Los Angeles lawyer Paul Kiesel is the 2015-16 president of the Los Angeles County Bar Association.

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Jack Trimarco & Associates
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Dear Mr. Trimarco:

In the winter of 2010, an environmental disaster occurred off the west coast of the island of Oahu in the State of Hawaii. Heavy rainfall caused millions of gallons of contaminated water—including toxic soil, trash and human medical waste—to pour from the Waimanalo Gulch Sanitary Landfill into the ocean waters. Federal officials launched an investigation into the landfill’s operator, Waste Management of Hawaii (“WMH”). The U.S. Attorney’s Office alleged there was a conspiracy between members of the WMH and its environmental consulting firm to submit false information to regulators about the adequacy of the landfill’s storm water management system.

I represented an employee of the environmental consulting firm hired by WMH to perform construction quality assurance. During the investigation, all evidence pointed to the fact that my client was innocent of any wrongdoing. Nevertheless, the Assistant U.S. Attorney insisted that my client pass a polygraph, or else risk being indicted as a participant in the criminal conspiracy.

In 2012, you conducted a polygraph examination of my client, unequivocally establishing that no deception was indicated. The Assistant U.S. Attorney then demanded that my client pass a polygraph examination administered by FBI agents in Honolulu. The FBI alleged my client failed their polygraph examination, but you responded with a thorough and compelling critique demonstrating how the FBI’s polygraph examination was deficient and should be disregarded.

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

Sincerely,

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[Signature]

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Los Angeles Lawyer publishes three types of articles. Feature articles (which may get your picture on the cover), departments, and Closing Arguments. Features educate and provide in-depth legal analysis to other lawyers on substantive issues or areas of law. These articles must be between 3,500 to 5,000 words and can be on any area of the law. (Authors are advised, however, to steer clear of politics, opinions, or public policy advocacy.) Department articles are a shorter version of a feature article, approximately 2,500 to 3,500 words. Popular department articles provide pointed, practical advice for the everyday practitioner. An excellent example in this issue is the Practice Tip by Judge Kevin C. Brazile, Elizabeth Mann, and Grant Miller, “Demurrer Practice Considerations in California Courts.” Look for the Style Guide on the website (http://www.lacba.org/showpage.cfm?pageid=2001) for details, or contact the magazine’s editor. For these articles we are looking for an analysis of legal issues with a focus on educating lawyers. The focus can be on a nuance of a particular practice area or a general introduction to a practice area that may serve as a guide for lawyers to navigate unfamiliar legal waters.

For those attorneys with a desire to express an opinion, we have the Closing Argument column. This versatile column provides an author with the opportunity to express a point of view on an issue of concern to the legal profession or judicial system that is not likely to be published elsewhere. This month’s column, for example, describes AB 1710, a new law in California. While large data breaches may generate scary newspaper headlines, this article offers our attorney readers a practical, helpful summary on what the law requires of businesses that maintain consumer data. Closing Argument columns are relatively short at 750 to 900 words. Authors may also have fun with a Closing Argument. Let your colleagues in on a personal experience you may have had in a particular case, or a challenge with a particular expert or witness. Comedy is welcome for these columns.

Perhaps you are wondering what you might get in return for all of your hard work researching, writing, and editing an article for the magazine. In short, you may expect some exposure for you and, if applicable, your law firm or university. LACBA membership and the magazine’s current circulation consists of approximately 21,000 lawyers, mostly in the Los Angeles area. Our writers regularly report on receiving positive feedback on their efforts. The magazine often receives requests to reprint articles in other forums, and articles published in the magazine are accessible through online database service providers. In fact, the LACBA website has a library of articles going back to 1996. Browse past issues and consider contributing to the legal community by writing an article.

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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Setting Goals for the Coming Year at LACBA

I AM HONORED TO SERVE as the president of the Los Angeles County Bar Association for 2015-16. As LACBA was founded in 1878, I stand proudly on the shoulders of over 135 years of leaders. If you are ever in need of a pleasant chuckle, make your way to the LACBA offices and stop by the Wilshire Conference Room, where the official portraits of all the former presidents hang. The wall is a reflection of the rich history of LACBA and a testament to the end of the organization’s white male dominance in the mid-1990s. That said, I am a white male. Nevertheless, I grew up in a home rich in diversity and openness. My parents marched for civil rights in the 1960s and never let me forget the importance of protecting those who do not have a voice or are in need of assistance. Having two older sisters—who used to dress me up in their clothing—and a strong mother gave me great respect and appreciation for a feminine perspective. The decision to become a lawyer was one I made while still a child and, since the age of eight, never wavered from.

My goals for LACBA during my presidency will be focused on three core areas. The first will be to continue the mission of advocating for adequate court funding. As most of you know, the courts have suffered years of reduced general fund revenue as the state grappled with the consequences of our economic turmoil from 2008 through 2013. The legislature and our governor heard the cries of hundreds of lawyers, clients, and stakeholders concerning the need to reverse the massive reduction in court funding. While we have a long way to go to restore the services and personnel that were cut, I am committed, as your president and the cochair of the Open Courts Coalition, to restore adequate court funding. The second goal for my presidential term will be to improve the delivery of continuing legal education (CLE) and be a responsible steward of LACBA’s finances. The third and final goal will be to increase the membership of our organization. For years, LACBA has consistently ranked among the largest voluntary bar associations in the country, with as many as 27,000 members, and it still is in the top in terms of membership size. However, in 2015, LACBA finds itself with approximately 21,000 members. Bar associations, much like other membership-based groups, have seen a reduction in membership across the board. It is time to reverse this trend at LACBA.

With respect to court funding, rather than launch into a litany of statistics—which may put you to sleep—it is enough to say that the courts have lost over 25 percent of their workforce and, in Los Angeles, 20 percent of our court buildings have been closed or scaled down. Anyone who practices personal injury work, as I do, has confronted the reality that cases that were previously handled in the district court for the area in which the injury occurred are now only handled in the personal injury courts Downtown. Those who practice anything from probate to landlord-tenant law have likewise felt the trauma of these cuts. The criminal bar has experienced the least impact, in part due to the constitutional protections afforded criminal defendants. No matter which area of law we LACBA members practice, however, we can and must play a leading role in advocating for our justice system. With over a third of all judges in the state and the largest civil courthouse in the world, when we get a cold, the entire state gets sick. Court funding is a bipartisan issue and an important reason we need all lawyers in Los Angeles to belong to LACBA. The larger we are, the more difficult we will be to ignore.

One way to increase membership is to offer our members outstanding quality CLE. I am excited to chair a committee whose focus is to streamline the quantity and improve the quality of our CLE. The goal of this committee, working in conjunction with the sections, will be to define and set minimum standards. These include the minimum number of attendees, the threshold charges per CLE unit, and the least cost associated with delivering CLE programming. Everyone can agree that our goal is not to provide CLE for just a few participants at prices and venues that guarantee that money is lost. We want to strive to provide quality programming at an affordable, practical price in an economically suitable environment. This committee will work to address these issues across the board.

Finally, we are a membership organization. The more members we have, the greater voice we speak with locally, statewide, and nationally. We need to find a way to offer relevance to the younger lawyers who are joining us in this journey. We must engage the newer lawyers in a way that reflects their needs. As most of you know, I have been a proponent of technology for most of my career. Whether writing the technology column for the Daily Journal or conducting seminars, I realize that technology and its application in our practice will be more important each year. When I began practice in 1985, the majority of law firms did not use computers, fax machines were rare, and Al Gore had not yet invented the Internet. How times have changed in 30 years. Today, we are driven by e-mail, smart phones, and instant access to news. Finding a way to harness and embrace these technologies to help newer lawyers adopt them for their own practice and helping our more senior lawyers feel comfortable with them is an important role that LACBA can uniquely serve.

I tell each of my new clients that I am the easiest lawyer to reach in America. For better or worse, that is my mantra. I make that same commitment to every member of our organization. If you want to talk, do not hesitate to reach out. Probably the best way to reach me is by e-mail. My e-mail address is Kiesel@kiesel-law.com. With my soon-to-be 21-year-old daughter and a 23-year-old son, text messaging seems to be the preferred method of communicating. With text messaging, my kids never have to hear their mother or father’s tone of voice and can communicate in clipped sentences with emojis (smiley faces and other pictorial expressions) or acronyms (which I often find myself using a search engine to help me decode) like “LMAO.” Or, you can always simply call my office at (310) 854-4444. Onward and upward.

The 2015-16 president of LACBA, Paul Kiesel is also the cochair of the Open Courts Coalition, a bipartisan committee of California attorneys advocating for funding of the civil justice system.
Carol Schatz Central City Association President and CEO

Do you have one particular achievement of which you are most proud? We got the city council to pass an ordinance called the Adaptive Re-Use Ordinance. The ordinance made it easier for developers to convert old office buildings into housing. The basic premise of downtown revitalization around the country is that you have to have a core group, a critical mass of residents, living in an area.

What is your future vision for DTLA? More. More of everything. More residents, more office buildings, more retail, more culture.

What do you think is DTLA’s most urgent public policy need? Parks and schools. We are the last great urban frontier.

You wrote an op-ed piece in 2012 for the Los Angeles Times describing certain policies as enabling the homeless. Can you explain further? What we, as a community, are concerned about is providing solutions that work. We want to see anybody who wants to be housed to be housed. But, we also know that there is a population that has resisted any efforts to provide services to them. We have to address that population. It’s unconscionable that people are living on the streets.

Do you think LAPD has been heavy-handed with the homeless in DTLA? No, I do not. I think they would like nothing better than enabling the homeless. Can you explain further? What we, as a community, are concerned about is providing solutions that work. We want to see anybody who wants to be housed to be housed. But, we also know that there is a population that has resisted any efforts to provide services to them. We have to address that population. It’s unconscionable that people are living on the streets.

What is the one adjective you would like on your tombstone? Effective.

What is your worst job? When I was 16 I folded remnants for 95 cents an hour.

What was your best job? This is my best job. I am very proud of what we’ve accomplished because I think it’s hugely important to the city.

What characteristic did you most admire in your mother? Her passion for her political views.

If you were handed $10 million tomorrow, what would you do with it? Buy a bigger house. Everyone is downsizing, I’d buy a bigger house. I want to know what it feels like.

Who is on your music playlist? On Sunday, I was listening to an album that was produced in the 1960s, Nina Simone.


Which television shows do you DVR? Downton Abbey, Mad Men.

Do you have a Facebook page? I think so.

Are you on Twitter? Hell, no.

Which person in history would you like to take out for a beer? Franklin Delano Roosevelt. I want to ask him what it was really like to put in the reforms that he did, at that time, coming from the privileged background that he did.

What is your favorite spectator sport? I love baseball. I love the Dodgers.

Which magazine do you pick up at the doctor’s office? Newsweek. Sometimes, People—I like to see how base popular culture has become.

You went to Loyola Law School and graduated in 1973. Did you ever practice law? At the attorney general’s office in consumer protection—that’s where I figured out I didn’t want to practice law.

You went to Berkeley as an undergraduate in the 1960s. Were you part of the liberal movement at that time? Yes, very much so.


What was Downtown Los Angeles like when you first started to work for CCA? When I began in 1990, I walked around the streets of Downtown, and I talked to myself. I said, “Schatz, you’re crazy, it’s never coming back.”

What was your worst job? When I was 16 I folded remnants for 95 cents an hour.

What is your two favorite U.S. presidents? FDR, Abe Lincoln, and Bill Clinton. I’ve given you three.

What is your future vision for DTLA? More. More of everything. More residents, more office buildings, more retail, more culture.

What was Downtown Los Angeles like when you first started to work for CCA? When I began in 1990, I walked around the streets of Downtown, and I talked to myself. I said, “Schatz, you’re crazy, it’s never coming back.”
The Key to Enjoying the Benefits of Barristers Membership

Although commuting from the Westside can at times be daunting, this was a board meeting I was not going to miss. It was late February of this year, and the LACBA board was scheduled to convene for its monthly meeting at the LACBA offices on West 7th Street in downtown Los Angeles. On this particular evening, though, we had a special guest. Although other elite and prestigious members of the Los Angeles legal community had joined our meetings in the past, this time was different. When I arrived and had the opportunity to shake hands with the 28th chief justice of the state of California, the Honorable Tani G. Cantil-Sakauye, I knew I was grateful—grateful to be part of LACBA.

It was so much more than a handshake too. It was an intimate conversation about the judicial branch budget crisis and what she is doing to make it better, as well as what we, as leaders of our county bar, can do to help. One-on-one face time with the chief justice—just another Wednesday evening at LACBA.

However, that wonderful opportunity would never have been made possible if I had not shown up. And that’s what this upcoming calendar year at LACBA is all about: showing up. Showing up gives you access. It gives you possibilities, and those possibilities lead to opportunities. This is especially true for the Barristers. The Barristers Section of the Los Angeles County Bar Association has been active for over 70 years and continues bringing professional development and opportunity-related services to young lawyers in the Los Angeles legal community.

To become a part of the Barristers does not take a whole lot. Barristers are young lawyers who are 1) members of LACBA and 2) either younger than 36 years of age or have been admitted to practice for five years or less. That is it. But you have to show up. Thinking about changing jobs? Barristers is for you. Want to develop business and show your partners you have the rainmaking skills to bring in a new case or client, joining Barristers is taking a step in the right direction to accomplish that. Through listserv and other email communications, monthly board meetings, and several downtown and Westside networking and community service-oriented events during the year, members of Barristers have quick and easy access to assisting LACBA make people’s lives better facing domestic violence, AIDS, and immigration, there is a lot of good we can do for those within our legal community and for those outside of it. There is no shortage of events, either. One of the events we are looking forward to this year, which is quickly coming up in July, is a panel discussion on how to litigate your first high-profile case.

For young lawyers, in particular, just starting out in their careers, becoming a part of the Barristers is a great opportunity to network beyond the workplace with attorneys in wide-ranging practice areas.

We are in very good company too. The past and present leadership of the Barristers comes from some of the most prestigious private firms as well as state, federal, and other public agencies in Los Angeles. Some of our notable past presidents include the Honorable Lee Small Edmon and the Honorable Margaret M. Morrow in addition to numerous LACBA presidents. It’s quite an impressive lineage of great legal minds. And trust me when I say it pays dividends to be a part of that lineage and to let it be known that you are. Remember that the first rule of Fight Club is you do not talk about Fight Club. Well, that’s not the case with the Barristers. You do talk about it, and talk about it as often as possible. Because when you do, you may just be talking about it to one of its past presidents who is now the judge at your next hearing or trial. As Justice Edmon (Presiding Justice in Division Three, Court of Appeal for the Second Appellate District) graciously expressed it when requested to describe her own Barristers experience:

Participating in the Barristers Section gave me the opportunity to meet and work with many lawyers whom I probably would not have met otherwise. Through the Barristers Section, I developed a network of colleagues who have provided support throughout my entire career. Perhaps most importantly, many of those people became lifelong friends.

Again, though, the first step in getting to that point is showing up. There are four main ways to get involved with the Barristers: 1) join the executive committee, 2) volunteer for one of our six sub-committees, which include CLE, government relations, law student outreach, legal profession, networking, and pro bono, 3) become a LACBA section liaison, and 4) simply attend Barristers programs and special events. From helping hone law students’ interviewing skills in our newly established mock interview law school program to assisting LACBA make people’s lives better facing domestic violence, AIDS, and immigration, there is a lot of good we can do for those within our legal community and for those outside of it. There is no shortage of events, either. One of the events we are looking forward to this year, which is quickly coming up in July, is a panel discussion on how to litigate your first high-profile case. The discussion will be followed by a cocktail reception at the Montage Hotel in Beverly Hills. This is definitely one event you do not want to miss, but our Montage event is just the start to a year filled with high-level and educational programming.

I hope you will join us this year as we grow together as young lawyers, help others develop into great young lawyers, and perhaps even pick up a case or client (or two or three) along the way. All you need to do is show up.

Robert Glassman is an associate at Panish Shea & Boyle LLP in Los Angeles, and is the 2015-16 President of the Barristers.
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Guidance on the Uniform Voidable Transactions Act

IN JULY 2014, THE NATIONAL CONFERENCE of Commissioners on Uniform State Law, also known as the Uniform Law Commission (ULC), amended the Uniform Fraudulent Transfer Act of 1984 (UFCA) and renamed it the Uniform Voidable Transactions Act of 2014 (UVTA).2 Fraudulent transfer laws fall largely under the jurisdiction of each individual state or territory, with a notable exception being the fraudulent transfer provision of the U.S. Bankruptcy Code.4 Thus, in an attempt to establish uniformity among the various fraudulent transfer laws in different jurisdictions, the ULC studies and prepares proposed legislation on a number of topics, which it then forwards to individual jurisdictions for consideration and adoption.5 The ULC has proposed uniform legislation on the laws governing fraudulent transfers for almost 100 years.9

In 1918, the ULC, in its first attempt to codify and unify the various fraudulent transfer laws in the United States, introduced the Uniform Fraudulent Conveyances Act of 1918 (UFCA).7 The UFCA is based on the principles propounded in the Fraudulent Conveyances Act of 1571, also known as Statute 13 of Elizabeth, which had been enacted by the English Parliament in the sixteenth century and was still widely used (in some form or another) in the United Kingdom, the Commonwealth, and the various jurisdictions of the United States.8 The UFCA provided that a transfer by a debtor meant to shield the debtor’s property from creditors was a fraudulent one, and thus could be avoided by the creditor, thereby treating the transfer as if it never occurred.9 The UFCA was adopted by 25 jurisdictions, including New York, which, along with Maryland, still continues to use the UFCA.10

In 1984, the ULC amended the UFCA, replacing the term “conveyance” with “transfer,” and renamed it the UFTA in order to more accurately reflect the applicability of the UFTA to real and personal property conveyances.11 Although the UFTA was similar to the UFCA in most respects, the UFTA allowed, among other changes, an existing or subsequent creditor to avoid a fraudulent transfer and eliminated a creditor’s ability to avoid a security transfer on the grounds that the value of the collateral securing an obligation was disproportionate to the secured debt (thus prohibiting foreclosures from being attacked and avoided as fraudulent transfers).12 The UFTA has been adopted by 43 states, Washington, D.C., and the U.S. Virgin Islands.13 Since its adoption, the provisions of the UFTA have been subject to conflicting interpretations in different jurisdictions across the United States, sometimes creating an inconsistent and unpredictable litigation environment.14 In order to address certain issues that arose as a result of conflicting judicial interpretations of the UFTA, the ULC amended the UFTA in 2014, renaming it the UVTA.15

The most obvious amendment to the UVTA is the removal of “fraudulent” and “transfer” from its title, which have been replaced with “voidable” and “transactions” respectively. The name change from “fraudulent transfer” to “voidable transactions” reflects the correction of the misnomer that has plagued fraudulent transfer law for years.16 Fraud has never been a required element in the prosecution of a claim under the UFTA, and its incorporation into the UFTA has been a source of confusion.17 The word “fraud” has created some trouble in the litigation of claims under the UFTA due to the heightened standard of pleading required for claims of fraud pursuant to the Federal Rules of Civil Procedure. It was incorrect to assume that UFTA claims require the same heightened standard of pleading as traditional fraud claims.

Rule 9(b) of the Federal Rules of Civil Procedure requires that “a party must state with particularity the circumstances constituting fraud….”18 This heightened pleading requirement has led to courts dismissing fraudulent transfer claims against debtors if the creditor has not specifically pled that the debtor had fraudulent intent in completing the transfer at issue.19 However, since fraudulent transfer claims are not common law fraud claims, the pleading of a fraudulent transfer claim does not need to meet the heightened standard set by the Federal Rules of Civil Procedure.20 The phrase “hinder, delay or defraud” in the UFTA refers not to a fraudulent transaction but instead one that “unacceptably contravenes norms of creditors’ rights.”21 Therefore, the term “fraudulent” was replaced with “voidable” to clear the confusion that has surrounded the litigation of fraudulent transfer claims. The word “transfer” was also replaced with the word “transactions” to include obligations incurred as well as transfers made.22

A significantly substantive amendment to the UVTA is the addition of a choice of law provision that identifies which jurisdiction’s fraudulent transfer law is to be used in determining claims under the UVTA, thus resolving any conflicts of law issues that may arise when litigating a fraudulent transfer claim that involves multiple jurisdictions. As mentioned above, while the ULC’s goal in drafting the UFCA, UFTA, and UVTA was to create uniform fraudulent transfer laws nationwide, many states, including California, have modified their versions of the UFTA, while others, including New York, have modified their versions of the UFCA.23 Such irregularities in fraudulent transfer laws affect the outcomes of certain multijurisdictional actions, depending on which jurisdiction’s fraudulent transfer law is used.

Brian Yeretzian is an associate at Hinds & Shankman, LLP, where his practice focuses on debtor, creditor, and trustee representation in bankruptcy court as well as representing parties in commercial disputes in state and federal court.
The UVTA sought to erase the irregularity that results from conflicts of law issues by adding a new choice of law section. Section 10 of the UVTA provides that a claim under it is “governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.”24 The UVTA further provides that a debtor who is a natural person is located at his principal residence and that a debtor who is an organization is located either at its principal place of business (if it only has one location) or at its chief executive officer’s office (if it has multiple locations).25 Because the determination of the debtor’s location is made at the time the fraudulent transfer occurs, a debtor will be prevented from making a fraudulent transfer in one jurisdiction and then moving to another jurisdiction in which the fraudulent transfer laws are more relaxed.26 The UVTA makes clear that the determination of a debtor’s location must be made “on the basis of authentic and sustained activity” and not “on manipulations employed to establish a location artificially.”27 This addition will help avoid unnecessary litigation surrounding conflicts of law issues in the prosecution and defense of fraudulent transfer claims.

Another important amendment made to the UFTA in the UVTA is the revision of the insolvency presumption. A debtor’s insolvency is an integral element in fraudulent transfer claims since under the UFTA and UVTA a transfer can only be avoided if the debtor was insolvent at the time of the transfer—unless the creditor can prove that the transfer was made with actual intent to “hinder, delay, or defraud” creditors.28 Since proof of insolvency can be difficult and expensive, the UFTA and the UVTA provide for an insolvency presumption. Under both acts, a debtor is considered insolvent if his or her liabilities exceed assets, or “balance sheet insolvency,” while a presumption of insolvency arises when a debtor is not paying his or her debts as they become due, or “cash flow insolvency.”29 This presumption was intended to allocate the final burden of proof of noninsolvency to the debtor, since the debtor is more likely to have access to information to prove that he or she is, in fact, solvent.

Despite the burden shift, some courts have applied a “bursting bubble” theory of presumptions, meaning that if the debtor has provided enough evidence to overcome the presumption of insolvency, the burden of proof again shifts to the creditor to prove the debtor’s insolvency.30 Other courts have kept the ultimate burden of proof of solvency with the debtor.31 In keeping in line with the goal of making the litigation of fraudulent transfer claims more predictable and less expensive, the UVTA sought to resolve the jurisdictional differences regarding the insolvency presumption by explicitly noting that the presumption of insolvency “imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.”32 In other words, the UVTA makes clear that after a creditor has shown that the debtor cannot pay his or her bills as they become due, the debtor must ultimately prove that he or she is more likely solvent rather than insolvent.

Apart from revising the insolvency presumption, the UVTA also updates the definition of insolvency for partnerships. Pursuant to the UFTA, a partnership is insolvent if “the sum of the partnership’s debts is greater than the aggregate, at fair valuation, of all of the partnership’s assets and the sum of the excess value of each general partner’s nonpartnership assets of the partner’s nonpartnership debts.”33 In other words, the UFTA includes the net worth of each of the partnership’s general partners in the value of the partnership’s assets.34 The UVTA deletes this special definition of insolvency for partnerships and employs the general balance sheet definition of insolvency used for individual and business debtors for partnerships as well. This revision was made in part because the definition of partnership insolvency under the UFTA credited the partnership with the net worth of each of its general partners while many partnership statutes do not require that all general partners be liable for all of the debts of the partnership.35 Similar to streamlining the insolvency presumption, the UVTA also amends the UFTA by clearly stating and allocating the burdens of proof and persuasion that are to be used in litigating fraudulent transfer claims, provisions which were lacking in the UFTA. These burdens are particularly important in fraudulent transfer claims because debtors are often uncooperative and untruthful in providing information to creditors.36 The UVTA explicitly states that the standard of persuasion for all claims under it is the “preponderance of the evidence.”37 It also allocates this burden of persuasion to specific parties with respect to specific claims.

Sections 4(c) and 5(c) of the UVTA explicitly state that the creditor asserting a fraudulent transfer claim under those sections bears the burden of proving the elements of the fraudulent transfer claim by a preponderance of the evidence. Sections 8(g) and 8(h) of the UVTA state that a party seeking to use the defenses available to a good faith transferee carries the burden of proof of the defense by a preponderance of the evidence. This means that pursuant to the UVTA, a transferee who wants to defend against avoidance of a transfer must ultimately prove, by a preponderance of the evidence, that he or she paid reasonably equivalent value for the property and made the transfer in good faith.38

The UVTA also goes a step further with regard to the burdens of proof and persuasion and explicitly states that courts “should not apply nonstatutory presumptions” that reverse the allocation and “should be wary of nonstatutory presumptions” that would dilute the allocation.39 Because of this, the UVTA goes against volumes of precedent that have resulted in nonuniform application of the UFTA and provides for more uniform prosecution of fraudulent transfer claims across the United States.40

The UVTA also makes minor revisions to

CONFLICTS OF LAW PROVISION

The Uniform Voidable Transactions Act of 2014 (UVTA) includes a provision that addresses which jurisdiction’s fraudulent transfer laws will govern in the case of a multijurisdictional fraudulent transfer action. This conflicts of law provision is not present in the Uniform Fraudulent Transfer Act of 1984 (UFTA), which is currently adopted in a majority of the states. The main impetus for inclusion of this provision is to limit a debtor’s ability to game the system by engaging in a fraudulent transfer in one jurisdiction and then moving to another jurisdiction to take advantage of less strict fraudulent transfer laws in that jurisdiction. The benefits of the new conflict of laws provision is exemplified below.

A debtor who lives in California “sells” his very expensive art collection in California on January 1, 2010 (without receiving reasonably equivalent value for the art collection and incurring debts that he cannot pay) and moves to Nevada, where he continues to incur debts and live a lavish lifestyle. The debtor knows that the statute of limitations in Nevada on fraudulent transfer actions is four years. When January 1, 2014, comes around, he can celebrate because under the current state of the law any creditor is out of luck in attempting to avoid that fraudulent transfer.

If the UVTA is adopted, the debtor is in trouble because the UVTA provides that the fraudulent transfer laws of the jurisdiction in which a debtor is located at the time of the fraudulent transfer governs in an action to avoid the transfer. Thus, because the debtor was in California when he putatively sold the expensive art, the debtor’s creditors have up to seven years, or until January 1, 2017, to sue the debtor to avoid the fraudulent transfer. Thus, the debtor will have to keep his champagne in the freezer for a few more years.—BY
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defenses available to transferees in fraudulent transfer actions. Pursuant to the UFTA and UVTA, an otherwise voidable fraudulent transfer is not voidable if the transferee takes the property in good faith and has paid a reasonably equivalent value for the property.43 Unlike the UFTA, however, the UVTA also requires that the reasonably equivalent value must be paid to the debtor.42

The UVTA also modifies a defense to fraudulent transfers resulting from the “enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code,” which provides that a secured party must enforce its rights in good faith, in a commercially reasonable manner, and must provide substantial protection to the debtor’s other creditors.43 The UVTA revision provides that a transfer that results from the enforcement of a security interest under UCC Article 9 “other than acceptance of collateral in full or partial satisfaction of the obligation it secures” is not voidable.44 This carve-out for strict foreclosures means that a transferee who receives its collateral due to a strict foreclosure is still subject to having that transfer voided; it is meant to protect a debtor’s other creditors since a debtor may not sufficiently protect his equity in the asset that is being foreclosed upon.45

The new UVTA also contains a provision that discusses its applicability to series organizations. A series organization is a special business organization comprising a series of membership classes in which each membership class, or series within the organization, owns a specific asset of the business organization.46 The benefit of a series organization is that each of the series within the organization is treated like a separate entity.47 Therefore, if one series defaults in an obligation, the default will not expose the assets of the other, non-defaulting series to the defaulting series’ creditors.48 Section 11 of the UVTA makes transfers between separate series in series organizations susceptible to avoidance actions under the UVTA by noting that for the purposes of the UVTA, the series organization, and each protected series of the series organization, is treated like a separate entity.49 This new provision will prevent series organizations from purposefully being used to circumvent fraudulent transfer liability.

The ULC, in amending the UFTA and renaming it the UVTA, sought to harmonize fraudulent transfer laws across the country and make the litigation and determination of fraudulent transfer claims more efficient, cost-effective, and predictable. Since the UVTA was amended in July 2014, it has been enacted in one iteration or another in Idaho, New Mexico, North Dakota, Minnesota, Kentucky, North Carolina, and Georgia. It also has been introduced, but not yet enacted, in California, Nevada, Colorado, Indiana, and Massachusetts. Thus, time will tell whether the revised UVTA will meet the goals the ULC intended for it.

3 See, e.g., CIV. CODE §§3439 et seq. California’s fraudulent transfer laws are based on the UFTA.
5 See Robert A. Stein, Forming a More Perfect Union: A History of the Uniform Law Commission (2013), http://www.uniformlaws.org [hereinafter Stein]. See also Case and Yeretzian, supra note 2, at 107. Since the amended UVTA has only been around since July 2014, it has not yet been adopted by any jurisdiction.
6 See Case & Yeretzian, supra note 2, at 107.
8 See Unif. Voidable Transactions Act, Prefatory Note (2014); see also Adkisson I, supra note 7.
9 See Adkisson I, supra note 7; see generally N.Y. DEBT. & CRED. LAW §§270-281 (New York state’s Fraudulent Conveyance Act, based on the UFCA).
11 See Unif. Voidable Transactions Act, Prefatory Note; see also Adkisson I, supra note 7.
12 See Unif. Voidable Transactions Act, Prefatory Note.
13 See Steven J. Boyadjian, Reconsidering the Uniformity of Uniform Fraudulent Transfer Act, AM. BANKER, INST. J., Apr. 2014, at 28 [hereinafter Boyadjian]. The UFTA has not been adopted in Alaska, Kentucky, Louisiana, Maryland, New York, South Carolina, Virginia, or Puerto Rico. Id. at 28 n.2.
14 Id.
15 See Unif. Voidable Transactions Act, Prefatory Note.
17 See id.; see also Adkisson I, supra note 7; Unif. Voidable Transactions Act, Prefatory Note.
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Demurrer Practice Considerations in California Courts

CALIFORNIA STATE COURTS are operating under unprecedented financial pressure. Years of budget cuts have led to crowded calendars, courtroom consolidations, and courthouse closures. Now more than ever before, our local courts must do more with less.1 Committed to continuing a tradition of excellence but facing these challenges, state court judges must necessarily rely upon counsel to expedite civil litigation. To do so, counselors must use the tools at their disposal efficiently and effectively. One such tool is the demurrer.

Although disfavored by many jurists because of overuse, when used correctly demurrers can eliminate meritless claims and focus court resources on the real issues. Misused, however, demurrers may be taxing and expensive for clients and courts. In 2013 and 2014, the Los Angeles Superior Court heard 24,300 demurrers—7,312 demurrers in unlimited civil cases and 6,988 demurrers in limited cases.2 Indeed, demurrers make up an estimated 38 to 45 percent of the law and motion calendar in the unlimited and limited civil courts.3 By keeping several key considerations in mind, practitioners can learn to use the demurrer properly, easing the burden on trial courts and creating value for clients.

A demurrer is a pleading4 that challenges the legal sufficiency of other pleadings, including complaints, answers, and cross-complaints.5 A demurrer challenges only the legal sufficiency of the pleading, not the facts.6 If the court sustains counsel’s demurrer without leave to amend, the court will dismiss the entire pleading, or a cause of action or affirmative defense alleged within that pleading. The court can also sustain the demurrer with leave to amend, which gives counsel an opportunity to allege additional facts in the complaint to state a legally sufficient cause of action. If the court instead overrules the demurrer, the pleading will stand and the matter proceed.

Technically, there are two types of demurrers available to counsel in the California state courts—the general and the special—although former Los Angeles Superior Court Judge Eric Younger notes that these terms are “largely historical, and not legally significant in most contexts,” except in limited civil cases in which special demurrers are not permitted.7 A general demurrer raises one of three nonwaivable challenges to a complaint, cross-complaint, or answer: 1) “[t]he pleading does not state facts sufficient to constitute a cause of action” under Section 430.10(c) of the Code of Civil Procedure, 2) “[t]he court has no jurisdiction of the subject of the cause of action alleged in the pleading or defense,” under Section 430.10(a), or 3) “[t]he answer does not state facts sufficient to constitute a defense” under Section 430.20(a). Except for the ground of a statute of limitations, the grounds for a general demurrer are never waived; counsel can later raise them in a motion for summary judgment, or even a motion for directed verdict at trial.8

All other grounds for demurrer are referred to as special demurrers. Special demurrers attack the form of the complaint. Grounds include: 1) the plaintiff’s lack of capacity to sue, 2) the existence of another action pending between the same parties on the same cause of action, 3) a defect or misjoinder of parties, 4) uncertainty, 5) in an action on a contract, the failure to allege whether the contract is written, oral, or implied, or 6) the failure to comply with the certificate of merit requirements applicable in malpractice actions against architects, engineers, and surveyors.9 Special demurrer objections are waived if they are not raised in a demurrer or an answer.10

Demurrer practice is governed by the California Code of Civil Procedure and the California Rules of Court.11 Counsel may demur “[w]hen any ground for objection to a complaint, cross-complaint, or answer appears on the face thereof.”12 Counsel may demur to an entire complaint or cross-complaint, or any of the causes of action stated therein.13 To survive an objection by demurrer, the challenged pleading must “set forth factual allegations that sufficiently state all required elements of the cause of action.”14 Thus, when the demurrer is for failure to state a claim, the challenged pleading must include the “ultimate facts sufficient to apprise the defendant of the factual basis for the claim against him.”15 The demurring party is deemed to admit “all material facts pleaded in the complaint and those that arise by reasonable implication, but not conclusions of fact or law.”16 Thereafter, “if it appears that the plaintiff is entitled to any relief against the defendant, the complaint will be held good.”17 While the court is generally restricted to considering the facts contained in the challenged pleading, the court may also consider any “matter of which the court is required to or may take judicial notice.”18 “Moreover, a party may not avoid demurrer by omitting facts pleaded in the original complaint ‘or by suppressing facts which prove the pleaded facts false.’”19 If a defect in the pleading does not appear

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on its face, or through the introduction of judicially noticed facts, counsel must object in an answer. If counsel has multiple objections—some to the sufficiency of the complaint and others to the merits of the allegations—counsel can demur and answer at the same time, although this procedure is uncommon.

**Leave to Amend**

Even if the court sustains a demurrer, it may grant leave to amend the pleading “upon any terms as may be just.” Thus, if “a reasonable possibility exists that amendment may cure the defect,” the court abuses its discretion by denying leave to amend. By the same token, the trial court need not simply defer to the plaintiff whenever he or she requests leave to amend. The plaintiff must prove that there is a “reasonable possibility” that amendment will cure the defective pleading. “[T]he burden is on the plaintiff to show what manner the complaint can be amended and how such an amendment would cure the defect.” The plaintiff cannot satisfy his or her burden with an “assertion of an abstract right to amend.”

To do so, the courts have recognized, “would make the demurrer meaningless.” Thus, demurring counsel should be wary of an objection that will be sustained with leave to amend. Such a demurrer only prolongs the proceedings and highlights to opposing counsel the weaknesses of its complaint. Demurring counsel’s resources may be better spent on a motion for judgment on the pleadings or, later, for summary judgment.

**Effective Demurrers**

What makes for an effective demurrer? First, unless counsel has a particularly good reason, he or she should only demur when his or her objection will entirely dispose of a lawsuit or cause of action. Rather than narrowing the issues, a valid demurrer that can be cured through amendment only delays the proceeding. Instead, demurring counsel should consider asking opposing counsel if he or she will agree to amend the complaint to cure any defects. This can save the court time and resources and save the parties the headache of amending the complaint. For the meet-and-confer to be effective, however, demurring counsel must at a minimum identify any purportedly inadequate paragraphs and initiate a meaningful discussion regarding each purported defect. Weil and Brown suggest that counsel consider whether the “uncertainties” identified by demurrer might be cured through written discovery. Second, a short summary of counsel’s argument contained in the introduction of a memorandum of points and authorities can be effective. This summary should not exceed one or two pages. Including such a summary quickly orients the judge—who may have limited time to review counsel’s brief—for any nuanced arguments that follow.

Third, a timeline can also be effective. The best place for a timeline is also in the introduction of the points and authorities. Like the summary of counsel’s argument, the timeline orients the judge in a matter’s narrative. Fourth, only relevant case authorities should be included. String cites are to be avoided, particularly for such noncontroversial items as the standard of review on summary judgment, basic evidentiary principles, and other settled principles and procedures.

Fifth, counsel should understand and make use of the weight of authority. California Supreme Court decisions are mandatory precedent on the courts of appeal and trial courts. However, only published decisions are given precedential effect. Many attorneys are unaware that a decision of the California Court of Appeal is binding on all trial courts, regardless of which division rendered it. At the same time, there is no horizontal stare decisis within the courts of appeal; a decision by one division is not binding on another. Finally, briefs should be brief. Two arguments are too many when one will suffice.

The long-reviled “kitchen sink” demurrer is still reviled. Moreover, if the demurrer does not “distinctly specify the grounds” of counsel’s objection to the complaint, cross-complaint, or answer, the court, in its discretion, may disregard the demurrer.

**Demur to Demurrer?**

Because California courts are so overburdened, the best demurrer may be no demurrer. What types of demurrers tend to succeed more often? While there are no hard-and-fast rules, anecdotal evidence abounds. A demurrer based on a legislative enactment or clear case law is more likely to succeed than one involving an unresolved legal question, new interpretation of statute, or a question left unresolved by applicable case law. The same is true for demurrers that are based upon an extension of existing law, or an argument for the application of existing law to some new set of facts. In contrast, a claim based on a novel legal theory, or involving some new form of proof of a legal theory, may be ideally suited for a general demurrer. Claims involving intentional wrongdoing, fraud, and punitive damages, or other claims requiring heightened pleading predictably elicit general demurrers. Finally, because courts generally prefer to reach the merits of a cause of action, a demurrer has an increased chance of success when the cause of action to which it objects does not require factual development and discovery.

With these factors in mind, demurrers involving the following claims or defenses tend to have a high probability of complete success: 1) a governmental immunity defense, 2) the failure to file a timely Department of Fair Employment and Housing or governmental tort claim, 3) a statute of limitations defense, 4) a claim for intentional or negligent infliction of emotional distress related to a wrongful termination claim, 5) a claim for negligent infliction of emotional distress by a third party or bystander, and 6) a claim in which worker’s compensation is the exclusive remedy.

Following the same analysis, demurrers attacking the following claims typically have only a moderate chance of success: 1) intentional interference with prospective economic relations, 2) negligent interference with prospective economic relations, 3) intentional interference with contractual relations, 4) failure to exhaust administrative remedies, 5) hostile work environment due to severe and pervasive harassment, 6) defamation (libel or slander), 7) breach of the implied covenant of good faith and fair dealing, 8) breach of fiduciary duty, 9) conversion, 10) insurance bad faith claims, and 11) personal privacy claims. Finally, demurrers challenging the following claims have a low chance of success: 1) breach of contract, 2) fraud, 3) negligence and professional or medical malpractice claims, 4) products liability and asbestos claims, 5) premises liability, 6) intentional infliction of emotional distress claims related to sexual harassment, 7) wrongful termination due to retaliation, disability, race, or sex, 8) assault and battery, 9) false arrest or false imprisonment, 10) elder abuse, and 11) malicious prosecution. The vast majority of the demurrers filed in Los Angeles Superior Courts in 2013 and 2014 did not succeed in obtaining dismissal of the entire case. Although the above generalizations are not entirely predictive, they may aid counsel considering a demurrer.

**Demurrers to Answers**

Just as a defendant may demur to an entire complaint or to any cause of action contained therein, a plaintiff may demur to an entire answer or to any defense contained therein. Three grounds exist to demur to an answer: 1) the failure to state facts sufficient to constitute a defense, 2) uncertainty, and 3) the failure to state whether a contract alleged in the answer is written or oral. When an affirmative defense constitutes a new matter, the defendant must plead the ultimate facts constituting the defense to the same extent as a cause of action in a complaint. A new matter is one for which, at trial, the defendant will have the burden of proof. When a defendant’s answer simply negates an essential allegation in the complaint, in contrast, the defendant does not create a new matter. In this case, the defendant does not need to specifically plead
such a defense, and the plaintiff cannot demur to that defense.

**Motions to Strike**

Any discussion of demurrer practice would be insufficient without a brief comment on the motion to strike. The motion to strike can reach defects that a demurrer cannot. For instance, it can be used against any pleading, including a demurrer, and can be used to strike an entire pleading or cause of action, or, unlike a demurrer, any portion of a cause of action. A motion to strike asks the court to “strike out any irrelevant, false, or improper matter in the pleading upon terms it deems proper.”

A demurrer is a pleading under Code of Civil Procedure §422.10, although for practical purposes it is treated just like a motion. With some important exceptions, the Code of Civil Procedure and the California Rules of Court treat demurrers much like other motions. California Rule of Court 3.113 expressly makes all the motion rules applicable to demurrers “[u]nless the pleading or subject matter otherwise requires.” Cal. R. Ct. 3.1103(c). See also Cal. R. Ct. 3.1112 (“Motions—other pleadings”), 3.1113 (“Motion—required elements”). California Rule of Court 3.1320 sets forth format rules expressly directed to demurrers. See Cal. R. Ct. 3.1320.


Title Ins. Co. v. Comerica Bank—Cal., 27 Cal. App. 4th 800, 807 (1994) (holding that a demurrer does not test “the truth of [the plaintiff’s] factual allegations or the plaintiff’s ability to prove those facts”).


This figure does not include the nearly 26,000 cases filed in four Personal Injury Courts, nor the several thousand cases currently pending in the Complex Civil Courts. Data collected for use by the leadership of the Los Angeles Superior Court.

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IN A RECENT CONSTITUTIONAL CHALLENGE to the California Education Code, Vergara v. California, the Los Angeles Superior Court declared that five of its challenged statutes violate the fundamental right of students to education—a right protected by the California Constitution. The plaintiffs successfully argued that the laws create inequalities in the educational opportunities being afforded to students across California. In striking down the challenged statutes, the court issued four important findings. First, the court held that the Permanent Employment Statute, which forces school districts to make tenure decisions after teachers have been on the job for only 16 months, provides too little time for school administrators to evaluate whether a teacher is effective. Thus, districts grant permanent status to some grossly ineffective teachers who would be screened out if districts had more time to make considered decisions. Second, the court found that three statutes pertaining to teacher dismissal standards make it virtually impossible for districts to remove ineffective teachers from the classroom once they obtain tenure. School districts must spend years and hundreds of thousands of dollars to dismiss a single grossly ineffective teacher—and even then, their efforts are likely to fail, with the result that district administrators are left with no choice but to assign ineffective teachers to classrooms. Third, when an economic downturn or declining enrollment forces school districts to conduct layoffs, administrators still may be prevented from removing grossly ineffective teachers because of the “last-in, first-out” layoff statute (also known as the LIFO statute) forcing them instead to fire teachers based exclusively on seniority. Finally, poor and minority students are relegated disproportionately to classrooms with less effective teachers. Consequently, these students fall further behind their peers, which exacerbates the achievement gap that education is supposed to ameliorate.

The defendants, including California’s teachers unions and the California Department of Education (CDE), argued that the challenged statutes are needed to protect due process rights of teachers and that without these laws school districts would be unable to recruit and

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retain teachers. Ultimately, however, the defendants were unable to justify the harm that the challenged statutes impose on students or the disproportionate burden they place on economically disadvantaged and minority children. The court, therefore, ruled that the challenged statutes violate the California Constitution. The Vergara decision is a groundbreaking ruling because it represents the first time a court has declared teacher quality to be an integral component of a student’s fundamental right to education and has ruled that excessive teacher employment protections are unconstitutional because they systematically harm students.4 The legal arguments underpinning Vergara, however, are grounded in decades of constitutional litigation.

More than 40 years ago the California Supreme Court recognized in Serrano v. Priest that education is a fundamental interest guaranteed by the California Constitution.5 Education is a fundamental right because it “lies at the core of our free and representative form of government.”6 Moreover, access to education is “the bright hope for entry of the poor and oppressed into the mainstream of American society.”7 In Serrano and other cases, the California Supreme Court has declared that “the right to an education today means more than access to a classroom.”8 At a minimum, the fundamental right to education guarantees that “all California children should have equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society.”9 In order to fulfill the constitutional promise of a meaningful education for all California children, “the State itself has broad responsibility to ensure basic educational equality.”10 When the state’s laws infringe on the fundamental right to educational opportunity, it is the role of the courts to invalidate those unconstitutional laws.11 Serrano arose in the funding context: the court declared that there can be no equality of educational opportunity without equal funding.12 Twenty years later, in Butt v. California, the California Supreme Court explained that the amount of time students spend in school also must be equal statewide.13 However, if funding and time in school are equal, students still cannot be assured of equal educational opportunities unless they have equal access to effective teachers. Teachers are the very vehicle through which students receive their education. In the words of John Deasy, former superintendent of the Los Angeles Unified School District: “The mission of the District is to assure that students learn…. In order to do that, the most important factor is a teacher, a highly effective teacher.”14 The CDE has acknowledged that “[t]he academic success of California’s diverse students is inextricably tied to the quality and commitment of our educator workforce.”15 Because “teacher quality is the single most important school-related factor in student success.”16

**Facial Challenge: Strict Scrutiny Review**

In Vergara the court agreed with the plaintiffs’ argument that the challenged statutes must be analyzed under the strict scrutiny standard, under which the “state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.”17 After the plaintiffs introduced the testimony of witnesses drawn from 28 school districts across California covering more than 22 percent of California students, seven leading education experts, and documentary evidence,18 the court ruled that the challenged statutes are facially unconstitutional for two reasons. One, the challenged statutes impose a “real and appreciable impact” on the right of students to education,19 and two, the challenged statutes have a disparate adverse impact on poor and minority students.20

The California Supreme Court has held that “the unique importance of public education in California’s constitutional scheme requires careful scrutiny of state interference with basic educational rights.”21 When a statute inflicts a “real and appreciable impact on, or a significant interference with the exercise of [a] fundamental right…the strict scrutiny doctrine will be applied.”22 Because “education is the life line of both the individual and society,”23 laws that inflict a “real and appreciable impact” on the fundamental right to education are unconstitutional unless they are narrowly tailored to serve a compelling state interest.24 California courts may look beyond the text of a statute when determining whether the statute is facially unconstitutional.25 As the name of the supreme court’s test implies, it is the statute’s “impact” that matters.26 The evidence presented by the Vergara plaintiffs established the substantial harms being imposed on students by the challenged statutes. The court in Vergara considered this evidence to determine whether the statutes in fact result in an unconstitutional deprivation of fundamental rights.

The Vergara plaintiffs successfully challenged the Permanent Employment Statute as harmful to students because it forces school districts to make tenure decisions before having an opportunity to evaluate the teacher’s effectiveness in an informed manner. The statute requires districts to notify teachers whether they will be reelected to permanent teaching positions no later than March 15th of the teachers’ second probationary year.27 Sixteen months simply is an insufficient amount of time for administrators to make well-informed tenure decisions for all of their probationary teachers because of the limited amount of classroom evaluation data, student and parent input, and student achievement data that can be collected over such a short period.

The dismissal statutes harm students because they prevent school districts from dismissing grossly ineffective teachers. The Vergara plaintiffs established that when a district is forced to dismiss an ineffective teacher through the process prescribed by the three statutes pertaining to teacher dismissal, it takes two to 10 years and costs $250,000 to $450,000 or more per teacher. Even then, the Commission on Professional Competence does not rule in favor of dismissal unless the district can show that the teacher is “incapable of remediation.” As a result, districts in California rarely seek dismissal of grossly ineffective teachers. Only 2.2 teachers are dismissed on average each year for unsatisfactory performance in California out of the 277,000 teachers statewide.28 The Los Angeles Unified School District (LAUSD) alone is aware of at least 350 grossly ineffective teachers that it believes should be dismissed immediately.29

The LIFO statute harms students because, in the event of districtwide layoffs, it compels school districts to adhere to a reverse-seniority selection process. The statute means that a teacher can be named teacher of the year and be laid off the same year. A former superintendent issued LIFO as follows: “[A] system that treats its best teachers this way…[and] ultimately doesn’t serve children…is broken.”30

**De Facto Analysis**

The California Supreme Court has emphasized the importance of factual analysis of external evidence and practical considerations in determining the facial constitutionality of a statute. For example, the statutes that comprised the school financing system at issue in Serrano were facially neutral, but the court examined the real-world effects of the relevant statutes and determined that “as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts.”31 The court rejected the state’s argument that the court should not concern itself with “unequal treatment [that] is only de facto, not de jure,”32 holding that courts “must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education.”33
gendered individuals seeking changes of gender on their birth certificates to file petitions in their counties of residence. The plaintiff alleged—and the court agreed—that the statutory provision at issue violated the equal protection rights of California-born transgenders individuals who lived out-of-state because it “effectively” denied them the right to obtain new birth certificates. Crucially, although the statute “on its face [did] not appear to create a class of petitioners that [was] treated differently, the [statute]…act[ed] to deny the rights created under the statute” to California-born transgenders individuals who lived out-of-state.

Indeed, when an equal protection challenge is premised on the infringement of a fundamental right rather than a suspect classification, the law at issue is often facially neutral. In Bullock v. Carter, for example, the U.S. Supreme Court held that a law requiring all political candidates to pay election filing fees was unconstitutional under the federal equal protection clause, despite the fact that the statutory language at issue did not expressly distinguish between individuals or classify groups of individuals. The Bullock court held that the filing fee requirement, the “initial and direct impact” of which was “felt by aspirants for office, rather than voters,” nonetheless violated the equal protection rights of voters because it “tend[ed] to deny some voters the opportunity to vote for a candidate of their choosing.” It would “ignore reality,” the court held, to overlook the fact that the “limitation…fell] more heavily on the less affluent segment of the community.”

Also, in Gould, the California Supreme Court was asked to “determine the constitutionality of an election procedure which automatically afford[ed] an incumbent, seeking reelection, a top position on the election ballot.” Even though the statute itself said nothing about voters, the court applied strict scrutiny and struck down the law because it “impose[d] a very real and appreciable impact on the equality, fairness and integrity of the electoral process,” thereby infringing the equal protection rights of voters. As the court explained, by providing “advantageous positions” to certain candidates, the election procedure “inevitably discriminate[d] against voters supporting all other candidates.”

The court in Vergara also recognized that the “real and appreciable impact” test does not require a showing by the plaintiffs that the challenged statutes are the sole cause, or even the “but for” cause, of the infringement on students’ fundamental right to education. The court’s ruling is premised on well-established precedent. The California Supreme Court clarified this very point in Gould:

The city asserts that because its ballot placement procedure does not cause or encourage voters to cast their ballots haphazardly, it cannot be held constitutionally responsible for any resulting inequality in the voting procedure. This argument simply misconceives the nature of the equal protection guarantee….It is the unequal effect flowing from the city’s decision to reserve the top ballot position for incumbents that gives rise to the equal protection issue.

In Serrano, the school financing statutes at issue did not cause districts to tax themselves at rates that produced disparities in educational opportunity—districts could, after all, select whatever tax rate they desired. The court recognized, however, that “the system itself” imposed practical “limitations” on the ability of the districts to provide their students with equal educational opportunities. Notwithstanding the nominal decisions that districts could make under the statutes, the court held that the “source of these disparities [was] unmistakable.” Relying on Serrano, the Vergara plaintiffs argued that the challenged statutes are facially unconstitutional because they “pose a present total and fatal conflict” with student rights, resulting in significant educational disparities. Disparate Impact

The Vergara court also accepted the argument of the plaintiffs that the challenged statutes required strict scrutiny even when the text of the law does not expressly draw distinctions among students on the basis of race or wealth and even in the absence of evidence that the law was enacted (or is being applied) with the purpose or intent of harming minority or low-income students. California law does not require a showing of discriminatory intent, provided there is a showing of disparate impact with respect to a fundamental right. In the words of the California Supreme Court, the California Constitution “demand[s] an analysis different from that which would obtain if only the federal standard were applicable.”

In the 1971 Serrano decision (Serrano I), the state argued that “no constitutional infirmity [was] involved because the complaint contain[ed] no allegation of purposeful or intentional discrimination.” The court explained that the “whole structure of this argument must fall for want of a solid foundation in law or logic.”
disparate impact is unconstitutional even when it is “merely de facto.”52 Accordingly, the court held that the plaintiffs properly asserted constitutional claims based on the “substantial disparities” resulting from the school financing scheme at issue.53

In Serrano II—the 1976 decision issued after Washington v. Davis—54 the California Supreme Court affirmed its earlier holding.55 As the court explained, “the fact that a majority of the United States Supreme Court ha[s] now chosen to contract the area of active and critical analysis under the strict scrutiny test for federal purposes can have no effect upon the existing construction and application afforded our own constitutional provisions.”56 In fact, the court pointed out that, even though the California Legislature had made “significant” and well-intentioned “improvements” to the state’s school financing scheme following the Serrano I decision, the amended school financing system was still unconstitutional because of its disparate impact.57

Like Serrano, the Vergara plaintiffs proved harm by demonstrating the de facto disparate impact on students. Ruling that access to effective teachers is critical to a student’s education, the court concluded that the challenged statutes—which ensure that California students will not have equal access to even minimally effective teachers—have a “real and appreciable impact” on the fundamental right to equal educational opportunity, and therefore that strict scrutiny applies.58 The former superintendents of Los Angeles, Sacramento, and Oakland school districts explained at trial that the focus of our education system must be on effective teaching that meets the needs of, and improves the lives of, the students. Moreover, they pointed out the various flaws in the challenged statutes that thwart effective teaching, particularly for poor and minority students.

The court found that the challenged statutes lead to a well-documented phenomenon known colloquially as the dance of the lemons. Because dismissal is not a viable option, principals seeking to improve their schools try to transfer ineffective teachers to other schools within the district. The schools that bear the brunt of these transfers are the schools serving predominantly low-income students, which typically have more vacancies and families who are less likely to complain.

The Vergara plaintiffs relied on unrebuted data that bears out that in LAUSD African American and Latino students are 43 percent and 68 percent more likely, respectively, to be stuck with a teacher in the bottom 5 percent of effectiveness than are white students. Low-income students in LAUSD are nearly twice as likely to have an ineffective teacher than their more affluent peers. The CDE admitted the prevalence of this injustice in California: “[T]he most vulnerable students—those attending high-poverty, low-performing schools—are far more likely than their wealthier peers to attend schools having a disproportionate number of ineffective teachers.”59

The existence of feasible alternatives is fatal under a strict scrutiny review.60 The Vergara plaintiffs proved that with respect to the Permanent Employment Statute, California is one of only five states with a probationary period of two years or less.61 Thirty-two states have three-year probationary periods, nine states have four- or five-year probationary periods, and four states have no tenure system.62 The evidence also showed that, with respect to the statutes pertaining to teacher dismissal, the California public school system itself provides feasible alternatives because the time and burden associated with dismissing nonteacher school employees is significantly less than dismissing a tenured teacher. LAUSD spends only $3,400 on average to dismiss a nonteacher employee, and the process takes “not much more than a month, month and a half.”63 With respect to the LIFO statute, California is one of only 10 states in which seniority must be considered in determining which teachers to lay off—20 states prohibit seniority from being the sole factor, and two states prohibit seniority from being considered.64

The Vergara defendants’ due process argument also did not save the challenged statutes. The court ruled that striking down the challenged statutes does not impair the constitutional due process rights that teachers—like all other public employees in California—enjoy.65 Teachers continue to have the right to notice and an opportunity to be heard before being dismissed for cause.66 The law still will prohibit districts from dismissing teachers for discriminatory reasons.67 Also, teachers will not be dismissed for teaching controversial subjects like Islam or evolution, which are part of the state curriculum. In rejecting the due process argument, the court found that the statutes provide excessive and unnecessary protections that go far beyond the requirements of due process, placing teachers in a category all to themselves and harming students in the process.

Although staying pending appeal, Vergara has already launched extensive public dialogue about the problems of excessive teacher protections.68 Sparked legislative initiatives to reform the California Education Code and related laws elsewhere,69 and led to similar lawsuits being filed in other states.70 U.S. Secretary of Education Arne Duncan described Vergara as “a mandate to fix these problems” and “an opportunity...to build a new framework for the teaching profession that protects students’ rights to equal educational opportunities while providing teachers the support, respect and rewarding careers they deserve.”71

5 E DUC . CODE §44929.21(b).
6 E DUC . CODE §§44934, 44938(b)(1)-2, and 44944.
7 E DUC . CODE §44955.
9 Serrano v. Priest, 5 Cal. 3d 584, 608-09 (1971) (Serrano I); see also CAL. CONST. ART. I, §7; ART. IV, §16; ART. IX, §§1 & 5.
10 Serrano v. Priest, 18 Cal. 3d 728, 767-68 (1976) (Serrano II); see also Serrano I, 5 Cal. 3d at 608-09.
11 Serrano I, 5 Cal. 3d at 609; see also supra San Francisco Unified Sch. Dist. v. Johnson, 3 Cal. 3d 937, 950 (1971) (“Unfair education . . . leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.”).
12 Serrano I, 5 Cal. 3d at 670; see also, e.g., Butt v. California, 4 Cal. 4th 668, 688 (1992).
14 Trial transcripts and exhibits are on file with the authors. Videos of most trial testimony and many trial exhibits are available at http://www.studentsmatter.org.
15 Id. at 748.
16 Butt, 4 Cal. 4th at 683.
17 See, e.g., Serrano II, 18 Cal. 3d at 776.
18 Id. at 748.
19 Butt, 4 Cal. 4th at 683; id. at 687 (“District students faced the sudden loss of the final six weeks, or almost one-fifth, of the standard school term . . . provided that protects students’ rights to equal educational opportunities.”)
21 Butt, 4 Cal. 4th at 683.
24 Butt, 4 Cal. 4th at 683.
25 See Gould v. Grubb, 14 Cal. 3d 661, 669 n.9 (1975) (“It is the unequal effect flowing from the [challenged law] that gives rise to the equal protection issue in question”); In re Smith, 143 Cal. 368, 372 (1904) (“[C]ourts are not limited in their inquiry to those cases alone where such a situation is shown upon the reading of the statute. They will consider the circumstances in the light of existing conditions.”); see also Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (“Law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal.”).
26 Butt, 4 Cal. 4th at 686.
27 E DUC . CODE §44929.21(b).
28 2/29/14 Tr. at 4914:14-23 (testimony of F. Fekete); 3/18/13 Tr. at 8503:9-12 (testimony of L. Nichols).
29 3/21/14 Tr. at 9238:27-9240:4 (testimony of V. Elchian).
30 2/3/14 Tr. at 2043:20-2045:15 (testimony of J. Raymond).
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Serrano v. Priest, 5 Cal. 3d 584, 598 (1971); see also id. at 599-600 ("[A]s a statistical matter, the poorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts.").

Id. at 601.

46 Serrano v. Priest, 5 Cal. 3d 584, 594 (1971)).


48 See, e.g., Coral Construction, Inc. v. City & County of S.F., 50 Cal. 4th 315, 332, 338 n.20 (2010); Serrano I, 5 Cal. 3d at 596-619.


50 Serrano II, 18 Cal. 3d at 764.

51 Serrano I, 5 Cal. 3d at 600-01.

52 Id. at 602-04 (citing Jackson v. Pasadena City Sch. Dist., 59 Cal. 2d 876, 881 (1963); San Francisco Unified Sch. Dist. v. Johnson, 3 Cal. 3d 937, 937 (1971)).

53 Serrano v. Priest, 5 Cal. 3d 584, 618 (1971); see also Butt, 4 Cal. 4th 668, 682 (1992) ("[U]nder California principles . . . the absence of purposeful conduct by the State [does] not prevent a finding that the State system for funding public education had produced unconstitutional results."). (citations omitted).

54 The U.S. Supreme Court In Washington held that a facially neutral law does not violate the Equal Protection Clause of the federal Constitution "simply because it may affect a greater proportion of one race than of another." Washington, 426 U.S. at 242. Instead, a federal Equal Protection plaintiff must prove that a law was passed or is being implemented with a "racially discriminatory purpose." Id. at 240-41.


56 Id. at 765.

57 Id. at 741, 768.


59 PIs. ‘Ex. 289 at P0289-5.


61 2/19/14 Tr. at 4732:8-4733:3 (testimony of S. Jacobs).

62 PIs. ‘Ex. 683 at P0683-3.

63 3/21/14 Tr. at 9244:20-9245:3 (testimony of V. Ekchian); 2/5/14 Tr. at 2622:15-19 (testimony of M. Douglas).

64 2/19/14 Tr. at 4742:16-4743:25 (testimony of S. Jacobs).


66 Id.

67 See, e.g., Gov’t Code § 12940(a).


AS COURTS have held, “The general rule with respect to the liability of an attorney for failure to properly perform his duties to his client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.” More particularly, the elements of a cause of action for legal malpractice are “(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney’s negligence.” It is commonplace for plaintiffs and defendants in legal malpractice cases to call expert witnesses to either support or refute the existence of a particular duty owed by attorneys to their clients and whether the facts at issue constitute a breach of that duty.

In Wright v. Williams, the appellants bought a boat with which to operate their diving business. They consulted Williams, the respondent attorney and a specialist in maritime law, about the existence of possible liens for past repairs on the vessel. They also asked questions concerning its ownership and the matter of a mortgage upon the boat. They did not inform Williams that they intended to use the boat in a business venture and, when asked how the vessel would be used, replied, “pleasure.” The attorney arranged for the transfer of title of the vessel, removed an existing mortgage, and provided for indemnity against liens.

The documents of title for the vessel included a statement on a bill of sale that it should not be used “in the coastwise trade” pursuant to the Merchant Marine Act if, at some time, it had been owned by an alien. The term “coastwise trade” includes hauling passengers for hire between ports in the United States. The boat had once been owned by an alien.

Michael D. Marcus, a former supervising judge of the State Bar Court, is a mediator, arbitrator, and discovery referee with ADR Services, Inc.
by a Mexican national. After the appellants were cited by the Coast Guard for using the boat in violation of the Merchant Marine Act, they sued their attorney for malpractice, claiming that he had negligently represented them in the boat’s purchase. The appellants in Wright offered no expert testimony at trial as to their claim that the respondent had failed in the performance of his duty of care. At the conclusion of their case in chief, the trial court granted the respondent’s motion for judgment, pursuant to Code of Civil Procedure Section 631.8, because, in part, the appellants had not carried their burden of proof. On appeal, the court first cited out-of-state authority and a California legal treatise for the proposition that “In some situations, at least, expert testimony is not required...[when] the failure of attorney performance may be so clear that a trier of fact may find professional negligence unaided by the testimony of experts. Where, however, the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met.”

The court then affirmed the judgment for the respondent because the case was one in which expert testimony was needed.

The court observed that the “[r]espondent was engaged to perform a service in the highly specialized area of admiralty law. He failed to call his clients’ attention to a problem in the documentation of (the ship), the significance of which cannot be determined by reference to general knowledge. Without expert testimony that a reasonably prudent specialist in admiralty law would, under the facts as the trial court found them, have acted differently than did respondent, there is no basis to attach legal fault to his conduct.”

Wilkinson v. Rives offers a lesson similar to that of Wright. Rives, an attorney, prepared and recorded a homestead declaration on the residence of the appellants. The declaration did not contain the optional affidavit provided for in the Civil Code at the time. Later on, the appellants entered into an agreement to sell the residence for $90,000. A preliminary title report was obtained from California Land Title Company (CLTC), another respondent in the case. CLTC denied appellants title insurance of attorney performance is so clear that a trier of fact may find professional negligence unaided by expert testimony, the court held that in the instant case expert testimony was required and affirmed the judgment. As the court in Wilkinson put it, “Whether an attorney in the exercise of due care in preparing for his client a declaration of homestead should have the client sign and verify

While acknowledging that expert testimony, otherwise admissible, is not objectionable just because “it embraces the ultimate issue to be decided by the trier of fact,” the appellate court in Piscielli also recognized that an expert opinion, whether or not it embraces an issue of law, is not admissible if it invades the province of the jury to decide a case.

The appellants claimed they had lost the homestead exemption in the sale of the property because Rives had prepared an invalid exemption. The appellate court rejected the contention because the declaration had been properly signed, acknowledged, and recorded, and the appellants had never lost their homestead exemption. The court reasoned that the optional affidavit Rives had not included did not affect the validity of the homestead declaration but merely pertained to certain evidentiary presumptions that arose when the optional affidavit, properly verified, was included in the declaration.

The appellants claimed they had lost the homestead exemption in the sale of the property because Rives had prepared an invalid exemption. The appellate court rejected the contention because the declaration had been properly signed, acknowledged, and recorded, and the appellants had never lost their homestead exemption. The court reasoned that the optional affidavit Rives had not included did not affect the validity of the homestead declaration but merely pertained to certain evidentiary presumptions that arose when the optional affidavit, properly verified, was included in the declaration. The court also observed that “For reasons best known to the appellate court...”

The court observed that “For reasons best known to appellants they never asserted their homestead exemption as against the various judgments and liens disclosed in the preliminary title report, but instead elected to negotiate and settle with the judgment creditors outside of escrow.”

More importantly, Wilkinson found it critical that the appellants failed to present expert testimony that Rives was negligent in failing to have them sign and verify the optional affidavit. While recognizing that expert testimony is unnecessary if the failure to call his clients’ attention to a problem in the documentation of (the ship), the significance of which cannot be determined by reference to general knowledge. Without expert testimony that a reasonably prudent specialist in admiralty law would, under the facts as the trial court found them, have acted differently than did respondent, there is no basis to attach legal fault to his conduct.”

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Expert testimony must be used in every legal malpractice case. If it is admissible, the claim against the attorney is related to that expertise.

1. The requirement for expert testimony in any legal dispute is subject to detailed statutory analysis. True False.
2. The elements of a legal malpractice claim are: 1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise, 2) a breach of that duty, 3) a proximate causal connection between the breach and the resulting injury, and 4) actual loss or damage resulting from the attorney’s negligence. True False.
3. Expert testimony in a legal malpractice action is admissible as to the elements of the existence of a duty and breach of that duty. True False.
4. The elements of a breach of fiduciary are the same as those for a legal malpractice claim. True False.
5. The trial judge decides whether expert testimony is admissible. True False.
6. The standards for admitting expert testimony are whether the opinion relates “to a subject that is sufficiently beyond common experience” and is “based on matter...of a type that reasonably may be relied upon by an expert in forming an opinion...” True False.
7. Expert testimony in a legal malpractice case is not admissible if it invades the province of the jury to decide the case. True False.
8. Expert testimony must be used in every legal malpractice case. True False.
9. An expert is needed in a legal malpractice action if the attorney held himself or herself out as a legal specialist and the claim against the attorney is related to that expertise. True False.
10. Day v. Rosenthal, because of its extraordinary facts, is an exception to the general proposition that expert testimony is required in legal malpractice cases. True False.
11. An expert is not needed in a court trial, as opposed to a jury trial, regarding legal malpractice if the attorney held himself or herself out as a legal specialist and the claim against the attorney is related to that expertise. True False.
12. If the attorney held himself or herself out as a legal specialist, and the claim relates to that expertise, the expert testimony should be whether a reasonably prudent specialist in that area of expertise would have acted differently or the same as did the defendant attorney. True False.
13. A legal malpractice claim can ordinarily be proven without an expert testifying about the applicable standard of care and the breach of that duty. True False.
14. Experts in a legal malpractice case regarding whether a legal specialist breached his or her duty of care should be knowledgeable in the same specialty. True False.
15. An expert is not needed in a legal malpractice claim if the attorney’s performance is so clearly contrary to established standards that a trier of fact may find professional negligence unassisted by expert testimony. True False.
16. A critical finding by the trial judge whether expert testimony is required in a legal malpractice claim is the amount of the claimed loss or damages. True False.
17. An expert is not required in a legal malpractice action if it is common knowledge that an attorney must perform a particular duty or act. True False.
18. Expert testimony is needed in a malpractice action if the question for the trier of fact is whether an expert in admiralty law would have acted differently than the defendant attorney. True False.
19. Expert testimony is required if a client has sued the former attorney only for breach of fiduciary duty. True False.
20. Expert testimony in a legal malpractice case may be used to show what a reasonable trier of fact would have done in the underlying case. True False.
priate in all cases....Where the attorney’s performance is so clearly contrary to established standards that a trier of fact may find professional negligence without expert testimony, it is not required.”

Nonetheless, the court in Day acknowledged that expert testimony may be necessary in a legal malpractice case. Citing Rives and Wright, the Day court observed, “Of course, a judge may resort to expert testimony to establish the standard of care when that standard is not a matter of common knowledge, or where the attorney is practicing in a specialized field. However, Rosenthal's numerous, blatant and egregious violations of attorney responsibility were not breaches of legal technicalities for which expert testimony is required. They were violations of professional standards; standards which the trial court was compelled to notice.”

In David Welch Company v. Erskine & Tulley, Welch, a licensed collection agency with a specialty in collecting delinquent employer contributions owed to employee-benefit trust funds, sued its former law firm, Erskine & Tulley, which, after their relationship had ended, acquired some of Welch’s former benefit trust fund clients. The issue in the case was whether the law firm, in acquiring the clients, breached its fiduciary duty to Welch, its former client. After discussing an attorney’s duty of loyalty towards his or her clients and related Rules of Professional Conduct, the appellate court, without any analysis, found that expert testimony was not required to find that the law firm had breached its duty of loyalty because “They were violations of professional standards; standards which the trial court was compelled to notice.” The court relied on Day for this holding.

Welch, however, involved a breach of fiduciary duty and not legal malpractice, and the elements of a breach of fiduciary duty, a species of tort distinct from a cause of action for professional negligence, differ from those for legal malpractice. A breach of fiduciary duty requires the existence of a fiduciary relationship, breach of that duty, and damages. A breach of fiduciary claim, as the appellate court held, can be resolved by simply looking at the language of the applicable Rules of Professional Conduct. In contrast, attorney legal malpractice is not so clearly defined; instead, the “applicable standard of care,” an ambiguous term by itself, can vary depending on a multitude of circumstances.

Mirabito v. Liccardo is, in many respects, similar to David Welch. Mirabito was represented by Liccardo, his second cousin, regarding Mirabito’s estate plans, which led to Mirabito’s investing millions of dollars in Liccardo’s businesses. Liccardo never advised Mirabito to seek the advice of independent counsel regarding the investments. Mirabito sued Liccardo’s estate for breach of contract, fraud, and breach of fiduciary duty. The appellate court held that the trial court did not err in allowing an expert to rely upon the Rules of Professional Conduct to explain why Liccardo had breached his fiduciary duty toward Mirabito. Citing Day, the court noted, “It is well established that an attorney’s duties to his client are governed by the rules.... Those rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his client.” Thus, like David Welch, Mirabito is about the need, or lack thereof, of expert testimony if a breach of fiduciary duty is alleged. While neither David Welch nor Mirabito is about legal malpractice, like Day they are illustrative of the fact-based analysis involved in the determination of whether an expert witness is needed.

Piscitelli v. Friedmanberg differs from these preceding decisions because, unlike them, it disapproves the use of expert witness testimony to establish causation in a legal malpractice case as contrasted to the admissibility of expert opinion on the applicable standard of care and the breach of that standard. Piscitelli was a former Prudential broker who had sold defective limited partnerships to clients as well as buying some for himself. He sued Prudential in federal court to recover his own losses. A class action against Prudential for sale of the limited partnerships was filed around the same time as Piscitelli’s case. Piscitelli notified Friedmanberg, his attorney, of the tentative settlement of the class claim. Later on, he told Friedmanberg that another Prudential broker had received a legal document about the class action. In response, Friedmanberg advised Piscitelli to check his mail for it. When Piscitelli advised Friedmanberg he had not received any notice, Friedmanberg told him not to worry. Thereafter, Piscitelli called Friedmanberg about the class action opt-out deadline. Friedmanberg responded he would take care of it. Friedmanberg did not obtain a copy of either the notice of the class action settlement or the settlement agreement, nor did he opt Piscitelli out of the class. He did, however, send Prudential’s attorneys both Piscitelli’s agreement to submit his case to arbitration and Piscitelli’s statement of claim. Ultimately, a trial court agreed with Prudential that the class notice barred Piscitelli’s claim.

Piscitelli sued Friedmanberg and several other law firms and attorneys for professional negligence, breach of fiduciary duty, constructive fraud, and negligent infliction of emotional distress. Before trial, Friedmanberg moved in limine to exclude expert testimony on the ultimate result of the underlying arbitration, arguing such testimony would improperly focus on what the arbitration panel would have done (as opposed to what it should have done) and also usurp the jury’s function to decide what should have been the result of the arbitration. The court denied the motion. In keeping with the court’s ruling, Piscitelli’s expert was asked to give an opinion on the “relative probability Mr. Piscitelli might have prevailed had the arbitration... been permitted to go forward.” The expert testified, in part, that “Piscitelli would very likely have prevailed in getting...monetary relief.”

The jury in Piscitelli found that an arbitration panel would have awarded Piscitelli $510,824 against Prudential and an additional $221,389,400 in punitive damages against Prudential. The trial court calculated Piscitelli’s total award against Friedmanberg to be $223,253,736. Friedmanberg moved for a JNOV and a new trial on grounds of excessive damages, insufficient evidence, legal errors, counsel misconduct, and inconsistency of the verdict. The court denied Friedmanberg's motion for the JNOV but granted a new trial on damages conditioned on Piscitelli's consent to a $221,389,400 remittitur. It also ruled the punitive damages component of the compensatory damage award was not supported by the evidence, the damages were excessive, and the evidence insufficient to support the verdict. After Piscitelli refused to accept the remittitur, Friedmanberg appealed from the judgment and the denial of his motion for JNOV. Piscitelli appealed from the court's partial grant of a new trial.

While acknowledging that expert testimony, otherwise admissible, is not objectionable just because “it embraces the ultimate issue to be decided by the trier of fact,” the appellate court in Piscitelli also recognized that an expert opinion, whether or not it embraces an issue of law, is not admissible if it invades the province of the jury to decide a case. It then concluded that the trial court had abused its discretion in admitting expert opinion on the ultimate result of the arbitration.

“In ruling as it did, the [trial] court misconceived the jury’s function in the legal malpractice case-within-a-case format. This format is properly employed as the method of proving the elements of causation and damages when the malpractice involves negligence in the prosecution or defense of a legal claim.” The appellate court went on to hold that an expert should not be allowed to testify what a reasonable trier of fact would have done in the underlying case, whether it be to a jury or arbitration panel. Such testimony invaded the jury’s province.

Lipscomb v. Krause represents the more traditional view that expert testimony is gen-
erally required to establish the standard of care and breach of that duty in legal malpractice cases. In *Lipscomb*, in which appellants sued their former attorney for dismissing an underlying water pollution case without their knowledge or consent, the trial court entered judgment for the defendant lawyer after the plaintiffs rested without calling an expert as to the duty of care reasonably owed by an attorney to his or her client. On appeal, the Lipscombs argued that, as required by Section 283 of the Code of Civil Procedure, an attorney has no authority to compromise a client’s claim without the client’s knowledge, there was no need to call an expert. The appellate court first distinguished the applicability of the statute in question and then, in affirming the nonsuit judgment, observed that, generally, evidence of legal malpractice “requires the testimony of experts as to the standards of care and consequences of breach.”

Taken as a whole, *Wright, Rives, Day, and Lipscomb* stand for the proposition that, in all but the most unusual circumstances, a claim of legal malpractice must be supported by expert testimony. *Wright* established the principle that expert testimony is not required to prove all legal malpractice claims but found otherwise when the action is against attorneys who hold themselves out as legal specialists and the claims, themselves, relate to that expertise. Wilkinson, like *Wright*, found that it was not common knowledge whether an attorney in the exercise of due care in preparing for his client a declaration of homestead should have the client sign and verify an optional affidavit. *Day* stands alone because few cases can match its facts. (“The trial judge drew the inescapable conclusion—Rosenthal was not merely negligent. His was ‘the type of conduct [not] to be condoned in the legal profession.’”) The allegations in an ordinary legal malpractice case do not come close to matching those in *Day*, and but for *Day*, the above cases hold that expert testimony is required in legal malpractice claims in which the elements of duty or breach are not of common knowledge (such as those involving a specialized field) or would assist the trier of fact. Plaintiffs’ counsel should not ignore these cases, even if the malpractice in question is egregious.

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1. Lucas v. Hamm, 56 Cal. 2d 583, 591 (1961); Kirsch v. Duryea, 21 Cal. 3d 303, 308 (1978) (quoting Estate of Kruger, 130 Cal. 621, 626 (Cal. 1904)).
6. Id. at 810-11.
7. Id. at 811.
9. Id. at n.4.
10. Id. at 646.
11. Id. at 647.
12. Id. (citing Wright v. Williams, 47 Cal. App. 3d 802 (1975)).
13. Id. at 648-49.
15. Id. at 1146-47.
16. Id. at 1147.
18. Id. at 893.
22. Id. at 45.
24. Id. at 972.
25. Id.
26. Id. at 973.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id. at 976.
33. Id. at 976.
WILLS AND TRUSTS have long provided the means for the testamentary disposition of various types of tangible and intangible assets. However, in the last decade or two, a new category of intangible assets—digital assets—has appeared. Some digital assets, such as photos, have intrinsic value, while others—for example, Bitcoin—have extrinsic value. Traditional estate planning tools may be ill-equipped to deal with digital assets, and many of the major Internet providers are resistant to proposed legislation seeking to close the gap between estate planning and digital assets.

While waiting for legislatures and courts to develop a workable set of rules to allow for the testamentary disposition of digital assets, attorneys can still help clients by creating and periodically updating a list of their digital assets, passwords, answers to gatekeeper questions, and so forth. In effect, attorneys can work with clients to create a digital inventory.

The next step is to integrate digital assets into estate planning. Before doing so, however, it is necessary to determine what digital assets are. *PC Magazine*’s encyclopedia defines “digital asset” as “any digital material owned by an enterprise or individual including text, graphics, audio, video and animations.” Similarly, Wikipedia defines the term as “any item of text or media that has been formatted into a binary source that includes the right to use it.”

Digital assets can be separated into four categories. First are personal digital assets, which include photos, videos, e-mails, contact lists, music, medical records, blogs, e-books, gaming assets, avatars, home security systems, and loyalty programs. Airline mileage points are one example, as are digital vacation photos stored in the cloud. The second category encompasses social digital assets, such as Facebook, Twitter, and LinkedIn accounts. However, if these are coupled with a business as part of its online marketing strategy, they become valuable business assets as well. The third category is financial digital assets. These include not just bank and credit card accounts but also tax documents, PayPal and Apple Pay, Bitcoin, and online accounts for U.S. savings bonds. Finally, there are digital assets that fall under the rubric of business digital assets. In addition to business-oriented social media, also found in this category are domain...
names, customer and vendor information and contact lists, intellectual property, and files that are password-protected. All those assets could disappear at death or even one’s incapacitation unless proper steps are taken. They could dissolve into cyberspace unless there is an up-to-date list to help one’s heir find and unlock them. What if a client becomes disabled and no one knows how to unlock password-protected devices, files, and sites? How will a client’s business continue to be operated after death if the company’s customer and vendor contact information is stored in some unknown or inaccessible corner of the cloud?

**Federal and State Law**

The contractual and statutory framework of digital assets includes federal and state law. For example, users of the Internet create enforceable agreements every time they click to accept terms of service from Yahoo, Google, AOL, Facebook, and others. Those contracts contain specific restrictions on access to one’s account that tie into federal privacy statutes.

One example of these common contractual restrictions is found in Yahoo’s terms of service: “Yahoo grants you a personal, non-transferable and non-exclusive right and license...” Similarly, Google’s terms of service provide as follows: “Google gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software provided to you by Google as part of the Services. This license is for the sole purpose of enabling you to use and enjoy the benefit of the Services as provided by Google, in the manner permitted by these terms.”

These contracts use the word “you.” Many internet service providers take the view that “you” means you and not one’s heirs and beneficiaries. For example, it would be a breach of the terms of service for family members to access and continue to use a person’s Google account after that person’s death.

Moreover, these restrictions have real teeth in them, thanks to federal privacy and antihacking statutes, such as the Computer Fraud and Abuse Act (CFAA), which makes it a crime to “intentionally [access] a computer without authorization or exceeds authorized access.” The basic violation is a misdemeanor, but it becomes a felony if done for profit, if the information obtained is worth more than $5,000, or if the act is done in furtherance of a state or federal crime or tort.

Is access in violation of those terms-of-service agreements that no one reads a violation of the CFAA? While there are no cases directly on point, disgruntled soon-to-be ex-employees and ill-tempered soon-to-be ex-spouses have spawned a number of appellate decisions that indicate that access that is not authorized by a terms-of-service agreement could very well be a violation of the CFAA.

**United States v. Nosal** involved an executive search firm and a current employee working covertly to assist a former employee. In that case, an employee logged on to her employer’s computer and handed the computer over to a former employee whose access privileges had been terminated. The former employee then downloaded files from the company’s confidential database. The court held that an indictment charging unauthorized access of a protected computer was sufficient to allege a violation of the CFAA.

**NCMIC Finance Corporation v. Artino** is another case involving an unhappy employee and, of greater import, a finding of a breach of the duty of loyalty. There, the court found that NCMIC’s allegations against Artino that he violated the CFAA survived demurrer. In that case, the court stated that an employee acts “without authorization” by obtaining confidential information from the employer’s computer and then using “that information in a manner inconsistent with the employer’s interests or in violation of other contractual obligations...”

The court relied heavily on the Restatement (Second) of Agency, specifically, “Unless otherwise agreed, the authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal.”

**In Global Policy Partners, LLC v. Yessin,** the parties were both sparring business partners (as co-managers of the LLC) and marriage partners who were in the midst of a divorce. The wife had used the company computer to write confidential e-mails to her divorce attorney. The husband, cleverly but unwisely, accessed her wife’s e-mail account and read her e-mails.

The court determined that Mr. Yessin “had no legitimate business reason to access Mrs. Yessin’s e-mail account and that he did so purely for personal gain.” Based on this finding, the court had no trouble finding that the allegations of Mrs. Yessin and the LLC that Mr. Yessin had violated the CFAA were not subject to dismissal at the pleading stage: “[E]ven assuming that [state law] might authorize managers to access information stored on an LLC’s computer servers for purposes of carrying out the company’s business, the factual allegations in the complaint are plainly sufficient to create a plausible inference that Mr. Yessin was not acting as an agent of [the company] in accessing Mrs. Yessin’s e-mail account.”

The other pertinent federal statute is the Stored Communications Act (SCA). This statute provides criminal penalties for unauthorized access to “a facility through which an electronic communication service is provided” or access in excess of authorization to such a facility by which one “obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage...” The exception to unauthorized access under the SCA is, naturally, authorized access. Access that is authorized “by the person or entity providing a wire or electronic communications service” is not a criminal act. Similarly, access that is authorized “by a user of that service with respect to a communication of or intended for that user” is permitted. One may surmise that if a person expressly authorizes access to, say, his or her e-mails, by appropriate language in an estate planning document such as a power of attorney, will, or trust, then the person given permission and access by an attorney-in-fact, executor, trustee, or beneficiary would not violate the SCA. On the other hand, it would seem that access by an executor that was not expressly authorized by the decedent would be a violation of the SCA. As with the CFAA, the criminal penalties for violating the SCA range from a misdemeanor, if not done for profit, to a felony.

Once again ex-employees and ex-spouses prove to be a fertile source of case law. However, the case most of interest to estate planners is **Konop v. Hawaiian Airlines, Inc.** Konop, a pilot for Hawaiian Airlines, was unhappy with his employers, his union, and just about everybody associated with either of them. To vent his frustration and build support, he created a website but restricted access. In particular, Konop’s terms and conditions of use “prohibited any member of Hawaiian’s management from viewing the website and prohibited users from disclosing the website’s contents to anyone.” Each time a user accessed the website and clicked “Submit,” he or she indicated acceptance of the terms and conditions of use.

Two of Konop’s fellow pilots allowed one of the airline’s vice-presidents to access Konop’s website by using their names and passwords. In reversing the District Court’s grant of summary judgment against Konop, the Court of Appeals framed the question as whether the airline was not liable for violating the SCA if an authorized user allows an unauthorized third party to access an electronic communication, specifically if the two pilots were users within the meaning of Section 2701(c)(2) at the time they allowed Hawaiian’s vice president to access Konop’s website. The court concluded, in effect, that a person who is authorized to access a website but does so for the purpose of allowing a nonauthorized person access...
is not a “user” within the meaning of the SCA, and thus the third party is not shielded from liability.30

Konop was not the only disgruntled employee to test the SCA. In *Ehling v. Monmouth-Ocean Hospital Service Corporation,* a nurse posted comments critical of her employer on her Facebook page. One of her friends took screenshots of the posts and provided them to hospital management. Ehling’s cause of action against the hospital under the SCA was dismissed as the court found that her friend was in fact an authorized user.

The federal CFAA and SCA both focus on criminalizing what can’t be disclosed or accessed. By contrast, a handful of states (but not California) have made an effort to describe what kinds of digital data can be accessed on death, by whom it can be disclosed, and under what circumstances it can be accessed. For example, Connecticut provides that “[a]n electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in this state at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person....”32 Rhode Island enacted a virtually identical provision, and similar laws are on the books in Indiana,34 Oklahoma,35 and Idaho.36

Seeking to avoid the hodgepodge nature and limited scope of these several state statutes, the Uniform Law Commission adopted the Uniform Fiduciary Access to Digital Assets Act (UFADAA) in July 2014. The Uniform Law Commission summarized the UFADAA as follows:

> UFADAA gives people the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property: by providing instructions in a will, trust, or power of attorney. If a person fails to plan, the same court-appointed fiduciary that manages the personal tangible assets can manage the person’s digital assets, distributing those assets to heirs or disposing of them as appropriate.37

In Section 4 (personal representatives of a decedent), Section 5 (conservators), Section 6 (attorneys-in-fact), and Section 7 (trustees), the UFADAA provides that a fiduciary “has the right to access: (1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. §2702(b) [as amended]; 38 (2) any catalogue of electronic communications sent or received by the decedent; and (3) any other digital asset in which at death the decedent had a right or interest.”39

In Section 8, the UFADAA states, in effect, that the fiduciary has the same rights to access the digital account as the principal does or did. Responding to state-level “electronic privacy laws,” the UFADAA responds that the fiduciary has the “lawful consent of the account holder.” In response to the federal SCA and CFAA, the UFADAA states that the fiduciary is also considered an “authorized user.” The UFADAA then takes direct aim at the restrictions in those ubiquitous terms-of-service agreements by stating that they are void as against “strong public policy” and only effective if the account holder affirmatively acts to consent.42 Within weeks, Delaware enacted the Fiduciary Access to Digital Assets and Digital Accounts Act.43 To date, Delaware is the only state to adopt the UFADAA.

### Facebook

After staunch opposition to adoption of the UFADAA in California, Facebook relented and created a legacy contract earlier this year. By going to Security and then clicking on Legacy Contract, a Facebook user may “[c]hoose a family member or close friend to care for your account if something happens to you.” Another option, “Account Deletion,” allows users to “request to have your account permanently deleted” when they “pass away.” In addition the person named in the legacy contract can: “Write a pinned post for your profile (ex: to share a final message on your behalf or provide information about a memorial service);” “Respond to new friend requests (ex: old friends or family members who weren’t yet on Facebook)”; or “Update your profile picture and cover photo.” Facebook also gives each user the option to “allow your legacy contract to download a copy of what you’ve shared on Facebook, and [Facebook] may add additional capabilities for legacy contacts in the future.”44

While a step in the right direction, Facebook’s new Legacy Contract is much narrower in scope than the UFADAA. For example, a conservator or attorney-in-fact could not manage a person’s account during that person’s lifetime, even if the person is disabled or incompetent. Secondly, naming a Legacy Contract takes an affirmative act on the part of the user. By contrast, the default rule under the UFADAA is that one’s fiduciary can access one’s digital account unless one chooses to restrict access. Thus, in California and many other states, one’s successor trustee or executor would be in violation of Facebook’s terms of service if the trustee or executor accessed one’s account without one’s first having entered into a legacy contract. Moreover, under no circumstances would a conservator or attorney-in-fact be able to access one’s Facebook page.

More than comprehensive legislation is needed to adequately provide for the disposition of digital assets in estate plans. Estate planners and their clients must also be proactive. Planning is just one piece of the puzzle. Creating a digital map or inventory is equally important, as illustrated by the fate that befell Leonard Bernstein’s memoir:

> The loss that can be incurred from being unable to access digital data is illustrated by the case of Leonard Bernstein. Bernstein died in 1990, leaving behind a manuscript for his memoir titled Blue Ink in a password protected file on his computer. To this day, no one has been able to break the password, resulting in a valuable asset being inaccessible.45

As part of the estate planning process, one should create a digital inventory and leave a hard copy with trusted family members, friends, and advisers. The first step in this process is to describe the physical location of the drives and disks containing your digital life. These include one’s laptop, external hard drives, flash drives, CDs, and DVDs. Another suggestion is to list answers to some of the typical access questions that are used to retrieve usernames and passwords. What was your mother’s maiden name? What was your first pet’s name? And so forth. This is in addition, of course, to actually writing down the various usernames and passwords.

If a client banks online, the client should list the financial institutions and accounts. Ditto for all one’s investment and retirement accounts. Does the client prepare his or her own tax returns and file them electronically? The client should write down which software program is used (the two most popular being TurboTax and H&R Block) and access information. On the other side of the ledger one should list credit cards, mortgages, deeds of trust, business and personal lines of credit, auto loans, and other personal loans, especially intrafamily loans. Next is to list one’s e-mail and social media accounts, including the ubiquitous Facebook, as well as LinkedIn, Twitter, YouTube, Skype, Google, and so on. Finally come digital assets with real world value—airline, hotel and retail loyalty programs, PayPal, Apple Pay, and Bitcoin. While the list is not endless, it is likely much more extensive than one realizes. Preparing a complete list takes time, but keeping it and updating it regularly is important and becoming more important every day.

One can no longer exclude digital assets from the estate planning process. To do so would risk losing family photos, financial and tax records, and even money. Now is the time to prepare a digital inventory, including usernames and passwords. Regularly is
the time to update that digital inventory, as new digital assets are acquired and passwords are changed. While estate plans have existed for millennia, they need to catch up with the times.

1 “The oldest known will is that of Uah, an Egyptian, which was executed in 2548 B.C.” 8 THE VIRGINIA LAW REGISTER 69 (May 1922).
3 One example is Yahoo’s September 14, 2014, written opposition to the UFADAA. Yahoo focused on what it viewed as the users’ expectations of privacy and viewed the proposal made by the Uniform Law Commission as setting the “privacy default at zero.” Yahoo stressed that it “honors[ ] the initial agreement that a user made with us. When an individual signs up for a Yahoo account, they agree to our Terms of Service, which outlines that neither their account nor the contents of their private communications are transferable at the time of death.” Available at http://yahoopolicy.tumblr.com.
7 Konop went on to obtain $9,000 in damages against Hawaiian Airlines (Konop v. Hawaiian Airlines, Inc., 411 B.R. 678, aff’d 401 Fed. App’x. 242 (2009)).
8 Id. at 880. (Under 18 U.S.C. §2701(c)(2), a user is allowed to authorize a third party’s access.)
9 Id. at 873.
10 Id. at 873. (Under 18 U.S.C. §2701(c)(2), a user is allowed to authorize a third party’s access.)
11 Id. at 873. (Under 18 U.S.C. §2701(c)(2), a user is allowed to authorize a third party’s access.)
15 Id. at 1056.
16 Id. at 1061 (quoting RESTATEMENT (SECOND) OF AGENCY §112).
20 Id. at 1061 (quoting RESTATEMENT (SECOND) OF AGENCY §112).
21 With regard to the rights of a trustee, its power is “restricted to administering the electronic address of the person.” UFADAA §2(4).
23 In this context, it is important to remember that one’s authority as an attorney-in-fact under a power of attorney expires upon the principal’s death. PROB. CODE §4152(a)(4).
24 Id. at 1056.
25 Id. at 1061.
26 Id. at 1061. (Under 18 U.S.C. §2701(c)(2), a user is allowed to authorize a third party’s access.)
28 The Electronic Communications Privacy Act, enacted by Congress in 1986, extended restrictions on the government’s ability to conduct wire taps to cover electronic data transmitted by computer.
29 The term “catalogue of electronic communications” is defined as “information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.” UFADAA §2(4).
30 The term “digital assets” is defined as “[a] record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.” UFADAA §2(9).
32 C ONN . GEN . STAT . §45a-334a.
33 R.I. GEN . LAWS Ch. 33-27.
34 IND . CODE §29-1-13-1.1.
35 O KLA . STAT . tit. 58, §269.
36 IDAHO C ODE §15-5-424.
38 The Electronic Communications Privacy Act, enacted by Congress in 1986, extended restrictions on the government’s ability to conduct wire taps to cover electronic data transmitted by computer.
39 The term “catalogue of electronic communications” is defined as “information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.” UFADAA §2(4).
40 The term “digital assets” is defined as “[a] record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.” UFADAA §2(9).
41 With regard to the rights of a trustee, its power covers both accounts opened by a trustee or that were transferred into the trust. UFADAA §7.
42 UFADAA §8(b).
43 79 Del. Laws 416, §1.
44 California has a similar requirement. See https://www.frs.ca.gov.
45 Helen M. Gunnarasson, Plan For Administering Your Digital Estate, 99 ILL. B.J. 71 (Feb. 2011).
and prevailing weather conditions, and the potential
tives; pilot-in-common training, licenses, rating, profi-
schedules, service bulletins and airworthiness direc-
tlope, component design, assembly and installation;
ure analysis, operational, maintenance, regulatory
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How to Stop Hackers Who Are Targeting Law Firms

IN FEBRUARY 2014, THE NEW YORK TIMES reported a leaked document from Edward J. Snowden that suggested foreign governments have systematically hacked into American law firms, collected attorney-client privileged information, and offered to share everything they uncovered with the National Security Agency (NSA). Although unexpected, this news should not come as a surprise. When law firms represent clients that could affect national security, governments will naturally become interested in the clients’ information. However, private hackers also possess enormous incentives to target law firms that have nothing to do with national security.

While an attorney may be ethically precluded from disseminating client information, a client’s competitor could greatly benefit from customer lists, contracts, software code, engineering schematics, manufacturing processes, financial records, and so on. As indicated in Zubulake v. UBS Warburg, the seminal case on electronically stored information (ESI), “as individuals and corporations increasingly do business electronically—using computers to create and store documents, make deals, and exchange e-mail—the universe of discoverable material has expanded exponentially.” This vast expansion in ESI has made virtually all of the records in law firms attractive to hackers who would otherwise have difficulty identifying valuable information buried within a client’s IT infrastructure. Furthermore, foreign competitors who may hack into a law firm represent a special hazard since taking action against an entity located in another country may prove nearly impossible especially when the competitor maintains close ties with a government that willingly turns a blind eye to its activities.

INCENTIVES TO HACK LAW FIRMS

In this age of expanding ESI there are at least three obvious reasons for hackers to try to collect information directly from law firms: 1) anticipating a competitor’s business strategies, 2) patenting technology and product design schematics could prove invaluable to a company that have nothing to do with national security, and 3) obtaining an advantage in litigation.

Anticipating Business Strategies. By opening a gateway to a client’s most sensitive communications, a competitor can get out in front of almost every major strategy and turn each business decision to its own advantage. Strategic acquisitions, employee salaries, sales contacts, product pricing, accounting records, distribution agreements, and product design schematics could prove invaluable to a company seeking to obtain a competitive edge over a client. For example, when a client requests attorney assistance in the acquisition of a third party critical to a planned expansion into a foreign market, the competitor could intercept the communications through the firm and learn everything about the acquisition by reviewing the attorney’s analysis. By assessing each development in secret, virtually every business decision could be outmaneuvered. Even if the client suspected foul play by the competitor, the client would be helpless since the hacker would retain access to the computer system of the client’s attorney.

Processing Patents. When a client hopes to patent an invention during its development, the client may request that a provisional application be filed with the U.S. Patent and Trademark Office (USPTO) to afford the client another year to develop the patent claims. In accordance with the client’s instructions, a patent attorney drafts the application, files it with the USPTO, and advises the client that it may begin providing the public with information about the new technology. However, if a competitor hacks into the patent attorney’s system before the attorney is able to file the client’s application, the competitor could copy the concept and submit a version with the USPTO first. As of March 16, 2013, U.S. patent law changed from a “first-to-invent” to “first-to-file” system, meaning that whoever files the patent application first gains priority for the patent regardless of who actually developed the invention. Thus, by filing before the real inventor, a competitor could destroy the inventor’s ability to obtain protection and even assert patent claims against the inventor for his or her own invention.

Prospective Litigation. The inherent risks created by computer hackers are not limited to monitoring business deals or technology but also can extend to demand letters created for complaints that are never filed. For every embarrassing sexual harassment or consumer violation that we read about in the news, there are countless claims that companies settle long before they are ever filed in court. Yet, a competitor monitoring demand letters as they come in could do a lot of damage with this privileged settlement information, either by selectively leaking what they learn or by requesting information about the claims during discovery.

As undesirable as a malpractice lawsuit is, a lawsuit...arising from a breach in cybersecurity could prove uniquely problematic, as any discovery uncovering the existence of a hacker could rapidly cascade into lawsuits from other clients.

Brian D. Pastore is an associate at Manning & Kass, Ellrod, Ramirez, Trester LLP, where he practices complex civil litigation. Prior to entering the legal profession, he worked as an engineer in the technology sector.
The California Business and Professions Code requires attorneys to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her clients.” As undesirable as a malpractice lawsuit is, a lawsuit alleging damages arising from a breach in cybersecurity could prove uniquely problematic, as any discovery uncovering the existence of a hacker could rapidly cascade into lawsuits from other clients concerned about the firm’s negligence. While a well-insured firm may be able to shoulder the litigation, the public’s awareness of a single breach could quickly devolve into utter loss in confidence in the firm’s integrity.

Change More Than Passwords
Given these law firm data security risks, the most oft-cited, yet frustrating, solution to any cybersecurity problem is “change your passwords.” This advice is not wrong. Users should change them often. Although the practice of changing passwords may deter the most inept of computer hackers, the reality is that there are ways for a computer hacker to slip past password protection. With respect to usernames, these can usually be obtained for any attorney by simply reviewing the e-mail address posted on the firm’s website. A hacker can then try to guess each user’s password by searching social media for birthdays, children, and pet names, or simply cycling through commonly used passwords. Alternatively, a hacker may trick an employee into unwittingly infecting the firm’s systems with a certain type of virus, commonly referred to as a Trojan horse or a keylogger Trojan, by attaching the virus to a seemingly innocuous e-mail or file on a USB drive. Once installed, the virus can record keystrokes typed into the system and report back any passwords as they are entered. Thus, asking a firm’s employees to change nothing but their passwords is the least that a law firm can do.

Third Party Testing
What a firm may do in addition to creating and enforcing employee policies regarding password maintenance and the use of USB drives is to ask its own IT department for an evaluation. However, one of the best ways to test a system’s security is to hire a third party to hack directly into it. Such a procedure is not novel in computer security. Financial institutions, software developers, and large organizations frequently hire professionals to attack a system from several different angles, assess its greatest risks, and provide solutions to enhance overall security. For obvious reasons, these analyses need to be conducted with great care in order to avoid compromising client privilege or work product, but such issues can be circumvented relatively easily so long as attorneys actively participate in the process. Indeed, attorneys need to participate in these tests because only an attorney can be expected to determine how to properly balance the needs of the firm against the risks that hackers present. While it may make sense for larger firms to compartmentalize access, create complex protocols, or place multiple layers of security on their network, a former attorney in a smaller firm may realize that the costs of implementing the necessary security greatly outweigh the risk to clients. Similarly, an attorney who maintains a direct line of communication with CEOs of major clients may require more robust training and specialized access than an associate who focuses primarily on document review.

Regardless of the situation, by encouraging attorneys to play an active role in the development of security policies, the firm can develop an efficient means to 1) test its systems, 2) train its employees, 3) monitor for threats, and 4) minimize exposure to substantial breaches. It would also force certain attorneys within each firm to develop skill sets that could prove invaluable when consulting clients on emerging cybersecurity issues.

With each day bringing new reports of hackers disrupting both private and government institutions, it seems highly unlikely that these forms of attack will disappear. Though clients may not expect their attorneys to provide the same level of security as a bank or a federal agency, it is only a matter of time before clients begin to ask hard questions about what law firms are doing to protect the information their clients provide. At the very least, someone in the firm should be able to provide them with an answer.

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3 RULES OF PROF’L CONDUCT R. 3-100.
5 35 U.S.C. §113(b).
8 BUS. PROF. CODE §6068.
10 Though technically different, “Trojan” and “virus” represent similar mechanisms for a hacker to breach a computer system’s security.

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Los Angeles Lawyer July/August 2015 51
New Consumer Data Protections Increase Liability Risk

CALIFORNIA IS A LEADER IN consumer protection legislation, and in the wake of recent high-profile data breaches, the legislature enacted AB 1710, which was signed into law by Governor Jerry Brown and took effect on January 1, amending Sections 1798.81.5, 1798.82, and 1798.85 of the Civil Code.

Businesses that deal with consumers should be aware that AB1710 restricts disclosure of Social Security numbers and mandates identity theft monitoring protections. Businesses in California must take note, as their consumer data policies and procedures may no longer be in compliance. There are at least three noteworthy changes.

The first change is an expanded application of security procedure requirements. The new law increases the number of businesses required to implement security procedures. Previously, only businesses that owned or licensed a consumer’s personal information were required to “implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure.” AB1710 significantly expands the application of these requirements to businesses that maintain personal information. “Personal” is defined as an individual’s first name or first initial and last name, in combination with a Social Security number, driver’s license number, medical information, or certain financial account information, when at least some of that information is not encrypted or redacted.

Businesses that own or license personal information are defined under the law as those that retain the information as part of their internal customer accounts or for the purpose of using that information in transaction with the person to whom the information relates. The law is less explicit in defining when a business “maintains” personal information, stating only that “the term ‘maintain’ includes personal information that a business maintains but does not own or license.”

Notification and Creditor Monitoring

In the event of a breach, California’s privacy laws require businesses to follow certain notification requirements. Specifically, businesses that own or license data must notify consumers whose information was or “is reasonably believed to have been acquired by an unauthorized person...in the most expedient time without delay,” while businesses that maintain personal information must immediately notify the owner or licensee of the data of the breach.

As an additional change, AB1710 increases the corporate obligation by requiring free credit monitoring services in some cases of breach. If a business was the source of the breach and the breach involves an individual’s name and Social Security number, driver’s license number, or California identification card number, “an offer to provide appropriate identity theft prevention and mitigation services, if any, shall be provided at no cost to the affected person for not less than 12 months.”

The ambiguous “if any” language has spawned debate regarding the scope and application of this creditor monitoring provision. Some read the provision to require all businesses that are the source of the breach to offer no-cost credit monitoring for at least one year while others argue that only businesses already offering such services will be required to comply. Further complicating matters, the law provides no clarity on what constitutes “appropriate identity theft and mitigation services.” Until the California courts consider this question, or the Attorney General sheds some light on the breadth of this provision, businesses must be prepared to provide credit monitoring services.

And the services must be offered for free and for no less than one year. While this may not be a significant change for many larger corporations that provide credit-monitoring services as a matter of practice, it is the smaller businesses that are likely to be most affected by these additional requirements and the uncertainty of their application.

Lastly, AB1710 also restricts disclosures of Social Security numbers, prohibiting the sale, advertisement for sale, or offer to sell an individual’s Social Security number. Exceptions apply if the release of a Social Security number is incidental to a larger business transaction, and the release is necessary to identify the individual in order to accomplish a legitimate business purpose. But the law is clear that the release of Social Security numbers for marketing purposes remains unpermitted.

AB 1710 is undoubtedly a significant expansion of California’s consumer data protections. But it remains to be seen how broadly these protections will be interpreted. Until further guidance is provided, the ambiguous drafting of the identity theft monitoring provisions, in particular, will pose difficulties for businesses trying to structure code-complaint breach procedures. If data breaches are not perilous enough, now navigating the legal implications of them could prove equally disconcerting. It will also be worth watching whether other states follow in California’s footsteps and enact similar legislation, or if the federal government will step in to address the diverse state approaches to consumer privacy protection.

Until that time, businesses will need to stay current with the laws of each state where they do business. State regulations will likely continue the trend toward greater data security regulation. This means businesses that handle consumers’ personal information will need to budget and plan for increased costs and liability.

Neal Salisian is a partner, and Katharine Miner a former associate, with Salisian Lee LLP in Los Angeles.
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