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her 2014 State of the Judiciary address, underfunding of the branch results in “harmful and astonishing delays in civil redress” such that “50 years after passage of the Civil Rights Act, we are on the verge of a different type of civil rights crisis.”

The share that the judicial branch has in the general fund fell from 56 percent in 2008-09 to 35 percent in 2014-15. Some of these budget cuts have been offset or back-filled, in part, by statutory increases in fees and fine assessment levels. Funding the courts through increasing fees and fines, however, leads to a perception of pay-to-play justice. The third branch of government, often characterized as invisible because judges cannot engage in the political act of legislative lobbying, is being transformed, as a Judicial Council report puts it, “into a user-fee-supported institution.” With the closure of 52 courthouses and approximately 200 courtrooms, parties with the financial means opt for private arbitration, while those of modest means travel longer distances and wait much longer for relief. This two-tiered system adversely affects access to justice for the state’s most vulnerable citizens.

California is not alone in this crisis. Recent federal lawsuits charge that Ferguson and Jennings, suburbs of St. Louis, Missouri, jail people solely for the inability to pay fines and fees on offenses such as tickets and other minor offenses. Dubbing this system a “modern debtors’ prison scheme” that earned Ferguson millions of dollars over the past several years, the suits allege that fees and fines allegedly “devastated the City’s poor, trapping them for years in a cycle of increased fees, debts, extortion and cruel jailings.” The demands include a declaration that Ferguson and Jennings jailed indigent residents because they were unable to pay fines and fees and they failed to provide adequate access to legal representation. According to the Wall Street Journal, Ferguson is a city of 21,000 that is two-thirds African American, and its residents often complain that minorities bear a disproportionate share of legal fees and charges, a claim bolstered by state records that show “minority drivers are more likely to be pulled over than white motorists.” Justice William J. Brennan’s 1986 remark that “We do not yet have justice, equal and practical for the poor, [and] for members of minority groups” still rings true today.

California’s Bench-Bar Coalition (BBC) seeks to alter the inequities of funding the judicial branch through court-imposed fees and fines in order to achieve equal access to justice. The Chief Justice informs us that the relationship of the three branches of government in service to the public is symbiotic. Quoting Dr. Martin Luther King, the Chief Justice reminds us “injustice anywhere is a threat to justice everywhere.” The three branches of government “are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly.”

Access to justice necessitates what the Judicial Council calls a “fresh look at statutory and structural challenges to efficiency and stability for the courts.” The bar is well situated to move this endeavor forward. Please join the efforts of the BBC and, if you are able to do so, urge your state representatives to increase the judicial branch’s share of the general fund.

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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What is overrated about being a trial attorney? How easy it is. It takes a lot of work, a lot of preparation, and a lot of stress. The fun part of it—helping people—makes it worthwhile.

What is underrated? How much intensity is involved in the courtroom.

What was your best job? Being a high school football coach and seeing the kids get better.

What was your worst job? Working on the loading docks, unloading railroad cars with 100-pound boxes.

What characteristic do you most admire in your mother? Her toughness. On her own, she got her college degree and became a teacher.

If you were handed $1 million tomorrow, what would you do with it? I’d give it to some high schools.

You played football at Fresno State as a free safety. What did you learn from that experience that still applies today? I learned about never giving up and fighting through adversity.

Later, you went to Southwestern Law School. Do you expect either your two daughters or son to follow in your footsteps? One daughter is taking the LSAT and applying to law school. The other two, I’m not sure. All of my brothers are lawyers; my father was a lawyer; and my wife is a lawyer. I love being a lawyer.

What scared you the most the first time you stood in front of a jury? Not doing a good job for my client. I had only been a lawyer for about a month. I didn’t want it to look like it was my first trial.

How have juries changed in the last 20 years? I really don’t think they’ve changed that much. When you get 12 people together, they all have a lot of different perspectives. They usually get it right. I believe in juries. I think they do a great job.

Do you believe jurors obey the judicial officer and ignore the news and social media during a trial? I do. I think they take the job very seriously. I have a ton of respect for the jurors.

Do you use the media differently in your cases than you once did? I don’t really try to go out and send out messages with the media, but sometimes you have to deal with them and be prepared.

Did you watch your dad, Howard Panish, at trial as a child? Every day at the dinner table he would cross-examine me.

In 1974, your father won the first case that awarded $1 million in punitive damages. In 1999, you won the first case that awarded $1 billion in punitive damages. Were you competitive with your father? I don’t think so. I remember on the day he won that verdict, he picked me up from high school. He told me what had happened. The next day, there was a small article in the LA Times. I was proud of him.

In 2005, you left Greene, Broillet, Panish and Wheeler after 18 years to start your own firm. Why then? I think the time was right; I had grown. I wanted to have my own firm and do things my way.

Who is on your music playlist? U2, Charlie Daniels, the Doobie Brothers, the Eagles, and Willie Nelson.


Which fictional hero would you like to be? Huck Finn.

Why? My wife says I never want to grow up.

What are your retirement plans? I like my job too much. I’m just getting into the prime of my career.


Do you have a Facebook Page? Not anymore.

Are you on Twitter? Yes, I like it.

Who do you follow? The Fresno State football coach, some athletes, some lawyers, my daughters.

What is your favorite radio station? NFL Network.

Which person in history would you like to take out for a beer? Clarence Darrow.

What are the three most deplorable conditions in the world? Poverty. Lack of adequate healthcare. Oppression.

Who are you two favorite U.S. presidents? John F. Kennedy and Bill Clinton.

What is the one word you would like on your tombstone? Accountable.
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Overview of the Guidelines of Civility and Professionalism

**EVER HEARD THE STORY** about an attorney who got served with an ex parte application on the eve of his daughter’s birth by an opposing counsel who was aware of the impending birth, or about an attorney who was denied a requested one-week discovery extension because opposing counsel was not in the habit of granting extensions? Having experienced both situations firsthand, I understand why lawyers get a bad rap. As noted in a recent decision: “Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy.”

Unfortunately, lawyers often seem to confuse the concept of zealous and passionate advocacy with a need to take unreasonably aggressive positions. While there is a time and place for taking a hardline stance, especially in the context of acrimonious litigation, it is equally true, as noted in a recent decision, that “[p]assion can easily coexist with respect, dignity, and civility.”

As Los Angeles lawyers, we are bound by the ethical and professional guidelines set forth in the state bar’s Rules of Professional Conduct that are intended “to protect the public and to promote respect and confidence in the legal profession.” While these rules garner the most attention among law school ethics professors and new lawyers attempting to avoid malpractice traps, we are also subject to the state bar’s Guidelines of Civility and Professionalism and the Los Angeles Superior Court’s Guidelines for Civility in Litigation. Violating these guidelines can result not only in sanctions but also discipline by the state bar. Thus, new attorneys should review and familiarize themselves with these guidelines.

The civility guidelines serve public policy interests and also provide numerous practical benefits to our careers as attorneys. For example, the guidelines direct us to grant opposing counsel reasonably requested extensions of time. Although inexperienced attorneys may think that denying an extension will make them appear tough to their clients, they are actually causing potential harm to their clients. Life often throws curveballs—whether it be a sudden illness, a nanny calling in sick at the last minute, or the receipt of an unexpected ex parte application on the same day that discovery responses are scheduled to be drafted. These circumstances can make it difficult, if not impossible, to meet every deadline. Chances are that extensions will be requested at some point down the line. By granting reasonable extensions to opposing counsel, an attorney increases the likelihood of reciprocal extensions thereby minimizing the potential prejudice to his or her own clients when an extension request is denied and papers have to be drafted at the eleventh hour.

The civility guidelines also direct us to engage in more than a pro forma meet-and-confer effort before filing motions—ideally by speaking to opposing counsel in person. This guideline makes practical sense, as lawyers who might otherwise take an unnecessarily aggressive stance through e-mail communication will often act more reasonably when engaged in a personal dialog. Given the current congestion and financial cutbacks plaguing the court systems (both state and federal), it is in every lawyer’s best interest not to place motions before a judge that could have been resolved without judicial intervention. After all, no one wants to risk invoking the ire of the very judge who might be ruling on the motion and who may ultimately decide the outcome of the case. Moreover, resolving an issue without motion practice can save a client substantial fees—a result that any client surely will appreciate.

The civility guidelines further direct us to address the prospect of settlement as soon as possible during litigation. While some lawyers may think that zealous advocacy means always pursuing a claim to the bitter end, from a practical standpoint, early settlement often makes the most sense. The overwhelming majority of cases eventually settle, and the legal fees incurred in going to trial often exceed the amount of damages at issue. As anyone who has attempted to collect on a judgment can attest, the process can go on for years, and there is no guarantee that the judgment will even be satisfied at the end. Thus, in many cases, obtaining a favorable settlement for a client at an early juncture may prove to be the most zealous form of advocacy.

It is in every lawyer’s best interest to review and follow the civility guidelines for the collective benefit of the profession and from a practical and client-management perspective. In the examples above both opposing counsel were soon discharged by their clients, so trying to appear tough by taking unreasonable, obnoxious positions eventually hurts, rather than helps, an attorney’s bottom line. In other words, a little common courtesy goes a long way.

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3. CAL. RULES OF PROF’L CONDUCT R. 1-100.
7. State Bar Guidelines, §10; LASC Guideline (h).
8. State Bar Guidelines, §13; LASC Guideline (k).

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The Application of Foley in Recent Lender Liability Decisions

THE RECENT RECESSION has resulted in a groundswell of lender liability actions in which plaintiffs have sued under a variety of theories ranging from tort to procedural defects in the note or in the foreclosure. In the context of commercial and high-net-worth lending, some borrowers resort to tort theories to avoid or delay collection. When contending with these new types of lender liability theory, defense counsel should remember the broad implications of a line of cases starting with Foley v. Interactive Data Corporation, in which the California Supreme Court held that tort damages should not be applied to what are essentially contract claims. These cases disapprove of recasting contract-type claims as tort claims and are not limited to only one cause of action.

While lender liability tort claims may take a variety of forms, they often assert that the lender caused the borrower lost business opportunities, reputational harm, or other damages by failing to perform a contractual duty or other alleged promissory obligation. The formal causes of action may include negligence, interference, slander of title, or other tort claims, but they share in alleging failure to perform a lender’s obligations faithfully.

In 1979, the California Supreme Court created the tort of bad faith breach of an insurance contract when it decided Egan v. Mutual of Omaha Insurance Company. Justice Stanley Mosk, writing for the court, held that an insurer may be liable for tort, and punitive damages if it breaches the covenant of good faith and fair dealing. While such a breach is normally only contractual in nature, the court authorized tort damages because insurers have a “special relationship” with the insured that is “quasi-fiduciary” in nature. According to the court, the special relationship arises from the fact that insurance companies have public obligations and a superior bargaining position.

Over the next five years, the supreme court twice suggested expanding Egan into fields other than insurance. First, in Tamney v. Atlantic Richfield Company, the court held that an at-will employee may sue for the tort of unlawful termination under some circumstances. In a footnote, the court hinted that an employee can sue in tort for breaches of the contractual implied covenant too. Second, in Seaman’s Direct Buying Service, Inc. v. Standard Oil Company, the court lowered the barrier a bit further in a commercial dispute when it said, in dicta, that “there are other relationships [besides insurer-insured] which have similar characteristics” and “are deserving of similar treatment.”

These cases spawned years of litigation against both employers and banks for tortious breach of the implied covenant. Courts used the language of Egan and reasoned that employers and banks—like insurers—have a “special relationship” that justifies tort damages for contract breaches and broken promises. Thus, as of 1984 it appeared that contractual breaches by employers or banks would invariably result in tort claims.

Foley and Mitsui Manufacturers Bank
In Foley the California Supreme Court stopped the expansion of Egan and defined just how narrow the special relationship exception is. According to the Foley court, Egan was “a major departure from traditional principles of contract law” and represented only “an exception to the general rule.” The general rule, the supreme court held, is that tort and contract law have divergent objectives: tort law vindicates social policy while contract law enforces private agreements and predictability in those relationships. In a contract dispute, a court does not punish a breaching party, the supreme court held, because “[t]he purpose of awarding contract damages is to compensate the injured party.”

Although it was an employment dispute, Foley represents a strong position against the extension of tort theories into breach of contract cases. The court overturned six court of appeal decisions that blurred the distinction between tort and contract, and it warned future courts that they should not extend tort damages to contractual situations “without careful consideration of the fundamental policies underlying the development of tort and contract law in general.”

Although the court left open the possibility that businesses could engage in conduct that might result in a special relationship with their arms-length counterparts, the subsequent case law has affirmed Foley’s central thrust.

The historical background behind the shift from Egan to Foley is a bit unusual. Three years after the Egan decision, California voters elected George Deukmejian as governor. In 1986, the governor and his political allies ran an unprecedented political campaign against three sitting California Supreme Court justices—including the chief justice—ostensibly because they did not adhere to California criminal law. These justices had formed parts of the majorities in Egan, Tamney, and Seaman’s, and they were ejected from the bench that year. In fact, only one justice remained on the Foley court from the Egan era—Justice Stanley Mosk.

Subsequent California Supreme Court authority twice reaffirmed the central principle in Foley as the general rule. First, in Freeman & Mills, Inc. v. Belcher Oil Company, the court held that a bad faith denial of the existence of a contract of indemnity is not a viable cause of action in noninsurance contracts. Relying on Foley, the court found that “certain basic principles relevant to contract law include the need for predictability” and the limitation of damages to those needed to compensate the injured party, rather than punish the breaching party. Second, in Erlich v. Menezes, the supreme court held that emotional damages are not available for breach of contract claims, reasoning that “conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law.”

The court of appeal applied Foley to the lender-borrower context

BY STUART M. RICHTER AND YONATON M. ROSENZWEIG

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in Mitsui Manufacturers Bank v. Superior Court. The bank in Mitsui had promised plaintiff that it would continue extending short-term credit until the borrower found long-term replacement financing. When the lender declared a default despite its oral promise, the borrower sued in tort, claiming a breach of the implied covenant.

The court rejected this argument, finding that “Foley, impliedly if not expressly, limits the ability to recover tort damages in breach of contract situations to those where the respective positions of the contracting parties have the fiduciary characteristics of that relationship between the insurer and insured.” Mitsui agreed that “the ordinary arms-length commercial lender/borrower relationship was insufficient as a matter of law to generate tort damages for the breach of the covenant of good faith and fair dealing.”

The Mitsui/Foley line of cases bars claims against a range of lender conduct, including breaches of oral or written promises regarding the loan. In Price v. Wells Fargo, for example, the court of appeal held that a bank is not liable for fraud and other torts when it promises to “work with” a borrower, even if it later takes a “hard line” in enforcing a written contract. Price squarely relies upon Foley, finding that it “dramatically upset” the availability of tort claims against lenders. Or, as another court of appeal expressed the same idea in a similar case: “The winds of change blew with the publication of Foley.”

In 2006, Stop Loss Insurance Brokers, Inc. v. Brown & Toland Medical Group, another court of appeal decision, dismissed a claim for equitable indemnification by [defendant] describes, at most, a breach of contract, not a breach of a legal duty of care.” The tort action was thus “an improper attempt to recast a breach of contract cause of action as a tort claim.”

Recent Cases

In 2007, the court of appeal in Holcomb v. Wells Fargo Bank held that a bank can be liable in tort if it fails to make a deposit and the depositor is harmed. Even though Holcomb distinguished Mitsui as being a case about the implied covenant, Holcomb does not address the lender-borrower relationship, the distinction between contract and tort, or Foley and its progeny. Instead, the court of appeals held that Mitsui was inapplicable to Holcomb since the defendant in Holcomb was making a claim concerning the bank’s making representations as a depository institution, and the court found this action is not barred under the California Uniform Commercial Code.

Another relevant case in the lender liability context is Nymark v. Hart Federal Savings and Loan Association, in which the court of appeal set forth a multifactor test to determine when a lender is so involved in a borrower’s project that tort duties arise. The Nymark court held that a bank’s faulty appraisal does not support a tort claim against the bank, because a bank has no duty to prevent the borrower’s venture from failing or to advise a borrower that his or her loan is unwise. In this respect, Nymark, which discusses neither Foley or Mitsui, supports the principles of freedom of contract set forth in both earlier decisions.

One recent court of appeal decision illustrates the continued vitality of Foley without interruption from Nymark or Holcomb. In Cappello v. HSBC Bank USA, N.A., the question presented was whether Mitsui applies to claims other than the tortious breach of the implied covenant. Plaintiffs alleged that HSBC promised its borrower to provide a “positive reference” to a third party who was considering making an investment in borrower’s company in order to help pay off HSBC’s loan. HSBC’s loan officer allegedly “fumbled” the call and provided a negative reference, thereby destroying the borrower’s...
IN JULY 2014, A WATER MAIN BURST in Westwood, flooding a significant portion of the UCLA campus.1 Similar but less newsworthy events are occurring more frequently, as municipal water delivery and sewage systems age. A recent exposé by the Los Angeles Times found that almost half the water pipes in Los Angeles received a grade of C or worse from the Los Angeles Department of Water and Power (DWP) and that average pipe age is 58 years across the system.2 While the DWP moved promptly to reach pretrial resolutions with many claimants whose property was damaged by the UCLA flood, it is expected that litigation of these types of claims will increase as pipes and sewer systems experience more frequent failures. There are constitutionally based legal principles that apply when damage occurs to private property from broken water mains, sewer spills, and sewer backups.

The concept of eminent domain—the government’s obligation to pay just compensation for the deliberate taking of private property—is well known to practicing lawyers. Less well known is the concept of inverse condemnation—the principle governing the public entity’s obligation to provide compensation for the unintentional damaging of private property. In eminent domain, a governmental entity files a lawsuit and seeks an order for condemnation of the property, as well as the setting of an amount to be paid to the property owner as just compensation. In inverse condemnation, the property owner files a lawsuit to recover compensation for damage done to his or her property as a result of a government project. The property owner alleges that the government has “taken” his or her property, even if unintentionally, by damaging it.3

Such damage may arise from many causes, including landslides, water damage, and sewage damage. For example, a municipal utility or water district’s water main may break, and escaping water may damage one or a few homes. The escaping water may even saturate the soil under a home, causing subsidence and eventual damage to the structure. A sewer system may discharge sewage into a home due to a blockage from tree roots or a shift in pressure during system-wide cleaning. While the entire community benefits from the public project—the water delivery system or the sewage system—one or a few property owners may bear a disproportionate share of project costs, as over an entire system it can be expected that there will be some unintended, unpredictable events. The law considers the ensuing damage to be part of the overall cost of the project.

Inverse condemnation provides the unfairly burdened property owner with a claim that is in many ways superior to tort causes of action. With regard to liability issues, inverse condemnation claims are superior because the claims are based upon the U.S. and California Constitutions.4 Thus, the property owner is not required to present a claim against the governmental entity within the relatively short time limit that is required under the Government Claims Act.5 That act is a trap for the unwary property owner that often proves to be an insurmountable bar to an otherwise potentially successful claim for property damage. In addition, inverse condemnation claims do not require proof of negligence on the part of the government or its political subdivisions.6 Inverse condemnation claims are also not subject to typical defenses to tort claims brought against governmental entities for property damage, for example the design immunity defense.7 Moreover, the property owner’s recovery of damages under inverse condemnation claims is superior in that the prevailing property owner is entitled to attorney fees and expert witness expenses.8 However, the property owner is not entitled to recover emotional distress damages, because the claim is limited to property damage.9 The property owner may also be entitled to relocation expenses.10

In inverse condemnation cases for property damage caused by water main breaks and sewer backups and spills, courts apply a strict liability test. Thus, the government, or a utility company that has the power of eminent domain11 will be held liable for any damage to real property caused by the public project, whether or not the damage was foreseeable, and whether or not the government acted negligently so long as the plaintiff proves a substantial cause-and-effect relationship between the public project or improvement and the damages.12 This liability derives from constitutional and public policy considerations that justify spreading the costs of public improvements benefitting the

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entire community among those who benefit rather than shifting the risk of loss onto just one or a few members of the community.13

Water Main Cases

The Los Angeles DWP’s reaction to the UCLA water main burst likely was influenced by settled case law in this area. For example, in Pacific Bell v. City of San Diego, in which a water pipe owned and maintained by the city of San Diego burst, flooding the basement of Pacific Bell’s facility.14 The court of appeal held that strict liability was applicable.15 Employing the strict liability standard, the court found that the city’s water delivery system was a public improvement, the design, maintenance, and construction of which led to the deterioration and subsequent breaking of the water pipe, subjecting the city to inverse condemnation liability.16 The court further found that policy considerations mandated application of a strict liability standard in this type of case because the costs of a public benefit—in this instance, a water delivery system—should be distributed among those who benefited by the public improvement rather than imposing a disproportionate burden on the individual who was harmed by the improvement.17 The same result obtained in Holtz v. Superior Court,18 in which a property owner who was damaged by construction of part of the BART subway system was permitted to pursue an inverse condemnation claim.19

Pacific Bell followed and relied upon McMahans of Santa Monica v. City of Santa Monica.20 In that case, the plaintiff’s furniture store was damaged after a city-owned-and-operated water main running under the alleyway behind the store burst, causing a 75-foot geyser to spew out of the break. The property owner brought an inverse condemnation action against the City of Santa Monica. The city argued that it was not liable because the damage was not caused by a public improvement as deliberately planned and built.21 The court of appeal rejected this argument, finding that the city’s program of water main installation and replacement was a public improvement and that its adoption of the water main replacement and maintenance plan constituted a deliberate act, subjecting the city to inverse condemnation liability for the resulting damages, whether those damages were foreseeable or not.22

Sewer Cases

Sewer cases follow the same general rule as water main cases, in that strict liability applies. In California State Automobile Association Inter-Insurance Bureau v. City of Palo Alto,23 backups in the defendant city’s sewer pipe caused raw sewage to enter a home. The homeowner’s insurer paid the homeowner’s claim for property damages and then sought subrogation against Palo Alto under an inverse condemnation theory.24 The trial court had entered judgment for the defendant, declining to apply strict liability principles. The court of appeal reversed, holding that not only was the strict liability test appropriate but also the plaintiff was not required to prove the specific mechanism that caused the sewage to back up.25 Instead, the law placed the burden on the city to prove that forces other than its project or improvement, acting alone, caused the damage to the home.26

In Ambrosini v. Alisal Sanitary District,27 the court of appeal affirmed a finding of inverse condemnation liability against the defendant sanitary district when its sewer outfall line overflowed and damaged the plaintiffs’ celery field. The court found the defendant liable in inverse condemnation despite the occurrence of more than three times the historic monthly average rainfall, which contributed to the overflowing of the sewer outfall line. Furthermore, the court explained that the defendant was liable for inverse condemnation regardless of whether the defendant acted intentionally or negligently in causing the damages,28 and regardless of whether the damages were foreseeable.29

In Amador Valley Investors v. City of Livermore,30 the plaintiff landowners brought an inverse condemnation action for damages allegedly caused by the defendant city’s discharge of treated sewage water into a creek that flowed through the plaintiffs’ property. The court of appeal found the city’s conduct actionable and that discharge of the sewage water into the creek was the proximate cause of the plaintiffs’ damages.31 It is settled law that courts apply a strict liability test in inverse condemnation cases involving property damage caused by water main breaks and sewer backups and spills. Under this standard, any injury to real property proximately caused by a public improvement is compensable under both federal and California constitutional law, regardless of whether the injury was foreseeable or whether the public entity was negligent.32

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2 Ben Poston, Matt Stevens, & Emily Alpert Reyes, L.A. identifies riskiest pipes in aging water system, L.A. TIMES (Nov. 6, 2014); Ben Poston, Matt Stevens, & Emily Alpert Reyes, More than 40% of Los Angeles water pipes graded C or worse, L.A. TIMES (Nov. 6, 2014); Ben Poston & Matt Stevens, L.A.’s aging water pipes: a $1-billion dilemma, L.A. TIMES (Feb. 16, 2015); Ben Poston, Matt Stevens, & Sarah Parvini, Under more pressure in hilly areas, old water mains prone to breaks, L.A. TIMES, (Feb. 18, 2015).
3 CAL. CONST. art. I, §19 (“Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”); 8 Witkin, SUMMARY OF CALIFORNIA LAW: CONSTITUTIONAL LAW §1143 (10th ed. 2005) (“The term ‘inverse condemnation’ is applied to an action by an owner to recover damages for injury to his or her property from some public works undertaking or other activity by an agency with power to condemn. The designation was coined because the object—compensation for property damaged in connection with a public use—is the same as in a condemnation action.”); Customer Co. v. City of Sacramento, 10 Cal. 4th 386, 379 (1995) (“[T]he words ‘or damaged’ were added to clarify that the government was obligated to pay just compensation for property damaged in connection with the construction of public improvements, even if the government had not physically invaded the damaged property.”).
5 GOV’T CODE §5810, 900, 903, 911; City of Stockton v. Superior Court, 42 Cal. 4th 730, 741 (2007) (explaining the requirement to file a claim in most instances); GOV’T CODE §905.1 (“No claim is required to be filed to maintain an action against a public entity for taking as of, damage to, private property pursuant to Section 19 of Article I of the California Constitution.”).
6 Albers v. County of Los Angeles, 62 Cal. 2d 250, 263-64 (1965).
7 GOV’T CODE §830.6.
8 CODE CIV. PROC. §1036.
9 Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306 (1941) (A claim for the death of the plaintiff’s son from a flood is not actionable in inverse condemnation; wrongful death is not a property claim).
10 GOV’T CODE §§7260-77.
14 Pacific Bell, 81 Cal. App. 4th at 600.
15 Id. at 602 (“Damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered under inverse condemnation and the presence or absence of fault by the public entity ordinarily is irrelevant.”) (citations omitted).
16 Id. at 607-08.
17 Id. at 615.
18 Holtz v. Superior Court, 3 Cal. 3d 296 (1970).
19 Id. at 303-04.
20 McMahan’s of Santa Monica v. City of Santa Monica, 146 Cal. App. 3d 683, 687 (1983).
21 Id. at 693.
22 Id. at 697-98 (“[T]he City was taking a calculated risk by adopting a plan of pipe replacement and maintenance that it knew was inadequate.”).
26 Id. at 481-83.
28 Id.
29 Id. at 730.
31 Id. at 492-93.
Doubling Down

California has yet to follow Delaware and other jurisdictions and allow double derivative standing

Although double derivative standing has been adopted in many jurisdictions outside California to address the modern corporate form, California courts have yet to rule on whether it will be allowed in this state. Application of the double derivative principle permits a shareholder of a parent company to sue for harm to its subsidiary and prevents corporate fiduciaries from using the parent-subsidiary form to circumvent shareholder derivative litigation. California’s policy of affording a right for every wrong, however, portends California’s adoption of double derivative standing.2

Shareholders, limited partners, LLC members, and others may bring a derivative action on behalf of an entity when that entity has suffered harm and those controlling it refuse to file suit. The right of an individual to sue derivatively is critical to ensure that insider corporate wrongdoing is addressed. In fact, it is the only recourse available when the corporation is controlled by the wrongdoers who may be expected to refuse to file suit against themselves.3 On the other hand, when an individual owns an interest in a parent company, and its subsidiary is the target of wrongdoing, the individual does not directly own shares in the subsidiary.4 Classic single derivative standing does not convey a right to sue on behalf of the subsidiary, because the individual only owns an interest in the parent. Technically, only the parent, as the direct owner of the subsidiary, has single derivative standing to sue on behalf of the subsidiary.

What recourse, then, exists if the subsidiary’s board refuses to file suit, and the board of the parent also refuses to bring a single derivative action on the subsidiary’s behalf? If no other person has standing to sue, a subsidiary could be left without a remedy. The mere layer of a second corporate structure could insulate wrongdoers under a simple formula of abuse: corporate boards and officers who wished to reduce or eliminate the risk of breach of fiduciary duty and other actions against themselves could simply form and operate through a corporate subsidiary while also controlling the parent.5 For this reason, numerous jurisdictions have kept stride with “the realities of the changing techniques and structures of the modern corporation.”6 Courts in other states have recognized and steadily expanded the double derivative category of standing, which allows an owner in a parent company to file suit in favor of a subsidiary.7

Foreign Law

Double derivative theory evolved over a century ago.8 It was well established in New York as early as 1948,9 in Delaware as early as 1963,10 and has been applied and expanded in numerous other jurisdictions as well as in the

by Robert M. Heller
Model Business Corporations Act.11 The question of whether California will adopt double derivative standing can, in part, be evaluated by examining the reasons double derivative standing has been adopted in other states.

A particularly illustrative opinion was issued in 1988 by the Illinois Supreme Court in *Brown v. Tenney.*12 There, three shareholders formed a corporation, appointed themselves to its board of directors, and operated the business. They then formed a separate corporation to act as a holding company, exchanged their shares for an equal percentage of the holding company's shares, and elected themselves as directors of the holding company.

The plaintiff, a minority shareholder in the parent, alleged that the defendants breached their fiduciary duties by converting corporate funds of the subsidiary and that both the parent and the subsidiary were controlled by the wrongdoers, who refused to sue. The plaintiff shareholder brought a derivative lawsuit on behalf of the parent and its subsidiary. The trial court refused to recognize double derivative theory for the subsidiary's suit, the appellate court reversed, and the Illinois Supreme Court accepted the appeal.

The Illinois Supreme Court noted that a "double derivative action is a long-standing doctrine of equity jurisprudence" and the "overwhelming weight of authority does accept the double derivative action."13 The Illinois high court agreed with the plaintiff, finding that "this court should not be derailed by convenient corporate formations which do not reflect business realities."14 Illinois has a well-settled principle to look beneath the corporate veil and disregard legal fictions "when used as a shield for wrongful acts."15 The court was more concerned with protecting the natural persons for whom the corporations were created rather than the "artificial creatures in whom legal title is vested."16

The Illinois Supreme Court was further persuaded that corporate officers and directors are fiduciaries and that single-derivative standing evolved to ensure someone could represent the interests of corporations and shareholders should the fiduciaries fail to act properly. The court reasoned that double derivative standing merely extended single derivative theory, so that the "beneficiary is in turn also a fiduciary" that deserves representation should interlocking directorates or collusion result in lack of representation.17 Otherwise, "the subsidiary is accountable to no one since its shareholder, the holding company, is controlled by the wrongdoers."18

The Illinois court rejected the defendants' contention that recognizing double derivative actions was tantamount to judicial legislation. The court swiftly disposed of that argument by noting that single derivative actions also had equitable, rather than purely statutory, origins.

California courts are also likely to look to Delaware decisions.20 For decades, Delaware courts have recognized double derivative standing, and in 2010, the Delaware Supreme Court greatly expanded the theory in *Lambrecht v. O'Neal.*20 The Lambrecht court first reviewed prior Delaware decisions, such as *Sternberg v. O'Neal,*21 in which the parent company acquired the subsidiary before the alleged wrongdoing had occurred. The Lambrecht court confirmed: "In these circumstances, our law recognizes a right to proceed double derivatively. Otherwise, there would be no procedural vehicle to remedy the claimed wrongdoing in cases where the parent company board's decision not to enforce the subsidiary's claim is unprotected by the business judgment rule."22 The Lambrecht court further reasoned that double derivative standing arises "where the parent corporation's board is shown to be incapable of making an impartial business judgment regarding whether to assert the subsidiary's claim."23

The Lambrecht case, however, presented an even more complex issue. The Lambrecht plaintiff had initially owned shares in the corporation at issue individually and directly, and had properly filed a single derivative case on behalf of that nominal defendant corporation. During the litigation, the nominal defendant entity merged with another corporation, thereby causing plaintiff to lose direct shareholder status. The court noted that a "post-merger double derivative action" was "a new, distinct action in which standing to sue double derivatively rests on a different temporal and factual basis—namely, the failure of the [current] board, post-merger, to enforce the premerger claim of its wholly-owned subsidiary."24 Despite the more complicated ownership issues presented, the Delaware Supreme Court nevertheless confirmed that "Delaware case law clearly endorses the double-derivative action as a post-merger remedy" and extended double-derivative standing to those circumstances as well.25

**California Law**

Despite the acceptance of double derivative standing elsewhere, the theory has remained an elusive issue of first impression in California and has avoided full evaluation in a published decision in the state's courts. California's lack of precedent complicates matters for California practitioners since, given the popularity of the parent-subsidiary form, the double derivative standing issue will likely arise in shareholder disputes. Moreover, since a successful lack of standing defense can terminate all liability, fiduciary defendants will likely contest the issue. California practitioners representing the would-be double derivative plaintiff may cite the foreign cases discussed above and may further consider advancing additional arguments to secure standing.

First, Corporations Code Section 800(b), which authorizes shareholder derivative suits, expressly permits derivative actions by "a shareholder, of record or beneficially." The legislature added the term "beneficially" to Section 800(b) in 1975, but did not define the term. *Pearce v. Superior Court,*26 a 1983 appellate court decision, was the first case to examine the new term, observing that beneficial shareholder standing was added as part of "the 1975 liberalization of the standing requirements" to bring California in line with the majority rule.27 Framing the term within the context of both the legal definition and that of usage in ordinary social discourse, *Pearce* stresses that a "liberal and expansive reading of section 800 and the phrase ‘shareholder…beneficially’" is proper.28

*Pearce* holds that a beneficiary of corpus of a trust was a "beneficial stock owner" under Section 800(b), even though the beneficiary did not personally own the corporate stock. In a subsequent case, *Patrick v. Alacer Corporation,* the wife of a shareholder with a community property interest in her husband's shares was deemed a beneficial owner with derivative standing, despite the fact the stock was not in her name.29 Thus, Section 800(b) expressly creates an exception to direct stock ownership, opening the door to the argument that a parent company shareholder is a "beneficial" owner of the subsidiary's stock and, as such, expressly granted standing by legislative enactment.

Second, California's creation of single derivative law was initially based in equity,30 and California strongly supports the "fundamental principle of our system of jurisprudence that for every legal wrong there is a remedy."31 California compensates injured parties for all damage proximately caused by the wrongdoer unless a departure from the basic principle is "mandated by a legislative exception or by strong public policy."32 When individuals are subjected to conduct by others that is deemed unfair and contrary to public policy, the courts have full power to afford necessary protection.33 Thus, even if a California court were to find in Section 800(b) that "beneficial" shareholder language did not legislatively sanction double derivative standing, California is rife with authority to support the theory based on equity alone.

Third, California opinions that have had indirect brushes with double derivative theory are favorable. In *Gaillard v. Natomas Company,* the court considered double derivative theory in the context of a merger. Before the merger was effective, the plaintiff
The Delaware Supreme Court in *Lambrecht* seemingly pulled the rug out from under the *Grosset* decision, expressly recognizing that double derivative standing does, in fact, exist under Delaware law to afford standing in the post-merger context. Because *Grosset* did not consider double derivative standing, *Grosset* is not controlling on that issue and remains one of first impression in California. The question thus remains whether California courts will follow Delaware’s numerous opinions, including *Lambrecht*, which hold that double derivative standing is, and has been, a viable theory for decades, whether under the postmerger cases or otherwise.

It seems likely that California will do so, given that California courts have historically been persuaded by and often follow Delaware corporate case law. *Grosset* itself illustrates a circumstance in which the action of the California Supreme Court could be interpreted as desiring to parallel Delaware law. Moreover, given that the *Grosset* court has already concluded that Delaware’s statutory “contemporaneous ownership” requirement is the same as, if not narrower, than California’s requirement for the purpose of single derivative standing, California courts will be hard pressed to now attempt to distinguish California law from Delaware law or otherwise conclude that double derivative standing cannot exist in California in light of *Lambrecht*.

Since *Lambrecht*, two California appellate courts have seemingly concurred and telegraphed that double derivative standing may soon be expressly adopted in this state. In *Kruss v. Booth*, the plaintiff’s second amended complaint alleged double derivative theory. The appellate court reversed the trial court and permitted the pleading to stand on demurrer, thus implicitly recognizing that double derivative standing exists in California.

Additionally, in *Villari v. Mozilo*, the plaintiff alleged multiple double derivative actions after a postcomplaint merger, but then dropped the double derivative theory of standing on appeal. Despite this, the court took the opportunity to cite and even quote extensively from *Lambrecht*, concluding “The continuous ownership rule, however, does not preclude a double derivative action by a former shareholder.” Apparently, the only thing standing in the way of double derivative standing in *Villari* was the fact that the plaintiff had abandoned it.

California courts may also be influenced by the Ninth Circuit’s holding in *In re Imperial Corporation of America*, in which the Ninth Circuit considered whether double derivative standing existed in the context of the doctrine of claim preclusion (res judicata). The court observed that claim preclusion bars not only claims that were actually litigated but also any claims that could have been litigated. In a prior lawsuit, the shareholders brought and settled a single derivative action against the officers and directors relating to the failure of Imperial Savings Association, which was a wholly owned subsidiary of Imperial Corporation of America. However, the shareholders only sued the parent company Imperial Corporation of America and did not bring a double derivative lawsuit on behalf of the subsidiary.

The Federal Deposit Insurance Corporation (FDIC), as receiver for the failed subsidiary, brought a separate action on behalf of the subsidiary against the same officers and directors for the same conduct. After concluding that the FDIC was in privity with the prior shareholder plaintiffs (a requirement for claim preclusion), the court further examined which claims the prior shareholder plaintiffs had or could have brought. Although the subsidiary was not a named defendant or a party to the settlement in the prior litigation, the Court cited *Gaillard* for the definition of double derivative and held that the prior
shareholder plaintiffs “could have brought a proper double derivative suit” on behalf of the parent in the prior action.52 After recognizing that double derivative standing would have allowed the prior shareholder plaintiffs to sue on behalf of the subsidiary, the court concluded that the FDIC’s claim on behalf of the subsidiary was barred by claim preclusion in the present action.53

The primary function of double derivative theory is to provide a remedy to individuals when both the parent company and the subsidiary refuse to act; it favors substance over form and promotes equity for the individual rather than the fiction of the corporate structure. Although California courts have yet to issue a clear, published decision on whether a double derivative plaintiff, in fact, has standing in this state, the nationwide move in that direction and the compelling reasons in favor of the theory should be persuasive argument leading to the formal, explicit approval of double derivative standing in California.


2 “It is a fundamental principle of our system of jurisprudence that for every legal wrong there is a remedy (CIV. CODE §3523), and that an injured party should be compensated for all damage proximately caused by the wrongdoer unless a departure from the basic principle is mandated by a legislative exception or by strong public policy.” Barbara A. v. John G., 145 Cal. App. 3d 369, 376 (1983).


4 The use of subsidiaries has become “increasingly popular with the growth and sophistication of the modern corporate enterprise. The reasons for this are complex and varied. Subsidiaries may be useful for tax reasons, for achieving the advantages of limited liability, for centralizing control in a relatively small percentage of stock ownership, for qualifying to do business under the laws of the various states, for reasons related to financing, and doubtless for a number of other purposes.” William H. Painter, Double Derivative Suits and Other Remedies with Regard to Damaged Subsidiaries, 36 IND. L. J. 143 (1961).

5 “The holding company has given rise to numerous new problems of the protection of stockholders from the misconduct of their directors.” Note, Remedies of Stockholder of Parent Corporation for Injuries to Subsidiaries, 50 HARV. L. REV. 963 (1937).


8 Ryan v. Leavenworth, Atchison & Northwestern R.R. Co., 21 Kan. 365, 402-04 (1879) (“If any other rule were adopted, the plaintiffs would be denied all
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relief, and the wrongs of which they complain would go unredressed.”


13 Id. at 234.

14 Id.

15 Id. at 235.

16 Id.

17 Id.

18 Id.


20 Lambrecht v. O’Neal, 3 A. 3d 277 (Del. 2010).


22 Lambrecht, 3 A. 3d at 283.

23 Id. at 282 (citing Rales v. Blasband, 634 A. 2d 927 (Del. 1993)).

24 Lambrecht, 3 A. 3d at 290.


27 Id. at 1064-65.

28 Id. In arriving at a meaning that “reflects a common understanding,” the court referenced both Black’s Law Dictionary (1968) and The American Heritage Dictionary of the English Language (1981).


35 The court reasoned: “We could well have a situation where a shareholder files a derivative action, navigates laboriously through the pleading stage, undertakes extensive discovery, incurs sizeable monetary obligations, and then, after an elapse of several years, is precluded from proceeding further because his or her corporation has just merged with another. It could not have been the intention of the Legislature that the adjudication of an alleged wrong be concluded in this manner.” Id. at 414.

36 Id. at 419.

37 Id.

38 Notably, in Lambrecht v. O’Neal, 3 A. 3d 277 (Del. 2010), the Delaware Supreme Court held otherwise, and confirmed that double derivative standing does exist in a postmerger case. Despite this inconsistency, both the Lambrecht and Guillard courts were united in the quest to ensure that the plaintiff shareholder continued to have standing to pursue the alleged wrongdoing.


41 Id. at 1119.

42 Lambrecht v. O’Neal, 3 A. 3d 277, 293 (Del. 2010).


44 Grosset, 42 Cal. 4th at 1110 (“Like Delaware, California has a statute that imposes stock ownership requirements for standing to pursue a shareholder’s derivative suit.” The court then applied what it believed to be Delaware law to arrive at its decision as to California law.).

45 Grosset, 42 Cal. 4th at 1119.


48 Id. at 1480.

49 In re Imperial Corp. of Am., 92 F. 3d 1503, 1510 (9th Cir. 1996).

50 The Ninth Circuit does not expressly state whether it was applying California or federal law to the double derivative issue. However, the court cites to Guillard v. Natomas Co., 173 Cal. App. 3d 410, 419-20 (1985) and had exercised diversity jurisdiction. Thus, it presumably based its recognition of double derivative standing upon California law.

51 In re Imperial Corp. of Am., 92 F. 3d at 1505.

52 Id. at 1510.

53 Id. at 1507-09.
DRAMATIC EVENTS roiled California’s legal ethics world in 2014. In a shocking letter to the state bar, the California Supreme Court rejected all 67 proposed rules of professional conduct drafted over nine years by the Commission for the Revision of the Rules of Professional Conduct and approved by the State Bar Board of Trustees. The court scuttled years of volunteer effort by the state’s most venerable ethics experts, but a new commission, whose members were announced on January 30, includes some veterans who are likely to build on the work product of their predecessors.¹

The state bar abruptly fired Executive Director Joseph L. Dunn after an investigation concluded Dunn had misled the board of trustees by, among other things, representing that Chief Justice Tani Cantil-Sakauye supported his proposal to sell the bar’s San Francisco headquarters and move to Sacramento. Dunn lashed back, suing the bar and its president² and claiming retaliation because he was an anonymous whistleblower, a position the bar described as “bewildering…since as the executive who is head of the entire organization he is responsible for managing operations…”³

Two judges narrowly avoided removal from the bench after they were charged with having sex in their chambers and lying about it, in violation of the Code of Judicial Ethics. Kern County Superior Court Judge Cory Woodward engaged in sexual activity with his married courtroom clerk in chambers and public places, and misled the presiding judge, assistant presiding judge, and court executive officer about the relationship.⁴ Orange County Superior Court Judge Scott Steiner engaged in sexual activity in his chambers with two women, both former students in law school classes taught by the judge, and one an intern.⁵ After the judges expressed remorse, they were censured by the Commission on Judicial Performance in a split vote.⁶

Two married lawyers found guilty of felony false imprisonment and conspiracy faced disbarment. Kent Easter, a former partner with Stradling Yocca Carlson & Rauth PC, and his wife Jilliane Easter embarked on a malicious campaign against a volunteer at their six-year-old son’s school that culminated in planting marijuana, Vicodin, Percocet, and a marijuana pipe in their victim’s car, and calling the police using a false name and foreign accent to have her arrested. Jilliane John W. Amberg is a partner in the Los Angeles office of Bryan Cave LLP, and Jon L. Rewinski is a partner in the Los Angeles office of Locke Lord LLP. Both are former chairs and Amberg is a current member of LACBA’s Professional Responsibility and Ethics Committee. Amberg is also a former chair and Rewinski is a former member of the California State Bar’s Committee on Professional Responsibility and Conduct.

John W. Amberg is a partner in the Los Angeles office of Bryan Cave LLP, and Jon L. Rewinski is a partner in the Los Angeles office of Locke Lord LLP. Both are former chairs and Amberg is a current member of LACBA’s Professional Responsibility and Ethics Committee. Amberg is also a former chair and Rewinski is a former member of the California State Bar’s Committee on Professional Responsibility and Conduct.
was disbarred in October 2014, and Kent’s disbarment will be decided in 2015.

California’s judicial branch continued to struggle to overcome $1 billion in budget cuts since 2008, which has forced the Los Angeles Superior Court to close eight courthouses and 79 courtrooms. Though the state budget provided $223 million in new funding, only $129 million was earmarked for trial courts, and Los Angeles Presiding Judge David S. Wesley bluntly concluded, “[T]his year’s budget is a disaster for access to justice.”

Confidentiality
A lawyer’s obligation to maintain client secrets is of fundamental importance, facilitating the candor necessary for clients to receive sound legal advice. Over 20 years ago, the California Supreme Court admonished in General Dynamics Corporation v. Superior Court that “[e]xcept in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of a lawyer to disclose publicly the secrets of a client.”

More than 10 years ago, the Second District Court of Appeal concluded in Fox Searchlight Pictures, Inc. v. Paladino that, notwithstanding this general rule, a former in-house lawyer could ethically disclose to her own attorney client secrets of her former employer to facilitate the preparation of a wrongful termination claim.

In 2014, in Chubb & Son v. Superior Court, the First District addressed a similar issue in the context of a lawyer-litigant claiming employment discrimination against her former employer, a captive law firm of insurer Chubb & Son. Unlike in Fox Searchlight, in Chubb & Son, the client secrets belonged to persons not parties to the litigation. When nonparty client secrets are involved, how should the parties and their counsel handle discovery?

Attorney Tracy Lemmon worked for Bragg & Kulva, a law firm that represented Chubb’s insureds in litigation. Lemmon alleged that she had consistently met or exceeded expectations on her performance reviews until after she took medical leaves due to complications with a pregnancy. Lemmon’s postleave reviews, based in part on a law firm audit of her cases, stated that she fell short of her goals. Then, claiming that Lemmon had misrepresented facts in a court declaration, Bragg & Kulva fired Lemmon. Lemmon sued Bragg & Kulva and Chubb for disability discrimination, defamation, and wrongful termination.

Claiming a duty to protect the confidentiality of its insureds’ secrets, Chubb refused to produce letters in which clients gave feedback on Lemmon’s performance. Chubb did produce, but with redactions, Bragg & Kulva’s internal case reviews, internal mem-
MCLE Test No. 245

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

   True.
   False.

2. Former in-house lawyers may ethically disclose the secrets of their former employer to their own attorney to prepare a wrongful termination claim.
   True.
   False.

3. Disclosure of privileged information to persons with a common interest does not waive the privilege.
   True.
   False.

4. The presence of persons with conflicting loyalties destroys the common interest doctrine.
   True.
   False.

5. Lawyers should take precautions to protect the confidentiality of communications with foreign clients from government surveillance.
   True.
   False.

6. A lawyer who consults with his firm’s general counsel regarding a problem with a client during the engagement breaches his or her fiduciary duty to the client.
   True.
   False.

7. The attorney-client privilege for communications between lawyers and their firm’s general counsel does not relieve the lawyers from reporting malpractice to the client.
   True.
   False.

8. A conflict of interest between a criminal defendant and his or her lawyer destroys the effective assistance of counsel.
   True.
   False.

9. A legal malpractice claim arising out of a 14-year-old settlement is time-barred.
   True.
   False.

10. A lawyer may have a fiduciary duty under the Probate Code to account for funds in his or her client trust account.
    True.
    False.

11. A conservator’s suit against the estate’s lawyers is barred by unclean hands because the former conservator’s malfeasance is imputed to the successor.
    True.
    False.

12. A new conservator can enforce the duties owed to the prior conservator by the former lawyers.
    True.
    False.

13. There is a split of authority in California whether malicious prosecution claims against a lawyer are governed by a one- or two-year statute of limitations.
    True.
    False.

14. An attorney’s lien on settlement proceeds in an action that has settled is time-barred.
    True.
    False.

15. An attorney’s right to assume an action is time-barred.
    True.
    False.

16. An attorney may not charge a contingent fee.
    True.
    False.

17. When a firm dissolves, all lawyers in the firm owe a duty to take steps to avoid prejudice to the clients.
    True.
    False.

18. A dissolved law firm may recover fees earned on ongoing matters for its former clients by successor firms.
    True.
    False.

19. It is unethical for a lawyer to imply an ability to improperly influence a judge.
    True.
    False.

20. Photographs on an attorney’s website showing the attorney at social events are not subject to rules governing attorney advertising.
    True.
    False.
Wildman Palmer lawyer to seek legal advice from her firm’s separately designated in-house general counsel and claims counsel on how to handle Mireskandari and his client matter. The appellate court concluded that the attorney-client privilege can attach to such intrafirm communications even while the firm continued to represent Mireskandari, as long as there was a genuine attorney-client relationship between the inquiring lawyer and general counsel. The court endorsed a four-factor test developed by the Massachusetts Supreme Court: 1) the law firm must have formally or informally designated an in-house or ethics counsel, 2) the in-house lawyer must not have performed any work on the underlying client matter or a substantially related matter, 3) the time spent on in-house communications cannot be billed to the underlying client, and 4) the intrafirm communications must have been kept confidential.

The court in Edwards Wildman Palmer rejected two federal cases holding that a conflict of interest would preclude a lawyer from forming a lawyer-client relationship with the lawyer’s own firm with respect to an open client matter. Under the plain language of Evidence Code Sections 950 to 952, the lawyer qualified as a client and the firm’s general counsel and claims counsel qualified as “lawyers” for purposes of the privilege. The law firm’s fiduciary and ethical duties to Mireskandari did not trump the privilege. Nor could Mireskandari imply a fiduciary or current-client exception to the privilege protecting the intrafirm communications. Courts have no power to limit the state’s statutory privilege by recognizing implied exceptions.

As the court noted, the existence of the privilege does not undercut the law firm’s and lawyer’s duty to keep a current client apprised of developments in the client’s case. The privilege protects confidential communications between lawyer and client, but it would not excuse, for example, a firm from having to report to a current client the fact that the firm had committed malpractice. Such a reporting duty would arise under a lawyer’s ethical obligation to keep a client reasonably informed about significant developments in the client’s matter.

Conflict of Interest
A client is entitled to representation by counsel free of conflicts of interest no less in criminal proceedings than in civil cases. The existence of an actual conflict destroyed the effective assistance of counsel in Harris v. Superior Court. Following a preliminary hearing at which Melvin Harris Jr. was defended by lawyer Gustavo Diaz, an information was filed against Harris, charging him with felony possession for sale of a controlled substance. Unbeknown to Harris and the superior court at the time of the preliminary hearing, attorney Diaz had himself been arrested and was facing felony charges by the same office that was prosecuting Harris. Moreover, the same deputy who had arrested Harris and was the sole prosecuting witness at his hearing had also arrested Diaz and was a potential witness against the lawyer. Harris learned this from the deputy, three months later in jail. After his motion to set aside the information resulting from the flawed hearing was denied, he petitioned the court of appeal. The appellate court described the lawyer’s conflict: “As a criminal defendant, Diaz had an interest in maintaining a cordial and cooperative (if not subservient) relationship with the district attorney’s office…. [But] Diaz’s duties with respect to charges simultaneously facing Harris almost certainly called for a different—perhaps somewhat less conciliatory and more adversarial—relationship with the prosecutor’s office.” Declining to remand for a new preliminary hearing, the court issued a writ, directing the lower court to dismiss the information.

Malpractice
Neither the passage of more than a dozen years nor the absence of an attorney-client relationship was sufficient to defeat claims in two malpractice cases. In Prakashpalan v. Engstrom, Lipscomb and Lack, clients Muruganandan and Navamalar Prakashpalan sued the Engstrom law firm for malpractice and fraud in 2011 in connection with the settlement in 1997 of their bad faith and property damage claim against insurer State Farm, arising out of the Northridge earthquake. The Engstrom firm had obtained more than $100 million for 93 insureds, including the plaintiffs, who received $500,000 after the lawyers deducted their one-third fee. After conducting discovery and comparing notes with other Engstrom clients, the plaintiffs contended that $22 million of the settlement was unaccounted for. The superior court sustained the lawyers’ demurrer to the amended complaint without leave to amend, holding that the claims were barred under Solin v. O’Melveny & Myers because the suit was incapable of complete resolution without breaching the attorney-client privilege of other Engstrom clients.

The appellate court reversed, holding that disclosure of aggregate settlement information did not require disclosure of confidential client information or implicate Solin. Instead, it focused on the statutes of limitation. The plaintiffs’ professional negligence and breach of fiduciary duty claims were barred by Code of Civil Procedure Section 340.6, which requires actions against an attorney for a wrongful act or omission, other than fraud, arising in the performance of professional services to be filed within one year after actual or constructive discovery or four years after occurrence, whichever occurs first. However, noting that Section 340.6 does not apply to fraud, the court concluded that the plaintiffs’ fraud claims based on the theory Engstrom had not properly distributed the aggregate settlement proceeds from its client trust account were not time-barred. In a novel approach, it relied on Probate Code Section 16460, which applies to a fiduciary’s duty to provide an accounting to a beneficiary; Rule of Professional Conduct 4-100(B)(3), which requires a lawyer to account for funds in the client trust account; and Rule 3-310(D), which requires informed written consent from each client before entering into an aggregate settlement. The limitations period in Section 16460 is three years, the same as the general fraud statute, Code of Civil Procedure Section 338(d), but discovery is triggered by the receipt of an accounting or if no accounting is supplied, by facts sufficient to put the plaintiff on notice of wrongdoing. Engstrom’s accounting in 1997 was incomplete, the court held, because it did not provide plaintiffs with sufficient information to evaluate whether all monies had been distributed and whether they had received all they were entitled to receive. The plaintiffs’ discovery of facts from other Engstrom clients 14 years later made their complaint timely.

In Stine v. Dell’Osso, a conservator sued the attorneys for the prior conservator who was removed after misappropriating more
than $1 million from the estate of his mother while they represented him. In a pretzel argument enthralling to lawyers, the defendants argued that the new conservator had all of the burden and none of the benefit: Since they had no attorney-client relationship with the new conservator, she could not sue them for malpractice, and since the malfeasance of their client, the former conservator, was imputed to the new conservator, her claim was barred under the doctrine of unclean hands. The court of appeal disagreed, holding that under the successor fiduciary exception, the new conservator succeeds to the duties owed by the prior lawyer. Citing the Probate Code and Borissoff v. Taylor & Faust, the court concluded that the successor fiduciary had standing to sue her predecessor's attorneys.

Unclean hands did not apply because the former conservator's wrongdoing was outside the scope of his fiduciary authority. The new conservator does not step into the morass created by his personal malfeasance, the court held. “[W]hy would any competent individual agree to take over as a successor fiduciary if he or she was tarred with and shacked by the malfeasance of a prior fiduciary?”

**Malicious Prosecution**

In Roger Cleveland Golf Company, Inc. v. Krane & Smith APC, Division Three of the Second District addressed the applicable statute of limitations when an attorney is sued for malicious prosecution. As noted above, Code of Civil Procedure Section 340.6 sets a one-year limitation following actual or imputed discovery for “[a]n action against an attorney for a wrongful act or omission, other than actual fraud, arising in the performance of professional services.” Section 335.1 sets a two-year limitation for “[a]n action for assault, battery, or injury to...an individual caused by the wrongful act or neglect of another.” In Roger Cleveland, Division Three concluded that Section 335.1 applies. In so holding, the court disagreed with decisions recently published by Division Eight of the Second District and the Fourth Appellate District.

In that Section 340.6(a) applies only to claims against lawyers and malicious prosecution claims can be asserted against lawyers and their clients, the court in Roger Cleveland was troubled by the concept that different limitations could apply to lawyer-defendants (one year under Section 340.6(a)) and non-lawyer defendants (two years under Section 335.1). The court was also troubled by the fact that Section 340.6(a) does not permit tolling on a claim against a lawyer while the underlying action is on appeal, even though tolling in these circumstances is well established in malicious prosecution cases. Perplexed, the court turned to the legislative history of Sections 340.6(a) and 335.1 and concluded that Section 340.6(a) was intended to apply to claims for professional negligence against a lawyer and not to malicious prosecution claims against a lawyer. Hopefully, the California Supreme Court will resolve the conflict among appellate courts.

**Getting Paid**

The Los Angeles County and Beverly Hills Bar Associations unsuccessfully sought republication of an unduly formalistic and impractical decision by the Second District, Mojtabedi v. Vargas, which involved the division of a contingent fee between successive counsel. Attorney Michael Mojtabedi entered into a written fee contract to represent two clients in connection with injuries they suffered in an auto accident. The contract allowed his firm to assert a lien against the plaintiffs’ claims. After eight months, Mojtabedi was replaced by new counsel, Fernando Vargas. Mojtabedi informed the claims adjustor he had a lien for attorneys’ fees on payments to his clients. After the case settled, settlement checks were made payable jointly to the clients, Mojtabedi’s firm, and Vargas’s firm, and deposited in Vargas’s trust account. Mojtabedi claimed $4,407 from the $14,500 settlement. When Vargas offered $2,000, Mojtabedi sued Vargas, the claims adjustor, and the banks that issued and deposited the checks. The clients were not parties to the suit, and there is no suggestion they disputed the fees.

The superior court sustained a demurrer to the complaint on the ground that Mojtabedi did not have an enforceable lien. The court of appeal affirmed, rejecting the written fee contract and lawyer’s time log, and holding that the lawyer must file a separate declaratory judgment action against his former clients to establish the reasonable value of his services. “[T]he attorney’s lien is only enforceable after the attorney adjudicates the value and validity of the lien in a separate action against his client.”

The opinion ignored settled authority regarding the duty of counsel holding the check to divide the contingent fee on a quantum meruit basis, in the absence of objection by the clients and without the need to sue them. In this situation, the bar associations argued, it was poor public policy to require the lawyer to file a new lawsuit against his clients.

After steering his client through two divorce actions and a Marvin lawsuit, attorney Hillel Chodos negotiated a divorce settlement worth an estimated $26 million and was discharged by the client without payment. In an action for his fees, in Chodos v. Borman a jury awarded Chodos $7.8 million by using a multiplier of five to increase his rate to $5,000 per hour. The court of appeal reversed, remanding the case for entry of a reduced judgment based on a $1,000 hourly rate. The court noted that Chodos and his client had an unenforceable oral agreement to pay him an hourly fee but no written agreement, and no agreement for a contingent fee. Since the lawyer had not voluntarily assumed any contingent risk, it was inappropriate to apply a multiplier. Awarding the lawyer a premium on his fees would reward him for his violation of Business and Professions Code Sections 6147 and 6148, which require a written fee agreement, and violate public policy.

**Law Firm Dissolution**

The last decade has witnessed the dissolution of several venerable law firms, including Dewey & LeBoeuf LLP in 2012, Howrey LLP in 2011, Wolf Block LLP in 2009, Thacher Proffitt & Wood LLP, Thelen LLP and Heller Ehrman LLP in 2008, and Coudert Brothers in 2005. During 2014, the state bar’s Standing Committee on Professional Responsibility and Conduct (COPRAC) and District Court Judge Charles R. Breyer issued important and timely opinions addressing some of the ethical and financial issues resulting from a law firm dissolution.

In Formal Opinion 2014-190, COPRAC reminds us that a law firm dissolution does not terminate a lawyer’s ethical duties to clients. On the contrary, under Rule of Professional Conduct 3-700, additional obligations are triggered. Rule 3-700(A)(2) precludes a lawyer from withdrawing from an engagement until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. The rule’s requirements apply when the lawyer’s withdrawal is prompted by the dissolution of the lawyer’s law firm. The rule’s requirements apply to all lawyers of the dissolved firm and with respect to all clients of the firm, regardless of the lawyer’s status within the firm and regardless of the lawyer’s personal connection, or lack of connection, to any specific client. What “reasonable steps” a particular lawyer must undertake depends on the lawyer’s prior relationship with a client, the lawyer’s ability to act within the firm, and the lawyer’s competence to perform any needed services for the client.

Therefore, COPRAC opined that a litigation partner of the dissolving firm, who supervised an engagement analyzing the potential claims of a client, some of which would soon be lost by operation of relevant statutes of limitation, likely breached her ethical obligations by sending an e-mail that merely notified the client that the firm was dissolving, the partner was joining a new firm, the partner would no longer represent the
client, and the client should engage new counsel quickly because of the relevant statutes of limitations. The litigation partner should have done more to protect the client from being prejudiced by her withdrawal, such as being sure that the client retained new counsel and the new counsel knew of the impending deadlines, or perhaps even filing a protective complaint. COPRAC opined that a nonlitigation partner with no prior relationship to the client probably satisfied his ethical obligations under 3-700 by participating in the firm’s creation of a dissolution committee responsible for protecting against the abandonment of the dissolving firm’s clients, unless the partner had reason to believe the dissolution committee was not doing its job. Finally, COPRAC opined that an associate, who had worked on the client’s matter, normally would satisfy her ethical obligations by voicing her concerns to her supervising partner, unless the associate had reason to believe that the partner would not convey those concerns to the client.

In Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP, 32 District Judge Charles R. Breyer concluded on summary judgment that the trustee of the bankruptcy estate of dissolved law firm Heller Ehrman LLP could not pursue claims for the profits earned by law firms that Heller’s former clients retained to work on hourly fee matters begun at Heller. In doing so, he distinguished and questioned the continuing validity of the unfinished business rule first articulated in Jewel v. Boxer.33 The dissolution in Jewel was voluntary and involved four partners who created two new law firms. Heller’s dissolution, on the other hand, was forced and involved hundreds of lawyers, many of whom joined existing law firms. Judge Breyer questioned the continuing validity of Jewel, decided in 1984, in light of material revisions in the Revised Uniform Partnership Act (RUPA) effective in 1999.34 Under the old act, partners breached their fiduciary duties by taking action with respect to unfinished partnership business for personal gain. Under RUPA, a partner became free to compete with the partnership immediately upon an event of dissolution. Thus, former Heller shareholders who signed new retention agreements with former Heller clients did not violate any fiduciary duty.35 Judge Breyer also reasoned that third-party firms should not be punished for hiring former partners of dissolved firms and clients should be able to retain lawyers from a dissolved firm who are familiar with their matters. “A law firm—and its attorneys—do not own the matters on which they perform their legal services. Their clients do. A client, for whatever reason, may summarily discharge counsel and hire someone else. At that point, the client only owes fees for services performed to the date of discharge, and his former lawyer must, even if fees are in dispute, cease working on the matter and immediately cooperate in the transfer of files to new counsel.”36

Advertising

Two California lawyers succumbed to the modern mania for self-promotion with disastrous results. In In re Edward R. Reines, a prominent practitioner before the Federal Circuit Court of Appeals and chair of its advisory council was publicly reprimanded for conduct unbecoming a member of the bar under Federal Rule of Appellate Procedure 46(b)(1)(B).37 After Reines argued two appeals before the Federal Circuit in March 2014, he received an effusive e-mail from Chief Judge Randall R. Rader reporting an internal court conversation with fellow judges who had praised his performance. After extolling Reines’s talents, the chief judge concluded: “In sum, I was really proud to be your friend today! You bring great credit on yourself and all associated with you! And actually I not only do not mind, but encourage you to let others see this message. Your friend for life, rrr.”38 It was an invitation Reines should have declined. However, his judgment no doubt clouded by praise and the rare spectacle of a judge flattering a lawyer, Reines promptly circulated the e-mail to 33 existing and prospective clients with a solicitation for business. In response to the Federal Circuit’s order to show cause why he should not be disciplined, Reines minimized his friendship with the judge and argued discipline would violate his First Amendment freedom of speech. Sitting en banc, the court stated that it is misconduct underABA Model Rule 8.4(e) for a lawyer to state or imply an ability to improperly influence a government agency or official, and concluded, “It would blink reality not to view respondent’s action as suggesting his retention because his special relationship to the client probably satisfied his ethical obligations by voicing her concerns to her supervising partner, unless the associate had reason to believe that the partner would not convey those concerns to the client.”39 The Supreme Court had upheld limits on attorneys’ commercial speech in Obralik v. Ohio State Bar Association40 and Florida Bar v. Went for It, Inc.,41 to protect the integrity of the legal profession and the public from misleading speech.42 Reines was publicly reprimanded, and Judge Rader resigned as chief judge and retired from the court.43

Attorney Svitllana Sangary was a proud immigrant to America whose entrepreneurial spirit traded on her adoptive country’s fascination with self-invention and celebrity culture. Sangary solicited clients through her firm’s website featuring photos in which she posed with famous celebrities and political figures, including Barack Obama, Bill and Hillary Clinton, Arnold Schwarzenegger, George Clooney, Paris Hilton, and many others. Unfortunately, the photos were created by taking original celebrity photos and overlaying the lawyer’s image to create the false appearance that she was in the presence of the celebrity. In a disciplinary action, In the Matter of Svitllana E. Sangary,44 the State Bar Court judge found that the doctored images on Sangary’s website violated Rule of Professional Conduct 1-400(D)(2), which prohibits attorney advertising that is false, deceptive, or tends to confuse, deceive or mislead the public.45 It also found that Sangary had failed to cooperate with the disciplinary investigation, noting that she refused to participate or answer questions, skipped conferences, and filed lengthy documents asserting her personification of the American dream that the court characterized as bizarre soliloquies having “little to no rational connection to the charges.” Though the State Bar had originally contacted Sangary about the fake photos in December 2012, they remained on her website throughout the disciplinary hearing in July 2014. Expressing “grave concerns” about her lack of insight and contemptuous conduct, the judge recommended suspension for six months.46

7 Despite budget gloom, some courts to avoid slashing service, L.A. DAILY J., July 14, 2014.
8 See BUS. & PROF. CODE §6068(e)(1), CAL. RULES OF PROF. CONDUCT R. 3-100.
12 Id. at 1115.
13 Id. at 1109 (internal quotation omitted).
14 See id. at 1105.
15 Seabass La Jolla Owners Ass’n v. Superior Court, 224 Cal. App. 4th 754 (2014).
16 Id. at 776.
19 CIV. CODE §§6150 et seq.
20 Seahaus La Jolla Owners Ass’n, 224 Cal. App. 4th at 775.
22 Listen Up: NSA surveillance policies raise questions about the viability of the attorney-client privilege, A.B.A. J. (Sept. 2014).
24 Id. at 1234-35 (citing RFF Family P’ship, LP v. Burns & Levinson, LLP, 463 Mass. 702 (2013)).
27 Id. at 1234.
28 See CAL. RULES OF PROF’L CONDUCT R. 3-500.
30 Id. at 1139.
31 Id. at 1149.
34 Prakashpalan, 223 Cal. App. 4th at 1126.
35 Id. at 1122.
36 Id. at 1123-24.
37 Id. at 1125.
41 Id. at 846.
45 Roger Cleveland, 225 Cal. App. 4th at 680-82.
47 Id. at 978.
48 See, e.g., Guzzetta v. State Bar, 43 Cal. 3d 962 (1987); CAL. RULES OF PROF’L CONDUCT R. 4-100; Cal. State Bar Committee on Mandatory Fee Arbitration, Arbitration Advisory 1997-03.
50 Id. at 106.
51 Id. at 101-02.
54 See CORP. CODE §§16100 et seq.
56 Id. at *1.
57 In re Edward R. Reines, 771 F. 3d 1326 (Fed. Cir. 2014).
58 Id. at 1328 n. 1.
59 Id. at 1330-31.
62 Reines, 771 F. 3d at 1332-33.
63 Judge Rader, Author of Controversial Email to Lawyer, to Resign from Bench, WALL STREET J., June 13, 2014.
64 In the Matter of Svitlana E. Sangary, State Bar Court of Cal., Case No. 13-O-13838—DFM, filed Sept. 11, 2014.
65 Id. at 7-8.
66 Id. at 13.
Bounds v. Superior Court holds that a taking under the financial elder abuse statute does not require full performance of a contract.

THE CALIFORNIA Court of Appeal recently clarified in Bounds v. Superior Court what constitutes a taking for the purposes of the financial elder abuse statute codified in Welfare and Institutions Code Section 15610.30. According to the court, a taking under the statute does not require completed performance of a contract but is adequately pleaded when any property right is impaired by means of an agreement. This holding interprets the term “taking” in the financial elder abuse statute and finds that contracts with anyone over the age of 65 may be subject to special scrutiny and the financial elder abuse statute’s heightened remedies, including attorney’s fees. Additionally, the court also clarified the scope of litigation privilege as applied to financial elder abuse claims.

The financial elder abuse statute provides that financial abuse of an elder occurs when a person or entity takes or assists in taking real or personal property of an elder for a wrongful use or with intent to defraud or by undue influence. A person is deemed to take an elder’s property when the elder is deprived of any property right by means of an agreement, donative transfer, or testamentary bequest. Additionally, the person must have either known or “should have known that this conduct [was] likely to be harmful to the elder.”

The legislature enacted the Elder Abuse Act to “encourage private civil enforcement of laws against elder abuse and neglect.” An elder is defined as a person residing in the state over age 65. These statutory provisions contain no requirement that an elder lack capacity or be of limited financial means. The act’s financial abuse provisions are in part premised “on the view that financial agreements entered into by the elderly should not be subject only to the general rules of contract, but should instead be subject to special scrutiny.” If the elements of financial abuse are met and the defendant has been “guilty of recklessness, oppression, fraud, or malice in the commission of this abuse,” the court shall award the plaintiff reasonable attorney’s fees in addition to other available remedies.

Sara Colón is a partner at Brown Neri & Smith LLP, formerly Ethan Brown Law LLP, and Catherine Eschbach is a law student at Pepperdine University School of Law. Ethan Brown Law LLP represented Ms. Bounds and the trustee of the Helen J. Bounds Living Trust in Bounds v. Superior Court.
cial abuse provisions to encourage speedy settlements of meritorious claims. The legislature intended to help settle these claims quickly and prevent elders from draining limited funds and energy litigating claims at the end of their lives. In doing so, however, the legislature also recognized it was creating a powerful tool that was potentially subject to abuse by overzealous litigants.

Despite, or perhaps because of, the heightened remedies available, there is very little decisional authority interpreting the financial abuse statutes. Prior to Bounds no California case law interpreted whether a taking occurs within the meaning of the statute if an agreement is not fully performed. One case, Bonfigli v. Strachan, did consider whether a taking had been asserted when the defendants encumbered the property without a valid power of attorney, but there was no contention in Bonfigli that the elders had not yet been deprived of their property. Instead, the question was whether a breach of contract claim was a taking within the meaning of the statute.

The superior court in Bonfigli had found that a lot line adjustment was not a taking and expressed concern that such a holding would transform any breach of contract claim with a person over age 65 into an elder abuse case. The court of appeal reversed, holding at least a skeletal claim for financial elder abuse was asserted where the lot line was adjusted without valid power of attorney and the elders received no compensation for the parcel subject to the adjustment. Additionally, the court affirmed under the financial elder abuse statute that it was not necessary to allege mental suffering associated with the taking. Bonfigli, therefore, provided only limited guidance on when a financial elder abuse claim is adequately asserted. No allegation of mental suffering is necessary and a breach of contract claim—specifically an invalid lot line adjustment without compensation—could constitute a taking. This left the question presented in Bounds unaddressed: Is there a taking within the statute’s meaning if there is a signed agreement but the property’s title is not yet transferred?

Property rights may be likened to a bundle of sticks. Included in that bundle are the right to sell the property and the right to use it. Conceptually, Bounds resolved the question of whether an elder had to be deprived of the entire bundle or only one stick for a taking to occur. Bounds also addresses whether the mere signing of an agreement implicated a stick without any further performance. The Bounds court concluded that an agreement does not need to be fully performed nor the elder entirely deprived of the property or property rights to constitute a taking under the financial elder abuse statute. It is sufficient to allege that any property right has been substantially impaired. This holding potentially subjects a party to liability for financial elder abuse the moment a contract is signed even if no transfer of the physical property or title ever occurs.

The Facts of Bounds

The Bounds cross-complaint for financial elder abuse alleged the following facts: Helen Bounds was an 88-year-old widow and the trustee of a trust owning her long-held family business. She was also suffering from Alzheimer’s disease but had not yet been diagnosed. The owner of the business on the adjacent lot sought to persuade Bounds to sell the family business’s property to him. Bounds had known the neighboring business owner for several years and trusted him. Without consulting her family, Bounds and the neighbor, along with the neighbor’s friend, a real estate agent, began negotiating for the neighbor to purchase the lot. During this time the neighbor and his friend repeatedly phoned Bounds and made exaggerated claims about the property’s poor physical and financial condition.

Bounds did not fully understand the terms being negotiated, which should have been apparent to her neighbor and his friend. She eventually consulted with her attorney and financial adviser about the sale, and then her family learned about the negotiations. After being told the sale would not resolve her financial worries and would, in fact, incur significant tax liability, she decided not to sell. A family member informed the neighbor and the neighbor’s friend that Bounds was not going to sell and that she was acting in a diminished capacity.

Bounds’s condition further deteriorated over the following months. Then, while her family was away on vacation, her neighbor saw her on the property and sought to reinitiate negotiations. Bounds felt overwhelmed with financial worries and was also having difficulty sleeping. Her business neighbor persuaded her to sell.

Shortly thereafter, Bounds and the neighbor signed a letter of intent stating there was no agent representing either party, even though the neighbor’s real estate broker friend had drafted it. Bounds acted without any professional or family assistance. Two days later, Bounds was convinced to execute a set of escrow instructions, even though no purchase contract had been signed. The price for the property in the instructions was around half of what Bounds had been advised the property was worth. At this time Bounds also executed a lease, allowing her business to remain on the property for a couple years, but at a rental rate reflecting a significantly higher property value than was to be paid to her per the escrow instructions.

As there was no formal purchase contract, Bounds, trusting her neighbor to be fair and acting in a diminished capacity, believed they were still negotiating. Eventually she consulted her attorney to draft a counter proposal, and her attorney sought to renegotiate fair terms. The neighbor refused and, rather than deal with Bounds’s counsel as her counsel directed, communicated with Bounds directly to demand she consummate the transaction or face a lawsuit.

In the meantime, the family learned weeks after Bounds had signed the escrow instructions that she was diagnosed with Alzheimer’s. Bounds’s counsel notified the neighbor of this and that his investigation of the property’s value revealed it was worth significantly more. Nevertheless, the neighbor demanded that the transaction close on the escrow terms. Shortly thereafter, the neighbor filed suit against the trust for specific performance and recorded a lis pendens. Bounds and the trust cross-claimed, alleging financial elder abuse on the basis that the moment she signed the escrow instructions, her property rights were taken and substantially impaired. Among other things, Bounds could not sell the property without disclosing the escrow instructions, and no buyer would purchase at fair market value knowing that information. Nor could the property be used to secure a loan, as no lender would extend reasonable and commercially acceptable terms knowing of the escrow instructions.

A demurrer to the financial elder abuse claims was sustained without leave to amend. Bounds petitioned for writ relief, and the court of appeal issued an order to show cause. In opposition, the neighbor and his friend asserted that the court should find that a taking by agreement can only occur by a consummated agreement. The petition was granted, and the court issued a writ, holding in a published opinion that Bounds adequately alleged a taking under the financial elder abuse provisions.

A Taking

The court held that the signed escrow instructions constituted a taking of Bounds’s property rights. In reaching this holding, the court noted that one premise for the financial elder abuse statutes is that contracts with elders should be subject to special scrutiny. Within that framework, the court determined the escrow instructions were an agreement that substantially affected the ability to sell the property or use it as collateral, as Bounds was under a legal duty to disclose the claim on it—a material fact that affected its desirability and value. Thus Bounds’s right to do with the property as she saw fit was impaired. The
neighbor and friend advanced the argument that there was no taking until title was transferred in a consummated agreement. The court explained this narrow interpretation would produce several troubling results and rejected it.

The first troubling result would be that an elder would be barred from asserting a claim until only after the result of the abuse was achieved with a transfer of property. This would immunize the abuser from the remedies under the act while the abuse was ongoing. Second, one legislative purpose in adopting the act was to protect elders with diminished or declining cognitive abilities from property deprivation by overreaching conduct. It would not serve that protective purpose to have elders wait to assert a claim until there was a complete property transfer. Third, a narrow interpretation would be inconsistent with the statutory framework of the provision. Section 15610.30 provides that a taking can occur by “means of an agreement, donative transfer, or testamentary bequest.” The terms “donative transfer” and “testamentary bequest” can refer both to performed and unperformed transfers. For example, the statute would apply when a gift is promised and when the gift is delivered. In view of these terms, the court held “by means of an agreement” can refer to both a performed agreement and to an agreement whose promises are still executory.

Federal Law

The troubling implications of the narrow interpretation become even starker when applied in the predatory lending context. Two federal cases illustrate why the Bounds court adopted the definition that best fits with both the statutory language and intent.

In Zimmer v. Nawabi, the Eastern District found there was financial elder abuse by wrongful use. The lender had induced the elder by false statements to refinance a mortgage on terms it knew were less favorable than the existing mortgage. This resulted in at least $10,000 in fees to the lender that the elder by false statements to refinance a mortgage on terms it knew were less favorable than the existing mortgage. There the court did not rely on any repayment on the loan in holding a taking occurred. Instead, it looked to the lender’s assertion of a secured interest in the property. The lender had secured that interest the moment the agreement was signed, regardless of whether the loan funds had transferred or repayment had started.

Under the interpretation of the statute that was offered by the neighbor and real estate agent in Bounds, to fully perform the elder would either need to repay the entire sum or the lender would need to secure the property on default. An elder who entered a loan agreement under undue influence or wrongful use would be unable to bring a claim upon realizing the terms were unjust. The elder would have to choose to either pay the entire amount or lose the property to the lender in order to bring a claim. This would entirely subvert the purpose of the financial abuse provision—speedy resolutions of claims and enabling the elder to retain the property.

Interpreting the Bounds court’s use of the term “performed agreement” to encompass part performance would create further ambiguity. In Bounds, for example, filing undue influence or wrongful use could satisfy the taking requirement at the signing of a contract, as that act impinges a property right.

The rule adopted in Bounds not only provides clarity but also enables the statute to fulfill its purpose. Looking to the example of an elder who signs a guarantee demonstrates this. If the narrow interpretation had prevailed, an elder who was unduly influenced to serve as a guarantor on a loan or lease agreement would not be able to assert a claim until the signer of the underlying agreement defaulted. An elder would be subject to potential liability on the agreement and without remedy against the abuser who subjected him to the potential obligation. Only in the event of a default and the transfer of the agreement’s balance would there be full performance. However, a property right was impaired the moment the guarantee was signed because the elder’s position changed. Any assets were subject to a future conditional claim. Thus, the elder would have been without a remedy against their
abuser, and living with the fear of potential liability for it, until default occurred.

The Litigation Privilege

The Bounds decision clarifies that a taking occurs when any property right is impaired, including any right impaired by merely signing an agreement without any further performance. It also provides guidance on the scope of litigation privilege in the financial elder abuse context. Bounds supports the argument that the litigation privilege cannot be asserted to shield liability. Initiating a suit for specific performance does not immunize a party against a claim for financial elder abuse. Under California Civil Code Section 47(b) a filing made in a judicial proceeding to achieve the objects of the litigation is privileged. The neighbor and realtor in Bounds asserted that because they filed a lis pendens and sued for specific performance, litigation privilege shielded them from the financial elder abuse claims. The Bounds court rejected this argument. If the cause of action is not based on privileged conduct but rather the underlying facts of abuse, the litigation privilege cannot be used as a shield for liability. In Bounds it was the abusive and deceptive actions of the neighbor and agent that formed the basis of the allegation—not the recording of the lis pendens.

However, this highlights why litigants need to draft their complaints carefully. If Bounds had alleged the taking was the result of the filing of the lis pendens or the suit for specific performance, the privilege would have attached, preventing the financial elder abuse claims. This is borne out in Consumer Solutions REO, LLC v. Hillery. Although the court found asserting a secured interest in the property was a taking, the court also found that the gravamen of the claim was not the making of the loan or obtaining the deed of trust but the steps taken in the judicial foreclosure proceedings. As such, privilege potentially attached.

If the Bounds court failed to find there was a taking it could have had the potential to undermine the financial elder abuse statutes. If there was no taking until a transfer of property occurred, in a contested case like Bounds, a taking would only occur as a result of a judicial process—thus making the taking privileged. This holding would have created a race-to-the-courthouse situation and treated similarly situated litigants differently.

Take for example, a case with the same underlying facts in Bounds as to how the elder’s signature was obtained. Except in this scenario the family or counsel never found out about the escrow instructions, and the elder went through with the transfer of the property—indisputably a taking. That elder would have been able to file a claim for financial elder abuse, whereas an elder who was subject to the same underlying abusive actions, but where the abuser first filed the lis pendens and suit for specific performance, would not due to litigation privilege attaching to the taking.

There are also some practical and procedural consequences of adopting a narrow interpretation of “taking.” At least three additional problems would have arisen if the Bounds court had found that an elder in Bounds’s position was required to wait for resolution of a suit for specific performance before stating a claim for financial elder abuse. First, if an elder could not show the taking resulted from undue influence under California Civil Code 1575 in a suit for specific performance, the elder would have to transfer the property and initiate a separate suit to recapitulate it under the knowingly wrongful use or undue influence standard in the financial elder abuse statute. This would not be judicially efficient. Further, the elder would expend attorney’s fees and court costs fighting the initial suit for specific performance, but even if she ultimately prevailed in the second action for financial elder abuse and recovered the property, she would not be able to recover the costs from the initial action, as would have been her right if a cross-claim for financial elder abuse had been filed.

Second, under the financial elder abuse statute an elder only needs to show that the taking was for knowingly wrongful use, whereas the affirmative defense to specific performance of a contract only offers the elder the option of showing undue influence. Thus, the wrongful use standard allows the elder to argue for rescission without putting her mental state at issue, as undue influence requires. Third, a court could potentially find this separate financial elder abuse claim was a compulsory cross-claim to the suit for specific performance and bar a later filed suit for financial elder abuse under preclusion doctrines.

These potential outcomes clearly contravene the legislature’s intent to allow elders to keep property taken from them by abusive action and to not deplete their limited energy and financial resources to do so. Therefore, allowing the elder to bring a cross-claim for financial elder abuse in a suit for specific performance is most consistent with the legislature’s intent that contracts with elders be subject to special scrutiny.

Given the broad interpretation of “taking” in Bounds, should a party fear that any contract with an elder will be subject to claims for financial elder abuse? Although a contract does not have to be fully performed for a taking to be alleged, only contracts that were
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obtained in a way that may give rise to an allegation of undue influence or knowingly wrongful use necessitate caution.

The standard for undue influence in the financial elder abuse statute may be found in California Welfare and Institutions Code Section 15610.70. Undue influence is defined there as “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.”

Wrongful use, as defined in Welfare and Institutions Code Section 15610.30(b), occurs when “the person or entity knew or should have known that this conduct is likely to be harmful to the elder.”

Accordingly, as long as the underlying contract was lawfully obtained and not for a wrongful use or by undue influence, contracting with a person over age 65 should not give rise to a claim for financial elder abuse or fear in contracting with an elder.

_bounds_ has brought clarity not only to the meaning of “taking” in the financial elder abuse statute but also to when litigation privilege attaches to a taking underlying a claim for financial elder abuse. Holding that a taking not does not require a fully performed agreement—but instead occurs if at the moment of signing any property right is infringed—does not mean all contracts with persons over age 65 have the potential for liability under the financial elder abuse schemes. However, this holding does subject contracts with elders to special scrutiny and puts persons contracting on notice that if the contract is obtained by undue influence or wrongful use they are potentially subject to heightened penalties.

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2 Welf. & Inst. Code §15610.30(a)(1), (5).
3 Welf. & Inst. Code §15610.30(b).
4 Welf. & Inst. Code §15610.30(c).
6 Welf. & Inst. Code §15610.27.
11 Id.
12 Id.
15 Bounds, 229 Cal. App. 4th at 472.
16 Id. at 473-77.
17 Id. at 480; Lingch vs. Savage, 213 Cal. App. 2d 729, 735 (1963).
18 Bounds, 229 Cal. App. 4th at 480.
22 Bounds, 229 Cal. App. 4th at 484.
23 Id.
24 See id. at 483.
26 Unlike the Bounds action, which was governed by Civ. Code §47, this action took place under Civ. Code §2429(d), which only provides for a qualified, not absolute, privilege. See Hillery, 658 F. Supp. 2d at 1018.
28 Welf. & Inst. Code §15657.5.
29 Welf. & Inst. Code §15610.30(a)(1), (2).
34 Welf. & Inst. Code §15610.70.
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I represented an employee of the environmental consulting firm hired by WMH to perform construction quality assurance. During the investigation, all evidence pointed to the fact that my client was innocent of any wrongdoing. Nevertheless, the Assistant U.S. Attorney insisted that my client pass a polygraph, or else risk being indicted as a participant in the criminal conspiracy.

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Last year, I was notified by the U.S. Attorney’s Office of the District of Hawaii that their office would not seek an indictment of my client, nor would any charges against him be pursued. I believe your carefully and competently constructed polygraph examination and critique of the FBI’s polygraph results played a central role in our advocacy that prosecution should be declined in my client’s case.

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20 Sunnyside Avenue, Suite A-321, Mill Valley, CA 94941, (415) 381-3133, fax (415) 381-3131, e-mail: jrutck@neoma.com. Web site: www.neoma.com. Jonathan S. Rutckih, MD, MPH is a physician who is board certified in both Neurology and Occupational and Environmental Medicine, and an Associate Professor at UCSF. He provides clinical evaluations and treatment, including electromyography, of individuals and populations with suspected neurological illness secondary to workplace injuries or chemical exposure. Services include medical record and utilization review and consulting to industrial, legal, government, pharmaceutical, and academic institutions on topics such as metals and solvents, pesticides, mold exposures, product liability, musicians’ injuries, and other areas: fires and explosions: electrical and gas product defect investigations, thermal and fire modeling and laboratory testing; water loss: materials, corrosion, and failure analyses of plumbing products; forensic testing; product testing, and computerized stress analysis; accident reconstruction: automotive, trucks, construction equipment, and premises liability. See display ad on page 41.

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20 Sunnyside Avenue, Suite A-321, Mill Valley, CA 94941, (415) 381-3133, fax (415) 381-3131, e-mail: jrutck@neoma.com. Web site: www.neoma.com. Jonathan S. Rutckih, MD, MPH is a physician who is board certified in both Neurology and Occupational and Environmental Medicine, and an Associate Professor at UCSF. He provides clinical evaluations and treatment, including electromyography, of individuals and populations with suspected neurological illness secondary to workplace injuries or chemical exposure. Services include medical record and utilization review and consulting to industrial, legal, government, pharmaceutical, and academic institutions on topics such as metals and solvents, pesticides, mold exposures, product liability, musicians’ injuries, and other areas: fires and explosions: electrical and gas product defect investigations, thermal and fire modeling and laboratory testing; water loss: materials, corrosion, and failure analyses of plumbing products; forensic testing; product testing, and computerized stress analysis; accident reconstruction: automotive, trucks, construction equipment, and premises liability. See display ad on page 41.

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1943 Buckingham Road, Los Angeles, CA 90016, (323) 934-4443, fax (323) 934-4034, e-mail: lore@hilburlaw.com or Richard@hilburlaw.com. Contact Richard Reinhardt. Lore Hilburg, Esq., is a seasoned professional who has served as an expert witness as to escrow issues, and real property title disputes as such as easements, construction, property management, finance, due diligence, conflict of interest, title insurance, escrow, and development. Expert witness 30-plus years in state and federal courts. Twenty-one published articles, arbitrator and mediator, general partner $300,000,000+, shopping centers, apartments, and industrial property. JD Stanford (1966). See display ad on page 59.

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Citigroup Center, 444 South Flower Street, 30th Floor, Los Angeles, CA 90071, (213) 362-1000, fax (213) 362-1001, e-mail: robertrosen@roosen-law.com. Web site: www.roosen-law.com. Specializing in securities law, federal securities law enforcement, securities arbitration and, international securities, insider trading, NYSE, AMEX, FINRA, DOC disciplinary proceedings, broker-dealer, investment company and investment adviser matters, liability under federal and state securities laws, private offerings, Internet securities, and law firm liability. AV rated. Former chair, LABEA Business and Corporations Law Section. LLM, Harvard Law School. Forty years practicing securities law, 12 years with U.S. Securities and Exchange Commission, Washington, DC. Published author/editor of securities regulations, including multivolum textbooks. See display ad on page 63.

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THE APPLICATION OF FOLEY IN RECENT LENDER LIABILITY DECISIONS

Continued from page 13.

chance to repay the loan and earn $10 million.36 Plaintiffs sued HSBC, pleading four claims sounding in tort and quasicontract: negligence, negligent interference, negligent misrepresentation, and promissory estoppel.

The trial court found that Mitsui and Foley, read together, applied to all four of those claims and thereby sustained a demurrer without leave to amend.37 On appeal, the borrower argued that Mitsui was limited to its facts and did not extend to any action of besides tortious breach of the implied covenant.38 The court disagreed: The Cappello parties’ attempt to limit Mitsui to the specific cause of action at issue (tortious breach of the covenant of good faith and fair dealing) is unpersuasive. As noted above, Mitsui relied heavily on Foley, applying its concepts to the lender-borrower relationship. And Foley broadly disapproved of extending tort damages to contract cases in general.39

The analysis in Cappello stands in firm opposition to an overbroad reading of Holcomb as applying to anything beyond the depositor context.40 Thus, a lender (or successor in interest to a note holder) facing the broad array of creative tort or fraud actions should remember that Foley and Mitsui retain broad implications.

2 Some recent experience suggests that lenders do not use this line of cases to full effect. See, e.g., Zigner v. Pacific Mercantile Bank, Orange County Case No. 30-2010-00374533 (filed Jan. 21, 2010) (entering a judgment against the lender for setting off accounts and refusing to extend loan maturity as orally promised); Avila v. Wells Fargo Bank, No. C 12-01237 WHA, 2012 WL 2953117, at *12 (N.D. Cal. July 19, 2012) (negligence action passed the motion to dismiss stage).
4 Id. at 817-19 (“Insurers hold themselves out as fiduciaries...[the special relationship between the insurer and the insured illustrates the public policy considerations that may support exemplary damages in cases such as this...[the availability of punitive damages is thus compatible with recognition of insurers’ underlying public obligations.”).
6 Id. at 179 n.12 (gathering out-of-state cases supporting tort damages for breach of the implied covenant).
10 Id.
11 Id. at 683.
12 Id.
13 Id. at 688 (majority opinion), 702 n.14 (dissenting opinion).
14 Id. at 689.
15 Chief Justice Rose Bird, Associate Justice Grodin, and Associate Justice Cruz Reynoso are the only three sitting California Supreme Court Justices ever removed from office.
17 Id. at 93 (reg’g Seaman’s and eliminating the tort of bad faith denial of the existence of a contract).
20 Id. at 730.
21 Id.
22 Id. at 729.
24 Id. at 478.
27 Id. at 1041.
28 Id.
30 Id. at 498.
32 On its facts, the lender in Nymark prepared an appraisal that failed to identify severe structural problems with the property. The plaintiff allegedly relied on the appraisal and ended up under water on his mortgage after making the repairs. The court found that this did not create a tort claim.
35 Id. at *1-2.
36 Id. at 2. (Comments made by the loan officer, Colman, supposedly “killed the deal.”) In addition, “Cappello had other favorable, professional and bankable references.”
37 Id. at 3.
38 Id. at 4.
39 Id. (“that case is distinguishable” as a case regarding “a representation” about a deposit).
In Miami, jobs were as segregated as land. Connolly writes: “Beginning in the 1910s and continuing well into the 1940s, white union members enforced ‘whites only’ membership rules within the sectors of carpentry and entertainment.” But “across the verdant grounds of the Royal Palm and other new hotels,” black men were preferred for pedaling guests about on “Afromobiles,” which featured wicker chairs mounted on three-wheeled cycle frames. In the new houses, moreover, “[r]oughly between 1900 and 1930, the number of white women engaged in domestic employment declined by 40 percent,” while the number of black women engaged in domestic employment increased by roughly the same amount.

While Connolly provides many such statistics, he enlivens the book with portrayals of the people who made money from the racial divide. M. Athalie Range, for example, “owned several houses in…Liberty City and Brownsville….including a house at 1184 NW Sixty-Second Street [that] suffered from several violations of the minimum housing code, including sizable holes in the floor and walls.” Yet, as Connolly points out, Range “also fought for school integration when it was highly unpopular and potentially dangerous to do so,” and she “built an impressive record of legislative success as a city commissioner.”

As Miami’s first black city commissioner, Range promulgated housing reform, helping to strengthen the city’s housing code in 1967 and opposing white landlords who refused to rent to blacks. As Connolly puts it, “Miami’s newest and most visible housing reformer…stood in violation of her own housing code.” Connolly explains such contradictions as the result of a pragmatic approach to dealing with Jim Crow. For example, when discussing Zora Neale Hurston (the author of the novel Their Eyes Were Watching God), who “spent several years in Miami collecting folklore and working as a domestic” in the home of the son of a judge, Connolly recounts that Hurston would regularly get into “fiery exchanges” with her employer. On the other hand, in letters and articles written at the Smathers house, Hurston argued against placing hope in “outsiders who picked fights with white business leaders” and for avoiding “civil rights celebrities” such as the NAACP’s Walter White. Instead, she favored “commonsense entrepreneurs” who could “hammer out the deals and build the communities that made Jim Crow work in daily life.”

Connolly labels the approach typified by Range and Hurston as “soft power” and its opposite, characterized by protest and disruption, as “hard power.” These two options could also be characterized as the dilemma of whether to try to change a system from within or from without. In the book’s introduction, Connolly frames this with a story of a “ribbon-cutting ceremony” attended by Range for a park under a freeway, one year after the 1968 riots. The park, created on “dead land” where homes had once stood before being bulldozed to “make room for I-95,” was Range’s “brainchild” and received “endorsements from an influential, interracial coalition that included the city’s mayor,” who with “what was likely unintended irony,” spoke of how “Miami does not shove socio-economic problems under the rug.”

At the ceremony for the park under the freeway, Range noted that “[t]hese are still explosive times,” in reference to the riots of 1968. What lay behind those riots? Connolly recounts how “During the late 1940s and 1950s, Liberty City and Brownsville attracted upwardly mobile West Indians, Spanish-speaking Caribbean folk, and American blacks…in search of parks, swimming pools, homeownership, and freedom from downtown slums.” This promise of the suburban good life went unrealized, however. “By the early 1960s…the promise of suburbia seemed unmade. White rental speculators and a wave of rezoning initiatives had turned much of Brownsville, and especially Liberty City, into a suburban ghetto.” Residents were “trapped in a web of stop-and-frisk policing…unemployment…and worsening rental conditions.” In Miami, which had dubbed itself “America’s playground” in real estate booster campaigns, the opening of a playground under a freeway “might seem absurd,” but it was also an expression of governance, capitalism, and a demonstration of “neighborhood pride.”

In his book, Connolly argues that to realize the economic potential of sunny Miami’s real estate, white and nonwhite Americans both invested governance in which Jim Crow was inescapable. As Connolly puts it, “Property continued to be both things and entitlements.” When blacks owned real estate, they also enjoyed property rights, and the fight to “line up black property rights with black merit…is what prompted Negro businessmen and white city officials, in 1957, to desegregate Miami’s municipal golf course.” It was Elmer Ward, “a wealthy black landlord and pharmacist,” who brought suit. Even in a “community that still lacked electricity and sanitation services,” there was “no contradiction at all” between suing for admittance to a golf course and hoping for a house with solid floors.

Eric Howard is the editor of Los Angeles Lawyer.
 Thirty-Hour Basic Mediation Training

STARTING ON MONDAY, APRIL 20, and continuing until April 24, the Center for Civic Mediation and LACBA will host a program to introduce the core principles and methods of alternative dispute resolution. Speakers Talin S. Bahadarian, Lynne S. Bassis, and Gail Nugent will provide a strong foundation in mediation skills through lecture, small group exercises, and role-playing. Rich in theory and practice, the training covers the nature of conflict, the history of mediation, the structure and management of the mediation process, intake and convening, mediation models, cultural awareness and diversity, legal requirements and ethics, maintaining neutrality, communication skills, negotiation, breaking impasses, closure, and drafting agreements. Participants receive an overview of various practice settings. The training fulfills the requirements of the California Dispute Resolution Programs Act. Early bird discount applies when registering 21 days prior to the start of the program, which will take place in the Fireside Room at the Long Beach Police Academy, 7290 Carson Street in Long Beach. Parking is located at the 605 Freeway & Carson Street behind Lowe’s Hardware in the Long Beach Towne Center (westbound on Carson Street from the 605 Freeway). The program will take place from 9 A.M. to 4 P.M. each day. Discounts are available for groups of five. The registration code is 012570.

$645—Center for Civic Mediation Associates member
$675—LACBA member
$690—all others (early bird)

26.75 CLE hours, including 2.75 hours of ethics and 1 hour of elimination of bias

2015 Labor and Employment Law Section Annual Retreat

ON FRIDAY, APRIL 24, the Labor and Employment Law Section will sponsor its annual retreat in beautiful Ojai. You will have an opportunity to mix and mingle with other labor and employment law practitioners and members of the judiciary in social and other informal activities. This retreat will take place at the Ojai Valley Inn and Spa on Country Club Road in Ojai. There will be a reception and meal on Friday, April 24, with the CLE program running on Saturday through Sunday from 9 A.M. until 12:30 P.M. each day. The program will feature segments on labor and employment law jeopardy, tips in employment cases, appealing strategies, and ethical considerations in social media. Speakers include experts from several leading law firms and a superior court judge. Call (888) 697-9116 to reserve a room at the negotiated rate. Registration and breakfast is at 8:30 A.M. with dinner at 6:30 P.M. The registration code is 012489.

$210—Spouse or guest of Labor and Employment Law Section member
$225—CLE+ member
$225—Barristers Section member
$225—Litigation Section member
$225—Business and Corporations Law Section member
$225—Corporate Law Section member
$265—LACBA member with meal
$315—All others with meal

7 CLE hours, including 1 hour substance abuse credit

2015 California and Delaware Law Update

ON THURSDAY, APRIL 30, the Business and Corporations Law and Corporate Law Departments Sections will host a program on recent developments in Delaware and California business law, which will include a keynote speech from Delaware Supreme Court Justice Karen Valihura. Keith Paul Bishop, a partner at Allen Matkins Leck Gamble Mallory & Natsis LLP in Irvine and C. Stephen Bigler, a senior director at Richards, Layton & Finger, P.A., in Wilmington, Delaware, will discuss recent developments in California and Delaware legislation and case law, respectively, applicable to business lawyers. Immediately following the symposium will be a cocktail reception during which the Marvin Greene Distinguished Service Award will be presented to Martin Murphy, a longtime member of the Business and Corporations Section Executive Committee who recently retired from his position as Examinations Director in the SEC’s Los Angeles Regional Office. The program will take place in the Bank of America Auditorium at the Arclight Theatre Hollywood at 6360 West Sunset Boulevard in Hollywood. Registration begins at 11:45 A.M., with lunch at 12:15 P.M., and the program continuing from 1:15 to 4:30 P.M. Discounts are available for groups of five. Parking at the Bank of America Plaza is available for $14 with parking validation. The registration code is 012528.

$140—CLE+ member
$225—Barristers Section member
$225—Litigation Section member
$225—Business and Corporations Law Section member
$225—Corporate Law Section member
$265—LACBA member with meal
$315—All others with meal

3.5 CLE hours
Six Examples to Counter the Allegation That Mediators Lie

GIVEN THE SECRECY that surrounds the mediation process, it may be no surprise that some suggest that mediators lie in mediation. On that issue, it is time to reveal some truths. First, secrets are not lies. For example, consider a plaintiff’s attorney who confides to me that he has yet to discover any corroborating evidence to substantiate the allegation of his client that she was teased at work due to her temporary disability. The attorney asks me expressly not to reveal the lack of evidence supporting the plaintiff’s discrimination claim. It would be a lie to advise the employer that the mediator has seen evidence supporting the plaintiff’s case, but it would not be a lie to suggest that evidence may be revealed. The stock in trade of mediators is the uncertainty of litigation. Keeping a secret is not lying.

As I once heard Professor Hal Abramson put it, a trial is performed under the full lights of transparency, with direct examination, cross-examination and written, documentary evidence, while a mediation is done in the darkness cloaked by confidentiality and the parties are at liberty to decide just how much light they are willing to let in. The slow drip of information that regularly takes place during a mediation hearing is not deception but nuance.

Second, assuring the parties of the confidentiality of the mediation process is not a lie. It is the duty of the advocates, not the mediator, to be explicit about those harmful facts that cannot be revealed to the adversary during the mediation process. Most professional mediators know that they cannot promise strict confidentiality on all communications. What they can promise is confidentiality on those issues that an attorney wants not to be disclosed. Mediators do not lie about their promise to maintain the confidential communications made to them, but if they are going to have sufficient latitude to reconcile two diverse versions of the same conflict, they need to be given a green light to reveal some of the evidence and legal theories that each side holds.

Third, mediators are not lying when they predict a particular response to an offer or demand. A mediator’s hunch or guess about an anticipated response or reaction to an initial offer that is just that: a hunch or guess, expressed as opinion, not fact. When a mediator tells an attorney about the other side’s attitude or concerns, that is also not a lie. Within the confines of confidential communication, the mediator’s own impression of the triggers and motivators of the parties waiting in the other room is perhaps the greatest truth an attorney may obtain once each side is in separate caucus.

Consider, in the same discrimination disability case described above, that the plaintiff wants to make an initial demand of $2 million, although her lawyer reveals confidentially that he values this case at something in the low to mid-six figures. Consider that the defense attorney, who has been hired through the employer’s EPLI carrier, confides to the mediator that there is a $1 million policy of insurance and no excess coverage. If the mediator returns to the plaintiff and expresses concern that by making an opening demand of over $1 million the demand may trigger coverage issues, but that if the opening demand was something under $1 million, the defendant had assured the mediator that a meaningful initial offer would be made, that is not a lie. That is simply coaching towards successful negotiation based upon information presented.

Fourth, mediators do not lie when they predict the outcome of a dispute. Occasionally, a trusting advocate will admit what his or her “top authority” or “bottom line” is to a mediator in confidence and encourage the mediator to negotiate within that number. Failing to accomplish a particular outcome is not a lie. Experienced mediators can often predict the outcome of a negotiation after a certain point, but as Daniel Ariely points out in his bestselling book, human behavior is predictably irrational, and some outliers will not conform to predictions. It is not a lie to be wrong about the outcome of the dispute.

Fifth, encouraging each side to agree to a mediator’s proposal is not a lie. By the time a mediator makes a proposal, he or she usually has a good idea that at least one side will agree. The more reluctant party should accept that encouragement. It is not a lie to express the likelihood of success of a mediator’s proposal.

Finally, mediators are not lying when they recommend—but do not insist—that the parties take the time to document the agreement before leaving the mediation session. The mediator is entitled to rely upon counsel to make sure that all terms of a settlement are fully documented in order to bind all of the parties. If the parties and their counsel elect to rely on a handshake, it is not the mediator’s role to stop them.

While some advocates question the conduct of some mediators and express concern that some bad experiences mean that all mediators lie, that is simply untrue. Real mediators do not lie. They persuade. They may withhold some facts or evidence in favor of crafting a deal that can be enforced without feeling the need to turn over every stone and show all of the good, bad, and the ugly that lead the disputants into the conflict. It is in the name of peacemaking, diplomacy, and nuance that mediators do not lie. They use whatever means are permissible within the bounds of ethical practice to aid the parties to reach an enforceable resolution of a conflict that the parties were unable to resolve on their own. Most mediators are ever vigilant to be honest brokers of lasting agreements between conflicting parties.

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