference to the trade secret misappropriation, no matter how egregious the misappropriation may be or how poorly it may reflect on the motives of the defendants. As much as possible, the related causes of action should read as stand-alone claims that are independent of the trade secret misappropriation claims.

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1 Civ. Code §3426.7(b). Technically, a California law such as CUTSA does not preempt other California laws. Typically, federal laws preempt state laws. Although noting that most courts use the term “preemption,” the California Court of Appeal has very recently held that the most appropriate term may be “displacement.” See Angelica Textile Servs., Inc. v. Park, 220 Cal. App. 4th 495, 498 n.3 (2013).


3 Id.

4 U.S. Trade Secrets Act §7(a).

5 CIV. CODE §3426.7.

6 Id.; Silvaco, 184 Cal. App. 4th at 234 (explaining CUTSA’s “peculiar construction—the provision of two savings clauses with no affirmative supersession clause—is best understood as assuming that CUTSA would occupy the field of trade secrets liability”).

7 Compare, e.g., K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc., 171 Cal. App. 4th 939, 969 (2009) (enunciating and applying the “broad” view of CUTSA preemption to all noncontract civil claims “based on the same nucleus of facts as the misappropriation of trade secrets claim for relief”) with Leatt Corp. v. Innovative Safety Tech., LLC, Case No. 09-CV-1301, 2010 WL 2803947, at *6 (S.D. Cal. July 15, 2010) (implicitly rejecting the “broad” view of CUTSA preemption, rejecting a dismissal of claims premised in part on trade secret misappropriation because they were based at least in part on other wrongdoing).


9 See, e.g., Ali v. Fasteners for Retail, Inc., 544 F. Supp. 2d 1064, 1070, 1072 (E.D. Cal. 2008) (denying a motion to dismiss a common law breach of fiduciary duty claim and conversion claim premised on the same misappropriation as the CUTSA claim, reasoning that dismissal was “premature” since it was “unclear how much of the allegedly misappropriated information was a trade secret”); First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 942 (N.D. Cal. 2008) (holding that a common law claim for a false promise not to disclose confidential information may proceed until the subject of the claim is determined to be a trade secret); Think Village-Kwe, LLC v. Adobe Sys., Inc., 2009 WL 902337, at *2 (N.D. Cal. Apr. 1, 2009) (permitting common law claims for misappropriation and breach of confidence to proceed “so long as the confidential information at
the foundation of the claim is not a trade secret, as that
term is defined in CUTSA").

10 Silvaco, 184 Cal. App. 4th at 238-39 and n.22
(information that does not fit the definition of “trade
secret” under CUTSA and that is not otherwise made
property by some provision of positive law cannot be
converted or stolen); see also SunPower Corp. v.
SolarCity Corp., No. 12–CV–00694–LHK, 2012 WL
6160472, at *5-6 (N.D. Cal. Dec. 11, 2012) (same,
explaining that to permit alternative pleading in the
trade secret context “would allow plaintiffs to avoid
the preclusive effect of CUTSA (and thereby plead
potentially more favorable common-law claims) by
simply failing to allege one of the elements necessary
for information to qualify as a trade secret”).


12 Id.

13 Id. at 216.

14 Id. at 217.

15 Id. at 219.

16 Id. at 237-40.

17 Id.

18 Id.

19 Id.

20 Id.

2d 911, 987 (C.D. Cal. 2011) (following Silvaco and
holding that CUTSA preempts “claims based on the
misappropriation of confidential information, whether
or not that information meets the statutory definition
of a trade secret”); Language Line Servs., Inc. v.
Language Servs. Assocs., Inc., 944 F. Supp. 2d 775, 780
(N.D. Cal. 2013) (same); SunPower Corp. v. SolarCity
Corp., No. 12–CV–00694–LHK, 2012 WL 6160472,
at *5 (N.D. Cal. Dec. 11, 2012); see also MedioStream,
Inc. v. Microsoft Corp., 869 F. Supp. 2d 1095, 1116
(N.D. Cal. 2012) (dismissing the plaintiff’s conver-
sion claim because it was “no more than a restatement
of the same operative facts supporting trade secret
misappropriation, and therefore preempted by the
CUTSA”) (internal quotations omitted); but see U.S.
Legal Support, Inc. v. Hofioni et al., Case No. CIV-S-
(same).

4th 495, 500 (2013).

23 Id.

24 Id.

25 Id. at 502.

26 Id.

27 Id. at 503.

28 Id. at 507-9.

29 Id. at 506-7 (reasoning that a cause of action can be
“related to a trade secret misappropriation” but not be
preempted if it is based in part on “facts distinct from
the facts that support the misappropriation claim”); see
also Amron Int’l Diving Supply, Inc. v. Hydrolinx
Diving Commc’n, Inc., No. 11–CV–1890–H, 2011
CUTSA preemption); E-Smart Techs., Inc. v. Drizin,
No. C 06–05528, 2009 WL 35228, at *6 (N.D. Cal.
Jan. 6, 2009) (denying summary judgment on CUTSA
preemption).

4th 495, 508 (2013).

31 Id.

32 Id. at 508-10 (holding that a contract cause of action
can never be preempted and that a conversion
cause of action survived because the plaintiff alleged
the stolen documents constituted tangible property as well
as that the issue of the documents’ value was not fully
litigated).
MANY LEGAL ISSUES apply to selling wine to the public, and in recent years, consumer passion for wine has significantly increased. This interest transcends regional borders and has been fueled by the Internet and social media. Laws, advisories, and other regulations in the wine industry have done an admirable job of keeping pace with modern wine commerce through the reinterpretation of long-standing statutes, well-calibrated legal advisories, and voluntary industry guidelines. Lawyers who are familiar with federal, state, and international guidelines for labeling, advertising, and promotion of wine can help their clients remain compliant.

Since the ratification of the Twenty-first Amendment and the subsequent repeal of Prohibition in 1933, virtually every aspect of a bottle of wine has been regulated, from production to sales. The Federal Alcohol Administrative Act of 1935 (FAA Act), which is still in effect, was the country’s first attempts to establish regulations after the repeal. Prior to 2002, the aims of the FAA Act were carried out by the Bureau of Alcohol, Tobacco and Firearms (BATF). Following the attacks of September 11, 2001, the Tax and Trade Bureau (TTB) was formed within the Treasury Department and assumed the BATF’s duties regarding enforcement of the FAA Act.

Other government agencies—including the FDA, the IRS, and the FTC—also have investigative and enforcement powers over alcoholic beverages. For example, the IRS often conducts investigations related to the failure to pay federal excise tax on wine. The FTC regulates deceptive and unfair commercial practices and can penalize offenders through injunctions and asset forfeitures as well as refer matters to the Department of Justice for criminal prosecution. Recently, the FTC has focused its attention on direct shipping of wine to customers and caffeinated alcoholic beverages. In addition, the FDA and the TTB often collaborate in

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their investigations—in the case of adulterated or contaminated wines, for example. The TTB, however, has the primary role in ensuring the integrity of the wine industry by permitting only qualified individuals and entities to operate. The bureau has the power to grant, deny, or revoke wine licenses, known as federal basic permits, which allow the importing, producing, blending, or purchasing of wine for resale.

As part of its regulatory duties, the TTB has the discretion to funnel some license applications to its Trade Investigations Division field offices for on-site inspections in order to verify information and determine if the premises are adequate for the planned operation. The TTB’s role with licensees is very hands-on, and once a basic permit is approved, the licensee faces compliance requirements, including record-keeping and reporting. The reports that must be submitted pertain to wine inventory, bonds, and tax payments. Thereafter, once the business is operational, the TTB’s regulatory objectives are realized through enforcement, especially when the violation involves tax evasion. For example, in 2012, the TTB filed an 11-count indictment against the owner of a bonded wine cellar in Monterey County for her failure to pay excise taxes in the amount of $877,126.94. Facing a maximum penalty of five years in prison for each count and a fine of $250,000, or two times the gross gain or loss, the owner entered into a plea agreement.

### Wine Label Regulation

In the wine industry, compliance issues involve more than taxes and business regulation. Wine drinkers may view wine labels as merely artistic expression, fancy packaging, or the means of distinguishing Malbec from Viognier, but, in reality, the information on a wine label is highly regulated. The FAA Act requires that all proposed wine labels be submitted to the TTB for approval before bottling.

Initially, the applicant submits a form to the TTB along with a complete set of proposed labels for approval. Labels are then evaluated by the TTB’s Advertising, Labeling and Formulation Division to ensure they comply with federal laws and regulations. Labels must provide adequate information to the consumer concerning the identity and quality of the wine and must not be misleading. If the wine label meets all the criteria, it is issued a Certificate of Label Approval, or COLA. Without a COLA, a wine cannot enter the stream of commerce.

While the process may appear straightforward, it is an administrative burden for wine businesses and the evaluators. The TTB reviews more than 100,000 alcohol labels each year, and to help streamline the process, it developed an online label submission process and revised its application form. Additionally, the TTB designated 23 conditions under which wine labels can be changed without applying for a new COLA. The addition of an internet address or a new vintage date on a preapproved label are examples of changes that do not require a new COLA.

The TTB also ensures that the label is true to the content of the bottle. If a wine has more than 7 percent alcohol by volume, the FAA Act spells out what information is mandatory and what is prohibited on the label. Mandatory information includes the brand name, the producer and bottler, as well as the alcohol content. Every wine label must also include two health warnings. The first is the statement that women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. This requirement was introduced by the Alcoholic Beverage Labeling Act of 1988 (ABLA).

### HOW TO READ A WINE LABEL

Wine bottles typically have a front and back label and may also have a label on the bottle neck. The front label, which may include artwork designed to entice the consumer, highlights the brand, grape varietal, and the wine’s place of origin. Unlike the front label, the back label is generally unregulated and often includes the story of the wine or the winemaker.

Some of the information on a label is mandatory. This includes:

- **The brand name.** On the front label is the name that the producer selects to identify its wine in the marketplace. The name can include the owner’s name, trademark, winery name, or geographic name. For example, Screaming Eagle is the brand name of a particularly valuable and sought-after cabernet sauvignon.

- **Name and address of the bottler or importer.** As in any other, the wine industry comprises varying levels of quality. The name of the bottler or importer can often tell a consumer what to expect.

- **Alcohol content.** If the wine alcohol content is 14 percent or greater, it must be so stated on the label. If the alcohol content is from 7 to 13 percent, the producer has the choice of stating the numeric alcohol content or placing the words “light wine” or “table wine” on the brand label. The alcohol content may be printed on the front or the back label. A little-known fact is that the stated alcohol content is not necessarily precise. Vintners are given a 1.5-percentage-point leeway, provided the wine does not exceed 14 percent alcohol. This means that a wine labeled 12.5 percent could be as high as 14 percent.

- **Net contents.** This is expressed in milliliters, and the standard wine bottle is 750 milliliters (25.6 ounces).

- **Declaration of sulfites.** Sulfites are a natural part of the grape and are frequently used on grapes in the vineyard to prevent mildew or at fermentation to prevent oxidation.

- **Health warning statement.** A mandatory warning that drinking alcoholic beverages during pregnancy may cause birth defects.

In addition to the mandatory content, labels may also have permitted information. This includes:

- **Grape varietal designations.** Chardonnay, Sauvignon Blanc, Merlot, and Zinfandel are examples of grape varieties with distinctive flavor profiles. The grape varietals customarily appear on the front label.

- **Appellations of origin.** American wineries may boast about the geographic pedigree of their wine and often place an appellation of origin on the label. Appellations are defined either by political boundaries, such as the name of a county or state or by federally recognized growing regions called American viticultural areas. Examples include the Stags Leap District or the Santa Lucia Highlands.

- **Vintage date.** This is the year the wine was produced. Most wines are produced when the grapes are harvested. This information is not mandatory, but most producers include it because it can reveal the grape quality, the wine’s ability to age, and the best time to drink the wine. Variations in weather and other conditions make each vintage unique. For instance, some believe that the 2011 vintage for Napa Cabernet Sauvignon was far from ideal because of excessive rains before the harvest, which affected the quality of the finished wine.

- **Voluntary disclosure of major food allergens.** This acknowledges that allergens such as egg whites and milk proteins are often used to fined and clarify wine. — E.F.

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enacting this law, Congress took pains to include a declaration of policy and purpose that the warnings promote the health and safety of the nation’s population. A violation of the ABLA subjects a malefactor to a civil penalty of up to $10,000 per day. Wines imported from outside the United States must either have labels printed with the warning or have what are called strip labels glued on each bottle with the necessary information. Another health issue is implicated with sulfites, which all wine contains. To alert those who may be hyperallergic to sulfites, wine labels must include the health warning that the wine contains sulfites.

The general rule with respect to all other label content is that it cannot be false or misleading. Examples of prohibited content include statements about the intoxicating quality of the wine as well as words or images that are obscene or indecent. Ventura-based Sine Qua Non Winery owner Manfred Krankl has a reputation for testing the limits of these terms. He once submitted a label featuring a nude man resting his head in the lap of a nun. The TTB rejected that label. The bureau also rejected a woodcut of a man leaning over a steering wheel with the name One Armed & Blind as a potential endorsement of driving under the influence of alcohol. The TTB also prohibits the use of content that is disparaging of a competitor, relates to the armed forces, depicts the American flag, or any other symbols that might mislead the consumer into believing that the product has been endorsed by the government. Under a related provision of a trade agreement between the United States and the European Union, U.S. wine labels cannot bear the terms “champagne,” “sherry,” “clos,” “sur lie,” or “late bottled vintage.”

Federal regulations also regulate labels, for example by prohibiting the use of health-related statements if they are untrue or tend to create a misleading impression. There are three general categories that are at issue: health-related statements, specific health claims, and health-related directional statements. Health-related statements suggest a relationship between the consumption of alcohol and health benefits or therapeutic effects on health. Specific health claims relate to wine’s effect on conditions or diseases and health-related directional statements refer consumers to a third party for information. The TTB evaluates these statements on a case-by-case basis and may require a disclaimer or some other qualifying statement to dispel any misleading impression. For example, one distilled spirits label that did not pass muster referred to its product as a “digestif.”

The recent interest in gluten content has resulted in winemakers touting their wine’s gluten-free character. In February, the TTB announced an interim policy stating that truthful, accurate, and nonmisleading gluten content statements would be permitted on labels and in advertisements, but the agency left open the option to modify the interim guidance when the FDA issues its final regulations on use of the term “gluten-free” on food labels. Truthful and specific statements about calorie and carbohydrate content in the labeling and advertising of wine are allowed on wine labels.

**Checking Retail Samples**

Winemakers are checked for compliance after wines enter the marketplace. Under the Alcohol Beverage Sampling Program (ABSP), the TTB selects bottles from retail shelves, checks the alcohol content, and reviews labels for missing information and for unauthorized revisions to the COLA. In 2013, the TTB sampled 154 wines and found that 37 were out of compliance. A common finding was that the alcohol content was higher than stated on the label, and in one case the government health warning contained errors. These samples may also be sent to the Beverage Alcohol Laboratory or the Compliance Laboratory for analysis. The TTB does not necessarily take a heavy-handed approach with the ABSP. If the violations are minor, such as a one-time failure to name the advertiser in radio, Internet, and print ads, the TTB will work with a licensee to ensure that it becomes compliant.

Because the wine industry’s regulatory landscape is vast, government agencies have placed a priority on education. Enacting new legislation and regulations can be an arduous process, so one way that the regulatory agencies have remained nimble is by issuing industry circulars and advisories. Agencies also announce new statutory requirements and corrective actions, and the TTB maintains on its Web site an Industry Circular archive that dates back to 1954. Although federal regulation of the wine industry is far-reaching, judicial decisions have recognized the broad power of the states to regulate in this area. In essence, the states may adopt any regulation short of total prohibition.

In California until 1954, the Board of

The industry circular gives explicit guidance on how to apply the advertising regulations to popular platforms such as Facebook, LinkedIn, YouTube, blogs, links, mobile apps, Quick Response Codes, and Twitter. For example, the TTB views a wine or winemaker’s entire page on Facebook as one advertisement, so mandatory statements need only appear once—either on the home page or on pages directly associated with it.
wine from a licensed winery. If the decoys are served, law enforcement may arrest the holder of the license. The criminal penalty for a first offense is a $250 fine, 24 to 32 hours of community service, or both. In addition, the ABC may impose a fine of $3,000 and a license suspension.

Advertisement and Sales

Because wine is hazardous, advertising or branding wine is subject to regulations that are distinct from those that apply to such products as clothing, cars, and household products. To protect the public, federal and state agencies exercise control to prevent wineries and wine retailers from utilizing misleading advertising content and to minimize the exposure of persons under the legal drinking age to alcohol advertising.

The government takes this role seriously and interprets the regulatory statutes expansively. The TTB has a brochure on its Web site that defines advertising broadly as “any written or verbal statement, illustration, or depiction which is in, or calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail.” New digital platforms such as Facebook, Twitter, and blogs that are being used to promote wines and sales create numerous ways to be out of compliance. The TTB, FTC, and ABC have accordingly shown interest in alcohol advertising regulation in online and social media.

Their concern is legitimate. A recent survey by the University of California, Davis, Graduate School of Management found that in social media, wine industry executives reported that their businesses use a variety of services, including Twitter, Facebook, Yelp, Instagram, Pinterest, and Trip Advisor to reach out to consumers. The research demonstrates that social media have fundamentally changed consumer decisions. Nielsen, a global information and measurement company, found that consumer decisions are now driven by the opinions and tastes of a global pool of friends and peers.

In May 2013, the TTB issued an Industry Circular to reinforce its position that the advertising provisions of the FAA Act and its implementing regulations apply to the types of social media that did not exist when the regulations were originally adopted. These regulations require that mandatory statements on alcoholic beverage advertisements be 1) conspicuous and readily legible, 2) clearly a part of the advertisement, and 3) readily apparent to the persons viewing the advertisement.

The May 2013 industry circular gives explicit guidance on how to apply the advertising regulations to popular platforms such as Facebook, LinkedIn, YouTube, blogs, links, mobile apps, Quick Response Codes, and Twitter. For example, the TTB views a wine or winemaker’s entire page on Facebook (the home page and pages directly associated with it) as one advertisement, so mandatory statements need only appear once—either on the home page or on pages directly associated with it. On the other hand, mandatory statements may not be hidden or buried in an obscure location. Winemakers should be aware, however, that any content on a Facebook fan page, even one created by a third party, is an advertisement and must be strictly monitored by the wine license holder.

With respect to Twitter and its 140-character limitations, the TTB has determined that it is impractical to require mandatory statements to appear in every tweet, so the conspicuous and readily legible mandatory information must appear on the Twitter profile page. Videos on YouTube can fall into the FAA Act definition of an advertisement and must include the mandatory statements within the actual video and not only on the Internet page where the video may be found. The FTC is also doing its due diligence by requiring the major alcoholic beverage advertisers to provide information about their Internet and digital advertising. However, the commission has not yet announced when it will release the findings of this information gathering or how they will affect the alcoholic beverage industry.

Industry Self-Regulation

The First Amendment limits the ability of the government to regulate truthful, nondeceptive alcohol advertising, even in the face of concerns about underage appeal. Thus, federal regulations cannot specifically prohibit alcohol advertisements that appeal to underage persons. For this reason, the FTC has long encouraged the alcohol industry to adopt and comply with self-regulatory standards to reduce the extent to which alcohol advertising targets teens. Several industry trade associations and digital media outlets have self-regulatory codes that apply to content and placement of alcohol beverage advertising. One example is the Wine Institute’s Code of Advertising Standards, which was adopted in June 2011. Its advertising restrictions, which must be followed by its membership, include: 1) models and personalities depicted as wine consumers should appear to be over the legal drinking age and be at least 25 years of age, 2) advertising in newspapers published by, or primarily for, a college or university is prohibited, 3) sports and entertainment figures used in advertising should not appeal to underage consumers, and 4) that age affirmation and age verification mechanisms on
Web sites are employed. Facebook and Twitter have voluntarily created alcohol guidelines for ads and stories on their platforms. Like the Wine Institute’s code, Facebook’s guidelines go beyond the restrictions of federal law. Facebook prohibits content that targets pregnant or nursing women or that links the operation of a vehicle or engagement in any sport or potentially hazardous activity, or violent, dangerous, or antisocial behavior with the consumption of alcohol. Whether self-regulation is effective is an open question. One study found that Facebook’s voluntary guidelines are openly flouted.

California’s ABC has utilized a different path regarding the regulation of Internet wine advertising and sales to consumers by recognizing that wineries and wine producers rely on promotion, marketing, and facilitation services of third-party providers (TPPs)—most often unlicensed online businesses that facilitate wine sales over the Internet. California was the first state to take a proactive role in regulating sales through TPPs and to proclaim that TPPs are not required to be licensed. In 2011, the ABC issued some guidance through a circular rather than through statutory or regulatory changes. This presumably will permit the ABC to modify the guidelines to meet its objectives as it expands its experience and understanding of how TPPs operate. In essence, a TPP can never sell, ship, or obtain possession of or title to wine. Instead, a TPP and the wine producer holding the ABC license must ensure that all wine is shipped directly from the producer to the consumer through legally compliant, third-party shippers. Overall, the rule is that licensees working with a TPP are ultimately responsible for the activities undertaken on its behalf.

The overarching point is that all those who are engaged in wine production, sales, and importation must have a good handle on the breadth and scope of wine laws. By encouraging and requiring responsible legal practices and conformance with federal and state regulations, government officials will no doubt continue to strive to find the appropriate balance between allowing the use of expanding technology to market wine and keeping the consumer protected.

4 See http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-e-commerce-case-online-wine-sales-and
MANY PUBLIC ENTITIES, nonprofits, and other member associations rely upon volunteers for emergency medical and fire services, education, and economic development, and in turn, many volunteers donate their time and services to promote the laudable goals of these organizations. Despite the importance of volunteers, they do not enjoy the same status and rights as full-time employees. Several recent court decisions make it clear that volunteers face an uphill battle if they sue for employment discrimination.

California’s laws protecting equal opportunity in the workplace are rooted in the Fair Employment and Housing Act (FEHA). The act’s antidiscrimination provisions were enacted to “protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement.” As such, the FEHA’s provisions make it unlawful for an employer to discriminate against a protected employee “in compensation or in terms, conditions, or privileges of employment.”

However, in order to benefit from the FEHA’s antidiscrimination protections, one must be an employee. The FEHA does not actually define who is an employee. Rather, the statute only includes exclusions for persons employed by close relatives and persons employed by nonprofit sheltered workshops and rehabilitation facilities. The statutory exclusion does little to shed light on who may or may not fit the definition of an “employee.” Therefore, California courts have had to look beyond the statute when assessing who is an employee entitled to the benefit of the FEHA’s antidiscrimination protections.

Courts have cited the definition of “employee” in regulations established by the Department of Fair Employment and Housing, which state that an employee is any indi-
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Ordinaries in the public sector and policy manuals or employee handbooks in the private sector typically define the appointment process for a volunteer. Even if these sources use some derivation of the word “appoint” to describe how an individual is awarded a volunteer position, the analysis does not end there. Rather, these same sources must be reviewed to see if there is a description of the process by which one is appointed to an employee position. For example, civil service rules typically describe how one is appointed to be a classified employee in the civil service system. The rules and provisions in these sources are the starting point for those attempting to show that they were appointed to a position.

Public Employees

Although volunteers at public employers have also attempted to argue employment by contract for the purposes of meeting the definition of an employee under Title VII, the argument has been largely unsuccessful. Unlike some private employment relationships, which may be governed by contract, the terms of public employment are typically governed by statute. As such, contracts cannot be used to circumvent statutory provisions controlling the terms and conditions of public employment. Therefore, individuals attempting to assert they are public employees for the purposes of an employment lawsuit must show employment in accordance with the applicable statute or local ordinance.

Because the antidiscrimination objectives and relevant wording of the federal antidiscrimination statutes are similar to the FEHA, California courts have also looked to federal authority on the subject. Title VII of the Civil Rights Act of 1964, which most closely approximates FEHA’s antidiscrimination objectives, “succinctly defines ‘employee’ as an ‘individual employed by an employer.’” The first element of the Title VII test of employee status requires a plaintiff to prove that he or she was hired by the putative employer. This first test requires that remuneration was provided in exchange for work.

Federal courts have applied this test to claims of employee status. The Second Circuit, for example, determined that an unpaid intern could not sue for sexual harassment under Title VII because she did not receive any financial benefit, and compensation is “essential” to the existence of an employer-employee relationship. In another case, the Eighth Circuit determined that a volunteer firefighter suing for sexual harassment who received $78 for responding to 39 calls, a life insurance policy, a uniform, a badge, and training, was not an employee under Title VII because she also had not make a requisite showing of remuneration.

California courts have followed suit in requiring a threshold showing of remuneration. In *Mendoza,* for example, the court considered Labor Code Section 3352, which excludes volunteers at public agencies from receiving workers’ compensation benefits. Based upon this statutory exclusion, California courts have determined that it would make little sense to find that a volunteer who is receiving no remuneration is an employee under the FEHA but not an employee for workers’ compensation purposes.

Even if an entity makes a policy decision to extend workers’ compensation benefits to volunteers, the receipt of those benefits by a volunteer may still not prove remuneration. In *Estrada v. City of Los Angeles,* the court of appeal determined that receipt of workers’ compensation benefits alone is insufficient to grant employee status. In that case, a former volunteer police reserve officer brought a lawsuit against a city alleging disability discrimination under the FEHA. The city’s administrative code included volunteer reserve officers within the definition of “employee” for the purposes of workers’
The FEHA’s provisions make it unlawful for an employee under the statute. True.

The FEHA clearly defines who meets the criteria of an employee under Title VII: A. The Second Circuit. True.
B. The Eighth Circuit. False.
C. The Ninth Circuit. False.
D. The Fifth Circuit. False.

The following category has been determined by California courts to meet the definition of an employee under Title VII: A. An individual hired under implied contract. True.
B. An apprentice. False.
C. An individual hired under express contact. False.
D. All of the above. False.

The FEHA includes exclusions for persons employed by nonprofit sheltered workshops and rehabilitation facilities. True.

The Department of Fair Employment and Housing defines an employee includes an individual who has been appointed by the employer. True.

The terms of public employment are usually governed by contract. True.

Written contracts can be used to circumvent provisions in statutes setting forth the terms and conditions of public employment. True.

Which federal statute most closely approximates the FEHA’s antidiscrimination objectives: A. Occupational Safety and Health Act of 1970. True.
C. Worker Adjustment and Retraining Notification Act. False.

An individual must show remuneration has been provided in exchange for work in order to qualify as an employee under Title VII. True.

This federal circuit recently determined that a volunteer firefighter suing for sexual harassment who received $78 for responding to 39 calls, a life insurance policy, a uniform, a badge, and training, was not an employee under Title VII: A. He had not signed an employment contract. True.
B. Management and employee protections. False.
C. Compensation or in terms, conditions, or privileges of employment. False.
D. None of the above. False.

Labor Code Section 3352 excludes volunteers at public agencies from receiving workers’ compensation benefits. True.

An individual’s receipt of workers’ compensation benefits alone is sufficient to qualify as an employee under the FEHA. True.

The California Legislature acknowledged the importance of remuneration in the employment relationship when enacting amendments to FEHA relating to which category of protection: A. Gender. True.
B. Race. False.
C. Age. False.
D. Disability. False.

For employee qualification under the FEHA, remuneration must come in the form of direct compensation. True.

A volunteer who only receives benefits from an employer consisting of clerical support and networking opportunities is still considered an employee. True.

The terms of public employment are usually governed by contract. True.

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compensation coverage only.\textsuperscript{27} Although the city had made a policy decision to extend workers’ compensation benefits to reserve officers, the court determined the consequence of this policy was not to convert uncompensated volunteers into employees for all purposes.\textsuperscript{28} The court noted that workers’ compensation benefits simply serve to make a volunteer whole in case of an injury while performing volunteer duties, and the benefits do not constitute remuneration.\textsuperscript{29}

\textbf{Remuneration}

The California Legislature has also acknowledged the importance of remuneration in the employment relationship. Specifically, when the legislature enacted amendments to the FEHA that extended its coverage to disabled employees, the legislature noted that by providing reasonable accommodations for disabled employees, employers were making the economy stronger by keeping people working who would otherwise be receiving public assistance.\textsuperscript{30} The legislature made it clear that disabled individuals needed to be compensated employees in order to benefit from the FEHA’s protection.\textsuperscript{31} There is no reason to believe the legislature’s statement regarding the FEHA’s protection of compensated employees is limited to the disabled.

Remuneration typically takes the form of direct payment of salary or wages. However, the court has also acknowledged that remuneration does not have to be direct compensation. In fact, even substantial indirect compensation that is not merely incidental to the activity performed, such as health insurance or vacation or sick pay can serve as evidence of remuneration.\textsuperscript{32} In one case, volunteer firefighters were found to have employee status because they received significant benefits, including disability pensions, survivors’ benefits, group life insurance, and scholarships for dependent children of deceased firefighters, all of which benefit the employee independently of the employer.\textsuperscript{33}

In another case, however, the only benefit provided to volunteer firefighters was participation in a service awards program, which conferred a financial benefit upon reaching a certain age if the volunteer accumulated a specified amount of service credit. Under this scenario, the court determined there was no “guarantee of consideration for the work performed,” because a volunteer might perform work but not accumulate the requisite amount of service credit and therefore receive nothing.\textsuperscript{34} Consequently, the volunteers in this situation were deemed not to be employees because they received no compensation for their work.

Similarly, when the only benefits being offered are incidental to the employer, such as clerical support and networking opportunities, a volunteer’s receipt of those benefits does not transform the volunteer’s status to that of an employee.\textsuperscript{35} Clearly, an individual in an unpaid position who does not receive any retirement, healthcare, insurance, tuition, reimbursement, or similar benefits cannot be said to have received remuneration, and thus does not meet the definition of an employee.\textsuperscript{36}

There may be circumstances in the nonprofit and nonpublic agency arena in which someone can show that he or she is an employee by virtue of having a contract or apprenticeship. Even if an individual can make this showing, he or she must still be able to show remuneration, and its absence will derail any efforts to prove the individual is an employee for the purposes of making a claim of employment discrimination under the FEHA.

There are some organizations, most notably in law enforcement, that have made the decision to include remuneration, sometimes significant remuneration, to its volunteers. Although the decision to include remuneration may be rooted in sound policy, these organizations must also understand that they are leaving themselves exposed to lawsuits based upon workplace discrimination. Discrimination lawsuits are expensive to defend, and if a plaintiff prevails they can include an award of attorney’s fees to the plaintiff’s counsel. Attorney’s fees awards can be significant even when they bear little relation to the underlying damages award.\textsuperscript{37}

Public agencies wishing to limit their exposure can take steps to ensure volunteers and other unpaid interns are not mistaken for employees. First, public agencies should ensure that local ordinances clearly define who is an employee. Second, they should state who is subject to the relevant ordinances, civil service, or other personnel rules governing employment with the public entity. Third, the rules should clearly state the employment provisions do not apply to volunteers. Fourth, the rules should clearly delineate the process by which appointments to there may be circumstances in the nonprofit and nonpublic agency arena in which someone can show that he or she is an employee by virtue of having a contract or apprenticeship. Even if an individual can make this showing, he or she must still be able to show remuneration, and its absence will derail any efforts to prove the individual is an employee for the purposes of making a claim of employment discrimination under the FEHA.
this is only a first step in asserting a claim under the FEHA, and the volunteer employee must still prove he or she was subjected to illegal animus based upon a protected category.

1 Gov’t Code §§12900 et seq.
2 Gov’t Code §12920 (The listed categories include “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation.”).
3 Gov’t Code §12940(a).
4 Shephard v. Loyola Marymount Univ., 102 Cal. App. 4th 837, 842 (2002) (“To recover under the discrimination in employment provisions of the FEHA, the aggrieved plaintiff must be an employee.”).
5 Id. at 847.
6 Id. at 847; Gov’t Code §12926(c).
7 Cal. Code Regs, tit. 2, §7286.5(b).
9 Id.
10 Id. at 629.
11 Id. at 633.
14 Mendoza, 128 Cal. App. 4th at 634.
15 Id. at 635.
23 Mendoza, 128 Cal. App. 4th at 637.
24 Lab. Code §3352 (“Employee” excludes any person performing voluntary services for a public agency or a private, nonprofit organization who receives no remuneration other than meals, transportation, lodging, or reimbursement for incidental expenses.)
25 Mendoza, 128 Cal. App. 4th at 635.
27 Id. at 155.
28 Id.
29 Id.
31 Id.
32 Id. at 636.
33 Pietras v. Board of Fire Comms’rs of Farmingville, 180 F. 3d 468 (2d Cir. 1999).
35 O’Connor v. Davis, 126 F. 3d 112, 115 (2d Cir. 1997).
37 Muniz v. UPS, Inc., 2013 WL 6284357 (9th Cir. 2013).
STATUTORY AUTHORITY concerning diminished mental capacity in decision making is comprehensive, but little case law exists on the public policy and practical concerns of allowing those with diminished capacity to dissolve a marriage. The recent California case *Marriage of Greenway* sets forth propositions that raise questions about the current applicable legal standards while solidifying the law regarding decision making by those with diminished capacity.

*Marriage of Greenway* holds, unless overruled, that the degree of mental capacity required to end a marriage is similar to the degree of mental capacity required to begin one. That is, while the ultimate determination of mental capacity is fact specific, the degree of mental capacity required to make decisions related to marital status is essentially the lowest level of mental capacity required to do almost anything as a functioning member of society.2

At first, that conclusion may seem logical, fair, and consistent with public policy regarding marriage and divorce. Indeed, the right to marry has been determined under the U.S. Constitution to be one of the “basic civil rights of man, fundamental to our very existence and survival.”3 Public policy favors marriage by offering significant economic benefits to married people. However, California public policy also firmly refuses to hold people in marriages that they do not want to maintain.4 Additionally, there are statutory protections in place for married people (fiduciary duties5) and for divorcing people (community property laws6).

However, it may be argued that the decision to marry is not the same as the decision to divorce. Are the consequences of divorce as comprehensible and predictable to the average person, let alone a person with diminished mental capacity? Should there be different considerations when the party with purportedly low mental capacity is the petitioner as opposed to the respondent? When might the low standard protect a spouse and when might it harm a spouse?

*Marriage of Greenway*

In *Marriage of Greenway*, the husband initiated divorce proceedings and the wife objected, claiming that her husband did not have the mental capacity to make a reasoned decision regarding his marital status.7 However, the husband insisted that he did have the requisite mental capacity. As evidence of his lack of capacity, the wife told the court that

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she thought her husband suffered from “cognitive mental impairment and short-term memory loss” possibly due to “metabolic insults” or “hydrocephalus,” and had been manipulated into filing for divorce by the parties’ adult son as a result of these mental impairments. The wife argued that allowing her husband to initiate divorce proceedings was not in his best interest and that he would be harming himself financially and otherwise if the court allowed him to proceed despite his mental deficiencies.

The husband insisted he was capable of making decisions regarding his marital status. As evidence, he stated that he “was fully aware when he signed the [initial] petition requesting legal separation” and ultimately amended his petition to request a dissolution of marriage stating that he “still wanted a legal separation [initially] and to manage his own financial affairs apart from [his wife],” and denied being manipulated by his son.

The trial court took testimony from multiple mental health professionals, all of whom, the court held, concluded that the husband suffered from some degree of dementia (defined by the trial court as “the loss of cognitive ability beyond what might be expected from normal aging”). The trial court held that, despite its understanding that the husband suffered from dementia, he had nevertheless evidenced that he had sufficient mental capacity to end his marriage because the husband was not so impaired that he was incapable of making a reasoned decision to do so. The trial court also pointed to the fact that “he was capable of expressing himself [regarding] the matter at issue, and [he] appeared to understand his obligations to tell the truth...he expressed humor and sarcasm....”

The court explained that the decision to marry should be considered in relation to other important decisions people make during their lives. As the court put it, “[M]ental capacity can be measured on a sliding scale, with marital capacity requiring the least amount of capacity, followed by testamentary capacity, and on the high end of the scale is the mental capacity required to enter contracts.”

The court explained that the level of capacity necessary to marry or divorce requires that one be able to form the intent that he or she wishes to do so. Similarly, In re Marriage of Higgason defined the mental capacity required to initiate a divorce as established if “the spouse is capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so.” In re Marriage of Straczynski also extended Higgason by adding a requirement that the initiating, incapacitated spouse must be able to maintain the proceeding if he or she is capable of continuing to exercise judgment and expresses the wish to end the marriage.

To define the requisite testamentary capacity, the court cited Probate Code Section 6100.5, which provides that a person must have the ability to understand the nature of the testamentary act, understand and recollect the nature of his or her assets, or remember and understand his or her relationship to family, friends, and “those whose interests are affected by the will.”

Finally, to define the mental capacity required to enter into a contract, the court looked to Civil Code Section 39, which provides that there is “a rebuttable presumption affecting the burden of proof that a person is of unsound mind...if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence.” With regard to contracts, the burden is on the party claiming capacity to contract. In sum, there is a rebuttable presumption that an individual has the mental capacity to marry, divorce, or execute a will but does not have the mental capacity to contract once a Civil Code Section 39 presumption arises.

The court’s approach of stages on the sliding scale raises several questions. Is it accurate to say that the decision to end a marriage requires only the lowest level of mental capacity? What if the wife in Greenway was correct, and her husband did not have the mental capacity to end the marriage and the parties’ children were taking advantage of him to benefit financially? What if the wife were protecting her husband, and the court’s requirement of only a low level of mental capacity did him a disservice?

The facts and holding of Higgason are similar to those of Greenway, but the holding in Higgason seems to ring more just. In Higgason, a wealthy 73-year-old woman initiated divorce proceedings against her 48-year-old husband, who entered the marriage with limited means. Before filing for divorce, the wife had declared that her husband caused her emotional distress and she sought orders restraining him from coming to the family residence. The husband objected, claiming that his wife did not have the mental capacity to initiate divorce proceedings.

The court considered the evidence and found that the wife was afraid of her husband and that she was competent enough to know that she was afraid. The court held that the wife was of sufficient mental capacity to initiate divorce proceedings because she was able to formulate a judgment and express a wish that the marriage be resolved. The court thus applied the lowest standard of mental capacity. If the court had applied a higher standard of mental capacity to the elderly woman, might she have been trapped in a violent marriage?

Both cases applied the same rule and came to the same result: decisions regarding marital status require only the lowest level of mental capacity, though Greenway seems to raise more questions. Does this rule comport with existing statutes and case law?

**Mental Capacity Determination**

The relevant part of the Due Process in Competence Determinations Act (DPCDA) is set forth in Probate Code Sections 810–12. The act expressly states that it broadly covers the capacity of persons to perform all types of actions, including, but not limited to contracting, conveying, executing wills and trusts, marrying, and making medical decisions. Thus, Greenway appears to be correct to categorize decisions regarding marital status along with these other decisions.

Section 810(a) provides that there “exists a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.” Section 810(b) goes on, “the mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.”

Probate Code Section 811(b)-(c) explains how and when a mental or physical disorder will support a determination that the person is not of sound mind to make a decision: “only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question...as well as the frequency, severity, and duration of periods of impairment.” That is, “there must be a causal link between the impaired mental function and the issue or action in question.”

Finally, Section 812 provides: a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following: (a) the rights, duties, and responsibilities created by, or affected by the decision; (b) the probable consequences for the decision maker and, where appropriate, the persons affected by the decision; and (c) the significant risks, benefits, and reasonable alternatives involved in the decision.

The Greenway court summarized Probate Code Section 812 as providing that “the required level of understanding depends entirely on the complexity of the decision being made.”
The Greenway court’s finding that a decision about one’s mental capacity to make a decision is dependent upon the facts seems to comport with the DPCDAs. The Greenway court asks how complex the decision at issue is and whether the person’s purported mental deficiency correlates in some way with that decision, understanding that all people are presumed competent. But why did the court hold that a decision regarding marital status is so simple? With regard to the decision to marry, the court cited Family Code Section 300. Under the code, marriage requires “the consent of the parties capable of making that contract,” and generally, “all persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.”

Maybe the decision to marry is simple and pure: people are in love and want the world to recognize it.

However, divorce, especially of a marriage with children and of long duration, can involve complex decisions, including custody, characterization of assets (of all kinds and complexity), the assessment and division of the marital estate, and payment of potentially long-term support. Indeed, entering into a settlement agreement to end a marriage—as opposed to having a judge decide the outcome via trial—involves entry into a contract. According to Greenway, this would require the highest degree of mental capacity.

In short, the difficult facts of Greenway create room for the argument that the two ends of the marital relationship should or may have different standards when it comes to the mental capacity of the people involved. To examine this issue, another recent case offers some illumination.

**Marriage of Lintz**

In Marriage of Lintz, the court addressed the question of whether the husband had the mental capacity required to execute enforceable testamentary documents. The parties married for the second time in 2005. Prior to the marriage, the husband had executed a complex estate plan along with several amendments, executed over the course of several years. Almost immediately after marrying, the husband executed additional amendments that increasingly provided the wife with more of the husband’s assets upon his death, disinheriting his children from a prior marriage. The later amendments had been prepared by an attorney of the wife’s choice at her direction. When the husband died in 2008 (a mere three years after the marriage), the husband’s family filed a complaint against the wife alleging financial abuse of an elder, breach of fiduciary duty, conversion, constructive trust, and undue influence. Although the court found that the deceased husband had testamentary capacity to execute all of the trust instruments, the court voided all of them on the grounds of undue influence and also found the wife guilty of conversion, elder abuse, and financial abuse.

Considering Probate Code Sections 810–12 and 6100.5, the court ultimately held that, despite the decisions at issue being nominally testamentary, the facts surrounding the instruments and the terms of the instruments rendered them very complex in nature, thus making the strict contractual standard appropriate, as opposed to the lower testamentary standard. The court held that the “trust instruments were unquestionably more complex than a will or codicil. They addressed community property concerns, provided for income distribution during the life of the surviving spouse, and provided for the creation of multiple trusts, one contemplating estate tax consequences, upon the death of the surviving spouse.”

The Lintz court analyzed Anderson v. Hunt to arrive at this conclusion. In Anderson, the court held that “Probate Code Section 6100.5 applied to the mental competency to make a will, not to a testamentary transfer in general.” The Anderson court supports the fundamental notion set forth in Greenway that the analysis and ultimately applicable legal standard is determined by the facts. Since Probate Code Sections 810–12, by their own terms, do not apply a single standard of contractual capacity, “capacity must be evaluated in light of the complexity of the decision or act in question.” Strict application of Probate Code Sections 811 and 812 dictates that a person’s ability to execute any testamentary instrument must be evaluated based upon the complexity of the specific terms of the trust at issue and whether the testator’s mental deficiency directly impacted his or her ability to make the decision to create that trust. The capacity to execute a trust “must be evaluated by [that person’s] ability to appreciate the consequences of the particular act he or she wishes to take.”

Anderson, therefore, is consistent with Greenway, although it appears to have gone a bit further than Greenway. Strictly applying Anderson to decisions regarding marital status may make it appropriate to consider the complexity of the marriage and divorce at issue, which could include, at a minimum, the custody of children, division of assets, and support.

Ultimately, the Lintz court adopted Anderson and held that the trial court had erred in applying Probate Code Section 6100.5 as opposed to the “sliding scale” of Probate Code Sections 810–12. The court held that the specific trusts at issue were incredibly complex (more so than a will or codicil) and that these needed to be taken into consideration. In Lintz, the court held that the husband was mentally capable of executing even the complex instruments at issue.

**Relevancy**

A case must be considered on its own facts, but when a question at issue is which facts are the most relevant to determining whether one has the mental capacity to become divorced, relevancy may seem unsettlingly subjective. In Greenway, the court emphasized the fact that the husband had previously executed durable powers of attorney for financial decisions and healthcare. The court stated that this
demonstrated the husband was of sufficient mental capacity to plan for his future. But looked at from another angle, the husband might have been forced to execute those documents. Therefore, caution is advised in assessing how much weight should be given to this factor.

However, the Greenway court also placed significant weight on its own observations of the husband in court. Because he was able to articulate his wishes and his understanding of the husband in court. Because he was able to articulate his wishes and his understanding of the consequences of the divorce proceeding, the court found him competent.

Ultimately, it seems that the Greenway court’s holding is proper, but that it should have been applied in more strict conjunction with the requirements of Probate Code Sections 810–12. That is, consider all of the relevant facts and then decide where on the scale the issue at hand should fall rather than find that because it is a divorce, the lowest level of mental capacity is the standard to apply.

The Anderson court seems to have gotten it right by finding that not all trusts are complicated and in fact some function more as wills. When that is the case, it is appropriate to apply Probate Code Section 6100.5 to a question about trusts even though, by its terms, that section applies only to wills. Alternatively, Probate Code Sections 810 et seq. clearly state that the existence of a mental deficit alone does not render a person incompetent. A question as to one’s ability to make decisions requires an assessment as to whether “the deficit...significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question...[including] the rights, duties and responsibilities created by the decision...the probable consequences;...and the risks and benefits of the decision.” When the issues in a dissolution are simple, the same impairment may not interfere with the ability to understand and appreciate the consequences of the divorce. That may not be true if the person with the same impairment has a very complex marriage and divorce.

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1 Family Code §760.
6 Prob. Code §760.
8 Id. at 632.
9 Id. at 633.
10 Id. at 637.
11 Id. at 637-38.
12 Id. at 639.
13 In re Marriage of Higgenbotham, 10 Cal. 3d 476 483 (1973).
15 Marriage of Greenway, 217 Cal. App. 4th 628, 642 (2013); see also In re Estate of Selby, 84 Cal. App. 2d 46, 49 (1948): “It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity.”
16 The wife also had a guardian ad litem, which the court did not find rendered her incapable of initiating divorce proceedings.
17 See Estate of Perkins, 195 Cal. 699, 704 (1925). Probate Code §811(b) states: “A defect in the mental functions listed above may be considered only if the defect, by itself, or in combination with one or more other mental function deficits, significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.”
19 Civ. Code §1556; see also Prob. Code §71.
21 Id.
22 Id.
24 Id. at 730.
25 The Anderson opinion also explained that the trust instruments at issue were, by their terms, essentially indistinguishable from a will or codicil, as the terms merely reallocated the trust estate, the lower mental capacity standard applicable to wills, Probate Code §6100.5, should apply, even though that section does not technically apply to trusts.
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Cost-efficient Ways to Improve Desk Space Productivity

IN A TIME OF RELENTLESS COST-CUTTING, lawyers have less support but still must deliver a product that meets client and company expectations. It is comforting to discover that there are devices and processes to boost productivity without a large investment in time or money. They include ways to expand the computer screen, different types of document scanners, alternatives to the mouse, speech-to-text software, and other tools to make desk space more productive.

Expanding the computer screen is a basic and relatively inexpensive strategy that can improve practice efficiency. In order to keep paper use down while reviewing and editing, it is helpful to have a screen that can display two documents legibly side by side. Being able to display documents simultaneously facilitates cutting and pasting between files. If one document is a reference source, it can remain visible as the other document is being edited. A 20-inch or greater screen with at least 1024 x 768 resolution (relatively standard for modern LCD screens) generally allows two documents to remain open side by side.

Another way to expand screen space is to add another display. Not long ago, in order to accomplish this, an additional or upgraded graphics card had to be added to the computer. Now, however, adapters allow the user to plug a video monitor cable into a USB port to run one or more additional displays, which makes the process easier and cheaper. When buying an adapter, though, caution must be exercised because some adapters mirror the display on a computer, similar to having two televisions showing the same program. This type of adapter can be useful with a small-screen laptop, when the benefits of working on a larger screen are desired, but for the capability of displaying different content or programs on multiple screens, an adapter that extends the desktop is best.

There are numerous cables and adapters on the market, but one that allows the user to extend the desktop must have a built-in graphics chip, for example, the UltraVideo USB 2.0 to DVI-I or VGA video adapter from Accell (www.accellcables.com). The unit is a little smaller than a deck of cards and has a USB cable at one end and a plug for a VGA monitor at the other, so it is portable for a laptop user. Once the software utility and drivers are loaded, the extra monitor can be plugged in. The multiple screens can be operated at different resolutions, which is helpful for screens of different sizes or for varying image size for easier reading. Moving from one screen to the other is accomplished by quickly moving the mouse to the edge of one screen until it appears on the other screen. Other similar adapters are available from Sewell (sewelldirect.com), Minideck USB to DVI SW 22857, and, at the higher end in terms of performance, Matrox (www.matrox.com), which makes units to connect two and three additional screens.

Scanners

Another easily implemented organizational step is to scan any paper documents that need to be kept for the files. Much has already been written about adapting desktop scanners of the sheet-fed variety, but in the case of bound documents, such as books, a two-step process is often the default solution. The pages can be photocopied and scanned (which is the only solution with a sheet-fed scanner), or, if a flat-bed style scanner is available, the pages can be scanned, the image edited to remove blackened areas from the border of the scan, and, in some cases, the page orientation adjusted to repair skewed pages. If the flatbed scanner has sufficient scanning area, two pages of a bound document can be scanned at a time.

Fujitsu recently introduced an overhead scanner, the ScanSnap SV600 (scanners.fcpa.fujitsu.com), which resembles a table lamp. Therefore, unlike most scanners, when this scanner is not in use, the area below the scanner is available for other uses. A book can be opened on the desk underneath the SV600 for scanning. Since it is designed for scanning bound documents, the software already has automatic and manual settings that adjust the scan image to compensate for the curve of the pages due to the binding. With some bound documents, it is necessary to hold down the pages by hand to keep them as flat as possible, but the hand marks are easily edited out from the final image. For larger projects a clear plastic pane from a picture frame works well on text but less so for pages with pictures of multiple colors and fine details.

The ScanSnap SV600 can also be used to scan delicate papers or objects that are too thick to insert into a sheet-fed scanner. The scanning area is up to 11.7 x 16.5 inches, which is wide enough to fit two letter-sized sheets of paper side by side. Moreover, the scanner can be set to scan when the pages of a book are turned or to scan at set intervals. While not as fast as a sheet-fed scanner, which can scan around 10 to 20 pages per minute, the SV600 takes about three seconds for a pair of pages. This speed is still faster than, or on par with, most multifunctional devices. Fujitsu also joins the SV600 with a software suite that can organize and edit the scans. Adobe Standard is bundled with the software as well as Abby Fine Reader for OCR support.

For small projects the camera in a smartphone can be used to capture images of pages. The camera images can then be moved to a computer. Two efficient ways to move photos to the computer are to send them as flat as possible, but the hand marks are easily edited out from the final image. For larger projects a clear plastic pane from a picture frame works well on text but less so for pages with pictures of multiple colors and fine details.

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Gordon K. Eng is a business transactions and real estate lawyer in Torrance. In connection with the preparation of this article the author received copies of some of the software and products from the manufacturer or developers for testing.
them by e-mail or, if synching the phone with a computer, by copying and pasting the images from the folder where the images are stored (digital camera images, or DCIM).

Most smartphones produce camera images in a .jpg format. There is also a range of other potential image formats that may be available on the smartphone, including .gif, .bmp, or .tif. There are various strengths with each format, but in order to simplify the mix of file formats stored on the computer, it will be necessary at some point to convert the camera images into PDFs. One solution is to add an application to the phone that automatically converts the camera image into a PDF. A broad range of free and not-so-free options is available. Some of the popular choices for Apple include iFiles Converter Lite, Doc Scan, TurboScan, and Genius Scan. For Android, they are CamScanner-Phone PDF Creator, Mobile Doc Scanner, Genius Scan, and DocScanner. The choices for Windows-based phones include Handyscan, Perfect Scan, and CamScanner.

The feature sets and user interface software for these applications are frequently changing. For most of these applications the paid version may be around five dollars, so user experimentation is fairly inexpensive. Some of the free choices with the resulting PDF files have advertisements or watermarks added to the scanned image.

Instead of using a smartphone to convert images into a PDF, the standard or professional versions of Adobe Acrobat are capable of converting the photos after they are transferred to a computer. The file can be uploaded to Acrobat.com through a browser or through the free version of Adobe Reader. There also are a number of other software solutions, including Primopdf by Nitro PDF Software and Free JPG to PDF by Free PDF Solutions.

There are a number of handheld scanners on the market shaped like a wand or a rectangular block a little larger than a cell phone that can be placed on the page to be copied and slid over the text to scan. Overall, however, the cost, ease of use, and size of handheld scanners make them less than competitive when compared with a high-volume desktop scanner or a smartphone application for less demanding use.

Mouse Alternatives

Although the mouse and keyboard are still the basic input and navigational devices used to interface with computers, touch-based screens on tablets and phones have improved in navigating the small screen. However, the efficiencies are less compelling on a standard desktop PC. For example, in a Windows 8 PC, the touch screen is a useful alternative to the mouse for navigation in serious word processing and spreadsheet creation, but the smudges on the screen left by touching it become very distracting. Also, the benefit of physical exercise in leaning forward to touch the screen and sitting back to work with the keyboard may not justify the time spent. Moreover, many programs are not yet optimized for touch screen use.

The answer may be to go big by having the entire desk turned into a touch screen. In 2007, Microsoft introduced the Surface (not to be confused with the tablet), a computer in which an entire tabletop is a screen with multitouch and multimedia capabilities. Unfortunately, at a price of $10,000 or more per unit, this product is not available to most consumers. A number of developers have invented methods of turning large television flatscreens into touch-capable screens. Some have modified a Nintendo Wii remote for use as a touch pen device for a modified touch screen. A more refined offering is made by Himalayas Touch Screen located in Hong Kong (www.himalayastouchscreen.com). While Windows 8 has various built-in touch capabilities, touch screen capability can be incorporated into a Windows XP up to a Windows 7 system. There will probably be many more developments in this area in the near future.

An incremental update to the mouse that may be useful is the Logitech Touchpad t-650 (www.logitech.com/en-us/product/touchpad-t650/). It is a wireless pad, approximately five square inches. It replaces the mouse in the same way as a touch pad on a laptop but is larger and can be moved to a more comfortable location. The left and right mouse button functions are achieved by pressing the lower left and right corners of the touch pad, which is large enough to handle touch gestures like pinching and multiple finger swipes. The Logitech Touchpad helps users make the transition to Windows 8 by providing a touch-capable surface for performing the various touch gestures. It is also a capable mouse replacement for Windows 7; however, lower versions of Windows and Apple operating systems are not supported. The Apple Magic Trackpad (www.apple.com/magictrackpad) is another standalone touch pad. It is similar in size to the Logitech.

Speech to Text

The dream persists that all the functions and capabilities of the computer can be activated by voice commands. Speech to text has been here for some time. For example, the Dragon Naturally Speaking Legal Edition version 12 was released in 2012 by Nuance Communications (www.nuance.com). Over the years Nuance has absorbed most of the speech recognition software developers.

Dragon Naturally Speaking continues to improve in accuracy, and every advance in computing power and storage expansion allows the software to operate more effectively. This may be a very efficient solution for users who cannot type at a reasonable speed, say 50 words per minute or faster, and who will commit the time to practice with the program and develop a speech pattern relatively free of verbal tics and inconsistent pronunciation.

While there has been an increase in accuracy from earlier versions of Dragon Naturally Speaking, there are still noticeable differences between computer and human transcription in screening out a speaker’s verbal tics and throat clearing. Also, a human transcriber can interact with the speaker to ask questions to better improve the accuracy of the transcription.

With the popularity of smartphones, everyone has a mobile recording device available to record thoughts and comments that can be downloaded to the computer for processing with a program like Dragon Naturally Speaking. Nuance offers apps for Android and Apple that allow the user to send audio files to Nuance for transcription, and there are several onshore and offshore companies that offer this service. However, for dedicated dictation a handheld digital recorder will likely have a higher quality microphone and greater functionality in terms of being able to advance, rewind, and insert information into a recording. It may be that the dedicated handheld digital recorder is going the way of the point-and-shoot digital camera as smartphones continue to advance in their capabilities, but for now the voice recorder is still a valuable tool.

The Philips Pocket Memo digital dictation recorder lineup carries forward the design of handheld tape recorders (www.dictation.philips.com). The DPM8000 is a recent handheld recorder. The sliding switch on the side of the device for advance, rewind, and stop is a convenient location for this control. Philips has its own transcription system that does not involve the use of Dragon Dictate. The Philips system uses files generated in a .dss format, but the settings can be adjusted in the handheld recorder to save files in an MP3 format suitable for Dragon Dictate. Sony has a few models, such as the ICDPX312D and ICDPX333D, among its handheld digital recorders that come bundled with Dragon Dictate, although it is not included in the legal suite.

Even though pressure continues to mount to do more with less, there is an ever-expanding inventory of cost-effective devices and processes that appear in the market for trial-and-error experimentation in the workspace that can help to bring the work environment up to the challenge.
The Need for a Reliable Test of Software Patentability

THE U.S. PATENT AND TRADEMARK OFFICE and the courts have long struggled with whether or not software should be patentable. While patent laws exist to encourage invention, monopolization of ideas—the building blocks of further invention—would be bad.

Recently, the U.S. Court of Appeals for the Federal Circuit faced the issue of software patent eligibility while sitting en banc for CLS Bank International v. Alice Corporation Pty. Ltd.1 While an equally divided court affirmed the district court’s holding that the claims in question were ineligible subject matter, the en banc decision consisted of several different concurrences and dissents with no single majority. The need to delineate what is unpatentable as an abstract idea is evident from these opinions.

The petitioner presented the issue as follows: “What test should the court adopt to determine whether a computer-implemented invention is a patent ineligible ‘abstract idea’; and when, if ever, does the presence of a computer in a claim lend patent eligibility to an otherwise ineligible abstract idea?”2

The patent claims at issue include a method and system for determining if both parties to a financial transaction, such as through a stock exchange, have sufficient means in their accounts to complete the transaction. The method or system uses a neutral, such as an escrow agent, who starts with an existing account balance for each of the transaction parties and keeps a running count of each party’s balance by debiting and crediting the balances during this period. An attempted transaction between the parties is only allowed if the parties have sufficient account balances. When it is time to settle, the neutral sends a message to the exchange stating whether or not to allow the transaction.

In Judge Alan Lourie’s concurring opinion, the approach was to determine the underlying abstract idea and then see whether the rest of the claim added anything to it or not (and thus monopolized the idea). The idea was determined to be “reducing settlement risk through intermediation.” Given that conclusion, anyone who implemented it would use a computer to gather credit record data, consisting of credit and debit transactions, and allow only transactions in which there was sufficient credit. The opinion further stated that a computer, even if required by the claims, “is just a calculator capable of performing mental steps faster than a human could.” 3 It is well accepted that mere mental steps are not patentable.

Unfortunately, determining the “idea” is not easy, and in doing so, one must dissect the patent claim. Long ago the Supreme Court said that it is “inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis.”4

Moreover, the court’s “idea” analysis is about novelty and nonobviousness, two completely different prongs of the test of patentability. Relying on this type of reasoning to determine patent-eligible subject matter will only make the struggle worse. When the Supreme Court heard oral argument on March 31, 2014, Justice Antonin Scalia wondered why implementing the method on a computer was not enough to show that the invention was patentable subject matter and indicated that the issue seemed to be the novelty of the program.

Since computer use has grown astronomically, and computers improve calculations and processing, the question of patentable subject matter arises often. In 1979 and 1980, the Supreme Court found that use of computer programs in a process did not automatically preclude patenting. For instance, if the process had a physical outcome—e.g., curing rubber—it could be patented. Similarly, the fact that the patent claim included a formula or idea did not preclude patenting.5

In a process patent, one cannot break up the process to see what was done before in order to determine if the only new aspect is an idea or mental step. One must look at the whole process to determine patent-eligible subject matter. In spite of its novelty, Einstein could not have patented the mere equation E=mc². However, designing a nuclear reactor that creates a certain energy output, in which E=mc² is used to determine an amount of radioactive mass to use could be patentable subject matter.

While some software patents may limit others practicing in the same field, limitation is what the patent system is about. Investment is encouraged by providing protection against competition for a limited time. Moreover, necessity being the mother of invention, when a patent that makes it difficult for others to operate is granted, the others are forced to innovate around the patent.6

As reliance on computers keeps growing, more of our best and brightest will move into software. Therefore, the need to protect invention and spur further invention in that area will only increase. The need to better understand the line between unpatentable mental steps and patentable software will also increase in importance.

By David Hoffman

3 CLS Bank Int’l, 717 F. 3d at 1286.
5 Id. at 184-85.

David Hoffman’s firm, Hoffman Patent Group, obtains and defends patents, trademarks, and copyrights.
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