Los Angeles lawyers Kenneth D. Sulzer (right) and Robert A. Escalante appraise the current state of PAGA representative actions and class actions.

Los Angeles Lawyer

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EARN MCLE CREDIT

New Trial Procedure
page 29

Mediation Confidentiality in Divorce
page 10

Advance Healthcare Directives
page 17

Voice Dictation Software
page 40

Uncertain Waivers

PLUS

NINGs
page 34

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20 Uncertain Waivers
BY KENNETH D. SULZER AND ROBERT A. ESCALANTE
No California appellate court has ruled that manageability concerns obligate a court to strike PAGA representative actions

29 Maroney’s Minefield
BY MICHAEL SHIPLEY
California offers a very narrow procedural gateway but broad substantive grounds for a new trial
Plus: Earn MCLE credit. MCLE Test No. 250 appears on page 31.

34 Considering NINGs
BY NEIL SCHOENBLUM AND CATHERINE COLOMBO
Subject to caveats such as trustee residency, the Nevada incomplete gift non-grantor trust may benefit Californians with substantial investment assets

Special Pullout Section
2015-2016 Los Angeles County Bar Association Directory

FEATURES

DEPARTMENTS

8 On Direct
Silvia R. Argueta
INTERVIEW BY DEBORAH KELLY

9 Barristers Tips
Recent developments in special needs trust caselaw
BY AURORA BASA

10 Practice Tips
The effect of Lappe upon mediation confidentiality in divorce cases
BY CLAUDIA RIBET

17 Practice Tips
Incorporating personal values into advance healthcare directives
BY MARSHALL S. ZOLLA

40 Computer Counselor
Directions for using voice recognition software in legal practice
BY PAUL D. SUPNIK

44 Closing Argument
What to do when a witness answers “I don’t know” at trial
BY MATTHEW D. TAGGART

42 Index to Advertisers

43 CLE Preview
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survey to find out more about the readers, their work, and which articles are of most interest to them. The results indicate that 60 percent of those responding are regular readers of Los Angeles Lawyer and have read at least three of the last four issues. Older lawyers read the magazine more, with more than 82 percent of lawyers over the age of 65 reading the magazine regularly, while only approximately 26 percent of lawyers under the age of 35 read the magazine regularly. Most respondents read only one or two articles that appeal to them, and spend an average of 35 minutes reading each issue.

There were several types of articles in Los Angeles Lawyer magazine considered: Practice Tips, feature stories (including those articles offering MCLE credit), Closing Arguments, Barristers Tips, and the CLE preview. Almost 90 percent of respondents to the survey had a moderate to strong interest in Practice Tips and features, which focus on substantive legal issues. Unsurprisingly, lawyers age 35 and under had twice the interest in the Barristers Tips than the older lawyers. More than 64 percent of respondents read the magazine to stay apprised of current law, and about one third clip or copy articles of interest. Many place a copy of the Los Angeles Lawyer in the lobby or reception area of their firm.

Respondents’ firms had an average of 35 employees, and the majority of respondents had a household income between $100,000 and $350,000. The largest percentage (42.8) of respondents had a litigation practice, followed by business (24.7), and real property (24). Following behind these practice areas were labor and employment; tort; wills, trusts, and estates; commercial; and corporate.

The respondents also expressed interest in other LACBA benefits. A majority of respondents to the survey had a strong or moderate interest in the Daily eBriefs as well as LACBA’s events, sections, calendar, and other publications. One interesting point is that approximately 60 percent of respondents were male and 40 percent female. Females represented approximately 62 percent of the respondents under the age of 35. The gender gap is enormous in the group of respondents over the age of 65—83 percent male and 17 percent female. It is a glorious time to be a young female lawyer in Los Angeles.

Respondents who read Los Angeles Lawyer regularly read it with twice the frequency of the Daily Journal, and more than California Lawyer, the ABA Journal, and the Metropolitan News.

The moral of the survey is that Los Angeles Lawyer has a strong reader base among lawyers in Los Angeles. If you would like to let other Los Angeles attorneys know of your expertise, consider submitting an idea for an article, or an article, for consideration and possible publication to Eric Howard, the editor. He can be reached at ehoward@lacba.org. We are always on the lookout for articles written by and for lawyers on substantive legal issues, and according to our recent reader survey, that appears to be exactly what Los Angeles lawyers like to read.

Donna Ford is a retired assistant U.S. attorney, now in private practice handling appeals and serving as a mediator and arbitrator.
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What does LAFLA do? We are the largest free legal service provider in Los Angeles. We help close to 80,000 people per year. We’re a safety net for the poor.

What are the financial requirements for receiving help from LAFLA? People have to fall under the federal poverty guidelines. For a family of four, that is $24,250 per year.

Is there equal access to justice for the poor? Not right now, but we’re making headway.

Who funds LAFLA? Our largest funder is the Legal Services Corporation, which is a federal nonprofit that receives money from Congress, but with that money come restrictions. We can’t do class actions, and we can’t represent undocumented folks, except in limited circumstances (cases involving the Violence Against Women Act, trafficking, or unaccompanied minors). We also get grants from the Department of Justice and state and IOLTA, EAF, and county funding.

Does LAFLA have enough money? Never.

You started with LAFLA in 1999 and became its executive director in 2009. Do you have one particular achievement of which you are most proud? I am building a new headquarters for LAFLA at our former location at 8th and Union. The community used to call it Big Red. Our Crenshaw location is being sold, and we needed a new home.

What do you think is the most urgent public policy need of Los Angeles? Affordable housing.

Does LAFLA work with the homeless population Downtown? We have a clinic at LACAN (Community Action Network). We have had that clinic for over a decade. We’ve worked on skid row representing the homeless with various partners.

Do you think LAPD has been heavy-handed with the homeless Downtown? We cannot solve the homeless problem without better dialogue. We need to address the affordable housing problem and improve mental healthcare for the homeless. The police have a task, which is to enforce the law, and the laws we are passing pretty much criminalize everything.

Do you work with vets? Yes, we have always helped vets and dealt with the Veteran’s Administration. When vets get their benefits, they are able to improve their lives. $221 per month in general relief is not enough.

What was your best job? This job. I get to work with fabulous people who care about the community they work in. I get to facilitate their ability to help an individual in the worst need.

What was your worst job? Babysitting my younger brother and sister.

What characteristic do you most admire in your mother? Her determination—she came to this country from Guatemala as a young widow with me in tow and didn’t know a word of English. She was determined to get ahead for me and then just built a family that is wonderful.

If you were handed $10 million tomorrow, what would you do with it? I would expand LAFLA’s services by hiring and paying better salaries to lawyers and support staff. I would also sit down to plan out how we use the money in a strategic fashion.


Which magazine do you pick up at the doctor’s office? People. I love the gossip.

You were a staff attorney at the Mexican American Legal Defense and Education Fund (MALDEF). What was your greatest achievement from that period? Challenging the denial of benefits to undocumented persons under Prop. 187. We prevailed.

Who is on your music playlist? Miles Davis. Bonnie Raitt.

What is your favorite sport as a participant? I’m really short, but I like basketball.

Which television shows do you watch? Orange Is the New Black. House of Cards.

Do you have a Facebook page? Yes, I do, but it’s terrible because I friend no one. I’m so afraid of privacy issues.

Who is your favorite fictional hero? Atticus Finch. To Kill a Mockingbird made me go to law school.

What are the three most deplorable conditions in the world? Hunger, lack of safety, lack of housing.

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

What is the one word you would like on your tombstone? Happy.
Recent Developments in Special Needs Trust Caselaw

A FIRST-PARTY SPECIAL NEEDS TRUST is often used to receive the proceeds of a personal injury settlement for a disabled individual. This trust allows the beneficiary to maintain needs-based government benefits and must include a provision for the payback of Medi-Cal expenses. For many years, Shewry v. Arnold1 has guided practitioners in efforts to preserve the assets of a first-party special needs trust for heirs after a beneficiary’s death.

The Shewry case, however, has not prevented the California Department of Health Care Services from seeking to recover the assets of deceased Medi-Cal recipients. Herting v. California Department of Health Care Services2 is the department’s latest effort to undo Shewry’s effects. Key differences between the two cases still leave the door open for practitioners to utilize Shewry as a mechanism for opposing the department’s claims against the assets of a special needs trust after the beneficiary has passed away.

Herting was the mother of Alexandra and trustee of her special needs trust. Alexandra was left a quadriplegic and in need of a ventilator at the age of 19 after an automobile accident. A first-party special needs trust was established, funded with the proceeds of a personal injury settlement in the amount of approximately $1.4 million in 2011. Alexandra passed away in 2013. At the time, there was nearly $1.3 million in cash left in the trust. Herting gave notice to the department of Alexandra’s death pursuant to Section 9202 of the Probate Code, which gave four months to file a claim against Alexandra’s estate. Medi-Cal had paid $418,000 in healthcare costs, for which the department claimed reimbursement.

Herting filed her final account and petition for termination of the trust, with a request for denial of the department’s reimbursement claim, invoking the exceptions set forth in 42 USC Section 1396p(b)(1)(B) and Welfare and Institutions Code Section 14009.5(b)(1), both of which limit the department’s right to recover from the estate of a decedent who received medical care while under the age of 55.

The department opposed Herting’s petition, citing 42 USC Section 1396p(d)(4)(A) and Title 22 of the California Code of Regulations Section 50489.9, arguing that a special needs trust must provide reimbursement to the state upon the person’s death. Indeed, Alexandra’s trust did include language to that effect. The department also noted that Probate Code Sections 3604 and 3605 gave it priority over funds remaining in the trust after the death of a special needs trust beneficiary. The superior court approved the settlement of Herting’s accounting but also granted the department’s claim. Herting appealed the court’s decision.

The appellate court sided with the department, stating that the statutes cited by Herting applied to recovery from the beneficiary’s estate rather than the statutes governing the special needs trust and the terms of Alexandra’s trust. The court specifically stated that Alexandra’s trust was not estate property but an instrument to maintain her benefits and enhance her quality of life.

In Herting, the appellate court attempted to distinguish Shewry. In that case, the department had sought reimbursement from Brenda Arnold, who had been the conservator of the person and estate of her mother, Etoria Hatcher, as well as the trustee of Hatcher’s court-established first-party special needs trust. Hatcher’s special needs trust was initially funded with $450,000 from a personal injury settlement. After Hatcher’s death, Arnold distributed all but $2.31 to herself as Hatcher’s sole surviving child.

Arnold, who was disabled herself, did not notify the department of her mother’s death. The department discovered Hatcher’s death during a routine periodic check of the Medi-Cal Eligibility Data System. The department wrote a demand letter to Arnold for payment of Medi-Cal services rendered to her mother. Arnold refused, stating that she was Hatcher’s sole surviving child and was disabled, and any property distributed to her was exempt. The department then filed suit.

The appellate court in favor of Arnold, stating that any remaining assets in the special needs trust are treated as part of the beneficiary’s estate for the purposes of Medi-Cal’s payback claim. Moreover, pursuant to Welfare and Institutions Code Section 14009.5(b)(2)(c), the department could not seek Medi-Cal reimbursement from the estate of a Medi-Cal recipient if there is a surviving child who is permanently and totally disabled.

A key difference between the facts in Herting and Shewry is the timing the department made its claim. In Herting, the trust assets had not yet been distributed and the trust not yet terminated when the department made its claim. In Shewry, the trust only had $2.31 remaining at the time of the department’s claim. Another difference is the exemption on which the parties relied in arguing that the department should not recover on its claim. In Herting, the trustee relied on the statutes that limited the state’s recovery when the Medi-Cal recipient received services under the age of 55. In Shewry, Arnold had argued that the department could not seek reimbursement from her because she herself was permanently and totally disabled. Most importantly, in Shewry the department had made the claim against Arnold not as trustee but as the recipient of the beneficiary’s estate. In Herting, the department had made its claim again the trustee in her fiduciary capacity.

The differences between the facts in both cases were recognized by the appellate court in Herting. The appellate court stated that it was only departing from Shewry as it generally interpreted the statutes to deem the assets of a special needs trust to be part of the beneficiary’s estate after death; therefore, it did not overturn Shewry. The variables in each case still present unique opportunities to the special needs trust practitioner.


Aurora Basa serves as vice president and senior fiduciary advisory specialist for the Special Needs Trust Services group for Wells Fargo Wealth Management.
The Effect of Lappe upon Mediation Confidentiality in Divorce Cases

Under Evidence Code Sections 1119 et seq. and cases decided by the California Supreme Court, confidentiality surrounding mediation is given great deference. Mediation confidentiality is intended to provide the assurance that what a party reveals in mediation cannot later be used against that party in litigation. This serves the public policy goal of encouraging settlement of cases without the attendant cost and uncertainty of litigation. However, a recent case, Lappe v. Superior Court, offered a challenge to mediation confidentiality. The Second District recently held in Lappe that declarations of disclosure exchanged by divorcing parties to assure full and fair disclosure of assets and liabilities must be produced in litigation following a mediation because the disclosure documents are not created and exchanged solely for the mediation. Rather, they are created and exchanged because the legislature demands it in all dissolution cases so divorcing spouses will have full and accurate information upon which to base fair and equitable divisions of assets. To understand how the Lappe decision has clarified that declarations of disclosure exchanged in mediation can be produced in subsequent litigation, it is necessary to review the mediation confidentiality rule as well as the statutes governing full disclosure in divorces.

Evidence Code Section 1119 creates a privilege barring discovery of writings prepared for mediation. It states, in relevant part, “No writing...that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any...civil action.” The California Supreme Court has interpreted the mediation privilege strictly, “except in rare circumstances.” The mediation privilege indicated in Section 1119 is designed to encourage parties to engage in the mediation process. The argument is that if parties cannot be confident that what happens in mediation stays in mediation, they will be deterred from mediating.

The seminal California Supreme Court case interpreting Section 1119 is Foxgate Homeowners’ Association, Inc. v. Bramalea California, Inc. In Foxgate, the court held that a mediator was prohibited from reporting on communications or conduct by a party that the mediator believed represented evidence of refusal to cooperate, even though the result was the unavailability of sanctions for failure to participate in good faith mediation. The court’s rationale was that allowing a mediator to be a tattletale, so to speak, could discourage frank sharing of views during a mediation. Thus, application of the mediation privilege fostered, rather than eviscerated, the competing policy encouraging effective mediation.

Later, in Cassel v. Superior Court, the high court held that the mediation privilege protected discussions between the petitioner and his attorneys prior to and during a mediation of a business dispute, and thus were not discoverable in the petitioner’s subsequent malpractice action. Cassel said, “We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose.” Cassel reiterated a similar statement of the Foxgate court that because the language of Sections 1119 and 1121 is “clear and unambiguous, judicial construction of the statutes is not permitted unless they cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature.” The Cassel opinion notes only one case in which mediation confidentiality was pierced. In Rinaker v. Superior Court, the court held that a mediator could be required to testify in a juvenile delinquency action about inconsistent witness accounts in a previous civil harassment action based on the same conduct. This was because the juvenile’s due process right to confront witnesses outweighed the policies behind mediation confidentiality.

In another case construing the mediation privilege, Rojas v. Richard Ewing.
Los Angeles Lawyer

Superior Court, the California Supreme Court explained that since statutory exceptions to the mediation privilege are described in Evidence Code Section 1122 and allow for disclosure of protected communications when parties agree to disclosure, no further exceptions should be implied unless clear legislative intent indicates otherwise. The court reached this conclusion based on the maxim of statutory construction of expressio unius est exclusio alterius, which holds that if exemptions are specified in a statute, no additional exemptions are to be inferred unless there is a clear legislative intent to the contrary.

Family Law Disclosure Rules

In Lappe, the court addressed the conflict between the public policy favoring confidentiality unless all parties agree to disclosure and the public policy in favor of full disclosure. California has a strong and explicit public policy in favor of full disclosure in all stages of dissolution proceedings. “Marriage is a matter of public concern. The public, through the state, has interest in both its formation and dissolution.” Spouses owe each other a fiduciary duty “of the highest good faith and fair dealing” with respect to community assets. This duty includes the obligation to make full and accurate disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest. The legislature has explicitly codified the state’s interest in full disclosure and fair distribution of marital assets when spouses opt to end their marriage. To implement this policy of full disclosure, the Family Code mandates that parties exchange preliminary and final declarations of disclosure: “In order to provide full and accurate disclosure of all assets and liabilities in which one or both parties may have an interest, each party to a proceeding for dissolution of the marriage or legal separation of the parties shall serve on the other party a preliminary declaration of disclosure under Section 2104 and a final declaration of disclosure under Section 2105.”

The exceptions to the statutory mandate that divorcing spouses exchange declarations of disclosure are few and narrow. Preliminary declarations of disclosure can almost never be waived. The only statutory provision for waiver of the preliminary declarations is Family Code Section 2107(b)(3), which allows a complying party to move for an order granting a voluntary waiver of the other party’s preliminary or final declarations of disclosure upon a finding of good cause.

Two cases prior to Lappe instruct that when parties to a divorce agree to settle their property and support issues by mediation, they may do so without strictly complying with the technical requirements of Family Code Section 2104 or 2105. However, exchange of a final declaration of disclosure remains mandatory before entry of judgment of divorce can occur.

Marital Settlement Agreement Cases Pre-Lappe

Neither of the two cases prior to Lappe squarely addressed the admissibility of documents, including declarations of disclosure, submitted in connection with a mediation. The trial court in Lappe relied substantially on one of the cases, Marriage of Kieturakis, which concerned a wife’s attempt to set aside a marital settlement agreement and undo the property division on grounds of fraud, duress, and lack of disclosure. After a thorough discussion of the cases concerning the mediation privilege, the court analyzed the content of documents submitted for the mediation and testimony by the mediator and appraiser, all of which the trial court had admitted for review in camera, as to the wife’s claim that her husband did not disclose continuing royalty payments from his surgical invention. The court did not reach the legal question whether the mediation privilege
covered the documents disclosed in mediation or the mediator’s testimony, finding instead that admission of the evidence was harmless error because both spouses would have waived the privilege on remand for retrial, and the evidence belied the wife’s claim that she was ignorant of the royalty income. Clearly, the court of appeal was swayed by the probative value of this evidence, and the court raised the possibility that, even in light of *Foxgate* and *Rojas*, there might still be a good cause exception to the mediation privilege.21 Curiously, the *Kieturakis* court did not even mention the Family Code disclosure statutes.

*Kieturakis* does, however, present a possible legal conundrum. If a case is not mediated, and one party claims that he or she entered into an agreement in which the other party gained an advantage, the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence.22 *Kieturakis*, however, instructs that this presumption of undue influence cannot be applied to marital settlement agreements entered into in mediation because applying the presumption to mediated settlement agreements would severely undermine the practice of mediation. The presumption would “turn the shield of mediation confidentiality into a sword by which any unequal agreement could be invalidated.”23 Thus the case created different standards for the admissibility of evidence and different standards of proof as between mediated and nonmediated marital settlement agreements, a result for which, the appellate court conceded, there exists rational criticism.24

The other case involving the mediation privilege and a marital settlement agreement was *Eisendrath v. Superior Court*.25 The issue in that case was whether the husband had impliedly waived the mediation privilege when he sought to introduce evidence of conversations he had with his wife during the mediation but outside of the sessions with the mediator. The court of appeal held that there is no implied waiver of the mediation privilege when a party places at issue the content of a confidential communication and that the mediator’s testimony was protected by the mediation privilege absent express waivers by both parties and the mediator. Nevertheless, in that case, the wife was willing to waive confidentiality. The husband, who was contesting the settlement agreement’s terms, was the one seeking to keep certain parts of the mediation discussions confidential.

**Lappe**

Gilda and Murray Lappe were married for 16 years and had two children together. Gilda was a stay-at-home mother during the marriage, and Murray was a medical doctor and successful businessman. Without counsel, Gilda and Murray went to a mediator to divide their assets and resolve their divorce. Notwithstanding declarations by Gilda and Murray that they served each other with preliminary and final declarations of disclosure, Gilda maintained that she never got any such declarations.

During the mediation, the parties executed a marital settlement agreement under which Murray was to pay Gilda a total of $10 million in full satisfaction of her entire community interest in shares of a community business known as eScreen, Inc. However, a year later, Gilda filed an application to set aside the judgment on grounds of perjury, fraud, duress, and mistake. She asserted in her application that less than five months after the judgment was entered she learned that Murray was in the process of selling eScreen and all equity shares he acquired in the company through the marital settlement agreement. As a result of the sale, Murray received approximately $75 million pretax for the eScreen shares. Gilda stated that Murray never disclosed that he was shopping eScreen for sale and that had she known this fact, she would not have agreed to surrender her community interest in the company for only $10 million.

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Gilda served a request for production of documents on Murray, which included a request for the declaration of disclosure that Murray said he served upon Gilda prior to entry of judgment. Murray objected, refusing to produce the declaration on the grounds that it was protected from disclosure by the mediation confidentiality statutes. Gilda brought a motion to compel.

A discovery referee believed that the motion should be granted on the grounds that declarations of disclosure have “independent legal significance,” but the trial court refused to confirm the referee’s proposed order. Murray argued, and the trial court agreed, that the referee erred by relying on a non-statutory exemption for documents having independent legal significance in violation of the California Supreme Court’s repeated instruction that courts may not craft judicial exceptions to mediation confidentiality.

Gilda brought a petition for writ of mandate to overturn the trial court’s ruling, arguing that the Evidence Code’s mediation confidentiality provisions cannot be applied in a marital dissolution proceeding to bar the discovery and admissibility of financial disclosures mandated by the Family Code. The court of appeal issued an order to show cause why the petition should not be granted.

The appellate court agreed with Gilda on the basis that “manifest as this [exclusionary] rule is, it does not answer the threshold question presented by this case…that is, do the mediation confidentiality statutes apply in the first instance to statutorily mandated disclosures that must be made regardless of whether the parties participate in mediation? We conclude the answer to this question is ‘no.’”

The court of appeal decision reminded practitioners that family code disclosure requirements are important to ensure full and accurate disclosure of assets and liabilities at the early stages of marital dissolution proceeding, to ensure fair and sufficient child and spousal support awards, and to achieve a proper division of community assets and debts.

The court of appeal decision emphasizes that it was not doing what the state supreme court has forbidden, namely, creating a judicial exception to the mediation confidentiality doctrine. Because the declarations were not prepared “for the purpose of, in the course of, or pursuant to, a mediation,” the court simply recognized that the confidentiality statutes do not apply in the first instance, because the statutorily mandated declarations do not fall within any category delineated by Section 1119.

The Lappe appellate decision does not instruct whether ancillary papers associated with a disclosure declaration, like a worksheet prepared to finalize it, are similarly...
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admissible. The answer will likely turn on the facts of a specific case. Very recently, in addition, some family law practitioners have argued that there should be a different mediation confidentiality rule for family law actions, one that creates an exception to mediation confidentiality for communications in mediation between spouses or registered domestic partners that result in a fraudulent breach of fiduciary duty. Such a rule, however, would eviscerate the idea that “whatever happens in mediation stays in mediation.”

What documents would fall within the new law and thus be subject to production? How related to the alleged fraud must the documents be? Given the interest of the divorce bar in the question of the parameters of mediation confidentiality, the Lappe decision will not likely end litigation over which document is or is not part of the parties’ declarations of disclosure.

2 EVID. CODE §1119(b).
5 Id. at 14-15, 17.
6 Cassel, 51 Cal. 4th 113.
7 Id. at 119.
8 Foxgate, 26 Cal. 4th at 14; Cassel, 51 Cal. 4th at 124-25 (citing Foxgate, 26 Cal. 4th at 1, 17).
11 Id. at 424 (citations omitted).
13 FAM. CODE §721.
14 FAM. CODE §§2100, 2102.
16 FAM. CODE §2103.
19 FAM. CODE §2106.
21 Id. at 93-94.
22 Marriage of Bonds, 24 Cal. 4th 1, 27 (2000).
24 Id. at 87.
27 Id. at 780.
28 EVID. CODE §111(b).
Incorporating Personal Values into Advance Healthcare Directives

THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, health insurance, Medicare, deductibles, prescription medication, copays, portability, stop-loss caps—the components of healthcare in California are a mélange dizzying enough to confuse most people. Nevertheless, the California Health Care Decisions Law grants individuals the power to make their own decisions about their healthcare plans, including decisions regarding future incapacity. Attorneys advising clients with respect to the designation of a healthcare agent or agents, end-of-life decisions, alleviation of pain directions, and other aspects of medical care, should encourage discussion of these issues with family members and ensure that their decisions are recorded with specific and appropriate documentation.

The U.S. healthcare system is costly. America’s total healthcare bill for 2014 was $3 trillion. The complicated insurance maze also adds to the stress that a spouse or family member faces when making healthcare decisions for another person. Given this daunting landscape, an advance personal healthcare directive can help prevent uncertainty, family tensions, and decisions that may run contrary to the patient’s wishes. A completed advance healthcare directive should be given to and discussed with one’s designated agent(s), primary care physician, and personal attorney. Many hospitals will scan an advance directive into one’s personal medical record for ready reference and safekeeping.

As the legislative findings set forth in Probate Code Section 4650(a) acknowledge, “an adult has the fundamental right to control the decisions relating to his or her own health, including the decision to have life-sustaining treatment withheld or withdrawn.” In furtherance of this policy, Probate Code sections 4670 et seq. provide the statutory guidance for advance healthcare directives. The key term “healthcare decisions” is defined in specific statutory provisions.

Selection and appointment of an agent or agents to make healthcare decisions is a threshold consideration. In the event of one’s incapacity, an advance healthcare directive authorizes that agent or agents to follow the directive’s detailed instructions, including end-of-life-decisions, relief from pain, organ donation, and the designation of a primary care physician. The statutory form may be modified or supplemented as an individual may desire to include personal preferences and values, treatment desires and directives, and requested consultations. Preprinted forms are available from the California Medical Association (CMA), the California Hospital Association (CHA), and local hospitals such as Cedars-Sinai Medical Center.

It can be instructive (and personally beneficial) for attorneys, before counseling clients, to complete our own advance healthcare directives. The decisions to be made include:

- Whom should I choose to be my healthcare agent(s)?
- Which decisions can my healthcare agent make?
- What guidelines will I set for the selection or dismissal of healthcare providers and the consent or refusal of particular medications, tests, and treatments?
- What should happen to my body and organs after I die?
- What legal action(s) may be needed to carry out my wishes?
- What end-of-life care steps do I wish to direct to my physician and designated agent(s) take?

Even if a healthcare agent is properly designated, the reach of the agent’s authority is often less than certain.

This last question involves many choices. An advance healthcare directive addresses whether a person elects to prolong his or her life artificially under certain circumstances such as: 1) the person is close to death, which mechanical life support would only delay, 2) the person has a terminal illness, and there is little or no likelihood of improvement, 3) the person’s quality of life would not be acceptable to the person under standards described in the directive. Alternatively, the advance healthcare directive may specify that the person has chosen to prolong his or her life as long as possible within the limits of generally accepted healthcare standards. Whatever one’s choices are about artificially prolonging life, additional decisions may be made about its end. Hospice and palliative care preferences may be specified in an advance healthcare directive.

Recent Cases

To validly execute an advance healthcare directive, however, a person must have legal capacity. The mental capacity of a client is measured by the standards set forth in the Due Process in Competence Determination Act, and the attorney’s role in assessing a client’s capacity to sign an advance directive is not without ethical considerations. In addition, the scope of a designated healthcare agent’s authority has been the subject of recent California appellate court decisions, particularly regarding the scope of an agent’s authority to consent to arbitration of healthcare disputes. These cases offer guidance for the drafting of advance directives and counseling of clients about how to set forth their healthcare goals.

In Garrison v. Superior Court, the court held that a daughter who had a durable power of attorney to make healthcare decisions for her mother could bind her mother to an arbitration agreement.

A fellow of the American Academy of Matrimonial Lawyers, Marshall S. Zolla has practiced law in California since 1964 and is certified as a specialist in family law.
in the admission documents of a residential care facility. In so holding, the court reasoned that the decision whether to agree to an arbitration provision in an admissions document was “part of the health care decision making process.” The Garrison court concluded that under the terms of the durable power of attorney and the applicable provisions of the Health Care Decisions Law, the daughter had the authority to enter into the arbitration agreement on behalf of her mother. The opinion referenced three provisions in the Probate Code. First, Probate Code Section 4683(a) provides that, subject to any limitations in the power of attorney for healthcare, “An agent designated in the Power of Attorney may make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so.” Second, Probate Code Section 4684 provides that “[a]n agent shall make a health care decision in accordance with the individual’s health care instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent’s determination of the principal’s best interests.” Third, Probate Code Section 4688 provides: “Where this division does not provide a rule governing agents under powers of attorney, the law of agency applies.”

In Hogan v. Country Villa Health Services, following Garrison, the court held that a mother’s designation of her daughter in a durable power of attorney for healthcare authorized the daughter to enter into a binding arbitration agreement. The Hogan court explained that “an agent under a health care power of attorney...is empowered to execute arbitration agreements as part of a long-term health care facility’s admissions package, without violating the principal’s constitutional right to a jury trial.” In this case, the mother signed a healthcare power of attorney designating her daughter as her agent, but chose not to limit the authority of her agent to select or discharge healthcare providers or institutions. The court considered whether that grant of authority included the right of the daughter to sign an admission agreement that contained an arbitration provision. Applying the general law of agency and Probate Code Section 4617 (which addresses the selection and discharge of healthcare providers and institutions as a healthcare decision), the Hogan court answered in the affirmative. The daughter had the authority to sign an admissions agreement containing an arbitration provision. In following the analysis in Garrison, the Hogan court determined that in the suit for elder abuse filed by children of the decedent against the nursing home, the arbitration clause in the admissions contract should have been enforced.

Flores v. Evergreen at San Diego LLC reached a different result on different facts. The court of appeal affirmed the trial court’s denial of the nursing home’s motion to compel arbitration, finding that there was no evidence that a wife, suffering from dementia and other ailments, had authorized her husband to act as her agent to bind her to a nursing home arbitration agreement. In this case, there was no advance healthcare directive, and husband did not have power of attorney, and he had not been declared her conservator or guardian. The Flores court rejected the nursing home’s contention that the husband’s act of signing the arbitration agreement created agency status, explaining that the conduct of the principal was necessary to show agency. The Flores opinion further explained that although the nursing home presented evidence that the husband had acted as if he were his wife’s agent, establishment of agency required conduct on the part of the wife confirming that status. A person cannot become the agent of another merely by representing himself or herself as such. To be an agent, a person must actually be so empowered by the principal.

A different result was seen in an unpublished case. Waterman v. Evergreen at Petaluma LLC was a civil action for personal injuries and elder abuse brought by Waterman as successor-in-interest to her deceased father and for wrongful death brought in her individual capacity. She had signed two arbitration agreements at the time she admitted her father into Evergreen Skilled Nursing Facility. Her father had signed an advance healthcare directive containing a power of attorney for healthcare. Waterman was his designated agent for healthcare decisions and his attorney-in-fact. In this case, the wording of the arbitration agreement signature lines was ambiguous, leaving it unclear whether Waterman signed the agreement as her father’s agent or merely as the responsible party. She also signed the resident agreement with the nursing home as her father’s responsible party, not as his agent or attorney-in-fact. In addition, neither the advance healthcare directive nor the financial power of attorney had been triggered so as to empower Waterman to waive her father’s jury trial rights by binding him to arbitration. The advance healthcare directive provided that her authority as her father’s agent became effective only when his primary physician determined that he was unable to make his own healthcare decisions. The financial power of attorney provided that it would take effect only if Waterman’s father became incapacitated or unable to manage his own financial affairs, and that his incapacity was required to be determined by written declaration of two licensed physicians. None of the trigger events occurred.

The court of appeal affirmed the trial court’s conclusion that there was no statutory or contractual basis for concluding that Waterman was authorized to waive her father’s right to pursue legal action rather than arbitration. Consequently, no valid arbitration contract existed, and the Evergreen Nursing Home’s petition to compel arbitration was properly denied.

Another unpublished but instructive case found no agency authority and no right to bind the patient to arbitration. In Hatley v. Superior Court, the Hanford Nursing and Rehabilitation Hospital sought arbitration of two civil actions for negligence and elder abuse. The trial court ordered arbitration of the entire case, but the court of appeal granted a writ and held that the petition to compel arbitration should not have been granted. (The Supreme Court had granted a hearing, then ordered the case transferred back to the appellate court with directions.) As in the Waterman case, there was no advance healthcare directive signed by the patient. The evidence made it not difficult to conclude that the decedent’s nephew did not have authority to bind the decedent to an arbitration contract. Another question was whether the decedent’s spouse validly executed the arbitration agreement on the decedent’s behalf. The answer was no; the evidence established no such authority. The court, following Flores, held that no statutory basis existed for a person, including a spouse, to agree to arbitration based solely on a familial relationship with the patient absent express authority to do so.

The Flores and Hatley opinions further illustrate that a detailed and comprehensive statutory scheme exists in the Health and Safety Code regarding the signature of a patient’s agent, responsible party, or legal representative on an admission contract to a nursing home and the authority for medical decisions if a patient lacks capacity. However, the statute does not define the precise scope of that authority, and case law holds that it does not include the right to consent and bind the patient to an arbitration provision.

Spousal Authority

As the cases above indicate, it is often family members who become agents for patients who lack capacity. It is a common misperception, however, that spouses assume agency when their spouses become unable to make medical decisions. In reality, there is no automatic right or entitlement of a spouse to make such decisions. Probate Code section 4717 places a spouse in the generic category of family member with no expressly provided priority. In addition, case law provides that marital status alone does not create an agency relationship between spouses.
direct agency authority (i.e., express appointment of a spouse as designated agent), federal and state law create obstacles for healthcare decisions by limiting access to a patient’s medical information and records. The chief goal of these laws is to guarantee protection of an individual patient’s health information while balancing the need to provide quality healthcare. Good practice dictates that when drafting advance healthcare directives, express HIPAA and California’s PAMRA authorizations is to be included.

**Gray Areas**

Even if a healthcare agent is properly designated, the reach of the agent’s authority is often less than certain. For example, it is unclear whether an agent can consent to the off-label administration of a drug or to the principal’s enrollment in a clinical trial. Another issue is if the patient’s wishes for treatment for an unanticipated condition are unknown, may the agent apply his or her own values to make a decision, or can the agent base a decision on the substituted judgment standard of Probate Code sections 2580-86? These decisions often have no clear guidelines, which is why hospitals and medical centers have ethics committees to guide healthcare providers, assess risk management, and advise healthcare agents and families who struggle in the emotionally difficult gray area in which many critical decisions affecting loved ones are made. Another potential source of guidance for agents and family members is a hospital’s chaplaincy service, which offers consultation with clergy of diverse faiths in times of stress and ultimate decision making.

The UCLA Medical Center and Cedars-Sinai Medical Center, for example, have chaplaincy programs with clergy from a diversity of faiths. It has been wisely observed that “[c]onversations around the hospital bed cut through the intellectual subtleties of theology into hard core of being.” Probate Code section 4700 allows an individual to set forth provisions and values regarding personal healthcare preferences other than those set forth in the statutory form. Well-informed counsel often suggest to clients that they add their own personal healthcare wishes and values, including consultation with clergy if they so desire, to assist their designated agents in making future healthcare decisions in unanticipated medical situations.

Personal healthcare planning in anticipation of future incapacity should be made in good health. Designation of a healthcare agent or agents, end-of-life decisions, alleviation-of-pain directions, and other aspects of medical care should be the subject of sober reflection, discussion with family, and specific and appropriate documentation. The Book of Ecclesiastes provides appropriate guidance in this regard: “So appreciate your vigor in the days of your youth, before those days of sorrow come and those years arrive of which you will say: ‘I have no pleasure in them.’”

18. Id. at 269.
25. HEALTH & SAFETY CODE §§1250(c), 1326, 1418(a)(1), 1430(b), 1599, 1599.60(b).
Uncertain Waivers

While California courts follow *Iskanian*, most federal courts have sharply criticized its preemption analysis

Under the Private Attorneys General Act (PAGA) of 2004, employees harmed by labor code violations have the right to sue employers not only for themselves but also for other aggrieved current or former employees. Moreover, recovery of penalties includes not only those exclusively within the state’s province (i.e., civil penalties) but also penalties created by PAGA for any Labor Code provision not otherwise carrying a civil penalty. Any penalties thus recovered are then distributed to the Labor and Workforce Development Agency (LWDA) at the rate of 75 percent, with the plaintiff retaining 25 percent.

Critics within the employer community raised concerns at the time of PAGA’s enactment that it created a situation in which the state was basically deputizing the plaintiff’s bar. They warned that contingent fee plaintiff attorneys could and would act without consideration for the costs and benefits of burdening courts and the business community with cases. Their interests would primarily be focused on the recovery of penalties and importantly, attorney’s fees, for these types of employer alleged misconduct. Accordingly, violations, both serious and technical, would be viable predicates for punitive “law enforcement” actions. Coupled with PAGA’s lack of an express requirement to satisfy class action requirements, these critics feared the exposure created by technical violations would be enormous. Thus, a year after PAGA was enacted, it underwent minor revisions, but the issues remained, with multimillion-dollar settlements sought for purely technical violations based largely on the PAGA exposure. Since its enactment, California courts have struggled to figure out exactly how to apply PAGA—primarily enacted to further the public policy of supplementing law enforcement—but thus far have been unable to give uniform guidance.

Arbitration and Settlement

As a consequence of the unpredictability concerning PAGA representative actions and class actions, many employers believe it best to avoid such actions altogether through arbitration or settlement agreements. Although

Kenneth D. Sulzer is president of the Los Angeles chapter of the Federal Bar Association and a partner and cochair of the labor and employment group in Proskauer Rose LLP’s Los Angeles office. Robert A. Escalante is an associate in the labor and employment group in the firm’s Los Angeles office.
the California Supreme court has provided some guidance, uncertainty remains.

In Iskanian v. CLS Transportation Los Angeles, the supreme court cited public policy as the basis to invalidate arbitration provisions requiring waiver of an employee’s right to bring a PAGA representative action even though it held class action waivers are valid as to non-PAGA claims. The court based its decision in part on the fact that California Civil Code Section 1668 provides that all contracts exempting a person from responsibility for his or her violation of the law are “against the policy of the law.” Because the California legislature’s purpose in enacting PAGA was to supplement the limited enforcement capability of the LWDA by enabling employees to enforce the Labor Code as representatives of the state, upholding waivers of this right would serve to “disable one of the primary mechanisms for enforcing the Labor Code.” Namely, employers would not be deterred from mass violations of the law because the penalties could only be assessed by individual plaintiffs representing only themselves. Thus, pursuant to Civil Code Section 1668, enforcing PAGA representative action waivers that exempt employers from violations of the law would be contrary to public policy.

The California Supreme Court further explained that the Federal Arbitration Act (FAA) does not preempt its rule against PAGA representative action waivers because the rule does not “stand as an obstacle to the accomplishment of the FAA’s objectives.” Specifically, the court characterized the FAA as primarily focused on private disputes rather than disputes between a government in its law enforcement capacity and individual employers. The court relied heavily on the FAA’s legislative history in reaching this conclusion. Additionally, the court noted that the FAA’s jurisprudence, with one exception, “consists of disputes involving the parties’ own rights and obligations, not the rights of a public enforcement agency.” Based on this interpretation, the court concluded that a PAGA claim is not governed by the FAA because it is not a private dispute between an employer and an employee. Conversely, similar to a qui tam action, it is a dispute between an employer and an agent or proxy of the state.

Employers and other critics (including the federal district courts) have been quick to voice their disagreement with Iskanian’s analysis of FAA preemption. They argue the FAA preempts California’s rule against PAGA representative action waivers because, as held in AT&T Mobility LLC v. Concepcion, a state law prohibiting the enforcement of an arbitration agreement pursuant to its terms is displaced by the FAA.

These critics argue that the California Supreme Court did not follow through with its analysis. They argue the fact that the PAGA was enacted to serve a public purpose is irrelevant under Concepcion because, like class actions, PAGA merely provides a procedural mechanism for persons to sue (albeit as a state proxy) on behalf of others. With regard to the California Supreme Court’s qui tam analogy, critics claim the analogy is false, noting that the purpose of PAGA is to protect employees, whereas the purpose of qui tam actions is to remedy an injury sustained by the government itself. In other words, unlike in PAGA actions, in which the victim is the employee, in qui tam actions, the victim is the government, though some argue that the government is a victim because it is losing the civil penalty monies. Moreover, the defense argues that regardless of whether a PAGA action is analogous to a qui tam action, PAGA claims are preempted by the FAA because Congress did not provide for an FAA exception to state-proxy disputes.

While state court judges follow Iskanian, the strong majority of federal district court decisions and rulings have sharply criticized the preemption analysis in Iskanian, holding that PAGA representative action waivers are valid and enforceable. In Fardig v. Hobby Lobby Stores, Inc., the district court held that an arbitration provision containing a representative action waiver prevented an employee from bringing a PAGA representative action on behalf of others similarly situated. The court noted that even in light of Iskanian, “the rule making PAGA claim waivers unenforceable is preempted by the FAA” and that the court “is not bound by the California Supreme Court’s understanding of federal law.” Likewise, in both Chico v. Hilton Worldwide and Langston v. 20/20 Companies, Inc., the district courts concluded that the FAA preempts the California rule barring PAGA representative action waivers and that such provisions will be enforced pursuant to the parties’ arbitration agreements. Similarly, in Ortiz v. Hobby Lobby Stores, Inc., the court upheld a PAGA representative action waiver, noting that “federal law is clear that a state is without the right to interpret the appropriate application of the FAA.” In Ortiz, however, the court went beyond all of the other cases and dismissed the claim entirely stating that PAGA permits only a representative action and not an individual claim.

However, one court in two related cases held that PAGA representative action waivers are unenforceable. The court in Cunningham v. Leslie’s Poolmart, Inc., held that employees cannot waive their right to pursue a representative PAGA claim in an arbitration agreement. Specifically, the court reasoned that while the FAA preempts “state law imposing the presence of certain procedures in the arbitration, the FAA does not preempt state laws ensuring that a plaintiff may assert substantive rights in arbitration.” Consequently, the PAGA representative action in that case proceeded to arbitration. The court in Martinez v. Leslie’s Poolmart, Inc., came to a similar conclusion, holding that the FAA does not preempt PAGA claims and that employees cannot waive their right to bring a PAGA representative action.

The court compelled arbitration, but stayed arbitration proceedings pending the completion of the arbitration in Cunningham.

Relatedly, the California Court of Appeal recently, in Montano v. The Wet Seal Retail, Inc., underscored that an arbitration agreement can be stricken in its entirety if poorly drafted with respect to PAGA claims. In this case, an employee brought a class action against her employer for various wage and hour violations. The employer moved to compel arbitration pursuant to the parties’ arbitration agreement, which contained a PAGA representative action waiver and a nonseverability provision. Because the appellate court found the PAGA action waiver invalid, it denied the employer’s motion to compel arbitration, holding that the PAGA action waiver could not be stricken from the arbitration agreement because of the nonseverability clause.

Franco v. Arakelian Enterprises, Inc., presents another significant post-Iskanian issue. In this case, the plaintiff filed suit on behalf of himself and other similarly situated employees, alleging various Labor Code and wage-order violations. The plaintiff’s complaint included a PAGA cause of action. Though the appellate court compelled the plaintiff’s individual claims to arbitration pursuant to a valid arbitration agreement, the court, following Iskanian, held that the PAGA representative action waiver is unenforceable. Thus, the court stayed the PAGA representative claims pending the outcome of the individual arbitration.

The defendant in Iskanian sought review by the U.S. Supreme Court regarding the issue of FAA preemption. Contemporaneously, the defendant in Brown v. Bridgestone Retail Operations, LLC, sought review regarding similar issues. The Supreme Court denied review of Iskanian on January 20, 2015, and Brown on June 1, 2015. Accordingly, Iskanian remains good law; however, several federal district courts have been consolidated for appeal and framed the issue for the Ninth Circuit, which heard oral arguments on June 3, 2015. After the Ninth Circuit rules, perhaps the Supreme Court will rule on FAA preemption of PAGA.

If and until the Supreme Court rules, how—
ever, the untenable situation in which forum governs outcome will likely continue with respect to the enforceability of arbitration agreements, making the battle to remove any PAGA claim to federal court even more critical.\textsuperscript{30} Once a PAGA action is filed, perhaps the first question defendants should ask is whether they can convince the judge to limit the scope of the representative action based upon considerations of the concepts of Rule 23 and manageability. While the California Supreme Court has indicated PAGA representative actions need not meet class action requirements, federal courts have remained split on the issue and uncertainty persists in state courts regarding the permissible scope of PAGA claims.

**Rule 23**

In *Arias v. Superior Court of San Joaquin County*, the California Supreme Court held that employees bringing PAGA representative actions need not comply with California’s class certification requirements.\textsuperscript{31} Though this is now the rule in California state courts (with some qualification explained below), federal district courts within the Ninth Circuit are split as to whether federal class certification requirements pursuant to Rule 23 apply to PAGA representative actions in federal court.\textsuperscript{32}

The majority of federal courts follow *Arias* and hold PAGA representation actions need not meet Rule 23 requirements. For example, in *Pedroza v. PetSmart, Inc.*, the court reasoned that “a PAGA action is fundamentally different in kind from a class action” and that PAGA claims are not subject to Rule 23 because employees asserting PAGA claims represent the same legal right as a law enforcement agency.\textsuperscript{33} Rule 23 class actions, which are efficient and promote consistency in decisions as to persons similarly situated, must meet the procedural and notice requirements of the rule because the rights of absent class members will be affected. On the other hand, PAGA claimants do not represent absent class members. Rather, they bring claims on behalf of themselves, serving as the LWDA’s agent and thus, according to the court, are not subject to Rule 23.\textsuperscript{34}

Other cases uphold the view that representative actions must satisfy Rule 23 requirements. The cases base their holdings primarily on fact that Rule 23 is a federal procedural rule that applies to state law claims invoking a federal court’s diversity jurisdiction.\textsuperscript{35} Recently, in *Medlock v. Taco Bell Corporation*, the court explained that there is a direct conflict between Rule 23 and PAGA because “Rule 23 would prohibit the maintenance of a class action in circumstances where PAGA would permit one.”\textsuperscript{36} It rejected other courts’ avoidance of dealing with this conflict by relying on the nature of PAGA representative actions as a law enforcement tool, deeming the characterization arbitrary and irrelevant. In the *Medlock* court’s view, the dispute was simply framed. While PAGA would permit a representative action to proceed in federal court on the basis of diversity jurisdiction, Rule 23 prohibits the maintenance of a representative action without demonstrating numerosity, commonality, typicality, and adequacy of representation. Accordingly, the Ninth Circuit, as a general matter, declined to extend the CAFA jurisdiction to PAGA claims. The Ninth Circuit recently held that non-class PAGA penalties may not be used to meet the $5 million amount in controversy threshold under the CAFA.\textsuperscript{40} Notably, the court also declined to decide whether a federal court may allow PAGA actions otherwise within its original jurisdiction to proceed under Rule 23 as a class action.\textsuperscript{41} In one case, *Baumann v. Chase Investment Services Corporation*, the plaintiffs petitioned for certiorari, which the U.S. Supreme Court denied on December 15, 2014.\textsuperscript{42}

**Manageability**

A third line of federal cases has developed that, while not requiring application of Rule 23 per se, still require proof of manageability. For example, in *Ortiz v. CVS Caremark Corp*.
oration, the court sided with the federal courts in adopting Arias, finding that a PAGA representative action did not need to meet Rule 23 requirements, but struck the representative action as unmanageable.45 The case involved claims for off-the-clock work and unreimbursed mileage. The plaintiff argued that trial courts routinely managed PAGA representative actions by, among other things, relying on plaintiffs’ use of statistics or survey evidence to prove damages. Concerning each of the claims at issue, however, the court noted that the plaintiff failed to demonstrate a means to avoid the highly individualized inquiries that would be required to establish liability for each allegedly aggrieved employee. As to this point, the plaintiffs failed to point to any trial court’s overcoming individualized issues of liability with statistical or survey evidence. Accordingly, the court struck the PAGA representative action as unmanageable.

Arias’s manageability concerns and the California Supreme Court’s recent decision in Duran v. U.S. Bank44 should arguably compel state trial courts to take similar action. PAGA, like class actions, does not expand substantive rights; plaintiffs may collect penalties on behalf of a particular employee only upon proof that the employer’s violation affected that employee.45 While class actions manage such issues by requiring commonality among the represented parties (and thus some allowance for common proof), Arias suggested PAGA does not require the same. Accordingly, adjudication of representative actions under PAGA may denigrate into the type of drawn out mini-trials that courts have consistently sought to avoid in the class action context.

Plaintiffs may argue that the concerns regarding manageability may be avoided through the use of statistical or survey evidence; however, as recently noted in Duran, statistical and survey evidence does not always suffice to accommodate defendants’ due process right to present a defense. Accordingly, when the represented employees’ claims lack commonality sufficient to make the adjudication of all employees’ claims superior to individual actions, statistical and survey evidence may not adequately account for variations among the employees. Duran can be utilized by the defendant to request that the plaintiff should provide a trial plan that passes muster even though no claim has been certified.

Regardless of the plain practical concerns, no California appellate court has ruled that these concerns empower (or obligate) a court to strike PAGA representative actions.46 Colorable arguments, however, do exist in the gaps left by Arias, most notably based on appellate authority that predates PAGA by over a decade.

Arias categorized representative actions into two groups: those brought as class actions and those not brought as class actions. Regarding nonclass action representative suits, an appellate court recognized a trial court’s obligation to preclude representative status based on manageability concerns. In Bronco Wines v. Frank A Logoluso Farms, a grape grower brought a nonclass representative action under California Business and Professions Code Section 17200, the Unfair Competition Law (UCL), on behalf of other grape growers for restitution from a winery that engaged in allegedly unfair business practices in the purchase of grapes.47 Specifically, the plaintiff brought a claim against the winery for “wrongfully rejecting and refusing to accept grapes, adopting arbitrary quality standards, applying quality standards unreasonably in order to pay less for accepted grapes than the price agreed to...and threatening to sue and suing growers who complained....”48 The court found the trial court erred in allowing the representative action to proceed, noting, among other things, the “insurmountable control and management problems associated with awarding judgments for or against nonparties not subject to the court’s jurisdiction.”49 Some courts have run with this analysis to preclude nonclass representative actions in non-PAGA cases and may use it to analyze manageability under PAGA.50 Other courts have suggested that the UCL cases do not support any limitation on PAGA because of the quasigovernmental purpose of PAGA.51

**Final Judgment**

Assuming the PAGA representative action makes it to verdict, uncertainty remains for both parties. The California Supreme Court in Iskanian recently struck a blow to the defendants’ efforts to avoid liability altogether based on constitutional ground. The defendant argued that, based on the court’s precedent, PAGA representative actions violated the separation of powers principal because it provided financial interests to private counsel prosecuting public claims without governmental supervision.52 The court rejected this argument, finding the separation of powers’ requirement for absolute neutrality only applied to cases in which a constitutional “liberty interest” or “the right of an existing business to continued operation” is at issue.53 The court further explained that no court has applied rules requiring absolute neutrality of private counsel acting as prosecutors to representative or qui tam actions. Moreover, the court noted that because the legislature has discretion to deputize private citizens to bring private suits, the PAGA does not violate the U.S. Constitution’s principle of separation of powers.

Having been unsuccessful in defeating the claim, the last arrow in the quiver may be the trial courts’ exercise of the discretion expressly provided for under PAGA. PAGA provides that a court may award a lesser amount in civil penalties than the maximum penalty amount specified under the statute “if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”54 Because a court can “only exercise its discretion to award lesser penalties based on the enumerated considerations” in the statute, and because the statute’s penalties are “mandatory,” defendants have to convince trial courts to lower PAGA’s penalties.55

In determining whether an award would be unjust, arbitrary, and oppressive, or confiscatory, courts consider several factors, including whether the defendant can afford to pay the award and whether the defendant made attempts at correcting its Labor Code violations either before or after a lawsuit was filed.56 In Thurman v. Bayshore Transit Management, Inc., in which a group of union employees brought suit against their employer alleging the employer failed to provide proper rest breaks, a California appellate court upheld a trial court’s 30 percent reduction in penalties under the PAGA because declining to do so would have resulted in an award that was unjust, arbitrary, and oppressive, or confiscatory. In support of its decision, the court explained that prior to filing suit, the union employees had not complained to the employer nor had they notified the employer of the rest break issue in writing. Furthermore, prior to the lawsuit, the employer attempted to ensure that the employees were taking adequate rest breaks by posting memorandums advising the employees to take 10-minute rest periods and by counseling individual employees of the need to take a rest period. In addition, the union president failed to respond to the employer’s letter regarding the implementation of rest breaks. In light of this evidence, and the fact that the employer would not have been able to pay the penalties assessed under the PAGA, the appellate court upheld the trial court’s 30 percent reduction in the civil penalties.57

Federal courts have similarly exercised their discretion to reduce PAGA penalties for a variety of reasons. For example, in Fleming v. Cowdien, Inc., the district court made an 82 percent reduction to the maximum penalties arising from the issuance of wage statements that violated Labor Code Section 226-(a).58 The court made the reduction because it found the maximum penalties unjust due in part because “the aggrieved employees
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suffered no injury.”59 There are also a handful of state court rulings that reduce PAGA penalties in various circumstances.60

An appellate court has yet to find a trial court that lessened penalties, still imposed some, but abused the discretion expressly granted under PAGA to do so. However, there is no guidance as to whether a court can make such a determination before trial, and there is no real guidance on what is considered unjust. Accordingly, both plaintiffs and defendants alike face significant uncertainty throughout and even after resolution of liability. Thus, courts have many open issues to decide, and practitioners can only watch closely how they will play out in state and federal courts.

1 LAB. CODE §2699(a).
3 LAB. CODE §2699(i).
7 Id. at 382 (citing CIV. CODE §1668).
8 Id. at 383.
9 Id. at 383-84.
10 Id. at 384 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 321 (2011)).
11 Iskanian, 59 Cal. 4th at 385. “Nothing in the text or legislative history of the FAA nor in the Supreme Court’s construction of the statute suggests that the FAA was intended to limit the ability of states to enhance their public enforcement capabilities by enlisting willing employees in qui tam actions.” Id. at 387.
12 Id.
13 Id. at 386-87.
14 Concepcion overruled the California Supreme Court case of Discover Bank v. Superior Court, which prohibited arbitration agreements that waived a consumer’s right to bring class claims. Indicating it understood the breadth of preemption under Concepcion, the California Supreme Court in Iskanian applied Concepcion to overturn its holding in Gentry v. Superior Court, which prohibited class action waivers in employment agreements.

21 Martínez, 2014 U.S. Dist. LEXIS 156218, at *14-16. Notably, the same judge decided both Cunningham and Martínez.
24 Id.
26 Id. at 925.
27 Id. at 965; see also Williams v. Superior Court (Pinkerton’s), 237 Cal. App. 4th 642 (2015) (reversing an order compelling arbitration of an individual PAGA claim prior to representative component).
30 Though the Ninth Circuit holds that the Class Action Fairness Act (CAFA) does not apply to PAGA actions brought purely on a representative basis (Baumann v. Chase Inv. Servs. Corp., 747 F. 3d 1117, 1120-21 (9th Cir. 2014)), PAGA penalties do not count toward the amount in controversy when a PAGA claim is brought along with a class claim. Yocupicio v. PAE Group, LLC, No. 15-55878, U.S. App. Lexis 13273 (9th Cir. July 30, 2015).

28 Los Angeles Lawyer October 2015

32 If a representative PAGA claim remains pending).


34 Id. at *22.

35 See Halliwell, 983 F. Supp. 2d at 1183 (citing Shady Grove Orthopedic Ass’n, P.A. v. Allstate Ins. Co., 559 F. 3d 37 (9th Cir. July 30, 2010)).


37 Id. at *19.

38 Baumann v. Chase Inv. Servs. Corp., 747 F. 3d 1117, 1122 (9th Cir. 2014).

39 Id. at 1122-23.


41 Baumann, 747 F. 3d at 1124.


46 A recent appellate opinion has, however, given trial courts some guidance on how to and not to manage uncertified PAGA claims. See Williams v. Superior Court, 236 Cal. App. 4th 1151 (2015), rev. granted Aug. 19, 2015, No. S227278 (affirmed trial court order compelling production of employee list from plaintiff’s location and deferring multi-location discovery until after plaintiff’s deposition).


48 Id. at 715.

49 Id. at 720-21. Proposition 64 essentially validated the Bronco Wines criticism, and now class certification standards are required in a UCL action.


51 See, e.g., Plaisted v. The Dress Barn, Inc., Case No. 2:12-cv-01679-ODW (SHx), 2012 U.S. Dist. LEXIS 135599, at *9 (C.D. Cal. Sept. 20, 2012) (“Unlike California’s UCL, PAGA does not provide for equitable restitutionary or injunctive relief; instead, plaintiffs bringing representative PAGA actions can recover only statutory penalties in fixed amounts per violation…. And unlike class or representative actions seeking damages or injunctive relief for injured employees, the purpose of PAGA “is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.”). See e.g., see Plaisted v. The Dress Barn, Inc., Case No. 2:12-cv-01679-ODW (SHx), 2012 U.S. Dist. LEXIS 135599, at *9 (C.D. Cal. Sept. 20, 2012) (“Unlike California’s UCL, PAGA does not provide for equitable restitutionary or injunctive relief; instead, plaintiffs bringing representative PAGA actions can recover only statutory penalties in fixed amounts per violation…. And unlike class or representative actions seeking damages or injunctive relief for injured employees, the purpose of PAGA “is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.”).


53 Id.


55 Amaral v. Cintas Corp. No. 2, 163 Cal. App. 4th 1117, 1213 (2008) (holding that though PAGA penalties are mandatory, trial courts can reduce these penalties if to do otherwise would result in an award that is unjust, arbitrary, and oppressive, or confiscatory).

56 Thurman, 203 Cal. App. 4th at 1136.

57 Id.


59 Id. at *5.

POSTJUDGMENT PROCEDURE in California state court is governed by complicated and confusing statutory and case authority. The procedures for new trial motions can be especially perilous. Courts have construed many of their requirements to be "mandatory and jurisdictional." That is, if a party (even the trial judge) makes a mistake, it often cannot be excused or repaired, even on remand. This results in a significant number of appellate reversals on procedural grounds. A recent decision, Maroney v. Iacobsohn, is illustrative. Until the California Legislature addresses this issue, attorneys moving for new trial would be well-advised to understand the many nuances of the procedure.

While the Federal Rules of Civil Procedure address the issue of new trials in less than 300 words in four subsections of Rule 59, California’s Code of Civil Procedure, in contrast, uses 12 separate sections of thousands of words, many of which were enacted in California’s 1872 codification of the Field Code. Numerous procedures are unique to new trial motions. The process starts with the movant’s filing a “notice of his or her intention to move for new trial.” There are several alternative timeframes during which the notice must be filed, depending on how the moving party received notice of the entry of judgment. The code lists the grounds—seven vaguely worded and conceptually overlapping categories—that are the only bases on which a new trial motion can be brought or granted. The notice must state the grounds—seven vaguely worded and conceptually overlapping categories—that are the only bases on which a new trial motion can be brought or granted. The notice must state the grounds and indicate whether the motion will be supported by affidavits, the record of the court, or both. The actual brief, along with any supporting affidavits, is not filed until 10 days later. An opposition, with any affidavits in support, is filed 10 days after that. And—under an amendment effective January 1, 2015—the moving party can file reply papers five days later.

The code includes a deadline for the trial court to decide the motion, again providing three alternatives. Failure to rule by the deadline is deemed a denial by operation of law. The code further dictates the form that an order granting a motion must take, to be followed by a written specification of reasons that the trial judge must draft him- or herself. A signed proposed order is not sufficient. Oral findings on the record, no matter how lengthy or detailed, are insufficient. On top of that, Section 657 of the Code of Civil Procedure contains some perplexing restrictions on appellate review, which can result in outcomes that are difficult to justify from the perspective of fairness and due process.

All this makes little sense, particularly to Michael Shipley practices complex commercial and securities litigation in the Los Angeles office of Kirkland & Ellis LLP and is the author of 111 North Hill Street, a blog on California Civil Procedure.
lawyers more familiar with federal practice. Worse yet, the mandatory and jurisdictional nature of certain rules results in a not insignificant number of appellate reversals over procedural mistakes—including those made by trial courts rather than the moving party. Many of these reversals cannot be fixed on remand. As Justice Otto Kaus noted in a dissent 30 years ago, the various judicial interpretations of the new trial statutes have created a procedural minefield that can defeat even the most vigilant attorney or experienced trial court judge.

Maroney, a recent decision by the Second District’s Division Three, is a good example. The plaintiff, Maroney, won a jury verdict, but the damages awarded were far less than her medical bills. The damages were reduced further because the jury found her 40 percent at fault. Although the court entered judgment, it is unclear how the parties learned of its entry. Notice was not served by the clerk, and neither party served the other with a notice of entry of judgment.

At any rate, Maroney definitely had actual notice—she attached the judgment as an exhibit to a motion to tax costs. Twenty-two days later, she filed a notice of intention to move for new trial. Maroney then filed a new trial motion, arguing that the damages were insufficient, that there was insufficient evidence of her contributory negligence, and that the jury should not have been instructed on the contributory negligence issue.

At the hearing, the court asked whether a notice of entry had been served, prompting Iacobsohn to suggest that the court’s jurisdiction had expired. After a continuance for supplemental briefing on the timing issue, the trial court heard the motion. Iacobsohn argued that Maroney’s motion was untimely under Section 659 because her notice of intention was filed more than 15 days after she received actual notice that judgment had been entered. The hearing occurred on the 82nd day after Maroney filed her costs motion—exactly 60 days after she filed and served her notice of intention. Although the trial court said it would have ordered if the court reporter's transcript. This kind of thing happens rather often in California new trial appeals. An appellant can correctly argue that the trial court had jurisdiction to grant a new trial, only to have the opportunity to actually conduct that trial taken away, based on the trial court’s failure to use the words the code requires it to say (or, in Maroney’s case, not say). An appellant can have an appeal deemed waived because the trial court’s purported “grant” of the motion tricked the appellant into arguing for an affirmance of a grant on the merits—in which the ruling is presumed correct instead of a reversal—in which the appellant bears the burden of showing error on the record.

Granted, Maroney missed some opportunities. Most significantly, she probably doomed her appeal from the start by taking the trial court at its word that it was granting her motion. A trial court only actually grants a motion for new trial when it orders a “re-examination of an issue of fact,” as though no trial had been previously had. When a motion for new trial is granted ‘in general terms,’ the cause stands ‘in the exact situation in which it was before any trial thereof had been had,’ and...no subsequent order may be made modifying the judgment previously entered. But a venerable line of cases establishes that an order purporting to “grant” a new trial motion that affords no relief or that provides relief other than a full-blown new trial on at least some issues, is, for all
1. A motion for new trial is timely only if a notice of intention to move for new trial is filed prior to the entry of judgment.
   True. False.

2. Which of the following is not a statutory ground for a new trial?
   A. Irregularity in the proceedings of the court.
   B. Misconduct of the jury.
   C. Misstatement of the evidence during closing argument.
   D. Excessive or inadequate damages.

3. A notice of intention to move for new trial must be accompanied by a memorandum of points and authorities.
   True. False.

4. A motion for new trial can raise factual issues outside the record of the court at trial.
   True. False.

5. An amendment to the Code of Civil Procedure permitting a moving party to file a reply brief became effective in:
   A. 1872.
   D. 2015.

6. When a court has not acted upon a motion within the relevant time period under Code of Civil Procedure Section 660:
   A. The motion is granted.
   B. The motion is denied by operation of law.
   C. The time to appeal is extended.

7. Maroney v. Jacobsohn holds that a party’s time to serve a notice of intention to move for new trial runs from the time at which the moving party has actual notice of the entry of judgment.
   True. False.

8. The court’s authority to grant a new trial motion expires 30 days after the clerk’s mailing of the notice of entry of judgment.
   True. False.

9. To grant a motion for new trial, the court is required to enter an order specifying its reasons.
   True. False.

10. The court can direct a party to prepare a proposed order specifying the reasons why the court is granting a motion for new trial.
    True. False.

11. In Maroney v. Jacobsohn, the court of appeal held that the ultimate result of the trial court’s error in deciding it lacked jurisdiction was to render the motion denied by operation of law.
    True. False.

12. After a bench trial, a court that orders an amendment of its statement of reasons in response to a new trial motion has granted the motion.
    True. False.

13. California trial judges have broad discretion whether to order new trials.
    True. False.

14. In deciding a new trial motion, a California judge can disagree with the jury regarding the credibility of witnesses.
    True. False.

15. Maroney v. Jacobsohn affirmed the denial of a new trial motion because the plaintiff failed to make a record for reversal on appeal.
    True. False.

16. A dissenting Supreme Court justice once referred to new trial procedure in California as a procedural minefield.
    True. False.

17. The requirement that the court specify its reasons for a new trial is mandatory and jurisdictional.
    True. False.

18. Serving a copy of a judgment attached to a pleading is sufficient to constitute notice of entry of judgment under Code of Civil Procedure Section 664.5(a).
    True. False.

19. California state courts are more willing than federal courts to entertain new trial motions that examine what occurred during the jury’s deliberations.
    True. False.

20. California courts have vacated new trial orders based on procedural mistakes by the trial judge that were outside the control of the moving party.
    True. False.
relevant purposes, a denial.\textsuperscript{55}

Were the order treated as a denial, two key and related consequences would follow. First, the unusual formalities that apply to an order granting a new trial motion—such as in those at issue in \textit{La Manna}, which was relied upon by the court of appeal—do not apply to an order denying a new trial motion.\textsuperscript{56}

Second, the rules against remanding to correct a trial court’s procedural errors are based on Section 657,\textsuperscript{57} which facially applies only on “appeal from an order granting a new trial.” There thus should be no bar to a reversal and remand\textsuperscript{58} to correct a timely,\textsuperscript{59} but procedurally erroneous, denial on an appeal under Section 660—just such an abuse.\textsuperscript{60} Finally, given the trial court’s comments that it was inclined to grant the motion, it would be difficult to say that the court’s error about its lack of jurisdiction was not prejudicial.\textsuperscript{61}

Another curious feature of California’s rules is that they offer a narrow procedural gateway but very broad substantive grounds for a new trial. For example, a trial judge can simply decide that the jury got it wrong\textsuperscript{62} and is afforded significant appellate deference if he or she does so.\textsuperscript{63} California courts may delve much more deeply into the jury’s deliberations than would be acceptable in federal court.\textsuperscript{64} On the other hand, a California trial judge is micromanaged on new trial procedure,\textsuperscript{65} and if a case falls into one of the code’s many traps, an innocent party may pay the price.

Over the past 50 years, the California Supreme Court has repeatedly noted the unfairness inherent in new trial procedures and—in tacit recognition of the California Legislature’s unusual primacy over civil procedure\textsuperscript{66}—has essentially invited that body to address the problem.\textsuperscript{67} Until these issues are addressed, however, practitioners must remain extremely diligent regarding the many complications arising from new trial procedure in state court.

\begin{footnotes}
\item[55] See \textit{La Manna} v. Stewart, 13 Cal. 3d 413, 422 (1975).
\item[59] See generally Gould v. Wood, 205 Cal. 141, 143 (1928) (noting that the Field Code was “the basis of our own Code of Civil Procedure adopted in 1872”).
\item[60] Code Civ. Proc. §659(a).
\item[61] Code Civ. Proc. §659(a)(2).
\item[63] Code Civ. Proc. §659(a).
\item[64] Code Civ. Proc. §660.
\item[65] Id.
\item[66] Code Civ. Proc. §664.5(a).
\item[67] See Code Civ. Proc. §664.5(a).
\item[68] Maroney, 237 Cal. App. 4th at 477. Iacobsohn had the right to recover his costs because he had made an offer of judgment under Code of Civil Procedure §998, which Maroney had rejected, and Iacobsohn recovered less than the offer.
\item[69] Maroney, 237 Cal. App. 4th at 477-78.
\item[70] Id. at 478.
\item[71] Id.
\item[72] Id.
\item[74] Maroney, 237 Cal. App. 4th at 479.
\item[75] Id.
\item[76] Id.
\item[78] Id.; see also Maroney, 237 Cal. App. 4th at 486.
\item[79] Maroney v. Iacobsohn, No. B249890, Combined Appellants’ and Resp’ts’ Br., 2014 WL 986487 (Cal. App. 2015).\end{footnotes}
trial is not implicated).
2.
3.
Mercy, 237 Cal. App. 4th at 481.
4. Id. at 484.
5. Id. at 485.
9. Id.
10. Id. at 486.
14. Id. at 149-50 (emphasis in original) (citation omitted).
15. See CODE CIV. PROC. §662 (permitting an award of other relief in lieu of a new trial when the right to jury trial is not implicated).
23. La Manna v. Stewart, 13 Cal. 3d 413, 422 (1975).
24. Mercer v. Perez, 68 Cal. 2d 104, 127 (1968); CAL. CONST. art. VI, §13. Id. at 112 (noting that the trial judge is “vested with the authority, for example, to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact”).
25. Id. (ruling will be upheld “unless a manifest and unmistakable abuse of discretion is made to appear”).
26. Compare Franel v. McDonnell Douglas Corp., 163 Cal. App. 3d 157, 173-76 (1984) (considering affidavits to determine whether the jury committed misconduct by adjusting verdict to account for anticipated attorney’s fees and income taxes); Krouse v. Graham, 19 Cal. 3d 59, 81 (1977) (remanding for trial court to consider juror affidavits attesting that a verdict was inflated to compensate the plaintiff for her attorney’s fees); with Wanger v. Shavers, 135 S. Ct. 521, 529 (2014) (juror affidavits admissible only as to evidence extrinsic to the jury’s deliberations).
28. See Oakland Raiders v. National Football League, 41 Cal. 4th 624, 635 (2007) (citing Mercer, 68 Cal. 2d at 117; La Manna v. Stewart, 13 Cal. 3d 413, 422 n.8 (1975)).
WITH THE MAXIMUM FEDERAL INCOME TAX RATE at 39.6 percent, the Medicare surtax on net investment income at 3.8 percent, and the California income tax rate as high as 13.3 percent, California residents with especially high incomes from investments or anticipating substantial capital gains are seeking strategies to lessen a substantial combined tax burden of 55 percent or more. Largely as a result of a series of private letter rulings issued by the IRS beginning in 2013, it may now be possible to reduce the tax burden by eliminating California income taxes on investment income. However, there are three critical caveats: first, this reduction only applies to investment income. It does not apply to compensation, to income from a trade or business, or to rents, royalties, or gains derived from ownership of tangible property in California. The second caveat is that the individual owner of the income-producing asset must transfer it into a special trust. Third, that trust must be administered from Nevada by a Nevada trustee and must not have a California trustee, no other California fiduciaries, and no California resident beneficiaries, except if their interests are contingent.

The trust is a Nevada incomplete gift non-grantor trust, or NING. Under California law, a trust is only taxed on the income from intangible investment assets if either a fiduciary (including a trustee) or a beneficiary (other than one whose interest in the trust is contingent) is resident in the state. If these criteria are not met, California has no authority to tax the investment income of the trust. Unlike tangible property, intangible investment assets not associated with a business situs in California are deemed to be situated where the trust is administered, which in the case of a NING is Nevada. Unlike the income from tangible property, which is traced to the location of the asset, the income from intangible property—for example, the passive investments of a typical trust portfolio—is traced to the residence of the owner. With a NING, the residency is Nevada, a state that imposes no income tax.

Neil Schoenblum is a senior vice president at First American Trust in Las Vegas. Catherine Colombo is the founding member of CMC Law Group, LLC, a boutique estate planning firm in Las Vegas that specializes in estate, business, and asset protection planning.

by NEIL SCHOENBLUM AND CATHERINE COLOMBO
The residency of the trust administrator is not the only criterion that a NING addresses in order to avoid taxation in California. The state requires that there be no California-resident fiduciaries, so a Nevada independent entity is utilized as the trustee.\(^3\) The trustee ordinarily serves purely as the legal owner of the transferred property. The actual decisions as to investments are reserved to a committee or committees that may or may not include the settlor. Decisions as to distributions are typically decided by a committee. That committee ordinarily consists of beneficiaries and the settlor, who may also be a beneficiary. To avoid tax liability, every effort should be made to ensure that no one on the committee is classified as a fiduciary. There should be an express provision to this effect. Persons who make distribution or investment decisions could be considered fiduciaries. Under California law, a resident fiduciary justifies the taxation of at least some of the investment income.\(^4\) If the committee members are explicitly not fiduciaries and are recognized as such, then even if they are California residents, their residence should not generate income taxation of the trust.

A clear and unambiguous statement in the trust instrument that no one on the committee is a fiduciary is therefore important, even if this does not end all doubt. The instructions for the California Fiduciary Tax Return, Form 513—especially Schedule G addressing apportionment of income between California and non-California sources—only discusses the residence of trustees when determining the allocation of trust income.\(^5\) However, notwithstanding this focus on trustees, there is still some risk that California-resident committee members could be regarded as fiduciaries, and this could be the case notwithstanding any disclaimer in the trust instrument. If counted as fiduciaries, they would shift pro rata the allocation of trust investment income to California and make that investment income taxable.

There is virtually no authority about what a fiduciary is under these circumstances and whether the specification of nonfiduciary status in the trust instrument will be effective. The principal tax administrative ruling that comes close to addressing the situation is *King Family Trust and Tunney Junior Trust*.\(^6\) In that decision, the State Board of Equalization reversed the Franchise and Tax Board, holding that a delegation of powers to Morgan Guaranty in New York and the carrying out by that corporation of all administrative functions removed the trusts from exposure to California income tax liability. This was held even though the named individual trustees with title to trust assets were resident in California and could have withdrawn Morgan Guaranty’s delegated author-

ity at any time. The SBE, however, offered no reasons for its reversal of the FTB. Furthermore, the opinion states that it is not to be cited as precedent.

This decision nevertheless offers a rationale for shifting tax residence of a trust to another state, thereby avoiding California income tax. Another question, however, concerns the residency of delegates. If the California delegates have significant responsibilities regarding trust administration, there is a risk of taxation under the implicit logic of *King Family Trust and Tunney Junior Trust*. Without any reasoning being offered by the SBE in the case, however, it is not possible to determine which of several grounds argued by the appellant trusts, if any, led to the outcome. Even assuming the SBE relied on the argument of the appellants that trust administration took place out of state by Morgan Guaranty, this argument could be flipped in the case of the NING. That is, the committee members are analogous to Morgan Guaranty, and the corporate trustee in Nevada is analogous to the individual official trustees in *King Family Trust & Tunney Junior Trust*.\(^7\) As such, California has jurisdiction to tax trust income. Thus, there should not be California delegates.

As for the inclusion of an unambiguous statement in the trust instrument that the committee members are not fiduciaries, this would no doubt prove very helpful. Still, there are some practical and legal concerns. From a practical standpoint, the settlor may be concerned that the people making important decisions about the trust are not bound by fiduciary standards. If the settlor has confidence in the committee members on a personal level, however, the legal constraint of a fiduciary status may not matter. As for the legal side of the matter, the issue is whether the settlor or trust instrument has the ability to waive the legal obligations of persons engaged in making distributional or investment decisions for a trust. This question has been discussed in recent years with regard to trust protectors.\(^8\) While the emerging consensus about trust protectors is that the settlor should be allowed to waive the fiduciary duty, there are exceptions.\(^9\) In light of the lack of California authority, California courts may defer to the trust’s choice of Nevada law. Still, there are no guarantees.

Because of this, the safest course is to populate NING distribution committees solely with individuals who are not and do not become residents of California. One potential problem with this approach is that California residents may be the only people a California settlor knows and trusts. Another is that even if committee members reside outside California, those who are corporate trustees must take care not to engage in acts in California with regard to the administration of the particular NING. The reason is that neither California statutory law nor the California revenue authorities have yet clarified how a determination is made regarding where the “major portion of trust administration” is being carried out for purposes of determining the residence of the trust.\(^10\)

In addition to addressing the issue of the residency of a fiduciary (including a trustee), a NING addresses the second criterion for a trust’s taxation in California—beneficiary residency. A beneficiary’s residence in California will spur at least partial taxation by the state. The exact amount taxed will depend on the interests of the beneficiaries.\(^11\) Not all resident beneficiaries count. In particular, a beneficiary who has a contingent interest is ignored, even if resident in California.\(^12\) This is true even if all the trust’s beneficiaries are resident in California.\(^13\) Thus, a crucial issue is what qualifies as a contingent interest under California income tax law. The Instructions for Schedule G of Form 541, found on page 14 of 2014 California Forms and Instructions 541, the fiduciary income tax return, states that “[a] noncontingent or vested beneficiary has an unconditional interest in the trust income or corpus. If the interest is subject to a condition precedent, something must occur before the interest becomes present, it is not counted for purposes of computing taxable income.” This language echoes in part the position of the California Franchise and Tax Board in Technical Advice Memorandum 2006-0002, which states that “[a] resident beneficiary whose interest in a trust is subject to the sole and absolute discretion of the trustee holds a contingent interest in the trust. The exercise of the trustee’s discretory power is a condition precedent that must occur before the beneficiary obtains a vested interest in the trust.”\(^14\)

Based on the foregoing, there can be little doubt that a trust that is characterized by such discretionary interests is not subject to California tax even if all the beneficiaries are resident in California, as long as their interests are discretionary. Therefore, a NING should be drafted in this manner, along with the committees as described above that make distribution and investment decisions. Technical Advice Memorandum 2006-0002 refers to the “sole and absolute discretion of the trustee.” While the language does not directly address the NING and only references trustees, the definition of contingent interest should still apply as long as any distribution to a beneficiary is subject to the decision of others, especially if they are not fiduciaries, since nonfiduciaries may act arbitrarily.

With respect to beneficiaries, another issue that must be considered when structuring and administering a NING is when they are...
residents of California. If a beneficiary receives a distribution while resident in California, he or she will be subject to taxation and must report the distribution of investment income on his or her income tax return for the year of the distribution, assuming some portion of it is gross income. Ordinarily, the amount reportable will be based on distributable net income, or DNI, calculated under federal tax law principles. Generally, this amount would not exceed the portion of the investment income of the trust for the current year that has been distributed to the particular beneficiary and may be somewhat less, after taking into account certain deductions and other adjustments.

The Throwback Rule
This relatively simple consideration is not the end of the story, however. California’s throwback rule, borrowed from the Internal Revenue Code, is designed to prevent income accumulated in an out-of-state trust from escaping California income tax when it is distributed. Without this rule, only the income for the current tax year would be subject to tax, and the accumulated income from prior years would basically be treated as a principal distribution. On account of the throwback rule, accumulated income is not allowed to masquerade as principal and is treated instead as a delayed distribution of taxable income. This presents some difficult questions about when accumulated income can be taxed. Recall that for income of a trust to be taxable, either a trustee or a noncontingent beneficiary must be resident in California. Accordingly, the income tax on accumulated income can only be imposed to the extent that the trustee or noncontingent beneficiary was resident in the year the accumulated income was earned. A requisite nexus with California must be shown.

While a beneficiary may consider moving out of California in the year of distribution, this is often impracticable. Familial and business obligations may deny the beneficiary that flexibility. Even if it is possible to move, California presumes the beneficiary to have been resident at the time of a distribution even if the beneficiary left the state within 12 months before the distribution and returned within 12 months after. This makes it quite difficult under the ordinary set of circumstances to avoid the tax by a temporary move. There is a considerably less disruptive means of avoiding the tax, however. The trust may be designed so that the beneficiaries are contingent. This is actually highly desirable for a reason other than taxation—it affords maximum asset protection to the beneficial interests of the beneficiaries should creditors seek the trust. It also introduces tremendous flexibility, especially if the settlor, in conjunction with other trusted persons, can effectively control distributions.

The NING has this structure. If the settlor can live with surrendering formal legal title, the assets will remain available to the settlor as beneficiary to the extent the need arises. Routine distributions make no sense, since the point of the NING is to avoid state income taxation, which is generated by distributions to the settlor-beneficiary. If the settlor can forego routine distributions and leave the assets in trust, significant tax savings are possible. These will add substantially to the wealth ultimately available to the settlor or to the settlor’s beneficiaries. An example is illustrative.

Jane created a high-tech company with essentially no capital but a great idea. Her company is being bought by Tech Giant, and she is going to receive $50 million. This gain will be taxed at California’s top rate—which, including the millionaire’s tax, is 13.3 percent, or $6,650,000. However, if the shares in the company are instead sold by the NING, this tax will not be imposed. The trustee could shortly thereafter distribute the gain from the trust to Jane’s beneficiaries who are not resident in California. This would not generate California state income tax, although it may result in taxation in states in which the beneficiaries reside. On balance, it may be advisable to accumulate instead. Certainly with respect to Jane and other beneficiaries resident in California it would be advisable to accumulate. Making distributions of the proceeds of sale to the California resident beneficiaries would defeat the purpose of the NING.

When the discretionary beneficiaries are California residents, the true value of a NING is as an accumulation trust. The longer the bulk of the untaxed income remains in the trust, the greater the tax savings. If California did not have the throwback rule, this retention for a long period would not be an issue. The trustee could simply wait until the new year and make the distribution. The income tax would be limited to the current year’s income, and the excess would pass to the beneficiary tax-free.

From a financial standpoint, the benefit from retaining the gain in trust is not merely that the gain escapes California income taxation. In addition, when that gain is reinvested, any income or gains earned thereon will also avoid California tax, and so on. This permits an acceleration of the return on investment and the growth of the trust estate. Admittedly, at some point there will need to be more substantial distributions. The throwback rule should not apply to claw back the growth enhancement but instead only the portion distributed.

The throwback rule spreads the distributed amount over the year of distribution and the preceding five years, or shorter period if the accumulation has been for a shorter period. The rest of the accumulated income will not be subject to tax as it continues to grow free of state tax. Furthermore, even with respect to the amount distributed, no interest charge is imposed with respect to the delayed payment of taxes. In short, the NING is especially suited to serve as a dynasty trust. In this regard, Nevada has a
365-year rule against perpetuities, in sharp contrast to California’s rule, which would likely allow for a trust of less than a third that duration. Of course, with respect to former resident beneficiaries, including the settlor who has left the state, there will be no barrier to distribution. While there may be tax imposed by another state upon distribution, an increasing number of states do not impose tax or at least impose tax at a considerably lower rate.

This does not take account of certain potential offsets to the proclaimed income tax savings resulting from accumulation. For example, the IRS taxes irrevocable accumulation trusts more progressively than is does individuals, with the result that a built-in additional tax applies when a NING is used. To the extent that relatively small amounts of investment income are involved, this makes the use of the NING inefficient. However, the persons seeking the benefits of the NING are likely to have substantial income and be in the highest bracket anyway. For them this federal tax cost is easily offset by the California state tax savings that the NING delivers.

Another arguable offset of the NING’s benefits is the deduction afforded on the federal tax return for income taxes paid to states. In other words, state taxes are not as bad as they seem, because they are offset by a reduction in federal taxes. Admittedly, there may be some benefit here. Again, it does not significantly diminish the savings of the NING, especially since the deduction itself is treated as a preference for alternative minimum tax purposes. In other words, much of the deduction relief afforded with respect to state income taxes may be washed away to the extent the AMT is applicable, which is the case with increasing numbers of individuals, especially high-income investors.

The Gift Tax

One may ask: If the trust is deemed the owner for income tax purposes, will not the shift in ownership of assets to the trust result in a gift tax, or at least the need to use up some or all of the applicable exclusion amount of $5,430,000 in 2015? And if so, then does not the gift tax cost offset any income tax savings?

The NING exists, however, to establish arbitrage between differing federal income tax and federal gift tax concepts of what constitutes retention of strings of control by the settlor. Before addressing that difference, it is important to note that while California imposes an income tax, it does not impose a gift tax. The objective in designing the NING is to avoid California income tax while also avoiding federal gift tax. Walking this tightrope is not easy. Administrative and distributive powers must be crafted in a way that makes them qualify as retained interests under the gift tax, but not so under the income tax. At the same time, the design must comport with the settlor’s actual dispositive intent.

With respect to the income tax, the grantor trust rules set forth in IRC 671-679, specify those strings of control that allow the IRS to ignore a trust for income tax purposes and tax the settlor on the income. These rules have also been incorporated into the California tax law. If they are not avoided, California income tax applies, even if the trust is resident in Nevada. The taxing authorities will look beyond the trust to where the settlor resides. If the settlor is a California resident he or she will be taxed fully on the net investment income that he or she sought to avoid by use of the NING. An examination of the grantor trust rules reveals, however, that if the settlor retains certain limited powers, the transfer will still be deemed complete and the trust will not be a grantor trust. Significantly, these very same powers will be deemed substantial enough so that the settlor will be regarded as having retained control for federal gift tax purposes.

While the IRS has shifted positions on this issue for the last decade or so, it did recently issue a number of private letter rulings that provide a template that can be relied upon. The rulings do not stand as precedent, however, so it is advisable, but not required, to seek a private letter ruling in each case before engaging in the NING strategy. Nevertheless, much can be learned from studying these private letter rulings.

For example, IRS Private Letter Ruling 201310002, issued March 8, 2013, scrutinized a distribution committee that consisted of the settlor and other adult beneficiary family members, though not necessarily all. The committee could direct the Nevada trust entity through the exercise of certain powers regarding distributions, which the trustee would have to carry out. First, the committee was granted a consent power to appoint property to the settlor or other persons by majority vote of the beneficiaries other than the settlor. It also required the consent of the settlor. No doubt, as a practical matter, a majority of the committee members would likely defer to the settlor. Not surprisingly, the ruling considers the settlor to have not surrendered control. Were the beneficiaries adverse to the settlor, however, the result might be different. In this regard, the beneficiaries are not adverse to the settlor for gift tax purposes merely because they are cotransferees of a power with the settlor or they are permissible appointees. Rather a beneficiary who is the cotransferor of a power is only considered as having an adverse interest “where he may possess the power after the possessor’s death and may exercise it at that time in favor of himself, his estate, his creditors, or the creditors of his estate.” The consent power was specifically designed to comply with this statement. Thus, the power terminated at the death of the settlor, thereby making the beneficiaries nonadverse parties. As a result, the settlor retained a power that made the transfer into trust incomplete for gift tax purposes.

Another power retained by the settlor in the NING examined in Private Letter Ruling 201310002 was a sole power. This power allowed the settlor to make distributions to issue of the settlor for their health, education, support, or maintenance and to do so in a nonfiduciary capacity. Designed to mimic a specific treasury regulation, this sort of power also makes the purported transfer incomplete for federal gift tax purposes. Still another power is reserved to the settlor in the nature of a testamentary power to appoint the trust property to persons other than the settlor, his estate, his creditors, or the creditors of his estate. Because of the settlor's power over the remainder, there is no completed gift with respect to the remainder.

While the foregoing powers afford the settlor considerable authority and indirect control over the assets, why not just give the settlor the power to appoint to himself or herself and without the need to work with a committee that can direct the trustee? The reason is the income tax law, especially the grantor trust rules. Any such solo power would result in the NING's being a grantor trust, which means it would be subject to income tax under California law in the case of a California resident settlor. With that question settled, the next is: At least do the powers that were designed to make the transfer incomplete for gift tax purposes constitute powers sufficiently weak to make the transfer complete for income tax purposes?

One important consideration affecting the answer is the presence of an adverse interest, as defined for income tax purposes. Adverseness comes into play with respect to the gift tax. Under the grantor trust rules, if a nonadverse party other than the settlor has the requisite power, even if the settlor does not have it, the income will be attributed to the settlor. But the meaning of “adverse” for income tax purposes is not in harmony with the gift tax law. Thus, for purposes of the income tax law, the beneficiaries on the distribution committee would be deemed to be adverse parties. They are treated as such because they have a substantial beneficial interest in the trust that would be adversely affected by the exercise or nonexercise of the power. For example, were they to approve a distribution to the settlor or anyone else, the result would be to diminish the amount poten-
To avoid grantor trust status, each grantor trust rule must be sidestepped. Running down the list of grantor trust rules, IRC Section 673 applies if the settlor has a reversionary interest. None of the powers considered in the private letter ruling afford the settlor a reversionary interest. With respect to IRC Section 674, it provides several safe harbors, even if the settlor can affect the beneficial interests of the beneficiaries. The private letter ruling found the trust in compliance and fitting within these safe harbors. For example, the sole power was found to comply with IRC Section 674(b)(5) in that it was limited by a reasonably definite standard. With respect to certain administrative powers, IRC Section 675 provides that they can produce grantor trust status. However, in the private letter ruling there were no such fatal administrative powers in the particular trust instrument. IRC Section 676 treats the trust as a grantor trust if the settlor has a power to revoke. No such power had been granted to the settlor in the trust instrument under consideration in the private letter ruling.

With respect to IRC Section 677, if income may be distributed to the settlor or the settlor’s spouse without the consent of an adverse party, even if not actually distributed, the trust is a grantor trust. The problem here is that if creditors can reach the trust, then the settlor is essentially receiving a distribution to satisfy his or her debts. In the case of a discretionary self-settled trust, such as a NING, a creditor can generally reach the maximum that could have been distributed to the settlor. However, Nevada does not allow creditors to do so. Indeed, unlike some other asset protection states, it bars even satisfaction of claims for maintenance and child support. Since No creditor, short of a fraudulent conveyance, can break the trust, the support. Since No creditor, short of a fraud-
other asset protection states, it bars even sat-
ning to IRC Section 677, it provides several powers such as the beneficiaries, other than the grantor, serving on the distribution committee. Fortunately, Section 678 is limited in a very important manner—it will not treat any such powerholder as the owner in any case in which the powerholder cannot exercise the power alone. Since in the NING being discussed no powers can be exercised by such beneficiaries on the committee solo, Section 678 would not apply.

As the foregoing consideration makes clear, the NING is a very specially designed trust vehicle for avoiding state income tax on net investment income without being considered to have made a taxable gift for purposes of the IRC. The benefits to be obtained by this avoidance of state income tax are especially appealing when the state in question is California, which has a high tax rate. By avoiding the jurisdictional contacts with the state that must exist before a trust’s investment income can be taxed under California law, investment income can be successfully shifted to a Nevada trust and California income tax on the investment income of assets held in the NING can be avoided. This strategy does not necessitate the settlor’s moving from California, nor does it require the beneficiaries’ moving away and staying away from California while income is being accumulated in trust. It permits the administration of wealth in trust for generations, far longer than under California law. It allows for a committee of the settlor and select beneficiaries to direct the trustee with respect to distributions. There are many traps along the way, so careful planning and design of the NING are required. Nevertheless, the NING may prove for a highly select group of clients a powerful tax planning tool that deserves to be considered by Californians and their estate planning advisers.
Directions for Using Voice Recognition Software in Legal Practice

THE FIRST DRAGON DICTATE voice recognition program for Windows 1.0, which came on the market around 20 years ago, was an improvement over the old dictating machines. The Dragon software allowed the user to connect a microphone to a computer and speak into the microphone. Then, voilà, words magically appeared on the computer screen. However, that program required painstaking enunciation of each word. Accuracy left a lot to be desired, but it was much faster to dictate thoughts than to write or even type them.

Since then, the Dragon NaturallySpeaking software (that succeeded the first program) has gone through many iterations: ownership has changed and new versions have come out, each promising greater accuracy than the prior version. The program still has a voracious appetite for computer resources, and only the best and the fastest computers can utilize it to maximum advantage. Also, the most important feature a dictation program can have is high accuracy, and while accuracy of Dragon NaturallySpeaking has improved, it is far from perfect. Even though it has been advertised as “up to 99% accurate,” as a practical matter errors tend to be greater. Even a high accuracy rate is insufficient to avoid considerable proofreading and rewriting because of new names, unusual abbreviations, and the program’s refusal to acknowledge the individual dictator’s specific manner of speech. Poor or inconsistent enunciation and failure to speak directly into the microphone can negatively affect output. Despite these infirmities, Dragon NaturallySpeaking has become a useful, if not essential, tool for practicing law.

Besides straight dictation of text, other features of the program are the ability to dictate various commands, such as “New Line,” “New Paragraph,” “Cap That,” or “All Caps That.” More sophisticated commands are available, but I find them to be a mere novelty. To use commands, they must either be committed to memory before dictating, or written on a separate reference card for use when dictating, and I have found that neither approach is practical.

Dragon NaturallySpeaking runs on a PC computer and will also work on laptops using the laptop’s built-in microphone. The advantage of Dragon NaturallySpeaking over other voice recognition approaches is that it can be trained by the individual user to better recognize your voice. It also can be trained to recognize specific words that may have unusual pronunciations and has the ability to add to its vocabulary special words, client names, and commonly used case abbreviations.

Upon installing the program the dictator speaks to the computer through a microphone for a brief period of time so the program can learn the idiosyncrasies of the dictator’s personal speech pattern. While that used to take as much as 20 minutes of training, it now works satisfactorily with only a few minutes of dictation. The information is stored as a profile for the dictator within the computer. The program can be trained to recognize uncommon words, unusually spelled words, and frequently used phrases. For example, you may wish to have an abbreviation for “Ninth Circuit” so that it will be spelled out as “9th Cir.” whenever you speak the phrase.²

There are several other competing voice recognition programs available to help the practicing lawyer. One is the dictation feature built into the Mac computer. The feature must first be installed, which is a relatively simple matter. Then, simply pressing twice on the Mac’s function key and speaking into the Mac’s built-in microphone results in dictation appearing on the computer screen. The performance has improved. Another form of voice recognition program in apps that may become important in the near future is Siri. Dragon itself has a Mac version of its full program, Dragon for Mac.³ Although I have not reviewed this product, I have read that its performance has improved. Another form of voice recognition program in apps that may become important in the near future is being offered by Google. So far, its use has been limited primarily to conducting searches rather than for dictation. Speed and accuracy are remarkable in this technology, although it still suffers from the infirmities present on the Apple computer because it does not allow

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training to adjust the program to a specific dictator’s voice. Dictation delivered to the Google system is presumably translated on a remote server, and of course, may be stored in Google’s archives.

Using an iPhone 6 as the microphone of choice is often a matter of convenience. The quality is also high. This microphone can take advantage of several specific apps. For example, Nuance has a Dragon Remote Microphone app that is downloadable from the Apple App Store at no charge and that works with the iPhone and Dragon NaturallySpeaking.

The iPhone is not the only microphone to use for dictation. Alternatives include dedicated microphones that will plug into the computer, as well as wireless headset microphones that work with Bluetooth or Wi-Fi. Dragon NaturallySpeaking boxed versions, as opposed to those that are available by download, are usually accompanied by a basic headset that plugs directly into most computers. Dragon also sells a wireless Bluetooth wireless microphone for use with the program. However, there are issues that occur with Bluetooth microphones. One is storing yet another device in the office. Also, some dictators may dislike the discomfort and look of wearing an earpiece. This may not be an annoyance if the Bluetooth earpiece is regularly used for telephone calls. Another issue is maintaining a charged headset battery since if it is not always charged or not easily charged when not in use, it is easy to lose the ability to dictate.

Three approaches to dictation are recommended. The first approach is to team up the Dragon Remote Microphone app on the iPhone with Dragon NaturallySpeaking. The Dragon Remote Microphone app syncs with the Wi-Fi network in an office. When speaking into an iPhone using the Dragon Remote Microphone app, the iPhone acts as if it were a microphone directly connected to the computer. Words spoken to the smartphone are communicated to the Dragon NaturallySpeaking program on a desktop computer, and the transcription by Dragon NaturallySpeaking shows up immediately on the computer screen. An Android version of the Dragon Remote Microphone app is also available for those who use Android smartphones. This approach may be used to insert a paragraph into an existing document or to draft a very simple letter.

The second approach involves using a note-taking iOS app, which uses Siri’s microphone feature, allowing the dictator to see the dictation immediately on the iPhone. That transcribed dictation can then be emailed so that it can be accessed from the office computer. Examples of these apps are WriteRoom—no longer available from the Apple App Store—and iÅ Writer, which is available at a nominal cost. An iÅ Writer stores dictation on Dropbox or sends it to an e-mail address.

The third approach to employ for dictation is the combination of Dropbox, Dragon NaturallySpeaking, Dropbox allows files to be stored in the cloud. Stored Dropbox files typically contain data and documents. Dropbox also allows maintaining other types of files, including voice files and MP3 files. A voice app DropVox can be combined with Dropbox and Dragon NaturallySpeaking to provide the ultimate solution to dictation. DropVox is an app available on the iPhone app store. A similar app, NetMemo, is available for Android users. It allows dictating into an iPhone with the voice file being stored on Dropbox.

Why DropVox? Ultimate simplicity. When the app is activated, a big red dot appears on the iPhone. Tapping the red dot begins the recording, and the red dot turns into a red square. Tapping the red square twice causes the recording to pause, and the red dot again appears. Then, pressing the red dot again continues the recording. When the dictation is over, tapping the red square one more time will automatically upload the voice message or dictation in the form of an MP3 file to the cloud. The cloud is Dropbox, and a special subfolder can be created in a Dropbox folder that stores the DropVox MP3 files with the dictation.

The next step in making the DropVox file useful is to go to a desktop or laptop computer in which Dragon NaturallySpeaking resides. Whether it is a minute or a week after the dictation took place, the Dragon NaturallySpeaking program can transcribe any dictation residing in the Dropbox folder on the Dropbox cloud. No administrative assistant is required to create that transcription.

After the Dragon NaturallySpeaking program loads, tapping on a drop-down menu and clicking on Transcribe opens a dialog box. It will ask to identify which particular file to transcribe. After a few times, the program automatically opens the same DropVox folder in Dropout so there is no need to search further for the Dropout files. The dialog box opens, and the MP3 files are listed in chronological order. Then, it is simply a matter of clicking on the most recent file, hitting Enter and then Transcribe.

The MP3 file will then be transcribed, but it takes a little time to do so—maybe five minutes or about a minute per page. During this time, it is possible to work on another matter or get a cup of coffee. Meanwhile, the text is transcribed on a notepad on the computer or directly into a Word document. Often, it is preferable to transfer the transcription to the notepad and later save that note to a Word file for editing. An assistant would certainly be helpful for reviewing the initial copy and making preliminary edits to correct inevitable errors.

The third dictation method allows dictation anywhere in the world. As long as the smartphone is connected to or will be connected to cellular data or a Wi-Fi connection for uploading, the voice file can be uploaded and stored. It is even possible to transcribe and retrieve the documents remotely, such as with GoToMyPC.com, by accessing Dragon NaturallySpeaking on an office computer and transcribing the DropVox MP3 file.

After becoming familiar with the dictation process, it is no longer necessary to review what is being dictated on the screen. It is, nevertheless, helpful to create a rough outline of the general topics to communicate before starting dictation. The outline need not be detailed, but even having a general roadmap is useful. This is especially beneficial when dictating a brief or anything more than a short letter. It is also a good idea to keep notes on words and names commonly used for dictation so that the user profile in the program can be updated periodically with this information.

Will every work dictated be accurate at all times? Absolutely not. Yet the results are close enough to what was dictated that this system becomes an exceptionally useful tool in the practice of law, particularly given the minimal time and effort required and its functionality in an increasingly mobile practice of law.

1 Dragon NaturallySpeaking, Nuance Communications, Inc., available on http://www.nuance.com/dragon/index.htm. Premium 13 sells for $149.95 and Dragon Professional for $599.99 (allows creation of macros as well as other features). I use the Preferred version, which has recently been renamed Premium. I do not recommend the Home version as it apparently does not work with Bluetooth headsets and does not transcribe audio files. At the time of publication, a new version, Dragon Professional Individual, has been released, which sells for $300. Added features include macros, monitoring folders for automatic transcription, and the ability to transcribe voices of speakers from speeches or podcasts. A mobile-based version—likely subscription-based—called Dragon Anywhere, is said to be available sometime this fall.

2 A legal version of Dragon NaturallySpeaking, which retails for $799, has a built-in legal vocabulary facilitating dictation of legal words and citation but does not provide sufficient advantage to justify its higher cost.


7 NetMemo sells for $4.99.

8 GoToMyPC, available on Gotomypc.com, sells for about $12 per month and up.
ON MONDAY, OCTOBER 12, Trial Advocacy and the Litigation Section will host the expert witness workshop, which provides introductory and advanced level instruction on how to use expert witnesses in civil and criminal actions, with special emphasis on expert testimony. Topics covered will include evidentiary rules regarding expert opinions, taking and defending expert depositions, how experts can help and hurt a case, direct and cross-examination of expert witnesses, establishing and challenging expert qualifications, and advanced expert testimony techniques. In the workshop portion of the program participants conduct direct and cross-examination of an expert witness. Written course materials will be distributed via e-mail prior to the first class. Please provide a correct e-mail address at the time of registration. The workshop will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration will begin at 1 P.M., with the program continuing from 1:30 to 5:30. The registration code number is 012465.

$250—CLE+ member
$500—all others
3.75 CLE hours

TAP Expert Witness Workshop

ON MONDAY, OCTOBER 12, Trial Advocacy and the Litigation Section will present the witness examination skills workshop. This workshop will provide introductory and advanced level instruction on how to examine a witness under oath. The first part of the program is a lecture with a question and answer component, covering how to lay the foundation for demonstrative evidence, create a strategy for cross-examination, control the witness, and employ techniques such as leading by prior question and anticipatory rebuttal. The second part of the program is a workshop in which participants conduct direct and cross-examination of witnesses. Participants receive constructive feedback on their performance. The workshop will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. Registration begins at 8 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The prices below include the meal. The registration code number is 012446.

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

LACBA Domestic Violence Project Volunteer Training

ON THURSDAY, OCTOBER 1, the Domestic Violence Project will host its volunteer training program. Volunteers provide a valuable service to a vulnerable population and gain expertise in the area of family law. No previous experience is required. Attorneys, legal professionals, and law students volunteer for two three-hour sessions per month for seven months. In order to volunteer for LACBA’s Domestic Violence Project, LACBA membership is required. This training provides a very comfortable learning atmosphere with a great opportunity for open dialogue with the presenters. Program attendees will receive substantial materials, and dinner is included. Last year, LACBA’s Domestic Violence Project helped more than 5,000 persons. During the course of a shift, a volunteer can help as many as three victims seek protection from their abusers. Volunteers interview victims on a one-on-one basis, gathering information with which to complete complicated legal documents. This allows the victims to file for restraining orders with professionally prepared petitions. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration and a meal will be available at 5:15 P.M., with the program continuing from 6 to 9:15 P.M. The registration code number is 012675.

$30—law student
$50—paralegal
$85—LACBA member
$175—nonvolunteer attendee
3 CLE hours
**What to Do When a Witness Answers “I Don’t Know” at Trial**

**WHEN QUESTIONING A WITNESS** at trial it is worthwhile to remember that the answer “I don’t know” does not mean no. It means “I have no recollection” or “I am incompetent on that topic” unless the witness clarifies that he or she means no. “I don’t know” does not mean yes either. Some lawyers get frustrated by an answer of “I don’t know,” convincing themselves that a witness should volunteer an admission the lawyer wants but that prior deposition discovery gives no reason to expect. This frustration cannot turn a lack of evidence for impeachment or inability to refresh recollection into a claim that the witness has no basis to challenge a point or supposed fact the examiner wants to prove but cannot. “I don’t know” can also be catnip to aggressive or bellicose lawyers who treat that answer as an opportunity to prove a point, arguing with a witness about the weight of other testimony and documents hoping to force an admission of truth, although the witness admitted to having no personal knowledge of the matter.

This type of questioning may be the result of a good habit: preparation. Sure of his or her own theory of the case, and spellbound by detailed outlines, trial binders, and exhibits, a lawyer can mistakenly try to argue a witness from ignorance into knowledge. Disinclined to listen to the witness’s profession of ignorance, the lawyer bounds forward, arguing the case to the witness, but it is not a witness’s role to weigh extrinsic evidence or testimony as a jury does. There are other options. The answer may be merely the most common refrain of the recalcitrant witness. In courtrooms and conference rooms around the country, witnesses claim not to know the answer to a question. The answer is not a revelation, a grand climax, or a breakthrough. It may be only a failure of memory or a strong indication that the witness cannot or will not provide the desired testimony.

At deposition, the answer “I don’t know” is usually neutral and not necessarily indicative of a lack of cooperation. It may indicate honesty or merely a failure to understand the question. At trial, however, it is less likely to be neutral, and the lawyer should not ask a question to which the answer will be “I don’t know” unless planning to impeach. If the answer is given at trial, it should not indicate that the lawyer lacks a clear picture of what he or she is trying to prove or of what the witness is competent to testify about. It also could be a sign that the questioner is on a fishing expedition, which is never a good idea, especially on cross.

Time passes. People forget or don’t care. Quizzing witnesses about their lack of knowledge while on the stand accomplishes little and risks much. When a witness says, “I don’t know,” you have three choices. First, if you have evidence that the witness does know, you can impeach with a prior inconsistent statement, thus attacking the witness’s credibility or getting the inconsistent statement into evidence as affirmative proof of a fact. If you cannot impeach, arguing with the witness is badgering, which tends to cause fact finders to sympathize with a witness. This tendency can be mitigated if the lawyer shows that the witness is a liar. If the lawyer fails to do this, however, he or she may seem unctuous and unprepared.

Second, try to refresh the witness’s recollection. This can be accomplished with leading questions, which are permitted with a forgetful witness, or through a document authored by the witness. The answer may appear in another record that can be introduced with a proper foundation. The third option, often the best, is to move on to what the witness actually knows. This can salvage the examination and avoid making a friendly witness seem like an ignoramus (if on direct)

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**Quizzing witnesses about their lack of knowledge while on the stand accomplishes little and risks much.**

Matthew D. Taggart is a commercial litigator at Steptoe & Johnson LLP in Century City who specializes in antitrust, securities, and general business litigation and is a member of the Los Angeles Lawyer editorial board.
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