Los Angeles lawyer Cynthia Pasternak examines the competing public policy goals that may affect mediation confidentiality.

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The Los Angeles Superior Court (LASC) recently held an annual recognition ceremony honoring many local lawyers who volunteer their time to serve the court as a temporary judge, also known as judge pro tem. The LASC uses these certified, experienced attorneys to serve as temporary judges in family law, civil harassment, small claims, traffic, and unlawful detainer courtrooms. The service of the temporary judges is not just in the courtroom. In addition to the requirement of a minimum of 10 years of practice, lawyers must also complete many hours of mandatory training.

Judge Stuart M. Rice, chair of the Temporary Judge Committee of the LASC, presided over the recognition ceremony this year, as he has done in past years, and presented certificates to the temporary judges. According to Judge Rice, “in the year 2014, hundreds of lawyers served as temporary judges, covering more than 5,600 calendars and handling 279,240 cases.” In addition to his day job as a superior court judge sitting in Department B at the Torrance courthouse, Judge Rice devotes additional countless hours every year conducting many of the training sessions for temporary judges and administering the program. The LASC Temporary Judge Committee works with the Temporary Judge Program Office to review and approve applications, to review complaints, to oversee the training requirements, and to make recommendations for additional training.

At the recognition ceremony, the Honorable Carolyn Kuhl, presiding judge of the LASC, also recognized and thanked the temporary judges for their service. Presiding Judge Kuhl noted that without the service of the temporary judges, the court workload would be distributed to other LASC bench officers, increasing the already overloaded calendars and caseloads of bench officers and courtroom staff, resulting in more continuances and delays for litigants throughout Los Angeles County.

The Los Angeles Superior Court serves a population of over 10 million, consisting of more than 500 judicial officers and 38 courthouses. Because of budget cuts in recent years, the court has implemented a consolidation plan and closed courthouses and courtrooms throughout Los Angeles County. The consolidation plan also created hubs in certain courthouses to specialize in processing certain cases in large volume, such as collections, personal injury, small claims, limited civil, and unlawful detainer matters. (See Los Angeles Superior Court Annual Report 2015.) In the wake of these budget cuts, as well as the high vacancy rate for Superior Court judges, the service of the temporary judges assists the LASC in providing access to justice for litigants by keeping calendars moving and courtrooms open.

In addition to using the services of temporary judges, the LASC is continually working to improve access to justice for Los Angeles County litigants. For instance, the LASC processes more than a million traffic citations a year, and assigns many temporary judges to traffic calendars to ease that load. The LASC conducted a survey and found that approximately 41 percent of litigants appearing on traffic matters simply wanted to pay a fine. (See Los Angeles Superior Court Annual Report 2015.) Thus, the LASC is expanding its website services to include the processing of traffic citations with user-friendly online payment plans, which will hopefully cut down the annual courtroom appearances in traffic court.

The LASC in recent years has been constantly evolving to provide so much more for so many litigants, with so fewer resources, thanks in part, to so many temporary judges.

Donna Ford is a retired assistant U.S. attorney, now in private practice handling appeals and serving as a mediator and arbitrator.
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lead and coordinate policy work nationally, focus my own policy work on nondiscrimination laws, and I litigate and supervise junior lawyers.

This June, the U.S. Supreme Court rendered a decision on gay marriage. Is history moving forward? History is absolutely moving forward in this country. I’ve been at Lambda Legal for almost 20 years, and the freedom to marry has been a central part of our work.

How do you celebrate the winning days? Often, there is a public celebration, which has the passion and the shared joy of our whole community. I also try to make sure there is time to have celebration within our litigation team and with my wife.

Do you look for teachable moments? Definitely, we just had a teachable moment with Kim Davis in Kentucky, abusing her office in a way that was so dramatic. She’s done the LGBT community a favor.

How so? She’s not Martin Luther King in jail; she’s George Wallace blocking the schoolhouse door.

Do you think that Kim Davis should quit her job? If Kim Davis is unable to do the requisites of the job in a nondiscriminatory manner, she doesn’t deserve to be paid by the taxpayers.

What about her staff? She was demanding the right to order her subordinates also to not do their jobs. That’s flabbergasting.

Is Kim Davis entitled to an accommodation? Title VII requires an employer to make an accommodation for the religious needs of workers. The employer’s duty to accommodate does not require undue burdens, and that means cost and efficiency. But it also means that an employee’s conduct cannot cause harm to coworkers or the public.

What state do you consider a role model? California.

What state do you think is in the most need of change? There is a large piece of geography that is in the need of change. Our country really is divided, but if the queer people and the immigrants and all the people of color get together, we will continue to make progress.

What about in other parts of the world? In many places, the conditions are worsening because of the work of reactionary religious leaders from the United States. Our work is part of a global context.

Do you believe there is widespread contempt for the gay community? It depends on where you are and who you’re talking to.

What about for transgender persons? Our society is at a much earlier spot on the learning curve concerning our transgender brothers and sisters. There is more discomfort and less respect.

Do public experiences like that of Caitlyn Jenner help or hinder understanding? Public figures like Caitlyn Jenner, Laverne Cox, and Chaz Bono—I think it helps, absolutely. Like Ellen DeGeneres for the gay community, who has changed the world—you have to be glued to your prejudice to dislike Ellen DeGeneres.

Should transgender athletes who are born biologically male be able to compete as a female? The NCAA has rules about this, and those rules are being used as models by lots of high schools. The figures are that the LGBT community is a bit under 4 percent, and the Trans community is only about .3 percent. It’s awfully easy to demonize a population that tiny.

What about shared spaces? The issue is actually relatively simple in most of our segregated spaces—restrooms and locker rooms. People in those spaces are not inspecting other peoples’ genitals.

What does “gender nonconforming” mean? It is presenting oneself—in appearance, clothing, and mannerism—in a way other
than other peoples’ stereotypes of your gender. Sometimes we “straighten up” when we are around nongay people to make them more comfortable or to blend in. Sometimes we do it without realizing it, and sometimes we are excruciatingly aware of it.

You graduated from Harvard College and NYU School of Law but have lived in Los Angeles for nearly 20 years. Are you an East Coast girl or So-Cal girl? I feel a strong loyalty to California.

If you were able to have only one dessert for the rest of your life, what would it be? Cognac.

Do you have a favorite food? Yellowtail sushi. Maybe I should pick something else; it’s endangered. And blueberries!

Do you have a Facebook page? I do.

It is personal or professional? It’s both. Among the most important things I do is to be Exhibit A on behalf of various folks for whom it’s dangerous still.

Is there one app you wish you could operate on your iPhone? Evernote.


What do you do on a three-day weekend? I’m working much of it.

What is the ideal vacation? We went on a safari; it was extraordinary. We have a plan to go back.

What are your retirement plans? Well, my wife has been using the “r” word recently. I suspect for both of us that there won’t be any full retirement. There will be participating in the movement in other ways, without compensation.

What would you grab while running out of the door if your house were on fire? Other than my wife? The portable hard drive that has many thousands of photographs on it.

What are the three most deplorable conditions in the world? Hatred. Cruelty. Climate change.

Who are your two favorite American presidents? Abraham Lincoln and Barack Obama.

What would you want on your tombstone? Tikkun Olam, meaning “repair the world.” It’s a Jewish concept of duty to act for social justice.
Optimizing the Initial Arbitration Management Conference

ARBITRATION IS EXTOLLED and favored for its efficiency and potential for providing a speedier resolution than through state or federal court. While this is not always the case, as parties increasingly draw out and expand pretrial discovery, arbitration for the most part continues to be beneficial for parties seeking quick, final resolution of disputes. In particular, the initial arbitration management conference (AMC) can be a powerful tool for ensuring quick resolution and setting the stage for ultimately winning your case. However, there are various considerations necessary to enhance the process.

Since arbitration is a final, binding procedure with limited right to appeal, it is important to ensure that the arbitrator has the experience, knowledge, and judgment both parties trust to arbitrate the dispute. Reviewing the arbitrator’s resume, polling other attorneys, and, where possible, reviewing decisions of former judge arbitrators are the best ways to determine the arbitrator’s competence and possible biases. If the arbitration is governed by an agreement in addition to forum-specific rules, such as AAA or JAMS, it helps to select an arbitrator familiar with those rules. The initial AMC is also the first opportunity to prime and educate the arbitrator as to both substantive and procedural issues, as well as establishing protocol, such as how the arbitrator should be addressed.

To the extent that it is possible to reach out to opposing counsel and agree on certain issues prior to the conference, this may save time during the AMC. When deciding a contested issue, an arbitrator will attempt to make both sides happy—unless one side is completely unsupported by law or reason. Therefore, it is important to be prepared to propose compromises to the other side, or the arbitrator, and to meet and confer with opposing counsel as much as possible before asking the arbitrator to intervene. Prior to the conference is also a good time to discuss with your client and opposing counsel whether mediation—an even more informal, nonbinding method of resolution—is an option.

Next, be familiar with the arbitration forum rules and any matter or client-specific contractual rules or arbitration plans, ensuring that the arbitrator knows or at least has a copy of any operative rules. If conflicts exist between these sets of rules, address them at the conference. Discuss material provisions of your arbitration plan, especially those unique to the agreement. If the arbitrator hesitates to adopt any material provisions, ask to brief the issue, presenting support for why the agreement controls.

The AMC can also be the time to tailor discovery. If the objective is to limit discovery as much as possible and push for early resolution, set a limit for discovery materials, especially if the limits are specifically identified in your arbitration plan. Conversely, if the case will require heavy discovery, request permission for extended discovery early, stressing the complexity of the case. Arbitrators often weigh a case’s complexity with the expediency goals of arbitration, so be prepared to explain why additional discovery is warranted.

Establish permissible motions and pleadings, either under the arbitration agreement, forum rules, or by the arbitrator. Some agreements or rules allow for dispositive motions, pre- and posthearing briefs, or motions to compel by right. Other agreements or rules require a showing of good cause or arbitrator permission. If the case appears simple, costs need to be controlled, or the issues are best decided at the evidentiary hearing, request that procedures be followed or showings made prior to filing the motions. If the case can be decided on the papers, secure the right to do so.

The AMC is a propitious time to discuss the arbitrator’s preference as to styles and substance of briefs or motions. Most arbitrators favor simplicity and avoiding a long recitation of summary judgment or demurrer history. A formal motion to compel or protective order is often not required for simpler discovery issues, and your obligation may be satisfied with a request accompanied by facts and relevant law.

Concerning pleadings, discovery disputes, the hearing, or even substantive law, if any doubt exists as to governing law, request that the arbitrator and all parties agree as to controlling law. For example, if an agreement calls for federal procedural rules and state substantive law, apprise the arbitrator and try to discern what sources the arbitrator will use to decide issues. While trial judges are limited to statutes, case law, rules of evidence, and procedural requirements, arbitrators can be quite flexible in considering relevant evidence and adjudicating based on fairness or equity. This premise is essential to the entire arbitration, as it may prove frustrating when you believe your position is clearly supported by law.

More arbitrations are reversed for failure to allow evidence than for other reasons. As a result, many arbitrators lean toward allowing everyone to present their case and all possibly relevant information to prevent reversal of an award. Since you may not have control over what evidence is admissible, well-established rules and procedures at the outset of the arbitration can be a shield, determining how that evidence will ultimately be evaluated. Requiring that the arbitrator issue an order memorializing all points discussed and deadlines established during the AMC is an excellent way to establish the governing rules and the rights of both parties to which you can later cite. The arbitrator’s order, rather than forum rules or arbitration agreements, often controls the case and is the best way to know how the arbitrator will approach and adjudicate any issue.

Finally, be professional and courteous. Due to the relaxed and informal nature of arbitration, some attorneys dismiss with even the most basic professionalism, and conferences can be reduced to yelling matches between counsel. Since you are the attorney, not the plaintiff or defendant, refrain from unprofessional tactics such as name calling, yelling, or disposing of other professional courtesies. Los Angeles can be a small legal community, and your professional reputation will last longer than any individual matter you might work on.

Radha Kulkarni serves as the networking cochair on the Barristers Executive Committee.
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**Guidance on the Use of Summaries of Evidence at Trial**

**LAWYERS ARE OFTEN FACED WITH** a large amount of documentary evidence at trial. A jury may have a hard time staying awake through tedious examination about complicated or technical documents and thereby miss the bigger picture. For these reasons, summaries of evidence—including timelines, tables, and diagrams—can be of great use. Under the California Evidence Code a summary can be a demonstrative exhibit or a “pictorial communication| of a qualified witness who uses this method of communication instead of or in addition to some other method.”

It may also be admissible independently as a summary of voluminous records. Likewise, the Federal Rules of Evidence permit the use of “a summary, chart, or calculation to prove the content of voluminous writings, records, or photographs.” A good summary is also useful to assist a testifying witness as either a means to refresh recollection or as a past recollection recorded.

A summary is a writing, and it must be authenticated before it is received into evidence. Authenticating a summary means introducing evidence that it is a correct representation of what it purports to depict. Typically, a witness will testify that he or she created the summary based on a review of documents or from some other source. That source must be independently admissible.

For example, a district attorney used two summaries as exhibits in trial. The first was a one-page chart summarizing the defendant’s criminal history. The other was a two-page chart summarizing the defendant’s history of institutional misconduct. The summaries had been described in more detail during an expert witness’s testimony. The court found that the summaries were admissible as visual representations of the expert testimony as well as relevant and necessary as an explanation of the factual basis for the expert’s opinions. Although the example is from an unpublished opinion, it demonstrates how the district attorney condensed important testimony into a summary that was admitted into evidence. The jury could rely on the summary during deliberation rather than relying on their own notes and memory.

Another example is when a witness is testifying about medical treatment received, confirming that she incurred medical bills, and whether the bill was paid or not. The witness can then be shown a summary of the medical expenses to lay a foundation for its admissibility and confirm it correctly summarizes the expenses incurred. (See the table on page 14.) The witness can also confirm that the table helps in testifying about the expenses and that it would help the jury to understand the witness’s testimony. The table can then be shown to the jury and admitted into evidence as an aid that illustrates the testimony of the witness.

**Condensing Records**

A summary is often not just illustrative of testimony but also condenses a large amount of documentary evidence. This type of summary is independently admissible under the summary of voluminous records exception to the hearsay rule. Although oral testimony is generally not admissible to prove the content of a writing, oral testimony is not made inadmissible “if the writing consists of numerous accounts of other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.”

For example, in *Exclusive Florists, Inc. v. Yale Kahn*, a florist brought a lawsuit to recover damages when the defendant failed to pay for floral arrangements and related services. During the trial the court admitted exhibits prepared by the plaintiff florist that consisted of summaries of the damages. One of the exhibits consisted of a summary of business records showing the quantity, kind, and cost to the plaintiff, the charge to the defendants, other merchandise used in decorating, and related services, including labor. The summary was compiled by plaintiff’s vice president who relied primarily upon purchase orders that were made available to the defendant for examination. The summary was also based upon invoices prepared by third parties that the court permitted because the invoices were used by the plaintiff on the job to verify the cost and delivery of flowers. Similarly, the summary of labor cost was based upon time cards and payroll records kept in the usual course of business. The plaintiff’s vice president testified about the summaries and also qualified as an expert regarding the reasonable retail value of the items in question. Thus, the court of appeal found the summaries admissible and affirmed the judgment.

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The Vanguard case is instructive because it shows that a summary does not have to actually be created by the witness but can be done at his or her direction. The summary can also be based on third-party documentary evidence, as in the Exclusive Florists case. In the example of medical expenses, a witness can lay the foundation for a summary of medical expenses incurred from different medical providers based on voluminous bills even if the witness did not actually create the summary. Moreover, the summary would be admissible not just as a demonstrative exhibit but also as a summary of voluminous records.

Aiding Witness Testimony

A summary may also prove beneficial by assisting a witness in testifying either as a past recollection recorded or a writing that refreshes memory. Witnesses often have difficulty remembering dates, exact dollar amounts, or other specific details. A summary can aid them in giving accurate testimony.

A writing can be used to refresh memory either before or during a witness’s testimony. Notably, any writing can be used to refresh memory. It does not have to be prepared by the witness or under his or her direction, although the testimony will likely have more weight if the summary used to refresh memory was created by the witness. In the example of medical expenses, the witness can refresh her memory using a table of expenses prepared by the questioning attorney and the witness before the trial.

Similarly, a witness can testify using a summary if it is a past recollection recorded exception to the hearsay rule. To meet the requirements of the exception, the summary must be 1) made at a time when the fact recorded in the summary actually occurred or was fresh in the witness’s memory, 2) made by the witness or under his or her direction or by some other person for the purpose of recording the witness’s statement at the time it was made, 3) offered after the witness testified that the statement he or she made was a true statement of such fact, and 4) offered after the writing is authenticated as an accurate record of the statement.

A writing that is a past recollection recorded is not admissible unless offered by an adverse party. Moreover, a writing used to refresh a witness’s memory is not automatically admissible. In other words, the summary can be used to assist a witness in testifying but you will need to find another method to have it admitted into evidence.

Objections to the Summary

There are common issues with the use of a summary that could be cause for objection by opposing counsel. For example, a summary,
by its nature, does not contain all the information that may be relevant. A summary may also contain an error. The opposing attorney may object to not having sufficient time to review the summary. Fortunately, the court of appeal has provided guidance regarding these objections in Wolfen v. Clinical Data, Inc.18 In Wolfen, a property owner brought an action against a tenant for the cost to repair construction in violation of building codes. At trial, the owner submitted into evidence an itemized summary of damages. The jury found in favor of the owner and entered a verdict against the tenant from which the tenant appealed. The appeal was based on various grounds, including that the trial court erred in admitting the summary into evidence.

The court of appeal found that the summary was admissible under the Evidence Code pertaining to oral testimony on voluminous writings.19 The damage summary was prepared from underlying invoices of repairs and renovations and related time sheets. It omitted certain costs that were not properly chargeable to the tenant. The tenant argued that the summary was incorrect because it was not a complete summary of the invoices. The court of appeal disagreed and found that it was acceptable for the owner to exclude irrelevant information in the summary. Otherwise, the summary would have lost its value.

The tenant also argued that the damage summary contained an error: it was $400 too low in the tenant’s favor. Notably, the expert testifying about the summary explicitly discussed the error. Since a witness’s testimony explained the error, the error did not render the summary inadmissible. The error affected the weight, not the admissibility, of the damage summary.20

The tenant also argued that the damage summary was not provided to the tenant prior to trial and that they did not have adequate time to review it. However, the proposed trial exhibit list referred to the summary. There was no record that the tenant sought to inspect the summary or compare it against invoices and other backup materials prior to the trial after its disclosure. The tenant also complained that the damage summary was “dumped” on them moments before the owner’s expert witnesses testified.21 However, after the expert witness testified on direct, the court adjourned to permit the parties to review the damages summary. When the trial court convened the next day, the tenant did not argue it did not have enough time to review the summary and did not request a continuance. Instead, the tenant cross-examined the owner’s expert witness regarding the details of the summary. Based on the foregoing, the court of appeal found that there was sufficient opportunity for the tenant to review the damage summary.

The lesson to be learned from Wolfen is that a court will exercise its discretion liberally in permitting a summary. It does not have to be a comprehensive summary of all information contained in the underlying documents. It can contain typos or arithmetic errors as long as they are explained in testimony. The summary also does not have to be provided to opposing counsel weeks in advance of the trial. However, it is advisable to provide the summary to opposing counsel as soon as practical to avoid any arguments that there was insufficient time to review it.

Even a potentially misleading inaccuracy may not prevent a summary from being admitted into evidence. In the Silvey v. Harm case, a diagram depicting the vicinity where the car accident occurred was prepared by an engineer.22 The diagram indicated the borders of the highway consisted of oiled rock shoulders even though at the time of the accident the shoulders were constructed with dirt. This was an important fact in the case because it was alleged that the defendant could have used the shoulder to prevent an accident. This inaccuracy was fully explained before the map was received into evidence.23 The court of appeal found that the map could be admitted as an illustration and to aid the jury despite the inaccuracy. Again, just as in Wolfen, the key is to have a witness explain the error or inaccuracy to increase the chance of having the summary admitted over opposing counsel’s objection.

A summary may also be used to assist the court in a motion for summary judgment; however, the parties seeking to use the summary must still lay a foundation for its use. For example, in Pajaro Valley Water Management Agency v. McGrath, a water agency filed a lawsuit to recover delinquent charges from one of its customers.24 The agency submitted a declaration from a general manager who testified about the amounts billed to the customer. The declaration recapitulated the contents of an exhibit which, in turn, recapitulated the contents of certain bills not before the court. Notably, the exhibit was not incorporated in the declaration or even vouched for. The court found that the declaration and summary exhibit were not admissible because the bills upon which they were based were hearsay which, in turn, meant that the summary was hearsay “and must on proper objection, be brought within an exception or excluded from evidence.”25

Summaries are often prepared shortly before trial or even shortly before a witness examination. Under such pressured circumstances, errors may not show themselves until the jury is in the box and the witness on the stand. The key is to not be discouraged. The witness should first lay the foundation for the summary and then explain the error.

One of the goals as a trial attorney is to have the jury focus on the important and substantial aspects of the client’s case. Often, this goal is accomplished through telling the client’s story without getting hung up on tedious details. Sometimes, the story involves lots of information that is confusing if told through testimony alone. A summary can help accomplish this goal and also can help witnesses testify. Putting the summary into evidence gives the jury a helpful exhibit that they can consider during deliberation rather than relying on their memory of testimony or their notes. For all these reasons, a summary is a powerful tool that should not be disregarded when presenting evidence at trial.

1 People v. Kynette, 15 Cal. 2d 731, 755-56 (1940), overruled on other grounds in People v. Snyder, 50 Cal. 2d 190, 197 (1958).
2 EVID. CODE §1237(d).
3 FED. R. OF EVID. 1006.
4 EVID. CODE §§1250, 1400-01.
5 People v. Ham, 7 Cal. App. 3d 768, 780 (1970), disapproved on other grounds in People v. Compton, 6 Cal. 3d 55, 60 (1971).
7 Id.
8 In federal court, demonstrative evidence is generally not admitted into evidence since it is a testimonial aid, but trial courts have broad discretion, and absent undue prejudice, the trial court’s ruling will be upheld on appeal. See United States v. Core, 633 F. 2d 871, 874 (9th Cir. 1980); United States v. Ollison, 555 F. 3d 152, 162 (5th Cir. 2009); Beadle v. FFE Transp. Servs., Inc., 715 F. 3d 1104, 1109 (8th Cir. 2013).
9 EVID. CODE §1237(d); see also FED. R. OF EVID. 1006.
11 Id. at 419.
13 Id. at 713-14.
14 Id.
15 EVID. CODE §771(a).
16 EVID. CODE §1237.
17 EVID. CODE §1237(b).
19 The case cites Evidence Code §1509, which has since been repealed, but the relevant portions are codified at Evidence Code §1523.
20 Wolfen, 16 Cal. App. 4th at 183.
21 Id.
23 Id. at 571.
25 Id. at 1108.
New FCC Rules Affect Companies That Use Automated Dialing Systems

THE OMNIBUS DECLARATORY RULING AND ORDER affecting the Telephone Consumer Protection Act of 1991 (TCPA), adopted on June 18 by the Federal Communication Commission, affects companies that use telemarketing calls or text messages to communicate with consumers. This order provides, among other things, heightened protection to wireless consumers against unwanted automated calls from telemarketers. A thorough understanding of the FCC’s position on these issues can help attorney who advise these companies mitigate risk and defend against lawsuits.

In enacting the TCPA, Congress authorized the FCC to implement rules and regulations enforcing the act and created a private right of action. Twenty-four years later, the TCPA has become a hotbed for class action litigation. The TCPA prohibits the making of any nonemergency calls using an automatic telephone dialing system (ATDS) or an artificial or prerecorded voice to a wireless telephone number without prior express consent. The FCC has interpreted calls to include communication technologies developed subsequent to the enactment of the TCPA, such as text messages, and courts have reached similar conclusions. The burden is on the party making or initiating the communications to prove that it received prior express consent. Calls that introduce an advertisement or constitute telemarketing (even if they also have a noncommercial purpose) require a consumer’s prior express written consent. Calls made for non-telemarketing purposes (i.e., containing noncommercial or purely information messages) only require a consumer’s prior oral consent. A caller that obtains written consent obtained in compliance with the E-SIGN Act (e.g., having the consumer text a specific word to a specific short code in order to receive text messages) satisfies the prior express written consent requirement.

While making calls using an ATDS without prior express consent may seem trivial, the possible liability can put a company out of business. Consumers can recover uncapped statutory damages of up to $1,500 per violation without need to prove actual damages. For example, a company that sends out 100,000 telemarketing text messages to consumers without receiving prior express written consent could face up to $50 million in liability, even without a showing of intent. Such liability is not hypothetical; some companies have settled TCPA lawsuits for numbers in the range of mid-eight figures, with at least one lawsuit settling last year for over $75 million. The prospect of such extreme payouts in conjunction with the FCC’s increasingly expansive interpretation of the TCPA and the ever-rapid advancements in technological communications has transformed the TCPA into one of the hottest areas for class action litigation.

The FCC’s June 18 order addresses nearly two dozen petitions from companies seeking clarification of the requirements under the TCPA and previous rules and orders issued by the FCC. The order took effect upon release on July 10 and is certain to create compliance challenges for a wide variety of businesses that use telemarketing calls and text messages for other kinds of commercial communications with consumers. Many businesses had hoped that the order might help stem the tide of often-frivolous TCPA class action lawsuits, but currently it appears that the order may have the opposite effect, offering new avenues of attack for plaintiffs’ attorneys while rejecting many defenses asserted by companies in response to TCPA litigation.

Perhaps the most significant issue addressed in the order relates to the definition of an ATDS. The TCPA defines an ATDS as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” Because “capacity” is not defined, many courts have interpreted “capacity” to mean present capacity (i.e., what the equipment can do without modification), rather than potential capacity (i.e., what the equipment could do if modified), and some have dismissed cases on the grounds that the caller’s technology did not have the present capacity to dial numbers randomly or sequentially. However, in a disappointment to organizations seeking more clarity, the order finds that an ATDS encompasses any equipment that could be modified to dial randomly or sequentially, not just equipment with present capacity. According to the FCC, “a piece of equipment can possess the requisite ‘capacity’ to satisfy the statutory definition of [ATDS] even if, for example, it requires the addition of software to actually perform the functions described in the definition.” The order further clarifies that a technology can be an ATDS even if there is human intervention involved and advocates an ad hoc approach to determining what level of human intervention would be required to remove a piece of equipment from the ATDS category. Although the FCC maintains that an ATDS does not “extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity,” the FCC refers to a “rotary-dial phone” as its only example of equipment clearly lacking any such capacity.

Companies that previously thought their systems might not be deemed to be an ATDS should revisit how their systems function and reevaluate their measures for complying with the TCPA. Any company that intends to make calls or text messages should obtain documented, clear, express written consent prior to initiating calls or text messages. And while the order arguably makes the waters surrounding the def

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undue burdens.” A company can send a single text message in response to a specific call to action without violating the TCPA “so long as it: (1) is requested by the consumer; (2) is a one-time only message sent immediately in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information.”

There are several takeaways on the consumer consent issue. First, companies should maintain a database or other repository to track all consents and opt out requests and keep clear records for at least four years, which is the statutory limitation for a TCPA action. Companies should also consider investing in technologies that can identify various forms of opt out. Finally, companies should not assume that any consent they received in the past is still valid, and should promptly remove any numbers from their database or repository upon receiving notice of revocation of consent.

Even with tracking all consents, companies are still at risk when calling reassigned numbers. The order states that “the TCPA requires the consent not of the intended recipient of a call, but of the current subscriber (or non-subscriber customary user of the phone).” The burden is on the initiator to determine whether the number has been reassigned. Callers that are unaware of a reassignment have a safe harbor of one call to a reassigned number “to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber.” Because a combination of tools and methods may be necessary to ascertain whether a number has been reassigned, the order recommends that companies establish and follow their own set of best practices in this regard.

Another issue addressed in the order is that of consumer consent. The TCPA is silent as to whether consumers can revoke consent if they no longer wish to receive calls or text messages. The order clarifies that consumers have a right to revoke consent at any time “using any reasonable method including orally or in writing” and that initiators may not designate the exclusive methods by which consumers can revoke consent. The FCC will determine what constitutes a reasonable method using a totality-of-the-circumstances test, considering factors such as “whether the consumer had a reasonable expectation that he or she could effectively communicate his or her request for revocation to the caller in that circumstance, and whether the caller could have implemented mechanisms to effectuate a requested revocation without incurring undue burdens.” A company can send a single text message in response to a specific call to action without violating the TCPA “so long as it: (1) is requested by the consumer; (2) is a one-time only message sent immediately in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information.”

The Order in Court
The elephant in the room is how the order will actually affect TCPA litigation and defense strategy in practice. That is currently not clear, as courts are only now beginning to react to the order. For example, in the recently dismissed case of McKenna v. WhisperText, the U.S. District Court for the Northern District of California rejected the plaintiff’s argument that the defendant’s equipment constituted an ATDS. The district court stated that if an application sends text messages only at a user’s affirmative direction, the action is taken with human intervention and the equipment used is not an ATDS. Applying the order, the district court further found that the defendant was not the maker or initiator of the text messages. The WhisperText decision is particularly interesting because it indicates that courts may continue to evaluate human intervention in a similar manner as they did before the order and that asserting ATDS defenses may still have value in TCPA lawsuits despite the order’s expansive interpretation of an ATDS.

It is also possible that the order could be reversed. At least six companies and organizations have already mounted challenges to it in the U.S. Court of Appeals for the District of Columbia. Days after the order was released, ACA International, which represents credit and collections professionals, sought judicial review of the FCC’s determinations on a number of issues. The petitioners argue, among other things, that the order is arbitrary and not in accordance with the law, in particular the FCC’s interpretation of “capacity” to include any equipment with potential functionalities, the one-call exemption for reassigned numbers, and the restrictions on limiting the manner in which revocation may occur. However, companies should not rely on the possibility of a reversal because any ruling is likely years away.

Ultimately, as before, the best strategy is compliance with the code. While compliance has become more difficult, it is possible to mitigate risk. In the event a company finds itself in a TCPA lawsuit, the company may also want to consider Spokeo, Inc. v. Robins, which is currently pending before the U.S. Supreme Court. The issue that the Supreme Court will consider in Spokeo is whether Congress may confer Article III standing on an individual who suffers no concrete harm by simply authorizing a private right of action based on the violation of a federal statute.
alone. A negative answer in Spokeo may also be dispositive of certain claims brought under the TCPA and other privacy legislation that provides for statutory damages without any showing of harm.

While the true effect of the order remains to be seen, one thing is clear: Businesses should take heed that the FCC has adopted an unabashedly proconsumer stance in addressing these questions, well beyond the telemarketing realm, and directly impacting day-to-day business communications. Organizations can mitigate risk and avoid costly litigation most effectively by developing practical, straightforward internal compliance guidelines for their business units to obtain effective and enforceable prior written consent for any calls or text messages.


The FCC recently acknowledged the increase in class action lawsuits under the TCPA. See F.C.C. Order, supra note 1 at 9, n.26 (United Healthcare Services, Inc., representing to the FCC that 208 TCPA cases were filed in January 2014, an increase of 30% from the previous year).

47 U.S.C §227(b)(1)(A); 47 C.F.R. §64.1200(a)(1).


The TCPA grants consumers a private right of action, with provision for $500 in statutory damages or the actual monetary loss in damages for each violation, whichever is greater, and treble damages for each willful or knowing violation. 47 U.S.C §227(c)(5).


FCC Order, supra note 1.

47 U.S.C §227(a)(1).

FCC Order, supra note 1, at §18.

Id.


FCC Order, supra note 1, at ¶64.

Id. at ¶64, n.253.

Id. at ¶106.

Id. at ¶72.

Id.


ACA Int’l, et al. v. FCC, No. 15-1211 (D.C. Cir., filed July 13, 2015). Sirius XM Radio, Inc., and the Professional Association of Customer Engagement filed similar petitions, which were consolidated into the ACA International proceeding. Following the consolidation, other companies and organizations have petitioned the court, including the Consumer Bankers Associations and the U.S. Chamber of Commerce.

MEDIATIONS RESOLVE thousands of disputes that would otherwise clog California’s trial courts. Legislative and judicial policies favor mediation and settlement. Confidentiality is widely recognized as essential to effective mediation because expression of frank views without fear that the communication will be used later in litigation is necessary for full participation. Mediation confidentiality is governed by the Evidence Code, which provides that any communication made for the purpose of, in the course of, or pursuant to, a mediation is inadmissible in any subsequent noncriminal proceeding. While parties may reveal noncommunicative conduct in a mediation, the statute precludes disclosure of mediation communications or a mediator’s assessment of a party’s conduct. Absent a statutory exception such as fraud, illegality or duress, express waiver, or due process violation, mediation participants may trust that all communications and writings prepared for and revealed at mediation are protected against disclosure in future proceedings, whether or not a case settles. This trust fosters candid communication and resolution of disputes.

The public policy rationale for mediation confidentiality is so strong that, traditionally, the California Supreme Court has been unwilling to create judicial exceptions to the mediation confidentiality statutory scheme. California courts have upheld the mediation privilege “even in situations where justice seems to call for a different result,” such as “where the unavailability of valuable civil evidence results in dismissal of claims of attorney malpractice or breach of spousal fiduciary duty.” Judicial construction of and judicial exceptions to mediation confidentiality may be crafted “only where due process is implicated, or where literal construction would produce absurd results” that clearly would defeat legislative intent. The California Supreme Court repeatedly has volleyed back to the legislature the task of resolving competing interests and crafting exceptions to mediation confidentiality.

The legislature’s attempt to alter mediation confidentiality, however, has been met with substantial opposition. For example, the legislature postponed the hearing on Assembly Bill 2025, which excepted communications between a client and his or her attorney during mediation in actions for legal malpractice, breach of fiduciary duty, or professional discipline. In March, the bill was withdrawn. Previously, in 2012, the legislature by joint resolution directed the California Law Revision Commission (CLRC) to analyze the relationship under current law between mediation confidentiality and attorney malpractice or other misconduct, and the purpose and impact of those laws on a variety of public interests. This September the CLRC announced it was in the process of formulating a tentative recommendation and asked for input from representatives of a wide spectrum of interests. The CLRC’s extensive study may quell a maelstrom of opposition to its proposed revisions to the mediation confidentiality statutes. While waiting for the

The California Law Revision Commission has been tasked with resolving the competing public policy goals of client rights, professional ethics, and mediation confidentiality

by Cynthia Pasternak
CLRC’s tentative recommendation and the legislative response to the recommendation, practitioners can protect themselves, their clients, and the mediation process by drafting clear, precise mediation and settlement agreements that govern the disclosure, partial disclosure, or nondisclosure of communications related to the mediation.

**Malpractice in Mediation**

The California Judicial Council initially drafted the California mediation confidentiality rules for panel mediators who were to be utilized under court-ordered mediation programs. These rules required the mediator to, among other things, comply with laws applicable to confidentiality, not disclose confidential communications revealed during mediation, and not use confidential information for personal gain. Later, the legislature expanded the scope of mediation through the California Mediation Act of 1997 and created mediation confidentiality from intertwined principles of the duty of a mediator to keep secrets and the need to protect the mediator from compelled testimony about these secrets.

The present version of the mediation confidentiality statutes followed the recommended revisions by the CLRC. The commission is formulating a tentative recommendation limited in scope to the relationship between mediation confidentiality and alleged attorney misconduct in a professional capacity in the mediation process, including “legal malpractice, and other attorney misconduct, particularly in the mediation process.”

Mediation confidentiality statutes include mediators in the sphere of confidentiality that extends to attorney-client communications. Mediation confidentiality statutes, however, were not intended to protect or to regulate attorney-client communications. California’s Business and Professions Code creates a very restrictive duty imposed on an attorney to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

The scope of the attorney-client privilege is so great that the only statutory exception to the attorney’s duty of confidentiality grants lawyers limited discretion, after warning the client, to disclose client confidential information if the attorney “reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”

The statutory waiver provision of Section 958 of the Evidence Code, on the other hand, creates a bar to the attorney’s duty to maintain inviolate the confidence of a client in cases alleging a breach of a duty arising out of the attorney-client relationship. While Section 958 mandates waiver of the attorney-client privilege in legal malpractice cases, California’s mediation confidentiality statutes prohibit disclosure of communications related to mediation proceedings in such cases. In civil actions where the alleged legal malpractice arises from the mediation process, maintaining mediation confidentiality conflicts with the mandatory waiver of attorney-client privilege.

The California Supreme Court addressed this conflict in *Cassel v. Superior Court.* The court in *Cassel* strictly construed the mediation confidentiality statutes to preclude, in a legal malpractice action, disclosure of attorney-client communications that were for the purpose of, in the course of, or pursuant to, a mediation. The court rejected the notion that the statutory waiver of attorney-client communications in attorney misconduct cases trumped application of the mediation confidentiality statutes to such communications, even though the non-disclosure rule resulted in dismissal of the action. Absent an express confidentiality waiver of particular communications by all mediation participants, which includes the attorney representing a party in mediation, the court ruled it was compelled to “apply the plain terms of the mediation confidentiality statutes…unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose.” Since the case did not involve a situation “that extreme,” the court held the statute’s terms governed, even though application of the confidentiality statutes would compromise the ability to prove a claim of legal malpractice.

The court reasoned that application of the mediation confidentiality statutes to the circumstances of the alleged legal malpractice action did not implicate due process concerns so fundamental so as to warrant an exception of constitutional grounds. Relying on a quartet of prior decisions, the court concluded that the premise of each case was that the mere loss of evidence necessary to prosecute a civil action for damages does not implicate a fundamental due process interest.

The court distinguished *Rinaker v. Superior Court* as a case in which due process outweighed mediation confidentiality. *Rinaker* held the testimony of a mediator could be compelled to protect the constitutional right of confrontation and impeachment of juveniles. The victim obtained a temporary restraining order presumably based upon an affidavit identifying the juveniles as the perpetrators of the vandalism. In a subsequent proceeding, the juveniles’ offer of proof established that during mediation, the victim made an inconsistent statement to the effect that he could not identify the perpetrators. The court ruled that the juvenile court could preserve confidentiality by determining in an in-camera hearing if the mediator was competent to testify. If the mediator denied or did not recall that the victim had made an inconsistent statement or did not recall whether he made the statement, the need for the mediator’s testimony would be eliminated.

The court in *Cassel* concluded that application of the “plain terms” of the mediation confidentiality statutes to the circumstances of the malpractice case did not produce a result “that is either absurd or clearly contrary to legislative intent.” Justice Ming Chin’s concurrence expressed concern that the holding in *Cassel* “would effectively shield an attorney’s actions during mediation…even if incompetent or deceptive,” which is a “high price to pay to preserve total confidentiality in the mediation process.” While not entirely satisfied that the legislature had “fully considered whether attorneys should be shielded from accountability in this way, Justice Ming agreed that the court had to “give effect to the literal statutory language.”

The recent decision in *Amis v. Greenberg Traurig* illustrates the concern that application of mediation confidentiality statutes in civil legal malpractice cases shields attorneys from accountability. In *Amis,* the appellate court affirmed the trial court’s ruling that “a malpractice plaintiff cannot circumvent mediation confidentiality by advancing inferences about his former attorney’s supposed acts or omissions during an underlying mediation.” *Amis* was a minority shareholder and officer in Pacific Marketing Works, a company that exported women’s apparel to Japan. Pacific had been engaged in litigation when one of Greenberg Traurig’s Japanese clients became interested in acquiring Pacific’s assets. Because the law firm’s Japanese client wanted the litigation settled before proceeding with its purchase of Pacific, Amis and other parties agreed to be represented by the firm at the Japanese company’s expense.

At mediation, the preexisting dispute settled with Amis and other individual parties agreeing to individually pay $2.4 million over time and stipulating to an accelerated judgment in the event of default. Greenberg Traurig’s Japanese client, however, backed out of the deal with Pacific, leaving it no funds to pay the settlement. The plaintiff in the underlying action proceeded to enforce its settlement. Amis filed bankruptcy and sued Greenberg Traurig for malpractice. The court of appeal affirmed the trial court’s granting summary judgment in favor of Greenberg Traurig on the basis that all of the alleged malpractice occurred during mediation so application of mediation confidentiality prevented admission of any evidence against the law firm.
Amis is the appellate court’s most recent call to the legislature for dictates on exceptions to mediation confidentiality. While California courts will not disturb the statutory mediation confidentiality protection in civil actions even against due process challenges based on loss of crucial evidence absent an express waiver, a federal trial court in the Central District of California case did so in Milhouse v. Travelers Commercial Insurance Company.43 The court in Milhouse recognized a “due process” exception to mediation confidentiality in a subsequent insurance bad faith case and allowed introduction of evidence of the exchange of offers and demands made during an unsuccessful mediation. The court also ruled admissible allowed evidence revealed in mediation to substantiate the insurance company’s argument that the plaintiffs had waived mediation confidentiality. The court concluded that, even absent waiver, due process compelled disclosure of evidence that presumably established that the Millhouses made extravagant and unreasonable demands during mediation. The court reasoned the due process right of the insurance company to defend itself was an exception to the mediation confidentiality statute, citing, without discussion, the Cassel decision, which, as noted earlier, had rejected a similar due process argument in a civil legal malpractice action. Milhouse presently is pending appeal before the Ninth Circuit.44 The precedent value of Milhouse in diversity cases has been questioned by a federal district court in Northern District of California.45

CLRC Studies the Conflict

The due process judicial exceptions to mediation confidentiality statutes are derived from disclosures that are regarded as criminal and quasi-criminal in nature or rely on express waiver. To further the interests of reasonableness and fairness, expansion of some exceptions to mediation confidentiality are warranted. In formulating a recommendation, the legislature identified competing interests for the CLRC to consider: public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, “as well as any other issues the commission deems relevant.”46

The CLRC limited the scope of the study and the recommendation47 to “the relationship between mediation confidentiality and alleged attorney misconduct in a professional capacity in the mediation process, including, but not limited to, legal malpractice.”44 The CLRC concluded that the legislature did not intend it to “go further” to reach mediator malpractice, other mediator professional misconduct, or the misconduct of other professionals.49 The CLRC has published staff memoranda comparing statutes, the law of other jurisdictions,50 scholarly contributions, and other sources to “compare and contrast the merits of various approaches.”51 In undertaking its review of mediation confidentiality and its interaction with attorney malpractice and other misconduct, the CLRC has considered what mediation confidentiality is and what secrets are being protected. The definition of “secret” is “a piece of information that is not generally known or is not known by someone else and should not be told to others.”52 A secret is a confidential matter or private affair, as opposed to something that is open or publicly known.

Often, mediation briefs describe information that has already been disclosed through correspondence, depositions, and other forms of discovery, and the information is labeled in the mediation briefs as confidential. To the extent that such information may at one time have been a privileged secret, the public disclosure of such information waives any right to confidentiality at mediation or at any other time.

The CLRC’s tentative recommendation should give consideration to what constitutes waiver and the extent to which an express written waiver is required. The Evidence Code53 provides that if a significant part of a communication is voluntarily disclosed or consented to disclosure by the holder of the privilege, the evidentiary privilege is impliedly waived. The implied waiver concept has not been applied to mediation confidentiality, however, because the mediation confidentiality statutes require express waiver.

The CLRC has noted that courts and commentators loosely use the term mediation confidentiality to refer one or more of the following categories of protection for mediation communications: 1) a rule making mediation communications inadmissible in subsequent legal proceedings, 2) a rule preventing compelled discovery of mediation communications in subsequent legal proceedings, 3) an agreement or rule providing that mediation communications must be kept confidential and not disclosed to anyone (i.e., true confidentiality), 4) a rule precluding a mediator from testifying about a mediation, and 5) a contractual agreement among mediation participants to keep their communications and mediation relation documents confidential.54

The CLRC believes the term “mediation confidentiality” may better be applied to “true mediation confidentiality,” which is illustrated by category three above. The CLRC proposes that the term “protection of mediation communications” should be used to encompass all five categories of protection.55 The CLRC identified four premises that drive the policy argument for and against mediation confidentiality. The policy factors in favor of confidentiality are: 1) confidentiality promotes candor in mediation, 2) candid discussion leads to successful mediation, 3) successful mediation encourages future use of mediation to resolve disputes, and 4) the use of mediation to resolve disputes is beneficial to society.56

The components of the policy analysis against mediation confidentiality are: 1) confidentiality may deprive a party of evidence of attorney misconduct, 2) confidentiality may result in exclusion of relevant evidence thereby causing attorney misconduct to continue and go unpunished, 3) allowing attorney misconduct to go unpunished may undermine attorney-client relations and the administration of justice, and 4) allowing attorney misconduct to go unpunished may chill future use of mediation and deprive the state of its benefits.57

It is to be hoped that the CLRC’s tentative recommendation will not complicate the informal mediation process with a plethora of rules and regulations or, even worse, impose such harsh confidentiality restrictions that the mediation process is entirely dismantled. The focus should be on mediation situations in which parties are coerced into settlement, not simply where parties are exposed to typical negotiation techniques that often include “unreasonable” demands and offers.

The client in any case is the ultimate boss and decision maker. If the proposed settlement is inadequate, the affected party should not settle. To make this or any important legal decision, the client should be given adequate information upon which to make an educated choice to accept or refuse a proposal. This principle of informed consent originates from the legal and ethical right of the client to direct what happens in the case and the attorney’s ethical duty to involve the client in these decisions.58 The CLRC’s recommendation should address postmediation disputes. Parties should be encouraged to submit any postmediation disputes to further mediation and binding arbitration. This will help participants obtain closure and avoid prolonged litigation.

Interim Measures

While waiting for the CLRC’s tentative recommendation and subsequent legislation, practitioners can take steps to minimize mediation confidentiality litigation. The most logical approach is to incorporate mediation protections into pre- and postmediation agreements. Here are some suggestions.

To satisfy informed consent obligations to a client, prior to mediation the attorney and client should sign a document that identifies the risks of mediation, states they have been discussed, indicates the client agrees to voluntarily accept these risks, and either contains an express waiver providing that mediation communications may be introduced.
into evidence in future proceedings or an express prohibition against such disclosure.

Once a case is resolved at mediation, with rare exception, a settlement agreement should be drafted immediately and signed by all participants. Typical terms include payments, dismissals, releases of liability, confidentiality clauses, that the agreement itself may be introduced into evidence and other relevant considerations. Relevant considerations include provisions in the settlement agreement stating that the parties entered into resolution freely, voluntarily, without duress or coercion, and with the advice of counsel. To the extent that certain secrets were disclosed and formed a basis for resolution, the agreement should state the specific findings on all agreed issues and include the parties' signatures or initials to each finding. To manage disclosure of evidence obtained during mediation, the agreement should include the protective orders, in camera hearings, and similar procedures to be followed. This allows for protection of a client's interests in keeping information confidential and for consideration of a relevant claim or defense by another party. To protect the clients' interests, the agreement should include a requirement that all mediation participants consent to an express waiver of mediation communications in the event of a subsequent attorney misconduct allegation. Finally, to keep the mediation process simple—as it was intended to be—the agreement should include a provision that all participants agree to submit any postmediation disputes to further mediation and binding arbitration.

Confidentiality is necessary for effective and conclusive mediation results. While the legislature struggles with how best to weigh competing interests—a process that could take years—mediation participants need to protect themselves to the fullest extent possible through written documentation, signed prior to and at mediation, which details how to handle future confidentiality considerations. Clearly written mediation and settlement agreements protect attorneys and their clients against postmediation disputes. Waiting until malpractice or other misconduct allegations are raised may be too late.

3 Code Civ. Proc. §1775(a).
4 Foxgate, 26 Cal. 4th at 18 n.14.
5 Id. at 17.
6 Evid. Code §1124(c).
8 Rinaker v. Superior Court, 62 Cal. App. 4th 155 (1998) (minor accused of vandalism compelled testimony of mediator who mediated victim's prior civil harassment action in which victim admitted he did not see who committed vandalism).
9 Evid. Code §1119; Cassel, 51 Cal. 4th at 117.
10 See, e.g., Foxgate Homeowner's Ass'n v. Bramalea Cal., Inc., 26 Cal. 4th 1, 13 (2001) (Strong legislative public policy of promoting mediation and applicable statutes bar disclosure of communications made during mediation absent an express statutory exception.); Rojas v. Superior Court, 33 Cal. 4th 407 (2004); Fair v. Bakhitan, 40 Cal. 4th 189 (2006); Simmons v. Ghaderi, 44 Cal. 4th 570 (2008); Cassel, 51 Cal. 4th at 118.
12 Cassel, 51 Cal. 4th at 136.
14 Cassel, 51 Cal. 4th at 124.
15 Id.
17 California Law Review Commission, Memorandum 2015-46: Study K-402: Relationship between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Public Comment (Sept. 9, 2015), available at http://www.cler.ca.gov/K402.html. The CLRC invited commentary from experts, interested parties, representatives of the California Supreme Court, the California State Bar, the local malpractice defense bar, and other attorney groups, individuals, mediators, mediation trade associations, mediation parties, and other mediation participants, cautioning all to “be mindful of existing constraints on disclosures of mediation communications and materials.” Id.
19 Cal. R. Civ. 3.854.
20 Cassel v. Superior Court, 51 Cal. 4th 113, 123 (2011) (legislature adopted current version of mediation confidentiality statutes pursuant to recommendation from CLRC).
21 Memorandum 2015-34, supra note 16, at 8.
22 Bus. & Prof. Code §6086(e).
23 Cal. Rules of Prof'l Conduct R. 3-100(c).
24 Evid. Code §958.
26 Evid. Code §958.
27 Cassel v. Superior Court, 51 Cal. 4th 113 (2011).
28 Id. (citing Evid. Code §1119(a), (b)).
29 Id. at 118 (“We have repeatedly said that these confidentiality provisions are clear and absolute...” except in rare cases, mediation confidentiality provisions must be strictly applied and do not permit judicially crafted exceptions.”); cf Simmons v. Superior Court, 44 Cal. 4th 570, 582 (2008) (“Except in cases of express waiver or where due process is implicated, we have held that mediation confidentiality is to be strictly enforced.”).
30 Id. at 119.
31 Id.
32 Id. at 135 (citing Foxgate Homeowner’s Ass’n v. Bramalea Cal., Inc., 26 Cal. 4th 1 (2001); Rojas v. Superior Court, 33 Cal. 4th 407 (2004); Fair v. Bakhitan, 40 Cal. 4th 189 (2006); Simmons v. Ghaderi, 44 Cal. 4th 570 (2008)).
34 Cassel, 51 Cal. 4th at 127.
36 Id. at 170. The court also noted the juvenile court could assess the inconsistent statement’s probative value for impeachment: if the mediation circumstances are trustworthy in the sense that they were made for the purpose of compromise rather than as true allegations of the minors’ conduct, the constitutional need for the evidence would not outweigh the public interest in mediation confidentiality. Id. at n.6.
37 Id. at 136.
38 Id. at 138-40.
39 Id. at 139.
41 Id. at 332.
42 Id.
44 Id. at 1108.
45 Silicon Storage Tech., Inc. v. National Fire Ins. Co., 2015 U.S. Dist. LEXIS 92775 (summarizing cases in the Ninth Circuit that applied California’s mediation privilege in diversity jurisdiction cases and rejected application of Federal Rule 408(b), which allows evidence of mediation communication to prove a witness’s bias or prejudice, to negate a contention of undue delay, or to prove an effort to obstruct a criminal investigation or prosecution).
47 Memorandum 2015-34, supra note 16.
48 Id. at 8.
49 Id. at 4, 5, 8.
50 In 2001, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) approved the Uniform Mediation Act (UMA). In 2003, the UMA was amended to include commercial mediation.
51 California Law Revision Commission, Staff Mem- orandum 2014-14: Study K-402: Relationship between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Law in Other Jurisdictions (Apr. 7, 2014) [hereinafter Law in Other Jurisdictions].
53 Evid. Code §912.
54 Law in Other Jurisdictions, supra note 51, at 4.
55 Id. at 5.
57 Id. at 9.
58 Cal. Rules of Prof’l Conduct R-3-100; Commercial Standard Title Co. v. Superior Court, 92 Cal. App. 3d 934, 945 (1979).
For-profit career colleges have faced suits and investigations for misleading advertising, predatory lending, and inflated job placement numbers.
October 15, 2008, and enrolled before August 22, 2013, and, within six months of graduation, did not find employment working at least 32 hours per week in a single position within their field of study.7

In addition to claims under the Education Code, students frequently allege claims under Business and Professions Code Sections 17200 and 17500. Section 17200 prohibits unfair competition by prohibiting any “unlawful, unfair or fraudulent business act or practice” and any “unfair, deceptive, untrue or misleading advertising.”8 Section 17500 specifically prohibits untrue or misleading advertising that is known, or which reasonably should be known, to be untrue or misleading.9

In 2004, for example, a student filed a class action lawsuit against Microskills San Diego L.P. (Microskills), accusing the post-secondary vocational school of using outdated statistical information to induce potential students into believing that the high-tech industry was booming with high-paying jobs available to its graduates.10 The complaint alleged that Microskills did not provide accurate information of postgraduate employment rates, thereby misleading students.11 Microskills moved to compel arbitration, which was denied, and lost on appeal.12 In 2006, Microskills closed its doors, leaving over 100 students with no option to complete their degrees. In 2007, the California attorney general and the San Diego district attorney’s office filed a complaint against Microskills alleging unfair business practices pursuant to Sections 17200 and 17500.13 In 2008, the company settled and agreed to pay $300,000 in restitution to 71 students.14

In conjunction with these statutory claims, students have alleged common law claims of fraud and negligent misrepresentation. Fraud generally occurs when someone gains something of value, usually money or property, by knowingly making a false representation of a material fact to another individual. To succeed on a fraud claim, a student must prove: 1) the school made a representation to the student that was materially false, 2) the school knew that the representation was false when made, or that it made the representation recklessly and without regard for its truth or falsity, 3) the school intended to defraud the student or to induce the student’s reliance, 4) the student reasonably relied on the representation, and 5) the student was harmed.15 Students that have alleged fraud against a for-profit college or vocational school typically claim that a college counselor misrepresented future job prospects to them before they started at the school.

Negligent misrepresentation occurs when a party asserts a fact that is not true and for which it has no reasonable ground for believing to be true. Students asserting negligent misrepresentation tend to claim that the school made misrepresentations to them through a school’s advertisements, website, or recruiters. To prove negligent misrepresentation students must show that 1) the school misrepresented a fact, 2) the school had no reasonable ground for believing the fact to be true, 3) the school intended to induce the students’ reliance on the misrepresented fact, 4) the students reasonably relied on the misrepresentation, and 5) the students were harmed.16 The main difference between a fraud and negligent misrepresentation claim is that negligent misrepresentation does not require an element of scienter or intent.

In Goehring v. Chapman University, three Chapman University law students from the school’s inaugural class alleged both fraud and negligent misrepresentation claims against their former school. The students claimed that Chapman University Law School did not fully disclose its ABA accreditation process and falsely represented that students would be eligible to sit for the California bar exam without accreditation.17 However, the students failed to satisfy the damages elements for their causes of action because they were unable to prove that their damages were directly related to their reliance on the representations made by Chapman University.18

While fraud and misrepresentation claims have been difficult to establish against for-profit career colleges, claims under other statutes have been successful. In Spielman v. Ex’pression Center for New Media, for example, students sued their former school under the now-repealed Private Postsecondary and Vocational Education Reform Act of 1989.19 The act prohibited private postsecondary educational institutions from misrepresenting their business in statements made to students.20 Rather than reading all the elements of common law misrepresentation into the statute, the court allowed for a remand so that the students’ claims could be interpreted under the plain meaning of the statute.21 The court noted that its own conclusion is “buttressed by the fact that there are similar statutes... which have been found not to include the elements of common law fraud unless those elements are made express in law.”22

**Corinthian Colleges Case Study**

By understanding the statutory and common law claims brought by students, for-profit career colleges can be better equipped to take preventative measures to avoid these claims. Educators can also learn from the travails of other institutions, such as Corinthian Colleges. Founded in 1993, Corinthian was a profitable educational institution with more than 100 college campuses. However, in October 2013, the California Attorney General filed a complaint against Corinthian and its subsidiaries for misrepresenting job placement rates to students and investors, false advertising, and unlawful enrollment provisions barring student claims.23 The complaint accused Corinthian of marketing false advertisements to potential students that were “isolated,” “impatient,” individuals with “low self-esteem,” and to students who have “few people in their lives who care about them” and who are “stuck” and “unable to see and plan well for the future.”24 These allegations were made to show the predatory tactics. In addition, Corinthian allegedly used military symbols to attract veterans. The claims in the case were that Corinthian specifically targeted students who would be less likely to complete the program or who might be more easily swayed to enter the program based on the representations of the job placement rates.

In 2014, following this complaint, the Consumer Financial Protection Bureau sued Corinthian for predatory lending against its students and illegal debt collection.25 Two years before that, Corinthian had drawn the attention of the U.S. Senate’s Health, Education, Labor, and Pension Committee, which studied the enrollment, retention rates, and profits of for-profit universities.26 The committee’s study concluded “Corinthian charges some of the highest tuition prices,” yet it was “unclear whether taxpayers or students [were] obtaining value from the $1.7 billion investment that taxpayers made in Corinthian in 2010.”27

The U.S. Department of Education thereafter began financially monitoring Corinthian. Because of the department’s intervention, Corinthian was forced to sell a dozen of its campuses and to close 85 more.28 In April, Corinthian closed the remainder of its campuses, leaving 16,000 students displaced. Corinthian has since filed for chapter 11 bankruptcy, which has effectively stayed litigation against the school.29 As a result, the Department of Education instituted a federal loan forgiveness program to help relieve the financial burden on the students affected by the closing of Corinthian’s campuses.30

**Effectively Preventing Student Claims**

The case of Corinthian Colleges is an extreme example of what can happen to for-profit career colleges that mislead students with aggressive marketing and deceptive advertising. However, there are many more career colleges and schools in the business of providing quality trade and technical skills to students who need them. Those schools can learn from the Corinthian example and some simple strategies to avoid claims by students.

First, schools should strive to be open and honest with students about their chances of graduating and finding a full-time job. It is imperative to establish transparency with students at the outset in order to establish
1. The U.S. Government Accountability Office will not interfere with the practices of for-profit career colleges.
   True. False.

2. Students commonly bring claims against schools under the Business and Professions Code.
   True. False.

3. The California Education Code provides guidelines for how schools can operate.
   True. False.

4. A school cannot be disciplined for overstating the availability of jobs upon graduation.
   True. False.

5. A school can freely advertise truthful information about graduation rates and prospects for employment.
   True. False.

6. Student claims against a school for unfair business practices can lead to a school’s closing.
   True. False.

7. Schools are permitted to advertise information that they reasonably could know may be misleading.
   True. False.

8. A student can bring both statutory and common law claims against a school.
   True. False.

9. In order to succeed on a claim for fraud, a student does not need to prove that the school knew that the representation it was making was false.
   True. False.

10. In order to succeed on a claim for negligent misrepresentation, a student does not need to prove that the school intended to induce the student’s reliance.
    True. False.

11. In order to succeed on a claim of negligent misrepresentation, a student does not need to prove that he or she was harmed.
    True. False.

12. The main difference between fraud and negligent misrepresentation is that fraud requires an element of scienter.
    True. False.

13. A student is able to sue a former school even if he or she is not a current student at that school.
    True. False.

14. The Consumer Financial Protection Bureau may protect the interests of students against predatory lending and illegal debt collection.
    True. False.

15. The U.S. Senate’s Health, Education, Labor, and Pension Committee studies the enrollment, retention rates, and profits of for-profit universities.
    True. False.

16. California state-funded schools are not required to comply with California’s record management program.
    True. False.

17. Schools should make statistics easily available to prospective students regarding tuition costs, graduation rates, and hiring opportunities.
    True. False.

18. Schools should only maintain records for one year in case a claim is later brought against them.
    True. False.

19. In Goehring v. Chapman University, the student claimants were able to succeed on their causes of action despite their inability to prove that their damages were directly related to their reliance on representations made by the school.
    True. False.

    True. False.
trust and to avoid unnecessary student claims. This can most simply be done by making statistics regarding student costs, graduation rates, and hiring opportunities easily available on the school website, in advertising materials, and elsewhere.

Second, schools should maintain a strong training program that instructs counselors and marketers on what they can and cannot say. Since many of the claims involve a counselor’s guaranteeing job placement or particular job outcomes, schools must stress to counselors the importance of avoiding overblown promises. Schools should retain documentation of the training process.

Third, schools should have students sign an acknowledgement before enrolling that they understand their counselor is not guaranteeing them a job. The acknowledgement should include language that shows the student was not relying on any other form of advertisement when enrolling. This will help preclude claims under the California Education Code as well as allegations of negligent misrepresentation.

Fourth, schools should also regularly refer to state and federal enforcement agencies such as the Bureau for Private Postsecondary Education for important updates and proposed regulations to ensure compliance. The U.S. Department of Education has also established a Negotiated Rulemaking Committee on Gainful Employment to prepare proposed regulations that establish standards for programs that prepare students for gainful employment in a recognized occupation.

Finally, one of the most important steps in preventing student claims is to maintain complete records. Having hard documentation of the practices and procedures of the school will go leagues in helping prove that the school abided by state and federal laws. Schools should have an organized document retention policy, including electronic documents, so that these documents may be preserved for electronic discovery if litigation appears imminent. Schools should maintain records for at least four years, since this is the point at which claims of fraud and breach of contract expire. If a student has not filed a lawsuit within three years of the date of the alleged fraud (or four years in the case of a breach-of-contract claim), then he or she is barred from bringing that claim. Schools should also stay current on statutory record retention requirements. California state-funded schools are required to comply with California’s record management program in order to “apply efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of state records.” The California Education Code and Code of Regulations, as well as Code of Federal Regulations, include sections governing record retention.

The rising trend of student and agency claims against for-profit career colleges poses a risk of which schools should be wary. By understanding the current climate surrounding for-profit career colleges, common claims, and engaging in appropriate preventative measures, schools can place themselves in a strong position to effectively manage the risk that student claims present.

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5 Id.
6 Id.
This section expands the reach of government agencies to monitor the advertising claims by colleges and vocational schools by providing that a government agency can seek recovery on behalf of the students for false advertising. See also CAL. CODE REGS. tit. 6, §17200. The Education Code also prohibits the use of certain advertising and marketing schemes, such as soliciting students for enrollment by publishing a “help wanted” column or using “blind” advertising that fails to identify the institution. See EDUC. CODE §94897.

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Id. at 366.


Id. at 428.

Id. at 433.

Id. at 432. See, e.g., CORP. CODE §§25110, 25120, 25130, 25503, 25400(d), 25500.

California v. Heald College, LLC, et al., 2013 WL 5576241, at *1 (Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief).

Id. at *3.


GOV’T CODE §14740.

CAL. CODE REGS. tit. 5, §§400, 401, 431, 432, 16020-16027; see also EDUC. CODE §§94900-94900.7; 34 C.F.R. §§74.53, 80.42 (b)(4).
NEARLY 50 YEARS of marriage equality litigation has finally produced a paradigm-shifting victory before the Supreme Court of the United States. In June, the Court issued its ruling in *Obergefell v. Hodges*, declaring that the Fourteenth Amendment to the U.S. Constitution prohibits states from discriminating against same-sex couples in their civil marriage laws. Earlier rulings had augured the possibility of such a ruling: *Romer v. Evans* rejected hostility toward gay, lesbian, and bisexual people as a basis for discriminatory legislation; *Lawrence v. Texas* repudiated the Court’s earlier ruling in *Bowers v. Hardwick* and decriminalized the intimate lives of same-sex couples, affirming their equal capacity to form relationships; and *United States v. Windsor* recognized the legitimacy of married same-sex couples, requiring that the federal government treat their marriages equally when they are valid under state law.

Each precursor was momentous in its own right. But *Obergefell* is different.

The marriage equality ruling is the rare Supreme Court decision that nonlawyers know about, care about, have views about. *Obergefell* struck down laws around the country that many people had recently voted on and that some invested with great significance. It produced a tidal wave of public response, with buildings and monuments around the country, including even the White House, blossoming in rainbow lights. It is too soon to know how much has changed following the decision, but it is apparent that it is a new day. There is what came before *Obergefell*, and there is what comes after.

Taking the measure of what comes after demands attention to the different voices in which the majority spoke while explaining its ruling, and the targets at which the dissents aimed their responses. The *Obergefell* decision is three opinions, not one. The language of these three opinions is blended together and presented as a single chorus, but their timber and tone are distinct. One opinion contains the Court’s doctrinal holding: an examination of its cases establishing a fundamental right to marry, which the Court finds equally applicable to same-sex couples. A second opinion is poetry and song: the Court’s lyrical account of the virtues of marriage and the equal capacity of same-sex couples to inhabit

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**The Three Voices of **

**In a profound review of case law, substantive due process, and the social virtues of marriage, the U.S. Supreme Court made marriage equality a reality**
those virtues. And the language of the third opinion is constitutional theory: an expansive account of the methodology that the Court should employ when presented with a substantive liberty claim. The first two sections of this chorus were necessary to provide a structure sufficient to support the Court’s landmark holding. The third was elective and opens the decision to criticism that will likely continue long after disagreement over the result fades. These are the three voices of Obergefell.

The Voice of Doctrine

The heart of Obergefell—its pure application of precedent, speaking in the voice of doctrine—is in many respects unremarkable. The majority grounds its holding in the line of cases that established the fundamental right to marry, of which Loving v. Virginia is the best known. It identifies “four principles and traditions” undergirding those previous holdings, an exposition that contains few surprises to any lawyer familiar with the case law. Those four principles, the Court holds, apply in equal measure to same-sex couples.

The right to marry entails, first, an element of personal choice—the right to enter into a conjugal relationship without being subjected to improper dictates from the state regarding one’s choice of partner. This idea of marriage as a personal right that requires freedom of choice in one’s partner was a central precept of the Court’s holding in Loving that antimiscegenation laws violated the Fourteenth Amendment’s substantive guarantee of liberty as well as its promise of equal protection. That “freedom to marry, or not marry, a person of another race resides with the individual,” Loving holds, “and cannot be infringed by the State.” Obergefell reiterated that proposition, holding—as the Court had done several times before—that Loving established a principle that extends beyond the particular intrusión on freedom of choice embodied in white supremacist laws. Same-sex couples, the Court found, have the same interpersonal investment in their relationships and are entitled to the same right of personal choice that the Court vouchedsafed in Loving.

Marriage also involves structuring one’s life in partnership with another, producing an alloy of private intimacy, public witnessing, and government sanction that has been the defining compound of civil marriage laws since the middle of the twentieth century. The right to access this state of being—the right not to be excluded altogether from experiencing this amalgamated existence—is a second element of the fundamental right to marry. In its earlier marriage cases, the Court gave voice to this principle most strongly in Turner v. Safley, a 1987 ruling that struck down a Missouri prison policy placing severe limitations on the right of people to get married while incarcerated. In response to the argument that an inmate’s inability to form a conjugal household while in prison defeats the purpose of marriage, the Court found that marriage has status implications that reach more broadly. Marriages “are expressions of emotional support and public commitment” between a couple, serve as a “precondition to the receipt of government benefits...and other, less tangible benefits” like the “legitimation of children” and, for some, constitute “an exercise of religious faith as well as an expression of personal dedication.” Incarcerated people can partake of all these aspects of marriage, despite the other restrictions on their liberty, and they had a right to do so while incarcerated. Obergefell relies on Turner in holding that same-sex couples cannot be excluded from this intimate form of association—an exclusion that is effectively categorical for people who are exclusively gay or lesbian. As the Court had said in Lawrence when it invalidated laws that sought to criminalize their intimate lives, “same-sex couples have the same right as opposite-sex couples to enjoy intimate association.” That intimate association has informed the fundamental right to marry for decades.

Safeguarding the welfare of children and preserving order in the larger community are the third and fourth elements of the fundamental right to marry that the Court identifies, and it presents them as interrelated. Within the marital household, the right to marry “draws meaning from related rights of childbearing, procreation, and education” when it “safeguards children and families.” Earlier cases had established rights related to parentage and the household: a right to choose whether to have children, to direct the upbringing of children and choose their educational path, and a right to form a household. In Zablocki v. Redhair, a 1978 case involving restrictions on the ability of individuals to marry when they fail to make child support payments, the Court presented these interests as a unified whole, describing “the right to marry, establish a home and bring up children as a central part of the liberty protected by the Due Process Clause.” In the larger community, the Supreme Court had proclaimed in the late nineteenth-century case of Maynard v. Hill that these aspects of the marital household provide “the foundation of the family and of society, without which there could be neither civilization nor progress.” Because “many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted,” Obergefell holds, excluding those “couples from marriage...conflicts with a central premise of the right to marry.” And because “[t]here is no difference between same- and opposite-sex couples” in their need for mutual support, recognition, and governmental validation, excluding same-sex couples from marriage imposes “material burdens,” consigns those couples “to an instability many opposite-sex couples would deem intolerable in their own lives,” and “teach[es] that gays and lesbians are unequal in important respects,” undermining the steadying force that marriage laws seek to exert in the communities where those couples live.

These elements of the fundamental right to marry were well established before Obergefell. As a matter of pure doctrine, much of the Court’s exposition entailed a reiteration of prior holdings. The difference, of course, was the recognition that these holdings were equally available to same-sex couples. Here is where the Court made new law, rejecting the idea that the fundamental right to marry is available only to opposite-sex couples as a definitional matter. “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.” The Court pointed to earlier precedents, including Loving, that exemplified this principle, but Obergefell is the first occasion on which the Court has stated directly that identity cannot be used to fence an individual out of a fundamental right.

The dissenting opinion of Justice Clarence Thomas, joined only by Justice Antonin Scalia, offered the most fully developed response to the majority’s doctrinal analysis. That response began with a categorical repudiation of the very idea of substantive due process and then proceeded to develop what Justice Thomas describes as a purely negative theory of liberty for the fundamental right to marry. The former was an unsurprising posture for the justice to adopt, given his long antagonism to substantive due process. Both he and Justice Scalia have called for the Court to reverse large portions of that doctrine, including but not limited to its rulings on abortion, reproduction, and sexual intimacy. The latter part of the opinion, however, rests on a novel reading of the Court’s marriage precedents that does not withstand careful scrutiny and is intellectually disingenuous in one key respect.

After reiterating his distaste for the entire enterprise of substantive due process, Justice Thomas distinguishes the fundamental right-to-marry cases by describing them all as limited to a “concept of negative liberty” that could never include “a right to governmental recognition and benefits.” Loving and Zablocki both involved laws that could be enforced through criminal penalties, and Turner involved...
restrictions on incarcerated people. According to Justice Thomas, the element of state-imposed criminal sanction was the defining feature of the constitutional analysis in each of these three cases. In comparison, he writes, the petitioners in Obergefell “cannot claim, under the most plausible definition of ‘liberty,’ that they have been imprisoned or physically restrained by the States for participating in same-sex relationships.”

There are several problems with this analysis. First, it finds no support in the Court’s precedents and indeed is foreclosed by the actual language of the opinions. In Loving, the Court said of the fundamental right to marry that restricting the choice of partners “on so unsupportable a basis as the racial classifications embodied in these statutes... is surely to deprive all the State’s citizens of liberty without due process of law.” It was the deprivation of choice that restricted the liberty of all citizens, not merely prosecution and the threat of incarceration that restricted the liberty of the couples who were actually pursued by Virginia authorities. The same is true of Zablocki, which relied on Loving as the “leading decision of this Court on the right to marry” and found any restriction that “interfere[s] directly and substantially with the right to marry” to implicate that right. And the entire point of Turner was that people have a right to marry—including the right to use the civil marriage laws to make “expressions of emotional commitment and public commitment” and to receive “government benefits”—even when incarceration strips them of other freedoms. Justice Thomas’s “concept of negative liberty” is a reflection of his consistently expressed view about the limited role of the due process clause, but it does not reflect the Court’s precedents.

The second problem is one of intellectual consistency. In response to his assertion that the plaintiffs in Obergefell “cannot claim... that they have been imprisoned or physically restrained by the States for participating in same-sex relationships,” one might appropriately reply, “No thanks to you, Mr. Justice.” Justice Thomas dissented in Lawrence and would have upheld the ability of states to target same-sex couples with criminal prosecution and imprisonment for sharing physical intimacy. He also joined Justice Scalia’s vituperative dissent, which asked “what justification could there possibly be for denying the benefits of marriage to homosexual couples” once their right to be free from criminal prosecution is recognized. Whether or not he believes that the persecution of same-sex couples is “uncommonly silly” (as he wrote in his own Lawrence dissent), Justice Thomas has directly linked his repudiation of the right to marry for same-sex couples to his belief that the state should be able to throw those couples in jail. It is disingenuous for the Justice to scold the couples in Obergefell for asserting a liberty claim when they are not under threat of criminal prosecution. That safety exists over the Justice’s own objections.

Finally, there is the dog that did not bark in the majority’s doctrinal exposition. The Court declined to issue an explicit holding on the core claims of discrimination under the equal protection clause that the plaintiffs had raised, opting instead to give a gloss on what constitutional scholars have described as “fundamental interest” analysis: the selective withholding of certain rights to just one group, provoking strict judicial scrutiny because of the importance of the activity in question. This mode of analysis has taken shape in a number of settings in which the existence of a full-fledged fundamental right has been in doubt. Thus, the opportunity to vote need not be extended at all in many circumstances, but it cannot be improperly withheld once granted, and the ability to challenge a criminal conviction on appeal might be eliminated from a state court system altogether but cannot be selectively withheld from defendants who cannot afford to pay court fees. As Justice Felix Frankfurter wrote, concurring in the opinion that addressed the criminal appeal issue, “If [the State] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.” Scholars have long situated the fundamental right to marry in this line of cases, observing that a state presumably has the option to eliminate civil marriage laws altogether but faces scrutiny when it selectively denies marriage to disfavored individuals or groups.

Obergefell did not expressly hold that antigay laws provoke heightened judicial scrutiny nor that laws excluding same-sex couples constitute gender-based classifications. Rather, the Court employed a “fundamental interest” mode of reasoning. Instead of examining the discrimination in these laws as an independent constitutional claim, it described the “synergy” and “interrelation” between the equal protection and due process clauses, finding that these selective “burden[s] [on] the liberty of same-sex couples” also “abridge central precepts of equality.”

The Court’s decision not to address the constitutional status of antigay discrimination more directly was unsatisfying to many who were watching these cases closely. But the components of a core equal protection holding are scattered throughout the majority opinion. The Court describes the identity of LGBT people as “immutable,” acknowledges the long history of abuse and discrimination that law and society have imposed, and dismisses as irrelevant the question of how to quantify the protection that LGBT people have at times managed to secure through the political process. These are the factors that the Court identified some 40 years ago in describing when discrimination against a disfavored group provokes heightened judicial scrutiny, and their inclusion in the majority opinion is obviously deliberate. So, too, is the majority’s exposition of the history of discrimination against women in civil marriage laws and the series of rulings in the 1970s and 80s in which the Court excised formal gender inequality from American family law.

Justice Thomas minimizes the significance of the majority’s equal protection holding, calling it a mere effort “to shore up its substantive due process analysis,” but his dismissal is misplaced—or, perhaps, a strategic effort to blunt the future impact of those passages. Obergefell has embraced the vocabulary, if not yet the explicit holding, that discrimination against LGBT people must be measured against a formally heightened standard of review, even in cases in which no fundamental right is threatened.

The Voice of Poetry

Woven through the majority’s doctrinal analysis is the poetry of the opinion’s author. Justice Anthony Kennedy’s lyricism has captivated readers outside the legal profession and provoked Justice Scalia, in particular, to paroxysms of outrage in dissent. The florid language is an easy target, and even supporters of the majority opinion have good reason to approach some passages with skepticism. But Justice Kennedy’s poetic language is not mere “ponderous self-importance,” as one scholar has called it. Justice Kennedy’s poetry has a purpose. The origin of that purpose is the Court’s 1986 ruling in Bowers v. Hardwick.

Bowers is infamous not just for its holding, which affirmed the power of states to target adults for criminal sanction when they engage in private, noncommercial, consensual sexual activity with another adult of the same sex, but for the ruthlessness with which the Court dismissed the humanity of gay, lesbian, and bisexual people in reaching that result. The case involved Michael Hardwick, a gay Georgia man who was intruded upon in his bedroom by police serving an unrelated warrant (under circumstances that were themselves suspicious, as Professor Kendall Thomas has noted). The police found Hardwick sharing oral sex with another man, and Hardwick was arrested and charged with a violation of Georgia’s sodomy law, which made oral or anal sex a felony. Hardwick challenged the constitutionality of this provision, and the Court rejected his claim. It was the first occasion on which the Court
had spoken at length about the constitutional rights of gay people, and the opinion set the tone for constitutional litigation for years to come. Ignoring the fact that Hardwick had levied a facial challenge to the statute—which made oral or anal sex illegal for all partners, regardless of their sex or marital status—Justice Byron White wrote an opinion that focused solely on “homosexual sodomy” and characterized as “at best, facetious” the idea that gay people had rights of intimate privacy that are commensurate with those of straight people. The “presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and objectionable” provided sufficient grounds for branding all gay people as felons. And lest anyone miss the intended message of condemnation, Chief Justice Warren Burger added a short concurrence emphasizing the “ancient roots” of antigay policies and the “millennia of moral teaching” that one would have to “cast aside” in order to include gay people within the Constitution’s promise of liberty in cases dealing with family and intimate relationships.

I graduated from law school in 1997, so I became a lawyer and then a law professor in the age of Bowers, when gay civil rights advocates would talk among themselves about the “gay exception to the Constitution” that seemed to appear whenever they would ask courts to apply established doctrines to LGBT litigants. If gay people could be branded as criminals—if the mere act of identifying oneself as gay could be treated by authorities as an “admission” of a “propensity” to commit “illegal homosexual acts,” as was the case under the antigay military policies—then gay people seemingly could find little hope or safety in the Constitution’s promises. Bowers was not just a ruling on substantive due process doctrine. It was a repudiation of the very idea that LGBT people and same-sex relationships possess a humanity that the Constitution must respect.

Romer v. Evans introduced the first hint that the ugliness of Bowers might not last indefinitely. The Court’s 1996 decision struck down Colorado Amendment 2, a state constitutional provision that singled out gay, lesbian, and bisexual identity and prohibited state law from providing any kind of protection from discrimination. The Colorado provision was extreme—the majority called it a “denial of equal protection of the laws in the most literal sense”—and the result in the case seems unremarkable in hindsight. But Justice Scalia responded with a dissent that was shocking in its stridency. It was here that Justice Scalia first accused his colleagues of being elitist prigs for holding that “homosexuality cannot be singled out for disfavorable treatment.” The majority were aligning themselves with the “Templars,” he wrote—“the knights rather than the villeins”—when they intruded on the ability of states to condemn gay people as practitioners of “reprehensible” conduct.

Nineteen years later, it is clear that Justice Scalia understood an important fact. The logic of Bowers and its constitutional exile of same-sex intimacy depended upon dehumanization: the precept that gay people can be criminalized and excluded from society because they are immoral and objectionable. When Romer repudiated that dehumanization as the product of impermissible animus, it began to invite gay people and same-sex relationships into the circle of humanity recognized by the Constitution. Once that shift takes hold, all forms of discrimination directed at gay people become suspect. In a review of Romer that I wrote at the time, I referred to the opinion’s “principled silence”—not yet engaging with the street-level reality of anti-LGBT discrimination, but recognizing a principle that laid the groundwork for a future recognition of full equality. Justice Scalia’s heated response to the majority opinion was a well-informed reaction to that prospect, not just “gratuitous shadow boxing.”

The poetry that Justice Kennedy would later employ in Lawrence, Windsor, and Obergefell has played a vital part in realizing the promise of Romer. As has been much remarked, Justice Kennedy wrote at length in all three opinions about the dignity that same-sex couples can find in their relationships—the “liberty of the person in its spatial and more transcendent dimensions”; the recognition, dignity, and protection of the class in their own community”; and the “dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.” In Obergefell, he embeds these sentiments in a starry-eyed account of the virtues of marriage—its “nobility,” “transcendent importance,” and “sacred” quality—and finds that same-sex couples have a right to partake in that tradition insofar as it is administered by the state.

This lyricism aims to effect a cultural shift in legal institutions that is a necessary prerequisite for the full inclusion of LGBT people and same-sex couples in the Constitution’s circle of humanity. Justice Kennedy’s paean to the equal capacity of same-sex couples to find dignity in their relationships in Lawrence and Windsor laid the rhetorical foundation for Obergefell’s more direct exhortation for a change in constitutional culture: “[W]hile Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”

Obergefell is not just a ruling on the application of doctrine. It aims to enfranchise a class of people who have been excluded from full citizenship through a combination of explicit persecution and willful blindness—to make them fully legible as rights holders. Not all of Justice Kennedy’s poetry merits celebration. His presentation of unmarried people as desperate and lonely souls in need of marriage’s salvation in one of the opinion’s most remarked-upon sentences—“Marriage responds to the universal fear that a lonely person might call out only to find no one there”—is perhaps the most awkward passage, particularly considering that all three female members of the Court, who together constitute a majority of the votes in support of the opinion, are currently unmarried. (Justice Ruth Bader Ginsburg lost her husband Martin in 2010, Justice Sonia Sotomayor divorced in 1983, and Justice Elena Kagan has never married.) Throughout his opinion, Justice Kennedy accords marriage a place of singular privilege among family arrangements, not just as a description of the significance that law and society currently attach to the institution but as a statement of enduring normative principle. It was not necessary for the Court to align itself with that proposition in order to decide the case, which I suspect will be viewed in later years as a hidebound chapter in an opinion that aspires to be forward-looking.

But these imperfections do not defeat the larger goals of the lyricism. However clumsy, Justice Kennedy’s poetry has a purpose that Justice Scalia understood and fought against from its inception: to speak about LGBT people, their lives, and their relationships as an equal and unqualified part of the human community. Prior to Romer, no hint of that sentiment had ever found voice in a majority opinion of the Court. Following Obergefell, there is reason to hope that the resulting shift in constitutional culture will be a lasting one.

The Voice of Constitutional Theory

It is in his broad statements on the proper way to frame a substantive due process claim—his voice of constitutional theory—that Justice Kennedy has introduced the greatest controversy. For most nonlawyers, the headline of Obergefell was “Nationwide Marriage Equality,” but the Court’s restatement of the substantive due process doctrine will likely provoke the most heated debate among lawyers in the years ahead. Obergefell removes some of the restraints that had previously confined that doctrine, and it does not clearly articulate the limitations that will replace them.

The Court’s leading statement of limitation in the modern theory of substantive due process came in Washington v. Glucksberg.
in which the Court unanimously rejected a right to physician-assisted suicide and turned aside attempts by the claimants to analogize to earlier holdings of the Court on matters of bodily integrity and personal privacy. An argument about a fundamental right, the Court held in that case, requires a “careful description” of the asserted right, which must be framed in highly circumscribed terms in light of specific historical practices—a bow to traditionalism that seemed to blunt the more open-ended statements about decisional autonomy that the Court had made in Planned Parenthood of Southeastern Pennsylvania v. Casey, in which it reaffirmed the core holding of Roe v. Wade. If applied aggressively, that tradition-bound methodology could have foreclosed a marriage equality claim grounded solely in substantive due process.

There was a narrow basis available to the Obergefell majority for distinguishing Glucksberg. The plaintiffs in Glucksberg sought recognition of a right in a realm of human experience different in kind from the subjects of the Court’s earlier precedents, and that is the context in which it articulated its strong restrictions based on narrowly defined historical practices. In Obergefell, in contrast, the plaintiffs sought inclusion rather than innovation: equal access to a right that had already been established and thoroughly explicated in a long line of cases. And indeed, in its discussion of constitutional theory, the Court reiterated that rights “cannot be defined by who exercised them in the past” lest “reified practices…serve as their own continued justification and new groups [be unable to] invoke rights once denied.” That principle sufficed to decide the case.

Instead, Obergefell repudiated the Glucksberg approach altogether, appearing to limit the earlier case to its facts: “[W]hile [Glucksberg’s] approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.” Rights do not arise merely from “ancient sources,” the Court went on, but also “from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.” Early in the opinion, the Court quotes selectively from a formulation first offered in dissent by Justice John Marshall Harlan II and holds that it is through “reasoned judgment” that courts should “identify[] interests of the person so fundamental that the State must accord them its respect.” “The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions,” the majority continues, “and so they entrusted to future
generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”

As a roadmap to future courts in discerning the content and limits of substantive liberty, these passages leave much to be desired. They reiterate yet again the proposition that such analysis must proceed from a principle of inclusion—that disfavored individuals cannot be excluded from the protections of liberty merely because they have historically been unpopular—and to that extent they merit some praise. But there is nothing analytically rigorous about this kind of intuitionistic reasoning. Even readers who are enthusiastic about the result in Obergefell and believe it fully justified as a matter of doctrine and principle could react with dismay at the lack of clear guidance that the Court gives for the future administration of these important principles.

Unsurprisingly, the dissenters seized upon these features of the opinion in mounting their critiques, with Chief Justice John Roberts leading the way. And yet, while we must acknowledge the valid bases for questioning aspects of the majority’s constitutional methodology, it must also be said that the chief justice wrote a remarkably mean-spirited opinion. The chief invoked Dred Scott v. Sandford—the 1857 decision in which the Court proclaimed that the Constitution was founded on principles of white supremacy and that people of African descent were “so far inferior that they had no rights which the white man was bound to respect”—and suggested that the majority opinion had reprimed Dred Scott’s style of analysis. He flourished a list of cultures past and present, seemingly chosen for their exotic names and about which he presumably knows little or nothing—“the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs”—in order to cast the idea of same-sex couples having a right to marry as self-evidently ridiculous. He then ends his opinion with a rebuke to LGBT people and their supporters—“by all means celebrate today’s decision. But do not celebrate the Constitution. It had nothing to do with it.” He delivered this opinion orally from the bench while LGBT members of the Supreme Court Bar and career-long civil rights advocates sat directly before him. Friends who were in the Supreme Court chamber when the opinion was handed down tell me that the presence of these leaders made the Chief’s scolding seem acutely personal. These are insults, pure and simple—the kind of holding forth that Justice Scalia has made into a sport but few others on the Court have indulged.

The majority reached further than they needed to in their statements of constitutional theory and adopted an approach to framing substantive liberty claims that should properly provoke debate. It is a shame that the leading dissent on this aspect of the opinion missed the opportunity to join that debate in a mature fashion.

Indeed, there is a vital element missing from every one of the dissents in Obergefell. Its absence is more blaring than all the outrage over subverting democracy and the dismay over betraying the virtues of the Aztecs. None of the dissenting opinions engages in even a glancing fashion with the lived experience of real LGBT people in the process of arguing that states should be able to relegate them to second-class status. The reality of their relationships, the harm done to same-sex couples and their families when they are categorically excluded from the entire apparatus of the family law, the injury felt by every LGBT individual whom the law excludes from full citizenship—it is all a screaming silence. Nor did one dissenting justice bestir himself to address the plaintiffs’ claims under the equal protection clause, despite the unabashed use of gender and sexual orientation in these laws to determine which couples were allowed to marry. This is a classification calling out for serious analysis, whatever one’s conclusion. Yet the closest thing to a formal equal protection argument comes from Chief Justice Roberts, who dismisses the majority’s treatment of the subject as inadequate and then writes the following as the entirety of his own analysis: “In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ legitimate state interest in ‘preserving the traditional institution of marriage.’” This kind of lazy ipse dixit is unworthy of a man of the Chief’s intellectual ability.

Presented with the equal protection claims of a community that has been systematically abused, persecuted, and subjected to second-class citizenship for most of our nation’s history, a judge’s most rudimentary responsibility—the least that one can expect—is a proper accounting of the harms that community has suffered and a serious explanation for why it should lie within the power of the state to continue inflicting those harms. Instead, equal protection was the clause that dared not speak its name in the dissenters’ opinions. Erasure has been one of the primary tools of subordination in the mistreatment of LGBT people. In Obergefell, erasure is the dissenting justices’ last gasp of indignation as marriage equality becomes the law of the land.

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8 Loving, 388 U.S. at 11.
10 Id. at 95-96.
11 Obergefell, 135 S. Ct. at 2600.
12 Id.
14 Id. at 384.
16 Obergefell, 135 S. Ct. at 2600.
17 Id. at 2601-02.
18 Id. at 2602.
19 Id. at 2636 (Thomas, J., dissenting).
20 Id. at 2635 (Thomas, J., dissenting).
25 Id. at 605 (Thomas, J., dissenting) (quotation omitted).
26 See, e.g., Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (when school board members are chosen through popular election, the right to vote on the position cannot be restricted to landowners or parents of students).
28 Id. at 24 (Frankfurter, J., concurring).
31 Id. at 2594.
32 Id. at 2604.
33 Id. at 2606 (“It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process.”).
34 Id. at 2603-04.
35 Id. at 2632 n.1 (Thomas, J., dissenting).
36 Andrew Koppelman, The Supreme Court made the right call on marriage equality—but they did it the wrong way, SALON.COM (June 29, 2015), http://www.salon.com (last visited Aug. 25, 2015).
37 See Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 1431 (1992).
39 Id. at 196-97.
42 Id. at 652-53 (Scalia, J., dissenting).
45 Id.
48 Obergefell, 135 S. Ct. at 2602.
49 Id.
50 Id.
51 Id. at 2598.
52 Id. at 2616-17 (Roberts, C.J., dissenting).
53 Id. at 2612 (Roberts, C.J., dissenting).
54 Id. at 2626 (Roberts, C.J., dissenting).
55 Id. at 2623 (Roberts, C.J., dissenting) (quoting Lawrence v. Texas, 539 U.S. 558, 585 (2003)).
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It’s Time for a Blockbuster in Legal Services Funding

IN LOS ANGELES, THE ENTERTAINMENT capital of the world, following the success or failure of new motion picture openings is similar to following the success or failure of a favorite sports team. We all know that a $100-million-dollar opening week is a superhero blockbuster and a $10 million opening is a disappointment or a failure. The same terminology, in an analogous fashion, can be applied to legal services funding in California.

In 1999, through the efforts of former Chief Justice Ronald M. George and others, the state of California established the Equal Access Fund to begin to provide state funding for legal services for the poor. The initial funding amount was $10 million. It has remained at nearly that amount, without any significant increase even for inflation, for the last 16 years.

Meanwhile, during those intervening years, IOLTA funding for legal services, which is collected by the State Bar from bank interest on attorney trust accounts, has shrunk precipitously as the result of the significant diminution in interest rates. While voluntary attorney monetary contributions for legal services have increased, the population of eligible California recipients has exploded as the result of the Great Recession of 2008. California attorneys now voluntarily contribute more funding for legal services programs than the state does. While many California attorneys are to be congratulated for those important monetary contributions, as well as the hours of legal services that they also voluntarily provide for California’s indigent residents, unfortunately not all California attorneys give those monetary contributions or provide those legal services. We all need to do more.

So, while those California attorneys who make monetary contributions or volunteer their time for pro bono legal services organizations are to be congratulated, the state’s contributions can only accurately be characterized as disappointing. More than 8 million Californians qualify for free legal services—over 20 percent of the state’s population. California’s Equal Access funding contribution for these residents equals a meager $1.25 per eligible resident. Viewed from another perspective, the state contributes 26 cents per California resident for legal services funding—no more than some loose change. California’s legal services funding per eligible resident ranks 21st among all states, slightly ahead of West Virginia.

In contrast, as the result of the strong leadership of Chief Judge Jonathan Lippman, New York’s funding for legal services shames California, totaling $85 million this year. In the last year alone, New York, which has a population that is approximately half of California’s, increased its legal services funding by more than the entire California contribution. While California provides barely enough for a pen or legal pad for each eligible recipient, New York provides almost $22.

This funding is of critical importance to the clients of legal services organizations. These services often provide essential assistance for low income Californians for the most basic necessities of life—shelter, food, family, medical treatment, and government benefits. There are California residents that need but cannot get legal services because there are too few available. These people include the homeless veteran in San Diego, immigrants in Los Angeles who need accurate information about immigration rights, the Central Valley farmworkers who are not receiving the wages to which they are entitled, and the Bay Area parent living with HIV who needs assistance securing medical treatment.

Those attorneys who do not provide monetary contributions or volunteer their time for legal services organizations should reconsider their priorities and join the many California attorneys who do. There are roughly 100 legal services organizations throughout the state that receive IOLTA contributions from the State Bar—including LACBA’s legal services projects, which are supported by LACBA Counsel for Justice (www.lacba.org/counselforjustice)—and all of them would welcome your contributions and volunteer service. A list is available at www.caforjustice.org/about/organizations. When you pay your bar dues this year, please make the voluntary contribution to fund the Justice Gap Fund so that the State Bar can provide additional funding for those legal services organizations. I also encourage you to make a voluntary contribution to Counsel for Justice to support LACBA’s legal services projects when you pay your yearly membership dues as well. LACBA’s projects helped more than 18,000 clients last year and provided over $4.6 million in pro bono service in the areas of domestic violence, veterans legal services, immigration, AIDS legal services, and civic mediation. The justice gap in California is more than a gap—it is a huge chasm and needs all of our support to close.

All Californians should urge the state to increase its monetary support for legal services to $50 million.

David Pasternak is a member of Pasternak & Pasternak in Century City, the current president of the State Bar, and a past president of LACBA.
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