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Recognizing that we, as lawyers, have a professional responsibility to provide legal services to those who cannot pay, the LACBA Board of Trustees unanimously approved a motion to adopt an update to the LACBA pro bono policy, which recommends that every lawyer commit to at least 50 hours of pro bono legal services per year. The motion was propounded by the LACBA Access to Justice Committee.

The pro bono policy is mainly meant to address the needs of persons of limited means, either directly or through current projects and organizations. The pro bono policy not only encourages every lawyer to provide pro bono hours of legal services every year but also asks that every Los Angeles law firm and corporate office articulate a pro bono policy that supports participation, mainly by giving credit for pro bono hours. The policy further encourages firms and corporate offices, in addition to financial contributions, to provide legal services at substantially reduced fees to persons of limited means whenever possible, or through activities for improving the legal system.

The American Lawyer annual pro bono survey indicates that while pro bono hours by firms have been robust, less time has been spent helping the poor, and more pro bono time was spent in high-profile matters.

Now, for the “what your bar association can do for you” part of the equation: as a lawyer, you can make a difference in your community and derive a great deal of satisfaction from assisting those who are less fortunate and unable to afford legal services. LACBA activities and committees generally, and pro bono activities specifically, can also enrich your practice and sharpen your legal skills. LACBA has five local service projects that present attorneys with an opportunity to volunteer: Domestic Violence Legal Services, Veterans Legal Services, Immigration Legal Assistance, AIDS Legal Services, and Civic Mediation. Through pro bono activities, you can pursue legal interests and experiences that you otherwise would not have at your law firm, law school, or corporate or government office. Pro bono activities give lawyers an opportunity to work on legal issues new to your practice and enrich your knowledge and courtroom skills.

Law firms benefit as well. Pro bono legal services are an inexpensive way for firms to professionally develop and train young lawyers. New lawyers in law firms can gain litigation experience by taking charge of a case, conducting client interviews, interviewing or deposing witnesses, and making court appearances.

Whatever experience, skill, and time a lawyer brings to pro bono work will come back twofold in experience and the satisfaction of benefitting the community by devoting more pro bono time to helping the poor with their basic legal needs. LACBA is here to help you meet that goal. For more information on pro bono opportunities in Southern California, visit www.lacba.org/cfj or www.californiaprobono.org/socal.

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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Steve Soboroff  President of the Board of Police Commissioners

What is the perfect day? My perfect day happens every day. I’m in balance between the time I spend familywise and the time I spend workwise—I’m not out of whack.

What does the Board of Police Commissioners do? It oversees the LAPD. It has only three direct reports—the chief of police, an independent inspector general, and the executive director.

What are your duties as its president? To ensure that the commission fulfills its responsibility as the voice of the community. One major goal is ensure the expansion of community-based policing. We have 10,000 great and committed cops who protect and serve our city.

What is the most critical issue facing the LAPD? On-officer cameras.

You are in favor of the LAPD’s using on-officer cameras. Why? The cameras are important for what they keep from happening, not just what they record.

Under what conditions do you favor their use? There are all kinds of policies and procedures. Anything can be abused. We have the technology and the rules to stop abuses.

What about allowing the officers to review the tape prior to writing their reports? They should.

You are involved in the Weingart Foundation, plus UCLA’s and USC’s schools of public policy. Do you ever sleep? We’re farmers and go to bed early, wake up early. We rarely turn on the headlights of our car.

You are also chair of the Leavey Center for the Study of Los Angeles at Loyola Marymount University. What is the biggest problem Los Angeles is facing? The elimination of the middle class.

What is its biggest asset? Diversity.

What was your best job? I consider everything the same whether I get paid or not. I like being police commissioner, because everything I believe in has to do with community.

What was your worst job? My worst job was laying asphalt in the Valley during the summers of the 1960s. My shortest was working for the Dodgers for one day as a vice chairman. Major League Baseball wanted to take the team back, so they took the team from the McCourts the day after I got there.

It is said that you were the driving force behind bringing Staples Center to Los Angeles. What was the biggest obstacle to making that happen? Politics. It was the biggest obstacle but also the key to getting it done.

What is campaigning like? I loved it—I would take one of my kids to every evening event. I took something that’s really difficult, that breaks families, and I made it into something great. I would win if I won, and I would win if I lost. I’m better for it, and so are my kids.

Do you still want to be the mayor? No.

If you were handed $10 million tomorrow, what would you do with it? I would be a great guy to be filthy rich because I have an understanding of the underserved and those with special needs.

Who is on your music playlist? Rihanna. She sits next to me at Staples Center. I call her Ri Ri. You should hear what she calls me.

What is your favorite vacation spot? It’s not where; it’s who I’m with. I like to travel with my wife.

What is your favorite hobby? I collect typewriters of famous people. I have the one that the Unabomber used, plus Hemingway’s and 30 others.

What is your favorite spectator sport? I like professional basketball; I like the Clippers.

Are you on Twitter? Yes. I have 6,000 followers.

Which person in history would you like to take out for a beer? I would take Henry Kissinger to The Pantry (I don’t drink beer) because I like shuttle diplomacy, and I think he’s as good as it gets. That’s what I am, a broker.

What are the three most deplorable conditions in the world? Next to the obvious (hunger, poverty, war) mental illness, substance abuse, lack of parenting.

Who are your two favorite U.S. presidents? If you asked me this 20 years ago or 20 years from now, I’d answer the same—the current president and the incoming president.

What words would you want on your tombstone? Come visit.
Understanding the Rules and Procedures for Jury Selection

PRACTICAL CONSIDERATIONS AT PLAY at play during jury selection are vital since jury composition can determine the outcome of a case. Jurors are charged with evaluating evidence and determining whether liability attaches based on the evidence presented. Thus, the court and lawyers are tasked with selecting jurors who can fairly evaluate evidence while exposing prospective jurors unable to do so. The reasons for this can range from unwillingness to consider application of the death penalty in capital murder cases to an inability to set personal biases or perspectives aside. The process of uncovering personal attitudes or belief systems harmful to one’s case can be problematic because it requires lawyers to interview the jury panel in a manner that encourages honest and forthcoming answers but does not alienate panelists who ultimately become jurors. California law sets forth specific rules and tactical considerations, with which every trial lawyer should be familiar, governing the process by which prospective jurors are evaluated for fitness.

Voir dire is the trial lawyer’s first opportunity to speak and advocate before the jury. The rules of voir dire permit the trial judge to allow each party to make a brief opening statement prior to questioning the jury. It provides an opportunity to frame the narrative and shape the way in which prospective jurors view the case. It also presents an opportunity to engage and generate interest among prospective jurors. The case overview should be brief but also address the major issues to be presented throughout the trial.

Rules governing jury selection in California are found in the Trial Jury Selection and Management Act. In federal courts, the presiding judge typically assumes the role of interviewing prospective jurors. Conversely, state courts, which generally empanel 12-person juries, permit attorneys to take a more active role in questioning prospective jurors during jury selection or voir dire. Section 222.5 of the California Code of Civil Procedure expressly permits an attorney from each party to question the jury panel for the purpose of probing the fitness of prospective jurors.

Prior to oral voir dire, lawyers should understand their case theories and defenses, crafting questions by topic to identify panelists resistant to those theories and defenses. They should think about the themes of their case and how best to present perceived weaknesses to the panel. The next step is to identify three to five categories of inquiry to address with the panel. An attorney requesting punitive damages, for example, should consider inquiring whether anyone on the panel would refuse to award punitive damages if the evidence supported an award. While examination of an adversarial witness is most effective through a series of direct, leading questions, asking open-ended questions may best uncover attitudes and philosophies of prospective jurors who might be better used on another case.

The ability to exercise challenges affords the parties an opportunity to shape the jury that, in their view, will be most favorable to their case. A challenge is an objection made to a prospective juror. Typically, during voir dire attorneys challenge individuals rather than the entire panel. Jury questionnaires completed and reviewed by attorneys in advance of voir dire are helpful in identifying issues requiring further probing. For example, an attorney representing a corporate defendant in a personal injury action should use voir dire to clarify with the prospective juror any statements evidencing distrust of a corporation that were indicated on the questionnaire.

Challenges to individual prospective jurors are classified in two ways: 1) a challenge for cause (commonly referred to as a “for cause challenge”) or 2) a peremptory challenge. For cause challenges are further divided into three categories: general disqualification, implied bias, or actual bias. Peremptory challenges are essential tools during voir dire because they provide trial lawyers an opportunity to remove jurors whom they perceive as hostile or biased but about whom it may be difficult to create the requisite record in the time allotted for interrogation. While the statute does not require a reason for the exercise of peremptory challenges, it may not be used to remove a prospective juror on the presumption of bias based on race, color, religion, sex, national origin, or sexual orientation.

The process of striking jurors can occur very quickly. Challenges for cause are exercised before peremptory challenges. All challenges to an individual juror, except a peremptory challenge, are taken first by defendants and then by the people or plaintiffs. In civil cases, each party is entitled to six peremptory challenges. In multiparty cases, the court divides the parties according to respective interests in the case, and each interest group may use up to eight peremptory challenges. Peremptory challenges are taken or passed by each side alternately, beginning with the plaintiff or the people. Once each side passes consecutively, the jury is sworn unless the court has good cause to intervene.

Jury selection is a routine but crucial part of the trial process. Having a clear command of the rules and a strategic approach to voir dire is essential to every trial lawyer’s toolkit. However, jury selection is not a science, and predicting an individual’s future behavior is difficult, if possible at all. The goals of voir dire are to provide a narrative of an attorney’s case and to ascertain the fair-mindedness of potential jurors. Thus, an attorney charged with selecting a jury should also rely on real-time assessments and judgment during this dynamic process. A three-pronged approach of knowledge, strategy, and judgment will provide the surest way to achieve the desired goals.

Shawtina Ferguson specializes in products liability defense at The Rasmussen Law Firm, LLP, in Los Angeles. She is also the education chair of the State Bar of California Young Lawyer’s Association and will serve as its chair beginning in October.
The Necessity of Trial Transcripts in Appellate Proceedings

A COMPLETE TRIAL RECORD is essential to presenting an effective appeal because appellate courts have no independent means of obtaining knowledge of the cases brought before them. The California court of appeal expressed this fundamental maxim of appellate review in one case: “When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.” Accordingly, a record of the lower court proceedings must be prepared in order for the appellant to establish the claimed error. Error is never presumed on appeal, and the appellant has the burden of overcoming this presumption by affirmatively showing error with an adequate record. The appellant cannot challenge the sufficiency of the evidence supporting a judgment when there is no transcript of the oral proceedings.

Before California’s fiscal crisis began to ease over the past few years, the budgets for the state’s courts were cut by over $1 billion. This resulted in the closure of 52 courthouses and nearly 4,000 court staff losing their jobs. In addition, most civil courts have terminated their court reporting service to achieve cost savings. In June 2013, Los Angeles County Superior Court eliminated all court reporters for general jurisdiction civil matters (except in the writs departments of the Stanley Mosk Courthouse). As a result, an increasing number of California appellate courts are refusing to reach the merits of an appellant’s claims in their decisions and are also warning future litigants of their court reporting obligation. A recent appellate decision highlights the significance of the lack of an adequate record. In Maxwell v. Dolezal, a pro per plaintiff filed an action for invasion of privacy and breach of contract. The plaintiff alleged that he had agreed to let the defendant use the plaintiff’s photograph and website in exchange for the defendant’s compensation with money, food, and housing, which the defendant failed to provide after using the plaintiff’s image. The defendant demurred on the grounds that the complaint was uncertain, and it could not be ascertained from the pleading whether the contract was written, oral, or implied. No court reporter was present at the hearing on the demurrer. Nevertheless, the trial court’s minute order explicitly sustained the demurrer “[f]or the reasons stated in open court,” without further elaboration. The trial court also denied the plaintiff further leave to amend on the ground that he was unable to articulate in open court a reasonable basis for any additional allegations that would remedy the deficiencies in the complaint.

On appeal, the court in Maxwell stated it was “profoundly concerned about the due process implications of a proceeding in which the court, aware that no record will be made, incorporates within its ruling reasons that are not documented for the litigants or the reviewing court.” The court of appeal cautioned that although the lack of a transcript did not preclude its review of the order sustaining the demurrer, the case was an exception because the operative complaint and demurrer were sufficient to permit effective appellate review. The court affirmed the trial court’s decision on the demurrer involving the invasion of privacy claim and reversed the court’s sustaining of the demurrer on Maxwell’s breach of contract action.

The origin of the Maxwell court’s due process concerns flow from the cardinal rule of appellate review that a judgment or order of the trial court is presumed correct and that prejudicial error must be affirmatively shown. This general principle of appellate practice is an aspect of the constitutional doctrine of reversible error. The California Constitution permits reversal only if an error resulted in a “miscarriage of justice.” A court cannot set aside a judgment or grant a new trial based on instructional, evidentiary, pleading, or procedural error “unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”

A miscarriage of justice will be declared only when the reviewing court is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Appellants meet their burden of overcoming the presumption of correctness by submitting an adequate record to the appellate court that identifies the error committed by the trial court.

Another case illustrating the importance of obtaining a transcript of oral proceedings is Vo v. Las Virgenes Municipal Water District. The appellant’s decision to proceed without a reporter’s transcript was fatal when that appellant challenged the sufficiency of the evidence produced at trial on appeal. The court even went so far as to hold the appeal as frivolous because the appellant failed to present a colorable claim that the trial court erred. The appellant had only designated some pleadings, the judgment, and the notice of the appeal and later added two exhibits admitted at trial. The court concluded, “Without a proper record, there is no way for this court to find that the trial court’s conclusions were not supported by substantial evidence.”

The appellate courts are usually consistent in their application of this rule. For example, in Vo v. Las Virgenes Municipal Water District, the court held that the appellant failed to provide an adequate record regarding an attorney’s fee award when the record did not contain a copy of the pleadings or a trial transcript. The court reasoned: The judgment must be affirmed because the record provided by defendant is inadequate to conclude the trial court abused its discretion in determining the fee was reasonable. As the party challenging a fee award, defendant has an affirmative obligation to provide an adequate record so that we may assess

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whether the trial court abused its discretion. We cannot presume the trial court has erred....The record on appeal does not contain a copy of the pleadings, nor does it contain a transcript. The experienced and highly regarded judge who presided over this case was the best judge of what occurred in his courtroom....The absence of a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion. It is not possible to judicially and appropriately determine from the inadequate record provided by defendant that the trial court abused its discretion. The absence of a record of the proceeds is having the appellate court simply decline to address the issue, other negative outcomes can also result. Most significantly, absent a proper record on appeal, all presumptions are construed to support the decision as to those matters on which the record is silent. The reviewing court conclusively presumes the evidence was ample to sustain the trial court’s factual findings. In City of Pinole v. Lionsgate, the appellant argued that it was required to provide only “a summary of the relevant evidence sufficient for the court to evaluate the appellate challenges.” Lionsgate dealt with a trial court order affirming an arbitration award. Under the California Rules of Court, an arbitrator may, but is not required to, make a record of the proceedings.18 The reviewing court found that the record on appeal was inadequate to come to a conclusion that $470,000 was a reasonable award in comparison to the scope of the litigation as a whole.13

Despite this rule, there are instances in which an appellate court may be somewhat more lenient with an appellant who failed to engage a court reporter. As discussed in the unpublished opinion of Van Halen v. Berkeley Hall School Foundation, Inc., the issue on appeal was whether the trial court properly sustained a demurrer to a fraud cause of action and not the rule. While the most severe consequence for an appellant who fails to secure a court reporter is having the appellate court simply decline to address the issue, other negative outcomes can also result. Most significantly, absent a proper record on appeal, all presumptions are construed to support the decision as to those matters on which the record is silent. The reviewing court conclusively presumes the evidence was ample to sustain the trial court’s factual findings. In City of Pinole v. Lionsgate, the appellant argued that it was required to provide only “a summary of the relevant evidence sufficient for the court to evaluate the appellate challenges.” Lionsgate dealt with a trial court order affirming an arbitration award. Under the California Rules of Court, an arbitrator may, but is not required to, make a record of the proceedings.18 Moreover, an arbitrator must not permit the presence of a stenographer or court reporter unless the arbitrator uses a report to make a record of the proceedings. Thus, arbitration proceedings are not recorded or transcribed unless desired by the arbitrator.

In Lionsgate, the arbitrator ordered a record because of the duration of the proceeding. On appeal, the appellant filed a 1,294-page appendix, but the reviewing court noted that there were substantially more documents presented at the arbitration and trial court level (e.g., the reporter’s transcript of the arbitration hearing alone was 6,794 pages). The reviewing court found that the appendix had misconstrued its burden on appeal: “As appellant, it had the burden of designating an adequate record for review, a different obligation than the one to set forth ‘all the material evidence’ in its brief.” The court found that based on the record before it, and indulging in presumptions to support the decision, there was substantial evidence to support the arbitrator’s decision.

Trial counsel must be familiar with the several types of records available upon which to take an appeal. The California Rules of Court provide an appellant with a choice of several types of records. The choices include: 1) a reporter’s transcript, 2) a clerk’s transcript or appendix, 3) an agreed statement, and 4) a settled statement.20 If a court reporter was not used for a hearing, the latter two options may be used. These options allow the appellant to provide the court of appeal with a record of the testimony and evidence at trial. However, these alternatives have strict deadlines and are often time-consuming.

As its name implies, an agreed statement is prepared by agreement of the parties. The statement, or a stipulation that the parties are attempting to agree on a statement, must be filed simultaneously with the notice designating the record on appeal. The agreed statement must explain the nature of the action, the basis for the appellate court’s jurisdiction, and how the superior court decided the points to be raised on appeal.21

A settled statement may be used if the designated oral proceedings were not reported or cannot be transcribed. A motion to use a settled statement must be filed simultaneously with the notice designating the record on appeal. Preparing and filing the settled statement is a four-step process. First, after the superior court grants a motion to use the settled statement, the appellant must serve and file with that court a proposed statement, which must be a condensed narrative of the oral proceedings the appellant believes necessary for the appeal. At a minimum, the statement should summarize each witness’s testimony. Second, the respondent may then propose amendments to the statement. Third, a hearing must be held by the trial judge for settlement of the statement. Lastly, the appel-
lant must file and certify the settled statement subject to the respondent’s objections.

Ironically, eliminating the use of court reporters in proceedings may have the unintended consequence of increasing the trial courts’ workload because without an official record, those courts may be required to produce a settled statement, a time-consuming and imprecise process.

Each of these options require the cooperation of opposing counsel and trial and appellate counsel and ultimately may prove to be more expensive than simply hiring a court reporter. Moreover, as a practical matter, it is far easier to speak with a client at the outset about securing a court reporter than to ask the court and all counsel to agree on these types of statements after the fact.

In addition to failing to hire a court reporter to transcribe trial proceedings, another example of record omission is sidebar conferences or meetings in chambers. These exchanges may be critical to an appeal, such as when a judge rules on the admissibility of a piece of evidence. If the discussion is not reported, it cannot be reviewed. Thus, whenever possible, counsel should insist that the court reporter record all dialogue with the judge or, alternatively, memorialize unreported dialogue when going back on the record.

Bench trials present additional issues that require planning prior to commencing the trial. Otherwise, there may be significant adverse consequences in obtaining relief on appeal. When a bench trial concludes, there are no jury instructions to review to ensure the trial court followed the law or special verdict form to confirm that the court correctly decided all the necessary ultimate facts. Thus, the parties should request a statement of decision from the court. If the losing party in a bench trial fails to timely request a statement of decision, the appellate court will assume the trial court made whatever findings the court executes the order. To avoid any potential issues with a private reporter, it is advisable to review the individual court’s official reporter pro tem lists of approved reporters. These individuals have applied to the court to serve as a court reporter, satisfied the minimum requirements for service, and do not require a stipulation by the parties to report a proceeding. The latter is particularly helpful when only one litigant is interested in having a proceeding recorded. However, the requesting litigant is responsible for the full cost when there is no stipulation.

Litigants may contact an approved reporter and request a fee estimate in advance. The fees must be calculated in accordance with the California Rules of Court, which state that the court reporter will be paid the “statutory rate” for a completed transcript. The statutory rates are set forth in Government Code Sections 69950 and 69954.

Equally important, the pros and cons of having a court reporter need to be explained to a client in clear, nonlegal terms. The significance of having a record for a potential appeal is certainly one important consideration that must be discussed. However, the presence of a court reporter may also have a significant effect on litigation strategy. Attorneys have observed that trial judges appear to be more open or free in their comments as when a judge rules on the admissibility of a piece of evidence. If the discussion is not recorded, clients may feel that their words are being transcribed. Clients should be made aware of this and what the attorney thinks is the best approach to take given a particular judge’s temperament. Once these issues are discussed, counsel should write the client and memorialize how the issue of a court reporter will be addressed. By doing so, attorneys can avoid an expert second-guessing their actions if any misunderstanding arises over this matter and the client files a malpractice action.

With limited exceptions, trial courts are no longer providing court reporters, and there is no sign that they will return anytime soon as full-time employees of the court. At the same time, an appellant cannot meet its burden to a reviewing court unless there is a record to cite to and the issues on appeal have not been waived. California case law stresses the importance for counsel to obtain client approval to incur the expense of retaining a court reporter in both law and motion hearings and trials. The appellate court will usually refuse to reach the merits of an appellant’s argument when no reporter’s transcript or suitable substitute is provided. When weighed against the necessity of having an adequate record, the burden of securing a reporter’s transcript is relatively de minimis. Further, the failure to have a record prepared could potentially expose an attorney to a malpractice claim. While the court in Maxwell had sufficient records without the hearing testimony, reliance upon courts to issue comprehensive orders or rulings is not recommended. Thus, counsel should prepare clients to incur this additional litigation cost.

2 EISENBERG, HORWITZ, & WIENER, CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ch. 4-A, §41 (2013) [hereinafter EISENBERG].
5 Protect Our Water, 110 Cal. App. 4th at 365.
7 Id. at 100.
9 CAL. CONST. art. VI, §13.
10 Foust, 198 Cal. App. 4th at 181.
11 Id. at 189.
13 Id. at 447-48 (citations omitted).
15 Id. at *13.
18 CAL. R. OF CT. 3.824(b)(1).
20 CAL. R. OF CT. 8.120.
21 EISENBERG, supra note 2, at ch. 4-C.
22 CODE CIV. PROC. §5632, 634.
23 CODE CIV. PROC. §273; see also Redwing v. Moncravie, 32 P. 2d 408 (1934).
24 CODE CIV. PROC. §128(a)(3).
25 GOV’T. CODE §68086; CAL. R. OF CT. 2.956(b), (c).
26 CAL. R. OF CT. 8.130(f)(2).
As of July 1, virtually all California employers were required to begin providing their employees with paid sick leave under the new Healthy Workplaces, Healthy Families Act of 2014. Together with Connecticut and Massachusetts, California is the third state to mandate paid sick leave in the growing momentum for a federal paid sick leave requirement. In the last state of the union address, President Barack Obama shared that the United States is “the only advanced country on Earth that doesn’t guarantee paid sick leave… to our workers.” California, however, is at the forefront of ensuring that this state’s workers can take time off work to care for their health or the health of a family member without any loss in pay and without fear of losing their jobs. Four California cities have already enacted some form of paid sick leave: Long Beach, Oakland, San Diego (currently stayed), and San Francisco.

Under the new law, California employers are required to provide employees with one hour of paid sick leave for every 30 hours worked. This works out to about 8.67 paid sick days per year for a full-time employee. However, the new law allows employers to limit an employee’s use of paid sick leave to three days per year as well as to limit an employee’s total accrual of paid sick leave to six days per year. These requirements apply to all employers that have at least one employee who works more than 30 days in a year in the state of California. Unlike California’s other leave laws, such as the California Family Rights Act (which only applies to employers with 50 or more employees), there is no exemption for small employers. Covered employers also include the state, political subdivisions of the state, and municipalities.

All employees—including exempt, part-time, per diem, and even temporary employees—who work more than 30 days within a year in California are entitled to paid sick leave. The only employees exempt from the law are 1) employees covered by a valid collective bargaining agreement that expressly provides for paid sick leave and meets other requirements, 2) employees in the construction industry covered by a valid collective bargaining agreement that meets certain requirements and either was entered into before January 1 or expressly waives the paid leave requirements in clear and unambiguous terms, 3) providers of in-home supportive services, and 4) individuals employed by an air carrier as a flight deck or cabin crew member, provided that they receive compensated time off equal to or exceeding the amount provided under the paid sick leave law. These are obviously narrow exemptions applicable to a very small subset of employees, which is why all California employers must pay attention to the new law since it likely applies to them.

Accrual and Use of Paid Sick Leave

Employees must accrue at least one hour of paid sick time for every 30 hours worked (including overtime hours), beginning on the first day of employment or July 1, whichever is later. Employees who are exempt from overtime requirements as an administrative, executive, or professional employee under an applicable Industrial Welfare Commission Wage Order accrue paid sick leave based on a 40-hour workweek, unless the employee normally works less than 40 hours a week, in which case the employee accrues paid sick leave based on that normal workweek.

Employees must be employed for at least 90 days before being able to use any paid sick leave. Thus, some employees will not be able to immediately use their accrued leave even though they began to accrue the leave on July 1. For example, Jane, who was hired on June 1, began to accrue paid sick leave on July 1 under the new law. However, Jane was unable to begin using her accrued paid sick leave until August 29, when she reached her 90th day of employment. By contrast, Joe was hired on February 1, so he reached his 90th day of employment on May 1 and thus began to accrue paid sick leave on July 1, and was able to begin using the paid sick leave immediately upon accrual since he had been employed for over 90 days.

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The new law requires that accrued, unused paid sick days carry over to the following year of employment. The law also permits employers to limit an employee’s use of paid sick leave to 24 hours or three days in each year of employment. For example, Jane, who works 40 hours per week, will accrue 8.67 paid sick days during her first year of employment. However, her employer has chosen to cap Jane’s use of her accrued sick leave to three days, and if Jane uses those three days of paid sick leave during that first year, the remaining 5.67 paid sick days Jane has accrued will be immediately available for her use at the beginning of the following year and will remain in her sick leave bank while she accrues another three days during that second year. If Jane does not use any paid sick leave that year, 8.67 paid sick days will carry over into her third year of employment. However, the law allows an employer to limit an employee’s total accrual of paid sick leave to 48 hours or six days. Therefore, if Jane’s employer chooses this option, Jane may not have any more than 48 hours or six days of accrued paid sick leave in her sick leave bank at any given time and will not accrue further sick leave until she uses the leave available in her bank.

For employers who wish to avoid keeping track of and calculating accruals and carryovers altogether, the new law allows a simplified way of complying with its requirements: providing employees with the full amount of paid sick leave at the beginning of each year. No accrual or carryover is required if an employer chooses this method. All the employer needs to ensure is that all employees—regardless of the number of hours they work—are given at least 24 hours or three days at the beginning of each year (or during a 12-month period) for use during that year only.

Sick leave must be paid at the employee’s hourly rate of pay. For situations that involve varying rates of pay—for example, different hourly pay rates, pay by commission or piece rate, or nonexempt salaried employees—the rate of pay must be calculated by dividing the employee’s total wages (not including overtime premiums) for the previous 90 days by the employee’s total hours worked to determine the appropriate rate within which to pay the sick leave. Payment for sick leave taken must be paid to the employee no later than the payday for the next regular payroll period after the sick leave was taken.

An employee may use accrued paid sick leave for the diagnosis, care, or treatment of a personal existing health condition or the existing health condition of a family member. In addition, paid sick leave may be used for the preventative care of an employee or an employee’s family member, such as for routine physicals and vaccinations. Paid sick leave may also be used by an employee who is a victim of domestic violence, sexual assault, or stalking.

For the purposes of this law, “family member” means a child, parent, spouse, registered domestic partner, grandparent, grandchild, or sibling of the employee.

**Posting, Notice, and Recordkeeping Requirements**

The new sick leave law imposes many new detailed and specific obligations on employers. First, as of January 1, employers were required to display a poster in a conspicuous place that states the following: 1) an employee is entitled to accrue, request, and use paid sick days, 2) the amount of sick days provided for under the new sick leave law, 3) the terms of use of paid sick days, and 4) that retaliation or discrimination against an employee who requests paid sick days or uses paid sick days, or both, is prohibited and that an employee has the right to file a complaint with the labor commissioner against an employer who retaliates or discriminates against the employee. The labor commissioner has created a template poster with this required information that is available on the labor commissioner’s website for use by employers. An employer who willfully violates this posting requirement is subject to a civil penalty in an amount of not more than $100 for each offense.

Second, employers must provide each employee with written notice setting forth the amount of accrued paid sick leave available on the employee’s itemized wage statement, together with the other required items set forth in Labor Code Section 226, or in a separate writing provided each designated payday with the employee’s payment of wages.

Third, employers must provide employees hired on or after January 1 with a revised notice to employee (required under Labor Code Section 2810.5) that includes paid sick leave information. The labor commissioner has created a revised notice to employee form that is available on the labor commissioner’s website for use by employers. In addition, Labor Code Section 2810.5(b) requires that all employees be notified in writing of any changes to information set forth in the notice within seven calendar days after the time of the changes. This means that all employees hired prior to January 1 must also be provided with a revised notice to employee that includes paid sick leave information. Alternatively, employers can satisfy this requirement by informing these employees of changes on a timely wage statement furnished in accordance with Labor Code Section 226, or in another writing that contains notice of all changes within seven days of the changes.

Pursuant to Labor Code Section 2810.5, the only employees not required to receive a notice to employee or similar notice are 1) employees covered by a valid collective bargaining agreement or by any political subdivision thereof, 2) employees who are exempt from the payment of overtime wages, and 3) employees covered by a valid collective bargaining agreement. Otherwise, all other employees must receive a notice to employee either at the time of hire (for employees hired on or after January 1) or within seven days after the paid sick leave program starts (for employees hired before January 1). Therefore, the final date for providing notice of changes relating to paid sick leave to employees hired before January 1 was July 8.

Finally, employers must keep records documenting the hours worked and paid sick days accrued and used by its employees for three years. If an employer fails to maintain adequate records, it will be presumed that the employee is entitled to the maximum number of hours accruable under the law, absent clear and convincing evidence to the contrary.

**Prohibitions on Employers and Penalties for Violations**

The new law prohibits employers from requiring, as a condition of using paid sick days, that an employee find a replacement worker to cover the time during which the employee will be using paid sick leave. The law also prohibits employers from denying an employee the right to use accrued sick leave, discharging, threatening to discharge, discharging, suspending, or in any manner discriminating against an employee for using accrued sick leave, attempting to exercise the right to use sick leave, filing a complaint with the labor commissioner or alleging a violation of the sick leave law, cooperating in an investigation or prosecution of an alleged violation of the sick leave law, or opposing any policy, practice, or act prohibited by the sick leave law. Furthermore, there is a rebuttable presumption of unlawful retaliation if an employer denies an employee the right to use accrued sick leave or discharges, threatens to discharge, demotes, suspends, or otherwise discriminates against an employee within 30 days of the employee’s engaging in any of the following: 1) filing a complaint with the labor commissioner or alleging a violation of the sick leave law, 2) cooperating with an investigation or prosecution of an alleged violation of the sick leave law, and 3) opposing a policy, practice, or act prohibited by the sick leave law.

The labor commissioner has the authority under the new law to enforce its provisions and impose various penalties. The labor commissioner may file a lawsuit in any court of competent jurisdiction to enforce any of the provisions of the law or to collect any penalty assessed under the law. The labor commissioner is authorized to seek attorney fees and costs in any action brought under the law.
The commissioner has the power to order the relief it deems appropriate, including reinstatement, back pay, the payment of sick days unlawfully withheld, and the payment of an additional sum in the form of an administrative penalty. If paid sick leave was wrongfully withheld, the employee is entitled to the dollar amount of paid sick days withheld multiplied by three, or $250, whichever amount is greater, not to exceed an aggregate penalty of $4,000, which shall be included in the administrative penalty. Furthermore, if an employee is harmed by an employer’s violation of the sick leave law, such as being terminated from employment, or if the employee’s rights are otherwise violated, the administrative penalty shall include a sum of $50 for each day the violation occurred or continued, again not to exceed an aggregate penalty of $4,000. Also, if the labor commissioner files a civil action to secure compliance of the law, it may order that the employer pay the state $50 for each day a violation occurs or continues, for the purpose of compensating the state for investigating and remedying the violation. The law places no maximum aggregate on this penalty. The state attorney general may also bring a civil action to enforce the sick leave laws. Notably, however, the new law does not expressly allow an aggrieved employee to file a private right of action.

Recommendations for Employers

The new paid sick leave law affects almost every employer in California. Therefore, every employer should carefully review the new law and become familiar with its provisions. As may happen with many other laws, even the most well-intentioned employer could simply misinterpret a part of the law and thereby unknowingly incur significant liability. Nevertheless, there are actions employers can take now to prevent future exposure for violations of the law.

Every employer must immediately display the poster mandated by the law in a conspicuous place in each workplace—such as where other workplace posters are located—since this was a requirement as of January 1. Employers should use the poster created by the labor commissioner to ensure full compliance with the law.

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of July 1, their employees started to accrue paid sick leave. Employers should decide whether to cap the use of sick leave per year and whether to limit total accrual of sick leave. Regardless of these decisions, all employees must receive at least three paid sick days per year. Employers can also forgo compliance with the law’s accrual and carryover rules by choosing the up-front method of providing employees with at least three paid sick days at the beginning of each year.

Employers should develop a system that makes it easy for them to keep track of their employees’ accrual and use of paid sick leave. Using these records, employers need to make sure that they notify all employees of their accrued paid sick leave on each of their wage statements or some other document furnished each payday. Employers also need to provide all employees with paid sick leave information no later than seven days after paid sick leave begins to be offered, and for employees hired on or after January 1, employers must furnish this information on the date of hire. Employers should use the notice to employee form created by the labor commissioner to satisfy these requirements and guarantee full compliance with the law.

Employers with existing paid sick leave policies should review the policies to ensure that all requirements of the new law are met. For employers in the four cities with their own paid sick leave ordinances, both the city law and new state law need to be compared and complied with. Employee manuals should be revised to include the new sick leave information, and discrimination and retaliation policies should be updated.

The seemingly extensive requirements of the new law may seem daunting at first glance, especially since employers already have so many employment laws to follow and stay on top of as part of running their businesses. However, with some time reviewing the law and carefully implementing these recommendations, employers can rest assured that their sick leave policies are fully compliant. The resulting payoff for this minimal effort will be fewer headaches, and hopefully sick days, for the employer.

1 AB 1522. See http://www.dir.ca.gov/dlse/ab1522.html.
3 LAB. CODE §246(b)(1).
4 LAB. CODE §246(d).
5 LAB. CODE §246(c).
6 LAB. CODE §245.5(b).
7 LAB. CODE §245.5(a).
8 LAB. CODE §246(b)(1).
9 LAB. CODE §246(c).
10 LAB. CODE §246(d).
11 LAB. CODE §246(e).
12 LAB. CODE §246(f).
13 LAB. CODE §246(g).
14 LAB. CODE §246(h).
15 LAB. CODE §246(i); but see emergency legislation amending AB 1522 to allow, among other things, for a third option, at http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0301-0350/ab_304_bill_20150326_amended_asm_v98,bhtml.
16 LAB. CODE §246(j).
17 LAB. CODE §246(k).
18 LAB. CODE §246(l).
19 LAB. CODE §246(m).
20 LAB. CODE §246(n).
21 LAB. CODE §246(o).
22 LAB. CODE §246(p).
23 LAB. CODE §246(q).
24 The poster can be found at http://www.dir.ca.gov/dlse/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf.
25 LAB. CODE §247(r).
26 LAB. CODE §246(q).
27 LAB. CODE §247(r).
28 LAB. CODE §246(q).
29 LAB. CODE §247(r).
30 LAB. CODE §246(q).
31 LAB. CODE §247(r).
32 LAB. CODE §246(q).
33 LAB. CODE §247(r).
34 LAB. CODE §246(q).
35 LAB. CODE §247(r).
36 LAB. CODE §246(q).
37 LAB. CODE §247(r).
38 LAB. CODE §246(q).
39 LAB. CODE §247(r).
40 LAB. CODE §246(q).
41 LAB. CODE §247(r).
THE ACHIEVING A BETTER LIFE EXPERIENCE ACT OF 2014 (ABLE Act) provides for the establishment of tax-advantaged savings accounts similar to 529 plans. Rather than providing for distributions to meet educational expenses as 529 plans do, however, ABLE Act accounts are specifically tailored to provide for disability expenses. Two bills are pending in the California Legislature to implement the act in California. In addition, the IRS issued guidance on June 19, and proposed regulations were published in the Federal Register on June 22. Guidance from the Social Security Administration and the Centers for Medicare and Medicaid Services should also provide answers to public benefits questions, and practitioners await further information about ABLE account distributions from the Program Operations Manual System (POMS) of the Social Security Administration (SSA). Once fully implemented, ABLE plans should add a useful tool to the kit available to attorneys serving the needs of people with disabilities.

In addition to 529 plans, ABLE plans bear comparison to special needs trusts. These comparisons provide insight into how ABLE accounts may best be structured to provide for clients with disabilities. For example, one similarity that ABLE accounts appear to have with 529 plans is that distributions from an ABLE account may apparently be made to the participant, the beneficiary, an eligible institution, or to a third party. While specifics have yet to be resolved, the ABLE Act does refer to distributions to the account’s “designated beneficiary.” Assuming that ABLE plan distributions will follow the model of 529 plans, distributions to a beneficiary who receives needs-tested public benefits such as SSI and Medi-Cal would not result in any reduction of the monthly cash payment or loss of eligibility due to the distribution, as long as the funds distributed from the ABLE account are utilized for qualified disability expenses. The funds held in an ABLE account are not considered a countable asset for purposes of needs-tested benefits.

Under the federal regulations, an ABLE account’s services may be delegated to one or more community development financial institutions. Legislation currently pending in California provides that the ABLE program will be administered by the treasurer. A state ABLE program must allow 1) input from the designated beneficiary to directly or indirectly direct the investment of any contributions to the program or its earnings “no more than 2 times in any calendar year,” 2) only cash contributions to the account, 3) total annual cash contributions of no more than the $14,000, 4) maximum Thomas E. Beltran represents children and adults with disabilities as well as elders in public benefits matters.
“aggregate contributions on behalf of a designated beneficiary” that are limited to that “established by the State under section 529(b)(6),” separate accounting for each designated beneficiary.14

While the benefits of the ABLE Act may be relatively modest compared to, for example, a special needs trust or 529 plan, they are nonetheless significant. For example, in California, the monthly Supplemental Security Income (SSI) cash payment amount is $889.40,13 or $10,672.80 annually, yet with an ABLE account, the SSI recipient can shelter, or by third-party contributions receive, up to $14,000 per year of additional assets. Borrowing from California’s 529 plan asset limit, in turn, an ABLE account’s total asset limit is $371,000, unless the designated beneficiary is an SSI recipient, in which case the aggregate contributions are limited to $100,000.16 Under an ABLE account, on the other hand, total annual contributions cannot exceed the maximum of $14,000.17 For some clients, however, the ABLE Act’s structure may offer an appropriate solution to the inconvenience of distributing funds from a special needs trust.

Eligibility
One example of how the ABLE Act may be well suited for the needs of some clients is found in its eligibility requirements. A person is eligible if for a taxable year that person meets the act’s test for disability. Unlike, for example, a first-party special needs trust, an ABLE account can be established by or for a person with or her own assets who does not meet the SSA’s strict definition of disability. Instead, the person may utilize a less-strict disability certification process to qualify for an ABLE account.18

It can be of great significance to some clients that an ABLE account is available to an individual not meeting the strict disability test that is required for the establishment of a special needs trust.19 For example, minors who are wards of the court fall within a category of eligibility for Medi-Cal without meeting any disability test. Minors who can meet at least the second prong of the eligibility test could benefit from an ABLE account. The ABLE Act’s definition of disability includes individuals “entitled to benefits based on blindness or disability under title XVI of the Social Security Act” and would include children.20

An eligible individual who opens, or for whom an ABLE account is opened, is referred to as a designated beneficiary. Only one account may be opened for or on behalf of the eligible individual, and the account can only be opened in the state in which the individual is a resident.21 The ABLE account can remain in the same program, however, even after the beneficiary moves to a different state.22 If the eligible individual is unable to open the account on his or her own behalf, it can be opened by an “agent under a power of attorney or, if none, by a parent or legal guardian of the eligible individual.”23

Disability Definition
For purposes of the act, the term “eligible individual” means 1) one whose disability “occurred before the date on which the individual attained age 26,” who either receives SSI or Social Security Disability Insurance (SSDI) benefits or 2) “has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind.”24

The first prong of the disability test covers those who have met the SSA’s definition of disability before the age of 26 years and are entitled to receive a monthly cash payment. This should not rule out an individual well over the age of 26 who can demonstrate that he or she met the definition prior to age 26. While children cannot receive SSDI, they can become eligible for SSI. The SSA’s disability definition, as applied to adult applicants for SSDI or SSI benefits, is centered on the ability to obtain and maintain employment. An individual with a “severe impairment” found in the Social Security Act’s listings of conditions who is unable to engage in substantial gainful activity (SGA, defined as the ability to earn monthly gross income of at least $1,090 this year25) should be eligible for SSI.26 If the individual had sufficient earnings and paid into FICA for the required period of time, or was disabled prior to age 22 and has a parent who has worked a sufficient time for SSA retirement benefits, he or she may be able to qualify for SSDI.27 One can receive both SSI and SSDI concurrently.28

The second prong of the disability test is likewise limited to those whose disability began prior to age 26 but contains a disability definition that is an amalgam of various elements of the Social Security Act, borrowing heavily from the children’s disability definition.29 The SSA’s disability definition applied to child applicants for SSI benefits excludes consideration of an inability to perform past work and/or the inability to achieve SGA from the evaluation process.30 Instead, the issue of SGA arises in the initial phase of the evaluation; if a minor is performing work that is substantial—i.e., doing SGA—he or she is simply denied benefits, ending the eligibility analysis.31 A minor who receives children’s SSI and later engages in SGA will be found ineligible.32 With respect to determinations of severity, the ABLE regulations do not clarify the issue of how the children’s definition of disability (which is generally based upon a comparison of the applicant’s functioning to that of same-aged, nondisabled children to determine severity) will be applied to adults.33 Instead, the regulations propose a determination of severity that in part takes “into account the effect of the individual’s prescribed treatment.”34

This second prong also includes the requirement that the eligible individual or his or her parent file a disability certification each taxable year, and the certification must include a diagnosis signed by a physician.35 The qualified ABLE program can vary the recertification period, providing for example, “that the initial certification will be deemed to be valid for a stated number of years, which may vary with the type of impairment.”36 But under the second prong individuals who could not qualify for an account under the first prong may well qualify as an eligible beneficiary.

Distributions, Assets, and Income
In order for the eligible beneficiary to enjoy not only the tax-free nature of distributions from his or her account but also their exemption (also referred to as a “disregard”) from public benefit limits, the distributions must be restricted to payments for qualified disability expenses.37 Currently, when an SSI recipient must spend down excess assets, the SSA typically requests copies of invoices to show the funds were actually spent down and not simply gifted or hidden in other accounts. Practitioners should be aware that two of the distribution categories (housing and funeral and burial expenses) implicate public benefits rules when distributions are made for the benefit of a public benefits recipient, and in particular one who receives SSI. Further, if distributions appear to be made directly to the designated beneficiary at the beneficiary’s request, in a manner similar to a 529 plan, a host of income rules are raised that, but for the ABLE Act’s exemptions, could result in a reduction of the monthly SSI check.38

The scope of the distributions that fall within the definition of “qualified disability expenses” are broadly defined to mean any “expenses related to the eligible individual’s blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by
the Secretary under regulations.” The regulations are equally broad: “Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit a disabled individual.”

In addition to allowable distributions, assets are another consideration for practitioners evaluating ABLE Act plans. Under the rules applicable to all SSI recipients, all assets owned by an SSI recipient are either deemed “countable” or “exempt” (or a “disregard”) by the SSA. When a recipient’s total assets exceed the asset limit set by the SSA ($2,000), the recipient becomes ineligible for a monthly SSI check. Federal needs-tested public benefits programs in which the needs test is used to determine “eligibility to receive, or the amount of, any assistance or benefit authorized by such provision to be provided to or for the benefit of such individual,” cannot consider the amount of assets or resources in the plan account, contributions to the account, or distributions from the account for qualified disability expenses for any “period during which such individual maintains, makes contributions to, or receives distributions from such ABLE Account.” Both resource and income determinations are made by the SSA on a month-by-month basis.

By contrast, it is not until assets and earnings owned by an SSI recipient beneficiary exceed $100,000 that they become a countable resource and the regular SSI asset rules are applied. When the assets in an individual’s ABLE account exceed the resource limit, the SSI recipient beneficiary becomes ineligible for a monthly SSI check. If the excess resources are not spent down and the recipient is ineligible for 12 consecutive months, SSI benefits are terminated at the beginning of the 13th month.

Since in California SSI recipients are categorically eligible for Medi-Cal, a serious consequence of surplus or ineligibility for SSI is a loss of the eligibility linkage for Medi-Cal. The county then has the duty to find a different Medi-Cal program for which the recipient is eligible prior to termination of Medi-Cal benefits. In any case, when excess resources are spent down to below the $2,000 asset limit the SSI/Medi-Cal recipient will regain SSI in the following month and the categorical Medi-Cal linkage is restored. After 12 consecutive months one must reapply for SSI, and if successful regain Medi-Cal as well.

With an ABLE account, if the SSI monthly cash payment is suspended due to excess resources (more than $100,000), the recipient-designated beneficiary continues to be eligible for categorically linked Medi-Cal. This rule bears some similarity to the income remedies under the Pickle Amendment or under Section 1619(b) of the Social Security Act that retain eligibility for Medicaid, notwithstanding excess income. In California, however, after an SSI recipient’s benefits terminate state law operates to continue Medi-Cal benefits long enough for a redetermination of whether the recipient is eligible for Medi-Cal under a different program or category.

Countable income is the portion of the income that actually affects the monthly SSI benefits check, resulting in a reduction by an amount equal to the countable income. The result is not the dollar-for-dollar reduction of the monthly SSI cash payment that results from unearned income but a reduction in an amount equal to one-third of the federal benefit rate, which in 2015 amounts to $244.33.

Housing

When any third party, including a trustee, distributes funds directly to a landlord for payment of shelter for the SSI recipient, the payment is characterized as in-kind support and maintenance to the beneficiary SSI recipient. In-kind income is characterized as either earned or unearned. Unearned income in the form of shelter—i.e., in-kind support and maintenance—results in a reduction of the monthly SSI cash payment under the SSA’s presumed maximum value rule. The result is not the dollar-for-dollar reduction of the SSI monthly cash payment that results from unearned income but a reduction in an amount equal to one-third of the federal benefit rate, which in 2015 amounts to $244.33.

Housing, however, is one category of allowable expenses from an ABLE account. The SSA uses the term “shelter” to describe expenses that if provided by a third party,
result in a penalty. The term “shelter,” as used in the Social Security regulations and POMS, refers to the following expenses: room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewer, and garbage collection services. The regulations use a broad definition of housing but require the qualified ABLE program to “establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions,” permitting identification of those expenditures that fall within the SSI definition of housing expenses.

In the case of a distribution from an ABLE account to a beneficiary for housing, the act states: “a distribution for housing expenses (within the meaning of such subsection) shall not be so disregarded.” What is unclear is how a distribution of cash directly to the SSI recipient-designated beneficiary for housing expenses would be treated, if permitted by the regulations. Consistent with other provisions of the act, it should be treated as in-kind income, reducing the monthly cash payment by a third of the benefit rate.

One possible use of an ABLE plan involving housing could combine an income stream, such as an annuity, with an ABLE account to pay certain regular costs such as condominium fees. Even for an SSI recipient, a home is an excluded resource. ABLE account funds can pay housing expenses, subject to the limitations for SSI recipients. Third-party payments for condominium fees are not deemed as income to the recipient by the SSA, except to the extent the fee includes a certain sum for a household cost such as utilities or garbage removal. Therefore a third party—for example, a parent—could gift a condominium to a child and fund an annuity that would pay the annual exclusion amount to the ABLE account each year until the annuity is fully paid out. The ABLE account in turn could pay the condominium fees.

**Comparison to Special Needs Trusts**

There are two types of special needs trusts: individual and pooled. Typically, a special needs trust is considered a resource remedy. When placed into a special needs trust, a sum of money, or resource, that exceeds $2,000 maintains eligibility when it would otherwise result in ineligibility for needstested benefits. Special needs trusts and ABLE accounts may also serve as remedies for this type of excess countable income when funded with an irrevocable assignment of periodic payments (including child support or alimony payments under certain circumstances), which are then no longer deemed countable income for SSI purposes. Without the irrevocable assignment, however, the income would reduce a monthly cash payment, even if upon receipt the funds were placed into a special needs trust or ABLE account.

There are several scenarios in which an irrevocable assignment of an income stream to an ABLE account might avoid a finding of countable income by the SSA. For example, individuals residing in a Medi-Cal funded long-term care facility retain $35 per month of their income, which is referred to as a monthly personal allowance. For a resident who does not make use of the funds, they accumulate to the point that they exceed the $2,000 resource limit. At that point he or she becomes ineligible for Medi-Cal, and the funds are spent down, and Medi-Cal benefits resume. This $35 per month can now be placed in the ABLE account and accumulated to the point at which something useful could be purchased for the resident, for example a medical device that is not available through existing benefit programs. This same cycle can occur in a community care licensed board and care facility where the SSI residents receive a monthly personal and incidental needs allowance, which this year is $131 per month.

Distributions of cash from a special needs trust follow the SSI income rules and reduce the monthly cash payment. One would expect the same rule would apply to distributions from an account. It appears, however, that under the ABLE Act cash can be distributed directly to a designated beneficiary in the same manner as distributions from a 529 plan. There is no consequence of a reduced monthly SSI cash payment as long as the funds are spent for qualified disability expenses. Therefore, a third party, contributing funds to an ABLE account can create additional cash income for the designated beneficiary without a reduction of the SSI check. Typically, a loan was the method of meeting an immediate need for cash without a reduction in benefits.

The ABLE Act provides a remedy for annual contributions that exceed the annual allowable maximum, stating that rules similar to those pertaining to individual retirement accounts under 26 USC Section 408(d)(4) apply. In the event that a contribution to an ABLE account exceeds the annual exclusion amount should occur, one should be able to remove the contribution from the account in the same manner in which a person can take back a contribution to an IRA account.

Although ABLE plans show promise at covering for some immediate needs with additional income, they should not be viewed as replacements for special needs trusts. Instead, the ABLE Act provides another tool for the estate planner. In fact, it could be beneficial to utilize both an ABLE Act account and special needs trust, taking advantage of the strengths and avoiding the weaknesses of each. One similarity between ABLE Act plans and special needs trusts is that the eligible individual with capacity can, as with pooled special needs trusts, establish an ABLE account funded with his or her own assets, without court intervention. An ABLE account and a pooled trust both relieve the beneficiary of the burden of finding an adequate pool of potential trustees, which is often one of the difficult establishment issues in individual special needs trusts.

An ABLE plan may also be beneficial in comparison to an established pooled special needs trust. If the trust is funded by a rather small settlement, typically under $20,000, it may not be cost-effective in comparison to an ABLE plan, under which a successful litigant could retain up to $2,000 (depending upon his or her existing resources) in a savings account, spend down some money, and place $14,000 in the ABLE account. In the alternative, a larger settlement could be structured to some extent to pay no more than the annual exclusion each year until the entire settlement has been deposited into the ABLE account.

There are also some distinctions between these two devices. Unlike a first-party special needs trust, an ABLE account can be established by a person who does not meet the SSA’s strict definition of disability. Instead, the person may utilize a less strict disability certification process to qualify for an ABLE account. Unlike any type of trust, whether first- or third-party, a SSI recipient can compel a distribution to him- or herself directly, and the trust assets are not countable. The designated beneficiary does, however, need to demonstrate that the amount of money distributed from the ABLE account was utilized for qualified disability expenses.

An ABLE account shares what may be a drawback with first-party special needs trusts: the payback clause. This clause ensures that the state is repaid the Medicaid funds it expended through Medi-Cal for medical expenses. A third-party special needs trust, on the other hand, is exempt from Medicaid claims. But even when an ABLE account is entirely funded with contributions from the third parties, making it comparable to a third-party special needs trust, the payback clause is enforced. While the payback clause provisions in an ABLE plan are similar to those of a special needs trust, the payback burden on an ABLE account is not as great.

In particular, the ABLE Act’s payback clause states that upon the death of the “designated beneficiary, all amounts remaining in the qualified ABLE account not in excess of the amount equal to the total medical assistance paid for the designated beneficiary after the establishment of the account...shall be distributed to such State upon filing of a
claim for payment by such State.”72 Under the ABLE Act, the payback of medical assistance payments on behalf of the designated beneficiary is only for the period beginning with the date the account was established.73 By comparison, the payback clause of a first-party special needs trust recovers all medical assistance paid for the special needs trust beneficiary, even predating the establishment of the special needs trust.74 The amount of the state’s Medicaid claim is reduced by the amount of premiums paid by the ABLE account on behalf of the designated beneficiary, to a Medicaid Buy-In program.75 Also, this distribution, which might be viewed as a distribution not used for disability expenses, is not subject to the tax imposed by the act.76 The act reverses the reporting duties required of a special needs trustee. Unlike the duty of the trustee of a special needs trust to give the required notice, the duty under an ABLE plan lies with the state Medicaid agency to file a claim (presumably with the ABLE plan) as a creditor.

Perhaps one of the most unfavorable aspects of an ABLE account in comparison to a special needs trust or a 529 plan is the funding restriction limiting annual contributions to the maximum amount allowed for the annual exclusion77 while also limiting the total assets to state limits.78 There are no such limits with special needs trusts, at least in California. The ABLE account limit may have its benefits, however. On a small scale, an ABLE account can provide quick solutions to situations involving relatively small amounts of money, which would not justify the engagement of a trustee to manage the funds, much less a court proceeding to establish an individual special needs trust. Such funds might be received by accumulation, gift, devise, or by way of a settlement or judgment in a lawsuit. In the case of a settlement or judgment in a lawsuit, one might proceed in accordance with Section 3611(d) of the Probate Code.

A distribution of these funds from a qualified ABLE program is includible in the gross income of the designated beneficiary, unless the distribution is excluded from the gross income of the designated beneficiary’s gross income because it does not “exceed the qualified disability expenses of the designated beneficiary.”79 If distributions exceed the disability expenses, the “amount otherwise includible in gross income shall be reduced by an amount which bears the same ratio to such amount as such expenses bear to such distributions.” But a contribution to an ABLE account will “not be treated as a qualified transfer” under IRC Section 2503(e), which is an “exclusion for certain transfers for educational expenses or medical expenses.”80 These are tuition payments that are made directly on behalf of a person to an educational organization, or payments for medical care made directly to the medical provider.

Gift Tax and Burial
While those direct payments will not be qualified, there is good news regarding contributions to ABLE accounts for gift tax purposes. These contributions are treated in the same way as contributions to a qualified tuition program.81 That is, they “shall be treated as a completed gift to such beneficiary which is not a future interest in property,” qualifying for the annual deduction.82 This is a significant issue for many donors. Given the direct cash distribution penalty, techniques to obtain the annual exclusion for contributions to a special needs trust, would have to rely on structuring Crumsey powers in a manner similar to that described in Cristofani v. Commissioner, which can lead to exposure to the IRS.83

Another potential benefit is burial payments. SSI recipients under existing SSI rules can own a burial plot, but a cash account to pay other burial expenses is limited to $1,500.84 These expenses should be payable from the ABLE account without the $1,500 limit as qualified disability expenses. The regulations allow payment of expenses after the death of the designated beneficiary but before the payment of a Medicaid claim. A first-party special needs trust has restrictions on expenditures at the death of the beneficiary for funeral expenses, which cannot be paid until after satisfaction of the Medicaid claim.85 Therefore, a beneficiary of such a trust might benefit from an ABLE account, which would allow such expenses to be paid before satisfaction of the Medicaid claim.86

An ABLE account can provide solutions to situations involving relatively small amounts of money that would not justify the engagement of a trustee to manage the funds, much less a court proceeding to establish an individual special needs trust. It does not appear, however, that ABLE accounts can be opened in California until early in 2016. Once California fully implements the act, however, practitioners working may encounter situations for which an ABLE account may fit a need more precisely than similar devices and provide families with some much-needed relief from financial worries.

4 See https://www.federalregister.gov/articles/2015/06/22/2015-13280/guidance-under-section-529a-qualified-able-programs.
table/021400213.html.
table/021400213.html.
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7 26 U.S.C. §529A(c)(2)(B); see also Instructions to IRS Form 1099-QA, Box 1, Gross Distribution.
9 Id.
10 26 C.F.R. §1.529A-2(b)(3).
11 See SB 324 at http://www.leginfo.ca.gov.
15 See, e.g., California Health and Human Services Agency, Department of Health Care Services, All County Welfare Directors Letter No. 15-08 (Feb. 9, 2015).
19 See 42 U.S.C. §1396p(d)(4)(A) or (C).
21 26 C.F.R. §1.529A-2(c)(1).
22 26 C.F.R. §1.529A-2(c).
24 42 U.S.C. §416(b)(1); 20 C.F.R. §404.30a(5).
25 42 U.S.C. §416(b)(1); 20 C.F.R. §404.30a(5).
26 20 C.F.R. §404.408b.
29 26 C.F.R. §1.529A-2(e)(2).
31 26 C.F.R. §1.529A-2(h)(1).
32 20 C.F.R. §416.1324.
33 26 C.F.R. §1.529A-2(o).
38 See, e.g., CAL. CODE REGS. tit. 5, §§30950, 30954; 20 C.F.R. §416.1123.
40 26 C.F.R. §1.529A-2(b)(1).
41 20 C.F.R. §416.1205.
43 20 C.F.R. §416.1335.
44 WELF. & INST. CODE §14050.1; CAL. CODE REGS. tit. 5, §§30950, 30954; 20 C.F.R. §416.1205.
46 WELF. & INST. CODE §§14050.1, 14005.31(a)(1), 14005.32.
47 42 U.S.C.A. §1396a (note); 42 C.F.R. §435.135.
48 42 U.S.C.A. §1382h.
50 20 C.F.R. §416.1130.
51 20 C.F.R. §416.1130.
52 20 C.F.R. §416.1123.
53 20 C.F.R. §416.1112.
54 20 C.F.R. §416.1130.
55 20 C.F.R. §416.1110.
56 20 C.F.R. §416.1141.
57 California Health and Human Services Agency, Department of Health Care Services, All County Welfare Directors Letter No. 15-08 (Feb. 9, 2015).
58 20 C.F.R. §416.1130(b).
59 26 C.F.R. §1.529A-2(h)(1).
63 POMS SI 01120.200.G.1.d.
64 WELF. & INST. CODE §§14050.1, 14005.31(a)(1), 14005.32.
65 WELF. & INST. CODE §§14005.31(a)(1), 14005.32.
66 42 U.S.C.A. §1396a(a)(note); 42 C.F.R. §435.135.
68 26 C.F.R. §1.529A-2(g)(4).
73 Id.
80 26 C.F.R. §1.529A-4(a)(1); I.R.C. §2503(e).
83 Cristofani v. Comm'r, 97 T.C. 74 (1991); Crummey v. Comm'r, 397 F. 2d 82 (9th Cir. 1968). The withdrawal right can be exercised for a limited time following the notice of right to withdraw, and most often the amount that can be withdrawn is limited to annual gift tax exclusion for that particular year.
84 20 C.F.R. §416.1231.
85 POMS SI 01120.203B.3.b.
86 26 C.F.R. §1.529A-2(p).
Outside of summary judgment or anti-SLAPP motions, there is little guidance for courts and attorneys on evidentiary objections

THE USE OF EVIDENCE in civil motion practice in California state court can raise numerous questions regarding evidentiary objections. These include: 1) whether to object to an opponent’s evidence, 2) whether to respond to an opponent’s objections, 3) what is the proper time and manner for submitting any objections or responses (i.e., whether to do it in writing before the hearing or orally at the hearing, and whether any written filings should adhere to a particular format), 4) whether the court is required to expressly rule on any objections, and 5) what is the effect on appeal of the trial court’s evidentiary rulings, or its failure to make the same.

In the context of summary judgment motions, the Code of Civil Procedure, the California Rules of Court, case law, and secondary authorities collectively provide answers to a number of these questions. There is clear enough guidance as to how and when to make and respond to evidentiary objections. Also, it is well settled that the court must expressly rule on all evidentiary objections and that in the absence of an express ruling, an objection is deemed overruled but preserved for appeal. With motions to strike under California’s anti-SLAPP statute, courts are also obligated to rule on evidentiary objections.

In other contexts, though, the authorities offer little or no guidance on any of these questions. This lack of guidance is surprising and problematic. Among other undesirable effects, it increases the uncertainty of and the burden on litigants, who may, as a matter of caution, feel obligated to submit evidentiary objections or responses thereto, and take an overinclusive approach that courts have criticized in the summary judgment context. Similarly, a litigant may, as a matter of caution, feel obligated to advance its position in writing in a prehearing filing, when doing so orally at the hearing could adequately preserve the position at far less expense. This situation also increases the burden on courts, as they are the recipients of all this potentially superfluous written material.

The solution, however, is not necessarily obvious. A rule that courts will not entertain evidentiary objections on motions other than those under the summary judgment or anti-SLAPP statutes would be simple and clear, and it would eliminate the burden on parties and courts associated with evidentiary objections. But such a rule would fail to recognize that decisions on other types of motions too should rest on solid evidence and that judges may not want to sort out evidentiary issues without input from the parties. If parties are

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to be entitled to make and respond to evidentiary objections, there should be specific rules, as with summary judgment, governing how and when to do so.

It would pose an undue burden on courts to extend their obligation to rule on evidentiary objections in the summary judgment and anti-SLAPP contexts to all civil motions. The best solution in this regard may be a compromise approach that draws from a recent proposed amendment to California’s summary judgment statute, Section 437c of the Code of Civil Procedure, which would require courts to rule only on objections to evidence that are material to the disposition of the motion. Courts should be encouraged to do the same for other kinds of civil motions.

**Summary Judgment and Anti-SLAPP Motions**

When contemplating what the rules governing evidentiary objections might look like, the natural starting point is the existing body of law governing evidentiary objections on summary judgment. Section 437c(b)(5) and (d) provide that objections must be made “at the hearing” or are deemed waived. Rule 3.1352 of the California Rules of Court provides that a party can make evidentiary objections either in writing or at the hearing as long as a court reporter is present.1 In Reid v. Google, Inc., the California Supreme Court confirmed that “written evidentiary objections made before the hearing, as well as oral objections made at the hearing are deemed made ‘at the hearing’” under Section 437c for purposes of preserving the objection. “[E]ither method of objection avoids waiver” on appeal.2 For written objections, Rule 3.1354(a) of the California Rules of Court supplies deadlines, requiring them to be served and filed “at the same time as the objecting party’s opposition or reply papers are served and filed.” Rule 3.1354(b) describes formatting requirements for written objections. Trial courts “must rule expressly” on evidentiary objections accompanying summary judgment papers.3 Reid holds that objections not expressly ruled upon are deemed overruled but preserved for appeal.4 Neither the Code of Civil Procedure nor the California Rules of Court addresses responses to evidentiary objections in summary judgment proceedings,5 but Tarle v. Kaiser Foundation Health Plan, Inc., holds that “a party who fails to provide some oral or written opposition to objections, in the context of a summary judgment motion, is barred from challenging the adverse rulings on those objections on appeal.”6

The rules governing evidentiary objections on summary judgment proceedings also apply to special motions to strike under California’s anti-SLAPP law, codified at Section 425.16 of the Code of Civil Procedure. Under that statute, a defendant who believes he or she has been sued for an act “in furtherance of the...right of petition or free speech under the U.S. Constitution or the California Constitution in connection with a public issue” may file a special motion to strike the offending causes of action.7 On such motion, the defendant must first “make a threshold showing that the challenged cause of action is one arising from protected activity.”8 If he or she does so, the burden shifts to the plaintiff, who, to defeat the motion, must demonstrate a “probability of prevailing on the claim.”9 In Gallant v. City of Carson, the court held that cases concerning evidentiary objections “in the summary judgment context...also govern[ ] anti-SLAPP motions because the two types of proceedings have similar standards.”10 That is, the trial court must “evaluate[ ] the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation.”11 No published case appears to address whether parties must follow Rules 3.1352 and 3.1354 with anti-SLAPP motions, but at least one practice guide12 and one unpublished appellate decision13 indicate those rules are applicable.

**Other Types of Motions**

Outside the summary judgment and anti-SLAPP contexts civil litigators basically are left to speculate about how and when to submit or respond to evidentiary objections, whether the court will consider and rule on them, and what it means if the court does not do so. As judges from the Santa Clara County Superior Court have repeatedly noted in their orders, “There is no authority holding that the Court must rule on an evidentiary objection made in connection with a motion other than a motion for summary judgment or an anti-SLAPP motion.”14 Appellate opinions confirm that some trial courts decline to rule on such objections.15

However, there is also nothing that prohibits trial courts from ruling on objections outside of the summary judgment and anti-SLAPP contexts. Just as there are cases in which trial courts have ignored objections, there are also cases in which they have ruled on them.16 Indeed, there is anecdotal evidence that in some courtrooms evidentiary objections have been considered and granted and that parties have been deemed to have waived the right to make or respond to objections if they fail to do so in writing before the hearing.17

**Undesirable Uncertainty**

That counsel cannot confidently predict how a court will deal with objections on a particular occasion illustrates how risky it can be for counsel to forego written objections or responses. Doing so can lead to an inference (by counsel, counsel’s partners or superiors, or the client) that counsel fell short of the duty to be a zealous advocate, especially if the outcome is unfavorable. Thus, the lack of guiding authority on evidentiary objections outside of the summary judgment and anti-SLAPP contexts has undesirable effects. For one, it encourages litigants to follow an overly cautious approach by filing written objections and responses whenever they can afford to do so. This often wastes litigant resources, as there is evidence that evidentiary objections rarely affect a court’s ultimate decision.18 Reid indicates as much in the summary judgment context, condemning the trend of making “‘blunderbuss objections to virtually every item of evidence submitted’”19 that has turned summary judgment proceedings into an “‘all-out artillery exchange.’”20 Reid approvingly cites amicus curiae comments that “[i]n the real world...most evidentiary objections do not matter very much to the...decision,”21 and “[a]ll too often trial courts face a flood of evidentiary objections, objections that may be addressed to matters that are tangential at best, at least given the trial court’s view of the critical issues or evidence.”22 A recent report jointly published by three committees of the California Judicial Council corroborates Reid’s point that evidentiary objections are usually inconsequential. The report states that “frequently, the number of objections that pertain to evidence on which a court relies in determining whether a triable issue of fact exists is a small subset of the total number of objections made by the parties.”23

According to the report, “many objections are unnecessary, and that there is no need for rulings on those objections.”24

In addition to causing parties to incur needless time and expense, the lack of governing authority on evidentiary objections is troublesome for other reasons. It exacerbates existing power imbalances in litigation because it tends to favor deeper-pocketed parties, who are less likely to balk at the additional expense that evidentiary sparring entails. It also tends to put attorneys litigating in an unfamiliar county at a disadvantage because they may not be aware of the local bench’s predilections regarding objections. The virtually unchecked discretion that trial courts currently have in dealing with evidentiary objections also risks damaging the bar’s perception of the judiciary. Absent clear standards, whose application could give a court’s decision the imprimatur at least of impartiality if not correctness, counsel are more likely to perceive that a court is acting arbitrarily, adopting whatever stance on the evidence.
1. The California Rules of Court contain deadlines for filing written objections to evidence in any papers supporting or opposing a civil motion.
   True. False.

2. A party wishing to make an oral objection to evidence at the hearing on a summary judgment motion must ensure that a court reporter is present at the hearing.
   True. False.

3. A party may file written objections to evidence in the papers on a motion for summary judgment any time before the hearing on the motion.
   True. False.

4. A trial court need not rule on objections to evidence in summary judgment papers unless the evidence is material to the disposition of the motion.
   True. False.

5. If a trial court does not rule on an objection to evidence in summary judgment papers, the objection is presumed overruled.
   True. False.

6. If a party does not oppose an objection to evidence in summary judgment papers, but the court does not rule on the objection, that party may challenge the objection on appeal.
   True. False.

7. The California Rules of Court require that oppositions to objections to evidence in summary judgment papers be made in writing.
   True. False.

8. The California Code of Civil Procedure does not address how to submit oppositions to objections to evidence in summary judgment papers.
   True. False.

9. The California Rules of Court do not address how to submit oppositions to objections to evidence in summary judgment papers.
   True. False.

10. If a party making an objection to evidence in summary judgment papers does not obtain a ruling from the trial court on that objection, that party has waived the objection on appeal.
    True. False.

11. The California Supreme Court has criticized a trend of parties submitting excessive evidentiary objections with summary judgment papers.
    True. False.

12. California’s anti-SLAPP statute allows defendants who believe they have been sued for an act in furtherance of their right of petition or free speech under the U.S. or California Constitution in connection with a public issue to file a special motion to strike the offending causes of action.
    True. False.

13. When analyzing the merits of a special motion to strike a cause of action under California’s anti-SLAPP statute, the first step is to assess whether the plaintiff has demonstrated a probability of prevailing on the claim.
    True. False.

14. Cases concerning evidentiary objections in summary judgment proceedings are also applicable to evidentiary objections in anti-SLAPP proceedings.
    True. False.

15. Declarations in civil litigation must state that they are made under penalty of perjury.
    True. False.

16. The California Judicial Council has recommended amending the summary judgment statute to state that trial courts need not rule on evidentiary objections in summary judgment proceedings.
    True. False.

17. There are no appellate cases showing that trial courts have ruled on evidentiary objections with motions beyond summary judgment motions and anti-SLAPP motions.
    True. False.

18. There are appellate cases showing that trial courts have ignored evidentiary objections with motions beyond summary judgment motions and anti-SLAPP motions.
    True. False.

19. Federal courts have used local rules to specify procedures for making evidentiary objections.
    True. False.

20. At least one California state court has used local rules to specify procedures for making evidentiary objections.
    True. False.
happens to be convenient for the outcome the court desires for the motion at hand.

Potential Solutions

One straightforward response to the current lack of guidance on evidentiary objections would be a rule that courts simply will not consider them in connection with motions other than summary judgment and anti-SLAPP motions. This approach would eliminate the burden on parties of preparing and responding to evidentiary objections and the burden on courts of adjudicating them. There is a colorable argument to support such a rule: that “judges are excellent sifters of proffered materials in support and opposition, are capable of giving due weight to whatever is produced in the record, and, therefore, technical evidence rules need not apply.” As one judge put it when faced with a slew of evidentiary objections, “‘fighting over comments or statements…as to whether or not they’re relevant or…objectionable, you know, this is not a jury for heaven’s sake. I’m a judge…I can sift through this stuff. … You should be able to rely on the court being able to…eliminate what’s not relevant.” This approach also might seem especially attractive given how severely budget constraints have hampered courts’ ability to process civil cases in recent years.

On the other hand, there are significant, and ultimately more persuasive, arguments against simply doing away with evidentiary objections and rulings. First, motion practice should not be an evidentiary free-for-all that relies entirely on the abilities of judges to sift the wheat from the chaff. After all, the system utilizes other mechanisms to ensure a basic level of reliability in evidence supporting civil motions. For instance, declarations must conform with the requirements of Section 2015.5 of the Code of Civil Procedure, whose purpose is to “enhance the reliability of all declarations used as hearsay evidence by disclosing the sanction for dishonesty”—that “perjured statements might trigger prosecution under California law.”

Second, some judges may not want to rely on their own evidentiary sorting abilities, instead subscribing to the view that litigants should not “treat judges as if they were pigs sniffing for truffles.” Third, even if it is true that evidentiary objections usually do not affect the ultimate outcome on a motion, there will be cases in which they do matter. Fourth, evidentiary objections are, with good reason, deeply engrained in civil motion practice in a variety of contexts, in which they may be just as vital to the adjudicative process as on summary judgment and anti-SLAPP motions, when objections are not just permitted but required to be ruled upon. By way of illustration, the rationale for requiring courts to make evidentiary rulings on anti-SLAPP motions is that those motions involve assessing a plaintiff’s probability of prevailing on a claim. Yet various other motions call for the same analysis, including motions for preliminary injunctions, to expunge liens, and for prejudgment attachment orders.

Admittedly, unlike summary judgment or anti-SLAPP motions, other motions do not have the potential to be case dispositive as a matter of law. However, depending on the circumstances, preliminary injunction or attachment proceedings could well be case dispositive as a matter of fact. Similarly, when it is not economically feasible to pursue certain claims unless they are aggregated as a class action, denial of a motion for class certification is essentially case dispositive. In these instances and others in which a motion’s outcome will materially affect a lawsuit’s status, there should be procedural constraints on the introduction of evidence that go beyond the “sifting” powers of the judge.

Thus, it would be too blunt a remedy to abolish evidentiary objections for all civil motions. A more nuanced approach would be to abolish written objections but allow oral ones. This could substantially reduce the associated burdens on parties and courts. If, however, the objections are numerous or complicated, airing them orally for the first time at a hearing may unduly extend (even derail) the hearing, risking that other parties’ matters would not be heard and that the court, having to make decisions on the fly, could make mistakes.

If evidentiary objections, including written ones, should be permissible, the next question is whether courts should have to rule on them in all instances. The answer seems to be no because such a requirement would impose an undue burden on the courts. For example, the above-referenced California Judicial Council report cites concern by one research attorney that, with summary judgment motions alone, “the court is overwhelmed with work even without having to rule on objections to evidence that, even if sustained, would have no impact on the court’s decision.” In that report, the Superior Court of San Diego County also commented: “Quite often it only takes a few documents for the Court to find a triable issue of fact. Ruling on objections to evidence not needed to make that determination is a waste of judicial resources.”

In response to these considerations, the report recommends amending Section 437c to provide that trial courts “need rule only on objections to evidence that is material to the disposition of the summary judgment motion,” which would displace their current obligation to rule on all objections as recently reiterated by Reid. Any objection not ruled upon would be preserved for appeal, under Reid, such objections are presumed overruled.

One can imagine a principle that takes a cue from the proposed amendment to Section 437c and encourages, but does not necessarily require, trial courts to rule only on material objections for civil motions generally. To be sure, doing so might call on some judges to perform more work than they currently do. Yet if courts are concerned by such a change, they could promulgate new local rules, general orders, or policy statements discouraging excessive evidentiary objections (such as by imposing numerical or page limits on objections and responses thereto). If parties receive the message that they should be judicious with objections to begin with, and it is clear the trial courts should simply ignore any objections that are inconsequential, the additional burden may not be great. Conversely, a principle assuring trial courts that it is acceptable to rule selectively on objections may actually save other judges some work. In the current vacuum of law, trial courts have sometimes ruled on objections that are ultimately inconsequential to the outcome on the motion. For example, in Morgan v. Wet Seal, the trial court, ruling on a class certification motion, denied all the plaintiffs’ objections to the defendant’s evidence, although it also noted that it had not relied on some of the declarations that the plaintiffs found objectionable.

Encouraging trial courts to rule on significant evidentiary objections is consistent with the idea that it is preferable for trial courts to explain their orders. One of the purposes of written opinions is to “communicate a court’s conclusions and the reasons for them,” and the process of preparing them should help impose “intellectual discipline on the author, requiring the judge to clarify his or her reasoning and assess the sufficiency of precedential support.” Evidence issues could be treated like any other argument in the parties’ briefs. If they affected a court’s rationale in the course of reaching a decision, it is helpful to the parties, attorneys, other observers, and appellate courts if the trial court record indicates as much.

The Need for Procedural Rules

Assuming that evidentiary objections are acceptable in proper doses, parties should not have to guess about when and how to assert or respond to them. The California Rules of Court could be amended to incorporate for all motions the procedures that now govern summary judgment motions, or some other set of reasoned and sufficiently clear procedures. Rule 5.111(c) already provides for family court proceedings a set of procedures
1 CAL. R. CT. 3.1352.
3 Id. (citing Vineyard Springs Estates v. Superior Ct., 120 Cal. App. 4th 633, 642-43 (2004)).
4 Reid, 50 Cal. 4th at 534.
5 See Tarle v. Kaiser Found. Health Plan, Inc., 206 Cal. App. 4th 219, 227 (2012) (noting that until that decision, that law seems to have “paid little attention to the duties, if any, imposed on a party opposing the evidentiary objections,” and “the governing statute (Code Civ. Proc., §437c) and rules of court (Cal. Rules of Court, rules 3.1350-3.1354) do not even provide for a written opposition to written objections.”).
6 Tarle, 206 Cal. App. 4th at 226.
7 Code Civ. Proc. §425.16(b)(1); see also Jarrow Formulas, Inc. v. LiMarchie, 31 Cal. 4th 728, 733 (2003).
8 Jarrow Formulas, Cal. 4th 733 (2003).
9 Gallant v. City of Carson, 128 Cal. App. 4th 705, 710 (2005); see also Zacher v. Galardi, 229 Cal. App. 4th 1466, 1480 n.7 (2014) (anti-SLAPP case fol-
10 lowing Reid with respect to evidentiary objections).
11 Gallant, 128 Cal. App. 4th at 710 (quoting Varian Med. Sys., Inc. v. Delfino, 35 Cal. 4th 180, 192 (2005)).
12 See 33 CAL. FORMS OF PLEADING AND PRACTICE— ANNOTATED §376.5(4)(b) (2015) (With respect to anti-SLAPP motions, “[i]f evidentiary objections exist, consider preparing written objections to the evidence to be submitted to the court in a separate document, reply memorandum or both, similar to the manner for objecting to evidence in papers submitted on a summary judgment motion…..” (citing Cal. R. Ct. 3.1352, 3.1354)).
14 Id. 8 Jarrow Formulas, 31 Cal. 4th at 733 (quoting Equilon Estates v. Super. Ct., 76 Cal. R. Ct. 3.1352.
15 Reid, 50 Cal. 4th at 534.
16 Id.
18 Reid, 50 Cal. 4th at 532 n.9 (quoting amicus curiae California Academy of Appellate Lawyers).
19 Reid, 50 Cal. 4th at 532 n.9 (quoting amicus curiae Association of Southern California Defense Counsel).
20 EVIDENTIARY OBJECTIONS, supra note 18, at 2.
21 Id.
22 See, e.g., Hon. Tani Cantil-Sakauye, Chief Justice, California Supreme Court, State of the Judicial Address (Mar. 17, 2014).
32 Reid, 50 Cal. 4th at 532 (quoting Mamou v. Trendwest Resorts, Inc., 165 Cal. App. 686, 711-12 (2008)).
33 Reid, 50 Cal. 4th at 532 n.9 (quoting amicus curiae California Academy of Appellate Lawyers).
34 Reid, 50 Cal. 4th at 532 n.9 (quoting amicus curiae Association of Southern California Defense Counsel).
35 EVIDENTIARY OBJECTIONS, supra note 18, at 2.
OUTDOOR SIGN BANS enacted by the city of Los Angeles have spurred claims under the First Amendment to the U.S. Constitution. Article 1 of the California Constitution, however, offers broader freedom-of-speech protection than its more well-known counterpart. In 1896, the California Supreme Court, in *Dailey v. Superior Court*, announced that Article 1 is “broader” than the First Amendment and affords “greater liberty in the exercise of the right granted.” Consequently, protection of nonmisleading commercial speech in California may be better sought under Article 1, which guards for free speech “on all subjects,” than under the protection afforded by the First Amendment.1

It may be said that the federal constitution provides a minimum baseline or floor for the protection of speech and that the California Constitution sets the ceiling.2 As Justice William Brennan once put it: “[S]tate courts cannot rest when they have afforded their citizens the full protections of [only] the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the [U.S.] Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.”3

Fairly recently, the California Supreme Court addressed government treatment of nonmisleading commercial speech in *Gerawan Farming, Inc. v. Lyons*, explaining that “[i]t is beyond peradventure that article I’s free speech clause enjoys existence and force independent of the First Amendment’s. In section 24, article I states, in these very terms, that ‘[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution.’”4 The *Gerawan* court cited eight of its decisions.

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since Dailey, underscoring the point that “article I’s free speech clause and its right to freedom of speech are not only as broad and great as the First Amendment’s, they are even ‘broader’ and ‘greater.’”10 As Justice Brennan observed, the First Amendment has dominated national discourse over freedom of speech.6 The U.S. Supreme Court, law professors, law school curricula, state and multistate bar exams, legal scholars, and media outlets focus on federal constitutional law and jurisprudence. Litigation surrounding outdoor advertising, however, offers practitioners involved in cases concerning city speech bans an opportunity to apply the California Supreme Court’s rulings on Article 1.

This approach can present difficulty, however, in cases before federal courts. For example, litigation several years ago over the constitutionality of the sign ban that Los Angeles had instituted resulted in a summary disposition by a Ninth Circuit panel, which attempted to label as dicta and thus discount the California Supreme Court’s explicit determination that Article 1 does not allow the government to discriminate between noncommercial and nonmisleading commercial speech.7 More recently, in Lamar Central Outdoor, L.L.C. v. City of Los Angeles, a case challenging the sign ban under Article 1, the Los Angeles Superior Court concluded that the Ninth Circuit should not dispense with the California Supreme Court’s Article 1 jurisprudence.8 When a state constitutional provision is at issue, state judges have a responsibility to independently determine protections afforded under the state constitution.9

Article 1 of the California Constitution and the First Amendment to the U.S. Constitution both guarantee freedom of speech as a fundamental liberty that the government may not curtail without sufficient cause. Accordingly, when implementing restrictions on the freedom of speech, the city of Los Angeles must, like any other state actor, consider the protections found in Article 1 and the First Amendment. In Lamar, the challenge to the city’s sign ban was founded principally on the broader speech protections afforded by Article 1 as it concerns the government’s power to regulate nonmisleading commercial speech.

The free speech clause of the California Constitution of 1849 read: “Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”10 Today, Section 2(a) of Article 1 reads: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”11

In each of its iterations, Article 1 departs from the language of the First Amendment in two significant respects. First, Article 1 creates a positive right to free speech, obliging the government’s protection of an individual’s speech, whereas the First Amendment mandates Congress shall make no law abridging the freedom of speech, thereby obliging inaction or, to put it differently, restraining the government from impinging on a person’s speech.12 Second, Article 1 specifies that freedom of speech shall encompass all subjects. And as the California Supreme Court has specified, Article 1 significantly differs from the spirit of the First Amendment’s free speech clause because “section 24, article I states, in these very terms, that ‘[t]he rights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution.’”13

California Constitutional Jurisprudence

In Gerawan, the California Supreme Court sustained a challenge by a plum grower to the California Marketing Act, which established the California Plum Marketing Board and required plum growers to finance the advertising of plums. The Gerawan court held that Article 1 affords greater commercial speech rights and protections than the First Amendment.14 The Gerawan Court provided the reminder that Article 1’s free speech clause was framed when “the prevailing political, legal and social culture was that of Jacksonian democracy,” which produced “wide and unrestrained speech about economic matters.”15 Most important, the Gerawan court determined that Article 1 did not incorporate a distinction between commercial and noncommercial speech. The language of Article 1 predates modern commercial speech law under the First Amendment and thus was not developed as part of the federal jurisprudence that began to take shape toward the later part of the twentieth century.16 The only restrictions on commercial speech recognized in California during that time concerned speech that was misleading or that pertained to products and services that the California Legislature had criminalized.17 The court also explained that Article 1 does not tolerate distinctions between categories of commercial and noncommercial speech because Article 1’s freedom to speak “on all subjects” means exactly that. Incidentally, the dissent by Chief Justice Ronald George had no trouble identifying the central message of Gerawan and “agree[ing] with the majority that the protection afforded by article I...is independent of and in some contexts greater than that provided by the federal Constitution under the First Amendment,” but the dissent does not show conviction that the free speech provision of Article 1 is “implicated by the challenged marketing program” or “imposes greater restraint on the state’s authority than its federal counterpart in the context presented by this case.”18

While the decision in Gerawan was the first instance in which the California Supreme Court explicitly determined that nonmisleading commercial speech receives greater protection under Article 1 than under the First Amendment, it was not the first time for the court to recognize that Article 1 provides greater speech protections and rights than the First Amendment.19 Citing its 1896 opinion in Dailey v. Superior Court, the California Supreme Court pointed out that “[A]rticle 1’s free speech clause and its right to freedom of speech are not only as broad and great as the First Amendment’s, they are even ‘broader’ and ‘greater.’”20 The court also noted the following three aspects of Article 1 demonstrate its greater breadth than the First Amendment: First, “Article 1, and not the First Amendment, affirmatively declares a ‘right’ that ‘[e]very person may freely speak, write and publish his or her sentiments on all subjects;’”21 second, Article 1, unlike the First Amendment, “runs against the world, including private parties as well as governmental actors;”22 and third, Article 1 explicitly protects all subjects, while the First Amendment does not.23

Since Gerawan, the California Supreme Court has repeated the principle that freedom of speech enjoys broader and greater protection under Article 1 than under the First Amendment.24 The judiciaries of other states with free speech constitutional provisions similar to Article 1 have followed suit, observing that their state constitutions afford protections and rights to nonmisleading commercial speech that are greater and broader than those provided through the First Amendment. One important example is California’s neighbor, Oregon. Four years after Gerawan, the Oregon Supreme Court struck down on state constitutional grounds25 the Oregon Motorist Information Act “because it requires permits for certain signs, but not for other signs, based solely on the content of the message on the sign.”26 Scholars have predicted that “such a result will ultimately be adopted nationwide.”27

Ninth Circuit Jurisprudence

After the California Supreme Court’s decision in Gerawan, the Ninth Circuit considered whether the proscription of certain outdoor signs found in various sections of the Los Angeles Municipal Code (LAMC) violated the First Amendment. First, in Metro Lights, L.L.C. v. City of Los Angeles, the Ninth Circuit considered and upheld the LAMC prohibition on most off-site commercial advertising even though the city contracted with a private party to permit the sale of such
advertising at city-owned transit stops.28 Then, in World Wide Rush, LLC v. City of Los Angeles, the Ninth Circuit considered and upheld the city’s bans on freeway facing, supergraphic, and off-site signs.29 Despite the California Supreme Court’s ruling in Gerawan, the parties in Metro Lights and World Wide Rush failed to claim the protections afforded under Article 1 and, accordingly, the Ninth Circuit had no occasion to apply Article 1 scrutiny.

However, the question was ultimately presented to the Ninth Circuit. Vanguard Outdoor, LLC v. City of Los Angeles made the independent state constitutional challenge to the city’s ban on supergraphic and off-site signs under Article 1.30 However, after holding a hearing on the appeal, the Ninth Circuit issued a simple, single-sentence summary disposition adopting the district court’s rejection of the Article 1 challenge.31 In other words, the Ninth Circuit allowed the district court’s conclusion that Article 1 does not provide greater protection than the First Amendment for nonmisleading commercial speech because 1) the California Supreme Court’s contrary conclusions reached in Gerawan were dicta, and 2) the California Supreme Court’s later decision in Kasky v. Nike, Inc., “recognized that the protections for commercial speech under the California Constitution are co-terminus with the protections under the First Amendment.”32

The dissenting opinion in Gerawan identified and repeated the Article 1 holdings and conclusions reached by the Gerawan majority, which in turn were observed by Vanguard Outdoor, LLC, in challenging the city’s bans on nonmisleading commercial speech. Moreover, the Ninth Circuit panel failed to address or otherwise acknowledge the long line of cited cases uniformly mandating that courts considering state constitutional questions must follow proclamations of the California Supreme Court regardless of whether such guidance may be characterized as dicta. As stated in People v. Trice, “Whether the Supreme Court’s obvious awareness of the consequences of its statement elevates the dictum to a holding or whether it is a dictum that we must follow does not make much difference. We follow.”33 The California Court of Appeal, in United Steelworkers of America v. Board of Education, again directed that “[e]ven if properly characterized as dictum, the statements of the Supreme Court should be considered persuasive.”34 Again removing any doubt over the force behind directives from the California Supreme Court, the California Court of Appeal in Hubbard v. Superior Court observed, “years ago, Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate appellate court justices: Generally speaking, follow dicta from the California Supreme Court….That was good advice then and good advice now.”35 Consequently, California courts must follow the conclusions set forth in Gerawan that within Article 1’s “unlimited” scope, which “expressly embraces ‘all subjects…’ article I’s right to freedom of speech protects political speech and ideological speech….It is not otherwise with respect to article I’s right to freedom of speech and commercial speech.”36

In contrast, the Ninth Circuit panel neither certified the question to the California Supreme Court nor followed the rule of deference to state high court decisions on matters of state constitutional law. Further, the Ninth Circuit suggested that Kasky curtailed Article 1’s greater and broader protections in the context of nonmisleading commercial speech.37 What Kasky decided, however, is that the “test for determining what constitutes commercial speech” is the same under Article 1 and the First Amendment in the context of reviewing claims concerning false or misleading commercial speech.38 That conclusion cannot be said to undermine the decision in Gerawan, which expressly assumes that Article 1 does not protect commercial speech that is unlawful, false, or misleading.39 Such speech had been proscribed since the California Constitution was adopted in 1849.40 Kasky does not say that it is distinguishing, superseding, overruling, or questioning Gerawan, and Kasky cites Gerawan with approval when articulating the rule that “[t]he state Constitution’s free speech provision, which provides that ‘[e]very person may freely speak…on all subjects…’ protects commercial speech, at least when such speech is ‘in the form of truthful and nonmisleading messages about lawful products and services.’”41 Additionally, California courts since Kasky have applied Gerawan’s holding that the California Constitution affords equal protection to commercial

![Image](https://via.placeholder.com/150)

### The Lamar Case

Late last year, a Los Angeles Superior Court issued an order in Lamar Central Outdoor,
Lamar v. City of Los Angeles applying the California Supreme Court’s Article 1 analysis in Gerawan. Lamar Central Outdoor, LLC, applied to the city’s Department of Building and Safety to convert its existing off-site commercial signs to digital signs. Off-site signs are defined by the LAMC as “A sign that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where the sign is located.” The off-site sign ban prohibits all new off-site signs, unless permitted pursuant to a relocation agreement, and further applies to “alterations, enlargements or conversions to digital displays of legally existing off-site signs,” excepting specifically enumerated alterations and off-site signs “permitted to a legally adopted specific plan, supplemental use district or an approved development agreement.”

The Department of Building and Safety denied Lamar’s permit applications on the basis that they violated the sign ban. Lamar filed suit, arguing that the sign ban violated Article 1. Lamar’s argument followed the analysis of Gerawan that Article 1 provides greater speech safeguards than the First Amendment, requiring the same level of protection for nonmisleading commercial and noncommercial speech. Both sides to the Lamar litigation acknowledged that the Gerawan court addressed the state’s power to regulate nonmisleading commercial speech, which was the same challenge presented by Lamar.

The city’s main argument opposing Lamar’s challenges, however, was that the Ninth Circuit’s Vanguard decision foreclosed Lamar’s reliance on Gerawan as well as Lamar’s Article 1 argument.

The trial court disagreed with the city, reasoning that Article 1’s guarantee of free speech “on all subjects” protects nonmisleading commercial and noncommercial speech equally, and thereby prohibits the sign ban’s “distinctions between commercial versus noncommercial subjects and on-site versus off-site signs” as a regulation of nonmisleading commercial speech. First, the trial court judge, Louis A. Lavin, reviewed whether the sign ban’s restrictions were content-based. Because, under Article 1, “a content-based restriction is subjected to strict scrutiny,” Judge Lavin next examined whether the content-based restrictions found were “necessary to serve a compelling interest” and “narrowly drawn to achieve that end.”

A restriction is content-based when it 1) favors noncommercial content over commercial content, or 2) a message itself must concern the location where the message is expressed. In Lamar, the court found the city’s sign ban to be content-based upon both grounds because the sign ban’s distinction between on-site or off-site signage inherently favors noncommercial content and expressly concerns the location of where messages are expressed. As one commenter has aptly noted, “it is hard to imagine how the onsite/offsite distinction can be considered content-neutral under this principle.” The trial court found common ground under Article 1 and the First Amendment’s respective treatment of nonmisleading commercial speech. Specifically, Judge Lavin cited the Ninth Circuit’s decision in Fotti v. Menlo Park, which states the First Amendment rule that a sign regulation is content based if the enforcing officer must read the sign to know whether the regulation has been violated. Further bolstering Judge Lavin’s analysis, the U.S. Supreme Court recently ruled in Reed v. Town of Gilbert that “[a] law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.”

Content-based restrictions must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. To be narrowly tailored, a content-based restriction of speech cannot be “based on hostility—or favoritism—toward the underlying message expressed.” Judge Lavin explained that the city of Los Angeles failed to demonstrate that the sign ban was necessary to advance the city’s interest in combating traffic and aesthetics problems, and that the ban fails to advance those interests, which, in any event, may qualify as substantial government interests but do not constitute a compelling interest.

Even if Article 1 required an intermediate scrutiny standard as the First Amendment does, the trial court held that the sign ban would nevertheless be held unconstitutional. Intermediate scrutiny under a First Amendment analysis requires a court to determine: “(1) whether the expression is protected by the First Amendment, which means that the expression at least must concern lawful activity and not be misleading; (2) whether the asserted governmental interest is substantial; if yes to both, then (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is not more extensive than is necessary to serve that interest.” Moreover, “[i]t is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.” “This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” Additionally, “in the First Amendment intermediate scrutiny context, the government’s position must be supported not merely by any evidence but by substantial evidence.”

Judge Lavin concluded that the sign ban is unconstitutional under the independent First Amendment analysis. First, because Los Angeles did not put forth evidence to meet its burden of proving that the ban advanced the city’s interest in regulating traffic and aesthetics. Second, the sign ban failed First Amendment scrutiny because the ban is broader than required to serve the city’s interests. Consequently, Judge Lavin concluded the sign ban is unconstitutional on its face and as applied to Lamar.

In its summary order, the Ninth Circuit panel in Vanguard adopted, without new analysis, a district court’s dilution of the California Supreme Court’s Article 1 decision in Gerawan primarily because it determined that decision was unpersuasive dicta. It is hard to reconcile the Ninth Circuit panel’s treatment of Gerawan with Gerawan’s straightforward language. Despite the Ninth Circuit’s abbreviated treatment of Article 1 in Vanguard, California courts are not bound by the Ninth Circuit’s decisions interpreting state law, and California courts have rejected contrary Ninth Circuit determinations.

One possible explanation for the Ninth Circuit’s disposition is that the federal judiciary is in constant search for national uniformity on constitutional subjects. In other words, it may be that two constitutional standards for the same speech does not as comfortably register in the minds of federal judges who must address principles of federalism, whereas state judges are more regularly called on to consult and apply both state and federal standards applicable to the same subject matter. But notions of federalism require uniformity in only one aspect: federally guaranteed constitutional rights are the irreducible minimum, or floor, that must be honored. A higher standard applies, however, if a state has raised this minimum. If a state sets its constitutional ceiling higher than the federal constitutional floor, the ceiling should apply to state officials. If they satisfy the state standard, they satisfy the federal one, but the opposite is not true. Accordingly, any policy argument that makes the claim that uncertainty results from laws that may not be uniform is exaggerated in the constitutional context. The federal system “provides a double source of protection for the rights of our citizens.” The city attorney of Los Angeles vowed to appeal, alluding that the city’s argument that the Ninth Circuit’s summary disposition was correct to dispense with the California Supreme Court’s Article 1 analy-
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dom of speech and commercial speech."64 Otherwise with respect to article I's right to free-
speech and ideological speech. It is not oth-
erwise with respect to article I's right to free-
speech and commercial speech.64

The trial court's decision in Lamar reflects the historical and continuing consensus among California state courts that the lower First Amendment standard for regulating commercial speech is not the entire law in California, and that nonmisleading commercial speech must be at least as strongly protected as noncommercial speech under Article 1 of the California Constitution.

1 Dailey v. Superior Ct., 112 Cal. 94, 97-98 (1896); CAL. CONST. of 1849 art. I, §9; U.S. CONST. amend. I.
2 See, e.g., Cooper v. California, 386 U.S. 58, 62 (1967) (recognizing that the state has power to impose higher standards than those required by the U.S. Constitution).
5 Id. at 491.
6 See Brennan, supra note 3.
How Courts Have Decided Coverage Issues in Cyber Insurance Cases

LARGE-SCALE DATA BREACHES have filled the news over the last year. Health care providers and financial institutions such as Blue Cross and JP Morgan suffered breaches that exposed the personal data of tens of millions of consumers. Even the U.S. government finds itself victim to the attacks, with the Department of Defense revealing that up to 18 million federal employees may have had their personal information compromised. The 2014 hacking of Sony Pictures, which included to-be-released movies, sensitive internal company memoranda, and personal information of employees, was significant enough to be called the “Sony-pocalypse.”¹ Much has been made of this specific incident because of the public nature of the hacked information, but on a broad level it is just another data point in what has become a troubling trend. Other high-profile companies targeted by data attacks since the beginning of 2014 include Blue Cross, Target, Michael’s, Facebook, Google, and Twitter, to name a few. But the Sony hack reinforces two important lessons: all companies are vulnerable to hackers, not just on-line retailers, and these companies should reassess their risk management tools, specifically insurance coverage.

Insurance companies have capitalized on this trend by adding data breach exclusions to their existing business insurance policies and creating new specialty cyber insurance products designed specifically to cover different types of losses that can result from hackers and other cyber threats.² In its basic form, a cyber insurance policy is designed to cover losses that result from data breaches. This could include first-party coverage for the expenses of hiring consultants to repair the data breach, notifying customers that their information has been stolen, or third-party coverage for defense fees in lawsuits filed by customers whose information was stolen.

Before the creation of cyber insurance products, companies might have expected data-related losses to be covered under their commercial general liability (CGL), professional liability, or property insurance policies. But any company looking for coverage under those same policies today should do so with some trepidation for two reasons. First, existing case law related to data loss—mostly decided under non-California law—is largely based on facts that are not entirely analogous to hacking.

Cases Finding Coverage

Some courts have found coverage for losses resulting from data breaches under one of two theories. The first considers data theft to be property damage: either loss of use of property or damage to tangible property. This could implicate property casualty policies or the property damage coverage under a CGL policy for third-party lawsuits. These courts have taken an expansive view of the meaning of physical damage and either broadly interpreted computer data to be tangible property or considered the damage to be to the computers themselves.

For example, in American Guarantee & Liability Insurance Company v. Ingram Micro, Inc.,³ a wholesale distributor of microcomputer products, Ingram Micro, purchased a specialty all-risk property policy to cover its real and personal property, and against business interruptions. The policy insured against “[a]ll Risks of direct physical loss or damage from any cause, howsoever or wheresoever occurring…. “⁴ A power outage caused all of the electronic equipment, including computers, at the defendant’s data processing and database maintenance center to stop working. Though power was restored within 30 minutes, all programming information was lost on three mainframe computers as a result of the outage. It also took the defendant several days to restore its computer systems to preoutage conditions. When the defendant submitted a claim for its losses, the insurer sued, seeking a declaratory judgment that the insurance policy did not cover the claim. The defendant counterclaimed for breach of the insurance contract. In its motion for summary judgment, the insurer argued that the computer equipment was not physically damaged, because “their capability to perform their intended functions remained intact.”⁵ Essentially, the insurer argued that the disruption did not affect the equipment’s ability to receive and process data, including the lost configuration settings. The defendant, which brought a cross-motion for summary judgment, argued a broader definition of “physical damage” that included loss of use and functionality. The court sided with the defendant’s broader definition, citing to a federal criminal computer fraud statute, and held that “‘physical damage’ is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality.”⁶ The court essentially held that there was property damage as a result of the power outage because the defendant’s “computer system and world-wide computer network physically lost the programming information and custom configur-

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rations necessary for them to function” and that the defendant’s mainframes were “physically damaged” for the hour and a half and that its worldwide computer network was inoperable.7

In Eyeblaster, Inc. v. Federal Insurance Company,8 another case focusing on loss of functionality, the plaintiff, Eyeblaster, was sued by a computer user who alleged that his computer, software, and data were infected by spyware and damaged after visiting one of Eyeblaster’s websites. Eyeblaster sought coverage under a general liability policy and an information and network technology errors or omissions liability policy. The insurer denied the claim, arguing that there was no coverage under the CGL policy because the plaintiff in the underlying suit did not assert claims against its insured for bodily injury caused by an occurrence, as defined by the policy. The insurer also concluded that there was no coverage under the information and network technology errors or omissions coverage because the plaintiff in the underlying suit had not alleged that the insured committed a wrongful act (as defined by the policy) in connection with a product failure or in performing or failing to perform its service. Both parties filed motions for summary judgment, and the trial court ruled for the insurer. On appeal, Eyeblaster argued that part of the definition of “property damage” obligated the insurer to provide coverage if the plaintiff was alleged to have caused the “loss of use of tangible property that is not physically injured” and that plaintiff’s computer, which his complaint alleged was “taken over and could not operate,” “froze up,” and would “stop running or operate so slowly that it will in essence become inoperable,” constituted tangible property.9 The general liability policy did not define “tangible property,” save to exclude from its meaning “software, data or other information that is in electronic form.”10 Because “the plain meaning of tangible property includes computers” and because the complaint in the underlying suit repeatedly alleged the “loss of use” of the underlying plaintiff’s computer, the Eighth Circuit concluded—under Minnesota law—that the allegations met the test for property damage and thus were within the scope of the general liability policy.

In a similar case, NMS Services Inc. v. Hartford Insurance Company,11 a software maker, NMS Services, was insured under a special property coverage form, which provided basic property coverage, and a computer and media endorsement, which provided optional computer coverage. NMS discovered that its computer systems had sustained considerable damage, including the erasure of vital computer files and databases, at the hands of a recently terminated employee who had installed a program that allowed him to hack into and damage NMS’s system. The property coverage was limited by a dishonesty exclusion that stated the insurer would not pay for loss or damage caused by or resulting from...dishonest or criminal act[s] by you, any of your partners, employees, directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose....12 The exclusion further provided that it did “not apply to acts of destruction by [the insured’s] employees; but theft by employees is not covered.”13 The trial court granted the insurer’s motion own reading of the policy language, and found that the plaintiff’s property “was not only damaged, but was completely destroyed by an employee...which triggers the exception to the dishonesty exclusion of the Special Property Form. Under the exception, acts of destruction by employees do not preclude coverage.”14

In Lambrecht & Associates, Inc. v. State Farm Lloyds,15 the plaintiff was an employment agency, matching prospective employers and employees for a fee. All of the plaintiff’s staff used computers to communicate with prospective employers and employees. One day the computers began malfunctioning, failing to boot up properly or to locate and retrieve stored information, performing a number of illegal operations, and ultimately freezing up and prohibiting stored information from being retrieved. The plaintiff had to replace its server, purchase a new operating system and other prepackaged software, and manually reenter large quantities of data. The plaintiff’s business insurance policy stated that “we will pay for accidental direct physical loss to business personal property at the premises described...”16 The policy also stated: [I]f loss of income coverage is shown in the Declarations, we will pay: 1. for the actual loss of ‘business income’ you sustained due to the necessary suspension of your ‘operations’ during this ‘period of restoration.’ The suspension must be caused by accidental direct physical loss to property at the described premises....17

The plaintiff filed a claim with its insurer for lost business income, as well as for the expenses of replacing the server and software and hiring someone to input company data on the new system. The insurer denied coverage, arguing that the loss was a result of hackers and, as such, the plaintiff’s loss was neither physical nor accidental. The trial court granted the insurer’s motion for summary judgment. The Texas Court of Appeals reversed, rejecting the insurer’s claims that the loss of information on the plaintiff’s computer systems was not a “physical” loss because the data on the plaintiff’s computers did not exist in physical or tangible form. The court of appeals held that “the plain language of the policy dictates that the personal property losses alleged by [plaintiff] were ‘physical’ as a matter of law” and that “the server falls within the definition of ‘electronic media and records’ because it contains a hard drive or ‘disc’ which could no longer be used for ‘electronic data processing, recording, or storage.’”18

In Retail Systems, Inc. v. CNA Insurance Company,19 the plaintiff, Retail Systems, a data processing consultant, developed computer programs and processed data relating to voter preference for a political party. Retail Systems was sued by the political party for the loss of a computer tape, which contained a voter survey as part of an election campaign and of which the party had given to Retail Systems for processing. When the tape was not in use, it was shelved at Retail Systems’ office, and it disappeared during the remodeling of Retail Systems’ computer room. Upon being sued, Retail Systems sought coverage from its insurer under a CGL policy. The trial court granted the plaintiff’s motion for summary judgment against the insurer. On appeal, the Minnesota Court of Appeals affirmed, holding that “data on the tape was of permanent value and was integrated completely with the physical property of the tape. Like a motion picture, where the information and the celluloid medium are integrated, so too were the tape and data integrated at the moment the tape was lost.”20 Therefore, “[t]he trial court did not err by finding that the computer tape and data were tangible property under the insurance policy.”21

Other courts that have found in favor of coverage for data loss have done so under coverage B in a CGL policy. Those courts have considered whether the data breach resulted in a publication of private facts sufficient to trigger coverage under CGL policies.

The best example of this result can be found in Tamm v. Hartford Fire Insurance Company.22 The plaintiff purchased a CGL policy that required the insurer to “pay those suits that the insured becomes legally obligated to pay as damages because of...personal injury...to which this insurance applies.”23 The policy further provided that the insurer “will have the right and duty to defend any ‘suit’ seeking those damages.”24 As defined in the policy, “personal injury” included oral or written material that slandered or libeled a person, or oral or written publication of material that violated a person’s right of privacy. However, the terms “rights of privacy” and “person” were not defined anywhere within the policy. A disgruntled former employee accessed and distributed information obtained in private e-mail accounts and threatened to further disseminate that infor-
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The Superior Court of Massachusetts found coverage, holding that the insurer owed a duty to defend any lawsuit seeking damages based on a personal injury claim. The court determined that “[i]n order to trigger the duty to defend under the invasion of privacy language of the policy, an underlying complaint must allege two things: (1) an ‘oral or written publication’ of (2) ‘materials that violate [a] person’s rights of privacy.’”

Because Massachusetts courts had previously held that intracorporate disclosures among employees of the same company constituted publication for purposes of an invasion of privacy, the Tann court concluded that these allegations in the employer’s complaint regarding access and use of confidential and private e-mails together with the allegations about the e-mails that the employee sent to the company’s outside counsel led to the conclusion that the complaint stated a claim based on the “unreasonable, substantial and serious interference of privacy.”

**Cases Denying Coverage**

Other courts presented with similar fact patterns have decided against policyholders when analyzing seemingly similar property and liability policies. The most frequent issue courts face is deciding whether liability policies will cover consumer complaints against the policyholders.

In a recent, widely publicized decision, *Zurich American Insurance Company v. Sony Corporation of America*,


The court determined that no coverage existed for third-party claims asserted against Sony by customers whose personal information had been stolen during a 2011 cyber attack on Sony’s PlayStation Network, stating that to find otherwise would unlawfully expand the policy’s coverage. The court read the insurance policy narrowly, holding that coverage could exist for loss resulting from information dissemination only if Sony was the party that disseminated the customer information. The court explained that transmitting private information from one server to another over the internet constituted “oral or written publication in any manner of material that violates a person’s right of privacy.” Despite this, the court found the insurer had no duty to defend because such “oral or written publication” was “perpetrated by . . . hackers,” not by Sony.

In *Ward General Insurance Services, Inc. v. Employers Fire Insurance Company*, a policyholder’s data was lost as a result of human error during a computer upgrade. The policyholder sought the cost of recovering the data and the losses from business interruption while it recovered the data. The insurer denied the claim. The court ultimately sided with the insurer because the policy covered only direct physical loss to property and the lost data was not a tangible or physical item. The court concluded that “the loss of the database, with its consequent economic loss, but with no loss of or damage to tangible property, was not a ‘direct physical loss of or damage to’ covered property under the terms of the subject insurance policy, and, therefore, the loss is not covered.”

In arriving at this conclusion, the court looked to the plain meaning of “physical,” which, according to Webster’s Collegiate Dictionary, means “having material existence” and “perceptible esp. through the senses and subject to the laws of nature.”

The court reasoned from this definition that “the loss of plaintiff’s database does not qualify as a ‘direct physical loss,’ unless the database has a material existence, formed out of tangible matter, and is perceptible to the sense of touch.” The court then distinguished information from the medium on which information is recorded, explaining “information is stored in a physical medium, such as a magnetic disc or tape, or even as papers in three-ring binders or a file cabinet,” but the information itself remains intangible. Here, the loss suffered by plaintiff was a loss of information, i.e., the sequence of ones and zeroes stored by aligning small domains of magnetic material on the computer’s hard drive in a machine-readable manner. Plaintiff did not lose the tangible material of the storage medium. Rather, plaintiff lost the stored information.

In *State Auto Property & Casualty Insurance Company v. Midwest Computers & More*, the district court considered cross-motions for summary judgment filed by the plaintiff insurer and the defendant, whose business was computer sales, repair, and service, and ultimately ruled for the plaintiff insurer. The policy at issue provided coverage for “property damage” to “tangible property.” The pertinent definition in the policy provided that “[p]roperty damage . . . includes (a) physical injury to tangible property, including all resulting loss of use of that property . . . or b. Loss of use of tangible property that is not physically injured . . . .”

Like the Ward court, this court turned to dictionaries to ascertain the meaning of “tangible property,” noting that the ordinary meanings of “tangible,” include “capable of being perceived esp. by the sense of touch: palpable[,] . . . capable of being precisely identified or realized by the mind[,] . . . capable of being appraised at an actual or approximate value [approximately assets].”

The court concluded:

None of these definitions fits data stored on a computer disk or tape. Although the medium that holds the information can be perceived, identified or valued, the information itself
cannot be. Alone, computer data cannot be touched, held, or sensed by the human mind; it has no physical substance. It is not tangible property.  

The court denied coverage because of a property damage policy exclusion for “that particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.”  

The defendants alleged that “they lost use of their computers as a result of work done on August 23, 1999, but that further work on October 12, 1999, caused or revealed the loss of computer data. Accordingly, the ‘completed operations hazard’ provision of the policy does not apply to the applicable ‘property damage,’ and the exclusion cited by plaintiff prevents coverage of the [defendants’] loss.”  

Another case, America Online, Inc. v. St. Paul Mercury Insurance Company, resulted from numerous class actions filed against AOL by consumers alleging that AOL’s version 5.0 access software had substantial bugs and was incompatible with the software and operating systems of other applications in their computers, which caused the computers to be damaged. The district court granted summary judgment to the insurer, holding that the underlying complaints did not allege physical damage to tangible property and that any damage from loss of use of tangible property fell within a policy exclusion. On appeal, the Fourth Circuit affirmed. The policy defined “property damage” as “physical damage to tangible property of others, including all resulting loss of use of that property; or loss of use of tangible property of others that isn’t physically damaged.”  

The court ultimately looked at the dictionary definitions of “tangible,” which meant “capable of being touched: able to be perceived as materially existent esp. by the sense of touch: palpable, tactile,” and of “tangible property,” which meant “having physical substance apparent to the senses.”  

Employing those ordinary meanings, the Fourth Circuit concluded that the physical magnetic material on the hard drive that retains data, information, and instructions is tangible property. But the conclusion that physical magnetic material on the hard drive is tangible property is quite separate from the question of whether the data, information, and instructions, which are codified in a binary language for storage on the hard drive, are tangible property.  

The court conceded that the hard drive on which the data was stored was tangible property but opined that “the data itself must be considered apart from the medium.”  

Denying coverage for data breaches under CGL policies is not completely illogical. When the coverage provisions for CGL policies were drafted, computers were not the critical tools they are today, the software was basic, and the idea of mass hacking of customer information was decades away. Altogether, the big takeaway for policyholders is that courts are inconsistent at best when determining if coverage exists for data breach claims under CGL and property policies. This should give policyholders pause before they assume they are covered under their existing policies.  

While it is impossible to know exactly how insurers will treat claims or how courts will rule on coverage under these policies until they are litigated, there are a few practical tips to consider. First, review cyber insurance policies thoroughly. It is critical for any insurance policy, but considering coverage for data breaches also requires a review of a business’s CGL policy, property policy, and any cyber insurance product. An insurance policy may well have express exclusions for data breaches that will necessarily eliminate coverage. While a cyber insurance policy is designed to cover these data breach losses, it is also a specialty product that will vary significantly from company to company. A business should never assume something is or is not covered. Second, consider how coverage for data breaches may fall within a client’s total insurance portfolio and plan accordingly. A basic cyber insurance policy often contains a provision that makes it excess to any other available insurance. “Excess” means that if coverage is available in any other policy, that policy pays first, and only when all of its limits are paid out does the cyber policy then pay any policy benefits. If this exclusion is not removed, the business may end up in the middle of an unexpected coverage war between its cyber insurance property and property or CGL carriers. Third, it is critical that a company’s counsel pay careful attention to how much coverage will be available for data breach losses under a firm’s policies. Companies should assess the value of their computer equipment and make sure they have sufficient property coverage to include potential loss of business in the event of a cyber attack. It is also likely that these products will develop sublimits for each type of coverage they contain. Fourth, exercise caution when completing a cyber insurance application. It may be worthwhile to consult coverage counsel, even at this initial stage, to ensure there will be no claims that the policyholder misrepresented or omitted critical information in the application as an excuse not to pay a claim. Some applications are almost 10 pages long and contain questions on subjects ranging from network security to information security to website and content information. Fifth, these are new products, so insurance companies have little in the way of actuarial data, and they are still learning the claims landscape on data breach events.

Therefore, do not be surprised if today’s quotes are ancient history by the same date next year or if the market rapidly expands or contracts based on the early actuarial returns. Finally, if the company has preferred consultants or vendors, it would be best to bring that up before coverage is binding since cyber insurance policies often require that consultants hired to provide remediation services are on a preapproved list.

1 Jose Pagliery, ‘Sony-pocalypse!’: Why the Sony hack is one of the worst hacks ever, CNN (Dec. 29, 2014), http://money.cnn.com (last visited July 1, 2015).
4 Id. at *1.
5 Id. at *2.
6 Id.
7 Id. at *3.
8 Eyeblaster, Inc. v. Fed. Ins. Co., 613 F. 3d 797 (8th Cir. 2010).
9 Id. at 801-02.
10 Id. at 802.
12 Id. at 513.
13 Id.
14 Id. at 514.
16 Id. at 19.
17 Id.
18 Id. at 25.
20 Id. at 737.
21 Id. at 738.
23 Id. at *1.
24 Id.
25 Id. at *3.
26 Id. at *4.
29 Id.
30 Id. at 556.
31 Id.
32 Id.
34 Id. at 1114.
35 Id. at 1116.
36 Id.
37 Id.
38 Id. at 1117.
40 Id. at 94.
41 Id. at 94-95.
42 Id. at 95.
43 Id.

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BEGINNING TUESDAY, SEPTEMBER 8, Trial Advocacy and the Litigation Section will host a program on the evenings of September 8, 10, 15, 17, 21, and 24 from 5:30 to 8:30 p.m. in one in a series of courses offered by LACBA's Trial Advocacy Project (TAP). Designed specifically for attorneys who have little or no trial experience, this course provides introductory trial advocacy instruction, mock trial performance, and constructive feedback. Participants learn to mark exhibits, lay evidentiary foundation, deliver opening statements, conduct witness direct and cross examinations, and deliver closing arguments. The course instructors are seasoned trial attorneys. Successful completion of this course meets the prerequisites for admission to LACBA's five-week traditional TAP course taught annually in the fall. Completion and certification from traditional TAP qualifies participants for a pro bono practicum with a local prosecutorial agency trying criminal cases. Written course materials will be distributed via e-mail prior to the first class, so a correct e-mail address at the time of registration is needed. 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 parking lots. On-site registration and dinner will be available at 5:00 p.m. The registration code number is 012419.

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Reflections and a Lesson from the “Blurred Lines” Trial

THE RECENT VERDICT IN Williams et al. v. Bridgeport et al. awarded Marvin Gaye’s heirs $7.4 million against Robin Thicke and Pharrell Williams for copyright infringement. Generally, a party proves infringement by showing access to the original work and substantial similarity between the original work and the subsequent work. The presence or lack of substantial similarity is determined by the fact finder. With that in mind, you may simply listen to and compare Gaye’s “After the Dance” with Thicke’s “Love After War” and compare Gaye’s “Got to Give It Up” with the “Blurred Lines” of Thicke and Williams.

If you are like me, you will have little doubt that “Love after War” is substantially similar to “After the Dance” and that “Blurred Lines” is substantially similar to “Got to Give It Up.” It seems very likely that at least one of the authors of the later works must have been well versed in the audio recordings of Gaye’s earlier works.

When Gaye composed the two songs at issue, however, the 1909 Copyright Act was in force. Because the drafters of the next iteration (the Copyright Act of 1976, which came in force in 1978) did not say otherwise, the 1909 Copyright Act continues to apply to songs registered before 1978. Under the 1909 Copyright Act, audio recordings could not be deposited with the Copyright Office as evidence of an original composition. Rather, only sheet music was allowed. Gaye, however, composed the songs by playing them and recording his performances, not by writing the sheet music deposited with the Copyright Office. Gaye probably did not draft the sheet music, or lead sheets, that were deposited with the Copyright Office for “Got to Give It Up.” The court appeared to accept that lead sheets were often notated by music copyists employed by the music publishers, not the artists themselves.

On summary judgment, the main legal issue was whether the Copyright Office deposit is the entire composition entitled to copyright protection, or whether the audio recordings, which the 1909 Copyright Act did not contemplate, were also entitled to copyright protection. It took over 100 years for a court to directly address this issue, and the federal court in this case ruled that the copyrighted composition consisted solely of what was deposited with the Copyright Office, not what Gaye actually composed and not what people actually buy.

The court reached this conclusion after considering the Ninth Circuit’s guidance that “[a]lthough the 1909 Copyright Act requires the owner to deposit a ‘complete copy’ of the work with the copyright office, our definition of a ‘complete copy’ is broad and deferential,” and “the deposit requirement is merely a limitation on the ability to bring an action for infringement at a particular time. It has no effect whatsoever on the validity or enforceability of a copyright.”

The Ninth Circuit’s language apparently had little influence on the federal district court, which held that only the written work is protectable because the general rule under the 1909 Act was that statutory copyright protection—including the right to sue for infringement—depended on publication of the work with proper notice, on reducing the work to sheet music or manuscript form, and on depositing that written form of the work with the Copyright Office. I say it is impossible to harmonize this reasoning with the Ninth Circuit’s guidance.

The district court’s curious ruling led to the jurors’ being instructed not to study the actual audio recordings in their spare time and to give no evidentiary weight to the recordings of these songs that they might have heard outside the courtroom. They were instructed not to place any weight on the performances of the deposited sheet music (i.e. the copyrighted composition as defined by the court) that they heard in court multiple times. The Gaye family faced a daunting challenge. They had to prove, with sheet music deposited with the Copyright Office...that there was substantial similarity between the songs.

By Vance Woodward

They had to prove, with sheet music deposited with the Copyright Office...that there was substantial similarity between the songs.

Vance Woodward is senior counsel with Palmer, Lombardi & Donohue LLP in Los Angeles.

1 Three Boys Music Corp. v. Boltron, 212 F. 3d 477, 486 (2000).
2 Twentieth Century-Fox Film Corp. v. Dunnahoo, 637 F. 2d 1338, 1342-43 (9th Cir. 1981).
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO: 8:14-cr-379-T-36TGW

JESUS HERNANDO ANGULO
MOSQUERA

ORDER

This matter comes before the Court upon the Defendant’s Motion for an Evidentiary Hearing on Admission of Polygraph Evidence (Doc. 67). An evidentiary hearing was held on this matter on December 23, 2014. In the motion, Defendant sought a hearing on the admissibility of the polygraph evidence and a ruling on the admissibility of said evidence. Accordingly, the Court will construe Defendant’s Motion for an Evidentiary Hearing on Admission of Polygraph Evidence (Doc. 67) as a motion to determine the admissibility of the polygraph evidence under Federal Rule of Evidence 702. The Court, having considered the motion and being fully advised in the premises, will grant the Motion and permit the polygraph evidence to be admitted at trial.

1. Background

Defendant Angulo-Mosquera, a 53-year old deckhand and cook, was indicted on September 4, 2014 in the Middle District of Florida on charges related to the seizure of 1,700 kilograms of cocaine concealed on board a Ruleighter known as the “Hope II” in August 2014. Defendant Angulo-Mosquera is a Colombian national with no known criminal record in any country. He has never before been in the United States. Defendant Angulo-Mosquera denies any knowledge of the drugs found concealed on the Hope II and any involvement of any kind in the illegal drug trade.