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The recent spate of officer-involved deaths of men of color in poverty-stricken communities stains a swath of states. Various solutions are being implemented, such as the Department of Justice's funding of a $20 million pilot program for the LAPD to outfit all patrol officers with body cameras. The legislature in Sacramento has also responded with a slate of proposed laws, including mandatory body cameras (AB 66), annual reporting of use of force incidents (AB 619), mandatory police reporting on stops, seizures, and arrests (AB 953), requiring prosecutors to criminally charge officer-involved shootings only by way of preliminary hearing and prohibiting prosecutorial use of grand jury proceedings in these cases (SB 227), and appointment of a special prosecutor in criminal cases involving an officer's use of force (AB 86). A recent article in the Los Angeles Times, “‘Tired of prayer vigils,’” summarizes these developments.

Assemblyman Jim Cooper and Los Angeles Times reporter Sandy Banks, however, are among those who argue that while these measures may be laudable, they do not address the plight of the poor, who are segregated economically to live in crime-ridden neighborhoods that lack properly funded and performing schools, grocery stores, banks, employment opportunities, and services for struggling families and at-risk youth. Others note laudable programs place too much emphasis on personal accountability, without addressing racial discrimination. Dr. Martin Luther King, Jr. aptly summed up the poor person’s dilemma: “It is cruel jest to say to a bootless man that he ought to lift himself up by his own boot straps.”

A recent op ed in the New York Times (“Forcing Black Men Out of Society”) found that 1.5 million, or “more than one in every six black men in the 24-to-54 age group disappeared from civic life, mainly because they died young or are locked-away in prison.” In addition, “many millions more are shut out of society” because of “the shrinking labor market for low skilled workers, racial discrimination, or sanctions that prevent millions who have criminal convictions from getting all kinds of jobs.”

California legal services and civil rights advocates recently analyzed the sanctions issue by examining the impact of the state’s legislatively mandated court fees, fines and assessments. The report, Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California, available at www.wclp.org, found that “low income Californians are being disproportionately impacted by state laws and procedures related to driver’s license suspensions.” Four million plus driver’s licenses have been suspended as the result of “increased fines and fees and reduction in access to the courts.” These suspensions hinder the ability to obtain and retain employment.

The report’s meritorious solutions include amnesty and reduction of debt based on ability to pay. The report, however, does not address the issue of judicial authority or discretion to impose, reduce, or waive fees and sanctions based on ability to pay or mitigating factors. Perhaps perceived as burdensome on the strained resources of high-volume courts, the exercise of judicial authority has been crucial to the public perception of fairness, as well as access to justice, since Marbury v. Madison.

On February 2, 2015, the Judicial Council reported in “Funding California’s Courts: 2015-2016 Budget Considerations” that “a comprehensive approach is needed to address court funding and the impact of court-related fees and collections on the public.” To achieve the goal of court funding from the state’s general fund, the Not Just a Ferguson Problem report deserves comprehensive consideration.

Mary E. Kelly is a nurse attorney and an administrative law judge II with the California Unemployment Insurance Appeals Board. She is cochair of the California Access to Justice Commission’s Administrative Agency Committee.
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I was thrilled to read the article “Crossing Borders” by Jeff Dasteel and Natalia de la Parra Ferreiro in the November 2013 issue of Los Angeles Lawyer. In 2004 I chaired a subcommittee of the Arbitration Committee of the Business Law Section (it was then a part of that committee). Our goal was to achieve parity for foreign attorneys so that they could appear for foreign clients in California international arbitrations without having to go through a pro hac vice procedure. I looked through my old (really old!) files and found the State Bar lobbyist who was prepared to carry it—I believe with the blessing of the State Bar. At that time, at the suggestion of the lobbyist’s office, it was also submitted to the Judicial Council, and it was totally buried by the Judicial Council, notwithstanding efforts that we made to get past their refusal to consider it.

I had started this, along with others, in our committee because we had situations arise where foreign (i.e., out of state) attorneys were prevented from appearing. Neither the State Bar nor the arbitral agents had any authority to prevent this misjudgment and, as you mention, it flies in the face of California’s purported desire to be a haven for international arbitrations.

Many thanks for again making it an issue, and good luck! Maybe we have a different Judicial Council by now with a more open approach.

Dixon Q. Dern

The recent opinion piece by Brad Seiling and Justin Jones Rodriguez (“The Ninth Circuit Rejects First Amendment Arguments in Favor of SOCE,” Closing Argument, April 2014), regarding challenges to California’s new law prohibiting sexual orientation change efforts (SOCE) with minors, was misleading with regard to both the therapy involved and the law.

If there is an “overwhelming consensus that SOCE is harmful and ineffective,” as the authors claim, that “consensus” exists only as a diktat of political correctness, not as a scientific finding. Even the American Psychological Association, in its 2009 Task Force Report on the subject, admitted: “We conclude that there is a dearth of scientifically sound research on the safety of SOCE…. Thus, we cannot conclude how likely it is that harm will occur from SOCE.”

The assertion by Seiling and Rodriguez that “[c]hildren who undergo SOCE are more likely than their peers to experience alcohol and drug dependence…[and] to commit suicide,” among other negative outcomes, has no scientific support. The APA declared, “We found no empirical research on children who request SOCE.”

Seiling and Rodriguez would have us believe that what Pickup v. Brown is really about is a mere clarification that the “First Amendment does not insulate medical professionals from giving negligent advice to patients.” Actually—as Judge Diarmuid O’Scannlain noted in his dissent—the court, “contrary to common sense and without legal authority, simply asserts that some spoken words—those prohibited by SB 1172—are not speech.” Should SB 1172 come before the U.S. Supreme Court, the Court should (and likely will) strike it down as exactly the type of unconstitutional restriction on unpopular minority speech the First Amendment was meant to prevent.

Travis Weber

There is a widespread belief that lawyers are lousy with numbers. While I enjoyed reading Gordon K. Eng’s article (“Cost-Efficient Ways to Improve Desk Space Productivity,” Computer Counselor, July/August 2014), sentences like this one help to perpetuate this math myth: “While not as fast as a sheet-fed scanner, which can scan around 10 to 20 pages per minute, the SV600 takes about three seconds for a pair of pages.” Three seconds for two pages equals 40 pages per minute (solve for x, where 2/3 = x/60).

Aaron Craig

Correction

On the cover of the April 2015 issue describing Robert M. Heller’s article “Doubling Down,” the term “double derivative indemnity” was mistakenly used instead of “double derivative litigation.” Los Angeles Lawyer regrets the error.

Articles Solicited

Los Angeles Lawyer encourages the submission of substantive, researched legal articles. Manuscripts, queries, and requests for a style guide may be sent to Eric Howard (ehoward@lacba.org). The Los Angeles Lawyer Editorial Board carefully considers all submissions.

Eric Howard, editor
What is the perfect day? A work day? They’re all work days. To set a plan—and carry the plan through—that’s a great day.

What is overrated in the law enforcement profession? As a result of Hollywood, that the police department and the sheriff’s department have unlimited resources. We’ve created a false sense of expectation, and people hold us to it.

What is underrated? The dedication, commitment, and effort put forth, every day, by the people who are out there doing their job.

Why did you personally choose to go into law enforcement? I need something where I’m out there, where I’m meeting new people all the time and where there are new challenges every day…where at the end of the day, in some small way, I have helped someone. I’ve never looked back.

What was your best job? Working homicide cases and investigating the ultimate crime that one person can do to another.
Principles for New Associates When Working with Law Firm Staff

AFTER SURVIVING THREE GRUELING YEARS of law school, enduring the firm interview process, and passing the bar examination, a newly licensed lawyer has every right to be proud upon receiving an offer to join his or her first law firm. It is only natural to want to revel in such an accomplishment. The trick, though, is to temper those feelings of pride and accomplishment lest they slide into a sense of entitlement.

An offer to become an associate at a law firm is undoubtedly the well-deserved fruit of years of hard work and commitment. For many a freshly minted attorney (many of whom are in their mid-20s), an associate position is the first job in which anyone will be working under him or her. So, the young associate has finally earned the right to call himself or herself someone’s boss, as staff members are in fact now working for the associate, right? Wrong.

An associate is no one’s boss. Granted, the associate may have the authority to request that certain tasks be performed by the staff and have supervisory responsibility over an assistant’s work, but an associate is first and foremost a coequal member of the team assembled by the firm’s partners. In the partners’ eyes, every employee under them is an integral component of the machine that allows the firm to address its cases efficiently. Each employee in the office was hired because the partners believed he or she could play a specific role. Only when everyone successfully fulfills his or her assigned role will the office run smoothly. Therefore, although the associate may perceive a hierarchical structure in the office, it is a mistake to think that beyond the fact that the associates are at the top of the food chain, there are any other bosses.

At any reputable law school, students are advised countless times to treat their future assistants and staff with respect. However, law students are seldom taught that the reasoning behind this goes much deeper than common cordiality. The bottom line is that a seasoned support staff member will know a lot more about the practice of law and legal procedure than a first- or second-year associate. And if it ever comes down to a serious disagreement or rift between the two employees—assuming there is no clear law or procedure on the issue debated—a partner will almost certainly side with the more experienced staff member, who has earned the partner’s trust and appreciation through the years. Moreover, a lawyer’s first few years of practice are certainly not the time to display unmerited cockiness. At that early stage in an associate’s career, he or she is in no position to be playing office politics.

And as counterintuitive as it may seem, the support staff actually yield a considerably greater amount of power over the firm’s newest attorneys than the other way around. Consider the assistant who has already spent decades in the work force. The last thing he or she needs is to be derided by some pompous 20-something with little to no real-world experience. If the associate allows his or her relationship with an assistant to get off to a rough start, there is no doubt that the associate’s life will be miserable. Important documents may begin to arrive at the associate’s desk later than they should. Typos may not be caught. The formatting of a pleading may be off. The point is, any of a number of errors (intentional or not) caused by staff will be the associate’s—and only the associate’s—fault. After all, it is the attorney’s responsibility alone to ensure that the firm’s overall work product is perfect. A new associate especially needs to be mindful of this, as he or she must not only supervise support staff but also ensure that the partners avoid mistakes as well. Thus, when a junior associate's name is on a file, any errors that occur will ultimately be the associate's fault, whether they originate from above or below. The associate’s role in this regard can be described as one of strict liability.

Despite these harsh words of caution, courting favor with the office staff and legal assistants can—nay, will—be beneficial to a new lawyer’s long-term interests. While the assistant certainly has the power to make the associate’s life difficult, by the same token, he or she can also make the associate’s life a whole lot easier. Simply put, it is a balancing act. One can be assertive without being a jerk. While it is important to be in charge, it is also prudent to avoid being oppressive. It is all right to horse around in moderation but never inappropriately. Most of all, an associate should treat others with random acts of kindness. If the associate gives the support staff members cause to genuinely like him or her, and if he or she treats them with the respect they deserve, that positive energy will manifest itself in returns to the associate. Support staff may start doing favors for the associate beyond what is required. They might start volunteering their services when they have yet to be asked. They might even stay late to help out on a tight deadline. Whether for selfish reasons or otherwise, nothing bad can come of being nice to the office staff. On the other side of the coin, only harm will come as a result of an attitude of entitlement.

Matthew A. Young is an associate at Kiesel Law, LLP in Beverly Hills, where his practice focuses on mass torts and class actions.
WITHIN THE PAST YEAR, there have been significant new developments in California employment law from both the legislature and the courts. In addition, the U. S. Supreme Court decided a number of important federal questions that directly impact employers in and outside the state. Moreover, the National Labor Relations Board (NLRB) weighed in with several important new precedents that affect California employers—including those without a unionized work force.

In enacting the Healthy Workplaces, Healthy Families Act of 2014 (AB 1522),1 which becomes effective July 1, 2015, California joins Connecticut in mandating paid sick leave for all employees.2 Employers that have at least one employee who works more than 30 days in a year in California must provide up to 24 hours of annual paid sick leave. The new law requires that this benefit be provided to all employees who work the requisite number of days (including those who are temporary or are employed part-time). Sick leave may be used for the “diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee’s family member.”3 Nonexempt employees accrue paid sick leave at the rate of one hour for every 30 hours worked; exempt employees accrue sick leave based on the lesser of their normal work schedule or a 40-hour workweek. An employee can use accrued sick leave after being employed for 90 days, and accrued but unused sick leave carries over to the following year of employment (subject to a 48-hour cap at the employer’s option).

There are extensive posting, notice, and recordkeeping obligations built into the law as well, including a requirement that employers provide written notice on an itemized wage statement or a separate notice that is distributed with the wage statement setting forth the amount of then-current paid sick leave available to the employee. Exempted from the law are employees who are covered by a collective bargaining agreement if the agreement expressly provides for paid sick leave as well as employees of in-home supportive service providers and flight deck and cabin crew members of an air carrier that is subject to the provisions of Title II of the federal Railway Labor Act.4

Perhaps the most obvious shot over the bow fired by the legislature at California employers last year was AB 2053, which amended Government Code Section 12950.1 by adding an additional training requirement for large employers (those with 50 or more employees).5 Prior to this amendment, Section 12950.1 required these employers to provide at least two hours of classroom or “other effective interactive training and education regarding sexual harassment to all supervisory employees in California within six months of their assumption of a supervisory position” and then once every two years thereafter. Under the new law, employers are required to add another component to this mandatory training: prevention of “abusive conduct” in the workplace. Abusive conduct is defined in the statute as “conductor of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person’s work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.”6 This statute is a shot over the bow in the sense that it introduces into the law the notion that an employer’s or supervisor’s hostile or even unfriendly treatment of an employee that is not linked to some legally protected category (e.g., race, age, sex, disability, religion, whistleblower, etc.) may lead to civil liability. For now, so-called bullying is not expressly illegal under California law—though, of course, it is an extremely unwise management technique for a variety of reasons—but this new training requirement may be the first step toward a possible future expansion of the law.

California Supreme Court Cases
The California Supreme Court finally decided to follow the U.S. Supreme Court’s lead and recognize that class action waivers are

Anthony J. Oncidi is a partner at Proskauer and chair of the Labor and Employment Law Department in Los Angeles, representing employers and management.
enforceable under the Federal Arbitration Act irrespective of contrary state law. In *Iskanian v. CLS Transportation Los Angeles, LLC*, the California Supreme Court held that under the authority of *AT&T Mobility LLC v. Concepcion*, class action waivers are enforceable in the employment context. In so holding, the *Iskanian* court declined to follow recent precedent from the NLRB that the National Labor Relations Act generally prohibits contracts that compel employees to waive their right to participate in class action proceedings to resolve wage claims. However, the *Iskanian* court also recognized a notable exception to its holding—that representative actions brought under the California Labor Code Private Attorneys General Act of 2004 (PAGA) cannot be waived. The court’s reasoning is that a PAGA action “functions as a substitute for an action brought by the government itself” and therefore is a type of *qui tam* action that is not waivable. Since employers in California are more likely to be sued under PAGA than by means of a traditional class action these days, *Iskanian* provides little comfort.

In *Patterson v. Domino’s Pizza, LLC*, the California Supreme Court reversed the court of appeal and reinstated summary judgment for Domino’s after giving deference to the franchise agreement. At issue in the case was whether the franchisor, Domino’s Pizza, was potentially liable for the alleged sexual harassment of a young female employee by her assistant manager, both of whom were employees of the franchisee Sui Juris, LLC. In her pleadings, the plaintiff alleged she was employed both by Sui Juris and its franchisor, Domino’s Pizza. Domino’s filed a motion for summary judgment that the trial court granted and the court of appeal reversed. However, the supreme court concluded that Domino’s did not retain or assume “the traditional right of general control an ‘employer’ or ‘principal’ has over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee’s employees.” On the other hand, the court of appeal had emphasized that inferences could be drawn from the franchise agreement that “Sui Juris lacked managerial independence” and that Domino’s “meddled” in Sui Juris’s employment decisions, including what to do with the alleged harasser in this particular case. Referring to the assistant manager, an area leader from Domino’s reportedly told the franchisee, “You’ve got to get rid of this guy.” Although Domino’s narrowly won the case (4 to 3), the California Supreme Court noted: “Nor do we mean to imply that franchisees, including those of immense size, can never be held accountable for sexual harassment at a franchised location. A franchisor will be liable if it has retained or assumed the right of general control over the relevant day-to-day operations at its franchised locations.”

It may be significant that the Patterson opinion was authored by now retired Justice Marvin Baxter, an appointee of former Governor George Deukmejian, who has since been replaced by former Stanford Law School professor Mariano-Florentino Cuéllar, who may have voted with the dissent if the case had been decided this term instead of last.

In a case involving an unauthorized alien who claimed disability discrimination, *Salas v. Sierra Chemical Company*, the high court ruled in favor of the employee. Vicente Salas worked on Sierra Chemical’s production line, filling containers with various chemicals. At the time of his hire, Salas provided Sierra with a resident alien card and a Social Security card and signed an I-9 Employment Eligibility Verification Form. After allegedly injuring his back several times and presenting doctors’ notes restricting his ability to lift, stoop, and bend, Salas was laid off as part of Sierra’s annual reduction in its production line staff. Salas received a recall-to-work letter, but Sierra did not permit him to return to work after he told the company he was “still seeing a doctor.” Salas later filed a lawsuit against Sierra, alleging disability discrimination and denial of employment in violation of public policy. After filing an in limine motion stating that he would assert his Fifth Amendment right against self-incrimination to any questions concerning his immigration status, Sierra discovered that the Social Security Number that Salas had used to secure employment belonged to a man in North Carolina. Summary judgment was granted in favor of Sierra on the ground that it never would have hired or recalled Salas if it had known he was using someone else’s Social Security number. However, in this opinion, the California Supreme Court reversed summary judgment and held that the federal Immigration Reform and Control Act preempts California’s Fair Employment and Housing Act, which protects employees regardless of their immigration status, only for loss-pay damages for the period of time after the employer discovers that the employee was ineligible to work in the United States.

**U.S. Supreme Court Cases**

In *Integrity Staffing Solutions, Inc. v. Busk*, the U.S. Supreme Court held that an employer is not required to pay employees for time spent in security screenings. The employer in this case, Integrity Staffing Solutions, provides staffing to Amazon.com throughout the United States. Plaintiffs worked as hourly employees, retrieving and packaging products at Integrity Staffing warehouses in Nevada. Integrity Staffing required its employees to undergo a security screening before leaving the warehouse at the end of each day. Plaintiffs filed a putative class action against Integrity Staffing on behalf of similarly situated employees for violations of Nevada state law and the federal Fair Labor Standards Act (FLSA). The suit alleged that the employees were entitled to compensation for time spent at the end of their shifts waiting to undergo and actually undergoing security screenings to prevent employee thefts—the plaintiffs alleged that the screenings amounted to roughly 25 minutes per day. In a unanimous opinion, the Supreme Court held that the security screenings at issue were “non-compensable postliminary activities” because the screenings were not the principal activity that the employees were employed to perform nor were they “integral and indispensable” to the employees’ duties as warehouse workers. Although the FLSA applies to California employers who are engaged in interstate commerce, the *Busk* opinion is likely to have minimal effect here because California state law defines “hours worked” as “the time during which an employee is subject to the control of an employer….”

In another unanimous opinion, the U.S. Supreme Court invalidated President Obama’s January 2012 recess appointments to the NLRB, thus calling into question scores of opinions issued by an improperly constituted board. Notable NLRB opinions at issue involve: 1) imposing an obligation to bargain over the discretionary aspects of discipline while collective bargaining was still underway, 2) determining that dues check-off clauses survive the expiration of a collective bargaining agreement, 3) finding the disciplining of a union member who wrote vulgar pro-union statements on union newsletters—then lying about it to the company—to be unlawful because the activity was protected by the NLRA, and 4) requiring employers to turn over witness statements as part of the duty to provide information to the union.

In another U.S. Supreme Court case, *Burwell v. Hobby Lobby Stores, Inc.*, the high court held that private employers are persons within the meaning of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA) and that the federal government had overstepped its bounds by requiring faith-based private, for-profit employers to pay for certain forms of birth control that those employers argued contradicted their sincere religious beliefs. At issue in the case was whether the requirement of the Patient Protection and Affordable Care Act that health insurance plans cover “preventive ser-
VICES”—which included four “abortifacients” that may have the effect of preventing a fertilized egg from developing—violated the employers’ right to freedom of religion under the constitution and RFRA. Specifically, the Supreme Court determined that there were less restrictive alternatives available such as requiring the government or the employers’ insurers to assume the cost of providing the “preventive services” without charge either to the employers or their employees.

In a decision that reverses existing law on employee use of an employer’s e-mail system, the NLRGB determined that employees may use their employer’s e-mail system during nonworking time to discuss unionization and the terms and conditions of their employment. The board overruled its own precedent in Register Guard on the ground that the earlier opinion accorded too much weight to an employer’s property rights over employees’ NLRA Section 7 rights to engage in concerted activity.

U.S. District Court Case

Although not a binding appellate opinion or a statutory mandate, a November 2013 verdict from a federal court jury in San Diego is a reminder of how unpredictable juries can be when deciding discrimination and harassment cases. Rosario Juarez, a former manager of AutoZone, claimed she was fired after complaining that she was demoted after giving birth. Juarez joined the company in 2000 and was promoted to parts sales manager the following year. She claimed that AutoZone had a glass ceiling for female managers that was perpetuated through an opaque promotion process. Juarez was promoted to the position of store manager in 2004 after complaining about discrimination. After she became pregnant in 2005, her district manager urged her to step down, saying that she would not be able to handle the responsibilities of running the store and being a mother at the same time. Juarez claimed she continued to be discriminated against after the birth of her son and that she was demoted in 2006 because of her complaints. In 2007, she filed a complaint over the demotion with the California Department of Fair Employment and Housing and was fired the following year after another employee allegedly misplaced an envelope containing cash from the register for which Juarez was blamed. Juarez sued for wrongful termination of employment, pregnancy and gender discrimination, retaliation, and failure to prevent harassment. The jury awarded Juarez $393,759 for past economic losses, $228,960 for future economic losses, $250,000 for emotional distress damages, and $185 million in punitive damages—presumably a world record verdict in a single-plaintiff employment discrimination case.

One in eight Americans lives in California—so what happens here has a significant impact on the nation as a whole. The developing labor and employment law cases do not just impact the country who look to developments in the Golden State as they contemplate changes to their own laws and regulations. The past year has been a blockbuster in terms of major changes—and there is little reason to believe that 2015 will be much different.

3 Lab. Code §246.5(a)(1).
4 45 U.S.C. §§181 et seq.
5 Gov’t Code §12950.1.
6 Gov’t Code §12950.1(g)(2).
7 9 U.S.C. §§1 et seq.
10 29 U.S.C. §§151 et seq.
11 In re D.R. Horton, Inc., 357 NLRB No. 184 (2012), rev’d in part, 737 F. 3d 344 (5th Cir. 2013).
12 Lab. Code §§2698, et seq.
13 Iskanian at 381-83 (citing Arias v. Superior Court, 46 Cal. 4th 969, 986 (2009).
14 On January 20, 2015, the U.S. Supreme Court denied the employer’s petition for certiorari in Iskanian; in October 2014, the NLRB reaffirmed its position that mandatory arbitration provisions violate the NLRA in Murphy Oil USA, Inc., 361 NLRB No. 72 (Oct. 28, 2014).
15 Patterson v. Domino’s Pizza, LLC, 60 Cal. 4th 474 (2014).
16 Id. at 503.
17 Id. at 485.
18 Id. at 503.
20 Id. at 416.
21 Id. at 417.
22 Id. at 430-31.
24 Register Guard, 351 NLRB 1110 (2007).
25 On January 20, 2015, the U.S. Supreme Court held that 2015 will be much different.
27 See generally IWC Wage Order No. 4-2001 §2(k.)
31 Register Guard, 351 NLRB 1110 (2007).
WORKERS’ COMPENSATION defense counsel are not engaged in the usual tripartite relationship that arises in other liability insurance contexts. The workers’ compensation insurance company is often the workers’ compensation defense attorney’s only client, and thus it is the only one entitled to attorney-client protections such as the attorney’s duties of loyalty and confidentiality. Nevertheless, employers may be required by contract to cooperate in the defense of their employees’ claims. Therefore, an attorney for an employer may not have the same client as a workers’ compensation defense attorney, even if they work together on a claim.

In California, workers’ compensation liability arises from the constitution and lies in neither tort nor contract. The workers’ compensation system “is exclusive of all other statutory and common law remedies, and substitutes a new system of rights and obligations for the common law rules governing liability of employers for injuries to their employees.” Because the workers’ compensation system seeks to ensure funding for the care of injured workers, workers’ compensation policies in California make insurance companies primarily and directly responsible for an injured worker’s benefits. In conformity, the legislature has defined the word “employer” to include the employer’s workers’ compensation insurer. Workers’ compensation claims have their own forum as well—the Workers’ Compensation Appeals

Joseph C. Gjonola practices business litigation, specializing in workers’ compensation bad faith and surrounding matters, at Roxborough, Pomerance, Nye & Adreani in Woodland Hills. He would like to thank Diane L. Karpman for her expert guidance through this specialized subject matter, Drew Pomerance for reviewing drafts and providing insight, and Nicholas Roxborough, Gary Nye, and Michael Adreani for their constant support.
Board (WCAB). When an insurer gives notice of its liability to an injured worker, “[t]he insurer shall…be substituted in place of the employer in any proceeding theretofore or thereafter instituted by such claimant to recover such compensation, and the employer shall be dismissed therefrom.” Under this statute, courts have ruled that employers do not share an attorney-client privilege with workers’ compensation defense attorneys because only the insurer is potentially liable for a claim, so only the insurer is the defense attorney’s client.7

The workers’ compensation scheme centers on the “workers’ compensation bargain” in which injured workers are provided medical treatment consistent with Labor Code 4600, temporary disability indemnity payments, permanent disability indemnity payments, and other statutory workers’ compensation benefits, all in exchange for giving up the opportunity to sue employers for damages. Employers trade the risk of potentially unlimited damages that accompany litigation for the limited obligation to fund injured workers’ reasonable medical and indemnity needs. It is essentially statutory liability without regard for fault and may even pay benefits, all in exchange for giving up the employer’s workers’ compensation premium.9

The X-Mod

Workers’ compensation insurance is regularly one of the three highest costs facing average California employers. An employer’s premium is determined, in part, by its loss history—both the frequency of injuries and the cost of benefits. A state-regulated formula derived from the employer’s loss history generates what is known as an experience modification rating (also called the x-mod or EMR), which is multiplied (along with other factors) against a base premium amount to determine an employer’s workers’ compensation premium.9 Therefore, an employer’s future premium—and possibly its ability to survive as a business—are affected by every benefit payout. If the x-mod is too high, some employers suffer additional penalties. For example, almost every application to bid for a public contract in California asks the applicant business to disclose its EMR. One extremely high, outlier workers’ compensation claim may affect the EMR and prevent a company from bidding for a contract.

Employers and their attorneys must therefore be aware that a workers’ compensation defense attorney’s duties of loyalty and confidentiality are owed to the insurance company, not the employer. For example, in the case of Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton, the plaintiff, Canton Poultry, sued its workers’ compensation defense counsel for malpractice. The workers’ compensation insurance defense firm, Stockwell, was hired by Canton Poultry’s insurance carrier, California Indemnity Insurance Company. Stockwell handled the defense of a workers’ compensation claim from an employee, Duran, who also filed a civil suit against Canton Poultry. Duran’s attorney in the civil suit told the workers’ compensation defense counsel that Duran wanted a settlement of both actions, which likely would have been a barrier for Canton Poultry. The workers’ compensation defense counsel, however, never told Canton Poultry of Duran’s desire, and no global settlement was made. Instead, after the workers’ compensation claim was finished, Canton Poultry had to litigate the civil suit at great expense. Canton sued Stockwell for failing to inform them of Duran’s desire for a global settlement. As the appellate court put it, “The question presented by plaintiffs’ appeal is what duties, if any, did Stockwell attorneys owe to Canton Poultry in conjunction with the information it had about Duran’s civil suit and his desire for a global settlement?”10

Labor Code Section 3755

To answer this question, the court relied on Section 3755 of the Labor Code. “[T]he insurer is substituted in place of the employer in any proceeding instituted by the claimant to recover such compensation, and the employer is dismissed from such proceeding. The proceedings then continue against the insurer instead of the employer.” Therefore, the court reasoned, Stockwell was not Canton Poultry’s attorney at the time Duran mentioned a global settlement. The court held that it was appropriate for Stockwell to tell Duran that “the civil action was none of its concern.” Moreover, the court held that Stockwell had no particular duty to inform Canton Poultry that Stockwell was not Canton Poultry’s attorney. According to the court, Canton Poultry should have known, “An employer’s reasonable belief at that point in time must necessarily be that the attorney represents the party who has been substituted in place and stead of the employer, and who remains involved in the case—the insurance carrier.” Moreover, according to the Canton court, Canton Poultry did not have the protection of Section 2860 of the Civil Code, the Camis counsel statute. That right to independent counsel is triggered by a conflict of interest. The Canton court held, “Since Canton Poultry was relieved of liability in the workers’ compensation case by operation of Labor Code section 3755, there could be no conflict of interest between itself and California Indemnity in that case.”

In California, there is a long line of cases that recognize the duties carriers owe to employers when handling workers’ compensation claims. Cases decided over the past 25 years have held that carriers have a duty to properly manage benefits, defend against claims, and settle claims when appropriate, because an employer’s premium can be negatively affected at each step in the process.11 Canton’s conclusion that workers’ compensation defense attorneys owe no duties to employers means that although insurance carriers owe affirmative duties to protect employers’ interests arising from claims, such duties are contractual and do not extend to the lawyers who have no direct relationship with the insured employers.12 Other states have followed California, even when the employers directly face liability due to having contracted for a high deductible policy.13 For example, in In re XL Specialty Insurance Company and Cambridge Integrated Services Group, Inc., Relators,14 the Texas Supreme Court went one step further than the Canton court and refused to recognize the employer’s interest in workers’ compensation litigation, even though the first $1 million of benefits was payable by the employer, Cintas. It had a large deductible policy with XL Specialty Insurance Company, with a $1 million retention. The claims were managed by Cambridge, a third-party administrator (TPA), rather than by the insurance company itself. Under their contractual arrangement, the TPA directed benefit payments made by XL, and Cintas reimbursed XL up to $1 million per claim.

In the underlying workers’ compensation claim brought by Cintas employee Wagner, the TPA denied benefits. Workers’ compensation litigation resulted in Wagner’s favor. Counsel hired by XL communicated with XL, the TPA, and Cintas about the progress of the case. Later, Wagner brought a civil suit against all three for breach of the common law duty of good faith and fair dealing, violations of the Insurance Code and Texas Deceptive Trade Practices Act. During discovery Wagner sought communications between XL’s attorney and the TPA and Cintas. The three asserted the attorney-client privilege, which the trial court denied. The three brought a writ of mandamus to the Texas Supreme Court.15

Section 406.031 of the Texas Labor Code, similar to California Labor Code Section 3755, makes the insurance carrier rather than the employer directly “liable for compensation for an employee’s injury without regard to fault or negligence.” Based on that statute,
and despite the $1 million that Cintas had at risk, the Texas Supreme Court decided that the attorney hired by XL never represented Cintas. “Thus, the insurer, not the insured, is the client and party to the pending action, and it retains counsel on its own behalf. In contrast, in a lawsuit involving a standard liability insurance policy, only the insured is a party to the case, and the insurer typically retains counsel on its insured’s behalf.”22 The court acknowledged that in a typical liability insurance case a tripartite relationship is created because the insured and insurer’s interests are aligned.23 Yet in the case before it, even though the insurer and insured’s interests were aligned through the $1 million retention, the court refused to apply the typical tripartite relationship.

Claims Adjusters Beware

Another case, American Zurich Insurance Company v. Montana Thirteenth Judicial District Court,24 arose in Montana’s Supreme Court and addressed “whether, in a claim for [workers’ compensation] benefits, an attorney’s communication to its client insurer is privileged when the client voluntarily discloses the communication to the nonclient employer.”25 The court held that “Montana statutes require an employer to elect one of three plans for insuring [workers’ compensation] liability. Pertinent here is Plan II, under which the employer purchases coverage through an authorized insurance company,…. The Plan II insurer is directly and primarily liable to the employee, and must pay directly to the employee any compensation for which the employer is liable.”26 In addition, the court found that “the common interest in keeping litigation and premium costs down [for the employer], by itself, is not sufficient to extend the [attorney-client] privilege beyond the attorney client relationship.”27

The court denied the attorney-client privilege to the employer despite recognizing that “the employer…retains a ‘duty to cooperate and assist its insurer, including [a] duty to assist in responding to discovery.’”28 As a result, claims adjusters—who are not lawyers but who work with defense counsel—should be clearly informed whenever they are receiving confidential information from defense counsel, so as not to inadvertently waive the attorney-client privilege by passing on confidential information to cooperating employers.

Employers Must Pay Attention

Because workers’ compensation defense attorneys owe duties to insurance companies, these attorneys may be free to act against an insured’s interests. In State Compensation Insurance Fund v. Scheffield Medical Group, et al.,29 Scheffield provided medical services to injured workers and filed liens for those services at the WCAB. Many of those injured workers were covered by State Compensation Insurance Fund (SCIF). It so happened that SCIF was Sheffield’s workers’ compensation carrier for Scheffield’s own employees. At the WCAB, SCIF filed a petition for removal, consolidation and stay of lien proceedings alleging that lien claimant Scheffield “engaged in a pattern of fraudulent conduct” regarding the medical services underlying their liens against SCIF.30

For its fraud claims, SCIF apparently relied on evidence gathered by its in-house workers’ compensation defense attorney, Roth, during SCIF’s defense of workers’ compensation claims brought by Scheffield’s own employees. “Scheffield contended that in workers’ compensation cases in which SCIF insured and undertook to defend Scheffield as an employer against claims brought for industrial injuries by Scheffield’s employees, SCIF and Roth engaged to attack Scheffield by obtaining fabricated testimony to use against Scheffield’s lien claims in other cases, and by creating an unfavorable claims history to increase Scheffield’s insurance premiums. Scheffield claimed that SCIF’s petition to consolidate the lien proceedings was primarily based upon fabricated testimony obtained from former Scheffield employees in exchange for liberal compensation for their claims.”31

The WCAB refused to find that evidence gathered by Roth was problematic as a matter of law. The board held that the lower tribunal “does not identify how any privileges Scheffield possesses or the duty SCIF owes to Scheffield in the cases involving claims by Scheffield employees is connected to the subject matter of the consolidated [lien] cases…. We do not believe a conflict of interest exists where an insurer, pursuant to Labor Code section 3755, assumes liability and substitutes in place of an employer, who is thereby dismissed from the proceedings.”32 On that basis, SCIF’s attorneys were free to build a case against Scheffield as a provider of allegedly fraudulent medical services, as the attorneys were defending SCIF against workers’ compensation claims made by Scheffield’s employees. “Scheffield has not established the existence of a possible conflict of interest here. Counsel for SCIF entered the cases involving Scheffield as an insured employer and represented the interests of SCIF, which had assumed full liability for any award, and had full control over the settlement of the claims. SCIF’s actions in those cases are irrelevant to the proceedings in the consolidated [lien] cases where SCIF is challenging Scheffield’s operations as a provider of medical services to injured workers and not as an insured employer.”33

Even employers that are not medical service providers therefore need to be aware that the law allows for investigation of the employer by workers’ compensation defense attorneys, as there are many different bases for suits by insurers against their insureds for breach of contract. The bases could be as simple as an employer’s misrepresenting the type of work employees do or how many employees are engaged in risky activities.

Accordingly, employers must understand that even if they have regular communications with the workers’ compensation defense attorneys regarding the defense of the claim, that attorney ultimately owes duties to the insurance carrier and not to the employer. Employers need to be aware that there are differences in the attorney-client relationship with respect to workers’ compensation insur-
ance and the standard tripartite relationship that exists in other lines of insurance. A lack of awareness or confusion about the nature and extent of the attorney-client relationship could have serious consequences.

2 See generally the California’s Workers’ Compensation Act (WCA), CAL. CONST. Art. XIV, §4; Quong Ham Wah Co. v. Industrial Accident Comm’n of Calif., 184 Cal. 26, 36 (1920).
4 Under Insurance Code §11651, every workers’ compensation insurance policy “shall contain a clause to the effect that the insurer will be directly and primarily liable to any proper claimant for payment of any compensation for which the employer is liable, subject to the provisions, conditions and limitations of the policy.” See also INS. CODE §11650.
5 LAB. CODE §3850(b).
6 LAB. CODE §3755.
8 CAL. CONST. art. XIV, §4.
9 The regulations governing the experience rating system are contained in the California Workers’ Compensation Experience Rating Plan—1995. See CAL. CODE REGS. tit. 10, §2353.1.
11 Id. at 1221.
12 Id. at 1226.
13 Id. at 1228.
14 Id.
15 See, e.g., http://dictionary.law.com for a definition of Cumis counsel.
18 Id.
21 Id. at 48.
22 Id. at 54.
23 Id. at 55.
25 Id. at 302.
26 Id. at 304 (citing MONT. CODE ANN. §§39-71-2201, 39-71-2203(3)).
27 Id.
28 Id. (quoting MONT. ADMIN. R. 24.5.301(4)).
30 Id. at 2.
31 Id. at 2-3.
32 Id. at 4.
33 Id. at 5.
DEFENSE

Musser v. Provencher did little to reduce the risks for a defendant in a legal malpractice case in which liability could attach to multiple attorneys

TO SUE OR NOT TO SUE? That is the question that many defendants in legal malpractice cases have to confront if they want to allocate a proportionate share of liability to other attorneys whom the plaintiff has chosen not to sue. Legally and strategically the question is not easy to answer and requires analysis of how to apply the unsettled law of equitable indemnity, contribution, and comparative fault.

Historically, courts have analyzed the allocation of damages among multiple tortfeasors in terms of two mutually exclusive doctrines: contribution and indemnity. The apportionment of loss between multiple tortfeasors was thought to present a question of contribution. Indemnity, on the other hand, dealt with whether a loss should be entirely shifted from one tortfeasor to another rather than apportioning the loss between the two.

In 1957, the legislature enacted statutes that created, for the first time in California, a right of contribution among joint tortfeasors. This contribution right limited the liability of each joint tortfeasor for a plaintiff’s judgment to his or her pro rata share of the judgment. Thus, if a joint tortfeasor paid more than his or her pro rata share of the judgment, the tortfeasor who paid more had a right to recover the amount in excess of his or her pro rata share from the other tortfeasors.

In 1978, the California Supreme Court, in American Motorcycle Association v. Superior Court, merged traditional concepts of implied indemnity and contribution and established the doctrine of comparative indemnity. It permitted the apportionment of comparative fault among multiple joint tortfeasors, allowing a joint tortfeasor to seek partial indemnity from other joint tortfeasors on a comparative fault basis. In addition to a comparative fault allocation between defendants, the plaintiff’s conduct was also allocated a percentage of fault so that the total comparative fault among all plaintiffs and defendants equaled 100 percent. Nonetheless, each tortfeasor whose negligence was a proximate cause of an indivisible injury to the plaintiff was individually liable for all proximately caused damages.

After American Motorcycle, the distinction between the doctrines of equitable indemnity and contribution became almost indistinguishable. Many courts now refer to contribution or indemnity actions under the “partial indemnity” or “comparative indemnity” labels. For simplicity, the two concepts may be generally referred to as indemnity unless differentiation between contribution and indemnity is essential.

For many years, the appellate courts seemed to be developing a bright-line rule that prohibited a legal malpractice defendant’s

Kurt L. Schmalz, a shareholder in the Beverly Hills law firm of Lurie, Zepeda, Schmalz, Hogan & Martin, has practiced business litigation in state and federal courts for more than 30 years.
indemnification. However, that rule got blurry in Musser v. Provencher, in which the California Supreme Court confronted “whether considerations of public policy require the adoption of a blanket rule barring concurrent counsel or cocounsel from suing one another for indemnification of legal malpractice damages.”

In Musser, a family law attorney obtained the advice and services of a bankruptcy attorney in a divorce action. The bankruptcy attorney gave erroneous advice to the family law attorney that resulted in the family law attorney’s improperly pursuing the wife’s child support claim even though the husband had filed for bankruptcy. The pursuit of the claim for child support violated the automatic stay. Facing punitive damages, the wife settled with her husband for less than the original support order and sued the family law attorney for malpractice and breach of contract. The family law attorney filed an indemnity cross-complaint against the bankruptcy attorney and settled the malpractice case with the wife. The bankruptcy attorney refused to contribute to the settlement and ultimately obtained a judgment of nonsuit against the family law attorney on the indemnity claims. The court of appeal reversed the trial court’s judgment and specifically found that the family law attorney’s indemnity claim against cocounsel was not barred by public policy.

The supreme court in Musser analyzed the numerous appellate cases involving lawyer indemnity claims, including Kroll & Tract v. Paris & Paris and Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker, both of which involved cocounsel indemnity claims that arose in insurance defense cases. The supreme court discussed a bright-line rule that generally barred indemnity claims by a predecessor attorney against the successor attorney in a legal malpractice case. Without expressly endorsing a blanket presumption against indemnification claims in “predecessor/successor cases” the court noted that the lower appellate courts, “with one much criticized exception, have barred indemnification.”

Setting aside the “predecessor/successor” cases, the court held that the courts should carefully analyze, on a case-by-case basis, whether the public policy concerns of avoiding conflict of interest between attorney and client and protecting the confidentiality of attorney-client communications are present before the courts prohibit indemnification claims in concurrent or cocounsel cases. The Musser court specified the public policy concerns that inform a case-by-case analysis as follows:

The first policy consideration is avoiding conflicts of interest between attorney and client: The threat of an indemnification action would arguably create a conflict of interest between the successor attorney and the client because the greater the award the successor attorney managed to obtain for the client in the malpractice action, the greater the exposure to the predecessor attorney in indemnification action. The second policy consideration is protecting confidentiality of attorney-client communications: In order to defend against an indemnification action, the successor attorney might be tempted to compromise the confidentiality of communications with the client.

The court in Musser also noted a third policy concern, which was to protect the right of clients to choose their attorneys. This policy concern was geared to reducing the risk that an indemnification action might discourage the successor attorney from representing the client in a malpractice action because the successor would be limited in defending the indemnification claim by the attorney’s duty to maintain confidentiality of client communications. The court, however, noted that this policy concern had been given little weight and was characterized as of “secondary importance” in some appellate cases.

Ultimately, the supreme court affirmed the court of appeal and found that none of the public policy concerns was present in the family lawyer’s indemnity action against the bankruptcy lawyer. The public policy concerns discussed in Musser, which the court derived from several prior court of appeal cases, seem to apply most clearly in situations in which the successor attorney still represents the client in the malpractice case against the prior attorney. Yet the court of appeal has found, in both predecessor/successor and cocounsel cases, that the policy concerns can be present if an attorney other than successor or cocounsel represents the client in the malpractice action.

The supreme court left undecided whether the rule prohibiting a malpractice defendant from suing successor counsel for indemnity is also subject to the case-by-case analysis. Thus, if predecessor counsel, sued by a former client for legal malpractice, tried to sue successor counsel for indemnity, would the indemnity cross-complaint be allowed to stand when, as in Musser, neither of the two public policy concerns was present? This is not an easy question to answer. Many pre-Musser courts bar lawyer indemnity suits in legal malpractice cases against successor counsel if the client hired the successor attorney to extricate the client from the condition created by the original attorney. These courts appear to base their holdings on a presumption (rather than a fact-intensive analysis) that public policy precludes the predecessor attorney from suing the successor attorney for indemnity. When the successor counsel is also representing the client in the legal malpractice case against the predecessor attorney, the rule prohibiting indemnity cross-complaints clearly applies.

After Musser, however, an argument can be made that other predecessor/successor cases may not so clearly invoke the public policy concerns to preclude indemnity cross-complaints, especially if the indemnity claim does not raise conflict of interest or confidentiality issues with the successor counsel. Nonetheless, substantial case law (mostly pre-Musser) supports a blanket rule to preclude indemnity claims in legal malpractice actions by the predecessor attorney against a successor attorney.

There is a dearth of published decisions in California on this issue after Musser, Forensis Group, Inc. v. Frantz, Townsend & Foldenauer is the leading post-Musser case discussing indemnity cross-complaints in malpractice litigation. Forensis, however, dealt with the indemnity cross-complaint of nonlawyer expert witnesses who had been sued by the client for malpractice. The experts settled the malpractice case and sued the lawyers who represented the client in the underlying action. The lawyers had not been sued by the client in the malpractice case. The trial court granted summary judgment against the lawyers and dismissed the indemnity cross-complaint. The court of appeal, however, reversed and remanded and found that the indemnity cross-complaint should have been allowed. The court in Forensis used an extensive analysis of whether the public policy concerns were present. This result is not surprising following Musser because the experts concurrently worked with the attorneys and the case could not be construed as a predecessor/successor attorney situation in which the successor attorney had been hired to extricate the client from a problem caused by the predecessor attorney.

Accordingly, the first issue the attorney defendant must confront when considering whether to sue or not is whether the indemnity cross-complaint has any legal viability following Musser and case law prohibiting indemnity claims by predecessor counsel against successor counsel. An indemnity cross-complaint will undoubtedly bring a demurrer or other dispositive motion. This motion practice could further complicate and prolong the malpractice case and increase the lawyer’s litigation expenses. Indeed, an insurer defending a lawyer in a legal malpractice case would probably not fund a cross-action by the lawyer defendant for indemnity. The lawyer might have to self-fund the action.

The lawyer defendant should, therefore,
1. The doctrine of comparative indemnity was established by the California Supreme Court in American Motorcycle Association v. Superior Court.
   True. False.

2. The doctrine of contribution was established in California when the legislature enacted Sections 875 through 878 of the Code of Civil Procedure in 1957.
   True. False.

3. In Musser v. Provencher, the California Supreme Court confronted the issue of whether successor counsel can sue predecessor counsel for indemnification of legal malpractice damages.
   True. False.

4. Musser v. Provencher:
   A. Rejected a bright-line, or blanket rule on lawyer indemnity claims.
   B. Adopted a case-by-case public policy analysis to determine whether a lawyer defendant could sue cocounsel for indemnity in a legal malpractice action.
   C. Left open whether the rule prohibiting a malpractice defendant from suing successor counsel for indemnity was also subject to a case-by-case analysis.
   D. All of the above.
   True. False.

5. The two primary policy concerns that the Musser court analyzed to determine whether to prohibit indemnity claims between cocounsel were 1) avoiding conflicts of interest between attorney and client, and 2) protecting the confidentiality of attorney-client communications.
   True. False.

   A. Cocounsel indemnity claims.
   B. Predecessor/successor indemnity claims.
   C. Post-Musser lawyer indemnity cases.
   D. None of the above.
   True. False.

7. Many published appellate cases in California support a “blanket” or “bright-line” rule to preclude indemnity claims in legal malpractice actions by a predecessor attorney against a successor attorney.
   True. False.

8. The appellate courts in California have issued many published opinions since Musser to analyze a lawyer’s claims against other lawyers for indemnification in legal malpractice cases.
   True. False.

9. Forensis Group, Inc. v. Frantz Townsend & Foldenauer dealt with:
   A. A predecessor lawyer suing successor lawyer for indemnification.
   B. Cocounsel suing each other for indemnification.
   C. A bright-line or blanket rule against lawyer indemnification claims in legal malpractice actions.
   D. Expert witnesses who were sued by the client for malpractice bringing indemnity claims against the client’s lawyers.
   True. False.

10. There is no strategic downside to a lawyer defendant adding lawyer cross-defendants for indemnity in a legal malpractice case.
    True. False.

11. A cause of action for implied indemnity does not accrue or come into existence until the defendant has suffered actual loss through payment.
    True. False.

12. A lawyer defendant’s indemnity claim against other lawyers not joined in the malpractice action is automatically time-barred if the client’s action against those other lawyers is barred by the statute of limitations.
    True. False.

13. A viable strategy for a lawyer defendant in a legal malpractice action is to wait for the malpractice case to conclude before suing the plaintiff’s other lawyers for indemnity.
    True. False.

14. Concurrent tortfeasors’ claims for partial indemnity or contribution are barred if not filed in the main action brought by the plaintiff.
    True. False.

15. One risk of a lawyer defendant not joining cocounsel to the malpractice action on an indemnity cross-complaint is potential joint and several liability for 100 percent of the malpractice damages.
    True. False.

16. Proposition 51 protection against deep-pocket joint tortfeasor defendants generally does not apply in legal malpractice cases.
    True. False.

17. A lawyer defendant in a legal malpractice action is legally barred from pleading comparative fault defenses as to the plaintiff and cocounsel.
    True. False.

18. Holland v. Thacher is noteworthy because it suggests that a lawyer defendant could use a comparative fault defense to impute the negligence of the other non-defendant attorneys to the plaintiff to reduce the recovery of plaintiff based upon an agency theory.
    True. False.

19. A lawyer defendant who is found liable for a client’s malpractice damages may file a second lawsuit for contribution or indemnity against any culpable cocounsel not joined in the original malpractice action.
    True. False.

20. In the 13 years since Musser, the appellate courts and legislature have done little to clarify the law governing attorney indemnification cross-complaints in legal malpractice cases.
    True. False.
inquire whether there is an advantage to expanding the complexity and scope of the malpractice case by bringing in one or more attorney cross-defendants. Strategically, the lawyer defendant's adding lawyer cross-defendants could be a defense nightmare. The plaintiff in a legal malpractice case would like nothing more than to have two or more lawyers pointing fingers at one another and, in essence, making the plaintiff's case. Certainly, the lawyer-versus-lawyer sideshow could derail the usual attorney defenses of statute of limitations or lack of causation and damages. A lawyer indemnity cross-complaint against another attorney in a legal malpractice case could, if it is not carefully drafted, validate the existence of malpractice or a breach of the standard of care without the plaintiff's doing much of anything. At a minimum, the lawyer's squabbles with other lawyers over indemnity can provide a road map to a plaintiff who otherwise might struggle to prosecute a legally viable malpractice claim.

Three Options

So what should the lawyer defendant do? The following three options involve varying risks. The first is to wait for a resolution of the malpractice case before raising indemnity issues. This option avoids expanding the scope of the malpractice action and the potential for finger-pointing by other lawyer defendants. Concurrent tortfeasors are not required to litigate their claims for partial indemnity or contribution in the main action. A cause of action for implied indemnity does not accrue or come into existence until the defendant has suffered actual loss through payment. Because the lawyer indemnity claims usually accrue long after the client's malpractice claim accrues and expires, the client's malpractice claims against the other lawyers may be barred by the statute of limitations, and this may be the reason why the client did not sue the other lawyers. However, the defendant lawyer's indemnity claim against the other lawyers would still be timely and could breathe new life into an otherwise dead malpractice claim.

Waiting for the malpractice action to conclude is not without risk, but delaying the filing of indemnity cross-complaints is a good option if the lawyer defendant has strong defenses that could result in summary judgment or if plaintiff's malpractice allegations appear weak or are difficult to prove. Indeed, if the lawyer defendant can win the malpractice case outright, there is no need to sue any indemnity cross-defendants. Similarly, the lawyer defendant who settles the malpractice action but still believes that other lawyers are fully or partially responsible for these damages can bring a subsequent action for indemnity and/or contribution against those other attorneys without the risk and complication of helping the disgruntled former client establish a legal malpractice case. This is similar to the option that the defendant attorney and her insurer chose in Musser.26

A second option is to add the other culpable attorneys to a special verdict form for apportionment of damages. The lawyer defendant may plead comparative fault defenses and seek to include a comparative fault jury instruction with a special verdict asking the jury to assign comparative fault to those lawyers who arguably are responsible for plaintiff's damages.27 The lawyer defendant would have to bring a motion to add a nondefendant to the special verdict and to prove to the court that the nondefendant was negligent.28

One court suggested that the defendant lawyer could use a comparative fault defense to impute the negligence of the other nondefendant attorneys to reduce the recovery of the plaintiff based upon an agency theory.29 This strategy would lessens the risk of not suing other culpable attorneys in the malpractice action; however, there is no published authority in the legal malpractice context to support this court's suggestion that the negligence of the nondefendant attorneys could be allocated to the plaintiff on an agency theory.

A third option is suing other culpable attorneys for indemnity in the malpractice action. While the other options militate strongly against adding other attorneys to the malpractice action on indemnity claims, there are risks to leaving a potentially liable attorney tortfeasor out of the malpractice case. For example, assume that the lawyer defendant decides not to join (or cannot join) cocounsel to the malpractice action on an indemnity cross-complaint and that the lawyer defendant is able to put nonparty cocounsel on the special verdict form for an apportionment of damages. The lawyer defendant is able to put nonparty cocounsel on the special verdict form for an apportionment of negligence. If the jury finds that the lawyer defendant is 10 percent comparatively negligent and that the nonparty cocounsel is 90 percent negligent, and the jury awards the plaintiff $1 million in damages, the lawyer defendant who is only 10 percent negligent in the jury's estimation is liable for the entire judgment if liability is joint and several. Of course, if the lawyer defendant can get the judge or jury to assign all of the other nonparty lawyer's negligence to the plaintiff on a comparative fault defense, then this horrible result could be avoided.

This result obliges the lawyer defendant to file a postjudgment action for indemnity or contribution against cocounsel to recover the difference between the lawyer's 10 percent liability and the remainder of the judgment, plus costs. Unless the nonparty cocounsel was heavily involved in the malpractice action (which is unlikely given the assumed facts), the jury's finding of 90 percent liability for cocounsel will not be collateral estoppel against the nonparty.30 It is possible the unfortunate lawyer defendant turned judgment debtor will have to prove cocounsel's liability all over again in a second lawsuit.

There may, though, be a postjudgment summary proceeding in the trial court to enforce the jury's finding regarding allocation of fault. One option would be to use a Code of Civil Procedure Section 187 postjudgment proceeding to add a judgment debtor and allocate a percentage of fault to the newly added judgment debtor, provided the court had or could obtain jurisdiction over the newly added judgment debtor.31 The courts have mostly used Section 187 to add a nonparty as an additional judgment debtor in situations in which the new party and judgment debtor are alter egos or in which the new party was added merely to correct the name of the real defendant.32 Nonetheless, “even if all the formal elements necessary to establish alter ego liability are not present, an unnamed party may be included as a judgment debtor if ‘the equities overwhelmingly favor the amendment and it is necessary to prevent injustice.'”33 Thus, one way for the court to get around the jurisdictional hurdle in a Section 187 proceeding would be to allocate the other nondefendant attorney’s percentage of fault to the plaintiff in the malpractice action on the agency theory suggested by the court of appeal in Holland v. Thacher.34

The dilemma for the lawyer defendant gets worse if the cocounsel who was found to be 90 percent at fault is impecunious or otherwise judgment-proof. In that scenario, the defendant who is 10 percent culpable would have to bear the entire amount of the judgment, and any indemnity claim against a judgment-proof cocounsel would be worthless.

The passage of Proposition 51, the Fair Responsibility Act of 1986,35 eliminated the foregoing nightmare scenario for certain tortfeasors with regard to apportionment of fault for noneconomic damages in actions alleging personal injury, property damage, or wrongful death.36 In those cases, the defendant who is found by the jury to be 10 percent at fault would only be responsible for 10 percent of the judgment as it related to noneconomic damages (e.g., compensation for pain and suffering). Unfortunately, in virtually all legal malpractice cases, the plaintiff's malpractice claim is not for personal injury, property damage, or wrongful death. Moreover, recoverable damages in legal malpractice cases are economic damages rather than noneconomic damages. Thus, Proposition 51 protection generally does not apply in legal malpractice cases.37

Despite questionable legal viability and numerous strategic reasons against indemnity cross-complaints in legal malpractice cases, the worst-case scenario described above could easily drive a decision by a lawyer defendant
to file one or more indemnity cross-complaints against other attorneys who may have contributed to plaintiff’s alleged damages. Well-planned and executed legal strategies generally should not be upended by worst-case scenarios or contingencies that are unlikely to arise. Nonetheless, the lawyer defendant’s decision on whether “to sue or not to sue” remains a judgment call that could have serious repercussions in any legal malpractice case in which liability could attach to multiple attorneys.

In the years since _Musser_, the appellate courts and legislature have done little to clarify the law governing attorney indemnification cross-complaints in legal malpractice cases. Moreover, nothing has been done to eliminate the risk that a defendant in a legal malpractice case found to be minimally negligent by a successor attorney hired to extricate client from condition caused by predecessor counsel are prohibited.); Holland v. Thacher, 199 Cal. App. 3d 924, 929-30 (1988) (“the clear weight of judicial authority prohibits the first attorney from cross-claiming for indemnity against the second attorney”); Held v. Arant, 67 Cal. App. 3d 748, 750 (1977). Gibson, Dunn & Crutcher v. Superior Court, 94 Cal. App. 3d 347, 356 (1979). However, Justice Jefferson’s dissenting opinion seems to foreshadow the fact-intensive case-by-case analysis by the California Supreme Court in _Musser_.

22 Id. at 18-20.
25 The attorney’s insurer, to the extent it paid the settlement to the malpractice plaintiff, could have a subrogation claim, based on the defendant attorney’s indemnity claim against the other culpable attorney. See _Musser_ v. Provencher, 28 Cal. 4th 274, 285-87 (2002). The other important holding in _Musser_ was that an insurer could be subrogated to the insured attorney’s indemnity claim against cocounsel without violating the rule against assignability of legal malpractice claims. Id.
26 Henry v. Superior Court, 160 Cal. App. 4th 440, 455 (2008) (In a slip-and-fall case, the property owners were allowed to admit evidence regarding malpractice of medical providers, even though neither the plaintiff nor the defendant had named the providers.). See also _Kroll_ & _Tract_ v. Paris & Paris, 72 Cal. App. 4th 1537, 1545 (1999) (The lawyer defendant can show that the negligence of other nonparty lawyer was the cause of the plaintiff’s injury through the affirmative defense of comparative negligence, thereby reducing personal liability.).
28 Holland v. Thacher, 199 Cal. App. 3d at 929-30 (“[B]ecause a successful affirmative defense would reduce the client-plaintiff’s recovery, cross-complaints have a superficial appeal.”).
29 There is no collateral estoppel of the jury’s finding as to a nonparty who did not have an incentive or opportunity to litigate the issue of liability among joint tortfeasors. Bostick v. Flex Equipment Co., 147 Cal. App. 4th 80, 90 (2007).
31 See _Tokio Marine & Fire Ins. Corp._ v. _Western Pacific Roofing Corp._, 75 Cal. App. 4th 110, 116-17 (1999) (nonparty insurer could not be added as judgment debtor to judgment against insured pursuant to _Section 187_).
33 Holland, 199 Cal. App. 3d at 929-30.
34 _Civ. Code_ §§1431.1 et seq.
35 _Civ. Code_ §1431.2.

In a concurring opinion, Justice Kennard noted that the scope of indemnity between predecessor and successor counsel was “not an issue in this case.” _Musser_, 28 Cal. 4th at 287.

38 See Major Clients Agency v. Diemer, 67 Cal. App. 4th 1116, 1130 (1998) (For sound policy reasons, cross-complaints for indemnity by predecessor counsel against successor attorney hired to extricate client from condition caused by predecessor counsel are prohibited.); _Holland_ v. _Thacher_, 199 Cal. App. 3d 924, 929-30 (1988) (“the clear weight of judicial authority prohibits the first attorney from cross-claiming for indemnity against the second attorney”).
40 Gibson, Dunn & Crutcher v. Superior Court, 94 Cal. App. 3d 347, 356 (1979). However, Justice Jefferson’s dissenting opinion seems to foreshadow the fact-intensive case-by-case analysis by the California Supreme Court in _Musser_.

42 _Code Civ. Proc._ §§875-78. See also id. at 592, 600-04.
43 See _American Motorcycle Ass’n_, 20 Cal. 3d at 582-84, 590.
44 Id. at 607-08.
45 See _Far West Fin. Corp._ v. _D & S Co._, 46 Cal. 3d 796, 808 (1988).
48 Id. at 277-79.
50 _Shaffery_, 82 Cal. App. 4th at 768.
51 _Musser_, 28 Cal. 4th at 280-81.
52 Id. at 284-85.
53 Id. at 281 (citations omitted) (emphasis in original).
54 Id. at 281 n.3.
55 Id.
56 Id. at 285.
57 See _Kroll_ & _Tract_ v. _Paris & Paris_, 72 Cal. App. 4th 1537, 1542 (1999), and _Shaffery_ v. _Wilson_, _Esher_, _Moskowitz_, _Edelman_ & _Kicker_, 82 Cal. App. 4th 768, 770 (2000), for examples of cocounsel cases in which neither attorney represented the client in the malpractice action. In _Musser_, however, the client who brought the malpractice action expressly waived the attorney-client privilege for the malpractice action so the policy concern regarding confidentiality of client information in the indemnity action did not apply. _Musser_, 28 Cal. 4th at 284.
Despite evidence of the benefits resulting from participation in sports, opportunities for girls in school athletics still lags behind those for boys

**TITLE IX** of the Education Amendments of 1972 forbids educational institutions that receive federal funds from discriminating on the basis of sex. While Title IX has transformed aspects of our society as diverse as law school admissions and the Olympic games, its mandate for equality in athletics remains underenforced. Athletics is often the last bastion of inequality for girls in schools. Although we would not tolerate classroom inequality such as giving new textbooks to boys but not to girls, schools often allow similar disparities in athletics.

Athletic participation, however, is not a luxury. Besides the health benefits, participation in sports is directly linked to critical gains in education and employment. In a recent Ninth Circuit case, *Ollier v. Sweetwater Union High School District,* the court affirmed the trial court’s rulings in a Title IX athletics case brought on behalf of a class of girls from a low-income, predominately Latino community in Chula Vista. This case was a first in prevailing under all three parts of Title IX’s mandate for equity in athletics—equal opportunities for girls to play, equal treatment and benefits for female athletes, and no retaliation for raising concerns about violations.

A review of Title IX jurisprudence shows that while courts have generally sided with the plaintiffs in Title IX athletics cases, there have been very few cases brought compared with other civil rights statutes such as Title VII. Moreover, while Title IX’s equal participation mandate has been the subject of most of the Title IX athletics cases, there have been few cases asserting equal treatment and benefits claims. Finally, although there was a notable Supreme Court case affirming the retaliation prohibition in Title IX, these claims too have been underdeveloped in the law.

The *Ollier* case provides guidance in all these areas. Title IX’s prohibition against discrimination covers all forms of sex discrimination by an educational institution unless specifically exempted. Title IX forbids teacher-student and student-student sexual harassment, discrimination against pregnant students, discrimination in academic admissions and hiring, and unequal treatment in athletics. When Title IX was passed, fewer than 300,000 girls participated in high school athletics. By the 2013-14 school year, that number was more than 3,200,000.

Despite these gains, the athletic playing...
field is still far from level. In fact, the number of girls competing in high school sports today still does not match the number of boys competing in high school sports back in 1972. Schools are providing girls with about 1.3 million fewer opportunities to play high school sports than boys. During the past 10 years, this equity gap has been widening rather than decreasing as schools continue to provide more athletic opportunities for boys than girls.

Girls who play sports in high school are 20 percent more likely to graduate from high school and 20 percent more likely to attend college. Participating in sports appears to cause these gains, as participation in other after-school activities did not result in similar gains. The educational benefits of playing sports in high school and college appear to last well beyond school, translating into significant gains in later employment. Girls who play sports are not only more likely to work in traditionally male-dominated (and usually higher paying) occupations, they also appear more likely to succeed—one study found that more than four out of five women executives played sports in school. On average, girls who participate in high school athletics make 7 percent higher wages 15 years later when employed.

The physical, mental health, and social benefits of playing sports is also well documented. Girls who play sports are less likely to smoke or use drugs, less likely to become pregnant as teenagers, and less likely to attempt or consider suicide. And as little as four hours of exercise a week may reduce a teenage girl’s risk of breast cancer by up to 60 percent. Providing girls with sports opportunities offers them a proven pathway leading out of poverty and into academic, health, and employment success.

**Ollier v. Sweetwater**

Ollier offers a comprehensive legal roadmap to the enforcement of Title IX compliance. From 2006 to 2015, girls at Castle Park High School sought to enforce Title IX’s provisions in athletics. Before the lawsuit was initiated, the girls’ softball field was poorly maintained and lacked basic amenities, in stark contrast with the boys’ baseball field. A closer look at Castle Park’s athletic program revealed that the inferior treatment of female student athletes was not limited to softball. An examination of the entire program revealed that girls were disadvantaged and provided inferior treatment and benefits in every substantive component of the athletic program.

The district court in Ollier found that the school district had violated all three parts of Title IX’s athletics equity mandate, holding on summary judgment that the district failed to provide Castle Park female students with equal athletic participation opportunities, and finding after a bench trial that the district failed to provide equal athletic treatment and benefits and that the school retaliated against female students when they complained about the unfair treatment. Recently, the Ninth Circuit affirmed the district court’s rulings on all claims and clarified several questions of importance, including the viability of class retaliation claims, particularly in Title IX class action lawsuits on behalf of student athletes.

**Equal Athletic Opportunities**

Ollier provides guidance on all three components of Title IX compliance in school athletics. One critical part of Title IX, as explained in its implementing regulations, requires that schools provide equal athletic opportunities for girls. This mandate is measured by a three-part test explained in an Agency Policy Interpretation and Agency Policy Clarifications. As the Ninth Circuit recently confirmed in Ollier, this test applies to high schools as well as colleges.

Title IX’s equal participation mandate, along with the three-part test, is perhaps the most well-developed area of Title IX jurisprudence. An early groundbreaking case, Coben v. Brown University, established that this portion of Title IX had teeth. Brown University I provides an important framework for Title IX equal participation claims. There, the court granted a preliminary injunction to a class of female athletes at Brown University after the school discontinued certain female sports. In Brown University II, the First Circuit affirmed the district court and elucidated burdens of proof. In Brown University III, the district court, following a trial on the merits, found that the school violated Title IX. The First Circuit upheld this judgment in Brown University IV but remanded to allow the school to submit a revised compliance plan. The Ninth Circuit favorably analyzed the First Circuit’s Brown University cases in Neal v. Board of Trustees of the California State Universities. There have been a number of other university-level cases regarding Title IX’s equal participation mandate. In Brust v. Regents of the University of California, the plaintiffs challenged UC Davis’s failure to provide equal participation opportunities for female students when there was a 6 percent disparity between female enrollment and participation that amounted to more than 80 women who could have played sports had the numbers been proportionate. In the Second Circuit, plaintiffs established that Quinnipiac University failed to provide equal participation opportunities when it had a 3.62 percent disparity between female enrollment and female athletic participation (amounting to 38 roster positions). The Quinnipiac case is also notable for its ruling regarding cheerleading and the school’s failure to show that cheer involved sufficient competition to be counted as a sport.

Title IX’s three-part test was a key element in Ollier. The first part of the test considers whether the school has achieved substantial proportionality, meaning that the percentage of girls enrolled in the school matches the percentage of girls playing sports. For example, at Castle Park in the year 2007–08, girls were 45.4 percent of the student body but only 38.7 percent of the athletes. This difference represented a 6.7 percent disparity, “equivalent to 47 girls who would have played sports if participation were exactly proportional to enrollment and no fewer boys participated.” Because 47 girls could “sustain at least one viable competitive team,” Castle Park did not show substantial proportionality.

The second part of the three-part test affords schools a safe harbor if they can prove, as an affirmative defense, that they have a history and continuing practice of expanding athletic programs for girls. This second portion of the three-part test was litigated in Mansourian v. Regents of the University of California, a case involving female wrestlers at UC Davis. The Mansourian plaintiffs challenged the elimination of wrestling opportunities, and the university claimed it had added opportunities for women over the years. The district court granted summary judgment for the defendant. The Ninth Circuit reversed and expanded on the meaning of the “history and continuing practice” defense. It found that the school had expanded women’s opportunities “only between 1996 and 2000” and then began reducing opportunities. The case was remanded, and the plaintiffs prevailed at trial on their equal participation opportunities claim because UC Davis did not meet its burden under prong two.

The school district in Ollier contended that it had added a number of teams for girls and that it offered more teams for girls than for boys at the school. However, the Ninth Circuit affirmed the district court’s determination that the district failed to meet their burden under prong two, correctly observing that “[t]he number of teams on which girls could theoretically participate is not controlling under Title IX, which focuses on the number of female athletes.” Applying that principle to Castle Park, the Ninth Circuit found that “there were more girls playing sports in the 1998–1999 school year (156) than in the 2007–2008 school year (149).” Girls’ athletic participation fluctuated widely, and the “‘dramatic ups and downs’ [were] far from the kind of ‘steady march forward'
that an institution must show to demonstrate Title IX compliance under the second prong of the three-part test." Also, Castle Park had eliminated teams for girls and therefore could not meet its burden under prong two. Therefore, the court concluded that there was no "history and continuing practice of program expansion for women’s sports at Castle Park." Finally, under the third part of the three-part test, a school can show compliance if it demonstrates that it is meeting all the unmet athletic interest of female students. The Ninth Circuit squarely placed the burden on the school to show that there is no unmet interest among female students to prevail under prong three. Moreover, the burden is on the school to assess student interest in athletics "periodically" to 'identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex.' If a school eliminates a viable team, as Castle Park did with field hockey, there is a presumption of unmet student interest. Finally, the Ninth Circuit rejected Sweetwater’s attempt to rely on the rules of the California Interscholastic Federation (the body governing high school sports in California) to determine which sports to offer for girls. The Ninth Circuit affirmed the district court’s entry of summary judgment to the plaintiffs, concluding that the school district had “not fully and effectively accommodated the interests and abilities of its female athletes.”

**Persistent Inequality**

Despite Title IX, many educational institutions, including high schools throughout the country, continue to place male sports programs in a position of superiority over female programs. This is due in part to the dearth of “equal treatment” claims under Title IX. The majority of the litigation under Title IX has focused on the first component concerning athletic opportunities. Few have focused on the second, for which the “governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.” Moreover, the few cases that have analyzed Title IX’s equal treatment component have mainly focused on one issue—disparities in scheduling—or inequities within a single sport. Ollier, on the other hand, offers a comprehensive analysis of Title IX’s equal treatment requirement beyond a single issue or one sport.

Under the equal treatment prong of Title IX, compliance is assessed based on an overall comparison of all treatment and benefits provided in an athletic program. This means that identical benefits and opportunities are not required provided that the overall effects of any differences are negligible. However, disparities in individual components of the program alone can be found to violate Title IX if the disparity is substantial enough in and of itself to deny equality of athletic opportunity. The individual components to be assessed, particularly at the high school level include: the provision of equipment and supplies, scheduling of games and practice time, provision of recruitment and coaching benefits, provision of facilities and medical services, as well as publicity and fundraising opportunities and benefits. For each component, the Policy Interpretation lists the factors that should be examined to determine compliance.

At Castle Park, girls received inferior treatment and benefits throughout the athletic program. The district court found that girls were provided with fewer coaches, coaches who were less experienced and had higher turnover rates, coaches who were hired later in the athletic season, and coaches burdened with excessive additional assignments—all factors that negatively affected both recruitment and coaching benefits. The court also found that the athletic facilities at Castle Park were of higher quality and better maintained for male athletes. Unequal facilities included a separate locker and meeting room equipped with athletic-sized lockers for male athletes while female athletes had access only to general P.E. locker rooms with lockers too small to store athletic equipment. Boys also had greater access to superior competitive and practice facilities with greater amenities such as scoreboards and snack bars. Other courts have found Title IX equal treatment violations based on such single-sport disparities. For example, in Landow v. School Board of Brevard County, the court held that disparities between boys’ baseball and girls’ softball programs at two high schools...
mm practice and competition times. As found in Communities for Equity v. Michigan High School Athletic Association, scheduling athletic seasons and tournaments for girls’ sports during nontraditional and less advantageous times of the academic year than boys’ sports is also a type of scheduling disparity relegated to girls (but not boys). Similarly, in Alston v. Virginia High School League, Inc., greater variation in the scheduling of girls’ sports seasons compared with boys’ seasons precluded summary judgment of alleged Title IX violations.

In terms of medical and training supports at Castle Park, the district court found that athletic trainers and doctors were provided predominately during the fall football season, disproportionately benefiting boys. And the equipment in the school’s weight room was designed for the “absolute-strength-based sports” in which boys participate. Boys’ sports were also provided with greater coverage in school yearbooks, more signage on the school’s electronic marquee and greater support from band, cheerleaders, and pep squads—resulting in greater publicity and promotional support. And boys’ teams were provided with more readily available fundraising resources, like snack bars. All of these factors contributed to the unequal treatment of girls at Castle Park.

Retaliation

Like many of our civil rights laws, Title IX also prohibits retaliation for raising complaints about violations of the law. Strong antiretaliation provisions are critical to ensuring vigorous Title IX enforcement. The U.S. Supreme Court explained in Jackson v. Birmingham Board of Education, that a coach who complains on behalf of his student athletes and then loses his job as a result states a viable claim for retaliation under Title IX. In Ollier, the class made out a claim for retaliation based on adverse actions taken against them after complaints about Title IX violations were raised. These adverse actions included terminating the softball team coach after a softball player’s parent complained about inequality for girls. Sweetwater vigorously argued that the class did not have standing to bring such a retaliation claim and that only the coach could pursue a retaliation claim for his termination. However, the district court and the Ninth Circuit agreed with the plaintiffs and held that there was student standing for such a claim. [Students like Plaintiffs surely fall within the zone of interests that Title IX’s implicit antiretaliation provisions seek to protect.]

On its merits, the district court applied Title VII standards to Title IX retaliation claims and made a finding of retaliation, which the Ninth Circuit affirmed. Specifi-
equality of athletic opportunity to students of one sex if it is substantial enough in and of itself to deny practice time) can alone constitute a Title IX violation of superiority) (citation omitted).

Institutions continue to place male sports in a position of parity over female sports... (internal quotation omitted).

While unequal expenditures on boys' and girls' sports do not alone constitute noncompliance, compliance may be assessed by examining the "failure to provide necessary funds for teams for one sex..." 34 C.F.R. §106.41(c).


Ollier v. Sweetwater, 768 F. 3d 843, 865-66 (9th Cir. 2014).

Id. at 866.

71 “Under [Title VII’s] framework, a ‘plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two.” Id. at 867 (citing Emeldi v. University of Or., 698 F. 3d 715, 724 (9th Cir. 2012)). Once a plaintiff makes this minimal showing, “the burden shifts to the defendant to ‘articulate a legitimate, non-retaliatory reason for the challenged action.’” Ollier, 768 F. 3d at 867. “If the defendant can do so, the burden shifts back to the plaintiff to show that the reason is pretextual.” Id.

The defendants argued that “to show adverse action, [the plaintiffs] must prove ‘that they were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation.’” The Ninth Circuit found its Emeldi decision foreclosed such an argument. Id. at 868 n.15.

Id. at 867, 869.

Id. at 869-70.

Id. at 871.


39 Ollier, 768 F. 3d at 859.
40 Id. at 858.
41 Id. (citing the 1996 Intercollegiate Athletics Policy Guidance).
42 Id. at 858.
43 Id.
44 Id. at 859.
45 Parker v. Franklin County Cmty. Sch. Corp., 667 F. 3d 910, 916 (7th Cir. 2012) (noting educational institutions continue to place male sports in a position of superiority) (citation omitted).
46 Id. at 916 (“Few cases have focused on “equal treatment” claims seeking substantial equality in program components of athletics.”).
48 Parker, 667 F. 3d at 924; see also McCormick v. Sch. Dist. Of Mamaroneck, 370 F. 3d 275, 295-96 (2d Cir. 2004); Communities For Equity v. Michigan High Sch. Athletic Ass’n, 178 F. Supp. 2d 805 (W.D. Mich. 2001), aff’d, 377 F. 3d 504 (6th Cir. 2004), vacated on other grounds, 544 U.S. 1012 (2005), aff’d on remand, 459 F. 3d 676, 695-96 (6th Cir. 2006).
49 Cruz v. Alhambra School District also examined an entire athletic program under Title IX but was settled before trial with “wide-ranging changes.” Cruz v. Alhambra Sch. Dist., 601 F. Supp. 2d 1183, 1187-88 (C.D. Cal. 2009).
50 34 C.F.R. §106.41(c).
51 Id.
52 McCormick, 370 F. 3d at 293 (“a disparity in one program component (i.e., scheduling of games and practice time) can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at school.”).
53 34 C.F.R. §106.41(c).
56 Id. at 1100-04, 1111.
59 Ollier, 858 F. Supp. 2d at 1104-05, 1111.
61 Ollier, 858 F. Supp. 2d at 1105, 1111.
64 Ollier, 858 F. Supp. 2d at 1106.
65 Id. at 1106.
66 Id. at 1107, 1112.
67 Id. While unequal expenditures on boys' and girls' sports do not alone constitute noncompliance, compliance may be assessed by examining the "failure to provide necessary funds for teams for one sex..." 34 C.F.R. §106.41(c).
69 Ollier v. Sweetwater, 768 F. 3d 843, 865-66 (9th Cir. 2014).
70 Id. at 866.
71 “Under [Title VII’s] framework, a ‘plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two.” Id. at 867 (citing Emeldi v. University of Or., 698 F. 3d 715, 724 (9th Cir. 2012)). Once a plaintiff makes this minimal showing, “the burden shifts to the defendant to “articulate a legitimate, non-retaliatory reason for the challenged action.” Ollier, 768 F. 3d at 867. “If the defendant can do so, the burden shifts back to the plaintiff to show that the reason is pretextual.” Id.
73 Ollier, 768 F. 3d at 867-68. (“The relief of injunction is equitable.”)
74 Id. (internal quotation omitted).
75 Id. at 869.
76 Id.
77 The defendants argued that “to show adverse action, [the plaintiffs] must prove ‘that they were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation.’” The Ninth Circuit found its Emeldi decision foreclosed such an argument. Id. at 868 n.15.
78 Id. at 867, 869.
79 Id. at 869-70.
80 Id. at 871.
ADMINISTRATIVE LAW

LAW OFFICES OF MICHAEL GOCH, APC
5850 Canoga Avenue, Suite 400, Woodland Hills, CA 91367, (818) 710-7190, fax (818) 710-7191, e-mail: gochmichael@aol.com. Website: MichaelGoch.com. Contact Michael Goch. Licensing and related disciplinary proceedings with emphasis on healthcare practitioners, as well as Department of Health Services matters and related issues, from investigatory stage through trial and writ proceedings. Degrees/licenses: JD Southwestern University School of Law, Cum Laude, 1978; admitted in California since 1978. Also admitted in Central, Eastern, Northern, Southern District and Ninth Circuit.

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FAY ARFA, A LAW CORPORATION
10100 Santa Monica Boulevard, Suite 300, Los Angeles, CA 90067, e-mail: fayarfa@sbcglobal.net. Website: www.bestdefender.com. Contact Fay Arfa. Fay Arfa specializes in state and federal criminal law, criminal trials, criminal appeals, and postconviction matters (Habeas Corpus). The California State Bar’s board of legal specialization has certified her as a specialist in criminal law. She has also been certified as a specialist in appellate law. The National Board of Trial Advocacy (an ABA-accredited organization) certified her as a criminal trial advocate. Fay Arfa vigorously fights for anyone accused or convicted of a crime. See display ad on page 5.

APPELLATE LAW/CIVIL APPEAL

HONEY KESSLER AMADO
261 South Wetherly Drive, Beverly Hills, CA 90211, (310) 550-8214, e-mail: honeyamado@amadolaw.com. Website: www.amadolaw.com. Contact Honey Kessler Amado. Ms. Amado (AV-rated) is a Certified Appellate Law Specialist (California State Bar Board of Legal Specialization). On the trial level, she joins the litigation team to assist with identifying issues, creating a sufficient record for appeal, and drafting complex briefs or postjudgment pleadings and motions. On the appellate level, Ms. Amado prepares all briefs and argues the case to the court. When retained as a consultant on appeal, Ms. Amado assists counsel with identifying issues, strategizing the appeal, and drafting or editing the appellate briefs and motions. Ms. Amado has been counsel in a number of landmark cases and has written and lectured extensively in the area of appellate law.

AVIATION LAW

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11845 West Olympic Boulevard, Suite 900, Los Angeles, CA 90064, (323) 274-2697, fax (888) 433-3968, e-mail: aren@kssbflaw.com. Website: www.KSSBflaw.com. Contact Karen S. Brown. Certified family law specialist handling divorce, complex custody, and financial matters for working families and high net worth individuals. I provide quality service for my clients and have extensive experience as a civil litigator and trial attorney for all family law related matters both prior to dissolution and postjudgment. Also, I handle prenuptial and postnuptial agreements. I work toward resolution of all matters and resort to litigation only when necessary. If that is the only option, I am a tenacious litigator and strive to get my clients their very best results in the court system after fully explaining the process and reviewing cost/benefit issues beforehand. Please refer to the testimonials on my website from clients for whom I handled complex matters of many years’ duration.

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11845 West Olympic Boulevard, Suite 900, Los Angeles, CA 90064, (323) 274-2697, fax (888) 433-3968, e-mail: aren@kssbflaw.com. Website: www.KSSBflaw.com. Contact Karen S. Brown. Certified family law specialist handling divorce, complex custody, and financial matters for working families and high net worth individuals. I provide quality service for my clients and have extensive experience as a civil litigator and trial attorney for all family law related matters both prior to dissolution and postjudgment. Also, I handle prenuptial and postnuptial agreements. I work toward resolution of all matters and resort to litigation only when necessary. If that is the only option, I am a tenacious litigator and strive to get my clients their very best results in the court system after fully explaining the process and reviewing cost/benefit issues beforehand. Please refer to the testimonials on my website from clients for whom I handled complex matters of many years’ duration.

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10100 Santa Monica Boulevard, Suite 300, Los Angeles, CA 90067, e-mail: fayarfa@sbcglobal.net. Website: www.bestdefender.com. Contact Fay Arfa. Fay Arfa, specializes in state and federal criminal law, criminal trials, criminal appeals, and postconviction matters (habeas corpus). The California State Bar’s board of legal specialization has certified her as a specialist in criminal law. She has also been certified as a specialist in appellate law. The National Board of Trial Advocacy (an ABA-accredited organization) certified her as a criminal trial advocate. Fay Arfa vigorously fights for anyone accused or convicted of a crime. See display ad on page 5.

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STEPHEN DANZ & ASSOCIATES
11661 San Vicente Boulevard, Suite 500, Los Angeles, CA 90049, (877) 789-9707, fax (310) 207-5006, e-mail: stephen.danz@employmentattorneyca.com. Website: www.employmentattorneyca.com. Contact Stephen Danz. Over 30 years of trial and settlement experience, Stephen Danz and Associates is California’s largest employee only, statewide law firm with offices in Los Angeles, San Diego, Sacramento, Fresno, Orange County, San Bernardino, and San Francisco. Our firm is dedicated to representing employees in disputes against their employers. Our attorneys represent employees and workers in class actions, wrongful termination cases, discrimination (age, sex, race, national origin, religion, and physical or medical condition) harassment cases, wage disputes, overtime pay cases, and rest and meal period cases. Our experienced lawyers have represented thousands of employees throughout the state of California and have won numerous trials and arbitrations on their behalf. If you think you have a possible claim please contact our office immediately. We don’t make empty promises; we deliver results. We provide free initial consultations. No attorneys’ fees unless we make a recovery on your behalf. Paying highest referral fees (per State Bar rules). See display ad on page 38.

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21700 Oxnard Street, Suite 2080, Woodland Hills, CA 91367, (818) 591-3700, fax (818) 377-3744, e-mail: ccm@walzermelcher.com. Website: www.walzermelcher.com. Contact Christopher C. Melcher. Complex marital dissolution litigation at trial court level or on appeal involving property disputes, businesses, or marital agreements. Certified Family Law Specialist. See display ad on page 1.

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1901 Avenue of the Stars, Suite 1100, Los Angeles, CA 90067, (310) 556-3800, fax (310) 556-3817, e-mail: info@mohajerian.com. Website: www.mohajerian.com. Contact Al Mohajerian. Specialties: Franchising & licensing. Mohajerian Inc. is a multipractice law firm in Century City. It proudly offers efficient, innovative, and proactive legal services throughout the USA. Representative cases or clients: Burger King, Quiznos, Vestar, Carl’s Jr., Jack in the Box, Medicine Shoppe, Pizza Man, Peter Piper Pizza. Professional affiliations: Franchise Law Committee of State Bar, INTA, ABA, Super Lawyer 2008-2013. Law school attended: UCLA. Billing arrangements: Hourly. See display ad on page 35.

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22815 Ventura Boulevard, Suite 405, Los Angeles, CA 91364, (818) 593-2949, fax (818) 593-2948, e-mail: hertz@campaignlawyers.com. Contact Bradley W. Hertz. The Sutton Law Firm and Los Angeles-based partner Bradley W. Hertz represent businesses, individuals, candidates, ballot measures, PACs, and nonprofit organizations involved in the political and legislative processes on the local, state, and national levels.

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9401 Wilshire Boulevard, Suite 1250, Beverly Hills, CA 90212, (310) 859-0100; fax (310) 388-5645, e-mail: paul@supnik.com. Website: www.supnik.com www.NotSoBIGLAW.com. Trademark litigation in federal courts; local counsel for out-of-town firms; trademark registration in the United States; trademark registration internationally in association with foreign counsel; trademark availability searches; trademark Trial and Appeal Board proceedings; licensing; right of publicity; domain name matters. Past chair of both LACBA’s Entertainment and Intellectual Property Section as well as International Law Section. See display ad on page 32.

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ALBERTSON & DAVIDSON, LLP
3491 Concours Street, Suite 201, Ontario, CA 91764, (909) 466-1711, e-mail: keith@aldavlaw.com. Website: www.aldavlaw.com. Contact Keith Davidson. Trust and will contests, trustee breach, accounting trials, contested trust and will probate matters, and financial elder abuse. See ad on page 39.

WATER LAW

BEST BEST & KRIEGER LLP
300 South Grand Avenue, 25th floor, Los Angeles, CA 90071, (213) 617-9100, fax (213) 617-7480, e-mail info@BBKlaw.com. Website: www.BBKlaw.com. Contact Eric L. Garner. From its roots helping to implement the California State Water Project, Best Best & Krieger is now a nationally and internationally recognized force in water law. The firm represents agencies that serve water to more than 21 million people, in addition to advising developer, agricultural and manufacturing clients. We aid in the acquisition, development and maintenance of surface and groundwater rights, and navigate issues related to regional management of water supplies and water transfers. BB&K also provides critical counsel in regulation compliance, and identifying and developing innovative funding strategies for water supply, conveyance, quality, treatment and reclamation, flood control, investment and recycling projects.
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Hourly & contingency fee arrangements
Opinion No. 526: Contingency Lawyer’s Right to Negotiate a Fee Agreement That Gives First Proceeds to the Lawyer and Shifts to the Client the Risk of Nonpayment

SUMMARY: A lawyer may enter into a binding and enforceable contingency fee agreement that provides to the lawyer some or all of the first proceeds of suit so as to impose on the client greater risk that the defendant’s financial condition will limit the amount recovered from a settlement agreement or judgment. Any such risk-shifting agreement requires the client’s informed consent based on the lawyer’s full and fair disclosure of pertinent information known to the lawyer.


STATEMENT OF FACTS: XYZ, Inc., wishes to pursue a contract breach claim against Potential Defendant. XYZ asks Lawyer to represent it on a contingent fee basis. XYZ explains to Lawyer that it has limited cash and credit, which it wishes to use to deal with the consequences of Potential Defendant’s conduct, and that it therefore lacks the financial ability to pay Lawyer on an hourly basis or even on a mixed contingent-hourly basis. XYZ believes that the amount of its potential damages could be “devastating” to Potential Defendant. XYZ shares this view with Lawyer, and it further provides Lawyer with information it has regarding Potential Defendant’s business activities, financial strength, and possible inability to satisfy XYZ’s claim fully. Lawyer has no information that suggests that XYZ’s beliefs are not well founded. Because of the nature of the claim, Lawyer expects that Potential Defendant will have no insurance to provide defense or indemnity, so that the entire financial burden of the proposed litigation will fall on Potential Defendant. Lawyer recognizes the resulting risk that her investment of time and other resources in pursuing Potential Defendant might result in a recovery limited by the Potential Defendant’s financial condition. As a result, and at Lawyer’s insistence, Lawyer and XYZ negotiate a contingency fee agreement that shifts to XYZ the entire risk of limited payment by Potential Defendant by giving Lawyer the right to the first proceeds of any settlement or judgment up to the full amount of the agreed contingent fee. The fee agreement is contained in an unambiguous writing that complies with Business & Professions Code §6147 and explains in clear language the risk that XYZ’s recovery might be reduced or even eliminated by Lawyer’s superior rights. Although the conduct of Potential Defendant has left XYZ in a perilous financial situation, and its management facing difficult operating problems, its management is experienced and capable.

ISSUE:

Based on these facts, we are asked whether Lawyer acted improp-erly in entering into a contingent fee agreement that shifted to her client the risk of partial payment of any resulting settlement or judgment. The Law Governing Lawyers §35(2): “Unless the contract construed in the circumstances indicates otherwise, when a lawyer has contracted

DISCUSSION:

Introduction. As a general rule, a lawyer is entitled to collect a contingent fee only as and when the client receives payment on a resulting settlement or judgment. This is recognized by Restatement Third,
for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment.” See also In re Stochel, 792 N.E. 2d 874 (Ind. 2003); Sayble v. Feinman, 76 Cal. App. 3d 509 (1978); and Cal. State Bar Op. 1994-135. However, while the restatement and other sources consider the lawyer’s collection right in the absence of a fee agreement to the contrary, we are not aware of any civil or disciplinary opinion or advisory ethics opinion that directly addresses the question of whether a contingent fee lawyer may enter into a fee agreement that gives the lawyer the first proceeds of any recovery, up to the full amount of the lawyer’s agreed fee, in order to shift to the client the risk that the defendant might be financially unable to satisfy any resulting settlement or judgment. We will address that issue in this opinion.

Fee Negotiations and Agreements. A lawyer’s fee negotiation with a client generally is an arm’s-length transaction in which the lawyer is entitled to act to advance and protect his or her own interests. See, e.g., Cotchett, Pitre & McCarthy v. Universal Paragon Corp., 187 Cal. App. 4th 1405, 1421 (2010); Ramirez v. Sturdevant, 21 Cal. App. 4th 904, 913 (1994); and Setzer v. Robinson, 57 Cal. 2d 213, 217 (1962).1 However, there are limitations on a lawyer’s ability to negotiate a fee agreement. With respect to a contingent fee agreement, the first two restrictions are that the fee agreement will be enforceable only if it fully complies with the requirements of Business & Professions Code §6147 and is reasonably understandable to the client. The latter prerequisite follows from the rule that any lack of clarity will be read against the lawyer, at least if the lawyer drafted the agreement. See, e.g., Alderman v. Hamilton, 205 Cal. App. 3d 1033, 1036-37 (1988), which states the rule that a fee agreement must be “fair, reasonable and fully explained to the client” (“explained” means that it must be fully stated and understandable, not that the lawyer has an obligation to provide legal advice to someone who is not yet a client2). The Statement of Facts shows that Lawyer has met both of these standards in her fee agreement with XYZ.

Illegal and Unconscionable Fees. The third and fourth limits on a lawyer’s fee agreement are stated in California Rules of Professional Conduct, Rule 4-200: “(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” (emphasis added) Examples of an “illegal” fee agreement under Rule 4-200(A) include one that violates 28 USC §2678 (making it a federal crime to enter into a contingent fee agreement for handling claims under the Federal Tort Claims Act for a fee in excess of statutory limits), one that attempts to prevent the federal district court from exercising its authority to determine the reasonableness of fees in an action under 42 USC §1983 (Matter of Yagman, 3 Cal. State Bar Ct. Rptr. 788, 1997 Calif. Op. LEXIS 8 (Rev. Dept. 1997)), taking fees in a bankruptcy matter without permission of the federal bankruptcy court (Matter of Phillips, 2011 Calif. Op. LEXIS 22 (Rev. Dept. 2011)), and any fees when engaged in the unauthorized practice of law (Matter of Wells, 2005 Calif. Op. LEXIS 9 (Rev. Dept. 2005)). There is no statute, rule, or case law that would make illegal the contingent fee agreement that is the subject of this opinion.

The concept of “unconscionable” under Rule 4-200(A) is more complex. A fee can be unconscionable without respect to its size when the fee is arrived at by some form of dishonesty or overreaching by the lawyer. This was described as follows in Herrscher v. State Bar, 4 Cal. 2d 399, 402 (1934): “In the few cases where discipline has been enforced against an attorney for charging excessive fees, there has usually been present some element of fraud or overreaching on the attorney’s part, or failure on the attorney’s part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client’s funds under the guise of retaining them as fees.” (citations omitted) An example of the Herrs-
cher kind of unconscionability is found in Matter of Van Sickle, 2005 Calif. Op. LEXIS 3 (Rev. Dept. 2005). There, a lawyer agreed to represent a client on a contingent fee basis as the replacement for the client’s prior contingency fee lawyer in the same matter. The second lawyer’s fee was to be an unremarkable 35 percent, but the fee agreement was held to be unconscionable because he failed to disclose to this client that this fee would be in addition to any fee payable by the client to her prior lawyer. There is nothing in the Statement of Facts that suggests such a violation because the surrounding facts were known fully to XYZ, and Lawyer did not hide or misrepresent any fact or any aspect of the fee agreement.

More commonly, a fee can be unconscionable from its size alone: “[I]f a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court.” Goldstone v. State Bar, 214 Cal. 490, 498-99 (1931) (followed, e.g., in Tarver v. State Bar, 37 Cal. 3d 122 (1984) (lawyer disbarred based, among other things, on charging an unconscionable fee). The “shock the conscience” standard is measured by the nonexclusive list of factors set out in Rule 4-200(B).

There is no known authority that would make unconscionable under the “shock the conscience” standard a fee agreement that shifts to the client the risk of limited collectability and thereby results in the lawyer’s receiving compensation that is disproportionate as measured by usual contingency fee rates or when compared to any net amount received by the client. As stated in the first sentence of Rule 4-200(A), the propriety of a fee normally is measured at the time the fee agreement is made. See, e.g., L.A. County Bar Op. 518 (2006). The rule is the same in the civil context. See, e.g., in Brobeck, Phleger & Harrison v. Telex Corp., 602 F. 2d 866, 875 (9th Cir. 1979) (applying California law), cert. denied, 444 U.S. 981 (1979) and Cetenko v. United California Bank, 30 Cal. 3d 528, 532 (1982). The requirement that the measurement be at the time the fee agreement is made is consistent with general principles of contractual unconscionability. Yerkovich v. MCA, Inc., 11 F. Supp. 2d 1167, 1173 (C.D. Cal. 1997) and Civ. Code §1670.5. Because of this rule, the eventuality that Lawyer receives most or even all of the recovery does not factor into the unconscionability analysis. Rather, the inquiry must be whether the facts known when the fee agreement was made require the conclusion that the risk-shifting device was unconscionable.

In other circumstances, such as hourly fee arrangements in which the amount of an attorney’s fee turns out to match or even exceed the amount of the client’s recovery, and even where the client recovers nothing, the fee agreement does not become unconscionable simply because the client receives a small recovery or none at all. The same is true when a lawyer represents a losing defendant in litigation or when a transactional lawyer represents a client in an unconsummated deal that therefore has no financial reward for the client. Likewise, in the contingent fee context the amount of contractual attorney fees might result in little or no net recovery to the client.

CONCLUSION

To the extent a lawyer’s fee is contingent on the outcome of a representation, the lawyer invests time and other resources with knowledge that he or she might earn little or no fee for a host of possible reasons. These include, among others, the client’s having misrepresented or misunderstood the facts on which the lawyer decided to accept the representation, changes in the law governing the matter, and the unavailability of witnesses or other evidence. Where a lawyer and client recognize the additional risk that there might be a successful outcome, but only a limited recovery because of the potential defendant’s financial condition, they can shift that risk in whole or part to the client with informed consent that is based on a full sharing by the lawyer of pertinent information known to the lawyer. Where a lawyer’s fee agreement would not have been unconscionable had the matter resolved in a financial favorable manner for the client, it does not become unconscionable by reason that the defendant later defaults in satisfying a judgment or contractual settlement obligation, or negotiates a settlement limited by its financial weakness, so that the amount actually obtained by the lawyer’s client is reduced or nonexistent.

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinion is based on the facts set forth in the inquiry submitted.

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1 A lawyer does not engage in a business transaction with a client when entering into an agreement for an hourly or flat fee or, as in the case here, a contingency fee agreement, and the business transaction rule, Rule 3-300 of the California Rules of Professional Conduct does not apply in any of those situations. See L.A. County Bar Op. 496 (1998).

2 It is only to a current client that a lawyer is obligated to provide representation, but a fee is unconscionable under Rule 4-200(A) of the California Rules of Professional Conduct if charged without the client’s informed consent. See Matter of Goddard, 2011 Calif. Op. LEXIS 13 (Rev. Dept. 2011).
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The Types of Clients a New Solo Practitioner Should Learn to Avoid

A YOUNG ATTORNEY BEGINNING a solo personal injury practice faces unique challenges. Competition is steep. There is no shortage of competent plaintiff’s lawyers in the community, and the young solo must convince clients of his or her abilities despite the dearth of decades of experience. The desire to stand out in a crowded field, the pressures of the contingency fee business model and deferred compensation, as well as the challenge of overcoming the perceived lack of experience all can lead the young attorney to accept questionable clients or cases. It is vital for the young solo to seek the mentorship of more experienced counsel to help decide whether to say no. My office has encountered some of the following scenarios, which are common but not exclusive to the new personal injury attorney attempting to build his or her book of business.

The malingering client is one to avoid. Black’s defines “malingering” as one who feigns sickness or disability to escape a task or duty. Many personal injury attorneys can recall representing a client who seemed to exaggerate his or her injuries. A plaintiff’s lawyer must keep in mind the eggshell skull rule and zealously advocate on behalf of injured clients. It is certainly not the function of a plaintiff’s attorney to minimize or downplay a client’s injuries. Nevertheless, if it becomes evident that the client is exaggerating his or her condition, ethical considerations may incline the attorney toward ceasing the representation. At the minimum, discussing the facts of the case with a more seasoned plaintiff’s lawyer may be in order for the young solo confronted with this situation.

The Untruthful Client

Clients are occasionally untruthful. Whether this is intentional or not depends on the facts of each particular case. For example, a client who was recently injured in an automobile accident claimed that the adverse driver ran a red light. Upon reviewing the traffic collision report, however, it became apparent that it was the client who ran the red light, which was confirmed by three independent witnesses at different vantage points in the intersection. When the client remained unconvinced by this evidence and suggested in its place a wide-ranging conspiracy to assign the blame to him, experienced counsel advised me to withdraw from the matter. While it may cause a new attorney some dismay to turn down a case, by doing so the attorney can avoid litigating a case that is likely to yield a poor result for the client and the attorney.

Another client it may be better to avoid is one who argues about fees. Most attorneys who work on contingency will agree to take between 33 1⁄3 to 50 percent of the total recovery or some variation thereof. When preparing the contingency fee agreement, the attorney should bear in mind Business and Professions Code Sections 6147 and 6148. At the outset of representation, the attorney must explain the contingency fee to the client to avoid confusion. The advice of solo practice guru Jay Foonberg comes to mind. He advises that the client who disputes your fee before the case is completed is the same client who will dispute your fee after the case is completed.

Another warning sign is the client who discusses the case with other attorneys after engaging your firm. Clients sometimes wish to discuss their case with other attorneys they meet. This is human. The attorney who represents the client, however, should make it clear to the client that the other attorney’s advice is not what controls the outcome of the case. If the client habitually seeks the opinion of other attorneys and second-guesses his or her own attorney, it may be advisable to withdraw from the representation or to refer the case to other counsel. Many attorneys will gladly pay referral fees provided that the rules of Professional Conduct (2-200) are followed.

Similarly, clients tend to “lawyer shop” and interview several lawyers before making a decision on whom to hire. An important question the young solo should ask is whether the client has interviewed other lawyers about the case. One should strive to learn why prior interviewees might have rejected the client’s case. Many larger, more-established personal injury firms will turn down smaller cases, so one should not automatically reject a new case if the client says that other firms have done so. The young solo is uniquely situated to accept smaller personal injury cases that are not as expensive to litigate. One firm’s crumbs may very well be another firm’s loaf.

Just as there are clients to avoid, there are also cases that may cause a new plaintiff’s attorney to think twice. Medical malpractice cases, for example, are notoriously difficult. They are extremely expensive to litigate and are often beyond the financial means of a newly established solo practice. If one must accept a medical malpractice case, consider partnering with a more established firm that has the resources to help litigate the case.

The practice of law takes decades to improve and perfect. The young attorney just embarking on the rewarding work of representing injured plaintiffs should remember this as he or she develops a client base, builds a book of business, and accumulates more experience. The young solo should never discount a gut feeling as to the likelihood of success in each particular case.
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