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What is the most important professional attribute a lawyer must have? Is it knowledge of the law? A knack for thinking on one's feet during trial? The ability to use an engaging writing style to persuade? The list of potentials could go on and on. For me, the answer can be summed up in one word: integrity. A lawyer's reputation for integrity is a calling card that leads to success in all ventures. Fundamentally, personal integrity means an unwavering commitment to keeping one's word, to telling it like it is, and to using the power of truth to let the righteousness of a client's cause shine through for all to see. It is unfortunate that some lawyers choose the path of pettiness, coarse behavior, and downright misrepresentation.

A long-time supporter of Los Angeles Lawyer magazine, Judge Lawrence Crispo, presents annual seminars to new admittees on this very topic. He tells an anecdote about being a young practitioner with a growing reputation, who became privy to a cloakroom discussion between two judges. One judge said he had been impressed by a young lawyer in his courtroom that day. On hearing the young lawyer's name, the second judge said, “Yes, Crispo—I’ve had him in my courtroom—you can trust his word; it’s as good as gold.”

What better advice is there for lawyers, young and old alike, than the moral of Judge Crispo’s story: We should all strive to be the lawyer about whom judges say, “His word is as good as gold.” I can tell you that I have witnessed instances in which the practicing lawyer did not fare quite so well. One situation involved a lawyer about whom a federal district judge complained, “Mr. C., I am having difficulty accepting the veracity of any representation you make to this court.” In another case I handled, the trial judge was eager to get a settlement agreement signed while the jury—two weeks into the trial—cooled its heels in the hallway. When I said, “My clients have signed, but I don’t know if the other side will sign,” the judge said “Oh, they’ll sign—they’ll sign it in blood. Their bar licenses are on the line.” My wife later told me that if a judge ever said that about me, I may as well not come home.

Recently, a few lawyers at the top of our profession have fallen on hard times for ethical breaches. In my lifetime, two American presidents have lost their bar licenses for ethical improprieties. I doubt that any of these men awakened one morning, looked in the mirror, and said, “Today is a good day to lose my law license.” I suspect external pressures had much to do with the predicaments these lawyers faced, and those pressures are not significantly different from the pressures all lawyers face.

In this month’s issue, Thomas E. McCurnin writes about the Nuremberg defense as it applies to legal ethics. If an associate, acting on instructions of a partner, does something unethical or sanctionable, does the law provide the associate with a defense? Is it a pity that a young lawyer might find himself or herself in that situation to begin with, but one would hope that the lawyer’s moral compass is aligned with the practical reality that good ethics is good for business. After all, wouldn’t you want to tell prospective clients, as a young Larry Crispo could, that they should hire you because judges consider your word to be as good as gold?

This marks my last issue as chair of the Editorial Board of Los Angeles Lawyer. In these challenging times for print publications, the magazine continues to shine as a beacon for educational leadership in the Los Angeles legal community. I leave the chair to Mary Kelly, a sitting judge whose word is as good as gold.

Paul S. Marks is the chair of the Editorial Board of Los Angeles Lawyer magazine and a partner with Neufeld Marks, a boutique law firm located in Little Tokyo. He serves as a commissioner on the California Commission on Access to Justice.
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How the Law School Mock Interview Initiative Helps New Attorneys

WHILE THERE ARE NO FIRM FIGURES on the methods new attorneys use to successfully land their first jobs, it appears that recent graduates are less likely to get them through such traditional mechanisms as the on-campus interview than they were 10 years ago. But what other avenues are available? Networking, in all of its various forms, seems to be a good one to explore. Even before the recession, many career services offices were advocating informal interviews and connecting with alumni. It can be intimidating, however, for a law student to reach out with a cold call or e-mail to an attorney. To address this concern, last year the Barristers, a section of LACBA for attorneys younger than 36 years of age or those who have been admitted to practice for five years or less, launched a Law School Mock Interview Initiative. The idea behind the initiative is to provide a forum for pairing Los Angeles area law students with attorneys whom these students might not otherwise have an opportunity to meet. LACBA Barristers volunteer their time to have a law student who is interested in practicing in their field come to their office and act as if they were interviewing for a job. The volunteer Barristers and law students are matched by career services staff at area law schools based on practice area and interests. In this way, the networks of the students are broadened beyond that of their own law schools and internships.

Rachel Rothbart, assistant director of career services at USC Gould School of Law, helps facilitate this program. She encourages her students to participate by giving the following pep talk:

When asked, “How does one get to Carnegie Hall?” the answer of course is “Practice! Practice! Practice!” and the same is true for mock interviewing. Mock interviewing allows the candidate to hear the types of questions that might be asked and the answers that [he or she] might provide to the interviewer. By hearing both the questions and the answers, the candidates can better prepare themselves for when the real interview happens. In addition, the person conducting the mock interview can provide constructive feedback on the responses, the candidate’s presence, and mannerisms so they can continue to capitalize on their strengths and incorporate any suggested changes.

The goal of the initiative is to help with interviewing strategies and skills that have a proven track record of helping students and recent graduates secure jobs. It has the added bonus of providing an informal networking structure. It is up to the students and attorneys how interested in practicing in their field come to their office and act as if they were interviewing for a job. The volunteer Barristers and law students are matched by career services staff at area law schools based on practice area and interests. In this way, the networks of the students are broadened beyond that of their own law schools and internships.

Anthony Ngo, a 3L at Loyola Law School, understands the value of networking. This year, he was the pioneer in starting a liaison committee for the Barristers at Loyola and is this year’s president of that committee. The purpose of the student-run group is to provide law students with programs like the Mock Interview Initiative and network opportunities in informal settings, to encourage student interaction with local legal professionals, and to promote involvement with the Barristers. Anthony participated in the program and commented:

The mock interview was great! I really got an insider’s perspective of the challenges faced in trusts and estates practice, an area of the law that I want to practice in when I graduate. Mr. Zack Dresben provided excellent advice, not only about how to break into the estate planning industry but also shared practical tips for when I take the Bar Exam this summer. I will definitely be keeping in touch with Mr. Dresben. I would encourage all law students to take advantage of the opportunity if they have the chance.

To make the most out of a mock interview, some of the same principles apply as when preparing for a real interview. “Why are you seeking a position at our office?” will be one of the questions, so have a clear answer. In order to respond effectively to the question “What have you learned from your participation in law review, externship, or volunteer work experience?” review your resume before arriving and have a couple of talking points on each experience. Another favorite question is “What accomplishments have given you the most satisfaction?” Take advantage if you get this question instead of “What are your main weaknesses?” If asked “In what kind of work environment are you most comfortable?” relate how your professional preferences and personality intersect, explaining why you might be a good fit at that office.

It is important to prepare beforehand by learning about the person who will be conducting the interview or, if it’s a more informal setting in which the person’s identity is unknown, a little about the practice area of whom you expect will attend. Also, for informational interviews, ask if the attorney could connect you with anyone else in the field, so that you can expand your network further.

Like so many of these tips, it should go without saying, but be professional (in dress, language, and manner) even in informal settings. Afterwards, be sure to write a note expressing appreciation for the interviewer’s time and consideration. Finally, if you meet a contact with whom you would like to keep in touch, set a reminder to follow up with that person in a few months so you can create contacts as well as build relationships.

Laura Riley, an associate at Lavi & Ebrahimian, LLP, serves on the Barristers Executive Committee and chairs its Law Student Outreach Committee.
Liability Insurance Considerations for Wage and Hour Class Actions

**WAGE AND HOUR CLASS ACTIONS** are among the most vexing of claims for California employers. First, they are class claims and implicate a wide, if not total, scope of the workforce. Second, they can be expensive to defend against, even if they have little merit. Third, they tend to be based not on federal law but on a wide array of claims allowed under the California Labor Code. Fourth, the claims allow for hefty fines and penalties on top of statutory damages. Fifth, they often allow for an extra year of damages, because of a longer statute of limitations allowed for claims under California law than under federal law. Finally, insurance companies tend to deny or severely limit coverage for them.

According to one estimate, several wage and hour class actions are filed in California daily. It might be safe to assume that there are a fair number of reported cases addressing an insurance company’s duty to defend or indemnify an employer against them under an employment practices liability insurance (EPLI) policy. However, except for a few decisions, mostly unreported, California case law is quiet on the subject.

It is nonetheless necessary for an employer facing a class action wage and hour suit to undertake its own thorough insurance coverage analysis. Counsel can perform a valuable service for a client by explaining how and why coverage exists when that is the case, as it may be in many instances. If necessary, counsel may advise an employer to file suit against the insurance company should the insurance company still deny coverage.

California courts have long recognized that an insurance company “must defend a suit which potentially seeks damages within the coverage of the policy” and that “[a]ny doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured’s favor.” An insurer has a duty to defend a case in which the policy is ambiguous and the insured would reasonably expect the insurer to defend against the suit based on the nature and kind of risk covered by the policy, or if the underlying suit potentially seeks damages within the coverage of the policy. All that is required to trigger a duty to defend is “a bare ‘potential’ or ‘possibility’ of coverage.” The determination of this duty depends “on a comparison between the allegations of the complaint and the terms of the policy.”

Most EPLI policies predicate coverage on the existence of an allegation that an employer committed a wrongful employment act. The policies then proceed to define the kinds of acts that meet that definition, for example, discrimination, retaliation, sexual harassment, wrongful termination, or negligence in hiring, supervision, training, or retention. An allegation that the employer failed to “create or enforce adequate workplace or employment policies and procedures” is a solid hook for landing EPLI class actions as covered claims because a classwide claim that an employer failed to pay wages or provide benefits is a demonstrably arguable allegation of the principle.

However, this is not the issue in which an insurance dispute typically arises. While EPLI policies tend to be overly general in granting coverage, they also tend to be particular in the matter of exclusions from coverage. EPLI policies invariably carve an exclusion to coverage for wage and hour claims, which insurers regard as restitution. The purpose of insurance is to cover damages or loss, not to provide restitution. Damages are intended to give the victim monetary compensation for an injury to person, property, or reputation while restitution is intended to return to the victim the specific money or property taken.

Insurance companies argue that a suit for recovery of a wage is a claim in restitution—the employer allegedly retained the value of an employee’s service without paying for it. When the employer is forced to pay that value to the employee, the employer is not sustaining loss but is returning the value for the service rendered.

This distinction is important. If an employer can show a claim does not seek merely the return of value but something else that may be regarded as loss, then the concept of restitution will not apply, and the employer may recover that loss under the policy. For example, as discussed below, claims for employee reimbursement of workplace expenses under Section 2802 of the Labor Code constitute covered loss. Courts have expressly found there is no public policy bar to insuring awards allegedly based on a payment of wages.

A suit for recovery of a wage often involves a claim for a fine or penalty. These amounts typically are also excluded from insurance coverage. Fines and penalties often signify a kind of intentional conduct that public policy and statute bar insuring against. However, Labor Code requirements are arguably remedial, not punitive. The level of intentionality required to establish liability under the Labor Code is far lower than the kind of intentionality otherwise excluded by insurance.

Apart from these general prohibitions, the terms of the EPLI policy control, and these terms must be parsed to determine whether a given claim is excluded from coverage. See the table “Comparison of Labor Code Claims with Various Policy Exclusions” on page 10, which compares excerpts from actual EPLI policies of coverage exclusions for any claim under the Fair Labor Standards Act (FLSA) with the corresponding Labor Code claims.

The policyholder is aided in this analysis by three well-recognized insurance coverage principles. First, while the policyholder has the burden of showing that the claimed loss falls under the coverage provision, the burden shifts to the insurance company to prove that a policy exclusion applies. Second, the law insists that coverage clauses be interpreted broadly to afford the greatest possible protection to the policyholder. Third, exclusions must be construed “narrowly in favor of coverage.”

When a policy provision has no “plain and clear meaning,” courts “invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured’s reasonable expectation of coverage.”

David A. Shaneyfelt is an attorney with The Alvarez Firm in its Calabasas office. He represented Classic Distributing in Classic Distributing & Beverage Group, Inc. v. Travelers Casualty & Surety Company of America.
### Comparison of Labor Code Claims with Various Policy Exclusions

<table>
<thead>
<tr>
<th>Common Class Action Labor Code Claims</th>
<th>Expressly Excluded?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
</tr>
<tr>
<td>Failure to pay daily overtime¹</td>
<td>Yes</td>
</tr>
<tr>
<td>Failure to weekly overtime²</td>
<td>Yes</td>
</tr>
<tr>
<td>Failure to pay minimum wage³</td>
<td>Yes</td>
</tr>
<tr>
<td>Misclassification of employee⁴</td>
<td>Yes</td>
</tr>
<tr>
<td>Improper tip pooling⁵</td>
<td>No</td>
</tr>
<tr>
<td>Unlawful wage deductions⁶</td>
<td>No</td>
</tr>
<tr>
<td>Failure to pay wages when due⁷</td>
<td>No</td>
</tr>
<tr>
<td>Unlawful bonus plan⁸</td>
<td>No</td>
</tr>
<tr>
<td>Failure to pay meal breaks⁹</td>
<td>No</td>
</tr>
<tr>
<td>Failure to pay rest breaks¹⁰</td>
<td>No</td>
</tr>
<tr>
<td>Unlawful commission chargebacks¹¹</td>
<td>No</td>
</tr>
<tr>
<td>Failure to reimburse employee expenses¹²</td>
<td>No</td>
</tr>
<tr>
<td>Failure to reimburse employee uniforms¹³</td>
<td>No</td>
</tr>
<tr>
<td>Wrongful forfeiture of vacation¹⁴</td>
<td>No</td>
</tr>
<tr>
<td>Failure to provide itemized wage statements¹⁵</td>
<td>No</td>
</tr>
</tbody>
</table>

**NOTE:** Column headings are as follows:

(1) “any similar provision of federal, state or local statutory law or common law”
(2) “similar provisions of any federal, state or local statutory wage and hour law”
(3) “the state or local equivalent of such statute”
(4) “any such law that governs wage, hour and payroll policies and practices”
(5) any law “governing or related to the payment of wages, including the payment of overtime, on-call time or minimum wages, or the classification of employees for the purpose of determining employees’ eligibility for compensation under such law(s)”
(6) “any similar law—regulating wage and hour practices such as unpaid wages, improper payroll deductions, improper employee classification, failure to maintain accurate time records, failure to grant meal and rest periods, or social security benefits”

(Emphasis added to highlight distinguishing features.)

¹ Lab. Code §510.
² Id.
³ Lab. Code §1194.
⁵ Bus. & Prof. Code §7200.
⁷ Lab. Code §203.
⁸ Lab. Code §§221, 400-410, 3751.
⁹ Lab. Code §226.7.
¹⁰ Id.
¹¹ Lab. Code §221.
¹² Lab. Code §2802.
¹³ IWC Wage Order No. 7-2001 §9.

### Exclusions under California Dairies

The coverage of California wage and hour claims under EPLI policies is nearly absent among reported cases. With the exception of a case from Kansas, only one reported case exists—California Dairies, Inc. v. RSUI Indemnity Company—and that case (a federal case) offers only some help in determining which claims are covered and which are not. The U.S. District Court for the Eastern District of California examined which of seven causes of action fell within an insurance policy’s exclusion for claims alleging a violation of the FLSA “or any similar provision of federal, state or local statutory law or common law.”¹¹ The FLSA regulates minimum wage, overtime pay, equal pay, and child labor.

In contrast, the Labor Code regulates far more extensive matters than those involving minimum wage or overtime pay. The Labor Code is unique among state labor codes elsewhere, which are typically coextensive with the FLSA. Insurance companies, however, write policies on a national basis and do not write exclusions simply for the California Labor Code. Consequently, policyholders are treated to the kind of language California Dairies addressed in which courts must determine whether or not Labor Code claims are similar to the FLSA.

In a methodical analysis of each of the claims, the court concluded that four causes of action were excluded from coverage, because the Labor Code provisions on which they were based were similar to the FLSA: 1) failure to pay minimum wage, 2) failure to pay regular and overtime wages, 3) failure to provide mandated meal periods or pay an additional hour of wages, and 4) failure to provide mandated rest periods or pay an additional hour of wages.²² The court also concluded that three causes of action were not excluded from coverage, because the Labor Code provisions on which they were based were not similar to the FLSA: 1) Section 2802: failure to reimburse employees for workplace expenses (in that case, costs incurred for company-required uniforms), 2) Section 226(a): knowing and intentional failure to provide itemized wage statements, and 3) Sections 201-02: failure to pay wages due at termination.²³

Nevertheless, California Dairies is of limited precedent because the decision was appealed to the Ninth Circuit Court of Appeals and affirmed on other grounds in an unpublished decision.²⁴ Other grounds were
based on a different policy exclusion—the insured versus insured exclusion typically found in director and officer insurance policies, which the policy at issue was.

Moreover, the employer in California Dairies had to make the losing argument that the claims arose under specific policy language that defined an EPLI wrongful act as an “[e]mployment-related misrepresentation to an Employee,” or, alternatively, a “[f]ailure to provide or enforce adequate or consistent organizational policies or procedures relating to employment.”25 The Ninth Circuit found no coverage to exist, in part because the underlying wage claim alleged no misrepresentations and nothing organizational about the workplace policies and procedures at issue—a modifier usually not found in EPLI policies. Conversely, a different employer found a basis for coverage under similar language because of the specific allegations in the complaint—the wage and hour plaintiff alleged that the employer had disseminated false information regarding whether employees were eligible for overtime wages, which was tantamount to a claim for an “employment-related misrepresentation.”26 While California Dairies is useful for analytical purposes, the decision is of limited application because of the facts and policy language at issue.

Three other cases, although unreported, sheds some light on these issues. The court in Classic Distributing & Beverage Group, Inc. v. Travelers Casualty & Surety Company of America27 ruled that wage statement claims fall within a policy’s exclusion for claims under any law “governing or related to the payment of wages, including the payment of overtime, on-call time or minimum wages, or the classification of employees for the purpose of determining employees’ eligibility for compensation under such law(s).”28 Comparing Classic Distributing with California Dairies reveals that a policy excluding claims based on laws governing or related to the payment of wages will exclude a wage statement claim whereas a policy that excludes claims based on laws similar to the FLSA will not.

An unreported decision from the Central District, TriTech Software System v. U.S. Specialty Insurance Company,29 offers a similar analysis in reliance on California Dairies to apply a policy’s FLSA exclusion to Labor Code claims for overtime and for unpaid meal and rest breaks. Unfortunately, the court does not explain why such claims are similar to FLSA claims, when, arguably, they are distinct—the FLSA imposes no requirements for unpaid meals or rest breaks.30

Finally, in another unpublished decision, SWH Corporation v. Select Insurance Company, an insurance company argued that its exclusion for “similar provisions of any federal, state or local statutory law or common law” served to exclude a variety of claims under the Labor Code.31 The court of appeal found this exclusion to be impermissibly vague and ambiguous, as there was no reason to think it was intended to exclude all claims under the Labor Code. Accordingly, the employer was entitled to prove that certain aspects of the class action settlement obtained with the plaintiff were covered under the employer’s EPLI policy.

Defense and Indemnity Potentially Available

The various distinctions among exclusions can mean the difference between some coverage or no coverage. If some coverage exists, the employer may at least be entitled to a defense of the class action, and that defense must extend to all claims in the suit, covered and noncovered.32

The duty to defend is especially relevant to those EPLI policies that promise a sublimit for coverage of wage and hour suits. For instance, a policy might offer $1 million in general defense and indemnity of EPLI claims, and a $100,000 sublimit solely for defense of wage and hour claims. To the extent an employer can show that some of the class claims do not fall within the wage and hour exclusion, the employer will be entitled to $100,000 for the defense of narrowly defined wage claims but up to $1 million for defense of all claims falling outside this narrow definition.

Indeed, an employer might well justify entitlement to indemnity for many claims as well. The remedies available under the Labor Code are extensive and may be covered as loss under an EPLI policy. In Classic Distributing, for example, the court rejected the insurance company’s argument that the remedy allowed under Section 2802 of the Labor Code—for employee reimbursements—is uninsurable restitution. The court ruled that the remedy “is more akin to damages than restitution,” because “[i]t would be difficult to characterize the employer’s payment as ‘restoring’ anything given that the plaintiff can recover only if he establishes that his purchases were ‘necessary,’ that he was not reimbursed by employer, and that his ‘costs’ were ‘reasonable.’”33

The requirement for such affirmative proof “sweeps Section 2802 awards outside any plausible reading of the words ‘return’ or ‘restore.’”34

Also, simply because many Labor Code provisions refer to relief as a penalty does not mean that relief is a penalty excluded from coverage. For example, the Labor Code provides multiple remedies for wage statement claims. One provision, Section 226(e), allows the employee to recover amounts “not to exceed an aggregate penalty” of $4,000, plus costs and attorney’s fees. Another provision, Section 226.3, authorizes a civil penalty of $250 per employee per violation. But the former provision is more in the nature of a liquidated damage, not a penalty, in which case insurance should cover it.

Such a distinction is recognized in other areas of the Labor Code where, for example, damages for meal and rest breaks under Section 226.7 are deemed wages and not penalties for purposes of determining which statute of limitations applies.35 In fact, the remedies under the Labor Code, which afford individual employees with private remedies (though called penalties), are distinct from the uninsurable penalties of city ordinances,36 uninsurable fines imposed through criminal conviction, or civil proceedings prosecuted by the state in the exercise of its police power and regulatory authority.37

Finally, two other claims commonly appearing in wage and hour class actions are claims under Section 17200 of the Business and Professions Code and claims under the Private Attorneys General Act (PAGA).38 The former claim is typically added because it piggybacks onto other Labor Code claims and alleges the claimed statutory violation constitutes unfair competition under Section 17200. Because Section 17200 is governed by a four-year statute of limitations, Section 17200 claims that follow Labor Code claims effectively turn a three-year statute of limitations into a four-year statute of limitations. While no damages can be awarded under Section 17200, attorney’s fees can be awarded under PAGA when the plaintiff is shown to have vindicated “an important right affecting the public interest.”39 Thus, a plaintiff’s success in proving a classwide claim under Section 17200 will justify an award for attorney’s fees under PAGA. In that case, while PAGA fines and penalties might not be regarded as damages or loss under an EPLI policy, an award of attorney’s fees under PAGA can be and would be covered along with any other attorney’s fee award under some other provision of the Labor Code.

It is important for employers and their attorneys to parse an EPLI policy carefully and to compare its language against allegations in class action wage and hour complaints. Doing so can mean the difference between coverage for the defense, and possibly indemnity, or no coverage whatsoever.

4. Foster-Gardner, Inc. v. Nat’l Union Fire Ins. Co. of
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5 Montrose, 6 Cal. 4th at 300.
7 Bank of the West v. Superior Court, 2 Cal. 4th 1234 (1992) (ruling that restitution ordered under the Unfair Business Practices Act is uninsurable).
11 INS. CODE §533.
17 Powerline Oil Co., Inc. v. Superior Court, 37 Cal. 4th 377, 391 (2005) (internal quotes omitted); see also Civ. CODE §1654.
21 Id. at 1029.
22 Id. at 1039-44.
23 Id. at 1044-48.
25 Id. at 722-23.
28 Id. at *9.
30 See also Big 5 Corp. v. Gulf Underwriters Ins. Co., No. CV 02-3320 WJR(SHx), 2003 U.S. Dist. LEXIS 27209, at *9 (C.D. Cal 2003) (tentative ruling that a claim for overtime under the Labor Code is similar to the same claim under FLSA).
32 Busi v. Superior Court, 16 Cal. 4th 35, 61 (1995) (An insurer’s duty to defend even one claim in a complaint extends to all claims in the complaint, even to those that are not otherwise covered under the policy.).
33 Classic Distributing, 2012 WL 3865597, at *8 (citing Civ. CODE §2802(1)).
34 Id. at *8.
38 LAB. CODE §§2698 et seq.

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COMICS HAVE LONG HAD TO contend with joke thieves and have resorted to filing suit to protect their material. It is reasonable for those who create and perform comedy to have an ownership interest, and copyright applies to any expressible form of an idea or information that is substantive and discrete. Recognized rights holders are to be credited and have the ability to control adaptations and performance of their work and to financially benefit from it. It is well established that jokes become subject to copyright protection when reduced to a tangible medium, but those accused of joke stealing have cited equally well established defenses, for example Section 107 of the Copyright Act.

In the 1980s, the comic Joan Rivers sued a male performer who impersonated her in a Las Vegas show. She alleged copyright infringement, claiming that the performer, Frank Marino, used copyrighted material and that advertising for the show was misleading. Marino did the act three times a night at the Riviera Hotel as part of a show that featured female impersonators. The lawsuit settled out of court, and Marino later conceded that after Rivers asked him to take out some material, he complied. Marino argued, on the other hand, that it is not possible to impersonate Rivers without using some of her material. Marino further took the position that “comedians borrow from each other all the time. Joan does it, too.” Following resolution of the lawsuit, the two comics reconciled and even appeared together on television.

Had the case proceeded to judgment on the claim for copyright infringement, Rivers may have had difficulty establishing liability. Copyright protection subsists in original works of authorship fixed in any tangible medium of expression. In order to possess a valid copyright, one must establish that he or she is the author or creator of the original work. To establish copyright infringement, a plaintiff must show ownership of a valid copyright and unauthorized use by defendant.

Tangible Medium

Although comedians may start with a written work such as a script, the performance of the work rarely occurs without deviation. As a result, copyright may not issue for a particular work because the work of authorship is not fixed in the manner necessary to establish a basis for protection. Stated differently, it is not possible to predetermine a script for a performance that involves, for example, audience interaction. Accordingly, the only protection that may exist for the writer-performer is the right to protect that singular performance but not the right to stop others from making their own performances from the content. As a result, the joke “thief” could prevail.

Like live performance, another less-than-tangible medium is a pitch. In 2010, Jared Edwards sued his former employer, the Wayans brothers comedy team, for copyright infringement. Edwards claimed that he proposed jokes to them on the theme of, “You know you’re a golddigger when.....” The brothers later published a book with the title 101 Ways to Know You’re a Golddigger. Edwards contended that after pitching the book to the Wayans brothers, they sold it to a publisher and took credit for its content without his knowledge or permission. The defendants countered by asserting that if the plaintiff authored the work, he did so in his capacity as an employee, and that the material constituted a work made for hire. Section 101 of the Copyright Act defines a “work made for hire” as either a work prepared by an employee within the scope of employment or a work specially ordered or commissioned for certain uses. The defendants also argued in the alternative that the material was a joint work or “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”

In the Ninth Circuit, courts considering joint authorship rely on Siegel v. Time Warner, Inc., and Ashton-Tate Corporation v. Ross and examine three issues: 1) whether the work consists of interdependent or inseparable components that were merged to create a unitary whole, 2) whether the work was created by two or more authors with the intention that their components be merged, and 3) whether each component is independently copyrightable. On summary judgment, Judge Manuel Real concluded that there was a genuine issue of material fact as to the plaintiff’s claim. The case settled 10 days short of trial.

While in the gold digger case the Wayans brothers stood together as defendants in a copyright action, in another case one
comedian sued his brother in a trademark action. Under the Lanham Act, trademarks provide a limited property right in a particular word, phrase, or symbol and aid in the identification of the manufacturer or sponsor of a good or the provider of a service. Like manufacturers of hard goods, comedians rely on branding in an effort to promote source identification. In this regard, branding is synonymous with trademarking. However, if the material and style are well received, others may appropriate portions of the act. When this occurs, a claim for infringement of an unregistered trademark is a plausible remedy.

In the early 1990s, prop comic Leo Gallagher’s younger brother, Ron Gallagher, asked him for permission to perform shows using the Sledge-O-Matic routine. Ron granted permission on the condition that Ron make it clear in promotional materials that it was Ron and not Leo who was performing. After several years, Ron began promoting his act as Gallagher Too or Gallagher Two. In some instances, Ron’s act was promoted in a way that provided no clue to prospective attendees that they were not seeing Leo.

Leo at first attempted to stop his brother from performing. In August 2000, after those efforts had proven futile, Leo sued his brother for trademark infringement and false advertising. Section 43(a) of the Lanham Act proscribes trademark infringement as any commercial activity that applies “any...[word, phrase or symbol]...likely to cause confusion, or to cause mistake, or...deceive as to the affiliation, connection, or association of such person with another person or as to...the sponsorship, or approval of his or her goods, services, or commercial activities by another person” and authorizes civil action to be taken by any party injured by the activity.

The parties reached an agreement that included a stipulated dismissal with prejudice. Since then, Ron Gallagher has been effectively stopped from bearing likeness to and performing any act that impersonates the prop comic in small clubs and other commercial venues.

While Jared Edwards claimed that he had been wronged when “You know you’re a golddigger when...” became a book with a slightly different title and his former employers took credit as authors, comedian Jeff Foxworthy may have felt wronged—or flattered—by Edwards. Foxworthy filed suit against another party however, after learning the company, Custom Tees, was engaging in the sale of shirts displaying changed versions of Foxworthy’s well-known redneck jokes. Custom Tees had reversed the order of premise and punch line. One shirt, for example, read, “If you’ve ever financed a tattoo...you might be a redneck.” Foxworthy filed suit, contending that the T-shirts violated his copyright and trademark rights. Foxworthy claimed a copyright only in the second part of each of his redneck jokes. With respect to the recurring first part of these jokes—that is, “You might be a redneck if...”—Foxworthy claimed a common law trademark and asserted that the defendants’ T-shirts made use of the mark in a way likely to confuse consumers regarding the source of defendant’s products.

The court’s trademark analysis focused on the commercial use of “You might be a redneck if...” Specifically, the court considered the likelihood of consumer confusion regarding the source of the goods under Section 43(a) of the Lanham Act. On a motion for preliminary injunction, the court held that Foxworthy was likely to prevail on this claim. “You might be a redneck if...” had, the court held, attained secondary meaning because it had become Foxworthy’s noted tagline.

In analyzing the claim, the court addressed the distinction of types of confusion. One customer’s not actually being confused at the point of sale does not change the likelihood that others may associate a Custom Tees shirt with Foxworthy, whether at the point of sale or among the public after sale. The court granted Foxworthy’s request for a preliminary injunction, finding that Custom Tees’s use of the redneck jokes would confuse the public into assuming that they were approved by Foxworthy, which gave the company an unfair competitive advantage.

First Amendment Protection

While courts recognize that copyright and trademark laws protect the rights of authors and creators of intellectual property, including redneck jokes, not all who build from what already exists are aptly characterized as infringers. The First Amendment provides a virtual shield for liability when the alleged infringer establishes the use is fair, that it constitutes parody, or that it is a statement on an issue of public interest.

The doctrine of fair use attempts to balance the rights of copyright owners with society’s interest in allowing copying in certain limited circumstances. This doctrine has at its core a fundamental belief that not all copying should be banned, particularly in socially important endeavors such as criticism, news reporting, teaching, and research. Although the doctrine of fair use was originally created by the judiciary, it is now set forth in the Copyright Act as four factors to be considered in determining whether a specific action is a fair use: 1) the purpose and character of the use, including whether such use is of commercial nature or for nonprofit educational purposes, 2) the nature of the copyrighted work, 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and 4) the effect of the use upon the potential market for or value of the copyrighted work.
SPDS’s motion to dismiss based on the fair use affirmative defense. The U.S. Court of Appeals for the Seventh Circuit affirmed. The Seventh Circuit explained that central to determining the purpose and character of a new work is whether it merely supersedes the original work or instead truly adds something with a further purpose or of a different character. The underlying purpose and character of SPDS’s work was to comment on and critique the social phenomenon of the viral video. Brownmark’s video exemplifies the viral video, and the South Park video lampoons viral videos by imitating Brownmark’s viral video. The South Park episode places Butters’s WWITB video alongside other YouTube hits. The Seventh Circuit stated that this kind of parodic use has obvious transformative value, which is fair use. The creative and expressive nature of the original WWITB places the work within the core of copyright protection. The Seventh Circuit concluded its analysis by pointing out the irony that SPDS’s parody cannot have an actionable effect on the potential market for or value of the original WWITB video because there is no “Internet money” for the video itself on YouTube. Any effect on the derivative market for criticism is not protectable.

Judge Learned Hand wrote many years ago, “No plagiarist can excuse the wrong by showing how much of his work he did not pirate.” A district court in New York has stated the corollary to this rule: “nor can a plagiarist excuse the wrong by showing how much of the copied work he did not pirate.” While comedians are vulnerable to theft of their more ephemeral material, fixing it in a tangible medium such as a book offers protection. Trademark law may also protect a tagline as recognizable as “you might be a redneck.” The First Amendment parody defense, however, is available to those who make a new joke out of someone else’s older one.

1 See, e.g., http://web.law.columbia.edu/intellectual -property/areas-law/copyright.
2 17 U.S.C. §106
9 Siegel v. Time Warner, Inc., 496 F. Supp. 2d 1111, 1114 (C.D. Cal. 2007); Ashton-Tate Corp. v. Ross, 916 F. 2d 516, 521 (9th Cir. 2000).
17 Id. at 1216.
20 Id. at 3; see also, e.g., http://legalnewsline.com/issues /unusual-lawsuits/236497-seventh-circuit-affirms-south -park-fair-use-ruling.
22 Brownmark Films, No. 11-2620, at 11 (citing 17 U.S.C. §107 and its preamble); see also Campbell, 510 U.S. at 597 (“[P]arody, like other comment or criticism, may claim fair use under §107.”).
23 Id. at 592.
24 Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. 2d 49, 56 (2d Cir. 1936).
THE FAIR USE DOCTRINE has recently been tested in decisions from the Second and Ninth Circuits as well as the Google Books cases,¹ which concern the scanning of millions of copyrighted works for sharing by university libraries and other institutions and for full-text searching online. In a related development, the House of Representatives heard testimony in January 2014 as to whether Congress needs to make adjustments to the Copyright Act with regard to the fair use doctrine in general and the test for transformative use in particular. The outcome of the Google Books cases raises the question of whether fair use doctrine is in need of a congressional overhaul.

In September 2005, the Author’s Guild and a handful of authors filed a class action complaint against Google for copyright infringement and for injunctive and declaratory relief in response to the Google Books program,² which encompassed two different efforts. The first was the noncontroversial Partner Program, in which Google hosted and displayed digital copies of works provided by publishers and others with the aim of “helping publishers sell books and helping books become discovered.”³ The second effort was called the Library Project or the Mass Digitization Project (MDP) and involved the scanning of more than 20 million books held by the New York Public Library, the Library of Congress, and some university libraries.⁴ The process was straightforward. Google scanned the books, made digital copies of the books available to participating libraries, and maintained digital copies of the books for itself, all without the consent of the copyright holders.⁵

In doing so, Google used optical character recognition technology, which renders a complete, text-searchable version of the original written work.⁶ The same technology enabled Google to create an index of all the works that it scanned.⁷ The result is a database that users can search, with the results including verbatim snippets of the books at issue.⁸ The plaintiffs argued that the Google

Edward E. Weiman is a partner in the Los Angeles office of Kelley Drye & Warren LLP who represents film, television, and other entertainment companies in intellectual property, entertainment, and general business litigation.
Books project infringed on the copyrights in their works, while Google defended the project on the grounds that it constituted fair use under Section 107 of the Copyright Act.9

In a companion case filed in the same court in September 2011 but assigned to a different judge, the Authors Guild and others sued an entity known as the HathiTrust for copyright infringement and injunctive relief in connection with the Google Books project.10 The HathiTrust is the service by which the University of Michigan, in partnership with other universities and institutions, created and shared the MDP—a digital repository of millions of works from their various holdings.11 The plaintiffs alleged that the MDP infringed on the copyrights in the underlying works, while the defendants argued that the MDP constituted fair use.12

It is well established that Section 107 provides a defense to copyright infringement claims for uses of copyrighted works for teaching, scholarship, or research, among other things.13 In order to determine whether a defendant is entitled to a fair use defense, the Copyright Act requires that a court consider the following nonexhaustive factors: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”14

Campbell v. Acuff-Rose Music, Inc.
The last time that the U.S. Supreme Court dealt with the issue of fair use in any substantial depth was in Campbell v. Acuff-Rose Music, Inc., arising out the rap group 2 Live Crew’s parody of the Roy Orbison song “Oh, Pretty Woman.”15 The district court granted summary judgment on the claim (brought by Acuff-Rose Music, which held the rights in the Orbison song), finding that 2 Live Crew’s parody was protected by fair use.16 The Sixth Circuit reversed on appeal, holding that the commercial nature of 2 Live Crew’s parody prevented it from being considered fair use.17

In a unanimous opinion, the Supreme Court reversed and remanded, holding that the court of appeal had improperly presumed that the commercial nature of the 2 Live Crew parody deprived it of fair use protection.18

Justice David Souter explained that fair use doctrine, which has existed as long as copyright law itself, “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”19 He went on to emphasize that “[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”20 Moreover, Justice Souter made it clear that the statutory fair use factors cannot be “treated in isolation” but rather “are to be explored, and the results weighed together, in light of the purposes of copyright.”21

Of particular importance in Campbell was the question of whether and to what extent the 2 Live Crew parody was transformative.22 The term was first applied in the fair use context by Judge Pierre Leval in a Harvard Law Review commentary titled Toward a Fair Use Standard, published in 1990.23 The thesis of Judge Leval’s commentary is that, in order to qualify as fair use, “the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.”24 To that end, Judge Leval posited that the first fair use factor (the purpose and character of the use) “lies at the heart of the fair user’s case” and requires an inquiry into “whether, and to what extent, the challenged use is transformative.”25 Judge Leval went on to summarize various ways to determine whether a secondary use qualifies as transformative:

- The use “must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”
- The use should add “value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”
- The use “may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it.”
- The use might also include “parody, symbolism, aesthetic declarations, and innumerable other uses.”
- Finally, “the transformative justification must overcome factors favoring the copyright owner,” such as the right to create derivative works.26

In Campbell, the Supreme Court formulated the inquiry in keeping with both Judge Leval’s approach and that of Justice William Story’s opinion in Folsom v. Marsh, asking whether the new work supersedes the objects of the original creation or adds something new, with a further purpose or different character.27 The Court was clearly enamored of the concept of transformativeness, opining: “although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is gen-
nals; and (c) the MDP did not harm the market for the original works since there was no evidence that plaintiffs were (or would ever) exploit the market served by the MDP.35

In balancing these factors, the district court held that the fair use analysis was satisfied, summarizing that the enhanced search capabilities, the protection of fragile works, and the ability of disabled persons to compete with sighted readers served the purposes of copyright law by contributing to “the progress of science and cultivation of the arts.”36

The court further emphasized that the MDP effectuated provisions of the Americans with Disabilities Act by providing equal access on the scale of the MDP is…almost impossible to fathom.”38

Two months after the district court decision in the HathiTrust case, albeit with greater focus on the search capabilities of Google Books, the preservation of out-of-print works, the provision of access to disabled readers, and the prospect of new income streams for the authors and publishers of scanned works whose titles might earn greater attention in Google Books than in “traditional in-store displays.”41 Like the opinion in HathiTrust, the decision in Google Books was appealed.42

Should Congress Act?

Two months after the district court decision in Google Books, Congress held a subcommittee hearing on the scope of the fair use doctrine, with specific regard to transformative use.43 The hearing was held before the House of Representatives Committee on the Judiciary, Subcommittee on Courts, Intellectual Property and the Internet. Subcommittee Chairman Howard Coble introduced the issues for the other subcommittee members and the witnesses,44 who included intellectual property professors and artists, including Naomi Novik, a bestselling author, and David Lowery, a singer-songwriter and founder of the band Camper Van Beethoven.45 Coble stated that, in his opinion, the strength of fair use doctrine is its ambiguity, but that this may also be its weakness. Coble questioned whether, in light of the fact that new technology is being developed faster than fair use issues can be resolved by courts, Congress should act to improve the doctrine.46

Coble’s concern was echoed by Representative John Conyers, who asked that the witnesses address whether certain calls for the expansion of fair use were justified by the fact that “specific statutory limitations have not kept pace with emerging technologies.”47 Conyers also expressed some concern that the transformative use standard has become “all things to all people” and, thus, might be ripe for reconsideration.48

Indeed, Representative Bob Goodlatte, Chairman of the House Judiciary Committee, emphasized that the most important question with regard to the application of the fair use test is, “How does one define what is transformative?”49 In the context of a discussion over whether every dispute concerning the application of the fair use doctrine should require judicial intervention, Goodlatte’s question suggested that he was asking whether Congress should act to make that definition clear.

Goodlatte invited the witnesses to speak directly to the issue of whether fair use doctrine is working and, if so, whether it is working for everyone or only specific groups.50 Professor June Besek, the Executive Director of the Kernochan Center for Law, Media and the Arts, responded that she believes fair use is working for some in the creative community but definitely not for all intellectual property rights holders.51 In a direct reference to the Google Books cases, Besek testified, “I think that one of the problems is these recent cases that deal with one party exploiting lots and lots of works at the same time is distorting fair use.”52 Besek expressed admiration for the goals of the project but said that “by trying to shoehorn it into fair use we are doing a disservice to the Copyright Act.”53

Functional Transformation

In Besek’s written statement on the issue, she chronicled the rise of transformative use.54 In her view, courts have expanded the notion of
transformational use beyond the Supreme Court's intent in *Campbell*, which anticipated the substantive transformation of a work, to include a notion of functional transformation. This concept embraces—and the Google Books cases may serve as an example of—the wholesale copying of works, justifying the application of fair use doctrine because the function of the new work is different from that of the original.15

Bесek also observed that, once a court has concluded that a use is functionally transformative, it tends to quite easily find that the new work serves a different market than the original, thus bootstrapping a finding on the first fair use factor to resolve the fourth.56 Indeed, the HathiTrust court did just that, holding that the new markets that the Google Books project created for works were just as transformative as the new works themselves.57

In this regard, Besek also cautioned that, among other dangers, the notion of functionally transformative use is so similar to the concept of a derivative work that a downstream user might effectively foreclose legitimate markets to the original copyright holder.18 This particular issue, as framed, does not figure in the outcome of either of the Google Books cases. Nonetheless, the Second Circuit expressed the same concern in *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, a case concerning a trivia quiz book called the *Seinfeld Aptitude Test* (or the SAT), which drew liberally from the popular sitcom.59 In denying fair use protection to the book, the Second Circuit acknowledged the potential difficulty of distinguishing between transformative use and derivative works. Relying on 17 USC Sections 101 and 106(2), the court observed: “‘[W]e note a potential source of confusion in our copyright jurisprudence over the use of the term ‘transformative.’” The court cited the definition of a derivative work found in Section 101: A “derivative work” is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. The court further cited Section 106(2), which grants the copyright owner the exclusive right to “to prepare derivative works based upon the copyrighted work.” The court thus reasoned: “Although derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation, such works—unlike works of fair use—take expression for purposes that are not ‘transformative.’ In the instant case, since the SAT has transformed Seinfeld’s expression into trivia quiz book form with little, if any, transformative purpose, the first fair use factor weighs against defendants.” 60

The Second Circuit in *Castle Rock* made it clear that true substantive transformation would not present the same problem since, “if the secondary work sufficiently transforms the expression of the original work such that the two works cease to be substantially similar, then the secondary work is not a derivative work and, for that matter, does not infringe the copyright of the original work.”61 In light of the fact that the Second Circuit will also be deciding the Google Books cases, it will be interesting to see how the court harmonizes those cases with *Castle Rock*.

In response to the reasoning of Besek and *Castle Rock*, Peter Jaszi of the Washington College of Law at American University argued in his congressional testimony that the Google Books cases were “really excellent examples of the [fair use] doctrine fulfilling its function.”62 In particular, Jaszi called out the public interest served by the project, and the fact that “[n]o existing licensing structures are available to enable those uses.”63

It is worth noting that Jaszi represents the National Federation of the Blind (NFB), an intervenor defendant in *HathiTrust*.64 The NFB was among the defendants who filed motions for summary judgment that were granted in the *HathiTrust* opinion on fair use grounds.65 In his written testimony before the subcommittee, Jaszi made the point that the *HathiTrust* court’s focus on the public interest served by MDP addressed a consideration that is not among the four statutory factors, but that those factors are, after all, nonexclusive.66 This arguably serves as a rejoinder to Besek’s position that the notion of functional transformation is an improper departure from the Supreme Court’s decision in *Campbell*.

At the same time, Jaszi directly addressed the prospective conflict between transformative uses and derivative works.67 In his view, this argument has two flaws. First, the right to create derivative works, set forth in Section 106(2) of the Copyright Act, is expressly subject to Section 107 and the fair use analysis.68 Indeed, Section 107 opens with the caveat that notwithstanding the provisions of Sections 106 and 106A, fair use is “not an infringement of copyright.”69 Second, Jaszi argues that the degree of transformation necessary to create a derivative work is slight, while the transformation necessary to satisfy the fair use analysis “demands far, far more in the nature of value added.”70

Notwithstanding their differing views, Besek and Jaszi each responded to Goodlatte’s question as to whether Congress should amend the Copyright Act to bring some clarity to the term “transformative” by proposing alternatives to that outcome. Besek suggested that, “[w]ithout altering the text of section 107, Congress might separately address the problems of mass digitization, including whether authors should be compensated for publicly beneficial uses...”71 Jaszi was more direct: “Don’t mess with fair use.”72 He believes that the decisions on the topic, having long evolved in the judicial ecosystem, must be allowed to continue to do so without any attempt to “facilitate short-form, non-precedential determinations of fair use disputes.”73

It may well be that the outcome of the Google Books cases will bring order to the debate over the proper confines of transformative use. If not, it remains to be seen whether artists, rights holders, academics, and politicians can come together on a solution that would satisfy each of those constituencies.

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2 Complaint, Authors Guild v. Google Inc., No. 05-CIV-8136 (S.D. N.Y. Sep. 20, 2005) (The complaint refers to the program as Google Print.).
5 Authors Guild, 2013 WL 6017130, at *2.
6 Id. at *3.
7 Id.
8 Id.
9 Id. at *5.
11 HathiTrust, 902 F. Supp. 2d at 448.
12 Complaint, Authors Guild, Inc. v. HathiTrust, No. 11 Civ. 6351 (S.D. N.Y. Sep. 12, 2011); First Amended Complaint ¶¶1-2, Authors Guild, Inc. v. HathiTrust, No. 11 Civ 6351 (S.D. N.Y. Oct. 6, 2011); HathiTrust, 902 F. Supp. 2d at 445, 458-64.
14 Id.
17 Id.
18 Id. at 594.
19 Id. at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).
22 Leval, supra note 21, at 1111.
FEATURED KEYNOTE PRESENTATIONS:

DAY ONE: JUNE 24, 2014
Disruptive Technology: The Next Game-Changing Innovation
Lisa Tanzi, Application & Services Group and Business Solutions Group, Microsoft
Nishan DeSilva, Senior Director, Business and Technology Strategy Legal and Corporate Affairs (LCA), Microsoft

DAY TWO: JUNE 25, 2014
Navigating Today’s Cyber Environment: How Secure is Our Data?
Moderator:
Monica Bay, Editor-in-Chief, Law Technology News
Panelists:
Judy Selby, Partner and Co-Chair, Information Governance Team, Baker & Hostetler LLP
John Tomaszewski, Senior Counsel, Internation Data Protection Practice Group, Seyfarth Shaw LLP
David Cunningham, Chief Information Officer, Winston & Strawn
Ray Aghaian, Partner and Co-Chair, Cybersecurity Practice, McKenna, Long & Aldridge LLP

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ON COPYRIGHT §13.05 nn. 82, 84.9 (2013) [hereinafter NIMMER]; Leval, supra note 21.

24 Leval, supra note 21, at 1110.

25 Id. at 1111 (emphasis in original).

26 Id. at 1111-12 (citations omitted).


29 Id. at 587-88.

30 Id.


32 Id. at 459-61.

33 Id. at 461-62.

34 Id. at 462.

35 Id. at 462-64.

36 Id. at 464.

37 Id. at 465.

38 Id. at 464.


41 Id. at *7-11.


44 Id. (statement of Rep. Coble).

45 Id.

46 Id.


48 Id.

49 Id. (statement of Rep. Goodlatte).

50 Id.

51 Id. (testimony of June M. Besek).

52 Id.

53 Id.

54 Id. (citing HathiTrust, 902 F. Supp. 2d at 457; Google Books, 2013 WL 6017130).

55 Id.

56 Id.

57 HathiTrust, 902 F. Supp. 2d at 463 (“A use that ‘falls within a transformative market’ does not cause the copyright holder to ‘suffer market harm….’”) (quoting Bill Graham Archives v. Dorling Kindersley Ltd., 448 F. 3d 605, 615 (2d Cir. 2006)).

58 Hearings, supra note 43 (testimony of Besek).


60 Id. at 143; see also Nimmer, supra note 23 at n.82.

61 Id. at n.9 (citing Nimmer, supra note 23, at §3.01, 3-3).

62 Hearings, supra note 43 (testimony of Peter Jaszi).

63 Id.

64 Id.; Docket, Authors Guild, Inc. v. HathiTrust, No. 12-4547 (2d Cir. Nov. 14, 2012).


66 Hearings, supra note 43 (testimony of Jaszi).

67 Id.


71 Hearings, supra note 43 (Bessek).

72 Hearings, supra note 43 (Jaszi).

73 Id.
IF AN ASSOCIATE acting upon the instructions of a supervising lawyer does something unethical or sanctionable, does California law provide a defense for the associate? If the associate refuses to perform the proposed unethical conduct, should the associate bring the matter to the attention of the law firm or the State Bar? Should the associate inform the client? If the associate resigns or is fired, does he or she have a claim against the firm? California’s rules of professional conduct and a recent case offer insight into these questions.1

The California Rules of Professional Conduct apply to members of the State Bar of California.2 The rules define a “lawyer” as a person who is admitted to practice law before any federal or state court3 and an “associate” as an employee who is employed as a lawyer.4 Thus, all lawyers who practice law in California are subject to the Rules of Professional Conduct, whether licensed in this state or not. Any attorney, including a new associate member of a firm, is bound by the rules of professional conduct.

Additionally, if the California Rules of Professional Conduct are silent on a particular issue, the American Bar Association’s Model Rules of Professional Conduct can provide guidance. Although they are not legally binding in California, the ABA’s rules have been cited in California decisions to justify decisions involving the conduct of California lawyers.5

Under the California Rules of Professional Conduct, a supervising lawyer has the duty not to ask the associate to commit an offense that would be a violation of the rules.6 Therefore, the partner may not ask an associate to lie or to file frivolous pleadings. Indeed, a supervising lawyer has an affirmative duty to ensure that an associate performs legal services with competence. For this to be achieved, the rules require the associate to apply the diligence, learning, skill, and mental, emotional, and physical ability reasonably necessary for the performance of duties.7 The rules also authorize a law firm to hire a lawyer who pos-

by Thomas E. McCurnin

THE NUREMBERG DEFENSE

An attorney should expect to answer for ethical misconduct performed at the direction of an employer

Thomas E. McCurnin is a partner at Barton, Klugman & Oetting, specializing in the representation of financial institutions.
The Nuremberg defense was also rejected, and suspensions ordered, in the case of Matter of Maloney & Virsik, in which a partner and associate worked to structure a phony election in connection with an Indian tribe and to misappropriate the tribe's bank accounts.

Mexico case litigated under the ABA Model Rules, a supervising lawyer would have been sanctioned for an associate’s misconduct except there was no evidence before the State Bar as to the level of the supervising lawyer’s actual supervision.11

Although the California Rules of Professional Conduct apply equally to partners and associates, and a partner may be liable for an associate’s ethical violations, an associate is not liable for a partner’s ethical violations, as an agent is not vicariously responsible for the acts of the principal to which the agent has no right of control.12 In sum, the rules apply to “members” and “lawyers” and provide no exception for associates who are merely following the directions of a partner.13

Jay v. Mahaffey

In Jay v. Mahaffey,14 the California Court of Appeal recently addressed the defense of an associate that she was “just following orders.” The plaintiff sued a lawyer for malicious prosecution. The claim was based on threatening letters and e-mail messages and a resulting cross-claim against 12 members of a limited partnership. The names of the law firm partner and the associate appeared on documents served in connection with one of the cross-complaints against the limited partners.

The 12 partners were ultimately dismissed from the suit, but the supervising lawyer attempted to condition the dismissal upon their cooperation in a derivative action, a finder’s fee, a buyout of their interests, and disclosure of the personal financial information of the limited partners. Under the California Rules of Professional Conduct, however, a lawyer may not undertake the representation of a client if he or she knows or should know that the objective of the employment is to bring an action, conduct a defense, or assert a position in litigation for the purpose of harassing or maliciously injuring a person.15 Indeed, if an associate makes this determination, the rules require the associate to withdraw from representation.16

In response to being sued, the associate took the position that she was given specific direction by the supervising lawyer regarding all assignments, including all writing assignments, all contact with clients, and all interactions with opposing counsel. The associate claimed that she was not responsible for the strategy or direction of any case while she worked for the firm, that the supervising lawyer directed the associate’s writing assignments, and that the associate would sign documents in the partner’s name but did not file or serve any document without its first being reviewed by the partner.17

The court of appeal specifically rejected the claim that the associate could work on part of the case and disclaim responsibility for other parts, especially when the associate signed questionable pleadings and fielded telephone calls to explain the position taken by her supervising lawyer. The court held that every lawyer is required to comply with the rules of professional conduct, notwithstanding the fact the lawyer may be acting at the direction of someone else.18 The court was not without some sympathy to the younger associate, stating:

We recognize that an associate attorney is not in the same position as an attorney associating into a case. There is a clear imbalance of power between an often younger associate and an older partner or supervisor, and situations may arise where an associate is put into a difficult position by questioning a more experienced attorney’s choices.19

Notwithstanding that difficult position, the court held to the principle that an associate has ethical duties that are not reduced or eliminated because a superior has directed a course of action.20 This rejection of what may be called the Nuremberg defense is found in the ABA Model Rules of Professional Conduct21 and the Restatement of the Law (3d) of the Law Governing Lawyers.22

Attorneys have been held liable for associating into cases containing frivolous claims.23 The Nuremberg defense was also rejected, and suspensions ordered, in the case of Matter of Maloney & Virsik,24 in which a partner and associate worked to structure a phony election in connection with an Indian tribe and to misappropriate the tribe’s bank accounts. The partner was in charge of the litigation and the associate was relatively inex-
MCLE Test No. 236

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

1. Out-of-state lawyers who practice pro hac vice are not governed by the California Rules of Professional Conduct.
   - True.
   - False.

2. Certified paralegals are governed by the Rules of Professional Conduct.
   - True.
   - False.

3. California lawyers who participate in unethical conduct outside of California may be held ethically responsible in California.
   - True.
   - False.

4. In-house lawyers are not governed by the Rules of Professional Conduct.
   - True.
   - False.

5. An ethics violation must be willful.
   - True.
   - False.

6. If an associate determines that he or she is doing something unethical or sanctionable, the associate’s first step should be to consult his or her supervising lawyer.
   - True.
   - False.

7. An associate may undertake to represent a client when the associate knows or should know that the object of the representation is to harass the opposing side without probable cause.
   - True.
   - False.

8. The Model Rules of Professional Conduct of the American Bar Association are legally binding upon California lawyers who participate in unethical conduct in advance of the conduct but exercise no control over the associate commits an ethical violation.
   - True.
   - False.

12. A supervising lawyer who is aware of an associate’s unethical conduct in advance of the conduct but exercises no control over the associate commits an ethical violation.
    - True.
    - False.

13. A supervising lawyer commits an ethical violation if the supervising lawyer ascertains that an associate is doing something unethical and consents to the action.
    - True.
    - False.

14. If an associate resigns from a law firm rather than take part in an ethical violation:
    A. The associate is required to advise the State Bar of the ethical violation.
    B. The associate is not required to advise the State Bar of the ethical violation.
    C. The associate is required to advise the State Bar only of a serious ethical violation.

15. If an associate resigns from a law firm rather than take part in an ethical violation:
    A. The associate is required to advise the client of the ethical violation.
    B. The associate is not required to advise the client of the ethical violation.
    C. The associate is required to advise the client only of a serious ethical violation.

16. An associate who resigns from a law firm rather than commit an ethical violation is not generally entitled to damages from the law firm.
    - True.
    - False.

17. If an associate resigns from a law firm rather than commit an ethical violation, the firm may give a client a false reason for the associate’s leaving the firm.
    - True.
    - False.

18. The duties of a law firm that terminates an associate as a result of his or her reporting an ethical violation are not covered in the California Rules of Professional Conduct.
    - True.
    - False.

19. A lawyer who follows the orders of a client to encumber the client’s real property with phony deeds of trust as part of an asset protection plan has committed an ethical violation.
    - True.
    - False.

20. The so-called Nuremberg defense is available to in-house lawyers.
    - True.
    - False.
and different job responsibilities. This commentator argues that the ABA rule accepts that lawyers in law firms must often act as one and permits an associate to defer to the supervising lawyer’s reasonable determination of an arguable issue. Employment lawyers, in turn, may point out that like any other employee an associate owes the partnership duties of good care, skill, loyalty, and obedience.

According to a Los Angeles County Bar Association ethics opinion, when an associate is faced with a potential ethical violation, the first step is to bring the ethical violation to the attention of the partner or other partners. This view has some support in the ABA Model Rules and the California Practice Guide: Professional Responsibility.

At least one commentator has acknowledged that refusing to perform an unethical act at the bequest of a supervising lawyer will place the associate in jeopardy and may subject the associate to retaliation. Although the Sarbanes-Oxley Act provides for protection for whistle blowers, corporate culture is widely regarded as viewing whistle blowers as disloyal. Nevertheless, if an associate cannot reach an ethical compromise with a supervising attorney, it is quite clear from the California Rules of Professional Conduct that the associate has a duty to withdraw from the representation if the continued representation would result in a violation of the rules.

Blow the Whistle?

The next question is whether the associate must inform the client. Every California lawyer has a duty to inform the client about significant developments in the client’s matter. According to a Los Angeles County Bar ethics opinion, a course of conduct that impairs the client’s interest must be thoroughly disclosed to the client notwithstanding an objection by the partnership.

California Practice Guide: Professional Responsibility agrees that advising the client may be necessary to preserve the client’s interests in the case of severe ethical violations by the partner.

Nevertheless, no one likes a whistle blower. An associate who brings ethical violations to the attention of his or her law firm and does not obtain a reasonable resolution should probably resign. The associate who does not resign may be fired instead and should not expect to claim retaliatory discharge.

A law firm may ask a departing associate carte blanche to implement a scorched-earth policy against a law firm.

While a firm is not required to compensate a resigning associate for damages, if the law firm creates false reasons for the associate’s termination, those false statements may be actionable. Cases such as Jacobson v. Knepper & Moga; Wallace v. Skadden, Arps, Slate, Meagher & Flom; and Bobatch v. Butler & Binion also indicate that courts are reluctant to create employment rights that did not exist before. Unless the ethical violations in question violate public policy, courts may refuse to grant an associate a right to sue.

Should the associate report the ethical violation to the State Bar? No direct authority from California sources requires the associate to do so. However, the ABA Model Rules do require that an attorney report the ethical violation of another attorney if the violation raises a substantial question regarding the attorney’s honesty, trustworthiness, or fitness as a lawyer. At least one commentator has opined that reporting a colleague is appropriate if the offense is serious.

According to one author, an associate who is still employed at a firm that he or she reports is engaging in unethical conduct will need to make some practical considerations regarding retaliation or ostracization.

Granted, it is extremely unlikely that in the ordinary course of the practice of law an associate would discover serious ethical misconduct against a supervising lawyer, resign, advise the client, and report the firm to the State Bar. On the other hand, it is not out of the question that an associate may be asked to take part in questionable conduct. The bottom line is that associates are responsible for their actions. The Nuremberg defense simply does not apply in ethical issues.

3 Cal. Rules of Prof’l Conduct R. 101(b)(3).
5 San Francisco Unified Sch. Dist. ex rel. Contreras v. First Student, Inc., 213 Cal. App. 4th 1212, 1235 (2013); In re Girardi, 611 F. 3d 1027, 1035 (9th Cir. 2010).
6 Cal. Rules of Prof’l Conduct R. 1-120.
7 Cal. Rules of Prof’l Conduct R. 3-110.
8 Waysman v. State Bar, 41 Cal. 3d 452 (1986).
9 Crane v. State Bar, 30 Cal. 3d 117, 123 (1981) (“An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority.”);
11 In the Matter of Michele Estrada, 140 N.M. 492, 505 143 P. 3d 731 (2006).

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15. CAL. RULES OF PROF’L CONDUCT R. 3-700(b).
19. BUS. & PROF. CODE §6068.
20. ABA MODEL RULES OF PROF’L CONDUCT R. 5.2.
22. Cole v. Patricia A. Meyer & Assocs., APC, 206 Cal. App. 4th 1095, 1100, 1119 (2012) (holding that an associate may not disclaim legal responsibility for actions that are taken on behalf of the client because the associate only took a passive role as a standby counsel).
24. ABA MODEL RULES OF PROF’L CONDUCT R. 5.2(b).
31. ABA MODEL RULES OF PROF’L CONDUCT R. 5.2(b).
32. RESTATEMENT (THIRD) OF AGENCY §§8.08, 8:09(2) (2006).
34. ABA MODEL RULES OF PROF’L CONDUCT R. 5.2(b).
40. Wallace, 715 A. 2d at 883.
41. ABA MODEL RULES OF PROF’L CONDUCT R. 8.3(a).
42. Smith, supra note 43.
THE QUOTE, “Whiskey is for drinking; water is for fighting over,” found in an opinion in one of the most significant California water rights cases of recent years and attributed to Mark Twain,1 has been true for all major water supply projects in the state, including the State Water Project (SWP) and the CALFED program for the Sacramento and San Joaquin River delta (the Bay-Delta). While these cases may have fallen under the radar of most legal professionals, disputes over water have had far-reaching implications that, during the current severe drought, affect the availability of water for existing use and shape how even nonwater-related projects are done. Both the SWP and CALFED program cases resulted in litigation and appellate decisions that determined significant issues under the California Environmental Quality Act (CEQA). Whereas litigation challenging an amendment to water distribution under the SWP resulted in a seminal decision about selection of the proper lead agency under CEQA,2 other litigation challenging the CALFED program, designed to restore the Bay-Delta and improve management of Bay-Delta water for drinking and irrigation, resulted in a California Supreme Court decision about the appropriate range of alternatives in an environmental impact report (EIR).3

As with the other major water supply projects, the 2003 Quantification Settlement Agreement (QSA) and related agreements settled longstanding disputes among California entities with rights to California’s supply from the Colorado River, a significant source of Southern California’s water supply.4

Litigation over water rights has tested the competing interests of environmentalists, farmers, and cities

by Lisabeth D. Rothman

Lisabeth D. Rothman is a partner at Brownstein, Hyatt, Farber, and Schreck and has led the litigation efforts for the San Diego County Water Authority in defending the QSA since 2003 through two trials and three appearances in the court of appeal.
The coordinated litigation challenging the QSA involved two trials, six trips to the court of appeal, two published opinions, and one unpublished decision before the second trial in 2012. This concluded with a superior court decision upholding the validity of 12 of the settlement agreements that were at issue in the litigation. Like the decisions in the SWP and CALFED cases, the QSA decision addressed a number of significant CEQA issues. While the QSA decision is now on appeal, the issues it raised and decided, as well as in the SWP and CALFED cases, are instructive concerning the complexities of the CEQA issues that such projects present.

**SWP and the Monterey Agreement**

The SWP supplies water to two-thirds of the state’s population, including farmers that use it to irrigate 750,000 acres of cropland. It is implemented through delivery contracts to 29 agricultural and municipal water supply agencies known as the SWP contractors. To settle longstanding disputes largely over water allocation among urban and agricultural SWP contractors during water shortages, as well as between the SWP contractors and the Department of Water Resources (DWR) regarding the DWR distributions to the SWP contractors, the DWR and the SWP contractors entered into an agreement negotiated in Monterey, California. The Monterey Agreement was implemented as amendments to the contracts with the SWP contractors—which became known as the Monterey Amendments—and settled the disputes by, among other provisions, modifying the long-term water supply contracts. The DWR and the five SWP contractors participating in the negotiations agreed to appoint the Central Coast Water Agency, a party to one of the contracts, as lead agency for the programmatic EIR prepared to analyze potential environmental impacts from the amendments.

The selection of lead agency was challenged. The Third Appellate District upheld the challenge in *Planning and Conservation League v. Department of Water Resources* and articulated important criteria governing selection of the lead agency and judicial review of that choice. First, the court held that review of the lead agency selection under the undisputed facts in the case is an issue of law subject to de novo review. Second, the court articulated criteria for determining the agency that has principal responsibility for implementing a project—principal responsibility being one of the key criteria for selecting a lead agency. Applying Public Resources Code Section 21067, the court stated that the public agency with principal responsibility for implementing the project is the proper lead agency. The court noted that while the regional Central Coast Water Agency had a substantial interest in seeing the Monterey Agreement implemented, the DWR is the agency charged with statutory responsibility for the SWP and with implementing the Monterey Agreement. It had statewide perspective and expertise regarding allocation and distribution of water in the state, which the Monterey Agreement restructured. Therefore, the DWR was the proper lead agency for the Project. Finally, the court held that delegation of lead agency responsibility is prohibited. CEQA Guidelines Section 15051 provides that multiple public agencies may rely on CEQA Guidelines Section 15051(d) to designate one of them as lead agency by agreement, but that provision requires that all of those agencies must satisfy the lead agency criteria specified in the guidelines. That was not the case here.

The Bay-Delta

The Bay-Delta is the hub of California’s two largest water distribution systems—the SWP and the Central Valley Project—and supplies drinking water for two-thirds of California’s residents and irrigation water for seven million acres of agricultural land. The diversion of water for urban consumption and extensive agricultural use in the Bay-Delta area resulted in pollution of Bay-Delta water, threatened extinction of plant and animal species, and increased the risk of levee failure. The listing of two fish species as threatened or endangered in 1993 led to restrictions on diversions from the Bay-Delta and contributed to periodic water shortages during dry years. A consortium of 18 federal and state agencies created the CALFED program, a multifaceted project to implement a long-term, comprehensive plan to restore the ecological health of the Bay-Delta and improve management of its water for urban and agricultural uses. The program was designed to “reduce conflicts in the system” by meeting four critical objectives: 1) improve habitats to support plant and animal species, 2) improve reliability for water supplies and uses dependent on the Bay-Delta system, 3) provide good water quality for all beneficial uses, and 4) reduce the risk of catastrophic levee failure. Longstanding conflicts among numerous stakeholders in the Bay-Delta—environmentalists, farmers, and urban water suppliers—resulted in blocking actions that promoted some interests at the expense of others.

CEQA requires an EIR to evaluate a reasonable range of alternatives to the project that reduce or eliminate the project’s significant environmental impacts, but the alternatives need only meet most of the project’s basic objectives. The requirement that all four objectives had to be met for each project alternative considered in the project’s CEQA analysis was challenged. Specifically, it was argued that the alternative of reducing water exports from the Bay-Delta could be an environmentally superior project and that, per the court of appeal decision, reduced water export would lead to smaller population growth in Southern California thus reducing future need for water from the Bay-Delta. The California Supreme Court reversed. It held that an EIR need not analyze an alternative that cannot achieve “the project’s underlying fundamental purpose.” That purpose was achieving the four primary project objectives concurrently. A reduced export alternative would gravely compromise the water supply objective and thus fail to achieve the basic underlying goal of reducing conflicts. While the supreme court acknowledged that a lead agency cannot artificially define a project’s purpose too narrowly, it may select for analysis only those alternatives that fulfill a reasonable definition of the project’s underlying purpose and basic goal. Presaging CEQA issues in the QSA litigation, the court stated that the reduced export alternative required by the court of appeal failed to sufficiently distinguish between preexisting environmental problems, which included existing water export requirements and adverse environmental effects of the project. What an EIR must study “is defined in relation to adverse environmental impacts of the proposed project.”

The Colorado River and the QSA

The Colorado River is the lifeblood of seven states, including California, and is governed by a complex series of treaties, interstate compacts, federal and state statutes, and case law known as the Law of the River. This governing law—the result of numerous conflicts going back over a century—is also the source of additional conflicts that the QSA helped resolve.

Federal compacts apportioned 4.4 million acre feet per year (MAFY) plus half of a specified surplus to California. Within California, the Seven Party Agreement of 1931 placed California’s seven Colorado River water users into a priority system that did not quantify the amount each would receive. Rather, it provided that the agency with the highest priority could use its full allotment before the agency with the next highest priority would be entitled to receive water. The agreement allocated a total of 5,362 MAFY; California’s entire guaranteed allocation of 4.4 MAFY was assigned within the first four priorities. For decades, California could and did exceed its allocation because there were surpluses on the river and because the other states did not use their full share. That changed in 1964, when the U.S. Supreme Court confirmed allocation of the shares of Nevada, Arizona, and California of Colorado River water, recon-
firming California’s entitlement at 4.4 MAFY, plus half of any surplus. The California agencies operating under the Seven Party Agreement were left to deal with a looming deficit of almost one MAF of water when surplus water became unavailable and the other states used their full allotment. The Metropolitan Water District of Southern California (MWD), which holds the fourth priority right to 530,000 AFY and the fifth priority right of up to 662,000 AFY, would be affected disproportionately by the cutback.

Water shortages began in the 1990s when Arizona and Nevada began taking nearly their entire apportionment of Colorado River water and drought conditions caused surplus supplies to dwindle. Lower priority water users, like the MWD and the Coachella Valley Water District (CVWD), which could lose significant portions of their allocation under the Seven Party Agreement, began to seek potential solutions to future Colorado River water shortages. At that time, the San Diego County Water Authority (SDCWA) imported 75 to 95 percent of its water supply from the MWD and sought to diversify its supply as a hedge against potential cutbacks in the MWD’s supply. All three eyed the Imperial Irrigation District (IID), which, with 3.1 MAFY, is the largest single holder of water rights on the Colorado River in California.

The IID devoted 98 percent of its water use to agriculture. This was significant to potential resolution of the impending shortage because implementing conservation measures in agricultural use could create additional water for urban use. Under the IID’s regular irrigation practices, agricultural runoff flowed to the Salton Sea, an accidental, below sea-level lake in the Imperial Valley created by floods from the Colorado River in 1904 and 1905 that have not repeated since. Without agricultural runoff, the Salton Sea would evaporate entirely. Even with these return flows, it becomes increasingly saline from evaporation. In the 1990s, increased cultivation of the Imperial Valley resulted in increased inflows to the sea and flooding. The State Water Resources Control Board found that the IID was wasting water and violating California’s prohibition against unreasonable use of water. The state board required the IID to conserve water and suggested that transfers of conserved water could help satisfy urban Southern California needs.

In 1998, the SDCWA and the IID entered into an agreement to transfer to the SDCWA up to 300,000 AFY of conserved water derived from improvements in the IID’s service area that the SDCWA would largely fund. This was the largest agricultural-to-urban water transfer in U.S. history. The Transfer Agreement allowed the IID to comply with the state board’s requirement to implement a long-term water conservation program and to retain its priority for Colorado River water. The agreement benefitted the SDCWA by diversifying the SDCWA’s water supply and making the supply more reliable. To implement the transfer, the IID and the SDCWA jointly petitioned the board for approval of the long-term water transfer. However, the CVWD and the MWD challenged the board’s jurisdiction and argued that federal rather than state law controlled the allocation of water from the Colorado River.

The QSA

A broader solution was required to resolve the disputes and competing needs. Ideally, that solution would fashion a “soft landing” for California from its historic overuse of Colorado River water instead of a cutback to 4.4 MAFY in shortage years. In 2003, a broad settlement was reached. Consisting of 35 separate agreements (including three federal agreements), the settlement allowed for conserved water transfers from the IID to the SDCWA, the CVWD, and the MWD totaling 300,000 AFY (with 200,000 AFY to the SDCWA for up to 75 years), entailed legislation to provide and allocate funding for mitigation required for the conserved water transfers and for developing a plan to restore the Salton Sea, and created a 15-year phase-out period for the use of surplus water. The key agreement, however, was the QSA itself, which altered the Seven Party Agreement by quantifying the allocation of Colorado River water to the IID, the CVWD, and the MWD, thus making conserved water transfers available. Agreements to complete lining of the All-American and Coachella canals also created and allocated additional conserved water to the SDCWA and the CVWD, among others. Compliance with CEQA and the National Environmental Policy Act (NEPA) was a prerequisite, entailing preparation of an EIR and an environmental impact statement for NEPA for the conserved water transfers, as well as a programmatic EIR for the QSA project. The key QSA elements were implemented as a program through the numerous agreements.

Litigation immediately followed approval of the settlement. Ten lawsuits challenging the settlement and a validation action the IID filed under Code of Civil Procedure Sections 860 et seq. to validate 13 of the agreements were coordinated in Sacramento. Pretrial motions narrowed the scope of the litigation and resulted in a three-week trial of four cases—the validation action and three CEQA cases. Appeal of the judgment invalidating the agreements at issue on constitutional grounds was reversed in a published opinion. The second trial after remand from the court of appeal focused on CEQA and decided a number of significant issues.

Baseline

Under CEQA, environmental conditions in the project’s vicinity as they exist at the time the notice of preparation of an EIR is published “will normally constitute the baseline physical conditions” against which a project’s environmental impacts are measured to determine if the impacts are significant. The proper baseline must be selected so that the EIR will provide information about the
environment with and without the project. 21 For the QSA project, the Salton Sea was receding and becoming more saline even without the conserved water transfers that would further reduce agricultural runoff to the sea. The usual snapshot in time baseline would not accurately distinguish between QSA programmatic impacts on the sea and clear historical trends of increasing salinity in the sea, decreasing elevation, and decreasing surface area. Drafted in 2002, the two QSA environmental impact reports utilized a “future baseline” developed with computer models that simulated evolving conditions at the Salton Sea over the QSA project’s 75-year term and predicted the impact of only the conserved water transfers. This approach presaged more recent conflicts in appellate decisions regarding the use of a future baseline that the California Supreme Court finally resolved in favor of the appropriate use of a future baseline in Neighbors for Smart Rail v. Exposition Metro Line Construction Authority. 22

Without the benefit of this later supreme court decision, the superior court arrived at the same conclusion for the circumstances presented. First, the QSA decision cited the supreme court’s observation in Communities for a Better Environment v.  South Coast Air Quality Management District that 1) the dates for establishing a baseline cannot be rigid—especially where environmental conditions fluctuate over time, 2) CEQA and the Guidelines do not impose a uniform, inflexible rule for determining baseline conditions, and 3) the selection of the baseline is essentially a discretionary determination of how existing physical conditions without the project can “most realistically be measured,” and constitutes a factual determination reviewed for substantial evidence. 23

Next, the superior court noted the conflicting positions taken by appellate cases on the use of predicted or future baselines rather than a snapshot of existing conditions. The courts in Sunnyvale West Neighborhood Association v. City of Sunnyvale 24 and Madera Oversight Coalition, Inc. v. County of Madera 25 rejected the use of a future baseline predicated on language of the CEQA Guidelines and other cases that allowed exceptions based on historical conditions but not future conditions. In contrast, the court in Pfeiffer v. City of Sunnyvale City Council 26 held that the lead agency has discretion to use a predicted baseline in which environmental conditions that would exist at the time the project is implemented would vary from conditions at the time of environmental review.

The superior court noted that the flexible approach utilized in Pfeiffer is consistent with CEQAs requirement that an EIR “must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed.” 27 Because the physical conditions at the Salton Sea could vary independently of the QSA project over the long course of implementation, the superior court concluded that the use of a predicted baseline that accounted for nonproject changes predicted to occur during implementation complied with CEQA. The QSA project’s approach was supported by substantial evidence, including detailed information about the hydrologic computer models developed and validated by the Bureau of Reclamation and other agencies, which included analysis of existing conditions and project impacts over the entire 75-year project term. The QSA decision concluded that use of this type of modeling constitutes substantial evidence in support of the future baseline. This conclusion was consistent with most appellate decisions that found determination of the baseline to be a case-specific exercise based on the facts and that the lead agency has discretion to choose among conflicting expert opinions or methodologies, including modeling, to arrive at the most appropriate methodology for measuring the project’s impacts. 28

After the QSA decision was issued, the California Supreme Court addressed the use of a future baseline in Neighbors for Smart Rail. 29 In that case, the Exposition Metro Line Construction Authority (Expo Authority) was constructing a light rail project that would not be completed until 2030 and therefore utilized 2030 as the baseline against which to measure project impacts on traffic and air quality. 30 Although the court found that the Expo Authority did not substantiate the exclusive use of a future baseline with substantial evidence, it found that error non-prejudicial. More importantly, it upheld that use of this baseline complied with CEQA when supported by substantial evidence and identified factors that must be present to employ only a future baseline. 31

The supreme court’s reasoning paralleled the QSA decision. This court first stated that determining the appropriate baseline must be based on the EIR’s fundamental goal, which is to identify a project’s adverse environmental impact. To accomplish that goal, the baseline must identify environmental conditions absent the project against which the project’s impacts can be evaluated. 32 Citing extensively to its decision in Communities for a Better Environment, the court noted that the baseline will ordinarily be the existing physical conditions rather than hypothetical conditions that could have existed under applicable permits. It also identified how the Communities for a Better Environment decision addressed the problem of defining existing conditions when the conditions changed or fluctuated over time:

Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence. 33

The California Supreme Court made clear that its decision in Communities for a Better Environment did not decide the issue of using future projected conditions as the baseline. The court reviewed the three appellate decisions on use of a future baseline and rejected the prohibition against exclusive use of a future baseline articulated in Sunnyvale and Madera Oversight Coalition as too restrictive. The court identified the standard for using only a future baseline as follows:

Projected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions—a departure from the norm stated in Guidelines Section 15125(a)—is justified by unusual aspects of the project or the surrounding conditions. 34

The court also added the condition that the lead agency may utilize only a future baseline and “forego analysis of a project’s impacts on existing environmental conditions if such an analysis would be uninformative or misleading to decision makers and the public.” 35 No such justification is required, however, if the lead agency considers “both types of baseline—existing and future conditions—in its primary analysis of the project’s significant adverse effects.” 36 The court further indicated that use of existing conditions and a predicted baseline is more consistent with CEQA Guidelines Section 15126.2(a), which provides that the EIR must also give “due consideration to both the short-term and long-term effects of the project.” 37
long-term impacts over the course of the 75-year project.

Alternatives

Each of the alternatives analyzed in the transfer EIR entailed a transfer of varying amounts of conserved water from the IID because the IID’s critical project objectives and fundamental project purpose included 1) retaining its water rights while complying with the State Board order to conserve water and 2) facilitating implementation of the QSA settlement. As in In re Bay-Delta, the range of alternatives was challenged as too restrictive, and the challenger proffered that an entirely conservative alternative within the SDCWA’s jurisdiction to lessen the water supply needs should have been considered. The QSA decision rejected the challenge on the same ground the California Supreme Court articulated in In re Bay-Delta: The proffered alternative did not fulfill critical project objectives and the project’s fundamental purpose and therefore did not need to be considered.

Use of Co-Lead Agencies

The IID, the SDCWA, the CVWD, and the MWD entered into an agreement to serve as co-lead agencies for the QSA programmatic EIR. The numerous agreements comprising the settlement and the QSA project originated from a 1999 document titled “Key Terms for Quantification Settlement,” which identified major settlement terms for disputes about quantification of water allocation within California and proposed plans to reduce California’s use of Colorado River water. Each of the four agencies had principal responsibility for implementing various components of the QSA project, and many aspects of the project were located outside the respective service areas of each. Based on the Planning and Conservation League decision, the use of co-lead agencies was challenged, claiming that the MWD was the primary beneficiary of the QSA, serviced the largest geographic area, and should have been the sole lead agency for the QSA project.

After careful analysis, this challenge was rejected. The QSA decision noted that no case had addressed the issue of co-lead agencies, and the case law focused instead on whether the designated agency qualified as the agency with principal responsibility for carrying out the project. The statutory language and criteria for lead agency in the CEQA Guidelines provide minimal guidance on this issue. Public Resources Code Section 21067 defines a lead agency as “the public agency which has the principal responsibility for carrying out or approving a project.” The QSA decision noted that this language neither allows nor prohibits multiple lead agencies. CEQA Guidelines Section 15050(a) appears to contemplate only one lead agency (“[o]ne public agency shall be responsible for preparing an EIR for the project”). However, CEQA Guidelines Section 15050(d) authorizes more than one agency to serve as lead agency:

Where the provisions of subsections (a), (b) and (c) leave two or more public agencies with a substantial claim to be the lead agency, the public agencies may by agreement designate an agency to be the lead agency. An agreement may also provide for cooperative efforts by two or more agencies by contract, joint exercise of powers or similar devices.

The superior court relied on the second sentence to conclude that a contract or joint powers agreement may establish a cooperative co-lead agency arrangement among agencies with a substantial claim to be the lead agency. Under the circumstances of the QSA project, the superior court upheld the use of co-lead agencies on this issue of first impression.

Growth-Inducing Impacts

Under CEQA, an EIR must describe any growth-inducing impacts of a project, includ-
ing ways in which the proposed project could foster growth, either directly or indirectly, and ways that the project could “remove obstacles to population growth.”39 Only a “general analysis” of a project’s potential to foster growth and the project’s “reasonably foreseeable consequences” is required.40 An EIR does not have to reanalyze growth that the project may facilitate if that growth was already reviewed under CEQA as part of a separate approval process, such as a general plan EIR.41 One indication of growth-inducing impacts is if the project requires construction of new facilities or otherwise “may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively.”42 The EIRs concluded that the QSA project would provide the SDCWA with a more reliable water supply but that the project would not induce growth in the SDCWA’s jurisdiction.

Presenting an issue of first impression, this conclusion was challenged on the ground that as a more reliable water source, the 200,000 AFY of transferred water was inherently growth-inducing for the SDCWA. Challengers contended that because it was higher priority water that was in addition to the firm 300,000 AFY supply the SDCWA received from the MWD, the transferred water would accommodate and foster growth in the SDCWA’s service area. The superior court rejected this challenge.

**Grounds for the QSA Decision**

The QSA decision based its conclusion on three grounds. First, substantial evidence showed the SDCWA’s water supply needs exceeded the so-called firm supply from the MWD and that the transfer water would replace, not add to, the water the MWD previously provided from Colorado River surpluses that were being eliminated. Hence, the transfer water would not add to the amount of Colorado River water the MWD supplied to the SDCWA, and would still not be sufficient to meet the SDCWA’s existing needs. Second, the conserved water the IID transferred would be conveyed through existing facilities, including water lines operating near capacity, and would not be able to convey more water to the SDCWA than it had been receiving from the MWD. No new infrastructure was required or planned to convey an increased amount of water to the SDCWA. Finally, the SDCWA water supply planning documents demonstrated that the transferred water would be used to meet existing water supply demands that had been planned and approved in general plans in the SDCWA’s service area for which CEQA documents had been prepared. The QSA decision concluded that using transferred water to meet existing

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The QSA program has been implemented since it was approved. The water transfers will continue while these and other issues are decided on appeal.

1 County of Imperial v. Superior Court, 152 Cal. App. 4th 14, 18 (2007).
4 Twenty-five percent of Southern California total water supply is from the Colorado River, which is nearly 45 percent of the total amount of water imported for Southern California. See http://www.dai.lycamera.com /state-west-newsci_23881996/ceds-take-measures-light -drought-along-colorado-river.
6 In re Bay-Delta, 43 Cal. 4th at 1165.
7 Id.
8 A detailed history of these disputes and the ensuing litigation is described in In re QSA Cases, 201 Cal. App. 4th 758 (2012) and County of Imperial v. Superior Court, 152 Cal. App. 4th 13 (2007).
10 In re QSA Cases, 201 Cal. App. 4th at 773, 788.
11 Id. at 758.
15 Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist., 48 Cal. 4th 310, 327-28 (2010).
17 Sunnyvale West Neighborhood Ass’n v. City of Sunnyvale, 190 Cal. App. 4th 1351 (2010).
23 Id. at 445-46.
24 Id. at 447.
25 Id. at 449 (quoting Communities for a Better Env’t v. South Coast Air Quality Mgmt. Dist., 48 Cal. 4th 310, 328 (2010)).
26 Note that the QSA decision quoted the same language from Communities for a Better Environment.
27 Id. at 451.
28 Id. at 453.
29 Id. at 454.
30 Id.
34 See, e.g., Clover Valley Found. v. City of Rocklin, 197 Cal. App. 4th 200, 228 (2011) (“[G]rowth has already been analyzed in the City’s general plan EIR and was contemplated in the general plan and the SPMUD Master Plan.... CEQA did not require the City to redo that analysis in this project EIR as part of the growth-inducing impacts analysis.”) (citing Pub. Res. Code §21094(a)); Sierra Club v. West Side Irrigation Dist., 128 Cal. App. 4th 690, 701-03 (2005) (upholding a negative declaration of water supply contracts because the water would serve growth already planned in the general plan and evaluated in the general plan EIR).
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Statutory Regulations Govern the Certification of Court Interpreters

A FEW YEARS AGO, I SAT IN ON A DEPOSITION in which the deponents were a limited English proficient couple whose primary language was Spanish and who had been sued by a woman bitten by their dog. A Spanish interpreter was provided for the deposition, but I was present because the attorney preferred to use his own interpreter when he conferred with clients in private.

It was not long before I started to notice that the interpreter was not very good. She repeatedly corrected her own interpretation without stating “interpreter correction” for the record every time she did so. The purpose of these two words is to clearly differentiate an interpreter’s corrections from those that come from a witness while testifying. The latter could convey the idea of uncertainty or unreliable memory as opposed to unaltering, confident responses.

In the language skills department, the interpreter also failed more than once. At one point, as one of the defendants elaborated on a moment of confusion and noisy disturbance that occurred in the inciting incident for the legal suit in which they were involved, the interpreter interpreted the word “escándalo” as “screaming,” thus giving a different nuance to what should have been described as “commotion.” The code of ethics for the judicial interpreting profession, intended to provide guidelines for interpreters on their professional and ethical responsibilities, suggests that unless the misinterpretation is a glaring error, an interpreter who witnesses the mistake should confer with his or her colleague in private in order to give that person the opportunity to correct the record.1

During one of the breaks, I brought the issue of the misinterpretation to the defense attorney’s attention, and he agreed that I should discuss it with the interpreter. I did, in private. She became defensive and insisted that “screaming” and “commotion” were synonyms. We went back on the record, and the awkwardness continued. No “interpreter correction” disclaimers were used, and a couple of seconds of silence occurred when the interpreter could not remember the Spanish word for the English adjective “mean.” Moreover, throughout the deposition, she was constantly looking at her cell phone.

Later, I discovered that she did not have certification from the Judicial Council of California. This is a violation of the statutes that govern the use of interpreters for legal proceedings. Section 68561 of the Government Code mandates that “any person who interprets in a court proceeding using a language designated by the Judicial Council...shall be a certified court interpreter.” Section 68560.5 defines court proceeding as a “civil, criminal, or juvenile proceeding, or a deposition in a civil case filed in a court of record.” Certified court interpreters in California have passed a rigorous exam, and other specialized terminology, and it is not an easy exam to pass. Just for Spanish there are slightly more than 1,300 certified court interpreters in all of California.2

Unfortunately, the law is not always followed. I sat in on another personal injury deposition not long ago, and once again the interpreter hired by the plaintiff’s attorney did not have certification from the Judicial Council but instead only administrative credentials, as did the interpreter for the deposition in the matter of the dog-biting incident. Administrative credentials qualify an interpreter for such administrative matters as workers’ compensation but not for a depo-

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Mariana Bension-Larkin is a state and federally certified court interpreter in Spanish and president of the Association of Independent Judicial Interpreters of California.
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