Los Angeles lawyer Laura Reathaford studies issues of manageability and class certification in PAGA litigation.

Los Angeles Lawyer

PAGA Performance

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Public service has been a theme of From the Chair over the last several months, covering a variety of public service opportunities for Los Angeles lawyers, including LACBA's Veterans Project and Lawyer Referral Service, Judge Pro Tem service, and the State Bar's Justice Gap Fund.

For my last column I would like to discuss another form of public service—government employment.

I am a retired Assistant U.S. Attorney who served nearly 25 years. I worked for less money than my counterparts in law firms, but the work was engaging and challenging. Even run-of-the-mill immigration or FOIA cases were interesting. For instance, one of my first FOIA cases involved a Russian sailor who jumped ship on the Mississippi River to seek asylum and was returned to the Russian vessel by U.S. authorities. U.S. officials interviewed the sailor to determine if he really wanted to stay in Russia, as he later declared, and a government watch group sought the tape of that interview. In another case, I represented former President Ronald Reagan. The parties sought to depose Reagan to determine his involvement in the exodus of the Marcos family from the Philippines through Hawaii, allegedly with CIA assistance, taking a golden Buddha with them. In civil employment discrimination cases, I represented an army general in a deposition, and in a case brought by a former covert operative against the CIA, one of my main witnesses who testified in court was the Director of Operations—the guy in charge of the spies. At one point in that case, I told my husband that I had to go out of town on a trip “to a place that doesn’t exist,” to talk to a man “who isn’t really who he is.” My husband, a very understanding man, just smiled, shook his head, and asked that I call him periodically to let him know that I was OK. In the early 1990s, I represented a number of government agencies involved with the installation of Nexrad Doppler radars across the country. The Coalition of Ojai and actor Larry Hagman sued, resisting the installation of a radar on Sulphur Mountain. I also handled civil rights, Fair Housing Act cases, and what I have been told was the largest quiet title action in the country, concerning approximately 3.5 million acres of government land.

On the criminal side I prosecuted alien trafficking and bribery of a government official for false citizenship documents used to obtain U.S. passports. Internationally, there were countless Mutual Legal Assistance Treaty (MLAT), letters rogatory, and extradition cases involving theft, rape, sex trafficking, and fraud. The MLAT cases were filed under seal, so I cannot be specific about the facts—but one involved a multiday interview of a former head of a foreign state, with high-ranking officials from that country present.

I also had the opportunity to work in Washington, D.C., with the Attorney General’s Advisory Committee on Native American issues, the White Collar Crime Council, and securities, bank, telemarketing, and healthcare fraud. I attended meetings at the Federal Reserve and gave presentations at the White House Annex.

The rewards are not just subjective. I received commendations from many agencies, including the Department of Homeland Security, the navy, the army, the Department of Labor, and the Civil Rights Division of the Department of Justice, as well as special achievement awards from Attorney General Janet Reno.

Public service employment is certainly something to consider at any point in your career—it is rewarding, fulfilling, and can be very interesting. Many lawyers leaving the USAO say that it was the most fun job. For me, it was my disc jockey job at a radio station on the east coast—that was pure fun!
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What is the perfect day? I live it most days. If there was a glass of water and it had 10 percent liquid in it, I would tell you it’s 90 percent away from being full. I feel so fortunate to have the opportunity to practice law every day in this country.

At your firm, Kiesel Law, you specialize in representing consumers. What kind of case is closest to your heart? Catastrophic personal injuries, representing individuals and families who have either suffered a catastrophic loss themselves or have had loved ones who have passed. It allows me to take care of someone who needs help.

In 2013, your own firm emerged after 14 years with partners Boucher and Larson. What happened? Two partners went through devasting divorces. One wound up on the front page of the Los Angeles Times. Family law issues permeated the practice for over seven years.

You are consistently selected as a top plaintiff attorney in California. What sets you apart? It’s probably my willingness to make a contribution to the legal community as a whole. I have never had an insular practice, and that allows me to interact with other lawyers.

You teach many CLE classes. Do you have a favorite war story? No. What I like the most is teaching technology, when they are all good lawyers, graying lawyers, who are stretching themselves rather than living in an age of carbon paper and typewriters.

Are you a techie? For at least 20 years, I’ve been the technology columnist for the Daily Journal. Technology has always been one of my passions. The only way to really do big things is to use technology.

It’s hard to find a big case you’re not involved in—Miramonte sex abuse, Metrolink, Porter Ranch homeowners. How do you get these important matters? I hope that I have a leadership style that is not abrasive, but is built on consensus. I am able to work with large teams of firms, in concert.

What is misunderstood about being a tort attorney? Most people view us as preying on the misfortunes of others and capitalizing on peoples’ worst moments, and not really on the best of why lawyers do the work. I try to proclaim what I do for a living, embrace it.

You won a California Supreme Court case about organic food labeling. Are you a healthy eater? I am incredibly conscious of my physical activity, but I am the worst eater.

If you had to choose only one entree for the rest of your life, what would it be? Raisin Bran.

What is your favorite exercise? Elliptical or stair master.

Your client reviews call you the “easiest lawyer to reach in the country.” Why? Wherever I am in the world, I always get the message. If I’m not there to reach out to a client, then I’m doing something wrong.

Why did you choose this profession? I wanted to do this since I was eight years old. We had a dear friend of the family who was a personal injury lawyer, and he had the best stories.

Whittier College of Law now has the Kiesel Advocacy Center. How involved were you in its design? The school ran the plans by me. It’s a spectacular facility. It’s gorgeous; the use of wood, stone, and light appeals to my aesthetic. This was hard for me because I was taught that true giving is anonymous giving.

You are a senior fellow of the Litigation Counsel of America, a trial honorary society. What advice do you give to new lawyers? The same advice to old lawyers; be a part of the community, stay involved.

What was your best job? I’m livin’ it.

What was your worst job? I was a cashier at Shop Rite Supermarket. It was a union job and it paid pretty well, but the manager told me to stop having so much fun. I actually drew pictures on the paper grocery bags; my boss was unhappy.

What characteristic do you most admire in your mother? Her capacity to love.

You are currently president of the Los Angeles County Bar Association. What is your major duty? Managing the financial obligations of an organization with a staff of 74 and an annual budget of $13 million. I try to make recommendations in the operation of the bar like the running of my practice, which is be mindful of your pennies because your dollars will take care of themselves.

How is it going? It’s not been easy, because there are folks that have a historic memory of an organization that, maybe, had different priorities or was at a different time. The organization has survived for over 100 years, but it needs to change to survive the next 100 years. We need to develop the tools to make the bar relevant for the next century.
Bar Associations across the nation are experiencing membership problems. What has changed? People don’t feel the need to be connected to bar organizations that they did 50 years ago. Today, social networking and live-streaming seminars have replaced, in part, the benefit that the bars used to provide. Now we need to figure out what the next step is, what is the future.

A Metropolitan News headline said that LACBA “fleeces” its attendees at events. What’s going on? I think everyone would agree that the organization should not run at a loss. The perception of some is that if the cost of a program is $2,000 and you recover $2,000 from the people who attend, you are breaking even. You are not. We need to have more revenue than the actual cost of the program. You have to run the organization. That’s not fleecing anyone—that’s being responsible stewards of an institution.

What is the biggest challenge facing LACBA? Attracting new, young lawyers and establishing the value added that the bar organizations have. An extraordinary value added, in California, is the relationship between the bar and the bench. If you are part of a bar organization, you have the opportunity to engage with a judicial officer in a much different way.

Should the bench attend bar events for free? There are certain events that judicial officers should not have to pay to attend. The more engagement we have with judicial officers as a bar organization, the better our organization will be.

You are cochair of the Open Court Coalition (OCC), a bipartisan committee advocating full funding of the civil justice system. What is the biggest challenge facing the courts? How to deliver services in the new century that is different than the way the services were delivered in the last couple of centuries.

Who is on your music play list? Classical music fills my soul.

What book is on your nightstand? The Verdict, by English author Nick Stone, in the vein of Turow and Grisham. It’s a fun book.

Which fictional hero would you like to be? Dirk Pitt, a spy extraordinaire created by author Clive Cussler.

Which magazine do you pick up at the doctor’s office? Esquire.

What is your favorite vacation spot? I really like to see different parts of the world.

What do you do on a three-day weekend? Stay in bed, schnuggle with my wife of 27 years, and watch TV that was recorded.


What are your retirement plans? When I stop enjoying it, I’ll walk away.

If your house were on fire, what would you grab on your way out? First, the family and our dog, Zoe. Ten years ago, I’d have said my photographs. Today I’ll say my computer’s hard drive—it’s all there.

Which president would you most like to take out for a beer? Bill Clinton. He’s been at our house, and he’s fun.

What are the three most deplorable conditions in the world? Poverty, ethnic warfare, lack of medical care in much of the world.

Who are your two heroes? Martin Luther King and Golda Meir.

What is the one word you would like on your tombstone? Honest.
**Guidance on Post-ATRA Estate Planning—Portability and A-B Trusts**

**PASSAGE OF THE AMERICAN TAXPAYER RELIEF ACT** of 2012 (ATRA) established rules for the estate tax that include a relatively new transfer tax rule known as portability. While portability contributes to the complexity of the estate planning process, the rule also provides for new estate planning opportunities that were previously unavailable. It is particularly relevant in estate planning for married couples with estates of less than $10.9 million, since this year the estate tax exemption has been raised to $5.45 million for individuals (thus $10.9 million between the spouses) with an estate tax rate of 40 percent.

Portability allows the surviving spouse (SS) to use the unused estate tax exemption, if any, of the deceased spouse (DS) if a portability election is made on a timely filed estate tax return and the DS has passed away prior to December 31, 2010. In other words, if the DS has not used his or her permitted estate tax exclusion in its entirety, the unused portion, referred to as deceased spousal unused exclusion (DSUE) amount, can be transferred to the SS for his or her use in addition to the SS’s own exclusion amount at death. If the community estate is $8 million and the DS deceases in 2016 bequeathing his or her $4 million to the adult children, $1.45 million of exclusion may be used by the SS spouse at his or her death in addition to his or her own exclusion amount. Although simple in concept, portability has many nuances. For instance, if the SS remarries, the applicable DSUE amount is the one belonging to the last DS, meaning the SS may use his or her former late-spouse’s DSUE amount if he or she predeceases the current spouse but may not if he or she survives the new spouse. Portability cannot be used to transfer the DS’s unused generation-skipping transfer (GST) tax exemption.

**Portability vs. A-B Trust Plans**

Before the introduction of portability, if the DS did not use his or her entire estate tax exclusion, the DSUE amount was wasted. Before ATRA, the traditional A-B trust plan was regarded as the best estate planning tool for a married couple that desired that the SS receive benefits of the DS’s estate without subjecting those assets to estate tax. Under an A-B plan, the community trust estate is divided into two shares upon the DS’s death. The share representing the DS’s one-half interest in the community estate and any of his or her separate property is allocated to the survivor’s trust or A, which is a revocable trust for the SS’s benefit. The SS serves as trustee and retains the power to amend and revoke A, the unlimited right to withdraw income and principal, and the power to dispose of assets in favor of any third parties either during lifetime or at death. The community property passing to A will receive a step-up in basis on the DS’s death, and upon the SS’s death, all assets of A will be subject to estate tax and receive another step-up in basis.

The share representing the DS’s one-half interest in the community estate and any of his or her separate property is allocated to the bypass trust or B, which is an irrevocable trust. The SS will not have the power to revoke B nor amend any of B’s provisions, including those provisions regarding B’s remainder beneficiaries. The DS may provide the SS with a limited power of appointment over B, allowing the SS to dispose of B’s assets to permissible third parties, either during the SS’s lifetime or upon death. Generally, B will provide that the SS may act as sole trustee and that the SS shall receive all of the net income and a right to invade principal, limited to an ascertainable standard for the SS’s reasonable health, education, maintenance, and support in his or her accustomed manner of living.

There are advantages to the A-B plan in lieu of making a portability election. B places restrictions on distributions to the SS to ensure that the DS’s assets are ultimately distributed to the DS’s remainder beneficiaries. This may be a factor when the DS has children from a prior marriage. B’s assets will receive a step-up in basis only upon the DS’s death and not on that of the SS. This may be a factor when the DS’s estate is anticipated to appreciate in excess of his or her DSUE amount given the life expectancy of the SS. If basis considerations are significant, A-B trusts may be drafted to confer upon an independent trustee the power to grant the SS a general testamentary power of appointment over a portion or all of B so that those assets may receive a step-up in basis by virtue of their inclusion in the SS’s estate. Another advantage of B is that all appreciation will pass to the remainder beneficiaries free of estate taxes. B offers some level of asset protection from the SS’s creditors and has the ability to preserve the DS’s GST tax exclusion for tax planning for more remote descendants.

Married couples, post-ATRA, may plan to utilize the unlimited marital deduction, make a portability election, and allocate the entire community estate to A for the benefit of the SS. This plan achieves a step-up in basis in the community assets at both deaths, avoids any estate tax upon the DS’s death, and minimizes or avoids the estate tax upon the SS’s death. One advantage—or disadvantage—of this plan is that the SS will have unfettered control over the community estate and any of the DS’s separate property, including the power to disinherit the DS’s issue in favor of a new spouse and new children. The SS will have no duty to segregate assets or account to remainder beneficiaries. This plan may be desirable when the settlors care more about the financial security and welfare of the SS than that of any surviving children. This plan is less desirable with blended families, when the SS will almost certainly be remarried, or the DS’s estate is anticipated to appreciate in excess of his or her DSUE amount.

There will likely be a tension between the SS’s control over the DS’s estate, opportunities to receive a step-up in basis, and other tax and nontax considerations. Nonetheless, successful estate planning requires a fundamental understanding of the couple’s objectives, needs, values, the nature and character of their assets, and some speculation as to what the remainder beneficiaries will do with the inherited assets.

Zachary S. Dresben practices estate planning, trust administration, and probate with Kramer Law Group in Los Angeles.
Changes to the FRCP Highlight Need for e-Discovery Expertise

RECENT AMENDMENTS to the Federal Rules of Civil Procedure (FRCP) concerning electronic discovery have a wide-ranging procedural impact, yet a recent survey of federal jurists indicates that judges lack confidence in the capacity of lawyers appearing before them to understand and efficiently advise their clients on e-discovery issues.1 Thus, it behooves litigators to acquire or learn about the legal and technical expertise necessary to provide the requisite e-discovery counsel and preparatory education to their clients, particularly in terms of the major recent amendments that affect e-discovery. This is especially true in California where electronic-discovery statutes are relatively new.2

In 2010, the Daily Journal underscored the need for lawyers to get up to speed in this emerging critical area of the pretrial process.3 If any doubters still remained in 2015, the recent amendments to the FRCP confirmed that e-discovery is not going away, largely because an e-mail trail is now a significant part of nearly every kind of case. As experts have noted, the courts recognize and enforce this “commitment to finding the crucial evidence” that rejects the contrary objection to “fishing expeditions.”4

The results of the survey of jurists make it clear that “disruptive change is needed for lawyers to become e-discovery competent.”5 The participants in the survey, including 14 federal judges and 22 attorneys proficient in e-discovery, responded that in this day, “being undereducated and underprepared is no longer an option,” yet an “expectation gap still exists” between what judges look for and what attorneys consider appropriate in the age of e-discovery.6 A significant proportion of survey participants reported encountering problems of lack of cooperation by counsel and clients (32 percent), miscommunication (27 percent), and a lack of education on e-discovery issues (27 percent). Fully 81 percent were of the opinion that most e-discovery mistakes are made in the early stages of a case, before judicial intervention. The survey also indicated that a “cultural change” is necessary to make all this work. Lawyers need to “get smarter” and become better educated in handling e-discovery or find someone else who is competent to assist, and above all cooperate with opposing counsel instead of acting in a combative manner.

In a 2015 Year-End Report on the Federal Judiciary, Chief Justice John Roberts highlighted what he considered the more significant FRCP amendments, and emphasized what they represent for the e-discovery bench and bar. Roberts stressed that while “the amendments may not look like a big deal at first glance…they are.”7 His comments make clear that lawyers are expected to resolve e-discovery disputes through cooperation. Comparing the early history of dueling in this country to competition between lawyers, Roberts noted that our “civil tribunals, far more than the inherently uncivilized dueling fields they supplanted, must be governed by sound rules of practice and procedure.”8 The new rules 1) “encourage greater cooperation among counsel,” 2) “focus discovery…on what is truly necessary to resolve the case,” 3) “engage judges in early and active case management,” and 4) “address serious new problems associated with vast amounts of electronically stored information (ESI).”9 The message of the chief justice is clear that the intent of the amendments is to move the discovery process along while at the same time controlling costs.

Roberts asserts that the amended language in Rule 1—the section titled Scope and Purpose—requires that bench and bar “work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow.”10 He goes on to make the point that “lawyers though representing adverse parties have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolution of disputes.”11 Failure to proceed accordingly can have serious consequences. In contrast to a discovery process historically permeated by an attitude of annoyance and drudgery, cooperation has become the order of the day in e-discovery because of the various issues surrounding volume, formatting, readability, and searchability of ESI. A lack of cooperation can cause difficulties that result in e-discovery disputes that are time-consuming and expensive. The goal is to make e-discovery “easier, less costly and more productive,” encouraging an understanding that “playing fair is worth it.”12

Rule 16, which is titled Pretrial Conferences; Scheduling; Management, requires that, unless exempted by local rule, a scheduling order must be issued either after receiving the report from the parties under Rule 26(f) or after a scheduling conference.13 The scheduling order must be issued as soon as practicable, but within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared, unless there is good cause for delay.14 The order may provide for disclosure, discovery, or preservation of ESI.15 It may also include “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502” (i.e., use of court orders to protect the parties from the consequences of waiver in producing electronic and other information in discovery).16 Moving parties will be required to have a conference with the court before seeking an order relating to discovery.17

A. Marco Turk, a professor and director emeritus of the Negotiation, Conflict Resolution and Peacebuilding program at CSU Dominguez Hills, writes a monthly column on e-discovery for The Daily Journal and serves as a neutral.

Failure to be adequately prepared to conduct e-discovery qualifies as “ethical incompetence.”
The scheduling order is based in part on what the parties report, containing deadlines and possibly provisions dealing with retrieval and production of ESI. The purpose is to provide an opportunity for the parties to prepare themselves for the Rule 16 pretrial conference, so they can demonstrate to the court that they have made diligent, good-faith efforts to comply with the rules and the court’s policies, and that they are therefore “deserving of its confidence.”

Rule 26(b)(1), which bears the title Duty to Disclose; General Provisions; Governing Discovery, explains the “concept of reasonable limits” using “increased reliance on the common-sense concept of proportionality.” The guiding principle of this rule requires “that lawyers must size and shape their discovery requests to the requisites of a case,” providing “parties with efficient access to what is needed to prove a claim or defense” while eliminating “unnecessary or wasteful discovery.”

In other words, as Roberts asserts, the “key here is careful and realistic assessment of actual need.” Six requirements are set forth for litigants that parties must adhere to in answering the important question concerning how discovery is proportional to the case: 1) importance of the issues at stake, 2) amount in controversy, 3) relevant access to pertinent information, 4) resources of the parties, 5) importance of the discovery in resolving the issues, and 6) whether the burden or expense of the proposed discovery outweighs the likely benefit.

Roberts insists that judges need to assume the role of stewards, “managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation.” Courts “can be tempted to postpone engagement in pretrial activities,” but those “who are knowledgeable, actively engaged, and accessible early in the process...will be” far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing. Rules 16 and 26(f) demand agreement by the parties concerning preservation and discovery of ESI in the conduct of “their case management plan and discovery conferences.”

Here, it is important to consider the necessity of entering into a “clawback agreement” under Federal Rules of Evidence 502 to retrace mistakenly produced privileged ESI. Without this type of agreement there is no obligation under the rules to immediately return all apparently privileged information that was inadvertently produced electronically—e.g., by CD—unless the producing party first notifies the receiving party of the mistaken disclosure, in which case the ESI must be promptly returned, sequestered, or destroyed by the latter.

Because proportionality is critical to the cases of both sides of the litigation, there must be a dialogue between the parties, and perhaps with the court, with respect to the amount of discovery reasonably necessary in view of the claims and defenses in the case. The allowance of virtually unlimited discovery is eliminated, although the rule continues to permit discoverability of information that may not be admissible in evidence. It is all the more critical to start planning for discovery as early as possible, and to anticipate an increased use of the meet-and-confer process. It may make sense for counsel and their clients to consider a mediation procedure for negotiation and informal settlement of all discovery issues.

Rule 34—Production of Documents; Electronically Stored Information; and Tangible Things, or Entering onto Land, for Inspection and Other Purposes—deals with production and objections. While the parties may stipulate to a different period, or the court could change the time limit, it is generally 30 days from a specified date for written responses and objections to requests for production. The response must be to each item or category and specifically state whether inspection will be permitted, or the grounds for objection with reasons. The response may state either that inspection will be permitted or that copies of documents or ESI will be produced. Production must take place within the time specified in the request or another time that is reasonable as set forth in the response. Objections must state whether any responsive materials are being withheld on the basis of reasons. Partial objections are permitted so long as they are specific and permit inspection of the rest.

Rule 34 is important today because employees increasingly use their own digital equipment for work purposes—e.g., Hillary Clinton’s use of her private e-mail for government business—as well as their participation on social media. In such circumstances, how does one delineate under Rule 34 what information an organizational party has in its possession, custody, or control?

Rule 37(e) concerning sanctions for failure to make disclosures or to cooperate in discovery recognizes the common practice of producing ESI instead of simply permitting inspection of documents and sets forth the consequences for failure to preserve information when litigation is foreseeable. A motion to compel may thus now be for either production or inspection. If there is a loss of discoverable ESI because of a party’s failure to take reasonable precautions to preserve it, the court must first determine whether alternative discovery efforts can be used to restore or replace it. The court may cure the resulting prejudice by ordering additional measures “no greater than necessary” to accomplish that end.

When the loss of ESI is due to the intent to deprive a party of the use of the information in the litigation, prescribed sanctions may be imposed, such as an adverse jury instruction, dismissal of the action, or entry of a default judgment. The question of good faith and reasonableness may be relegated to obtaining an early negotiated preservation agreement from the opposing party, which takes arguments for sanctions off the table in most situations.

In cases of spoliation, when the destruction of records, for example, may have relevance to an ongoing or anticipated litigation, government investigation, or audit, the courts have not established a uniform required level of intent before sanctions are warranted. However, the courts generally look at the culpability of the offending party, prejudice to the injured party, and what remedies may be appropriate under the circumstances.

Courts are cautioned to exercise restraint in applying the sanctions specified in Rule 37(e)(2) because the remedy should match the wrong, and the severe measures provided should not be applied when the information lost was relatively unimportant or when lesser measures would provide a sufficient remedy for the loss. These measures may include forbidding the party who failed to preserve information from putting in certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions assisting in the evaluation of the evidence or argument, other than those for intentional deprivation to which Rule 37(e)(2) applies.

Roberts sums up the new amendments as follows: “We should not miss the opportunity to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result.” If lawyers and their clients keep in mind this spirit, negotiating through the increasingly complicated world of ESI will be made easier, more successful, and capable of achieving the goals of the new amendments without unreasonable challenges to all concerned. After all, it has been said that technology-assisted review can be 50 times more efficient than human review. As Susan Beck has observed, “The test for plaintiffs’ and defendants’ counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results.” Moreover, Roberts emphasized that lawyers need to be focused on what is necessary to resolve a case and encourage cooperation among the parties. This has been underlined by issuance of Opinion 2015-193 by the California State Bar’s Standing Committee on Professional Respon-
sibility and Conduct, which defines an attorney’s ethical duties concerning discovery of ESI. The opinion clearly states that ESI is now an accepted part of a law practice, and may not be ignored simply because counsel may be “highly experienced” in other aspects of litigation. Failure to be adequately prepared to conduct e-discovery qualifies as “ethical incompetence.”37

Litigation is a contest in which there will be a winner and loser, whereas in advocacy both parties speak in favor of cooperation and compromise. Therefore, successful utilization of the mediation process and application of its appropriate advocacy—vis-à-vis litigation—skills will go a long way towards achieving the cultural change ensuring that lawyers will get smarter when it comes to e-discovery.

6 Id.
8 2015 REPORT, supra note 7, at 3.
9 Id. at 5.
10 Id.
11 Id. at 6.
12 SCHEINDLIN, supra note 4, at 256, 270.
13 FED. R. CIV. PROC. 16(b)(1)(A)-(B).
14 FED. R. CIV. PROC. 16(b)(2).
18 SCHEINDLIN, supra note 4, at 257.
19 2015 REPORT, supra note 7, at 6-7.
20 FED. R. CIV. PROC. 26 (b)(1).
21 2015 REPORT, supra note 7, at 10.
22 Id. at 10-11.
23 Id. at 8.
24 SCHEINDLIN, supra note 4, at 300.
26 FED. R. CIV. PROC. 34(b)(2)(B).
27 FED. R. CIV. PROC. 34(b)(2)(C).
28 SCHEINDLIN, supra note 4, at 4.
29 FED. R. CIV. PROC. 37(e)(1).
31 SCHEINDLIN, supra note 4, at 636.
32 Id. at 631-37.
33 Id. at 1047.
34 2015 REPORT, supra note 7, at 12.
36 Id.
Consideration of the DMCA Exemption for Documentary Filmmakers

IN 2015, THE U.S. COPYRIGHT OFFICE issued an exemption from the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA) for documentary filmmakers seeking to make fair use of content from DVDs, Blu-ray discs, and online sources.1 It was the third consecutive time that the Copyright Office had issued a DMCA exemption for documentary filmmakers in its triennial Section 1201 rulemaking, and the exemption was the broadest yet granted. While the Copyright Office declined to extend this exemption to narrative filmmakers, the office considered the issue for the first time in earnest. (The entertainment industry often uses the terms “narrative film” and “fictional film” interchangeably.)

Every three years, the Copyright Office reviews exemptions for certain types of uses of copyrighted works from the anticircumvention provisions of the DMCA, which makes it a crime to circumvent technological measures employed by or on behalf of copyright owners to protect their works. The purpose of the Section 1201 rulemaking is to strike a balance between copyright and digital technologies.2 Through a public proceeding that involves the submission of proponent comments, reply comments by both proponents and opponents, hearings before members of the Copyright Office, and additional commentary from interested parties, the rulemaking allows the Librarian of Congress to consider granting limited exceptions to the prohibition on circumventions to ensure that the public can still engage in fair and other noninfringing uses of works. The Register of Copyrights has acknowledged that while Section 1201 of the DMCA has been important for the secure development of digital platforms, the anticircumvention laws also have a powerful impact on other types of consumer activities that have little to do with the concerns of copyright holders.3 For example, interested parties have advocated for a variety of acts to be exempt from anticircumvention laws, including unlocking or “jailbreaking” electronic devices, classroom teaching, and online education.4

While Section 1201 has provided an avenue for certain uses and users to obtain exemptions to the DMCA, many have criticized its anticircumvention provisions as overbroad, thus stifling a wide array of legitimate activities rather than stopping copyright infringement.5 These parties have generally argued that the DMCA jeopardizes fair use, impedes competition and innovation, and chills free expression.6

Since 2000, Section 1201 rulemaking has provided a safe harbor from DMCA liability for many different parties, although the safe harbor has a time limit. The exemptions granted under the Section 1201 rulemaking last for three years.

Well in advance of the rulemaking in late 2015, the Library of Congress issued a public notice of inquiry and request for written comments from proponents of a proposed exemption to be received no later than November 2014.7 The library later issued a call for written comments from the members of the public.8 In April 2015, the Library of Congress issued a notice of public hearing in which proponents and opponents of proposed exemptions were invited to take part in Los Angeles and Washington, D.C., in May.9

Before then, in 2008, a coalition of independent film and media organizations had requested that the Copyright Office consider documentary filmmakers—who often use archival footage—as a class of users that required an exemption from the DMCA under the fair use doctrine. After interested parties were allowed to present evidence of documentary filmmakers’ substantial need for an exemption request, a round of comments and responses, and then finally a public hearing, the exemption request was granted for documentarians who needed material from encrypted DVDs to take advantage of fair use.

The initial comment submitted in December 2008 presented the following scenario: A documentary filmmaker, familiar with the fair use doctrine, wishes to use a small portion of a copyrighted work in a documentary for purposes of criticism and commentary. In order to illustrate the point being made in the documentary, the filmmaker needs to use the archival material contained on a DVD. There is no way to access the material other than to license it from the copyright holder, which may not be a viable option for a variety of reasons. Perhaps the copyright owner is unwilling to license the material based on the subject matter of the documentary, or the copyright holder may want to charge an exorbitant fee. Alternatively, the copyright owner may propose a nonnegotiable license agreement that contains nondisparagement clauses and other provisions unacceptable to an independent journalist.

While the material may be available from lower-quality sources, for example a VHS tape, this material will not meet the technical requirements of broadcasters in the U.S. and abroad. Thus, for this type of filmmaker, fair use becomes the only option. Although the filmmaker would normally be able to rely on the fair use doctrine for the use of the material without the permission of the copyright owner, the copyright holder may propose a nonnegotiable license agreement that contains nondisparagement clauses and other provisions unacceptable to an independent journalist.

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the material cannot be accessed because the DMCA makes it a crime to circumvent access controls that protect DVDs. This predicament raises the question of whether fair use is of practical use when circumventing the access controls of the only viable source for the material would arguably violate the DMCA.

The coalition of filmmaking organizations were successful in stating this substantial need for an exemption, and in 2009 documentary filmmakers secured a Section 1201 exemption in cases in which they were using clips pursuant to fair use. The rulemaking proceeding reviews exemption requests on a de novo basis, so the fact that an exemption has been previously created no presumption that the exemption will be granted next time around. While the proponents of this request won an exemption in 2009, the Copyright Office denied the exemption in 2012 in part due to a lack of evidence that there was a substantial need for the exemption.

Thus, in 2012, a coalition of filmmaking organizations returned to advocate for an exemption from liability for circumventing access controls not only on DVDs but also Blu-ray discs and digitally transmitted video. Based on the arguments and evidence presented, the Copyright Office was convinced that there was a substantial need for an exemption that would apply to circumventing access controls on DVDs and digitally transmitted video, but it did not see enough evidence to expand the exemption to apply to Blu-ray discs. According to the filmmaker coalition, however, allowing access to Blu-ray discs was vital. Jim Morrissette of Kartemquin Films in Chicago argued that the technical specifications of broadcasters and other distributors both within the United States and abroad have become more stringent. Also, more and more material is available only on Blu-ray and from online sources rather than on DVD.

Many filmmakers rely on the fair use doctrine as well as the issuance of affordable errors and omissions (E&O) insurance policies, which now provide full coverage for claims related to unlicensed materials used pursuant to fair use. Proponents of an exemption for documentaries argued that without it, many documentary filmmakers would not be able to include the materials necessary to illustrate the points being made in their films. Gordon Quinn, longtime documentary director and producer and head of Kartemquin Films, has testified at hearings to argue that an exemption for narrative filmmakers has a substantial need for an exemption, elected not to expand the exemption to narrative filmmakers. At that time the case law was not as strong as it is today, and the proponents had very few examples of fair use in narrative filmmaking. However, the 2015 filmmaker exemption request cited a marked increase in the number of narrative filmmakers who were taking advantage of fair use, most noticeably in films that were based, in whole or in part, on real events.

In the most recent triennial hearing, the proponents of the exemption submitted to the Copyright Office a list of narrative films that had obtained E&O insurance and had been able to make fair use of copyrighted content. The list detailed use of archival footage and limited use of photographs. For example, the narrative film Cesar Chavez, released in 2014 and starring Michael Peña as Chavez, tells the story of the grassroots organizer who led the struggle of California migrant farm workers for better working conditions. The filmmakers used some archival footage that showed migrant farm workers enduring difficult conditions and footage of strikes and protests led by Chavez and the United Farm Workers. The film secured a fair use endorsement on its E&O policy and was distributed worldwide.

Additional recent cases demonstrate that fair use is often successfully employed in narrative films. For example, Sofa Entertainment, Inc. v. Dodger Productions, Inc., holds that the use of a seven-second excerpt from a 1966 episode of The Ed Sullivan Show in a musical is fair. The court found that the defendant’s use of the clip was fair even though the musical, Jersey Boys, is also certainly a commercial endeavor. Arrow Productions v. Weinstein Company is another case involving fair use in a nondocumentary film. Lovelace contains several re-creations of scenes from the pornographic film Deep Throat. The court held that the re-creations were fair use. And in Faulkner v. Sony, the U.S. District Court for the Northern District of Mississippi held that a paraphrase of a quote from William Faulkner’s Requiem for a Nun in Woody Allen’s Midnight in Paris was a fair use. The court found the use to be transformative and even expressed wonder at how “Hollywood’s flattering and artful use of literary allusion is a point of litigation, not celebration.”

These cases demonstrate that courts are quite capable of finding fair use in works that contextualize or criticize other copyrighted works, even if the work making use of another copyrighted work is a successful Broadway play or a Hollywood box office hit. However,
at the 2015 rulemaking hearings, despite the presentation of relevant case law and nonlitigated examples of fair use in narrative filmmaking, the Copyright Office decided that the potential damage to copyright holders outweighed the need for narrative filmmakers to make fair use of content on Blu-ray discs.21

While the Copyright Office’s decision not to expand the exemption to fictional filmmakers may have made it difficult for some of them to view fair use as a realistic option, it is clear from a review of the 2015 hearings that the Copyright Office seriously considered expanding the exemption to narrative filmmakers.22 During the hearings, the interested parties engaged in lengthy discussions regarding the application of fair use in films. The truth is that in Hollywood the line between a true story and a story based on true events has always been blurred. Moreover, and especially in the digital era, filmmaking allows for documentaries that use reenactments, insertion of fictional content in old scenes (factual or fictional), and creative mixing of real events or settings in otherwise fictional stories.

It has thus been difficult even for the opponents of the exemption to define categories for exemption. The DVD Copy Control Association (DVD CCA), for example, wrote in its comment that a biopic is a documentary, while other opponents insisted on a much narrower definition of documentaries.23 Ultimately, the distinction between documentary and narrative filmmaking may not matter. Filmmakers on both sides of that line are creating artistic works that use material in a transformative way to tell new stories. In fact, one of the reasons the expansion of the exemption to narrative filmmakers is so important is precisely because the line between documentary and narrative films is so blurred.

While the Copyright Office chose not to expand the exemption to narrative filmmakers, the expanded exemption granted to documentary filmmakers should have a significant impact on their ability to take advantage of fair use within their films. Before this rulemaking, a filmmaker could take advantage of the fair use doctrine in a documentary, but if the only way to source the copyrighted material was from encrypted sources, there was always the danger of liability from a violation of the DMCA.

Now that the exemption has been granted, what does this mean for the documentarian? If the documentary filmmaker has made a fair use of third-party material from an access-controlled DVD, Blu-ray disc, or online source, he or she will not be in violation of the DMCA. On the other hand, if the copyrighted material is not used pursuant to fair use, the access will also likely be a violation of the DMCA. From a practical perspective, the documentary filmmaker will want to secure an E&O insur-
ance policy for the film with a fair use endorsement. The endorsement may be secured after a clearance attorney, authorized by the E&O provider, reviews the film and provides a legal opinion on the fair use materials.

The coalition of filmmakers will likely return in 2018 to argue for an exemption that applies to narrative filmmakers. Whether that exemption is granted will depend in large part on the fair use case law that develops in the next three years as well as the demonstration by fictional filmmakers that there is a substantial need for such an exemption.

2 Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, 2 (Oct. 2015).
3 Id.
6 See id.
12 Id. at 25-26.
13 Id.
14 SOFA Entm’t, Inc. v. Dodger Prods., 709 F. 3d 1273 (9th Cir. 2013).
15 Id. at 1278.
17 Id.
18 Id. at 368.
20 Id. at 711.
22 Transcript, supra note 10, at 9-43.
WHEN it comes to litigating a representative action under the Private Attorney General Act (PAGA), there is no “one size fits all” approach. There is no requirement that it proceed as a class action, so parties and courts are left to their own creativity—and common sense—in determining how to proceed. Some courts have dismissed PAGA claims outright because the parties and the claims are too numerous or complex to be litigated, or tried, in any efficient manner. Other courts have refused to do so even when the number of individual issues to be tried could result in clogging the court’s docket for months. Some courts have allowed a subset of the proposed group to proceed through discovery—and trial—while holding in abeyance the claims of the others. Still other courts have considered allowing a statistically significant sample of employees to represent the larger group in proving liability at trial.

In a time when more plaintiffs are filing “PAGA-only” cases—arguably to avoid class certification, federal court, and arbitration—and court dockets and state budgets are overburdened, it seems logical that judges and litigants should consider whether a PAGA action can be efficiently tried despite its status as nonclass action. As a representative enforcement action, plaintiffs who bring these lawsuits do so to remove the burden from state labor agencies and seek to collect civil penalties for current or former employees. However, this strategy does not always translate into efficient litigation. Instead, it may result in the potential to overburden another critical state agency: the courts.

The representative adjudication of claims has been held to accomplish judicial economy by avoiding multiple suits and to protect the rights of persons who might not be able to present claims on an individual basis. There are two forms of representative actions: those that are brought as class actions and those that are not. Class actions must be certified as such before they can be tried. In California:

[...] party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members. The community of interest requirement involves three factors:

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Therefore, by design, courts may consider whether a PAGA action—as with any other action—can and should proceed to trial in some manageable way.

In most cases, it might be naive to expect a definitive resolution of this issue as early as the case management conference. Most conferences typically occur within 90 days of the action’s having been filed, and the parties are typically at odds about which aggrieved employees should be included in the group. The PAGA plaintiff typically defines the group as “all aggrieved employees in California,” although in general only a small fraction of the putative employees may have potential claims or have been subject to the purportedly unlawful policy or practice. Conversely, the employer defendant typically argues that the group should be more specific and contained within, for example, the work location and job category in which the PAGA plaintiff worked.

The parties are also typically at odds about which purported Labor Code violations should be tried. It is common for PAGA plaintiffs to file a complaint alleging a whole host of Labor Code violations, including missed meal and rest periods, unpaid vacation, unreimbursed business expenses, overtime, and minimum wage, not to mention derivative claims, according to many employers, usually lack merit and are experienced, if at all, only by the named party bringing the claim.

Prior to the supreme court’s decision in Arias, the courts—believed that PAGA cases should be litigated in the same way as class actions because PAGA litigants, like class actions, represent other current and former aggrieved employees for purported Labor Code violations. If this theory had been affirmed in Arias, manageability in these cases could be an essential consideration.

Now notwithstanding that PAGA representative claims need not be certified, courts have been willing to strike PAGA claims altogether when they are found to be unmanageable or so infused with individualized inquiries that proceeding to trial would be inefficient or unwieldy. In Ortiz v. Caremark Corporation, a California district court dismissed a PAGA claim by granting the defendants’ motion to strike. The court had already denied class certification, but the plaintiffs wanted to proceed to trial on their PAGA representative action nonetheless. After concluding that class certification requirements are not required to maintain a PAGA action, the court considered whether the PAGA overtime and expense reimbursement claims at issue would be manageable at trial. The court noted that in order to prove an off-the-clock claim, for example, the plaintiff needed to demonstrate that she actually worked off the clock, that she was not compensated for it, and that the employer was aware or should have been aware that she was performing off-the-clock work. The court then held that “proof of this claim would be unmanageable and could only be accomplished with detailed inquiries about each employee claimed to have done so and her manager’s knowledge thereof.”

The Ortiz court also held that the plaintiffs’ unreimbursed mileage claim would require individualized inquiries about whether the claimed expenses were necessary and incurred in direct consequence of the discharge of the employee’s duties, whether the employee actually sought reimbursement from the defendants for the expenses, and whether the defendants reimbursed the employee for the expense. The court held that gathering inquiries for each of these expenses would be nothing short of unmanageable.

Following Ortiz, the district court in Litty v. Merrill Lynch & Co., Inc., dismissed a PAGA claim on a motion to strike where the lawsuit would have required many individualized assessments of overtime and wage statement claims and would therefore be unmanageable. In Litty, defendants brought a motion to strike a PAGA action after class certification was previously denied. The court held that where it had already decided that the plaintiff’s state law claims could not be certified as a class because “individualized issues predominate[ ]” the PAGA claim would also be unmanageable given the “multitude of individualized assessments” that would be required to try the case.

In Bowers v. First Student, Inc., the court struck the plaintiff’s PAGA allegations based on a failure to satisfy Rule 23’s class certification requirements but stated that “[e]ven if Rule 23 did not apply...[PAGA] claims can be stricken if they are found to be ‘unmanageable....A PAGA claim can be considered unmanageable when a ‘multitude of individualized assessments would be necessary.’” The court in Bowers cited both Ortiz and Litty. This finding was adopted by the same court in Raphael v. Tesoro Refining and Marketing Co., holding that:

Raphael’s claims are on behalf of himself and thousands of other current or past employees. Tesoro provided a nonexhaustive list of twenty-six relevant inquiries and requirements the court finds essential to assess in order to determine the appropriate penalties. The Court would have to engage in a multitude of individualized inquiries making the PAGA action unmanageable and inappropriate.
Interestingly, the court in *Amey* considered manageability from the standpoint of ascertainability—the ability or inability to determine who is an aggrieved employee under PAGA. In *Amey*, the plaintiffs alleged Cinemark failed to provide meal and rest breaks, wages for all hours worked, accurately itemized wage statements, and other related derivative claims. There were more than 10,000 class members in this case, many of whom worked for managers who followed Cinemark’s compliant wage and hour policy. The court dismissed the PAGA claims because the plaintiffs were unable to “offer no easy way to identify those who may actually be aggrieved.” While the complaint alleged that the plaintiff—and each and every other class member—is each an “aggrieved employee,” as defined by California Labor Code Section 2699(c), the actual aggrieved employees were not defined with sufficient particularity to give Cinemark notice of the scope of the PAGA claim. Accordingly, the court dismissed the PAGA claim finding that “it would require too great a number of individualized assessments to determine the scope.”

These types of decisions are not unique to California federal courts. For instance, in *Zhang v. Amgen, Inc.*, the Ventura County Superior Court granted Amgen’s motion to deny PAGA representative status due to the court’s inability to effectively manage a case involving more than 350 plaintiffs. In *Zhang*, the plaintiffs brought suit for PAGA penalties, arguing that they were misclassified as exempt employees. The plaintiffs were senior associate scientists in various areas of specialization: biologists, microbiologists, zoologists, chemists, and biochemists. Amgen had shown that the work habits of the employees varied, as did the nature of their duties. The court found that their work habits varied to such an extent that it denied class certification. Amgen then moved to deny representative status of the PAGA claims, and the court granted the motion. The court stated:

The court believes that the variance in what the plaintiffs do is sufficiently varied that using Mr. Zhang, and what he does, is not a valid measure of what the others do. Plaintiffs have submitted a declaration from Devon Porter that an analysis based on questions to the plaintiffs can lead to a valid statistical consensus of what all of these employees have in common. As presented, it is not convincing. The affidavits of the various scientists as submitted by Amgen are more persuasive as to what is actually occurring on a day by day basis in the conduct of the work of a SAS.

Of course, some courts have rejected these decisions, finding, for example, that the “defendant’s manageability argument inconsistent with PAGA’s purpose and statutory scheme.” As the court in *Zackaria v. Walmart Stores, Inc.*, held “The fact that proving his claim may be difficult or even somewhat burdensome for himself and for defendant does not mean that he cannot bring it at all.” At the same time, the court seemed to recognize that it had an obligation to manage the proceedings efficiently and ordered the plaintiff to file a trial plan that 1) identified the aggrieved employees for purposes of the PAGA claim, 2) proposed a plan for the court’s evaluation of the aggrieved employees’ claims—with citations to relevant case law, and 3) described the evidence he plans to put forth in support of his claim that each aggrieved employee has suffered a violation.

### The UCL Analogy

Analogous rulings addressing proposed representative actions brought under California’s Unfair Competition Law (UCL) arguably provide guidance for determining whether PAGA actions should be subjected to a manageability requirement. Prior to 2004, plaintiffs similarly did not have to obtain class certification in pursuing representative claims on behalf of the general public under the UCL. Thus, California courts considered manageability as a prerequisite before allowing the representative actions to proceed to trial.

In *Bronco Wine Company v. Frank A. Logoluso Farms*, a grape grower sued a winery for breach of contract and sought recovery for “all growers under contract to [defendant] in 1982.” The winery moved to strike the claims asserted on behalf of nonparty growers or, alternatively, to require that the matter proceed as a class action. The trial court denied the motion and entered judgment for the defendant, the court found “it would require too great a number of individualized assessments to determine the scope.”

### The UCL Analogy

Another case, *Marshall v. Standard Insurance Company*, has a similar effect. In that case, the named plaintiffs claimed that the defendant, a disability insurance carrier, violated the UCL by unlawfully denying his claim for disability benefits. The defendant filed a motion to dismiss as to the representative claims only. The court applied the five *Bronco Wine* factors and found the case ill suited for representative action, as there was no “simple, straightforward mathematical calculation” that could be used to resolve all claims. Instead, the court would have to review the individual medical records, prior earnings, length of disability, and any offsetting income of each claimant. This would “pose enormous control and management problems for the court” and could raise due process concerns regarding the potentially affected, but unrepresented, class members.

Some courts have rejected the UCL analogy to PAGA claims because PAGA claims seek civil penalties on behalf of the state as opposed to individual equitable relief, which is the only remedy under the UCL—the damages component of which might arguably support greater individualized assessments. However, these courts did not consider how a plaintiff will try the case and are therefore arguably of little value to the manageability analysis.

Conversely, in *Alakozai v. Chase Investment Services Corporation*, the court found that the “Plaintiffs’ claims for penalties under the Labor Code and PAGA...necessitate[d] the same underlying showing as their restitution claims: that the defendants misclassified its employees as exempt” and denied the representative action to proceed to trial. Since PAGA plaintiffs are required to prove “Labor Code violations with respect to each and every individual on whose behalf plaintiff seeks to recover civil penalties,” the *Alakozai* court logically concluded that where a plaintiff cannot establish manageability with...
the class and working each of the various
class members. To be representative, the proposed wit-
testies must be a random, statistically signif-
erant sample of multiple class members
necessary to differentiate between employees who
accordinly complies with some provision of
n. Labor Code Section 226(a) because they inaccurately stated the total
number of hours worked by the plaintiff in the
pay period and did not state the overtime
rate of pay. In order to proceed to trial, the
plaintiff requested that a sample size of
10 percent of the represented group be used,
or about 4,200 employees.

The defendant opposed this request, stat-
ing that: One must examine each wage state-
ment received by each class member
to determine liability. For example, two
separate class members may each receive 60 wage
statements, one or more of which allegedly did not tech-
nically comply with some provision of
Labor Code Section 226(a). One of
the two class members may have one
non-complaint wage statement, while
the other class members may have 59.
The court agreed and rejected the plaintiff’s
request for statistical sampling, stating that
[a] sampling methodology would not be
able to differentiate between employees who
never worked premium or overtime hours
and those that did.

On the other hand, Garvey v. Kmart Cor-
poration was tried to a judge based on a
sample of employees. The plaintiff claimed
that she was denied a suitable seat when she
worked as a cashier at Kmart. Initially, the
plaintiff sought to represent a class of Kmart
cashiers throughout California that amounted
to approximately 3,600 individuals from 100
stores. Due to manageability concerns con-
cerning statewide certification, the court denied
class certification, in part, and certified a nar-
rower class of 71 cashiers who worked in a
single Tulare Kmart store in which the named
plaintiff worked (within the applicable
limitations period). The order also held in abreave “the extent, if at all, any other Kmart
stores will be certified. Notably, the court
explained in a posttrial order that “no class
manageability issues arose and, indeed, it
became apparent that class treatment for at
least the Tulare store was entirely appropri-
ate.”
One reason for this ruling could be the fact that the evidence was based on the
design of the store and not on testimony of
any of the 71 employees.

In Rix v. Lockheed Martin Corporation, the
plaintiff brought a class action and a PAGA
representative action for the misclassification
of security guards as exempt employees. The
operative complaint alleged 15 causes of action,
including purportedly unpaid overtime, missed
meal and rest periods, and the defendant’s failure
to provide accurate wage statements.
The court denied class certification and noted
with respect to the PAGA claim that “[t]he
Plaintiff will have to prove Labor Code viola-
tions for each and every individual on whose
behalf he seeks to recover.”

The defendant moved to dismiss the PAGA
case as unmanageable. Rather than propos-
ing a statistical sampling, the plaintiff
attempted to shift the burden to the employer
to prove that all 88 employees were properly
classified and stated simply that “[t]he
Defendant remains free to call any and all witnesses
that Defendant believes is required to defend
the PAGA claim and the alleged Labor Code
violations.”

The court rejected this approach and granted the motion to dismiss, stating that
[t]he Plaintiff’s PAGA claim requires
Plaintiff to prove Labor Code violations
for over one thousand claims. The Court is
not persuaded that this can be done through
cummon evidence.

Finally, in the context of awarding a de-
fault judgment, the court in Guifu Li v. Perfect
Day Franchise, Inc., accepted the statistical
survey evidence submitted by the plaintiff to
establish the amount of PAGA penalties due.
The plaintiff’s economic expert interviewed
24 out of 127 randomly selected class members.
The results of these interviews were
averaged with respect to the plaintiff’s claims
for unpaid minimum wages, unpaid overtime
wages, inaccurate wage statements, and
unreimbursed work-related expenses, and the
average calculation was applied to the remain-
ing 103 class members. With respect to the
PAGA penalties, in particular, the expert analy-
sis included a 100 percent-rate violation for
a total PAGA penalty amount of $3,283,744.
Except for the wage statement PAGA claim
which the court found would be unnecessarily
duplicative—the court accepted these calcula-
tions and awarded the plaintiff $2,764,896.

In the face of Arias, class certification of
PAGA claims is a nonissue. However, that
does not mean that California courts are re-
quired to ignore obvious case management
concerns underlying large PAGA cases. Coun-
sel are encouraged to use their judgment, cre-
ativity, and expertise to assist the courts in
determining the most efficient use of court
resources for resolving the specific PAGA
claims at issue. While plaintiffs will likely con-
tinue to advocate against a procedural review
of collective treatment for PAGA cases, the
survival of unmanageable PAGA claims is not
a foregone conclusion.

1 See, e.g., Ortiz v. CVS Caremark Corp., No. 12-CV-
5859 EDL, 2014 WL 1117614, at *3-5 (N.D. Cal.
Mar. 18, 2014).
12-CV-1520 FMO, 2015 WL 6745714 at *6 (Nov. 3,
2015).
3 See, e.g., Jeske v. Maxim Healthcare Servs., Inc.,
(limiting discovery to the claims in the complaint where
plaintiff has knowledge of actual labor code violations);
Garvey v. Kmart Corp., 11-cv-2573 WHA, 2013 WL
1284321, at *1 (Mar. 28, 2013) (limiting trial to one
store of 71 employees).
4 See, e.g., Delgado v. New Albertson’s Inc., No. 08-
CV-806 DOC (Jun. 21, 2010).
5 Crown, Cork & Seal Co. v. Parker, 462 U.S. 345
(1983).
6 See Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th
116, 126 n.10 (2000); Residents of Beverly Glen, Inc.
7 CODE CIV. PROC. §382.
8 Id.
10 Duran v. U.S. Bank Nat’l Ass’n, 59 Cal. 4th 1, 29
(2014).
11 Id.
12 Arias v. Superior Ct., 46 Cal. 4th 969 (2009). Notably,
however, the court left open the possibility that a PAGA
plaintiff could seek to certify the claims. See id. at 981
n.5.
13 Id. at 930.
14 Id.
15 See, e.g., Zackaria v. Wal-Mart Stores, Inc., No. 12-
CV-1520 FMO, 2015 WL 6745714, at *6 (Nov. 3,
2015) (“as the Court concluded with respect to defen-
dant’s argument regarding Rule 23, the court finds
defendants manageability argument inconsistent with
PAGA’s purpose and statutory scheme”).
16 Amey v. Cinemark USA Inc., 13-CV-5669 WHO,
2015 WL 2251504, at *16 (N.D. Cal. 2015).
17 See, e.g., Cal. R. Ct. 3.725, 3.727(15); Fed. R. Civ.
P. 1 (“These rules shall be construed and admin-
istered to secure the just, speedy, and inexpensive deter-
dination of every action and proceeding.”); Thompson
v. Housing Auth. of City of Los Angeles, 782 F.2d
829, 931 (9th Cir. 1986) (“District courts have inherent
power to control their dockets.”).
18 See, e.g., Amey, 2015 WL 2251504, at *2; Ortiz v.
CVS Caremark Corp., No. 12- CV-5859 EDL, 2014
WL 1117614, at *1 (N.D. Cal. Mar. 18, 2014); Jeske
v. Maxim Healthcare Servs., Inc.-11-CV-1838 LJO,
19 See, e.g., Jeske, 2012 WL 78242, at *19.
20 See, e.g., Rafael v. Tesoro Ref. & Mktg. Co., LLC,
No. 15-CV-2862 ODW, 2015 WL 5680310 (C.D. Cal.
§§201, 202, 204, 226(a), 226.7, 510, 512(a),
1174(d), 1194, 1197, 1197.1, 1198, 2800, and 2802)
(Continued on page 35)
ALTHOUGH in-house lawyers have an attorney-client relationship with their employers and in-house counsel and outside counsel owe the same duties to their clients, cases decided under California law demonstrate that an employer cannot sue its in-house lawyer employee (or other employees) for malpractice or negligence arising from the acts (or omissions) of the in-house lawyer that are within the scope of the employee’s employment. The doctrine of respondeat superior renders an employer’s claim of liability for the professional negligence of in-house counsel unavailable. It appears that employers must respond to in-house counsel who commit malpractice in the course of their employment the same as they would treat any other employee who caused damage or injury to the employer—suing in-house counsel for malpractice is simply not an option.

There can be no doubt that an attorney-client relationship is created when a nonattorney employer hires an in-house lawyer, and that outside counsel and in-house lawyers have the same duties to their employer clients. Among these duties are the duty of loyalty and the duty of confidentiality.1 Lawyers are bound not to reveal or disclose the confidential information of a client,2 but in addition lawyers are required 1) to avoid the representation of adverse interests,3 2) not to limit the lawyer’s liability to the client,4 and 3) to communicate with the client and keep the client reasonably informed about significant developments relating to the representation.5

Although the duties are the same, the exposure for in-house attorneys and outside attorneys breaching duties or committing malpractice are very different. California courts have recognized the similarity of the obligations. In citing General Dynamics Corporation v. Superior Court,6 the court in Gutierrez v. G & M Oil Company, Inc.,7 stated that “The important thing about General Dynamics for our purposes is that there is no way one can read it without coming away with this basic thought: In-house attorneys employed as attorneys for their employer do indeed have an attorney-client relationship with their employers.”8 The court in Gutierrez also cited PLCM Group v. Drexler,9 in which it was held that both in-house counsel and outside counsel are “bound by the same fiduciary and ethical duties to their clients.”10

These notions were further reinforced by the Gutierrez court’s application of provisions relating to certain procedural

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requirements of litigation contained in Section 473 of the California Code of Civil Procedure to in-house lawyers. In applying Section 473, the court stated: “There is nothing in Section 473 that suggests corporations or other business entities who elect to have an in-house lawyer represent them in litigation should be at some disadvantage vis-à-vis the negligence of their attorneys that would not apply when they elect to retain outside counsel.”¹¹

Despite the similarity of the obligations and duties of in-house counsel and outside counsel, employers do not have the same recourse against in-house counsel for malpractice that is available against outside counsel. However, one possibility for an employer to recover for the malpractice of an employee attorney can be found in Section 2865 of the California Labor Code, which provides that “[a]n employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer.” Section 2865 has seldom been cited on the issue of malpractice liability. Notwithstanding the fact that in-house counsel and outside counsel have the same duties to their clients, there is a paucity of appellate authority, both in California and in other states, on the issue of whether an employer has the ability to sue their in-house counsel for professional negligence.¹²

**Cahuenga Partners**

A recent unpublished decision, 1538 Cahuenga Partners, LLC v. Jacqueline M. Fabe,¹³ which covers a number of issues, including whether an employer can sue its in-house counsel employee for malpractice, surveyed the landscape relating to the ability of employers to sue employees. In sustaining a demurrer to a malpractice claim, the Cahuenga Partners court rejected the argument that Section 2865 permits an employer to sue an employee for negligence.

Specifically, Cahuenga Partners strongly rejected two cases, Division of Labor Law Enforcement v. Barnes and Dahl-Beck Electric Company v. Rogge,¹⁴ both of which were cited by the employer for what the court of appeal declared to be “the rather startling proposition that a corporate employer may sue its in-house counsel for professional negligence, stating that “Cahuenga offers no reasoned argument why we should interpret the term ‘culpable degree of negligence’ in Section 2865, for the first time since its enactment in 1937, to include the professional negligence of in-house counsel” and indicating that no other credible authority exists in support of such a position.”¹⁸

**Respondeat Superior**

Under the well-established doctrine of respondeat superior in the law of agency, the principal (an employer) is responsible for the actions of its agents (employees) in the course of employment. The court in Harris v. Oro-Dam Constructors¹⁹ stated that “Although in a sense Respondeat Superior imposes strict liability upon the employer, its foundation is the imputation of the employee’s fault to the employer because of the special relationship between them.”²⁰ Citing several cases only one of which was a California appellate decision,²¹ the court in Harris stated that “activity ‘within the scope of employment’ is the pivot of the employer’s responsibility, but the pivoting action responds to two primary inquiries: (1) the activity’s benefit to the employer’s enterprise and (2) his right to control it.”²²

It is certainly clear that in-house counsel for a corporation is an employee and agent of that corporate employer, and so long as any wrongful acts by the in-house lawyer occur in the scope of employment, the doctrine of respondeat superior applies and the employer is vicariously liable to third parties harmed by the lawyer’s conduct. Relying on this tenet, the Cahuenga Partners court concluded that an employer does not have the capacity to and cannot sue its employee in-house counsel for professional negligence, because the doctrine of respondeat superior makes the employer responsible for the negligence of the employee lawyer.

Any analysis of the issue should take into account that there is the ethical prohibition found in Rule 3-400(A) that lawyers may not prospectively limit their liability to the client for malpractice which states that an attorney shall not: “(A) Contract with a client prospectively limiting the member’s liability to the client for the member’s professional malpractice.” However, notwithstanding the fact that there appears to be no liability imposed on in-house counsel for malpractice, in addition to relying on the current legal standards applicable to in-house lawyers, cautious attorneys may seek, in advance, to contractually limit potential exposure to their employer client. While they cannot accomplish this objective by entering into an agreement with their employer client, there may be a way for the in-house lawyer to achieve this additional protection.

Notwithstanding the provisions of Rule 3-400(A) and without violating any duties thereunder, in-house counsel may obtain contractual indemnification from a nonclient, such as an entity or individual affiliated with the employer,²³ but for which the in-house lawyer does not perform any services and has not previously represented in an attorney-client capacity. While this is not a proven method, there seems to be no prohibition.

Under Labor Code Section 2802, an employer is required to indemnify an employee “for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties...including reasonable costs and attorney’s fees.” However, Section 2802 only applies to general employer-employee relationships and to third-party claims against the employee and has been held not to apply to claims by an employer against its own employees. Therefore, if an employer were to sue an employee attorney for malpractice and the employee is ultimately held liable for malpractice, the employee attorney will not be able to recover for the cost of defending the action brought by the employer. The court in Cahuenga Partners rejected the defendant’s assertion that she could be indemnified for expenses incurred in a suit her own employer filed against her, although the court found that the employer was responsible to indemnify her for expenses in a third-party suit against her.

In Nicholas Laboratories, LLC v. Chen,²⁴ the court held that Labor Code Section 2802 does not require an employer to reimburse its employee for attorney fees incurred in the employee’s successful defense of the employer’s action against the employee. After the employer filed a complaint against its employee, the employee responded with a cross-complaint, claiming that he was entitled to indemnification under Section 2802 of the Labor Code for the expenses and attorneys’ fees he incurred in defending himself against claims that related to his service as an employee or agent of the employer plaintiff. The court of appeal rejected the employee’s rationale for attorney fees, stating “Labor Code 2802 is applicable to third party claims against an employee, but not as to claims by an employer against its own employees.”²⁵ In so ruling, the court of appeal cited Cassady v. Morgan, Lewis & Bockius LLP, which held:

Section 2802...requires an employer to indemnify an employee who is sued by third persons for conduct in the course and scope of his or her employment, including paying any judgment entered and attorney’s fees and costs.
MCLE Test No. 258

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at http://www.lacba.org/mcleselftests.

1. An attorney-client relationship is created when a nonattorney employer hires an in-house lawyer.
   - True.
   - False.

2. Outside counsel and in-house lawyers are bound by the same fiduciary and ethical duties to their clients.
   - True.
   - False.

3. Labor Code Section 2865 provides that employees who are guilty of a culpable degree of negligence are liable to their employers for the damage.
   - True.
   - False.

4. Labor Code Section 2865 has been found to support the imposition of malpractice liability on in-house counsel.
   - True.
   - False.

5. An employer may not, pursuant to Code of Civil Procedure Section 473, seek relief from a court from a judgment, dismissal, order, or other proceeding taken against it as result of a mistake of its in-house counsel.
   - True.
   - False.

6. Liability for the malpractice of an in-house attorney is imputable to the employer of the in-house attorney by virtue of the doctrine of respondeat superior.
   - True.
   - False.

7. An outside counsel may not prospectively limit his or her liability to a client for malpractice.
   - True.
   - False.

8. An in-house attorney may not prospectively limit his or her liability to a client for malpractice.
   - True.
   - False.

9. Labor Code Section 2802 requires an employer to indemnify an employee for necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, including reasonable attorney fees and costs.
   - True.
   - False.

10. Labor Code Section 2802 has been held to apply to claims by an employer against its own employees.
    - True.
    - False.

11. If an employer were to successfully sue in-house attorney for legal malpractice, Labor Code Section 2802 would allow the employee attorney to recover from the employer the costs of defending the action.
    - True.
    - False.

12. Labor Code Section 2802 has been found to require an employer to pay the fees and costs incurred in an employee’s affirmative litigation against the employer.
    - True.
    - False.

13. An employer may sue an in-house attorney for legal malpractice.
    - True.
    - False.

14. Employers generally obtain legal malpractice insurance to protect them from the potential malpractice of their in-house attorneys.
    - True.
    - False.

15. Historically, a client’s power to discharge an attorney has been absolute.
    - True.
    - False.

16. A client’s power to discharge an attorney is not subject to any limitation as a matter of public policy.
    - True.
    - False.

17. In the context of a wrongful termination of an in-house attorney, a client’s power to discharge an attorney is not absolute.
    - True.
    - False.

18. An in-house attorney may assert a claim for wrongful discharge against his or her employer based upon his or her status as a whistleblower.
    - True.
    - False.

19. A retaliatory discharge claim may be available to in-house attorneys when the ethical norms of the Rules of Professional Conduct conflict with an illegal demand of the attorney’s employer.
    - True.
    - False.

20. Being a whistleblower automatically absolves an in-house attorney from his or her ethical duty to maintain client confidences.
    - True.
    - False.
incurred in defending the action.... As long as the employee is acting within the scope of his or her employment, the right to indemnity is not dependent upon a finding that the underlying action was unfounded. 26

In addressing the employee’s argument that statutory indemnification is owed if the employee successfully defends the employer’s claim, the court in Nicholas Laboratories acknowledged that “[n]o court has directly addressed this precise issue.” The court of appeal went on to state that the employee’s “interpretation of Section 2802 conflicts with the common understanding of the word ‘indemnify’ as applied to litigation (i.e. an obligation to pay for judgments suffered and/or expenses incurred in a lawsuit brought by a third party against the indemnitee, not a one-sided attorney fee provision in a dispute between the indemnitor and the indemnitee).” 27 Two federal cases discussed in Nicholas Laboratories come closer than any California case in addressing the issue relating to indemnification by the employer. In the first of these cases, O’Hara v. Teamsters Union Local No. 856, 28 employees were successful in their claim for indemnification under Section 2802 for costs in defending a lawsuit by a third party, notwithstanding a cross-claim by the employer seeking indemnification for defending and settling the third-party action on the grounds that the employees’ actions had been illegal. The employees also succeeded in obtaining indemnification for fees and expenses incurred in enforcing their claims against the employer. The court in O’Hara held that defending against an employer’s claim can (at least in some circumstances) provide the basis for indemnification under Section 2802. However, the court in Nicholas distinguishes this case because it “involved an underlying third party claim that was the basis for the monetary dispute between the parties over who was required to indemnify whom.” 29

The second federal case, Freund v. Nycomed Amersham, 30 held that an employee who

Wrongful Termination of In-House Counsel

In addition to not being subject to malpractice claims by their clients, in-house lawyers differ from outside lawyers in other respects. As the California Supreme Court observed in 1972 in the case of Fracasse v. Brent, “a client should have both the power and the right at any time to discharge his attorney with or without cause.” 31 In fact, this is still technically a true statement. However, developments in employment law and the law of public policy have placed limits on a client business’s absolute right to discharge its in-house lawyer.

This principle was recognized by the same court in 1994 in its decision in General Dynamics Corporation v. Superior Court. 32 The case arose out of the 1991 termination of Andrew Rose, an in-house attorney in the employ of General Dynamics. When Rose sued General Dynamics for wrongful termination, the company demurred, asserting that because Rose had been employed as an in-house attorney he could be fired for any reason or for no reason based upon the principles enunciated in Fracasse. 33 When General Dynamics came before the court, it acknowledged that the principle it had enunciated 22 years earlier as an absolute in Fracasse best fit a traditional form of the attorney-client relationship that was fundamentally different from what existed in the modern world of in-house lawyers. The court reasoned:

The sources of contract and tort claims in wrongful termination cases are analytically distinct from the circumstances confronting the contingent-fee plaintiff that propelled our analysis in Fracasse. Given these disparate origins, it is unlikely that the client’s undoubted power to discharge the attorney at will is one that can be invoked under all circumstances without consequence. 6

The court recognized that an unqualified immunity from any liability for terminating in-house counsel would be inconsistent with both the implied and in-fact contractual limitations that underlie the principles of wrongful termination law as well as the underlying fundamental public policies that underlie antidiscrimination law and statutory rights to collective bargaining. The General Dynamics court concluded that “an in-house attorney may pursue a wrongful discharge claim for damages against his corporate employer even though a judgment ordering his reinstatement is not an available remedy.” 15

In declaring the right of an employer to terminate in-house counsel at will to be subject to limitations based upon considerations of fundamental public policy, the court stated: [T]he in-house professional may be trapped between a laudable desire to further the goals of the client-employer and restrictions on conduct imposed by the ethical norms prescribed by the Rules of Professional Conduct. Of course, the potential for such a dilemma is common to outside counsel as well. But, unlike their in-house counterparts, outside lawyers enjoy a measure of professional distance and economic independence that usually serves to lessen the pressure to bend or ignore professional norms. Here again, the distinguishing feature of the in-house attorney is a virtually complete dependence on the good will and confidence of a single employer to provide livelihood and career success. 6

By extension, therefore, the court found that the in-house attorney’s right to be a whistleblower and to pursue a claim of retaliatory discharge as the circumstances require should be protected if and when an attorney’s adherence to his or her professional ethical responsibilities place them at odds with his or her in-house employer. 7

The court sought to balance the right under common law of an in-house attorney to pursue a claim for wrongful or retaliatory discharge with the professional ethical obligations of an attorney to maintain client confidences. In achieving this balance, the court made it clear that an in-house attorney is not absolved from the ethical obligation to maintain client confidences.

Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client. In any event, where the elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege. 8

Thus, while public policy may permit in-house attorneys to sue former employers for wrongful discharge, it does not resolve the ethical dilemmas attorneys may face in doing so.—D.B.P., E.B., & J.A.O.

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2. General Dynamics Corp. v. Superior Court, 7 Cal. 4th 1164 (1994).
3. Fracasse, 6 Cal. 3d 784 (1972).
4. General Dynamics, 7 Cal. 4th at 1175.
5. Id. at 1177 (emphasis in original).
6. Id. at 1182.
7. Id. at 1186.
8. Id. at 1190.
successfully sues an employer for wrongful termination is not entitled to recover attorney fees in that action under Section 2802, stating, "As the language of the statute makes clear, [Section] 2802 is designed to indemnify employees for the legal defense costs when they are sued for actions arising out of their employment....It does not require an employer to pay the fees to support an employee's affirmative litigation against the employer."31

The court in Nicholas stated that "any interpretation of Section 2802 which would allow the statute to become a unilateral attorney fee statute in litigation between employees and employers would be incompatible with that larger body of law."32 The court concluded that attorney fees incurred by the employee in defense of an employer's claim do not fall within the domain of Section 2802 of the Labor Code, stating:

We are not persuaded that the Legislature, in drafting Section 2802, intended to depart from the usual meaning of the word 'indemnify' to address 'first party' disputes between employers and employees. The Legislature could have specifically provided in Section 2802 that attorney fees incurred defending an action by the employer were recoverable by a prevailing employee. The fact that the Legislature did not so suggests disputes between employers and employees are subject to the ordinary rules applying to the recovery of attorney fees in California litigation.33

It is interesting to note that malpractice insurance is not generally available to cover claims by employers for professional negligence against in-house lawyers. Malpractice liability insurance generally covers the negligence of a lawyer to clients and third parties and does not cover intentional torts or punitive damages.34 Moreover, employment practices liability insurance provides coverage for wrongful acts arising from the employment process, with the most frequent types of claims covered being wrongful termination, discrimination, sexual harassment, and retaliation. Some insurance carriers, such as Chubb, provide a form of employment practices liability insurance for law firms, which offers coverage for punitive damages and claims by partners. It is unclear as to whether the coverage extends to protections for in-house counsel.

Although an attorney-client relationship exists between in-house lawyers and their employers, in which the in-house lawyers owe the same duties to their employers as outside counsel owe to their clients, the few relevant California cases demonstrate that an employer cannot sue its in-house lawyer employee (or other employees) for malpractice negligence arising from the acts or omissions of the in-house lawyer that are within the scope of the lawyer’s employment. Furthermore, it appears that employers are not required to indemnify in-house counsel (or other employees) under Section 2802 of the Labor Code for expenses incurred by the in-house lawyer in a suit filed by his or her employer, successful or not. Thus, an employer may not hold its in-house counsel responsible for professional negligence through claims for damage. Instead, employers should look to follow traditional employment-related alternatives to in-house lawyers whose errors cause injury to the employer.

1. Bus. & Prof. Code §6068(e)(1) imposes the duty on an attorney to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
8. Id. at 559.
10. Id. at 1094.
16. Id. at *17.
17. Id.
19. Id. at 915.
22. The Fourth District Court of Appeal, in Brooklyn Navy Yard Congregation Partners, L.P. v. Superior Court, 60 Cal. App. 4th 248 (1997) confirms the general rule that a corporate affiliate is a distinct entity except in limited circumstances, including those in which one corporation is the alter ego of the other.
25. Id. at 1247 (citing and adding emphasis to Cassidy v. Morgan, Lewis & Bockius LLP, 145 Cal. App. 4th 220, 230 (2006)).
30. Id. at 766.
32. Id.
33. See INS. CODE §533.
The Health and Safety Code offers local governments a means of remediating blighted properties through receiverships.
the property have to collect income to be put into receivership. The types of property range from burned-out houses in the desert valued at less than $10,000 to multimillion-dollar apartment buildings in some of the largest urban areas in the state. The question is not one of size or value but whether or not the property presents a substantial danger.

Section 17980.7(c) authorizes the appointment for any substandard building while Section 17980.6 defines as substandard any building that violates the Health and Safety Code, the State Building Standards Code, local ordinances, and municipal codes when “the violations are so extensive and of such a nature that the health and safety of residents or the public is substantially endangered.”

A nuisance has been found due to accumulation of trash, faulty wiring, faulty windows, immobile vehicles parked on-site, and fire hazards. Also, a dilapidated roof, lack of landscaping, structural maintenance issues, dried brush as fire hazard, and deterioration and vandalism damage have been found to constitute nuisance property conditions. Every city code enforcement team or official knows which properties are nuisances in their communities, and in making these showings to the court, a photo can be more effective than 10 declarations describing the problem.

**The Receiver**

Once the showing of a nuisance is made, and the notice provisions met, the receiver can be appointed under Section 17980.7(c). Specific portions of the statute govern what a receiver can do; however, the powers and duties start with Code of Civil Procedure Sections 564 et seq. So the statute governs, but the appointment order and later orders of the court set the course for the receiver: “Generally, the functions and powers of a receiver are controlled by statute, by the order of appointment, and by the court’s subsequent orders.” Moreover, the receiver’s powers can be ratified after the fact by order of the court if necessary. The theory underlying the statute is that the receiver presents recommendations and options to the court, for all parties to comment on, with the court’s making the final decision as to the course of action. Thus, in principle, the court stays out of the day-to-day decisions that have to be made to correct violations and instead relies upon the recommendations of its agent or cedes specific decisions to the receiver who is effectively the instrument of the appointing court.

Who may serve as a receiver is mostly undefined by statute but governed by real-world practicalities. Receivers cannot have any interest in a property or a prior agreement with the parties; however, the proper receiver and necessary skills are as varied as
the properties over which receivers are appointed. Although receivers are often attorneys, a law degree is not required. Receivers can be accountants or construction managers, for example. For matters that involve complex legal issues or require many court appearances and complicated requests, however, an attorney is advisable, just as for any other party engaging in complex matters before a judge. The authority for a receiver to hire an attorney is in Rule 3.1180 of the Rules of Court, and even attorney receivers are often expected to retain their own counsel when necessary: “The receiver...although himself a member of the bar, [...] could hardly be expected to act in propriety, conducting a trial of such gravity and complexity, examining witnesses and making objections and arguments.”15

The decision that most cities have to make when nominating a receiver is to find a balance of experience, skill, and cost. An increasing number of courts are looking with a jaundiced eye towards billing rates of $600-800 per hour, but on the other hand, courts are reluctant to appoint individuals without any experience. In the end, the court has to approve the fees and billing rates,16 so it is wise for the requesting party and the court to ensure that the recommended receiver is a match for the duties of the appointment.

The Abatement Process

The work that a receiver is authorized to do is governed by the appointing court and the need that the receiver was appointed to remedy, thus the end of the receivership comes when that work is completed.17 Each case has its own scope of work or list of things that have to be done. This may be a full-scale, total demolition,18 or it may simply be repairing a stairway or connecting a sewer line.19 In some cases, it means selling the property to a buyer that has shown an ability to remedy the violations.20 The approach and the recommendation on what work has to be done and how best to do it is left up to the receiver, and then the court as to whether to accept the recommendation.

As discussed at length in the preeminent Health and Safety Code receivership case, City of Santa Monica v. Gonzalez, demolition is proper in the circumstances that call for it and that use of discretion will not be disturbed on appeal absent “evidence of fraud, unfairness or oppression.”21 That same deferential standard does not apply only to demolition but also may apply for determinations to sell the receivership property to address the violations,22 or even a court’s denial of the recommendation and a refusal to pay for the work.23 The appointing court reviews the receiver’s recommendations and chooses whether or not to act on them. Thus, appellate review of these determinations, even when as drastic as ordering the sale or demolition of the property, is done only to search for an abuse of discretion.

The challenge for the receiver is the balance of the work necessary as well as value and equity. The receiver must evaluate the condition of the property and make recommendations to the court that are reasonable based on the economic realities that exist and the interested parties’ concerns. The work recommended by the receiver and approved by the court must be capable of being financed either by the owner’s willingness to pay for the work or through a receiver’s certificate, which is secured to the property itself and can be funded to pay for the work necessary. This is where the experience and skill of a receiver comes into play, because a lot of people can recommend or solicit bids from contractors, but a receiver has to be able to arrange financing for that work.

The Costs

The fees and costs, including the city’s enforcement and abatement costs, are generally paid by the receivership property.24 This transaction is usually at the expense of an owner’s equity or a secured lender, but the costs are in some way paid out of the receivership property. Thus, the property owner or interest holders that created the nuisance pays for the remediation, and the costs are not passed on to the taxpayers burdened with the nuisance. A nuisance property not only pays its own remediation costs but also pays the costs of obtaining the appointment of the receiver, as well as the administrative costs incurred by the receiver.

The process of paying receivership fees and costs is a simple matter when a property is creating income but can be difficult when there are no readily available funds to cover the fees and costs. If there is insufficient income, the party responsible for the condition of the property can be ordered to pay the unpaid fees and costs personally.25 Obviously, owners that refuse to cooperate to bring a property into compliance are also unlikely to cooperate to pay the fees and may be ordered by the court to pay the fees and costs. If there is insufficient income generated by the property and the owner will not or cannot pay to correct the existing violations, the court is authorized to issue a receiver’s certificate.26

The receiver’s certificate authorizes a lien against the property and is funded by a private lender with a deed of trust. The certificate can be granted priority over prior secured lenders if the court sees fit to do so.27 The difficult task is to find lenders for the certificate, as lenders are often unfamiliar with it, and often only hard-money lenders are willing to put up funds. The seminal case on this aspect of receivership is Title Insurance & Trust Company v. California Development Company, which involved certificates for a railroad line and allegations that the appointed receiver was instead seeking to extend the line.28 The necessity for a court to prioritize a certificate was left entirely to the discretion of the particular superior court.29

If a certificate or owner-funding are not options, the court can order the property to be sold as part of the actions necessary to remedy the violations, and the manner in which the property is sold can be altered to achieve receivership goals.30 The court can even “strip” the existing liens from the property, and place them on the sale proceeds if need be.31 While a sale is usually only necessary at the end of the process—and only in certain cases—it sometimes can be a useful tool to accomplish the goal of the receivership.

All of these powers are tools of the receivership court to be utilized when necessary and appropriate in order to achieve the purpose for which the receivership was established. Obviously, stripping liens off properties or subordinating existing liens is not a trifling matter and may not be done without substantial findings in highly contested motions. Just as a receivership is a “drastic remedy to be employed only in exceptional circumstances,”32 these extreme methods to pay for the work performed in a receivership are to be used carefully and only when necessary. Many judges are hesitant to utilize these methods to pay for the receivership, but they are available options when conditions support their use.

The End of the Receivership

Health and Safety receiverships end when the conditions that required the appointment are remedied.33 The end of a receivership requires the preparation and filing of final accounting, when all expenses, including the receiver’s interim fees and costs, are reviewed.34 The receiver will file a motion for discharge, which is the last call for claims against the receivership estate and the receiver.35

There are often dubious claims made against the receiver and the receiver’s administration when the motion for discharge is made. For example, the derelict property owner ironically could find fault in the work performed by the receiver that the owner previously refused to do. Also, owners missing in action for months or years often finally show up for the distribution of whatever remains in the receivership account, or to dispute the final accounting. As this is a common occurrence, there is some case law on the issue, mostly protective of the receiver.

In City of Whittier v. Southland Display Company, a property owner was denied leave to sue the receiver,36 and the legal fees for...
defending against the suit brought in direct
defiance of that denial were awarded and
affirmed.37 In Builders Bank v. Carbon Beach
Partners, LLC, some ex post facto challenges to
motions and requests for the receiver were
denied, and the court affirmed.38 In Hemar-
atanatom v. Pasternak, an appointed receiver
was supported by all parties (who even op-
posed his request to step down as receiver)
until the bill came due.39 In both of the latter
cases, the courts found that these late challenges
were unwarranted. Just as the reasons for ap-
pointment are left to the judge's discretion,
so is the review of the alleged claims and pro-
cedure for allowing those claims to be made.

The appointing court retains jurisdiction
up to 18 months after discharge.40 While
this can be helpful if the property was sold
to a new owner in order to remedy the vio-
lations, often that much time is not necessary.
Any lingering or expected issues—like con-
tinued hoarding or the living conditions of
owners—can be planned for at discharge.
For example, service contracts to haul away
junk can be set up or arrangements made
for an owner to be placed into a care facility.
Usually, the matter is then complete, requiring
no more action, but Section 17980.7(c)(10)
acts as a backstop in case any further action
is required later.

Reluctance to Seek Appointment
While the receivership remedy is a conclu-
sive, inexpensive, and effective way to deal with
the most pressing and persistent nuisance
properties, some cities or counties are reluc-
tant to utilize the Health and Safety receiver-
ship remedy. First, the procedures and show-
ing required to obtain an order granting a
receivership are detailed. The notice require-
ments are strict and there are fact-intensive
findings that have to be made to the judge.
Also, all this has to be done by a city that
is often frustrated by years of prior enforcement
on a property that has already been a constant
drain on public resources.

Second, the receivership remedy can be
difficult politically. While the most dire and
dangerous properties are clear-cut, not every
receivership property is an abandoned drug
squat. Obviously, a nuisance property used
to cook meth or sell drugs does not have
many defenders, but there are some hoarder
properties whose owners may have support-
ners. City councils might misunderstand the
process and be wary of paying more attorney
fees to remedy a lingering problem. Ad-
dressing these concerns requires an adept
and nuanced solution, undertaken with sen-
sitivity for these issues.

Each situation obviously presents a different
set of circumstances and requires a varied set
of tools. If the appointed receiver does not
handle a sensitive situation carefully, it can
cause problems for the city, the owner, and
the court. However, there is no reason that
the problems cannot be avoided by a capable
and experienced receiver and city prosecutor.
Health and Safety receiverships are a grow-
ing remedy, and cities all over the state are
beginning to realize that this tool is a useful
way to attack the most pressing and dangerous
properties that burden a community. Larger
cities with lists of hundreds of code-violating
and nuisance properties are finding that in-
stead of letting these properties languish, they
can employ the Health and Safety receivership
to remedy the nuisance—and that, in fact,
pursuing these remedies can pay for them-

The Health and Safety receivership
statute is an example of the legislature's cre-
ating a very useful and valuable remedy, and
even if it took a few years, a legal community
has now grown around that remedy to the
point that it does what it was intended to do.
While larger cities are starting to utilize the
remedy more, it is actually the small to mid-
sized cities that have led the way in putting
the statute to work. That may be because
smaller cities have the political responsiveness
to convince a city attorney to take action, or
it may be that their code enforcement depart-
ments are not large enough or simply lack
the substance to obtain enforcement without
court action or a neutral third party’s involve-
ment. Whatever the cause may be, as use of
the remedy grows, so does the body of law
around it, and the necessity for practicing
attorneys to learn about it.

1 People v. Riverside Univ., 35 Cal. App. 3d 572, 583
(1973) (citing Lesser & Son v. Seymour, 35 Cal. 2d
494, 499 (1950)). See also CAL. R. OF C T. 3.1179;
27a
3 City of Cathedral City v. Estate of Madeline
4 People in, City of Yorba Linda v. Sinan Shabandar,
6 People v. Empyrean Towers, LLC, No.
13 California R. C. 3.1179;
27a
3 City of Cathedral City v. Estate of Madeline
4 People in, City of Yorba Linda v. Sinan Shabandar,
6 People v. Empyrean Towers, LLC, No.
13 California R. C. 3.1179;
27a
3 City of Cathedral City v. Estate of Madeline
4 People in, City of Yorba Linda v. Sinan Shabandar,
6 People v. Empyrean Towers, LLC, No.
Administrative Law

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

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261 South Wetherly Drive, Beverly Hills, CA 90211, (310) 552-8214, fax (310) 274-7384, email: honeyamado@amadolaw.com. Web site: www.amadolaw.com. Contact Honey Kessler Amado. Ms. Amado (AV-rated) is a Certified Appellate Law Specialist (California State Bar Board of Legal Specialization). On the trial level, she joins the litigation team to assist with identifying issues, creating a sufficient record for appeal, and drafting complex briefs or postjudgment pleadings and motions. On the appellate level, Ms. Amado prepares all briefs and argues the case to the court. When retained as a consultant on appeal, Ms. Amado assists counsel with identifying issues, strategizing the appeal, and drafting or editing the appellate briefs and motions. Ms. Amado has been counsel in a number of landmark cases and has written and lectured extensively in the area of appellate law.

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444 West Ocean Boulevard, Suite 1750, Long Beach, CA 90802, (562) 432-8421, fax (562) 432-3822, e-mail: newclient@workercomplaw.com. Web site: www.workercomplaw.com. Contact Justin Schieber. Employees of contractors or subcontractors of the Department of Defense or other U.S. government agencies injured working overseas are entitled to workers’ compensation benefits under Defense Base Act (DBA), which applies the provisions of the federal Longshore and Harbor Workers’ Compensation Act (LHWCA) to these overseas workers. Overseas workers residing locally may file here in California. The DBA is the exclusive remedy for injured overseas workers.

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

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PAGA Performance
(Continued from page 22)


22 Arial v. Superior Court, 46 Cal. 4th 969 (2009).


25 Id.

26 Id. at *4.


28 Id.

29 Id.

30 Dr. Terry, W. “Mental Health in the Workplace,” 2015 (California’s Mental Health Institute).


32 Id. at *3.

33 Id.


35 Id.


37 Id. at *7.


39 Id. at *2.

40 Id. at *8, 16.

41 Id. at *17.

42 Id.


44 Id. It remains to be seen how other state trial and appellate courts will address these issues.


47 Id. at *6 n.2.


49 Id. at 715.

50 Id. at 715-16.

51 Id. at 720-21.


53 Id. at 897.


55 Id. at 1064.

56 Id.

57 Id. at 1070-71.


60 Id.

61 Id.

62 Id.

63 Id.

64 Id.

65 Id.

66 Id.

67 Id.

68 Id.


71 Delgado, No. 08-806, slip op. (C.D. Cal. June 11, 2010).

72 Delgado, No. 08-806, Dkt. No. 103.

73 Delgado, No. 08-806, Dkt. No. 102.

74 Delgado, No. 08-806, Dkt. No. 109.

75 Garvey v. Kmart Corp., No. 11-cv-2575 WHA, 2013 WL 6599534, at *1 (N.D. Cal. Aug. 13, 2013). Notably, this PAGA case was certified as a class action before proceeding to trial.

76 Garvey, No. 11-cv-2575 WHA 2012 WL 2945473, at *7 (N.D. Cal., July 18, 2012).

77 Id. at *6.


79 Id. at 1.


81 Id.

82 Id. at 3.

83 Id. at 2.

84 Id. at 1.

85 Rix, No. 09-2063, Dkt. No. 97.

86 Rix, No. 09-2063 CAB slip. op. at 3.

87 Guifa Li, No. 10-1189, Dkt. No. 520-1.


89 Guifa Li, No. 10-1189, Dkt. No. 520-1.

90 Guifa Li, No. 10-1189, Dkt. No. 520-1.

91 Guifa Li, No. 10-1189, Dkt. No. 520-1.
Proposals for Bridging the Justice Gap across the Nation

RECENT CENSUS BUREAU DATA shows that one in three Americans qualify financially for legal services to obtain the basic needs of living—safety, subsistence, and family stability. The Legal Service Corporation (LSC), in turn, estimates that 59.4 million Americans—a 17 percent increase from 2007—will qualify for legal services in 2017. Given federal budget limitations, LCS’s 2017 budget request, however, is at the 2007 funding level. Throughout the nation, states are closing courthouses and agencies and limiting services while the need for basic civil legal assistance for those who cannot afford to pay for it is great and rising. Even though the profession’s pro bono efforts have improved—LSC reports 2014 was the best year for pro bono ever—pro bono efforts are not a panacea. Cost-cutting measures and technological efficiencies likewise cannot quell the harm to public protection from the tide of staff reductions, office and court closures, and denial of basic legal services. In spite of strong support and effort for legal service funding and pro bono provision of legal services, a great justice gap persists for the poor and persons of moderate means. The access to justice gap is a public protection crisis.

Protecting the public by bridging the justice gap has been the hard work of the legal profession, with support from the courts and local, state, and national bar associations. The Los Angeles County Bar Association’s Counsel for Justice, through the generous support of its members, provides crucial legal services to veterans, victims of domestic abuse, people with AIDS, and immigrants, as well as education about mediation and alternative dispute resolution. Fulfilling LACBA’s mission to advance the administration of justice, many members of LACBA, including the Access to Justice Committee, provide educational and hands-on services for those in need of civil and criminal legal services.

Public protection is the California State Bar’s statutory mission, and many entities within the State Bar are developing bridges to the justice gap. The State Bar’s Access to Justice Commission spearheads numerous committees and programs that enable innovation in, and funding for, the expansion of legal services to the poor and those of modest means, including the very successful Incubator Guide, a national resource for incubator attorney programs. A working group of the State Bar’s Committee on Regulation, Admission and Discipline Oversight investigated and recommended regulating limited licenses to practice law without attorney supervision in the limited areas of creditor/debtor, family, landlord/tenant, and immigration law. The State Bar’s Civil Justice Strategies Task Force is further studying the issue.

California has the largest state court system in the nation. California courts serve 38 million people, nearly 12 percent of the U.S. population. The California courts implemented a spate of cost-cutting efficiencies and technological innovations, court facilitators and self-help centers, but the demand for legal assistance, and the lack of representation for it, continues to explode across the state. To meet the challenges of protecting the public’s access to state courts, California Supreme Court Chief Justice Tani Cantil-Sakauye established the Commission on the Future of California’s Court System. The commission held hearings on innovations in technology to assist self-represented parties, enhance court proceedings, and enable online transactions. The commission also explored ways to reduce misdemeanors to infractions. Additional suggestions include reducing jury size in certain civil cases and the number of peremptory challenges in misdemeanor cases. In public addresses, the chief justice also suggests that the practice of imposing bail in certain infraction cases should not be required.

Underfunding the legal system across the nation has fueled a proliferation of unregulated legal service providers.

Underfunding the legal system across the nation has fueled—albeit unintentionally—a proliferation of unregulated and potentially inadequate legal service providers (LSPs) and entities. To respond to the potential public protection threat posed by unregulated LSPs and entities, the American Bar Association’s House of Delegates (HOD) approved amended resolution 105, adopting the ABA’s Model Regulatory Objectives for the Provision of Legal Services. This ABA resolution urges the states to recognize that each “state’s highest court, and those of each territory and tribe” has the authority to regulate LSPs, including nontraditional legal service providers. The resolution recommends that LSPs’ regulation should be guided by a number of enumerated model regulatory objectives, the first of which is public protection. The ABA Commission also recently circulated for comment an Issues Paper Concerning Unregulated LSP Entities. With the public increasingly turning to unregulated LSPs, especially internet entities, as a solution to the shortage of legal services, the commission believes full exploration of “the regulatory issues associated with this development” is necessary to ensure adequate public protection. The regulation of traditional law practice entities, such as law firms, is not exempt.

Judy Martinez, chair of the ABA’s Futures Commission, reminds us that we are sworn to serve the public and we “must embrace change in terms of how it will help the public we are sworn to serve.” The father of the ABA’s Futures Commission, former ABA President William Hubbard, holds our feet to the fire to develop a sense of urgency about bridging the “justice gap while continuing to deliver services in an effective and efficient way.” Guided by a commitment to public protection, we distinguish ourselves as members of the profession of law, as opposed to members in the business of law.

Mary E. Kelly is a member of LACBA’s Board of Trustees and an ex officio commissioner of the California Access to Justice Commission.
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