Los Angeles lawyers Mitchell Wexler (right) and Andrés Ortiz offer guidance on the duty to advise clients on the immigration implications of a criminal proceeding.

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story, “New U.S. Effort to Aid Unaccompanied Child Migrants,” the White House director of domestic policy stated that border agents have seen a recent spike in the number of girls under the age of 13, “including some barely old enough to walk.” Yet, on September 28, the Los Angeles Times reported that in a recent poll Californians remain equally divided about whether these children should be deported immediately or be allowed to remain while they await legal proceedings.

Some argue that providing access to immigration court through publicly funded legal services violates federal law and makes the problem worse by encouraging more illegal immigration. But many unaccompanied and undocumented children have legitimate claims that would grant them legal status if they could navigate the labyrinthine web of immigration laws. An analysis of immigration cases through June, as reported by the Transactional Records Access Clearinghouse at Syracuse University, establishes that legal representation makes a difference. In almost half of the cases in which a child had representation, the immigration court allowed the child to remain in the United States, but “nine out of ten children were ordered deported” when they were not represented. Legal assistance makes a huge difference in overcoming obstacles to access to justice for these children, who also face a language barrier.

According to the Los Angeles Times, California took the humanitarian lead in providing publicly funded representation for the approximately 4,000 unaccompanied undocumented minors detained here. On September 28, Governor Jerry Brown signed SB 873, which authorizes a budget appropriation of $3 million to fund legal representation of unaccompanied minors. The new law codifies the jurisdiction of the state superior court, including the juvenile, probate, or family divisions, to make an order containing the necessary findings regarding special immigrant juvenile status, if there is evidence to support those findings, that may enable a child to petition the U.S. Citizenship and Immigration Service for classification as a special immigrant juvenile.

A similar effort has been made at the federal level. On September 30, the New York Times reported that the U.S. Department of Health and Human Services announced the federal government’s authorization of $9 million over two years for the legal representation of unaccompanied minors facing deportation in immigration courts. Federal officials reported to the New York Times that about 58,100 children caught at the border remain in custody.

LACBA’s Immigration Legal Assistance Project has also responded to this humanitarian crisis, providing a two-day pro bono training in June for attorneys representing unaccompanied minors. The Los Angeles legal community enthusiastically joined the pro bono call for legal assistance. According to Directing Attorney Mary Mucha, the program sold out. Another program was offered in October.

I urge attorneys to attend a program and to volunteer. As Bishop Eusebio Elizondo of Seattle told the New York Times, “This is a humanitarian crisis....These children are refugees who deserve the protection of our nation. They should not be viewed as lawbreakers.” They deserve access to justice.

Mary E. Kelly is a nurse attorney and an administrative law judge II with the California Unemployment Insurance Appeals Board. She is cochair of the California Access to Justice Commission’s Administrative Agency Committee.
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Ron Brown  Los Angeles Public Defender

What is the perfect day? The day that does not have a fire—by fire I mean no one is in trouble with the State Bar, no one is being held in contempt, and I don’t have to discipline anyone. I can work on policy.

What is overrated in the legal profession? Jury trial experience. There is more to it than the number of trials. But, if you don’t try a case, DAs will force upon you a bad deal.

What is underrated in the legal profession? Salary. Some of the smaller counties actually eclipsed us in salary. I can’t stand to lose a good lawyer because I can’t promote them to a rank they deserve.

Why did you choose this profession? I wanted to be a lawyer because you can really help people. I interviewed for the district attorney’s office, and it didn’t work out well. I interviewed with the public defender’s office, fell in love with the interviewers, fell in love with the office.

What is the biggest misconception about being a public defender? If the sources are free, we can’t be worth anything. The best criminal defense lawyers out there are public defenders. Private lawyers come to us for advice.

What has been your best job? Public defender.

What was your worst job? Custodian’s assistant while I was in high school; it was no fun cleaning toilets.

What characteristic did you most admire in your mother? Her respect for the law. Her thirst for education. She was great at making me go to a library and making me study.

What would your mother say if she knew you were the public defender? She’d be very, very proud of me, but would say don’t get a big head about it, you didn’t get there on your own.

If you were handed $1,000,000 tomorrow, what would you do with it? I would save $900,000 and go out and buy a Tesla with the rest of it.

What is your favorite vacation spot? Maui.

What is your favorite sport as a participant? Bicycling.

What is your favorite spectator sport? College football.


Which person in history would you like to take out for a beer? If I drank beer, I would probably want to spend some time and talk to Abraham Lincoln and say, “What took you so long?”

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

What are the three most deplorable conditions in the world? Hunger, poverty, imprisonment.

Who are your two favorite U.S. presidents? Jimmy Carter and Abraham Lincoln.

What is the one adjective you would like on your tombstone? Fair.
Guidelines for a Successful Lateral Job Search

gone are the days when staying at one firm for an entire career was the norm. With an array of options available to a generation of recent graduates known for seeking changes of scenery, it is almost inevitable that a new or young lawyer will at some time be looking for a new opportunity. However, substantial decisions accompany making a transition. In the compressed and highly competitive legal market a lateral move can mean more than a simple change of job. It may entail a change in lifestyle, a less agreeable, a job, uncomfortable shake-up, and a resetting of reputation—not necessarily always a bad thing. While making a move is no minor decision, there are many practical ways to look for a lateral position that can increase the likelihood of landing something in line with desired goals and aspirations.

The most fundamental misunderstanding about the job search is that new and younger attorneys often believe that sending out resumes expansively, without making a personal contact, is an effective way to obtain a job. This archaic method has a much smaller role in today’s legal landscape. While casting a wide net is certainly advisable, the majority of attorneys who did not graduate in the top 10 percent of their class will find much more success in pounding the pavement. The search is a job in itself, requiring diligence in advertising one’s skills and experience.

Employers are more apt to hire individuals with whom they have had a prior affiliation or a social connection, and the odds of a potential employer’s granting an interview are greatly enhanced if there has been previous personal acquaintance. It is very difficult to impress someone on paper since resumes are often vetted by individuals with no ultimate input on the selection process.

There are relatively easy ways to forge these types of relationships. Los Angeles may have one of the most accessible legal communities on the planet. First, decide what area of law to transition into, then explore all of the organizations in town that have sections or groups devoted to that practice. Nearly every conceivable area of the law is represented. Join the target group and become available to contribute. Participants in these kinds of endeavors are generally the movers and shakers with whom it is extraordinarily helpful to be acquainted.

It is also important to adamantly—and respectfully—have coffee with everyone who practices in the areas of interest. Job opportunities are often presented first to hungry, motivated newer attorneys who have put their names out through individual, targeted networking. Passing out business cards at events is fine, but it is not an effective networking tool unless a one-on-one impression is made through follow-up. Most alums are happy to grab a quick coffee with a fellow graduate, and are even more apt to do so if the purpose is to network and learn rather than to immediately be asked for a job. This activity provides an opportunity to inquire about jobs that may not even exist yet but that almost certainly will in the future. It is much better to be one of the first or only applicants than to be the 500th.

A key to landing a satisfying lateral position also depends on having a positive attitude. Unfortunately, there is still a doomsday mentality when it comes to job searching, so transcending the lamentations of other attorneys can be a formidable challenge. Learning to become one’s own cheerleader while dealing with what will likely be a substantial amount of rejection is a great skill to have. Although it may be a buyer’s market for employers, looking for a lateral position

Be willing to investigate all potential avenues but unwilling to sell yourself short. Employers are not only looking for hard workers but also individuals with whom they would be willing to share a beer after work.

has the advantage of time. Be willing to investigate all potential avenues but unwilling to sell yourself short. It may take an inordinate amount of time to find the right spot, but attorneys will more than likely be practicing law for life so it is worth putting time and energy into the search for the next job. Employers are not only looking for hard workers but also individuals with whom they would be willing to share a beer after work. A conversation illustrating unique passions outside the law is better than a resume that lists Westlaw as an interest.

The newer generation’s reputation for rapid, constant change means having to answer the interview question “Why are you looking to move?” strategically and carefully. Aside from the basic questions that are variants of “Why should I hire you?” and “Do I want to have a beer with you?” an inquiry into the rationale for change is a manifestation of employer fears of only being a stopover. These fears can be allayed by the applicant’s presenting himself or herself as a long-term option.

Meeting a myriad of practicing attorneys can be personally and professionally rewarding even if the interaction does not lead to a dream job. Although it may sound like a cliché, the most important parts of a lateral search are to have fun, keep perspective, and push forward.

John D. Fowler is a litigation associate specializing in entertainment and business at the Los Angeles office of Carlsmith Ball LLP.
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Dealing with Domestic Violence during a Divorce

BEFORE THE INK DRIES on a retainer agreement, a family law practitioner should advise clients on what to do if they become embroiled in domestic violence with the opposing party. The attorney should also have a strategic plan for advising clients on what to do should domestic violence occur.

First, the attorney may advise a new client that if violence erupts, he or she should remove himself or herself from the location and call the police immediately, as the failure to make a timely report can lead to complications in prosecuting a claim. Clients should also be counseled against engaging in activities that may be deemed aggressive, such as keeping the children in violation of an agreement or forcibly taking them from the other parent, even if the other parent is in violation of a court’s orders. Clients should also be advised against placing themselves in vulnerable situations. In a contentious case, it is usually sound advice to instruct the client to refrain from meeting with the other party where there are no witnesses.

It is also important to educate clients on the potential consequences of domestic violence that go beyond the emotional and physical injuries to the victim and children. For the perpetrator, a conviction entails the possibility of incarceration, fines, court-ordered counseling or classes; loss of employment and future employment opportunities; loss of liberty associated with a restraining order; loss of immigration status; and loss of child custody rights. The consequences do not end there. Courts also consider domestic violence when deciding a support award and division of joint property. A victim of domestic violence may choose to sue the perpetrator in civil court and decide a support award and division of joint property. A victim of domestic violence may choose to sue the perpetrator in civil court and may receive damages greater than half of the community estate.

If violence occurs, family law attorneys should clear their calendars and meet with the client as soon as practicable afterward to help make critical decisions, such as whether or to retain a criminal defense attorney or obtain a domestic violence restraining order (DVRO). The first step in getting a DVRO is to make a request for a temporary restraining order (TRO), which requires the filing of an ex parte motion with or without notice. The moving papers for a DVRO include the following Judicial Council forms: Request for Domestic Violence Restraining Order (DV-100), Notice of Court Hearing (DV-109), and Temporary Restraining Order (DV-110). In Los Angeles County, an additional form, Civil Case Cover Sheet Addendum and Statement of Location (LACIV-109) needs to be completed unless the parties already have an open unrelated matter in family court, such as a pending dissolution of marriage.

The forms are largely self-explanatory, but attention should be given to the client’s needs. For example, if the case involves child custody, an additional form (DV-108) will have to be completed. Likewise, a separate form (DV-150) is required if the client requests the opposing party have only monitored visitation with the children. In all cases in which the client is seeking financial relief, such as child support, spousal support, and attorney’s fees, an Income and Expense Declaration (FL-150) needs to be filed with the moving papers. It is best to consult with the client while completing the forms.

Attorneys should take care in writing the client victim’s declaration. The judicial officer who reads the request for a TRO makes his or her decision based on the evidence in the declaration. To support the declaration, the attorney should attach exhibits as corroborating evidence, such as photographs of the victim’s injuries and text and e-mail messages. The client’s declaration should highlight the most recent incidents first and then chronicle any past domestic violence.

The filing procedure is straightforward. Rather than filing the request with the filing window, the moving papers are handed directly to the clerk in the department in which the case will be heard. The judge will usually review the documents in chambers and either grant or deny the request without hearing argument. If the request is granted, the court will direct the clerk to schedule an evidentiary hearing for a permanent restraining order within approximately three weeks. After the TRO is issued, the sheriff enters it into the California Law Enforcement Telecommunications System (CLETS). Once this happens, law enforcement will have 24-hour access to the terms of the order. Nevertheless, the client should file a copy of the TRO with the local police (along with the proof of service) and the children’s school. Clients should also keep a copy on their person at all times, as it is possible there will be a mistake made in entering the TRO into CLETS.

On occasion a client will obtain a TRO on his or her own and then ask for help with the evidentiary hearing. In these cases, the client’s moving papers should be scrutinized, as they are likely to contain errors. Discovering the client’s mistakes in advance of the hearing gives counsel time to correct them. If the client failed to request attorney’s fees, for example, counsel will need to file a separate motion. Furthermore, in the weeks before the hearing, it is imperative to gather witnesses and prepare the client’s testimony. Evidence that corroborates the client’s version of the event is most valuable, as in most cases the court will not issue the restraining order after hearing only

Donald P. Schweitzer is a certified family law specialist in Pasadena.
Civil Code Section 1708.6.

opposing party in civil court pursuant to civil lawsuit for domestic violence against the including the possibility of filing a separate to leverage the domestic violence incident, should also explore other avenues with clients

Frequently in family law cases, a party or any public safety agency. Parties should be familiar not only with the Civil and Family Code sections relevant to domestic violence but also the Penal Code. Its definition of domestic violence is different from that of the Family Code, of which Section 6320 requires the moving party to prove only by preponderance of the evidence that the offending party engaged in harassment or conduct likely to disturb the peace of a reasonable person. A criminal conviction, on the other hand, requires specific elements of a crime to be proven beyond a reasonable doubt.

For example, battery against a spouse is not easily proven without corroborating evidence. A more serious crime occurs if a person willfully inflicts upon his or her spouse or former spouse a corporal injury that results in a traumatic condition. This crime can be charged as a felony, and a conviction may be punished by imprisonment in state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to $6,000 and imprisonment. In California, evidence of a traumatic condition exists if the injury is visible, however slight. The element of this crime that prosecutors most frequently struggle to prove is that the defendant caused the injury. Also, the injury itself may come into question if, for example, the photograph is poor.

Frequently in family law cases, a party removes, damages, destroys, or obstructs the use of a wireless communication device with the intent to prevent the use of the device to summon assistance or notify law enforcement or any public safety agency. Parties commit this crime are guilty of a misdemeanor. Supporting evidence of this crime can be found in a recording of the victim’s 911 call and photographs of a destroyed phone. Another crime—less likely to be observed in divorce cases—is violation of the stalking statute. In this crime, a party willfully, maliciously, and repeatedly follows or harasses another person and makes a credible threat with the intent to place that person in reasonable fear for his or her safety or safety of his or her immediate family. This is punishable by imprisonment for not more than one year or by a fine of not more than $1,000, or both. The most challenging element of this crime to prove is that the defendant had specific intent to place the other party in fear. On the other hand, one of the most prevalent crimes in family law cases is usually easy to prove. If a party, with intent to annoy, telephone or makes contact by means of an electronic communication device with another and addresses to the other person any obscene language or any threat to inflict injury on the person, that party commits a misdemeanor. The result of a criminal court proceeding is likely to be very influential in family court, which is mandated to consider a criminal conviction in deciding custody issues, spousal support, and a permanent restraining order. One frequent challenge to the patience of clients, however, is that criminal matters can take months to resolve. As family law proceedings progress, however, they can influence the criminal case. The declarations and testimony of both parties may be used as evidence.

If the client is the one accused of domestic violence and criminal charges have been filed or appear likely to be filed, counsel should advise him or her regarding the Fifth Amendment right against self-incrimination. If a client is facing criminal charges for domestic violence, the family law attorney should advise the client against speaking to the police without an attorney. Anything that a client tells the police will likely be used against the client at trial. It is therefore usually a bad idea to file a client’s declaration concerning the incident in family court during the pendency of the criminal case.

Unless the family law attorney has significant experience representing clients who are facing criminal charges for domestic violence, he or she should maintain a relationship with a local criminal defense attorney. If the case is referred to a defense attorney, it is important to coordinate the criminal and family cases. The last thing a family lawyer wants is to jeopardize the client’s criminal case by taking action in the family law case before the criminal matter is resolved. The client will need to make critical decisions as to whether to proceed in family court with the DVRO hearing or to wait until the criminal matter is resolved.

If the party alleging domestic violence intends to cooperate with the prosecution in criminal court, the wisest course for the attorney of the accused is to request a continuance in family court for the hearing on a permanent restraining order. The loss of some or all child visitation privileges for several months may be the sacrifice that the client must make in order to allow the criminal matter to resolve. In deference to the accused party’s due process rights, the family court generally will allow continuance of the DVRO pending resolution of the criminal matter. Many courts will also grant the client’s request for visitation with the children during the pendency of the criminal matter, although the visitations may be monitored.

One effective way that family law practitioners can assist clients in reaching a favorable resolution in the criminal matter is to deprive the party who made the allegations and any other people who purported to have witnessed the incident (excluding children). A thorough deposition of the opposing party can be a valuable tool for the criminal defense attorney, as it is likely to uncover weaknesses in the case, such as prior inconsistent statements.

Client Expectations

It is important to manage the expectations of a client accused of domestic violence. A family lawyer must be realistic in evaluating the opposing party’s evidence. Often, the evidence is so strong against the accused that an attempt to fight the DVRO would be futile and potentially insulting to the court. The better tactic is to ask the court for leniency with respect to the type of restrictions imposed. Despite the exhaustive list of mandatory requirements imposed by the Family Code, the trial court still has broad discretion to issue orders with respect to the DVRO, such as duration, child custody, and visitation. Criminal defense attorneys and criminal court judges are generally unfamiliar with family law or how the criminal case affects client’s pending family court matters. Therefore, it is helpful for the family law practitioner to provide the district attorney and the court not only with a status of the family law proceedings but also a copy of the current child custody orders. Otherwise, it is entirely possible that the protective order issued in the criminal case will preclude the client from visiting his or her children. Furthermore, without knowing the relevant issues in the family court case, the district attorney and the court often have only one side of the story.

The potentially severe consequences of a restraining order make it important to have a clear understanding of the client’s goals. A
victim of domestic violence may have a strong need for child or spousal support or a desire for reconciliation, and a restraining order can be at odds with this objective. If, for example, the alleged perpetrator of domestic violence is likely to lose a job as a result of the restraining order, a client may want to forego obtaining one. In these situations, however, it is advisable for family law practitioners to warn their clients of the advantages of having a DVRO, which include favorable outcomes regarding custody and support.

Attorneys need to be aware, however, of the alternatives to a DVRO, which is required to be registered on CLETS. Parties can choose instead to enter into a stipulation and order that contains similar types of restraining provisions as a DVRO and hold the same enforcement capability—i.e., contempt. Parties may wish to enter into these agreements to avoid the mandatory provisions of a DVRO. For example, the code mandates that in almost all circumstances the restrained person turn in his or her firearms. This provision can cause a financial hardship on the entire family if the possession of a firearm is required for the restrained party’s employment. The court does not need a DVRO in order to allow the victim to record phone calls with the restrained party and to make the restrained party participate in domestic violence classes and parenting classes as a condition to exercising visitation with the children. In addition, termination or modification of a DVRO requires the court’s assent, while a stipulation can be modified with a subsequent stipulation between the parties.

Given the possibility of domestic violence arising in a family case and the severe consequences it can entail, all family lawyers should have plans to protect clients—whether victims or accused. Attorneys who are ready to provide clients with proactive and effective legal representation can make a positive difference on the outcome of their cases.

1 Fam. Code §§3011, 3044.
3 Fam. Code §6300.
4 Fam. Code §6344.
6 See Penal Code §243(e); People v. Watson, 46 Cal. 2d 830 (1956).
7 Penal Code §273.5(a).
9 Penal Code §591.5.
10 Penal Code §546.91(a).
11 Penal Code §653m.
12 Fam. Code §§3011, 3044.
13 Fam. Code §§4320, 4325.
14 Fam. Code §6320.
15 Fam. Code §6380.
16 Fam. Code §6389.
17 Fam. Code §§3044, 3022.
The Dissolution of a Law Firm can be a financial catastrophe for its partners. In a typical law firm dissolution, the partners lose any bonuses that they were promised and their end-of-year draws. The thousands or hundreds of thousands of dollars in capital that each partner contributed for the firm’s operating expenses are usually sacrificed to pay the firm’s major creditors—typically landlords and banks. Most of the firm’s partners must start over, building a new practice with a new set of colleagues and making a new capital contribution to their new firm.

If the firm’s creditors force it into bankruptcy, which often happens following law firm dissolutions, the partners can expect to be the targets of litigation. In each of the bankruptcies of Brobeck, Phleger & Harrison LLP; Heller Ehrman LLP; Dewey & LeBoeuf LLP; Coudert Brothers LLP; Thelen LLP; and Howrey LLP, the representative of the firm’s bankruptcy estate demanded that the former partners pay the estate staggering sums or else be sued.

- In the Heller bankruptcy, the estate representative demanded that the shareholders—the Heller equivalent of a partner—return all distributions and other compensation received in the eight months prior to Heller’s dissolution. To settle the claims against them, the senior shareholders—attorneys that had been elevated to shareholder for five or more years—paid $100,000 on average, with high-earning shareholders paying $350,000 each.1
- The partners at Dewey repaid funds under a complex partner contribution plan in order to obtain a release of claims against them. Under this plan some 444 partners paid a total of $71.5 million, with several of the partners paying more than $1 million apiece.2
- In the Howrey dissolution, the estate representative demanded that the partners return all distributions and other compensation received in the 12 months before the firm filed for bankruptcy. Although not all claims against the partners have been settled, a large group of partners recently paid between $21,000 and $192,000 each to settle the claims against them.3

The partners’ new firms have also paid dearly. For example, Covington & Burling LLP settled claims with the Heller estate for $4 million,4 Morgan, Lewis & Bockius LLP agreed to pay $10.2 million to the Brobeck estate,5 and more than $8.6 million has been collected in the Heller bankruptcy from the 46 firms facing claims by the Heller trustee.6

In the major law firm bankruptcies, there are two types of claims usually alleged. The first are clawback lawsuits, which assert that the former partners must return all or a substantial portion of their draws and other compensation. These lawsuits are based on the allegation that the bankrupt law firm was insolvent or inadequately capitalized when it paid the distributions to the partners and that the law firm, at the time of insolvency or inadequate capitalization, should have kept its revenues to ensure that present and future creditors would be paid rather than distributing any draws or other compensation to the partners. Hindsight plays a key role in these types of allegations, as seemingly profitable firms lose tremendous value once the law partners lose faith that their partnership will continue to be profitable. Partners rarely know or suspect that their firm may be insolvent. However, under constructive fraudulent transfer law, a transfer is avoidable whether or not the recipient knows that the transferee is insolvent. Under the Bankruptcy Code, the trustee can avoid a transfer of a debtor as constructively fraudulent if the transfer was for less than reasonably equivalent value and if the debtor was insolvent, inadequately capitalized, or believed that it was about to be unable to pay its debts as they came due.7

The second type of claim is the so-called Jewel lawsuit, which is brought against the former partners’ new law firms seeking to collect any profits that the new firms earned from the dissolved firm’s former engagements. Jewel lawsuits are based on the duty, under the Uniform Partnership Act (UPA) and the Revised Uniform Partnership Practice Tips

By Matthew C. Heyn

The Application of Jewel v. Boxer to Law Firm Dissolutions

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that it was only applying a default rule under the UPA and that the default rule could be altered or waived by agreement of the partners.14 Firms in dissolution (or near it) have repeatedly attempted to waive Jewel duties, but bankruptcy courts and district courts have found that the waivers may be set aside as fraudulent transfers if such waivers are entered into at a time that the law firm is insolvent or inadequately capitalized.15 As a result, many law firms have paid bankruptcy trustees millions to avoid litigating the value of unfinished business transferred to them.

Decisions Rejecting Jewel

Two recent decisions, one from the New York Court of Appeals (which is the highest court of the State of New York, the situs of the Dewey, Coudert, and Thelen bankruptcies) and one from the District Court for the Northern District of California (which reviews the decisions of the bankruptcy court handling the Brobeck, Heller, and Howrey bankruptcies) have changed the landscape for law firm bankruptcies by rejecting the applicability of Jewel to major law firm bankruptcies.

This year, *in Heller Ehrman LLP v. Davis, Wright, Tremaine LLP*, Judge Charles R. Breyer of the U.S. District Court for the Northern District of California issued a ruling in several consolidated lawsuits—against Davis Wright & Tremaine LLP; Jones Day; Foley & Lardner LLP; and Orrick, Herrington & Sutcliffe LLP—arising out of the Heller bankruptcy.16 Prior to Heller’s bankruptcy and as part of its dissolution, Heller notified its clients that it would no longer be able to provide legal services to its clients, leaving clients with ongoing matters no choice but to seek new counsel and Heller Shareholders no choice but to seek new employment.17

Second, in *Jewel*, “[t]he new firms represented the clients under fee agreements entered into between the client and the old firm.”18 The former Heller clients signed new retainer agreements with the new firms. This was significant in showing that the new firms were not completing Heller’s business.

Third, in *Jewel*, the new firms consisted entirely of partners from the old firms. One firm with four partners became two firms with two partners each. In Heller, the defendants were each large preexisting law firms “that provided substantively new representation, requiring significant resources, personnel, capital, and services…”20 Unlike the defendants in *Jewel*, the firms hiring Heller’s former partners never owed any duty to the dissolved firm and its creditors.

Fourth, *Jewel* treated hourly fee matters and contingency fee matters as indistinguishable. *In Heller*, there were no contingency fee cases at issue.21 This seems to be relevant because it is not clear from the *Jewel* decision to what extent the postdissolution fees at issue were for hourly or contingency fee matters.

Finally, *Jewel* case was decided in 1984 and thus applied the UPA, which was superseded in California and most other jurisdictions—but not New York—by the RUPA. California’s adoption of the RUPA was significant for two reasons. First, under the RUPA, partners of a dissolved law firm are entitled to compensation for completing unfinished business. This change undermined the primary basis for the California Court of Appeal’s decision in *Jewel* since under the UPA partners had not been entitled to compensation for completing unfinished business unless the partners agreed otherwise. Second, under the RUPA—but not the UPA—the duty not to compete with the partnership ends on dissolution. Thus, former Heller partners and their new firms were free to enter into agreements with their former clients. Those new agreements did not give—and did not need to give—any rights to the Heller estate.22

To these legal arguments, Judge Breyer added a public policy argument that forcing firms that hired former partners of dissolved law firms to give up their profits would dis-
recent New York contingency fee cases, the New York court held that “[a] law firm does not own a client or an engagement, and is only entitled to be paid for services actually rendered.”27 The Thelen court’s rejection of Jewel was premised on two principles. First, under New York law—California law is similar—clients have an “unqualified right to terminate the attorney-client relationship and can terminate an attorney at any time.”28 Second, because the client can terminate a law firm at any time, the “expectation of any continued or future business is too contingent in nature and speculative to create a present or future property interest.”29 Thus, although New York’s partnership act imposed an obligation to liquidate the firm’s property and to account for any property and unfinished business, the client matters that Thelen and Coudert were working on before they dissolved could not constitute property or unfinished business. The firms in dissolution had no ability to complete the work, and the clients had no obligation to stay.

The Thelen court also distinguished Stem v. Warren30—a 1920 case involving an architecture partnership—and several more recent New York contingency fee cases.26 New York followed the rule in Jewel. However, the court rejected the application of Jewel to dissolved law firms. In a portion of the opinion that echoed Judge Breyer’s decision, the court held that “[a] law firm does not own a client or an engagement, and is only entitled to be paid for services actually rendered.”27

Judge Breyer’s decision in Heller was soon followed by a decision from the New York Court of Appeals. On July 1, 2014, in response to questions arising out of the Thelen and Coudert bankruptcies, the New York court unanimously held in In re Thelen LLP that, as a matter of New York partnership law, there was no Jewel duty because “pending hourly fee matters are not [a dissolved law firm’s] ‘property’ or ‘unfinished business’” under New York’s partnership law.24 In that consolidated appeal, the bankruptcy trustees of Thelen and Coudert argued that under Stem v. Warren25—a 1920 case involving an architecture partnership—and several more recent New York contingency fee cases,26 New York followed the rule in Jewel. However, the court rejected the application of Jewel to dissolved law firms. In a portion of the opinion that echoed Judge Breyer’s decision, the court held that “[a] law firm does not own a client or an engagement, and is only entitled to be paid for services actually rendered.”27

As did Judge Breyer, the Thelen court noted significant policy reasons for rejecting Jewel. This court argued that the trustees’ position “would have numerous perverse effects” and would conflict “with basic principles that govern the attorney-client relationship under New York law and the Rules of Professional Conduct.”32 Among other public policy considerations, the court noted that New York has a “strong public policy encouraging client choice and, concomitantly, attorney mobility,” which would be undermined by holding that firms that hire a dissolved firm’s partners would have to pay any profits from transitioned matters.33 Among other things, the departing lawyers “might advise their clients that they can no longer afford to represent them, a major inconvenience for the clients and a practical restriction on a client’s right to choose counsel.”34 In addition, “clients might worry that their hourly fee matters are not getting as much attention as they deserve if the [new] law firm is prevented from profiting from its work on them.”35

It is likely that the decisions by the New York Court of Appeals and the Northern District of California will have a significant impact on law firm bankruptcies. Because the New York Court of Appeal is authoritative on New York law, it is binding for the bankruptcy of any New York law partnership. It is most likely that the Thelen and Coudert trustees will dismiss their actions against the law firms. Future bankruptcies of New York firms are unlikely to see demands or lawsuits against firms that hire the attorneys from the partnership in bankruptcy. It remains to be seen whether the New York Court of Appeal’s decision will have any application to nonlegal partnerships formed in New York.

Judge Breyer’s decision in Heller is not controlling authority. Moreover, the Howrey trustee has said he intends to appeal the decision and may not stop until the California Supreme Court decides the matter. However, the decision will carry significant persuasive authority, particularly in combination with the New York Court of Appeals decision. Although the Howrey trustee seems committed to continue pursuing Jewel claims through the courts of appeal, it is safe to say that most bankruptcy trustees will be much more reluctant to incur the expense of doing so given the apparently changing landscape of Jewel lawsuits.

1 Drew Combs, Settling with Banks, Heller Estate Moves Toward Closure, The AMLAW Daily,
4 Id.
5 Id.
8 Accord CORP. CODE §16404(b)(1).
10 Id.
11 Id. at 177.
12 Id. at 178-79.
14 Jewel, 156 Cal. App. 3d at 179-80.
17 Id. at *2.
18 Id. at *4.
19 Id. (quoting Jewel, 156 Cal. App. 3d at 175.).
20 Id.
21 Id.
22 Id.
23 Id. at *13.
28 Id. at *5 (quoting In re Cooperman, 83 N.Y. 2d 465, 473 (1994)).
30 Id. at *5.
31 Id. at *6.
32 Id. at *5-6.
33 Id. at *15.
34 Id. at *16-17.
35 Id. at *8.
36 Id.
The most significant contribution of Padilla v. Kentucky to California law is an acknowledgement from the U.S. Supreme Court that a failure to advise a noncitizen defendant of the immigration consequences of a plea can constitute ineffective assistance of counsel. In doing so, the Court largely adopted the obligations that California criminal attorneys have borne for over 25 years to advise a noncitizen of possible immigration consequences stemming from a plea. In Padilla, the Supreme Court recognized that over the years Congress has placed increasingly stringent restrictions on the foreign nationals who can be admitted into the United States and which noncitizens may remain in the country. At one time, there was only a narrow class of crimes that resulted in expulsion from the country, and until recently, immigration judges were granted wide discretion to “ameliorate unjust results [of a deportation] on a case-by-case basis.” Under current law, there is a wide class of crimes that makes a noncitizen’s removal nearly inevitable. In turn, the changes in immigration law have “dramatically raised the stakes” for noncitizens facing criminal charges. In many cases, a noncitizen’s immigration case is litigated during the criminal proceeding. These changes caused the Supreme Court to reflect upon a criminal defense attorney’s responsibility to inform a noncitizen client of adverse immigration consequences as a component of competent assistance of counsel.

Jose Padilla’s story illustrates how a noncitizen can be harmed when a criminal attorney fails to provide an adequate immigration advisal. Padilla, a native and citizen of Honduras, crossed the border into the United States in the 1960s. Subsequently, he honorably served in the U.S. military and eventually became a lawful permanent resident (LPR). He was a commercial truck driver at the time he was arrested for transporting marijuana. The state of Kentucky subsequently charged Padilla inter alia with a felony for marijuana trafficking. Before agreeing to plead, Mr. Padilla asked his defense counsel whether pleading guilty to the charges would affect his immigration status. The attorney said that because he was a long-time permanent resident, pleading guilty to the felony would not have any immigration consequences. However, in reality, pleading guilty to the controlled substance trafficking offense would

by MITCHELL WEXLER and ANDRÉS ORTIZ

Attorneys must adequately advise noncitizen clients of how a criminal plea can affect immigration status
made his deportation “virtually mandatory.”^{10}

Padilla filed for habeas relief, arguing that his previous attorney provided ineffective assistance of counsel. The Kentucky Supreme Court rejected his claim, but the U.S. Supreme Court granted the writ of certiorari and reversed the lower court’s ruling.^{11} Specifically, the Court held that defense counsel must inform a noncitizen client whether a plea carries a risk of deportation and that failing to advise of the consequences will not absolve the attorney’s duty to address the ramifications of a plea.^{12}

In reaching this conclusion, the Court recognized that the unique penalty resulting from a deportation is often worse than any penalty imposed by the conviction itself.^{13} Because of the devastating consequences associated with deportations, the Court addressed the question of whether a criminal defense attorney could provide ineffective assistance of counsel under the Sixth Amendment by failing to advise a noncitizen of the immigration implications of a plea.^{14} To determine whether counsel provided constitutionally insufficient representation, courts apply the test established under Strickland v. Washington.^{15} Under Strickland, the court must first determine whether counsel’s representation fell below an objective standard of reasonableness.^{16} Determining constitutional deficiency is necessarily linked to the practice and expectations of the legal community. The Supreme Court observed that “the weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”^{17}

However, the Court expressly declined to reach the second prong of the Strickland test, which requires the defendant to demonstrate prejudice due to the defense counsel’s deficient performance.^{18}

The Court explicitly stated that when immigration consequences are certain according to the Immigration and Nationality Act (INA), the defense attorney must advise the client that the plea will result in deportation.^{19} However, when the consequences are uncertain, the defense attorney must do no more than advise the client that he or she may be deported.^{20} Under California jurisprudence there are a number of appellate decisions predating Padilla that impose a greater burden on criminal defense attorneys to advise a noncitizen of the immigration implications of a plea. In Chaidez v. United States, the Supreme Court held that Padilla is not retroactive in federal criminal cases and in state courts that did not have preexisting duties to advise noncitizens because Padilla “altered the law of most jurisdictions.”^{21}

The holding, however, did not affect case law in jurisdictions where a preexisting Padilla-type duty already existed. State courts are charged with enforcing federal constitutional rights, so states are free to adopt protections for federal constitutional rights greater than those provided by the U.S. Constitution. Moreover, Padilla-type decisions that are based on the interpretation of state constitutional law remain unchanged by Chaidez.^{22}

California Precedential Cases

For over 25 years, in state court criminal proceedings, California criminal defense attorneys have been required to meet a higher burden than those required by Padilla. In 1987, the California Court of Appeal held in People v. Soriano that criminal defense attorneys are obligated to advise noncitizen criminal defendants about the actual and specific immigration consequences of conviction and to defend against those consequences.^{23} Moreover, Soriano’s holding is expressly grounded in the defendant’s right to effective assistance of counsel under the Sixth Amendment and section 15 in Article I of the California State Constitution.^{24}

In addition to the obligation to investigate the specific immigration consequences of a state criminal conviction, a criminal attorney may fall below the requisite standard of competence by failing to request or pursue a remedy that will help a noncitizen avoid immigration consequences. In People v. Barocio, the California Court of Appeal held that the defense counsel provided ineffective assistance of counsel when he failed to pursue judicial recommendation against deportation (JRAD) as part of the sentence.^{25} “Under the prevailing professional norms, counsel’s failure to advise respondent of the availability of a [JRAD hearing] from the sentencing court where respondent was subject to deportation as a result of his conviction renders his assistance constitutionally inadequate.”^{26}

Similarly, in People v. Bautista, the California Court of Appeal held that a criminal defense attorney correctly advised his client of certain immigration consequences stemming from a conviction for the possession for sale of marijuana.^{27} Nonetheless, defense counsel may have provided ineffective assistance of counsel by failing to pursue a different plea that would have preserved the defendant’s ability to apply for discretionary relief from deportation.^{28}

Clearly, Soriano, Barocio, and Bautista fit within Padilla’s aspirational framework that defense counsel will inform the noncitizen defendant of the immigration consequences of a plea. However, these California precedential decisions firmly impose a greater burden on defense counsel to take affirmative steps to help the noncitizen avoid the harsh consequences of deportation. Compliance with these requirements is not easy. As the Ninth Circuit recognizes, “Since 1931 the law on deportation has not become simpler. With only a small degree of hyperbole, immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’”^{29} Thus, the “proliferation of immigration laws and regulations has aply been called a labyrinth that only a lawyer could navigate.”^{30}

Immigration Law

Concerns about the competence of criminal attorneys to navigate the labyrinth of immigration law are well expressed in Justice Samuel Alito’s Padilla concurrence, in which he made two observations that should give great pause to criminal attorneys tasked with advising noncitizens about the immigration consequences of a plea.

First, Justice Alito points out that a defense counsel will rarely be able to read an isolated section of the INA and definitively determine the immigration consequences of a plea. For example, an “aggravated felony” or a “crime involving moral turpitude” (CIMT) often cannot be defined merely by reading the INA. As Justice Alito notes, conduct under state law that fits within an aggravated felony definition may penalize acts that are neither aggravated nor constitute a felony. Determining the crimes that constitute a CIMT is no easier, particularly because the INA does not provide a definition for a CIMT. Therefore, these consequences often can only be understood after reviewing case law, which is often in conflict. Justice Alito’s underlying message is that identifying crimes with immigration consequences is neither obvious nor intuitive and requires diligent investigation.

Indeed, California criminal statutes provide a number of nonobvious, nonintuitive illustrations of crimes that have surprising immigration consequences. For example, a noncitizen convicted under California Penal Code section 191.5(a)—DUI manslaughter—may neither be an aggravated felon nor have committed a CIMT. However, a noncitizen who, regardless of the circumstances, commits a shoplifting offense under Penal Code Section 484(a) on two separate occasions may not only be deportable but also could be barred from seeking immigration relief.

Second, Justice Alito observes that a criminal counsel’s advice on deportability may be misleading and that the advice could result in unintended consequences, jeopardizing the noncitizen’s ability to remain in the country. Justice Alito provides an example demonstrating that a seemingly well-crafted plea could shield the noncitizen from deportability but make the client excludable. As a result, a permanent resident who leaves the United States to visit a sick parent could be placed into immigration proceedings upon return. This example is not merely acade-
mic, since two years after Padilla the Supreme Court addressed a similar factual scenario in Vartelas v. Holder.40

The petitioner, Panagis Vartelas, was a long-time permanent resident who had a felony conviction but had never been placed in deportation proceedings.41 He left the United States to visit his parents. Upon his return, immigration officials placed Vartelas in deportation proceedings not because he was deportable for his felony conviction but because the government believed he was

would have left intact the possibility of pursuing discretionary immigration relief.46 Consequently, at least under California law, a defense counsel’s constitutional duty does not end at an advisal but extends to investigating whether a different plea could provide some immigration benefit.47

Finally, in immigration court the case will frequently turn on whether sufficient documentation exists to prove the state conviction “constitutes a predicate offense for immigration purposes.”48 For example, possessed methamphetamine may benefit from a vague record that does not specify the substance because the immigration officials will be unable to sustain the burden of proof that the noncitizen is deportable.53 While there is no California case directly requiring the criminal attorney to construct a vague or specific record depending on the noncitizen’s immigration circumstance, Soriano clearly places a state and federal constitutional burden on counsel to investigate the immigration consequences of the conviction and to defend against those consequences.54 A critical aspect of defending against immigration consequences is developing a record that allows the noncitizen to seek relief should he or she be placed in immigration proceedings. Thus, a well-crafted plea that complies with Padilla and possibly provides an avenue to pursue discretionary immigration relief could nonetheless be constitutionally below the requisite standard of care if the plea is not properly documented.

Undoubtedly, these cases demonstrate that it does not suffice for California defense attorneys simply to identify whether a noncitizen will be removable but that counsel must also strive to acquire a solution that will preserve the noncitizen’s right to remain in the United States. If a criminal attorney fails to adequately advise and advocate for the noncitizen, it could lead to serious consequences. “Tremendous personal stakes are involved in deportation or exclusion involving as it may the equivalent of banishment or exile.... To banish [noncitizens] from home, family, and adopted country is punishment of the most drastic kind.”55 Undoubtedly, this punishment will have negative ramifications not only for the noncitizen but also for the noncitizen’s family. As Bautista articulated, deportation will not only cause a client to be separated from home and job but also children, who will be forced to “choose between their [father] and their native country.”56

Grave consequences of an inadequate advisal however, are not just confined to the noncitizen. The criminal attorney’s obligation to protect the noncitizen’s ability to remain in the United States has been required for competent representation for over 25 years in California. Given the length of time
the obligation has existed, there is little doubt that a criminal defense attorney who fails to comply with these professional obligations has rendered ineffective assistance of counsel and may be exposed to a complaint with the State Bar. Additionally, the attorney could be exposed to civil liability for committing legal malpractice. It is critical then for criminal defense attorneys to understand the immigration implications of any criminal proceeding in order to ensure that foreign national clients are provided the best opportunity to avoid permanent banishment from family, home, and “all that makes life worth living.”

2 Id. at 1479-80.
3 Id. at 1479.
4 Id. at 1480.
5 Id.
6 Id. at 1481.
7 Id. at 1477.
8 Id.
9 Id. at 1478.
10 Id.
11 Id.
12 Id. at 1482, 1483 n.10. (“Lack of clarity in the law...does not obviate the need to say something about the possibility of deportation, even though it will affect the scope and nature of counsel’s advice.”)
13 Id. at 1480.
14 Id. at 1482.
17 Id.
18 Id. at 1478.
19 Id. at 1483.
20 Id.
22 See generally Texas v. Brown, 460 U.S. 730, 733 n.1 (1983) (The Supreme Court may not have jurisdiction to review a state court decision that rested on a state rule that operated independently of federal case law.).
24 Id.
26 Id. at 109.
28 Id. at 242.
32 Id. at 1488-89.
33 Id. at 1489.
35 Padilla, 130 S. Ct. at 1489, 1490.
38 Padilla, 130 S. Ct. at 1491.
39 Id.
41 Id. at 1483.
42 Id. at 1485.
44 Id. at 238.
45 Id. at 242.
46 Id. at 239-41.
47 Padilla also recognized that preserving a noncitizen’s right to remain in the country is often more important than any jail sentence. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (citing INS v. St. Cyr, 533 U.S. 289 (2001)).
49 Coronado v. Holder, No. 11-72121___ F. 3d __, 2014 WL 357027, at *3 (9th Cir. Jul. 18, 2014).
50 Id. at 4; see also Rendon v. Holder, No. 10-72239, ___ F. 3d __, 2014 WL 4115930, at *8 n.11 (9th Cir. Aug. 22, 2014) (acknowledging the holding in Coronado that Health & Safety Code §11377(a) is a divisible statute).
57 CAL. RULES OF PROF’L CONDUCT R. 3-110(A) (fail- ing to perform legal services with competence.).
59 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
by DANIEL A. CRIBBS and RAVI R. MEHTA

The transfer of risk through express indemnity does not always lessen uncertainty when a claim arises

ADDITIONAL INSURED ENDORSEMENTS and express indemnity provisions are common risk transfer mechanisms, but they have generated uncommonly complex and difficult-to-reconcile judicial holdings. Litigation concerning priority-of-coverage disputes that include consideration of the vertical and horizontal exhaustion doctrines is necessarily complex, but it is part of an evaluation of the risks, rights, and obligations of clients engaging in commercial contracts. Courts must consider the insurance policies of the parties as well as the agreements between the insureds to determine the order in which each party’s policies must respond to a given loss. As one court has observed, “[E]stablishing a pecking order among multiple insurers covering the same risk…has been characterized as ‘a court’s nightmare…’ ”1

In many jurisdictions, including California, courts resolving a priority-of-coverage dispute face a spectrum of options. On one end, courts may look only to insurance policy language. On the other, they may look only to the contract between the insureds. Insurance policies and contracts—especially those with express indemnity provisions—are often at odds, so, more likely than not, courts will give attention to one at the expense of the other. The difficulty of resolution does not end there. Complex insurance matters typically involve multiple parties, risk transfer provisions in contracts between those parties, additional insured status, multiple layers of coverage, losses exceeding the limits of a single primary policy, and losses that span several policy periods within primary and excess layers.2

To address these complex issues, courts follow one of two doctrines: horizontal exhaustion or vertical

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exhaustion. Under the former, all applicable primary policies must exhaust before any excess policy may trigger. Under the latter, all primary and excess policies for a given period or party must exhaust before the primary or excess policies of another period or party may trigger. In California, the horizontal exhaustion doctrine is the majority rule.3

An example is illustrative. A construction contract between a general contractor and subcontractor contains an express indemnity provision in favor of the general contractor. Both parties have primary and excess layers of liability insurance, and the subcontractor's primary and excess policies name the general contractor as an additional insured. The value of a loss is greater than the limits of either party's primary policy. The issue presented to a court is the order in which the policies must respond.

Under the horizontal exhaustion doctrine, the insurers in this example must respond to the loss in this order: 1) the subcontractor's primary policy, 2) the general contractor's primary policy, 3) the subcontractor's excess policy, and 4) the general contractor's excess policy. In contrast, under the vertical exhaustion doctrine the insurers must respond to the loss in this order: 1) the subcontractor's primary policy, 2) the subcontractor's excess policy, 3) the general contractor's primary policy, and 4) the general contractor's excess policy.

When express indemnity is at issue, courts in vertical exhaustion doctrine jurisdictions have criticized the application of the competing horizontal exhaustion doctrine on the basis of circuitry of action. The leading cases in this respect are Wal-Mart Stores, Inc. v. RLI Insurance Company and American Indemnity Lloyds v. Travelers Property Casualty Insurance Company.4 In Wal-Mart, Cheyenne, a distributor of halogen lamps, entered into a sales agreement with Wal-Mart that included an express indemnity provision in favor of Wal-Mart for liability resulting from sale of the lamps.5 St. Paul provided Cheyenne with a $1 million primary policy, and RLI provided Cheyenne with a $10 million excess policy.6 Pursuant to the sales agreement, Wal-Mart was an additional insured on both policies. Additionally, National Union issued a $10 million primary policy to Wal-Mart. After St. Paul and RLI paid $1 million and $10 million, respectively, to settle a claim, the Eighth Circuit was presented with the question of whether Wal-Mart and National Union were obliged to pay $10 million to reimburse RLI.7 The court answered no.8

The court based this outcome on the express indemnity provision in favor of Wal-Mart and not on the competing “other insurance” clauses in the RLI and National Union policies.9 These clauses commonly define priority of coverage for an insured when other insurance is available. The court explained its concern regarding circuitry of litigation: [T]o make Wal-Mart or National Union liable to RLI would simply be the first step in a circular chain of litigation that ultimately would end with RLI still having to pay the $10 million. To avoid these results, we hold that Wal-Mart and National Union have no obligation to RLI for any part of the $10 million settlement.10

The court reasoned that if it were to make Wal-Mart liable to RLI for the $10 million payment, Wal-Mart would successfully pursue Cheyenne for express indemnity, obtaining a judgment in its favor. According to the court, Cheyenne would then tender the judgment to its insurer, RLI, which in turn would have to pay $10 million to Wal-Mart, resulting in the same circumstances as those at hand in which RLI has paid $10 million to settle the claim. Similarly, the court reasoned that if it were to make National Union liable to RLI for the $10 million, National Union would step into the shoes of its insured, Wal-Mart, via subrogation against Cheyenne based on the express indemnity provision, again resulting in RLI's payment of $10 million.11 To avoid this circuitry, the court in Wal-Mart applied the vertical exhaustion doctrine and relied on an express indemnity provision to shift the entire loss to the indemnitor by way of its insurers.

A California Case

In California, the seminal case discussing the treatment of express indemnity in a priority-of-coverage dispute is Rossmoor Sanitation, Inc. v. Pylon, Inc.12 Rossmoor engaged Pylon to construct a sewage pump station and related sewage lines, pursuant to a contract that required Pylon to “indemnify Rossmoor against all claims for damages arising out of the work...”13 U.S. Fire Insurance Company insured Pylon as a named insured and Rossmoor as an additional insured. The Insurance Company of North America (INA) also insured Rossmoor as a named insured. During construction, a trench cave-in killed one Pylon employee and injured another. The total loss to Rossmoor was $267,000. INA paid the damages on behalf of its named insured, Rossmoor. The INA and U.S. Fire policies contained nearly identical “other insurance” clauses stating that if the insured had other insurance available to respond to a covered loss, a pro rata apportionment should be made.

Rossmoor sought declaratory relief against Pylon and U.S. Fire for indemnity.14 The trial court found that INA was subrogated to the express indemnity rights of its insured, Rossmoor, that these rights could be exercised against Pylon, and that therefore Pylon’s insurer, U.S. Fire, was responsible for the loss.15 The California Supreme Court affirmed the judgment in favor of Rossmoor and INA.16 As a preliminary matter, the Rossmoor court found the loss was sufficient to trigger express indemnity pursuant to the contract.17 Finding the agreement to contain a general indemnity provision, the court reasoned that indemnity may only operate if the indemnitee or Rossmoor is not actively negligent.18 The trial court’s ruling that Rossmoor was “at most passively negligent” was unquestioned.19 Next, the court explained why it disagreed with the contention that “other insurance” clauses work to apportion the loss between INA and U.S. Fire. First, “to apportion the loss in this case pursuant to the other insurance clauses would effectively negate the indemnity agreement and impose liability on INA when Rossmoor bargained with Pylon to avoid that very result as a part of the consideration for the construction agreement.”20 Second, the court reasoned that INA and U.S. Fire calculated policy premiums knowing that they each may be called upon to respond to a loss such as the one at issue and that neither insurer knew of the other’s potential for responding to the loss at the time policy premiums were calculated. In fact, the court found the availability of coverage from INA to be a “mere fortuitous circumstance” for U.S. Fire. Third, the court distinguished its decision by concluding that express indemnity trumps “other insurance” language because the former is the result of bargained-for rights and obligations between the parties, whereas there is no evidence that either INA or U.S. Fire knew there would be other insurance available when they issued their respective policies.21

The Rossmoor court applied basic contract interpretation principles to the insurance policies and the contract. The court’s inquiry into the information known to the insurers at the time of calculating policy premiums foregrounds a long line of case law that uses this inquiry as a guidepost in resolving priority-of-coverage disputes. However, subsequent cases have distinguished Rossmoor.

Reliance National Indemnity

In Reliance National Indemnity Company v. General Star Indemnity Company,22 the California Court of Appeal explored the boundaries of Rossmoor regarding layers of coverage. Don Law Company and Lollapalooza Joint Venture were organizers and sponsors, respectively, of a rock music festival.23 The sponsorship agreement between the parties contained an express indemnity provision in favor of Lollapalooza. In a $1 million primary policy, Gulf Insurance Company insured Don Law as a named insured and
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The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. Under the horizontal exhaustion doctrine, all primary and excess policies for a given period or party must exhaust before the primary or excess policies of another period or party may trigger.
   True.  False.

2. Rossmoor Sanitation, Inc. v. Pylon, Inc., is often cited for the concept that express indemnity trumps “other insurance” clauses because express indemnity is the result of bargained-for rights and obligations between parties.
   True.  False.

   True.  False.

4. Subrogation is the right of an insurer to recover from a party primarily responsible for a liability by stepping into the shoes of an insured.
   True.  False.

5. Subrogation is a form of relief only available between insurers who share the same layer of coverage as to the same insured.
   True.  False.

6. According to Hartford Casualty Insurance Company v. Mt. Hawley Insurance Company, even if the factual predicates necessary to operate express indemnity are not established by a trial court, a reviewing court may use record evidence to establish those predicates.
   True.  False.

7. In Travelers v. American Equity Insurance Company, the court resolved the coverage dispute by looking only to the insurance policies and by refusing to enforce the express indemnity provisions at issue.
   True.  False.

   True.  False.

9. Compared to an excess insurer, a primary insurer charges a higher premium for assuming a greater risk.
   True.  False.

10. In Continental Casualty Company v. St. Paul Surplus Lines Insurance Company, the court expanded the application of express indemnity provisions, citing the priority of established rules governing the application of primary, as opposed to excess, coverage.
    True.  False.

11. In Wal-Mart Stores, Inc. v. RJ Insurance Company, the claim underlying the priority of coverage dispute arose from the sale of deli meats.
    True.  False.

12. In California, the majority rule is:
    A. the horizontal exhaustion doctrine.
    B. the vertical exhaustion doctrine.

13. In Continental Casualty Company v. St. Paul Surplus Lines Insurance Company, the insurance profiles of the parties were atypical because Continental had an umbrella policy rather than an excess policy.
    True.  False.

14. Insurers covering different risks, including different layers of coverage, must rely on subrogation.
    True.  False.

15. Factual determinations of the active or sole negligence of a party are important in priority of coverage disputes because the operation of express indemnity may turn on those determinations.
    True.  False.

16. In Travelers v. American Equity Insurance Company, the court labels the following as “bad public policy and clearly inconsistent with equitable considerations”:
   A. Insurance with aggregate limits under $1 million.
   B. Unenforceable express indemnity provisions.
   C. Requiring an insurer to present the operation of an express indemnity provision by proving that liability resulted from the sole negligence or willful misconduct of its additional insured.
   D. Not accounting for the different risks assumed by primary, excess, and umbrella carriers when deciding priority of coverage disputes.
   True.  False.

17. The ability of a reviewing court to determine indemnity rights of insured entities when a trial court has not made the requisite findings of fact is significant in construction defect litigation because a vast majority of disputes are resolved well before a trial court may make any findings of fact.
   True.  False.

18. In Hartford Casualty Insurance Company v. Mt. Hawley Insurance Company, the court cites with approval the proposition of Travelers v. American Equity Insurance Company that express indemnity between two insureds cannot be adjudged unless those insureds are parties to the priority of coverage action.
   True.  False.

19. In Wal-Mart Stores, Inc. v. RJ Insurance Company, the court applied the vertical exhaustion doctrine to avoid circuitry of litigation.
    True.  False.

20. The reasoning of Rossmoor Sanitation, Inc. v. Pylon, Inc., applies to priority-of-coverage disputes between two primary insurers but not between primary and excess insurers.
    True.  False.

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17. [ ] True  [ ] False
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Lollapalooza as an additional insured pursuant to the sponsorship agreement. General Star Indemnity Company also insured both Don Law as a named insured and Lollapalooza as an additional insured with a $10 million excess policy. Reliance National Indemnity Company insured Don Law as a named insured with a $1 million primary policy and a $1 million excess policy.

A crowd surfing personal injury generated a loss of $2,142,858. Reliance and coverage as to the same insured. By contrast, insurers covering different risks, including different layers of coverage, must rely on subrogation. Thus, while acknowledging that Reliance properly instituted its right of subrogation, the court refused to enforce that right, citing “well-established principles of insurance coverage.” The Reliance court distinguished Rossmoor as a priority-of-coverage dispute between two primary insurers rather than a priority-of-coverage dispute provision in the contract to shift the entire loss to the insurer of the indemnitee. Hartford unsuccessfully relied on a decision by the First District, Travelers v. American Equity Insurance Company. In that case, the court resolved the coverage dispute by considering only the insurance policies. The explanation of why the court did not apply Travelers establishes Hartford as an important progeny of Rossmoor.

The Hartford court refused to apply the express indemnity provision for three reasons. First, it was without sufficient evidence to determine whether the provision may operate. Second, only the insurers and not the insureds were parties to the action. Third, reliance on the express indemnity provision would result in an insurer’s having to prove that its additional insured (the would-be indemnitee) was negligent.

The Hartford court first turned to the issue of the factual predicates necessary to operate the express indemnity provision. The contract between PCS and Valley Metal contained an exception to indemnity for liability resulting from the sole negligence or willful misconduct of the would-be indemnitee, PCS. The court found the express indemnity provision applied because 1) neither the complaint nor Hartford alleged on appeal that PCS engaged in willful misconduct, and 2) Mt. Hawley had established as an undisputed fact in its summary judgment motion that PCS was not solely negligent. Similarly, in Rossmoor, the court relied on the factual finding of the trial court that the would-be indemnitee was “at most passively negligent,” thereby triggering the general indemnity provision.

However, even if the factual predicates necessary for the operation of an express indemnity are not established by a trial court, a reviewing court may use the record to establish those predicates, thereby eliminating the need for a separate action between insureds to determine indemnity rights. For example, the record evidence may be sufficient to adjudicate the preliminary question of the negligence of a would-be indemnitee when liabil-
ity results from the settlement of a claim.\textsuperscript{48} The ability of a reviewing court to determine indemnity rights of insureds when a trial court has not made the requisite findings of fact is particularly significant in construction defect litigation, as a vast majority of disputes are resolved well before a trial court may make any findings of fact. \textit{Hartford} espouses this position as a way to avoid a separate indemnity action between insureds. In discussing judicial economy and circuitry of litigation, \textit{Hartford} makes a direct comparison to Wal-Mart. The Hartford court observed that in the pending indemnity action between PCS and Valley Metal, PCS would almost certainly establish that it was not the sole cause of the accident, thereby requiring Valley Metal to indemnify PCS. Mt. Hawley would then be subrogated to PCS’s right to recover from Valley Metal the amount awarded to Hartford here. In essence, Hartford’s recovery in this case would be returned to Mt. Hawley in the next one.\textsuperscript{49} 

\textit{Hartford} demonstrates that reliance on express indemnity cannot be a matter of course in priority-of-coverage disputes. The express indemnity issue must be addressed in light of contractual and statutory exceptions to its application.

\textit{Hartford} rejects the position of \textit{Travelers} that express indemnity between two insureds cannot be adjudged unless those insureds are parties to the priority-of-coverage action.\textsuperscript{50} This is because insurers may step into the shoes of their insureds via subrogation.\textsuperscript{51} Even if insureds are not parties to a priority of coverage action, insurers may use discovery to obtain the information necessary to adjudicate express indemnity rights.\textsuperscript{52}

\textit{Hartford} also addresses a peculiar circumstance that results when a priority-of-coverage dispute arises involving insureds who are parties to an express indemnity agreement and one party is an additional insured of the potential indemnitor.\textsuperscript{53} For example, PCS was an additional insured of Hartford and a purported indemnitor of Hartford’s named insured, Valley Metal.\textsuperscript{54} This arrangement placed Hartford in the awkward position of having to prevent operation of the express indemnity provision by proving that liability resulted from the sole negligence or willful misconduct of PCS. \textit{Travelers} labels this “bad public policy and clearly inconsistent with equitable considerations.”\textsuperscript{55}

While expounding on the key tenets of \textit{Rossmoor}, Hartford was the first California case to subsume the reasoning of Wal-Mart. Hartford respects \textit{Reliance} in that it recognizes that \textit{Rossmoor} does not stand for the proposition that express indemnity always trumps the horizontal exhaustion doctrine. In other words, \textit{Hartford} preserved the proposition in \textit{Reliance} that express indemnity cannot upset principles of insurance priority when a dispute involves insurers of differing layers of coverage. Three years later a California court had an opportunity to respond to these issues.

**The Limits of Rossmoor**

In JPI Westcoast Construction, LP v. RJS & Associates, Inc.,\textsuperscript{56} the First District considered Rossmoor and its progeny, JPI and RJS entered into a construction subcontract that contained an express indemnity provision in favor of the general contractor, JPI.\textsuperscript{57} Transcontinental Insurance Company insured JPI as a named insured via a $1 million primary policy.\textsuperscript{58} Underwriters at Lloyds insured RJS as a named insured and JPI as an additional insured, pursuant to the subcontract agreement, via a $1 million primary policy.\textsuperscript{59} Agricultural Excess and Surplus also insured RJS as a named insured and JPI as an additional insured with a $9 million umbrella policy.

A fatal construction accident generated a liability of $4.9 million.\textsuperscript{60} Lloyds paid $1 million and Great American $3.9 million. Approximately 22.2 percent of these payments were on behalf of each insurer’s additional insured, JPI. Transcontinental did not make any payment. JPI and Transcontinental sought a declaration that by virtue of express indemnity in the subcontract agreement, Great American must respond to the loss before Transcontinental.\textsuperscript{61} In turn, Great American sought recovery of the portion of settlement it had paid on behalf of JPI on the ground that express indemnity “does not trump the rule that as an excess carrier Great American’s obligation is not triggered until the limits of the Transcontinental policy are exhausted.”\textsuperscript{62} After review of opposing motions for summary judgment, the trial court ruled in favor of Great American.\textsuperscript{63} The court of appeals upheld the lower court’s ruling, extending \textit{Reliance} and rejecting the applicability of Rossmoor.

First, the court rejected Rossmoor’s approach of shifting the entire loss to the indemnitor and its insurers, instead concluding that Great American’s policy was excess under California law because it provided coverage only after a predetermined amount of primary coverage was exhausted.\textsuperscript{64} Great American’s policy contained a schedule of insurance that had to be exhausted before coverage could trigger.\textsuperscript{65} Unlike the contribution action in Rossmoor, the facts of JPI were akin to those of Reliance, in which an excess insurer advanced a subrogation claim against a primary carrier.\textsuperscript{66} Accordingly, as in Reliance, the express indemnity provision could not con-
ment Corporation, which contained an express indemnity provision in favor of Crown.72 St. Paul insured Crown as a named insured and Tasq as an additional insured, pursuant to the lease agreement, with a $5 million primary policy.73 Continental insured Tasq as a named insured and Crown as an additional insured, pursuant to the lease agreement, via a $1 million primary policy. Continental also insured Tasq as a named insured via a $2.5 million umbrella policy.74

Each party was therefore an additional insured on the other’s insurance policy, making the facts of this case especially complicated. Particularly curious is that the St. Paul policy that insured Crown also named Tasq as an additional insured, because the express indemnity provision in the agreement between the two insureds rendered Tasq an indemnitor and Crown an indemnitee. Thus, the indemnitor’s primary policy named the indemnitor as an additional insured.

After a forklift accident on Tasq’s property, Continental settled a wrongful death action against both Crown and Tasq for $3.5 million, with $1 million from Crown’s primary policy and the remaining $2.5 million from Crown’s umbrella policy.75 Continental sought a declaration that with respect to Crown’s liability, its primary St. Paul policy had to be exhausted prior to any obligation under its umbrella policy. St. Paul sought a declaration to the contrary, holding that the express indemnity provision shifted the entire loss to Tasq and its insurers.76 Siding with Continental, the court held “indemnification under the terms of the lease is a concept distinct from the priority of coverage in this case, and the lease terms are not controlling in that regard.”77

First, the court established that, pursuant to the horizontal exhaustion doctrine, the St. Paul policy was primary to the Continental umbrella policy.78 The court refused to enforce St. Paul policy language that it may be applied as excess insurance, characterizing it as an impermissible escape clause.79 The court also cited to the “other insurance” clause in the St. Paul policy, which designated it as “primary insurance.”80 Second, the court discussed why the express indemnity provision did not affect the finding that the St. Paul policy was primary to the Continental umbrella policy. As in Reliance and JPI, the Continental court rejected the application of Rossmoor, distinguishing it as a priority-of-coverage dispute between two primary insurers and not between insurers affording differing layers of coverage.81 In short, the court relied on Reliance: “[T] he terms of an indemnity agreement cannot trump general rules governing the application of primary, as opposed to excess, coverage.”82

The court did not address the operation of the express indemnity provision because it was immaterial to the priority-of-coverage determination. The court specifically acknowledged that St. Paul’s request for summary adjudication of the legal effect of the provision “goes beyond the scope of the present action.”83 Had the court’s finding that the St. Paul policy was primary to the Continental umbrella policy been coupled with a determination that the underlying wrongful death action was a liability properly triggering the express indemnity provision in favor of Crown and against Tasq, then St. Paul would have been able to initiate a cause of action for equitable subrogation against Tasq and, in effect, its umbrella insurer, Continental, to recover the $1 million it had become obligated to pay. Simply put, had the court determined that the express indemnity provision was operable, St. Paul would have been able to subrogate to the express indemnity rights of its insured, Crown, and seek recovery of any amounts it had become liable to pay to Continental. Instead, the court avoided this question altogether.

Despite reasoning to the contrary, the Continental court could have decided the operability of the express indemnity provision, particularly pursuant to Hartford. The Continental court refused to decide the operability question because “no determination of the relative fault for the decedent’s death as between Tasq and Crown has occurred,” and “[t]he parties to the lease agreement are not even parties to this litigation.”84 First, the court could have used record evidence to obtain the requisite findings of fact.85 Chieﬂy relevant is the lower court’s order that “in all future motions and proceedings in this litigation, an adverse inference will be drawn in Continental’s favor on any factual dispute, claim, or defense that depends on proving or disproving…Crown’s insistence that the settlement agreement exclude apportionment of liability between Crown and Tasq.”86

Second, the court could have remedied the matter to the trial court for determination of the factual predicates necessary to operate the express indemnity provision. In the remedied proceeding, St. Paul and Continental could both have availed themselves of discovery instruments.87 Thus, Crown and Tasq do not need to be parties to an action to determine one another’s express indemnity rights and obligations. Yet, in the remedied action Continental may be obliged to establish that its additional insured, Crown, was negligent so that the express indemnity provision cannot operate. Conversely, in the remedied action, St. Paul may have to establish that its named insured, Crown, was not negligent in such a way as to prevent operation of the express indemnity provision. However, although this analysis is consistent with St. Paul’s failure to pursue one, made circuity of litigation a nonissue.

Recommendations

The treatment of express indemnity in priority-of-coverage disputes offers valuable insight into practical ways to minimize liability, particularly as an indemnitee such as a general contractor or developer risking construction litigation. The potential solutions below are specific to general contractors and developers but may be similarly applied to any relationship between parties to an express indemnity agreement and insurers of those parties.

First, a general contractor must ensure that its subcontractors obtain an endorsement on their excess policies calling for those policies to provide primary and non-contributionary coverage for their additional insureds as required by contract. As an additional insured, a general contractor can thus rely on the express indemnity agreement and the subcontractors’ primary and excess policies to absorb a loss before the general contractor and its insurers are required to do so. The excess policy endorsement coupled with the express indemnity agreement provides a strong illustration of the intention to contravene the horizontal exhaustion doctrine.

Second, a general contractor must require its subcontractors to obtain primary coverage with per-occurrence limits higher than the standard $1 million. This increases the potential for a subcontractor’s primary policy to respond to an entire loss without implicating excess coverage. While this may be a suitable alternative to the excess policy recommendation above, in practicality, the higher premium for this type of insurance may prove unfeasible. Subcontractors may either refuse to absorb the higher premium cost or insist on passing through at least a portion of it to the general contractor.

Third, a general contractor must ensure that both its insurers and those of its subcontractors are on notice of any express indemnity agreement before the policies are issued. This must be done at the underwriting stage as a deliberate effort to have the insurers acknowledge the existence of the express indemnity agreement, so that premiums may be calculated accordingly. In addressing priority-of-coverage disputes, every decision discussed above considers what the insurers knew when they calcu-
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lated premiums as relevant. For a general contractor, this option may have the effect of lowering its insurance premiums, while the opposite may hold true for subcontractors. Nevertheless, it is important to provide as much information as possible to the insurers, including the existence of an express indemnity agreement, so that the subcontractor’s insurers can be said to knowingly assume the risk transfer occasioned by the express indemnity provision.

The circuitry of litigation concern developed in Wal-Mart is fact-specific and reliant on the operation of the express indemnity provision. As alluded in Hartford, such a provision cannot operate automatically. Rather, available record evidence and statutory exceptions need to be considered. Yet Wal-Mart, Rossmoor, and its progeny all bring to light one common problem that does not respect jurisdictional boundaries: Risk transfer may prove to be more difficult in application than parties originally contemplate. Disparities in the transfer of risk via additional insured endorsement and via express indemnity agreement have the potential to create uncertainty when a claim arises. Consistency and uniformity of intention in these risk transfer mechanisms, as well as the coordinated efforts of an insured, insurer, counsel, risk manager, and broker at all stages, are necessary to minimize this uncertainty.

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2 See, e.g., JPI Westcoast Constr., L.P. v. RJS & Assoc., Inc., 156 Cal. App. 4th 1448, 1460 (2007). Primary coverage may be triggered upon the occurrence that gives rise to liability. By contrast, excess coverage liability attaches only after a predetermined amount of primary coverage has been exhausted.
5 Wal-Mart, 292 F. 3d at 585.
6 Id.
7 Id. at 585-86.
8 Id. at 594-95.
9 Id. at 587.
10 Id.
11 Id. at 593-94.
13 Id. at 625-26.
14 Id. at 626-7.
15 Id. at 633-35.
16 Id. at 635.
17 Id. at 633.
18 Id. at 629.
19 Id. at 629-33.
20 Id. at 634.
21 Id.
23 Id. at 1068.
24 Id. at 1069.
25 Id.
26 Id. at 1071.
27 Id.
28 Id. at 1073.
29 Id. at 1076 (internal citations omitted).
30 Id. at 1079.
31 Id.
32 Id. at 1080.
33 Id. at 1079.
34 Id. at 1076.
35 Id. at 1082-83.
36 Id. at 1082.
38 Id. at 282-86.
39 Id. at 282.
41 Id. at 1157.
42 Id.
43 Hartford, 123 Cal. App. 4th at 282.
45 Hartford, 123 Cal. App. 4th at 301-04.
47 Hartford, 123 Cal. App. 4th at 302.
48 Id. at 303-04.
49 Id.
50 Id. at 303.
51 Id. at 303-05.
52 Id. at 282.
55 Id. at 1451-52.
56 Id. at 1452.
57 Id. at 1452-53.
58 Id. at 1454.
59 Id. at 1455.
60 Id. at 1456.
61 Id. at 1456-57.
62 Id. at 1460.
63 Id. at 1453.
64 Id. at 1460-63.
65 Id. at 1462.
66 Id. at 1463-64.
67 Id. at 1464.
68 Id.
69 Id.
71 Id. at 1117.
72 Id. at 1116.
73 Id.
74 Id. at 1116.
75 Id.
76 Id. at 1118.
77 Id. at 1120-21.
78 Id. at 1120.
79 Id.
81 Continental, 803 F. Supp. 2d at 1122.
82 Id. at 1126.
83 Id. at 1126.
84 Id. at 1136, 1126.
85 Hartford, 123 Cal. App. 4th at 301-04.
86 Continental, 803 F. Supp. 2d at 1124.
87 Hartford, 123 Cal. App. 4th at 303.
88 Id. at 304.
SINCE Cotran v. Rollins Hudig Hall International, Inc., was decided in 1998, courts have continued to address the issue of the adequacy of workplace investigations and provided additional guidance on the proper way to conduct them, whether they concern wrongful termination (as in Cotran) or discrimination and harassment claims. As a result, attorneys offering employers advice or training on workplace investigations should not only take heed of Cotran’s holding concerning notice of the allegations and opportunity to respond but also what other factors increase the likelihood that a court will find an investigation adequate as a matter of law.

When a plaintiff alleges wrongful termination in breach of an implied contract to fire only for good cause and the employer raises the findings of a workplace investigation as the basis for that good cause, the adequacy of the investigation becomes an issue at trial. In such cases, Cotran asks, “Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?” The Cotran court defined the term “good cause” in the context of implied employment contracts as “fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.” However, the Cotran court emphasized that “it would be imprudent to specify in detail the essentials of an adequate investigation. It is better, we believe, to adhere to the common law’s incremental, case-by-case jurisprudence, adjusting the standard as its sufficiency is tested in practice.”

Soon after Cotran, Silva v. Lucky Stores, Inc., provided guidance concerning the essentials of an adequate investigation. The court commended Lucky Stores on using an uninvolved human resources representative who had been trained by in-house counsel to investigate the case. The court also commended: 1) promptly investigating the complaints, 2) interviewing the complainant on the same evening the offensive actions allegedly occurred, 3) memorializing investigative findings on Lucky’s witness interview forms, 4) asking important witnesses to provide their own written statements regarding relevant events, 5) asking open-ended, nonleading questions, 6) attempting to elicit facts instead of opinions or suppositions, 7)
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maintaining confidentiality by conducting a number of interviews away from the workplace or by telephone, 8) encouraging those interviewed to call the investigator or page him if they wanted to add anything further, 9) promptly notifying the accused of the charges against him and affording him an opportunity to present his side of the story, 10) encouraging the accused to call the investigator with any further thoughts and calling the accused the next day to provide more information, 11) allowing the critical witnesses an opportunity to clarify, correct, or challenge information provided by other witnesses that contradicted their statements or that cast doubt on their credibility, 12) giving the complainant an opportunity to comment on and rebut evidence contradictory to her allegations, and 13) addressing the credibility of the parties and witnesses.

Other courts have also lauded these practices, giving a good set of guidelines for investigators. Although the investigator in Silva did not interview all possible witnesses, the court found that investigators do not have to interview all relevant witnesses but rather that investigations must be conducted “under the exigencies of the workday world and without benefit of the slow-moving machinery of a contested trial.”

Courts have also articulated what they think constitutes an adequate investigation as a matter of law. In King v. United Parcel Service, the court stated that because neutral personnel investigated the claims, eyewitnesses provided statements, and the plaintiff was given an opportunity to explain what happened, the investigation was adequate as a matter of law. In Ghani v. Lockheed Martin Space System Company, the record showed that Lockheed investigated the incident, Ghani had a full and fair opportunity to explain his version of the events, and he admitted the alleged wrongdoing. The court ruled that the investigation was adequate as a matter of law.

**Notice and Opportunity to Respond**

Although investigations may be found adequate if investigators gave the accused notice of the allegations and a chance to respond, which is the only specific criteria articulated in Cotran, several unpublished cases have allowed exceptions to this general rule if circumstances warrant. In Smith v. California Institute of Technology, for example, the court reasoned that because the Cotran court purposefully adopted a flexible approach, it left open the possibility that employers may not need to give the accused notice and an opportunity to respond in every case. The Smith court postulated several circumstances under which it may not be advisable to give the accused notice and opportunity to respond, including cases involving harassment of coemployees or situations in which the misconduct is so clear that the investigator can reach accurate conclusions without speaking with the accused.

This occurred in Urquhart v. Life Care Centers of America, Inc. The employer was accused of breach of confidentiality with respect to a patient’s medical condition and treatment. The circumstances clearly showed that outside parties could not have learned the confidential information other than through the accused employee’s lapse. The court allowed the jury to find good cause for the termination even though the accused had not been given a chance to tell his side of the story during the investigation that led to his termination. The appellate court did not find error in this and let the verdict stand. Also, in Cerda v. McDonnell Douglas Corporation, the Ninth Circuit found an employer justified in failing to inform the accused employee of the identities of coemployees who made charges of sexual harassment against him because the complainants feared retaliation by the accused.

In a published opinion, a terminated employee of Costco argued that the investigation that led to his termination was inadequate because it failed to give him sufficient time to prepare his response. However, the court found that the plaintiff did have adequate time to respond to the charges. In fact, he prepared and submitted two written responses to the charges before Costco made its termination decision. The plaintiff was also able to produce the piece of evidence that he claimed he needed more time to obtain. Therefore, the court found that the plaintiff failed to raise a genuine issue of fact regarding the time allowed him to prepare his defense. Although Costco did not interview all the employees whom the plaintiff requested to be interviewed, the court found that, under the conditions of the workday world, Costco conducted an adequate investigation as a matter of law.

Similarly, the plaintiff in Granillo v. Exide Technologies, Inc., argued that he was terminated before all relevant witnesses were interviewed and before he could explain his side of the story. However, the court found that the plaintiff had received a 45-minute interview during the investigation and found that time sufficient for the plaintiff to have a fair opportunity to present his position. The court also found that the investigators interviewed numerous witnesses, including the complainant, the accused, and other employees. Therefore, the court found no triable issues of fact with respect to the employer’s termination of the plaintiff.

**Inadequate Investigations and the Cat’s Paw**

While most cases involving adequacy of workplace investigations upheld the investigations as adequate, a few have found investigations inadequate. In Swenson v. Potter, for example, the Ninth Circuit held that an investigation that is rigged to reach a predetermined conclusion or otherwise conducted in bad faith will not satisfy the employer’s remedial obligation. This was illustrated in Collier v. Windsor Fire Protection District Board of Directors, in which an investigation was found to be inadequate because the fire chief dictated the outcome of the investigation, stating that he wanted both parties to the inappropriate incident fired. Although the chief recused himself from the investigation, and the district’s general counsel hired a professional investigator to conduct the investigation, those who made the final termination decision did not fully utilize the investigator’s data. Instead, they selected facts from the investigation upon which to base their termination decision. The court found triable issues of fact as to whether the investigation was fair and conducted in good faith.

A fairly recent U.S. Supreme Court decision also found an investigation inadequate under the cat’s paw theory. In Staub v. Proctor Hospital, which concerned wrongful termination and discrimination, the court held that the plaintiff’s supervisor, in an attempt to fire him due to his military reserve obligations, placed a disciplinary notice in his personnel file that referred to the plaintiff’s breaking a fabricated work rule. Later, during an investigation of a claim filed by a coworker, the investigator relied on the prior disciplinary notice in the personnel file without investigating whether that discipline itself was legitimate. The lower court found that the investigation could have been more robust since it failed to look into Staub’s allegation that the disciplinary notice was fabricated. The court nevertheless upheld the investigation as adequate. The Supreme Court disagreed.

In view of this decision, if an issue of prior illegal discipline is raised during an investigation, investigators should investigate that allegation or risk that their investigation will not be upheld as adequate.

In another case that involved a wrongful termination and allegations of discrimination—Miller v. United Parcel Service, Inc.—the court upheld the investigation as adequate because the accused was given notice of the charges and an opportunity to respond. The plaintiff admitted that he was given a full and fair opportunity to explain himself prior to his termination. Specifically, he testified in his deposition that he was able to tell his side of the story before he was terminated. The investigation, however, was questionable. The
court noted that the investigation was not done by experts and was assigned in stages to different employees. Not all the investigators were disassociated with the accused, and they did not investigate the accused's training on company procedures, which was an issue. Furthermore, the investigation lacked thoroughness. The investigation did not meet the articulated criteria of Cotran; however: notice of the charges and an opportunity to respond. If not for that element, it seems likely that the investigation would have been ruled inadequate. Additionally, the Ninth Circuit, in Fuller v. City of Oakland, a discriminatory harassment case that was decided before Cotran, stated that a jury could find an investigation inadequate. The investigation file revealed delays in the investigation, a failure to meet all deadlines, and a need to address concerns regarding the adequacy of the investigation. Neutral, trained investigators should conduct it; and it should be conducted in stages to different investigators. As shown in Turley, a code of silence among employees is no excuse for an inadequate investigation. Following Staub and Collier, the outcome of the investigation should not be predetermined. If the highest in com-

Recently, an investigation was found inadequate in a discrimination and harassment case. In Turley v. ISB Lacawanna LLC, an African American worker in a steel plant in New York endured years of racist harassment. Coworkers called him a monkey, an ape, a gorilla; they repeatedly called him a n***** and “that f***** n*****.” One coworker’s conduct was particularly egregious. He confronted Turley, screaming at him, “you f***** black b*****. You f***** black piece of sh*.” Using similar language, the coworker also threatened Turley’s life. Turley was denied bathroom breaks; his time sheets were tampered with, and his car was often vandalized. One day, Turley returned to his car to find a monkey doll hung in effigy from his rear view mirror. The company’s supervisors investigated some of the first incidents but claimed they could get no adequate answers from the other employees about Turley’s problems. A private investigator was also unable to reach conclusions. After the coworker threatened Turley’s life, however, the police were called. The police asked for evidence, but employer representatives declined to provide the requested items, claiming a need for authorization from the company’s legal department, even though the company had no separate legal department. The employee who threatened Turley’s life was suspended but allowed to make up the missed hours with overtime in the same week. The company may have allowed this so that it could meet its orders. The employee who threatened Turley’s life was suspended but allowed to make up the missed hours with overtime in the same week. The company may have allowed this so that it could meet its orders. The jury awarded Turley $25,000,000, and the corporation and individual defendants (supervisors, the labor relations and security manager, the human resources manager, and others) were held liable. The appellate court found the investigation to be feeble and perfunctory, stating that the jury could reasonably have found the investigation to be inadequate, and upheld the jury’s assessment of liability.

**Good Investigations**

In Cotran, the California Supreme Court appeared unwilling to compel a precise type of investigation as long as it is fair. Cotran’s general guidance, however, is that employees accused of wrongdoing for which they may be fired should be provided with notice of the alleged wrongdoing and an opportunity to respond. On the other hand, Smith, Urquart, and Cerda offer circumstances under which employers that skip these steps may nevertheless be found to have conducted an adequate investigation. For example, the misconduct may clearly be attributed to the employee, or the complaining parties (as in cases involving charges of harassment) may fear retaliation from the accused.

Case law also provides guidance on the adequacy of the investigation. Neutral, trained investigators should conduct it; and it should not be assigned at unfinished stages to different investigators. As shown in Turley, a code of silence among employees is no excuse for an inadequate investigation. Following Staub and Collier, the outcome of the investigation should not be predetermined. If the highest in com-
confidentiality by conducting interviews away from the workplace or by telephone. Investigators may ask important witnesses for written statements and memorialize findings on interview forms. Written statements are worth seeking if the request does not quell a party’s willingness to talk directly with the investigator. Parties and witnesses may be reinterviewed to clarify facts as needed, and critical witnesses may need an opportunity to clarify, correct, or challenge information. Before beginning the written report, the investigator should review pertinent files and forensic evidence. The report may properly evaluate the credibility of the accused, complainant, and relevant witnesses.

Cases since Cotran offer considerable guidance about what the courts accept as an adequate workplace investigation into employee misconduct. The good investigative practices described in court opinions such as Silva allow for more thorough and fair workplace investigations, and cases such as Turley and Collier describe inadequate investigations. Attorneys advising and training employers and investigators can find considerable guidance in cases after Cotran and Silva for conducting investigations that are likely to be upheld in wrongful termination and discrimination cases.

2 Id. at 107.
3 Id. at 108.
4 Id.
6 Id. at 272.
7 Id. at 265.
8 Id.
9 Id. at 272.
10 Id.
11 Id. at 270.
13 Id. See also Jones, 34 F. App’x at 322 (Costco did not contact everyone Jones listed, but the investigation was adequate as a matter of law “under the exigencies of the workaday world.”).
15 King, 152 Cal. App. 4th at 440.
16 Id.
18 See also Jones, 34 F. App’x at 322 [Jones had notice of the charges and an opportunity to respond. Enough witnesses were interviewed to draw conclusions; the investigation was adequate as a matter of law].
23 Cerda, 205 F. 3d 1350.
24 Jones v. Costco Wholesale Corp., 34 F. App’x 320, 322-23 (9th Cir. 2002).
25 Id. at 322-23.
26 Id. at 322.
27 Granillo v. Exide Techs., Inc., 24 Am. Disabilities Cas. (BNA) 1371, 66-71 (C.D. Cal. May 20, 2011) [Jones had notice of the charges and an opportunity to respond. Enough witnesses were interviewed to draw conclusions; the investigation was adequate as a matter of law].
28 Id. at 70-71.
29 Id. at 71.
33 Id. at *5.
34 Id. at *33.
37 Id. at 1193-94.
39 Id. at *26.
40 Id. at *7-9.
41 Id.
43 Fuller, 46 F. 3d at 1535.
45 Id. at 433-34.
46 Id.
47 Id. at 435.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
53 Id.
54 Id. at 441-42.
55 Id. at 443.
56 Id. at 435.
57 Id.
58 See generally, e.g., Patricia C. Perez, Workplace Investigations, in 16A ADVISING CALIFORNIA EMPLOYERS AND EMPLOYEES 1689 (CEB 2014); Beth K. Whittenbury, Investigating the Workplace Harassment Claim (ABA 2012).
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10988 Wilbur Avenue, Tarzana, CA 91356, (818) 700-2229, fax (818) 345-1950, e-mail: Aquaconcepts@Hotmail.com. Web site: www.Aquaconcepts.com. Contact Richard Schwag. Swimming Pool and Spa Expert Witness and Consultant. 37 years in the pool construction field as owner of Aqua Concepts, Inc. Involving the planning, design, construction and renovation of many thousands of residential and commercial swimming pools/spas. Applied decades of swimming pool construction knowledge towards performing an expert witness in litigation relating to site inspections, documentation/deposition review, and testimony for depositions, mediation, arbitration, and trial. Specializing in swimming pool construction, although my expertise expands to other areas as you can see in my active licenses: CA Contractors 418988, B General Builders, C2 Swimming Pools, C27 Landscaping, and C8 Concrete.

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16501 Ventura Boulevard, Suite 601, Encino, CA 91436, (818) 464-2400, fax (818) 464-5399, e-mail: cjaffe@mmrstrategy.com. Web site: www.mmrstrategy.com. Contact Cheryl Jaffe. MMR Strategy Group (MMR) provides trial-ready surveys, rebuttals, and expert witness services in marketing for intellectual property litigation. Our studies measure consumer attitudes and behaviors for matters involving topics such as confusion, secondary meaning, deceptive advertising, dilution, and claim substantiation. The firm is a national and international business litigation firm. Contact Beth B. De Lima, has testified for both plaintiff and defense in the following areas: human resources standards of care, employment ADA accommodation, FEHA, FMLA, CFRA, ADA & EEOC violations. Wrongful termination, performance management, discrimination, sexual harassment, exempt labor market assessment, and vocational evaluations. She holds national and state specific certification—Senior Professional in Human Resource (SPHR-CA), certified mediator, and consulting since 1992.
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Law of the Jungle

This new book by Businessweek senior writer Paul M. Barrett is based on his investigative reporting of a class action environmental lawsuit in Ecuador. Barrett chronicles how an American plaintiff’s lawyer pursued, won, and then lost a $19 billion verdict against Chevron.

In the late 1990s, Steven Donziger was a young, Harvard-educated lawyer and social activist. He joined a team of plaintiffs’ lawyers suing Texaco on behalf of a class of native Ecuadorian Indians who had suffered many ailments and deaths that they blamed on Texaco. Beginning in the 1970s, Texaco had discharged billions of gallons of petroleum-exposed water into the streams, rivers, and lagoons of Ecuador’s jungles. This case of many twists and turns started as a class action in New York and was transferred some nine years later back to Ecuador at Exxon’s request. It was then tried through a tortured and comically corrupt Ecuadorian court system that delivered a record judgment against Texaco and its new owner, Chevron.

This David-versus-Goliath story, however, did not have a Hollywood ending. As Barrett reports, Chevron decided from the start that it would not settle the lawsuit, since it believed that it had acquired Texaco free of any liability and that the responsibility for cleaning up the pollution lay with the government of Ecuador. Texaco had passed operational control of its oil fields to Ecuador in 1990, and the government later released any ecological liability claims against Texaco. Chevron said it would fight the lawsuit “until Hell freezes over—and then we’ll fight it out on the ice,” and it did just that, hiring an aggressive team led by Gibson, Dunn, & Crutcher attorney Randy Mastro. A former mob prosecutor, Mastro decided to fight the Ecuadorian judgment by going after Donziger and his team personally, arguing that the plaintiffs’ counsel had obtained the Ecuadorian judgment by means of racketeering and fraud.

What led Mastro’s team to that unusual strategy was a film called Crude. This documentary remarkably followed the plaintiffs’ lawyers, at Donziger’s own invitation, through their most sensitive, closed-door strategy discussions. The film was supposed to produce public relations and funding support for Donziger. It delivered on that promise in spades. Crude was featured at the Sundance film festival, won a number of awards, and generated support among celebrities and environmental groups for Donziger’s fight against Chevron. Nevertheless, the film ultimately backfired on Donziger. The version of Crude that first aired on Netflix had one scene in which a plaintiff’s lawyer secretly met with the putatively neutral expert appointed by the Ecuadorian court to decide if Chevron was liable. After viewing this version, Chevron asked Judge Lewis Kaplan of the U.S. District Court in New York to force the producers of Crude to turn over all of the film’s outtakes, which proved to be astonishing.

Among other things, the outtakes showed that Donziger had threatened an Ecuadorian judge with blackmail if he did not allow him to handpick the court-appointed expert. Donziger’s team had evidence that the judge had sexually harassed his assistant. Donziger then had his own paid experts ghost write the report of the ostensibly neutral expert. Donziger had also exerted massive political and media pressure on Ecuadorian judges to decide the case in his favor. Judge Kaplan was disturbed by a number of things Donziger can be seen telling his team in their strategy meetings. For example, at one point, Donziger urges his team to approach the case with the attitude that “Facts do not exist. Facts are created.” At another point, Donziger tells them, “Science has to serve the law practice; the law practice doesn’t serve science.” Donziger sums up his view of the case in the outtakes, when he states that his lack of evidence on a key point “is all for the court just a bunch of smoke and mirrors and bullshit. It really is.”

In Judge Kaplan’s eyes, what damned Donziger even more was his belief that his actions in Ecuador would never be discoverable. In one conversation in the outtakes, the head of Amazon Watch, Atossa Soltani, asks Donziger if anyone can subpoena the videos the film crew was taking. Donziger replies, not in Ecuador. “What about the U.S.?” Soltani asks. Donziger unwisely ignores her. Judge Kaplan found that the plaintiffs’ lawyers, in complete disregard for the law, bribed a judge who issued a judgment against Chevron, which was also ghost written by Donziger’s own team. Ironically, some of the corroborating evidence was discovered on their hard drives.

The result of all this evidence was a devastating RICO judgment against Donziger and the Patton Boggs firm, which had signed on to help him enforce the Ecuadorian judgment. Judge Kaplan ruled that the plaintiffs and their attorneys could not profit from the fraud committed in the Ecuadorian courts, and his findings make it unlikely that a judge in any country will ever enforce the judgment. The ruling also devastated the reputation of Patton Boggs, which had pursued a strategy of trying to enforce the judgment through multiple foreign proceedings to force a settlement.

Barrett, who began following the story for Businessweek, had access to the lawyers and witnesses on both sides of the case. He also had access to extensive notes that were subpoenaed by Chevron, which chronicled Donziger’s plunge into an ethical and moral abyss in pursuit of victory. Although he exposes Donziger’s many failings, Barrett does not spare the lawyers for Texaco, who had been hoisted on their own petard by insisting that the New York court transfer the case to Ecuador in the belief that the case would die a quiet death there. Written in the style of a novel, the book is a fascinating factual tale of how a law-of-the-jungle mentality ruined a worthy cause, along with the careers of the lawyers who pursued it.

Ben M. Davidson is the founder of the Davidson Law Group in Los Angeles.
ON TUESDAY, NOVEMBER 11, Trial Advocacy and the Litigation Section will host the evidence skills workshop, which is based on the premise that the best way to learn the rules of evidence is to argue them in an evidentiary hearing in which the admissibility of evidence is determined. In this workshop, participants argue the admissibility of evidence in 21 different evidentiary vignettes, using a breach-of-employment-contract fact pattern. No preparation is necessary for this unique program. Within five minutes, participants are on their feet arguing the admissibility of evidence. The evidentiary vignettes include witness competency, foundations for exhibits, chain of custody, authenticity, relevance, undue prejudice, the secondary evidence rule, the better evidence rule, the reliability of scientific evidence, nonhearsay, hearsay, party admissions, prior inconsistent deposition testimony, business records, judicial notice, lay opinion, expert qualifications, expert opinion, and cross-examination of experts on treatises. Written course materials will be distributed via e-mail prior to the first class.

Please provide a correct e-mail address at the time of registration. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th Floor, Downtown. Parking is available at 1005 West 7th and nearby lots. On-site registration will begin at 1:00 P.M., with the program continuing from 1:30 to 5:30 P.M. The registration code number is 012208.

$125—CLE+ plus member
$250—LACBA member
$350—all others
3.75 CLE hours

TAP: Expert Witness Workshop
ON TUESDAY, NOVEMBER 11, Trial Advocacy and the Litigation Section will host the expert witness workshop, which provides introductory and advanced instruction on how to use expert witnesses in civil and criminal actions, with special emphasis on expert testimony. Topics covered will include evidentiary rules regarding expert opinions, taking and defending expert depositions, how experts can help and hurt a case, direct and cross-examination of expert witnesses, establishing and challenging expert qualifications, and advanced expert testimony techniques. In the workshop portion of the program participants conduct direct and cross-examination of an expert witness. Written course materials will be distributed via e-mail prior to the first class. Please provide a correct e-mail address at the time of registration. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th Floor, Downtown. Parking is available at 1005 West 7th and nearby lots. On-site registration will begin at 1:00 P.M., with the program continuing from 1:30 to 5:30 P.M. The registration code number is 012246.

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

2014 Complex Court Symposium
ON WEDNESDAY, NOVEMBER 12, the Litigation Section, the Labor & Employment Law Section, the Los Angeles Chapter of the Association of Business Trial Lawyers, the Association of Southern California Defense Counsel, and the Consumer Attorneys Association of Los Angeles will host the 2014 Complex Court Symposium. The symposium, which includes most of the complex judges from across California, including those from the Los Angeles complex courts, will provide the bench perspective on complex case management, class action issues (both pre- and post-certification), trials of complex and class cases, and the latest issues that can affect counsel and clients. The symposium will take place at the Millennium Biltmore Hotel, 506 South Grand Avenue, Downtown. Valet parking is available for $20. Registration is available from 3 to 3:30 P.M., and the meal will begin at 6:15, with the program continuing from 3:30 to 7:30. The registration code number is 012422.

Free—CLE+ member
$85—CLE+ member with meal
$290—Litigation Section member
$225—LACBA member
$260—all others
2.75 CLE hours

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org, where you will find a full listing of this month’s Association programs.
Looking for Big Solutions for Access to Justice in California

BY HERNÁN D. VERA

LaWYERS FALL BELOW SOME other professions in measures of public popularity. Firefighters, teachers, and doctors all make the most-trusted list. Would that change if Californians truly understood what an attorney’s help means for people who have to go to court alone? For people who cannot afford to have a good lawyer on their side, the court system can be an intimidating and inhospitable place, and its promises of equality can ring hollow.

The Sinclair family’s story shows the difference an attorney can make. Ceith and Louise had lived for more than 15 years in a small home in Altadena, the same home where Louise grew up as a foster youth. They raised their children there, creating the stable family life that Louise always wanted. When Ceith and Louise fell behind on their mortgage payments during the economic crisis, they applied for and received a loan modification. Or so they thought.

Although the Sinclairs paid their modified loan for many months, a new servicer took over their loan and instituted foreclosure proceedings. The Sinclairs were on the brink of eviction when Public Counsel went to court to reverse the foreclosure, and an attorney at the nonprofit Eviction Defense Network worked to stop the family’s eviction. Just before Christmas, the Sinclairs got word that the eviction and foreclosure threats had ended, and they spent the holidays where most of us want to be: at home.

Without an attorney, the Sinclairs would have been another casualty in California’s mortgage crisis. Courts and attorneys have taken major steps to try to level the playing field for the unrepresented, and Public Counsel is proud to be part of the solution through our court-based clinics and leveraging the pro bono efforts of Los Angeles’s top firms and in-house corporate counsel. Public Counsel also works alongside the Los Angeles County Bar Foundation and its projects, which serve Los Angeles’s underrepresented through pro bono and staff-provided services. The Foundation projects assist clients in the areas of domestic violence, veterans, immigration, HIV/AIDS, and community and school mediation services. But the economic crisis that put so many families like the Sinclairs on the brink continues to hurt these efforts to close the justice gap.

For decades, California legal services have relied on the generosity of attorneys. Donations to the State Bar’s Justice Gap Fund, the innovative funding approach of IOLTA, and philanthropic giving by law firms and in-house counsel have all helped keep the courthouse doors open. Last year alone, attorneys contributed an additional $4.5 million through a voluntary donation on the State Bar dues bill. But what will it take for more attorneys to give to Public Counsel, the Los Angeles County Bar Foundation, or another legal service provider? As the leader of one of California’s largest nonprofit law firms, I know that the public interest sector can help to make our case that access to justice is worth supporting. Here is a pledge I will make: We will push justice into every corner of California. With the support of a grant from the California Bar Foundation, Public Counsel is expanding veterans’ courts across California. In addition, we work with groups throughout the state to keep young people in school and off the jailhouse track by changing harsh school discipline laws. We are in constant dialogue with state and local policymakers to make our systems more responsive to foster youth, immigrants, and California consumers.

We will be smart and efficient. Providing free legal help is always about meeting clients where they are and doing whatever it takes to help them win. The public interest sector’s track record of efficiency should be the private sector’s envy. We know how to work together. Examples include the new California Consumer Justice Coalition, a group of attorneys and housing counselors funded through the Attorney General’s Office as part of the National Mortgage Settlement, and the Shriver Housing Project, an effort to level the playing field in high-stakes eviction cases that is funded through a seed grant from the Judicial Council.

We will look for big solutions. The State Bar is currently considering initiatives that could put more attorneys to work for people in need. A task force is developing a statewide 50-hour pro bono requirement for law students and newly admitted attorneys that would expose many more future lawyers to the gaps in our justice system. Another task force is exploring innovative strategies, including a “limited license legal technician” program for certain civil law areas in which the market is not filling the need. These ideas will not all be realized tomorrow, but big solutions require big visions.

We will shout our successes from the rooftops. We are in the life-changing business. Legal help makes the difference for a family about to lose their home, a student about to be pushed out of his or her school and into the justice system, or a person who struggles with mental illness. When an attorney wins a case for clients like these, we should all know it. At www.CAforJustice.org, the Campaign for Justice is telling the stories of ordinary Californians who benefit from legal help. Our clients already trust us to do what is right for them. Could we convince more California attorneys and nonattorneys to trust us to do what is right for our justice system? Then, we may start to close the justice gap once and for all.

Hernán D. Vera is president and CEO of Public Counsel, a public interest law firm cofounded by the Los Angeles County Bar Association in 1970, and a member of the State Bar of California Board of Trustees.
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