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As we all know by now, our state courts have faced major budget cuts in recent years. The cuts resulted in major cuts in services, layoffs of court personnel, and the Los Angeles Superior Court consolidation plan, which closed several branch courthouses and combined other courtrooms by using administrative hubs for certain types of cases. The impact of these changes was far reaching, particularly to litigants of limited means.

The courts have made strong efforts to do more with less and are working on initiatives to become more efficient. However, more funding is needed to protect access to justice for litigants, particularly those of modest and limited means, “and the discussions are back to basics about why funding of the courts is essential and why this is an access to justice issue,” notes Amos Hartston, chair of the LACBA Access to Justice Committee.

The California state court system is the largest in the world, serving approximately 38 million people. (See http://www.courts.ca.gov/partners/courtsbudget.htm.) For fiscal year 2015 through 2016, just 1.4 percent of the state general fund (GF) was allocated to the judicial branch. (See http://www.courts.ca.gov/14908.htm.) The most recent data from the National Center for State Courts reports 1.86 percent as the average percentage of state GF budget devoted to the courts across the nation. Thus, California’s effort is only 75 percent of the national average. California ranks 30th of all states. New York’s allocation, in contrast, is 4.47 percent.

Since California now faces a budget surplus, many hope that funding of the courts can be increased to improve access and restore personnel and courtrooms. The governor’s proposed budget is out, and the various constituencies are making their case for revisions before the budget is finalized in May. Governor Brown’s budget proposal for fiscal year 2016-17 provides $91 million in increased trial court funding. The remainder of the proposed increase includes $7 million for increased language access, funding for uncontrollable cost increases, restricted funding, and one-time funding to encourage innovation and for the costs of implementing Prop 47. (See http://www.ebudget.ca.gov/2016-17/agencies.html.)

Carolyn Kuhl, presiding judge of the Los Angeles Superior Court, notes that “under an objective formula based on the Los Angeles Superior Court’s workload, we still are funded at only 68 percent of our need. Despite many innovations and efficiencies adopted over the last two years, due process requires a sufficient number of courtrooms to allow parties to be heard by the judge. We continue to have unacceptable delays in hearings on motions in general jurisdiction cases, and we still cannot afford to provide court reporters in civil cases. We sincerely appreciate the assistance that LACBA and all the local bars have provided in helping legislators understand the needs of the courts. We look forward to continuing this vital collaboration.”

The courts are the third constitutional branch of government but are funded like other government agencies, most of which lobby the legislature. LACBA officers and LACBA’s Court Funding Committee, cochaired by the Honorable Brian Currey, Elizabeth Mann, and Jeff Westerman, are leading efforts to team up with the courts and other Los Angeles area bar organizations and meet with legislators about the importance of court funding. It is imperative that Los Angeles lawyers meet with and explain to our legislators the role of the courts, the litigation needs of their constituents, and why adequate funding of court programs is essential.

Donna Ford is a retired Assistant United States Attorney.
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David Holmquist General Counsel to the Los Angeles Unified School District

Why did you want to become a lawyer? It’s a tremendous skill to think like a lawyer.

LAUSD Superintendent Ramon Cortines just retired and Michelle King was hired. What is the process of selecting a new superintendent? It’s probably the most important thing that our board does. The superintendent is a job of significance, not just locally but nationally.

How so? We have 1,100 schools; we oversee 283 charter schools. Our buses drive more miles than MTA. We serve the most meals of anyone else in LA County. We are the largest property owner in LA County. We are a major player in construction work.

A bomb scare recently forced the closure of LAUSD. How did you communicate with the parents? Robocalls and the media.

New York City did not close its schools. Do you think LAUSD overreacted? I do not. New York read the e-mails when their kids were already in school. The decision about whether to send kids home early is a different one than deciding to close the schools in advance.

What kind of training does LAUSD have for this kind of issue? We have a 450-member school police department that is a law enforcement office for all purposes. They are well trained.

Does that include “active shooter” training? Yes.

What characteristic did you most admire in your mother? She was strong. During the depression, she raised her two younger brothers in a house with a dirt floor.


What is the perfect day? See my two grandsons who live with me in the morning, no traffic problems on my way to work, no smog in the air, deal with complex problems to help kids, and leave work at a reasonable time.

As general counsel of LAUSD, what are your three major job duties? Advising the board of education and senior staff of legal matters. Litigation—we are currently involved in more than 2,000 lawsuits. Working with staff—200 people directly or indirectly report to me.

You earned your BS in 1983 and your JD in 1995. Why the delay? When I graduated, I wanted to make money and work in the world. When I started to work around lawyers, I decided to go to law school at night.

What is a typical legal question that your office receives? Someone at a school site calls, saying that an adult is at the school with paperwork, asking to take a child from our custody.

LAUSD had a “teacher jail,” or a waiting room for teachers on administrative leave. Why has it been eliminated? Having to oversee and supervise folks who were required to report to work every day while their cases were being investigated was a drain on resources. We adopted the philosophy that most government agencies use—send them home.

One hundred and eighty teachers are currently on administrative leave. How many will return to their classrooms? Nearly 50 percent.

Why do some investigations take two years? Our goal is to get them done in 90 days; the average is 66 days. If it’s longer than that, it is typically because law enforcement has asked us not to start our investigation until they have completed theirs.

Your website mentions that your ultimate clients are the students. How do you measure success as to the pupils? We are important strategic partners in educating our youth. I ask one question all of the time: How does that help students?

What is the goal? One hundred percent graduation, student safety, and 100 percent attendance. I believe our work supports every one of those.

There are more than 100,000 full- and part-time employees at LAUSD. What is the budget? Our general fund budget is just over $8 billion. Other sources of funds, such as bonds, can bring that figure up to $12 billion.

What is the ratio of student to teacher? We have more students per teacher in secondary than in elementary. Unfortunately in some cases, it can be over 45-50 per teacher, which is unacceptable. Money issues.
The CAHSEE Test is a high school exit examination that was removed as a requirement to graduate. Do you agree with that? Yes. Ending the test allows students who passed the 12th grade and met other state requirements to receive their diploma. It's an excellent call, one which we recommended.

What makes our district unique? We have some of the best teachers in some of the best schools in the country. We win the National Academic Decathlon almost every year. We are amazing and well-challenged.

What challenges? Four out of five kids are on free or reduced meal plans, which is a measurement of poverty. A majority of our students are English language learners—110 different languages are spoken at the homes of LAUSD students.

What is your most treasured accomplishment as GC? I set up an intern program and an entry-level attorney program. We have to watch every penny.

What was your best job? This one.

What was your worst job? Picking berries when I was 12 years old in the fields around Portland. On my best day, I made $4.

What kind of music is on your playlist? Baroque.

What is your favorite vacation spot? A cruise to Tahiti comes to mind.

What do you do on a three-day weekend? Work for part of it, spend time with my grandkids.

What are your retirement plans? I promised my wife that we'd talk about it.

Which feature on your iPhone do you wish you could operate? Siri.

Which person in history would you like to take out for a beer? Thomas Jefferson.

If you had to choose only one dessert for the rest of your life, what would it be? Something with chocolate.

What is your greatest vanity? My blue eyes; I'm glad I have them. Believe it or not, I used to maintain single-digit body fat.

What are the three most deplorable conditions in the world? Starvation, violence, illiteracy.

Who are your two favorite U.S. presidents? FDR and Abe Lincoln.

What is the one word you would like on your tombstone? Honest.
MCLE Opportunities through Nonprofit Legal Services Organizations

THE STATE BAR OF CALIFORNIA requires all California licensed attorneys to complete a total of 25 approved Minimum Continuing Legal Education (MCLE) hours every three years. These 25 hours include four hours of legal ethics, one hour of competence issues, and one hour of recognition and elimination of bias in the legal profession and society. If you are in Group 1 (A-G), you likely recently reported your compliance to the State Bar of California.

For newer attorneys, these MCLE rules may change in the near future if the Supreme Court of California and the California legislature adopt the Task Force on Admissions Regulation Reform (TFARR) competency training proposals. In 2012, the State Bar of California Board of Trustees appointed the TFARR to determine whether there should be a competency training program for bar applicants and new attorneys in California in an effort to develop better trained attorneys. After much thoughtful planning and discussion with stakeholders and the public, TFARR recommended, among other things, a postadmission requirement that new attorneys complete 10 additional hours of MCLE specifically focused on “law practice competency training” within the first year following admission, or participate in a “bar-certified mentoring program.” If adopted, new attorneys will potentially have to seek out additional educational courses and training to fulfill this requirement. At first glance, this may seem like a daunting or burdensome requirement. The good news is that getting free, quality MCLE is relatively easy in California when you partner with a nonprofit legal services organization (LSO).

In California, there are approximately 100 programs funded by IOLTA that provide free legal services in civil matters to low-income Californians. This is the largest network of LSOs in the nation. There are many other LSOs not funded by IOLTA that also serve the needs of the poor in California. What these organizations have in common is an overabundance of clients who are in need of their services. In fact, with over six million people living at or below the federal poverty threshold, California has the highest number of low-income residents in the nation, and most of these individuals qualify for free legal services. Unfortunately, LSOs are only able to serve about 20 percent of the legal needs of the poor in California due to extremely limited resources. As a result, thousands of low-income households find access to justice unavailable due to the expense of private counsel and the difficulty of navigating the complex court system. This number represents a huge “justice gap” that limits low-income people’s ability to protect or access basic life necessities. Though we may never be able to match the number of attorneys to the number of low-income individuals who need free legal assistance, pro bono volunteers can help bridge the gap.

Free MCLE

For this reason, many LSOs depend on the pro bono service of volunteers in the legal community to expand their resources and to assist many more low-income individuals. In an effort to increase pro bono participation, LSOs regularly provide free MCLE training in a variety of substantive topics to better prepare pro bono attorneys to take on poverty law-related cases. LSOs also partner with community organizations, bar associations, law schools, and other entities to develop free training that supports clinics and other coordinated volunteer opportunities. The training ranges from a one-hour commitment on a single substantive topic to a series of trainings to prepare volunteer attorneys for more expansive pro bono cases or for accreditation in certain types of cases.

Free pro bono opportunities and MCLE training are easy to find. The State Bar of California has lists of organizations that provide pro bono opportunities. LACBA also provides numerous opportunities to volunteer and, in some cases, earn MCLE training through its five legal service projects that serve in the areas of domestic violence, veterans, immigration, AIDS, and civic mediation. Prospective pro bono volunteers may visit LACBA’s website to learn more about LACBA’s pro bono opportunities. LSOs regularly offer live training on particular substantive topics. Also, law firms and bar associations interested in developing a pro bono partnership or project with an LSO may request free MCLE training to get started.

Free MCLE training is provided regularly not just by LSOs and their partners but also online by a number of providers. Organizations like the Practicing Law Institute and the Pro Bono Training Institute provide free online on-demand pro bono training on a broad variety of pro bono topics.

In the end, pro bono service can satisfy much more than State Bar-mandated MCLE hours. It allows attorneys to directly improve the lives of individuals in extremely dire circumstances who have no one else to turn to. Collectively, pro bono attorneys can also bring about positive and lasting change in law and policies that affect low-income communities. At the same time, pro bono service enables attorneys to learn new areas of substantive law, develop lawyering skills, and strengthen professional relationships under the mentorship and guidance of skilled legal services attorneys. The reality is that pro bono service is a win-win situation that benefits all participants. Low-income individuals can finally get the legal assistance they need, LSOs are able to serve many more clients, and pro bono attorneys gain valuable work and life experiences. The hope is that with a bit of encouragement, including free MCLE, attorneys can develop a culture of providing free legal services and help close the growing justice gap in California.

1 See http://www.calbar.ca.gov/AboutUs/BoardofTrustees/TaskForceonAdmissionsRegulationReform.aspx.
2 See http://www.calbar.ca.gov/Attorneys/MemberServices/IOLTA.aspx.
3 See http://www.calbar.ca.gov/Attorneys/MemberServices/IOLTA.aspx.
4 See http://www.lacba.org/volunteer. See also http://www.californiaprobono.org for additional pro bono opportunities and MCLE training.

Phong Wong is an attorney and the Pro Bono Director at the Legal Aid Foundation of Los Angeles.
The Implications of Ghostwriting in State and Federal Courts

**WHILE LIMITED SCOPE ENGAGEMENTS** have been widely accepted for years in the realm of transactional law, litigation has remained largely the territory of full-service practice—that is, an attorney represents a client from the beginning of a case to its conclusion rather than limiting his or her service to discrete tasks. Traditionally either litigants were represented by counsel throughout the case or chose to represent themselves and appeared pro se.

In response to the ever-rising cost of legal representation as well as the increased availability of information and public sophistication, the number of self-represented litigants continues to increase. In response to this growing segment of pro se litigants, an industry of legal ghostwriting has flourished. Attorney ghostwriting is the practice by which a licensed attorney drafts documents to be filed with a court by a self-represented party or otherwise provides substantial legal assistance to the party. Notably, an attorney ghostwriter does not enter an appearance in the case or otherwise disclose the attorney’s involvement; rather the client continues to represent himself or herself in court appearing pro se. As such, ghostwriting presents one means of bringing limited-scope representation to litigation clients who are otherwise unable or unwilling to procure full-service legal representation.

While ghostwriting and the larger availability of limited-scope representation increases access to legal services for clients, ghostwriting raises a number of distinct issues relating to ethical and professional duties, including the ghostwriting attorney’s duty of candor and honesty to the court and opposing parties. While attorney ghostwriting is increasingly being accepted by state courts under the larger umbrella of permitted unbundled legal services, federal courts generally continue to remain opposed to the practice of ghostwriting.

Proponents of ghostwriting often frame their support in the context of defending the benefits of limited-scope representation as a whole. Critics of ghostwriting, however, do not generally oppose the unbundling of legal services. Rather, criticisms of ghostwriting concern a number of ethical and procedural pitfalls that are specific to the practice and not to limited-scope representation as a whole.

Ethically, ghostwriting implicates attorneys’ ethical duties of candor to tribunals and third parties. By permitting a pro se litigant to submit documents to a court that have been substantially authored by an attorney, ghostwriters arguably create (or at the very least contribute to the creation of) a false impression that the documents were created without legal assistance. Such a misimpression potentially runs afoul of the duty of candor. Section 6068 of the Business and Professions Code imposes a duty upon an attorney to “employ... such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”

This same requirement is reiterated by Rule 3-200 of the California Rules of Professional Conduct, which also expressly prohibits an attorney from seeking “to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.” Section 6128 of the Business and Professions Code provides that a lawyer is guilty of a misdemeanor if he or she engages in “any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.”

Attorneys who violate their state’s rules of professional conduct are subject to discipline and even disbarment. Attorneys who violate their state’s rules of professional conduct are subject to discipline and even disbarment.

Procedurally, ghostwriting implicates the fairness and efficiency of the judicial process in that the practice allows attorneys to circumvent applicable rules and inhibits the legal system’s ability to effectively regulate the conduct of parties and counsel during litigation. For example, when an action is brought or maintained without probable cause, a victorious defendant may be able to bring a subsequent malicious prosecution action against the plaintiff and, if represented by counsel, also the plaintiff’s attorney. Notably, liability for malicious prosecution is not limited to the party who unsuccessfully prosecutes an underlying action. Rather, anyone who is actively involved in bringing or continuing such action may be held liable in a malicious prosecution lawsuit. Accordingly, an attorney who initiates the underlying action is potentially liable, as is an attorney who continues to prosecute the action after discovery of facts that establish that the action lacks merit.

The rationale behind imposing attorney liability for malicious prosecution is that lawyers have a duty to bring and maintain only valid claims. In the case of an attorney ghostwriter, however, the victorious defendant may be entirely unaware of the ghostwriter’s involvement; and if the defendant proceeds against the unsuccessful plaintiff, the plaintiff may assert reliance on advice of counsel. Depending on circumstances, the victorious...
defendant may be unable to ascertain the attorney’s identity, thereby allowing the ghostwriting counsel to avoid all liability. Additionally, because certain conduct is subject to sanctions only if committed by an attorney (but not a party), it is important to the administration of justice in the case that the court accurately knows whether an attorney is actively participating in the action.

Ghostwriting further implicates the fairness of the judicial process in that the practice allows pro se litigants to take advantage of the courts’ established practices of extending leniency to pleadings of pro se litigants. In fact, the U.S. Supreme Court has long required that pleadings presented by pro se litigants be held to a lesser standard than attorney-drafted pleadings. However, when a pleading is ghostwritten by an attorney but presented by a pro se litigant, that litigant unduly receives the benefit of liberal construction. When this occurs, the pro se litigant receives a distinct advantage at the expense of the opposing party since that opposing party is held to a more stringent standard, irrespective of the fact that both parties had the benefit of assistance from counsel.

Federal Courts

Federal courts nearly unanimously condemn ghostwriting as being a form of misrepresentation to the court as well as a violation of Rule 11 and various ethics rules governing candor to the tribunal. Such disapproval stems largely from the belief that the practice of ghostwriting undermines and impedes the overall fairness of the judicial process. Rule 11 of the Federal Rules of Civil Procedure requires that “every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney’s name—or by a party personally if the party is unrepresented.” By affixing this signature to each document, the signer certifies that to the best of his or her knowledge the document is not being presented for an improper purpose, the claims presented are warranted by existing law, and the factual contentions have evidentiary support. When a ghostwriter fails to sign a document that he or she has substantially authored, however, federal courts have expressed concern that the attorney thereby avoids the obligation of making the mandatory certifications to the court as required by Rule 11.

Federal courts are likewise wary of pro se litigants’ receiving undue deferential treatment that would undermine the fairness of the process. Specifically, if a litigator’s papers are viewed more deferentially and leniently than they would otherwise because the judge believes that the litigant is self-represented, that party obtains a distinctly unfair advantage. In a recent case out of the Eastern District of California, the court affirmed this position when it granted a motion to dismiss a complaint filed by a pro se litigant after that plaintiff failed to oppose the motion. Although the plaintiff attempted to plead ignorance of procedure as an excuse for failing to oppose the motion, the court rejected this explanation and indeed expressed its extreme skepticism regarding the plaintiff’s pro se status given the sophistication of the plaintiff’s various other filings. Discussing ghostwriting, the court expressed its strong disapproval of the practice, explaining: [G]hostwriting is disfavored for the reasons presented in this action: pro se litigants may ask Courts for leniency due to their lack of legal sophistication while at the same time receiving legal advice from another attorney. Allowing Plaintiffs to do this would grant them an unfair advantage over Defendants. Plaintiffs are forewarned that the Court regards the signing of a paper filed with the Court as an implied representation that the filed paper was written by the signer. If the Court determines that Plaintiffs are making misrepresentations to the Court by submitting papers signed by Plaintiffs but actually written by someone else, Plaintiffs may be subject to sanctions.

When a party is able to obtain an unfair litigation advantage, the overall fairness of the legal system is jeopardized, a result which is against public policy. Accordingly, to the extent that ghostwriting does indeed compromise the fairness of the legal system, such practice is contrary to public policy should not be permitted.

State Courts

The disapproval of ghostwriting voiced by the federal courts lies in stark contrast to the far more tolerable approach adopted by state courts. More than a decade ago the Los Angeles County Bar Association issued its Formal Ethics Opinion 502 in which it opined that there was no duty for an attorney to disclose to the court his or her assistance in preparing a client’s briefs, if the client under- stands the scope of services the attorney will provide, is informed of the risks of proceeding pro se, and if applicable ethics and pleadings rules are followed. Notably, Formal Opinion 502 specifically recognizes the schism between state and federal court treatment of ghostwriting and is careful to clarify that the opinion’s conclusion are limited to state court and that “practitioners who desire to [ghostwrite] pleadings or documents for presentation in a California federal court...must comply with that court’s rulings on ‘ghostwriting’ and if disclosure is required, comply with such rulings.”

Several years after the publication of Formal Opinion 502, the American Bar Association released its Formal Opinion 07-446, which likewise takes a permissive view of ghostwriting. Specifically, Formal Opinion 07-446 concludes that so long as the pro se litigant does not affirmatively state in a manner that can be attributed to the lawyer that a ghostwritten document was prepared without legal assistance, the lawyer has not been dishonest within the meaning of the Model Rules. Using a similar reasoning, the opinion further concludes that an attorney who has ghostwritten a pleading for a pro se litigant does not assume responsibility for the substance and content of that pleading so long as that attorney has not signed the document.

This opinion, however, takes an extremely narrow and literal view of conduct involving dishonesty, fraud, deceit or misrepresentation; suggesting such conduct exists only in the case of a clear affirmative deception while wholly ignoring the underlying spirit and purpose of the rules (i.e. to preserve the integrity and efficiency of legal proceedings).

Best Practices

Given the staunch disapproval of ghostwriting by federal courts, it is strongly recommended that if an attorney provides substantial assistance to a client appearing pro se in federal court, that the assistance be disclosed to the court and that the attorney obtain client permission for the disclosure as a condition of accepting the engagement.

For those attorneys practicing in California’s state courts who nonetheless remain drawn to ghostwriting, it is critical to remember that limited-scope representation does not diminish an attorney’s basic ethical obligations or the fundamental duties that are owed to clients. Thus, just as with any other engagement, attorneys providing limited-scope representation should ensure that they have executed retainer agreements in place before providing any legal services. That agreement should not only clearly establish the scope of services being rendered but also make clear what services are beyond the scope of the representation and will therefore be the sole responsibility of the client. As with any representation, it is critical that the retainer agreement likewise clearly describe the fee structure of the representation. Because of the inherently fleeting nature of limited-scope representation, it is often prudent to employ a fee arrangement in which the client pays for services as they are provided rather
than providing services on more traditional credit terms.

Practitioners engaged in limited scope representation must also remain diligent as to the ethical obligations associated with this type of representation. California rules of professional responsibility require, for example, that attorneys bring to bear that level of legal knowledge, skill, experience, and ability necessary to represent a client effectively. The mere fact that an attorney represents a client only in a limited capacity (such as ghostwriting a pleading), does not alleviate that attorney's duty to provide competent assistance to the client. As such, an attorney contemplating providing ghostwriting services should consider declining work in areas of law in which he or she is inexperienced.

Likewise, attorneys should be wary of stepping into a limited-scope engagement under rushed circumstances or imminent deadlines. Hurried analysis or drafting is likely to be less complete and effective and, therefore, presents heightened liability for the attorney. Accordingly, attorneys encountering pro se litigants with looming deadlines might first advise those clients as to ways to seek appropriate extensions in order to allow sufficient time for the attorney to provide competent representation. Having adequate time to review the issues of the matter is especially important because practitioners (even those engaged in limited-scope representation) have an affirmative duty to alert clients to legal problems that are reasonably apparent even if such problems fall outside the scope of the limited representation.

Although not obligated to represent a client as to matters falling outside the scope of a limited representation, an attorney is nonetheless obligated to consider and advise the client as to any reasonably apparent related matters that should be pursued to avoid prejudicing the client's interests and the possible need for other counsel.

Further, while ghostwriting might appear to be an appealing and viable way for attorneys otherwise employed by a firm or in-house to moonlight, attorneys should be carefully to review their employment agreements and employers' policies before doing so. Many employers prohibit their lawyers from performing outside services, and insurance policies may not cover such activities. Likewise, sole practitioners and self-employed attorneys should carefully review their own insurance policies to be sure that ghostwriting is not excluded and inform clients as necessary.

The practice of ghostwriting remains a controversial topic posing numerous ethical and procedural difficulties for practitioners and courts alike. As the practice of limited-scope litigation representation gains acceptance, California state courts have increa-
ing come to treat ghostwriting as a permissible (and even beneficial) legal reality. Such acceptance, however, does not eliminate the numerous ethical and procedural problems posed by the practice of ghostwriting. Such problems stem, to a large extent, from the fact that the rules of court and procedure were designed to operate primarily within the context of traditional full-scope representation rather than unbundled legal services. Recognizing the various yet unresolved contradictions and inconsistencies between attorneys’ ethical duties and ghostwriting, the practice remains almost universally condemned by federal courts. While the debate will no doubt continue, practitioners engaging in ghostwriting should be sure to comply with all rules and ethical requirements of the court in which their work product may appear.

2 CENTRAL DISTRICT OF CALIFORNIA, ANNUAL REPORT OF CASELOAD STATISTICS: FISCAL YEAR 2014 (8% of the Central District of California’s total civil filings by nonprisoner pro se plaintiffs); JUDICIAL COUNCIL OF CALIFORNIA, STATEWIDE ACTION PLAN FOR SELF-REPRESENTED LITIGANTS (2004) (over 4.3 million of California’s court users are self-represented).
3 See Roatta v. California, 4 F. Supp. 2d 961 (S.D. Cal. 1998) (ghostwriting occurs when attorneys gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the court).
4 BUS. & PROF. CODE §6068(d).
5 CAL. RULES OF PROF’L CONDUCT R. 5-200(B).
6 BUS. & PROF. CODE §6128(a).
7 CAL. RULES OF PROF’L CONDUCT R. 1-100.
10 BUS. & PROF. CODE §6068(c)(a) (a lawyer has a duty to bring only “legal or just” claims or defenses, except in the defense of criminal actions); CAL. RULES OF PROF’L CONDUCT R. 3-200 (prohibiting acceptance or continuance of representation when there is no probable cause for advocacy and when the purpose of the advocacy is to harass or maliciously injure another person).
13 Porter v. Bank of Am., N.A., 2014 WL 1819396, at *3 (E.D. Cal. May 7, 2014) (“Court regards the signing of a paper filed with the Court as an implied representation that the filed paper was written by the signor.”).
14 FED. R. CIV. PROC. 11(b)(1)-3).
15 Travelers Cas. & Sur. Co. of Am. v. Williams Bros., Inc., 2:12-CV-00558-LDG-NJK, 2013 WL 5537191, at *3 n.3 (D. Nev. Oct. 4, 2013) (“ghostwriting raises issues of professionalism...by failing to assure that the legal assistance provided is accompanied by the ethical duties and responsibilities an attorney has to a client”); see also Duran v. Carr, 238 F. 3d 1268, 1271-72 (10th Cir. 2001) (ghostwriting inappropriately shields attorney from responsibility and accountability).
16 See, e.g., Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (ghostwriting impedes justice because it may result in skewing the playing field rather than leveling it; a pro se litigant has the benefit of counsel while also being subjected to less stringent standards reserved for self-represented parties).
21 Id.
23 CAL. RULES OF PROF’L CONDUCT R. 3-110.
26 See CAL. RULES OF PROF’L CONDUCT R. 3-410.
 Recently Expanded Relief from Retaliation for Whistleblower Activity

**AS PUBLIC POLICY** has become more firmly rooted in encouraging the disclosure of employers’ unlawful activity, so has the need to encourage employees to come forward to report the unlawful activity and to protect these same employees from retaliation. California Labor Code Section 1102.5 is California’s general whistleblower statute, protecting from retaliation employees who disclose an employer’s unlawful conduct or refuse to participate in unlawful activity. It evinces the strong public interest in encouraging employees to report illegal activity in the workplace.

Section 1102.5 was amended in 2014 to expand the protections from retaliation for California employees and to close perceived loopholes in the protections afforded to employees. The amendments included expanding the types of reports protected by the statute. Several recent court of appeal cases have analyzed Section 1102.5 and the scope of protection that it provides to employees who claim they have suffered retaliation for disclosing their employer’s unlawful activity.

Section 1102.5 makes it unlawful for an employer to retaliate against an employee for disclosing information about illegal activity to certain enumerated persons or entities, or because the employer believes that the employee disclosed or may disclose information. Thus, a retaliation claim may be actionable even if the employee did not actually disclose any information but the employer thought he or she did or was going to do so. Moreover, the retaliation may be actionable even if the employee was wrong about the activity being illegal, so long as the employee had reasonable cause to believe he or she was disclosing illegal activity.

The types of reports protected by Section 1102.5 include 1) reports to a government or law enforcement agency, 2) reports to a person with authority over the employee, and 3) reports to another employee who has the authority to investigate, discover, or correct the violation or noncompliance, and 4) testimony before any public body conducting an investigation, hearing or inquiry. These reports are protected if the employee has reasonable cause to believe that he or she is reporting a violation of a state or federal statute, or violation of or noncompliance with a local, state or federal rule or regulation. The report is protected even if disclosing that information is part of the employee’s normal job duties.

Section 1102.5 also makes it unlawful for an employer to retaliate against an employee who refuses to participate in an employer’s illegal activity. Moreover, the whistleblower protection extends to reports that an employee may have made at a prior employer. This is presumably designed to protect whistleblowers from being black-balled.

Although public employees are separately protected by the California Whistleblower Protection Act (CWPA), codified at Government Code Sections 8547 et seq., they are also governed by the protections of Section 1102.5. Moreover, a claim for violation of Section 1102.5 is a stand-alone cause of action, separate and apart from a common law claim for wrongful termination in violation of fundamental public policy.

In order to establish a prima facie case of retaliation under Section 1102.5(b), the plaintiff must demonstrate that he or she engaged in a protected activity as set forth in the section, that the employer subjected him or her to an adverse employment action, and that there is a causal link between the two. Once the employee establishes a prima facie case of retaliation, the burden shifts to the employer to demonstrate by clear and convincing evidence that it had a legitimate, nonretaliatory explanation for its conduct. If the employer is successful in meeting this burden, the employee must show that the employer’s explanation is a pretext for retaliation.

**Protected Activity**

Several cases have grappled with the question of what constitutes protected activity. One issue is whether an employee is protected when he or she discloses or reports conduct of which the employer is already aware. Different courts have come to different conclusions. For example, *Mize-Kurman v. Marin Community College District* involved a community college employee’s allegations that she was reassigned to a less desirable position after reporting her concerns about what she believed to be unlawful tampering with the hiring process and unlawful use of state money in a scholarship program. The college district claimed that it was aware of the incidents that the employee protested, thus her reports did not constitute protected activity. As to that argument, the court agreed with the college.
district, concluding that an employee’s reporting of information already known to the employer did not constitute a protected disclosure.\(^1\) In reaching its conclusion, the court relied on federal cases interpreting federal whistleblower laws and analyzed the definition of the word “disclosure” as meaning “to reveal something that was hidden and not known.”\(^1\)

The court in \textit{Hager v. County of Los Angeles} came to a different conclusion. In \textit{Hager}, a former sheriff’s deputy alleged that he was terminated in retaliation for disclosing the misconduct of another sheriff’s deputy. The county argued that it was already aware of the alleged misconduct through another employee’s report, and that because another employee had already disclosed the information, it could not be liable to the plaintiff because he was not the one who first alerted the county to the misconduct. However, the court disagreed with the county’s position, rejecting a rule that would limit whistleblower protection to only the first employee who discloses a violation of the law.\(^1\) The court found the county’s position to be contrary to the plain statutory language of Section 1102.5 and the legislative intent behind it.\(^1\)

The \textit{Hager} court distinguished \textit{Mize-Kurman} based on the manner in which the employer learned of the alleged misconduct, reasoning that because in \textit{Mize-Kurman} the evidence did not reveal that the employer learned of the illegal activity from another employee prior to the plaintiff’s complaints, \textit{Mize-Kurman} did not discuss a “first to report” rule. Whether this fine line of how the employer first learned of the alleged misconduct will be determinative of whistleblower protection for a report of misconduct of which the employer was already aware will have to be decided by future appellate cases. For now, both employers and employees currently have authority on which to rely to argue whether or not a disclosure of unlawful conduct constitutes protected activity where the employer was already aware of the unlawful conduct.

Employers have also argued in defense to retaliation cases brought under Section 1102.5 that an employee’s disclosure was related to illegal activity not by the employer but by another employee, which is therefore not protected activity. Current case law maintains that an employee’s reports of illegal activity by a fellow employee or a contractor of the employer may also constitute a protected disclosure.\(^1\) Thus, the report need not be limited to illegal activity by the employer.\(^1\) Nonetheless, since an offending supervisor already knows about his or her wrongdoing, a complaint to a supervisor who has engaged in the unlawful activity is not a disclosure and therefore is not protected activity.\(^1\)

An additional issue relating to whether a whistleblower’s report constitutes protected activity concerns the report’s relation to the employer’s business operations. This issue is currently under review by the California Supreme Court. In \textit{Cardenas v. M. Fanaian, D.D.S., Inc.}, the Fifth District Court of Appeal held that an employee’s report of matters not arising out of the employer’s business activities is nevertheless protected.\(^1\) In \textit{Cardenas}, an employee of a dental office filed a police report arising out of the theft of some jewelry at work by a coworker. The employee who filed the police report was terminated and brought a retaliation action pursuant to Section 1102.5. The employer argued that the employee did not engage in protected activity under Section 1102.5 since her report to the police concerned a purely personal matter and was unrelated to the defendant’s business as a dental office. The court disagreed, looking to the plain language of the statute, which does not contain any such limitation. The court contrasted the language of the section with that contained in the CWPA, which applies to state employees. Unlike Section 1102.5, the CWPA limits whistleblower protection “to reports of wrongdoing arising out of the performance of the employee’s duties.”\(^1\) Because Section 1102.5 does not contain a similar limitation, the court refused to impose one.\(^1\) One justice in \textit{Cardenas} disagreed, reasoning that when an employee makes a report of a purely personal nature unrelated to the employer’s business operations, that employee is not a whistleblower and the protections of Section 1102.5 should not apply.\(^1\) The California Supreme Court granted review in \textit{Cardenas} to determine whether Labor Code Section 1102.5(b) prohibits an employer from retaliating against an employee for reporting any alleged violation of law or only for reporting alleged violations that involve the conduct of the employee’s business activities.

Notably, the employee’s motivation in reporting illegal activity is irrelevant to determining whether the activity is protected.\(^1\) As explained by the \textit{Mize-Kurman} court, “[I]t is not the motive of the asserted whistleblower, but the nature of the communication that determines whether it is covered.”\(^1\)

In order for whistleblowing activity to be protected, it must involve a violation of a statute, rule, or regulation. Thus, if the employee’s complaint is merely about internal policy decisions or personnel decisions, such reports may not be actionable. For example, in \textit{Mueller v. County of Los Angeles}, a plaintiff expressed disapproval that two firefighters had been transferred, and suffered retaliation at the hands of their replacements. The plaintiff alleged that the retaliatory conduct violated Section 1102.5. However, the court disagreed, finding that the plaintiff had not reported a violation of a statute, rule, or regulation.\(^1\) Rather, the court found he had complained about internal personnel matters, which did not constitute protected whistleblowing activity.\(^1\) Similarly, the court in \textit{Patten v. Grant Joint Union High School District} explained that disclosures encompassing only the context of internal personnel matters do not amount to whistleblowing.\(^1\)

When an employee is disclosing policies that are unwise, wasteful, that constitute gross misconduct, or the like, and the policy is one about which debatable differences of opinion may exist, the disclosures are subject to the debatable policy matters limitation, and are not protected disclosures.\(^1\) However, if the employee reasonably believes that the policy he or she is disclosing violates a statute or regulation, it is nevertheless a protected disclosure, even if the wisdom of the policy is debatable.\(^1\) In such cases, an employee’s reasonable belief about the nature of his or her disclosures is crucial in determining whether the employee has an actionable claim.

**Standard of Adverse Action**

Once it has been determined that the plaintiff has engaged in protected activity, the question becomes whether the employer has subjected the plaintiff to an adverse employment action. The standard used to determine whether an employer’s conduct amounted to an adverse employment action is the same as that used when an employee alleges retaliation in violation of California’s Fair Employment and Housing Act (CFEHA), as set forth in \textit{Yanowitz v. L’Oreal USA, Inc.} The test—known as the materiality test—is whether the adverse action materially affected the terms and conditions of the plaintiff’s employment.\(^1\) The materiality test encompasses all employment actions that “are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career.”\(^1\) The test is to be interpreted liberally, “with a reasonable appreciation of the realities of the workplace.”\(^1\) Moreover, the plaintiff’s allegations are to be considered collectively. While one action alone may not be deemed to materially affect the terms and conditions of a plaintiff’s employment, that same action combined with others may rise to the level of materiality.\(^1\)

Thus, in \textit{Patten}, the court found triable issues of fact as to whether there was an adverse employment action when a principal at an underperforming junior high school was transferred to a smaller junior high school comprised of high-achieving students, even though the principal suffered no diminution in wages, benefits, or duties.\(^1\) The employee presented evidence that working at the higher...
achieving school would affect her ability to make her mark and advance her career.

In contrast, in Mueller, the court found no legally actionable adverse employment action when a firefighter was transferred, written up and counseled in retaliation for protesting the transfer of two supervisors out of the firefighter’s station.37

There is minimal case law that specifically concerns an adverse employment action for purposes of a retaliation claim under Section 1102.5. Thus practitioners dealing with this issue should rely on cases brought pursuant to the CFEHA interpretation of what constitutes an adverse employment action.

In addition to establishing that there was a protected activity and that he or she suffered an adverse employment action, the plaintiff must also establish causation between the two. For instance, the timing of an adverse employment action provides strong evidence of retaliation.38 Due to the dearth of case law specifically dealing with Section 1102.5, practitioners should look to case law brought under state and federal antidiscrimination and antiretaliation statutes to support their positions regarding causation and temporal proximity.39 It is essential in proving causation to demonstrate that the employer had actual knowledge that the employee had engaged in protected activity.40

Prior to 2014, there was a split of authority as to whether a plaintiff seeking to assert a claim for retaliation under Section 1102.5 was required to exhaust administrative remedies with the California labor commissioner prior to filing a civil lawsuit.41 That ambiguity ended with the passage of Assembly Bill 263, which amended Labor Code Section 98.7 to add subsection (g) and Labor Code Section 244 to add subsection (a). Section 98.7(g) provides, “In the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures.” Similarly, Section 244(a) provides, in relevant part, “An individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of this code, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy...”

After the passage of AB 263, the question became whether the amendments were retroactive. According to Satyadi v. West Contra Costa Healthcare District, the amendments merely clarified existing law, and thus even for cases based on retaliatory conduct occurring prior to January 1, 2014, there is no requirement that a plaintiff exhaust administrative remedies by filing a claim with the California Labor Commissioner.32 However, Satyadi and similar case law, as well as the amendments to Sections 98.7 and 244, are limited to exhaustion under the Labor Code.

Just because a plaintiff is not required to exhaust administrative remedies by filing with the Labor Commissioner does not mean that a plaintiff does not have to follow an agency’s internal administrative grievance procedure. For example, an employee of the University of California’s system may still be required to exhaust the system’s internal remedies.43 Similarly, an employee of a public entity may be required to exhaust internal administrative remedies if the applicable civil service rules include whistleblower claims.44 Therefore, counsel seeking to bring a claim pursuant to Section 1102.5 should explore whether any internal administrative remedies need to be exhausted prior to filing a civil suit.

A plaintiff who successfully prosecuted his or her claim for retaliation in violation of Section 1102.5 may recover compensatory damages, including economic and emotional distress damages.45 Additionally, defendants that are corporations or limited liability companies are liable for a civil penalty not exceeding $10,000 for each violation of Section 1102.5.46 A successful plaintiff may also be entitled to reasonable attorneys’ fees and costs pursuant to California Code of Civil Procedure Section 1021.5 when the lawsuit has resulted in a significant benefit to the general public or a large class of persons. The applicability of Code of Civil Procedure Section 1021.5 is beyond the scope of this article but should be examined by practitioners representing whistleblowers in matters of societal importance and considered by counsel defending employers in such matters.

The expansion of protections afforded by Section 1102.5 is likely to result in a greater number of such claims brought by aggrieved employees. Employers should enact policies and train their managers and human resources personnel to properly respond to an employee’s reports of wrongful activity and how to ensure that retaliation does not result from such reports. At the same time, employees should feel better protected from retaliation based on the expansion of the protections afforded by Section 1102.5.
IN THE PAST SEVERAL YEARS, the National Collegiate Athletic Association (NCAA) has come under fire from current and former college athletes. Most notably, several former college athletes brought actions against the NCAA, its licensing arm the Collegiate Licensing Company (CLC), and Electronic Arts, Incorporated (EA) over the use of the former athletes’ images and likenesses in videogames produced by EA. Under a series of licensing contracts with the NCAA and the CLC, EA produced the popular and lucrative videogames NCAA Football, NCAA Basketball, and NCAA March Madness. The former athletes claimed these games infringed on their individual rights to publicity. In response, the EA argued that the First Amendment protected its use of the former athletes’ images and likenesses.

Complex issues in the college athlete cases concerning the videogames produced by EA include the public nature of and interest in college sports, the restrictions on student-athletes’ rights to market their images imposed by the NCAA through its bylaws and regulations, and the fantasy and historical elements of the videogames. Further, the college athlete cases have highlighted the unique nature of college athletics in general, compelling players and former players to file a myriad of lawsuits against the NCAA on several fronts challenging the traditional view of the college sports business model.

In California, two separate lawsuits, Keller v. Electronic Arts Incorporated1 and O’Bannon v. NCAA,2 were consolidated into a single action, In re NCAA Student-Athlete Name & Likeness Licensing Litigation.3 In both cases, the plaintiffs alleged that their rights to publicity were violated by EA’s use of their images and likenesses in the NCAA-series of videogames produced by EA.4 Late in 2013, EA and the CLC settled with the plaintiffs for a purported $40 million, although the terms of the settlement agreement are supposedly confidential.5 The parties settled after a divided panel of the court of appeals for the Ninth Circuit affirmed the district court’s denial of EA’s motion to strike the complaint as a strategic lawsuit against public participation (SLAPP), under California’s anti-SLAPP statutes.6 In affirming the district court’s denial of EA’s motion to strike, the Ninth Circuit rejected EA’s claim that its use of the former

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athletes’ likenesses was protected as a matter of law by the First Amendment.7

In Hart v. Electronic Arts, Inc., commenced in the U.S. District Court for the District of New Jersey, Ryan Hart, a former quarterback at Rutgers University, filed suit against the NCAA, CLC, and EA, also alleging a violation of his right to publicity by EA for its use of his likeness for the videogame NCAA Football.8 EA filed a motion to dismiss on First Amendment grounds, which was granted by the district court.9 A divided panel for the U.S. Court of Appeals for the Third District, however, reversed.10

The Use of Image and Likeness in Fantasy Sports Videogames
It is undisputed that videogames are entitled to First Amendment protection. The U.S. Supreme Court recognized this right in Brown v. Entertainment Merchants Association, stating, “Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).”11 Equally undisputed, however, is that First Amendment protection is not absolute and a state may recognize and protect a right to publicity in a manner consistent with the First Amendment.12 However, these questions remain: What is the best method to weigh these competing interests in this situation and what factors are relevant in performing this balancing test?

On July 31, 2013, the Ninth Circuit issued its opinion in NCAA, regarding whether the EA’s use of the former student-athletes’ likenesses in the videogames NCAA Football, NCAA Basketball, and NCAA March Madness are protected under the First Amendment.13 In support of its position, EA alleged that it was entitled to First Amendment protection based on four theories: 1) California’s transformative use test, 2) the Rogers test—derived from Rogers v. Grimaldi,14 and the landmark case balancing First Amendment rights and claims under the Lanham Act, 3) the public interest test, a defense for a common law right-of-publicity claim under California law, and 4) the public affairs exemption, a defense to California statutory right of publicity claim.15 The court rejected EA’s other arguments and, following a determination that the transformative use test applied,16 concluded that EA did not satisfy the elements necessary to warrant protection.

The transformative use test is “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”17 There are five factors that the court is instructed to consider: 1) the celebrity likeness and whether it is the sum and substance of the work in question or only a raw material, 2) whether the work is the defendant’s own expression or the expression of something other than the celebrity likeness, 3) whether the “literal and imitative or creative elements predominate in the work,” 4) whether the marketability or economic value of work is derived from the use of the celebrity’s name, image, or likeness, and 5) whether the “artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity in order to commercially exploit his or her fame.”18

Applying these factors, and comparing the facts of this case to four seminal California cases,19 the court concluded that EA’s videogame was not sufficiently transformative to warrant First Amendment protection. The court focused on each individual player-avatar, concluding that EA merely replicated the physical characteristics and statistics of the former players and did nothing to “transform” the player’s individual identities.20 It concluded that the videogame “realistically portrays college football players in the context of college football games.”21 The court did not find the transformative elements of the entire videogame as a whole persuasive, nor did it find significant the fact that the users can alter the avatars.22

Both the Third and Ninth Circuits of the U.S. Court of Appeals rejected EA’s First Amendment claims applying the transformative use test formulated by the California Supreme Court in Comedy III Productions, Inc. v. Gary Saderup, Inc.23 In his dissent, Judge Sidney Thomas agreed that the transformative use test is the appropriate test to apply, because it is more nuanced than the test set forth in Rogers.24 He believed, however, that the majority inappropriately focuses on the “single athlete’s likeness” in the videogame “rather than examining the transformative and creative elements in the video game as a whole.”25 He concluded: “The salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual persona or image has been altered.”26 He also believed that other factors are significant and should be considered. For instance, he focused on the number of athletes the videogame depicts, stating that this factor “diminish[es] the significance of the publicity right at issue.”27 Further, he also found significant the fact the individual players are not identified by name (although third-party software can be purchased to accomplish this task) and the avatars are founded on publicly available information, which does not fall into the category of information protected by the right to publicity.28 Finally, and although Judge Thomas did not devote a significant amount of time to the analysis, he found that the fact that the athletes’ rights to publicity are restricted is significant because there is no compelling interest in protecting the economic value of right to publicity.29 At issue in NCAA is Section 12.5.2.1 of the NCAA Manual that specifically prohibits the student athlete from the commercial licensing of the name and likeness of the player.30 The dissent characterizes NCAA Football as “a work of interactive historical fiction.”31

Applying the same test as the Ninth Circuit—California’s transformative use test—the court in Hart reached similar conclusions about two months prior to the Ninth Circuit’s decision in NCAA.32 When applying the transformative use test, the court focused on the individual athletes not the game as a whole. It stated that it is the likeness and biographical information, which, “when combined, identify the digital avatar as an in-game recreation of Appellant—that must be sufficiently transformed.”33

There was also one dissenting judge in Hart who, like Judge Thomas, believed the majority in Hart failed to focus on the transformative nature of the entire work to make its determination and instead mistakenly focused on the individual characters depicted in the game. In this dissent, Judge Thomas Ambro states: “EA’s use of real-life likenesses as ‘characters’ in its NCAA Football videogame should be as protected as portrayals (fictional or nonfictional) of individuals in movies and books…the work should be protected if that likeness, as included in the creative composition, has been transformed into something more or different than what it was before.”34

The dissenting opinions in NCAA and Hart raise valid points and raise an additional question not answered by the decisions of the Third and Ninth Circuits: does the transformative use test as applied fail sufficiently to take into account the context of the work and lack the subjective elements necessary to determine whether the work is sufficiently transformative to warrant First Amendment protection?

To answer this question, an analysis of cases addressing the right to publicity in other sport contexts is helpful. For instance, in C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advance Media, L.P., the U.S. Court of Appeals for the Eighth Circuit considered the First Amendment versus the right to publicity in the context of online fantasy baseball leagues.35 The game, produced by C.B.C., allowed participants to “form their fantasy baseball teams by ‘drafting’ players from various major league base-
The fantasy team’s success depended on the actual performance of the real athletes throughout the season. In C.B.C., the court held that the players’ rights to publicity must give way to the First Amendment. Instead of applying a particular test, the court looked at numerous factors, including that the type of endeavor, the type of information used, which was public information, the subject matter—sports—which it deemed to be a matter of public interest, and the reasons why the law protects the right to publicity, which has mostly economical but some emotional elements.

The analyses in the dissenting opinions in Hart and NCAA are more similar to the court’s analysis in C.B.C, which examines multiple factors regarding the online fantasy baseball game, including its subject matter. Judge Thomas stated in NCAA that the “considerations” set forth in Comedy III are not mere “analytical factors” and, instead, the court’s opinion in Comedy III provides a “more holistic examination of whether the transformative and creative elements of a particular work predominate over commercially based literal or imitative depictions.” He finds this distinction “critical” because “excessive deconstruction of Comedy III can lead to misapplication of the test.” Judge Thomas’s statement highlights the underlying dissonance between C.B.C and the majority opinions in Hart and NCAA.

While there are a number of differences between fantasy leagues and fantasy sports videogames, it is difficult to predict whether these differences are significant enough to warrant a different outcome. In NCAA and Hart, the courts identified only a few of these differences. In Hart, the court found the distinguishing characteristic to be the use of avatars. In NCAA, the Ninth Circuit did not address C.B.C., but the district court noted that the game in C.B.C., unlike EA’s games, relied on actual reports of the players’ performance for that year, offered only names and statistics for each player, not physical characteristics, and did not allow users to “control the virtual players on a simulated football field.”

**Use of Athletes’ Images: Unchanged or Developing**

Even prior to the use of avatars and online access, athlete’s images were protected and sold, contracted, and marketed for profit. In 1909 through 1911, the American Tobacco Company issued a set of 524 baseball cards to promote tobacco sales, including, without permission, baseball cards depicting Pittsburgh Pirates Hall-of-Famer Honus Wagner. Wagner threatened a lawsuit over the use of his image, so the American Tobacco Company ceased production of his card, and the photographic plates that contained Wagner’s image were destroyed, a remedy no longer really possible in the internet and digital age. Of the cards that used Wagner’s image, only nine remain in the world. One of those nine was valued at $2.1 million in 2013.

In the 1950’s, the U.S. Court of Appeals for the Second Circuit recognized a celebrity’s right to his images, defining it as a property right. In Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc, both Haelan Laboratories and Topps Chewing Gum claimed to have contracted with professional baseball players to use their images to sell gum. The court recognized the “right to publicity” and defined the rights of players to their images as a property right, not only a tort: “We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross’, i.e., without an accompanying transfer of a business or of anything else.”

The NCAA, CLC and EA also are not the first companies to use athletes’ names, likenesses, and images for games. The foundation for fantasy sports was laid in the 1970s. The biggest of the fantasy sports makers were Stratomatic Baseball, APBA Baseball and Negamco Baseball/Big League Manager Baseball, which marketed board games where-in one could draft baseball players and create fantasy teams, manage teams, and earn points. An athlete was represented by his or her name and various player ratings and statistics. The players were not based on personal characteristics, much like the game in C.B.C. above. A participant could add a player-card with an image option to play these games, which are now available online.

Today, what constitutes fantasy in the sports industry is not limited to an analysis of the First Amendment and rights to publicity in the context of college athletics. For instance, currently, the Department of Justice as well as some state agencies are investigating the business model of online fantasy sports phenomena FanDuel and DraftKings for possible violations of federal law related to online gambling, specifically, whether their business models establish unlawful gambling or constitute a permissible game of skill. The FanDuel and DraftKings business models include NCAA competition. The NCAA has determined that the sites do constitute gambling according to their bylaws and, as such, the use of the sites will render players ineligible to participate in NCAA sports. Also, the NCAA has actively tried to prohibit advertising from these companies during NCAA championship broadcasts, a move that could cost networks millions of dollars in advertising revenue. A New York Judge recently issued a preliminary injunction prohibiting the sites from doing business in New York. The Nevada Gaming Control Board also ruled that pay-to-play daily fantasy sports is
a form of gambling requiring a Nevada license to operate within the state.50

**Fantasy Fallout**

Although the NCAA, the CLC, and EA are not the first companies to use athletes’ names, likenesses, and images for games, the fallout appears massive. In July 2013, the NCAA and EA announced that their partnership was terminated and NCAA Football, NCAA Basketball, and NCAA March Madness will no longer be produced using NCAA names and logos.51 NCAA Football alone generated $1.3 billion in revenue for EA since its inception in 1998.52 More importantly, in the $1.3 billion in revenue for EA since its inception in 1998.

In March 2015, in the same court room and in front of the same judge as the NCAA case, two more cases are being heard: Alston v. NCAA55 and Jenkins v. NCAA,56 both of which were allowed to proceed as class actions, a decision the NCAA has appealed. In the Alston case, the plaintiffs—including women’s basketball and men’s football athletes—argue that the schools are in violation of antitrust laws and are seeking an injunction against the limits placed on scholarships that limit the amount to the full costs of tuition, thereby keeping costs down—they want market value. In Jenkins, which includes men’s football and basketball athletes, the plaintiff has thrown another hat in the ring and filed a federal antitrust claim against the NCAA and the five biggest NCAA athletic conferences. Several cases, including Alton and Jenkins, were consolidated and are now referred to as *In re National Collegiate Athletic Association Athletic Grant-in-Aid Antitrust Litigation*, which is before the U.S. Judicial Panel on Multidistrict Litigation.57 This is not the first time these issues have been litigated; however, the landscape is different now.58

On another front, the NCAA also is a defendant in In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation, a concussion lawsuit filed in the college football context. Concussion lawsuits have been raging for a while in the professional football environment and are the subject of the 2015 release of the movie *Concussion*, starring Will Smith. The proposed settlement in *In re NCAA Student-Athlete Concussion Injury Litigation* calls for the NCAA to fund $70 million for research for a 50-year study but no damages and no admission of liability.59 The resolution of the NCAA lawsuit is different from the professional football lawsuits: in the former, “[t]he NFL set aside funds for players who have suffered brain injuries while paying to receive medical treatment” and, in the latter, the athletes are allowed “to sue individually for damages.”60

Finally, the NCAA put in an appearance in a dispute between college and former college players regarding their right to unionize. In early 2014, former Northwestern University quarterback Kain Colter, other Northwestern football players, and the College Athletics Players Association filed a petition with the National Labor Relations Board (NLRB) for the right to unionize.61 The NLRB approved this request and deemed the players employees and their coach, their boss.62 Northwestern University appealed and, in a surprising and deflating move for student-athletes, the NLRB declined jurisdiction.63 The NCAA filed an amicus brief supporting Northwestern’s appeal, as did members of Congress and various sport authorities.

The NCAA is being flanked on all sides: NCAA is not its only battle, just the biggest one for the moment in a changing landscape. Despite the vast implications and the enormous investment and immense publicity of the NCAA case, the impact of the case on college sports is still extraordinarily wide open, and the NCAA still battles to maintain its multi-billion-dollar amateur athletics industry.

1 Keller v. Electronic Arts Inc., 724 F. 3d 1268 (9th Cir. 2013).
6 In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F. 3d 1268, 1272 (9th Cir. 2013). A discussion of California’s anti-SLAPP statute is beyond the scope of this article, but the gist of the motion to strike the complaint is that the complaint alleges protected activity, which is an exercise of the rights of petition...
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and free speech. CODE CIV. PROC. §426.16.

7 NCAA, 724 F. 3d at 1284.
9 Id.
10 Id. at 170.
13 See generally In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F. 3d 1268, 1272 (9th Cir. 2013).
14 Rogers v. Grimaldi, 875 F. 2d 994 (2d Cir. 1989).
15 NCAA, 724 F. 3d at 1273.
16 Id. at 1284.
17 Id. at 1273 (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 106 Cal. Rptr 2d 126, 127 (2001) (Mosk, J., concurring)).
18 NCAA, 724 F. 3d at 1274 (quoting Comedy III Prods., 106 Cal. Rptr 2d at 141-43).
20 NCAA, 724 F. 3d at 1278.
21 Id. at 1279.
22 Id. at 1276-77.
23 Comedy III Prods., 25 Cal. 4th 387.
24 NCAA, 724 F. 3d at 1284 n.1.
25 Id. at 1285.
26 Id.
27 Id. at 1287.
28 Id. at 1288.
29 In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. 09-CV-01967 CW, 2011 WL 2729, 2733, (2011.)
31 NCAA, 724 F. 3d at 1288.
33 Id. at 165.
34 Id. at 174.
35 C.R.C. Distrib. and Mktng, Inc. v. Major League Baseball Advance Media, L.P., 505 F. 3d 818 (8th Cir. 2007).
36 Id. at 820.
37 Id. at 824.
38 Id. at 823-24.
39 In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F. 3d 1268, 1285 (9th Cir. 2013).
40 Id.
45 Haelan, 202 F. 2d at 868.
52 O’Bannon v. NCAA, 802 F. 3d 1049 (9th Cir. 2015).
57 See, e.g., White v. NCAA, MAN 06-CV-1999 (C.D. Cal. 2006).
59 Id.
63 Northwestern University, 362 NLRB 167 (2015).
CALIFORNIA BUSINESSES face a choice when hiring consultants and independent contractors to create or develop intellectual property. A conflict between federal and state law could have critical operational and legal consequences. The use of work-made-for-hire agreements by businesses engaging creative independent contractors is well established. However, California businesses may be violating California state law when engaging creative independent contractors in work-made-for-hire agreements. Similarly, artists, designers, programmers, and other creative individuals may be unknowingly waiving important rights and remedies granted to them under California state law.

In 1982, the California legislature enacted Labor Code Section 3351.5(c) and Unemployment Insurance Code Sections 686 and 621(d), which directly address the express terms of the U.S. Copyright Act regarding creative works made for hire. California businesses face a critical decision in dealing with this potential conflict. They may take advantage of the benefits afforded by the work-made-for-hire doctrine of the Copyright Act but be treated under California law as an employer, or they may sacrifice the benefits of the work-made-for-hire doctrine yet maintain the independent contractor status of its creative workers. Whichever decision the business makes could have lasting legal and practical consequences.

Oddly, this conflict of law is not a new issue. In fact, it was raised in legal journals in 1984 and 1995. However, there appears to be very little of record in the past 20 years. There is a dearth of federal and state case law interpreting this conflict, and there are no California Labor Department opinions indicating any intent to enforce the California laws. This has led to a general ignorance of the laws in both the creative and legal communities. With the increasing scrutiny on the classification of independent contractors and employees under California law, as evidenced by the recent decisions involving Uber drivers and unpaid interns at Fox Searchlight, it is likely only a matter of time until the focus lands on the practice of hiring independent contractors to create works made for hire.

Generally, under the Copyright Act, the creator of the creative work is the author of that work and therefore the owner of the copyright. However, if the creator is an employee of the business and acting within the scope of employment when the creator creates the work of authorship, then the employer owns the copyright by operation of federal law. The Copyright Act also provides a specific, limited mechanism in which an independent contractor can be treated similarly to an employee with regard to the creation of intellectual property. If an independent contractor creates the work of authorship as a work made for hire, the business

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that engages the creator is deemed to be the author of the work and therefore owns the underlying copyright in the work.⁶

For works created after January 1, 1978, the Copyright Act defines a “work made for hire” as, among other things, a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, or as a compilation if the parties expressly agree in a written instrument that the work is a work made for hire. A work created by an independent contractor can be a work made for hire only if it falls within one of the listed categories and there is a written agreement between parties specifying that the work is a work made for hire.⁷ A work-made-for-hire contract provision serves to transfer copyright to the business that engages the independent contractor without the requirement to formally hire the independent contractor as an employee. This would apply to an actor hired by a production company to act in a film or to a studio musician hired by a record producer to play on a song recording. However, this also applies to graphic designers hired to create company logos, marketing materials, or websites; or to programmers or software developers hired to create computer code or design apps or widgets. Extending this even further, it could also include photographers, set designers, visual artists and camera operators.

Because copyright ownership is initially established at the time the creative work of authorship is created, creative businesses need to be vigilant in ensuring that copyright is properly secured. Customarily, a business acquires the work of authorship created by the independent contractor because it intends to integrate it into a motion picture, television show, internet product, software program or application; or incorporate it into marketing materials, websites, and logos. Therefore, having the ability to reproduce, sell, distribute, or license these materials is of utmost importance to a business. The Copyright Act grants owners of copyright five distinct exclusive rights: 1) to reproduce the copyrighted work, 2) to prepare derivative works based upon the work, 3) to distribute copies of the work, 4) to perform the work publicly, and 5) to display the work publicly.⁸ This list makes clear why it is imperative that the business obtain and retain copyright ownership in the creative work product that independent contractors create or develop.

California Labor and Unemployment Insurance Codes

In California, however, there are state statutes that effectively negate the work-made-for-hire provision of the Copyright Act.⁹ Under California Labor Code Section 3351.5(c), a person who creates a work of authorship under a contract that expressly provides that the work is to be considered a work made for hire, is an employee.¹⁰ Similarly, under California Unemployment Insurance Code Sections 686¹¹ and 621(d),¹² a party commissioning a work under a contract that expressly provides that the work is to be considered a work made for hire, is an employer.¹³ Most businesses engage independent contractors in work-made-for-hire engagements to secure copyright ownership of the work of authorship without affording the creator the job, wage, or benefit security of a formal employee.

California businesses may well continue to take advantage of the work-made-for-hire benefits of the Copyright Act and secure copyright ownership in the creative work product. However, the California Labor and Unemployment Insurance Codes are clear—businesses that do so will be deemed employers of the independent contractors who create works made for hire. Section 686 of the California Unemployment Insurance Code specifically defines “employer” as:

[An]y person contracting for the creation of a specially ordered or commissioned work of authorship when the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire, as defined in Section 101 of Title 17 of the United States Code, and the ordering or commissioning party obtains ownership of all of the rights comprising in the copyright in the work.

The ordering or commissioning party shall be the employer of the author of the work for the purposes of this part.

Unemployment Insurance Code Section 621(d) defines “employee” with reference to Section 686. Similarly, Section 3351.5(c) of the Labor Code contains a similar definition of “employee” to include someone entering into written agreements to produce works made for hire. Therefore, if a California business engages an independent contractor, yet has a written agreement stating that any intellectual property created by the independent contractor is a work made for hire, the business will be deemed under California law to be an employer, and the independent contractor will be deemed to be an employee.

What are the practical ramifications if an independent contractor is deemed to be a statutory employee, and the business is deemed to be a statutory employer, under California law? First, employers must register with the Employment Development Department (EDD) within 15 days after paying an employee in excess of $100 in wages.¹⁴ Second, employers must report new employees within 20 days of the employee’s start-of-work date. Third, employers must be provided with pamphlets on employee withholdings, unemployment insurance (UI), state disability insurance (SDI), and paid family leave (PFL).¹⁵ State and federal regulations require employers to display various posters and notices to inform their employees of certain laws and regulations pertaining to employment and working conditions such as UI, SDI,¹⁶ and PFL¹⁷ claims and benefits information. Employers must then make UI, employment training tax (ETT), SDI, and California personal income tax (PIT) payroll tax deposit (DE 88) payments. Subsequently, employers must file a Quarterly Contribution Return and Report of Wages (DE 9) form to reconcile the tax and withholding amounts with the DE 88 deposits for the quarter.¹⁸ Finally, employers must file a Quarterly Contribution Return and Report of Wages (Continuation) (DE 9C) form to report total subject wages paid, PIT wages, and PIT withheld for each employee.

An employer under California law has an affirmative legal obligation to secure workers’ compensation insurance covering employees before any agreement is even commenced. This law is deemed to be violated at the moment the work-made-for-hire agreement is executed without having the insurance.
MCLE Test No. 255

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/mclesseltests.

1. Without a written work-made-for-hire agreement, the hiring business is the author of the creative work and the owner of the underlying copyright.
   True.  False.

2. If the creator of a work is an employee of the business and acting within the scope of employment when the creator creates the work, then the employer automatically owns the copyright by operation of federal law.
   True.  False.

3. For works created after January 1, 1978, the Copyright Act defines a “work made for hire” as a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, or as a compilation, if the parties expressly agree orally that the work is a work made for hire.
   True.  False.

4. A work created by an independent contractor can be a work made for hire only if it falls within one of the listed categories and there is a written agreement between parties specifying that the work is a work made for hire.
   True.  False.

5. Under California law, an independent contractor who creates a work of authorship under a contract that expressly provides that the work is to be considered a work made for hire is an employee of the business.
   True.  False.

6. Under the California Unemployment Insurance Code, a business commissioning a work under a contract that expressly provides that the work is to be considered a work made for hire is an employer.
   True.  False.

7. Under California law, employer businesses are not required to make unemployment insurance, employment training tax, state disability insurance, and California personal income tax, and payroll tax deposit payments for their independent contractors.
   True.  False.

8. An employer under California law has an affirmative legal obligation to secure workers’ compensation insurance covering employees after services have commenced.
   True.  False.

9. Only a labor commissioner has the authority to issue a stop order against any business that is discovered to be unlawfully uninsured for workers’ compensation.
   True.  False.

10. The primary problem with misclassifying an employee as an independent contractor is that the employer may wind up paying all the back employment taxes, including the employee’s share, plus interest and penalties.
    True.  False.

11. Copyright ownership can be transferred or assigned orally or in a written document.
    True.  False.

12. A work of authorship generally created after January 1, 1978, by a single author is protected by copyright for an initial term of 28 years, with one extension of 28 years.
    True.  False.

13. The Copyright Act of 1976 allows certain authors who have transferred copyright by contract or otherwise to terminate the copyright transfer and regain those transferred rights after 35 years.
    True.  False.

14. The copyright termination of transfer right can be waived only in a written contract by the author.
    True.  False.

15. Corporations and limited liability company entities are not considered employees under the California statutes for the purposes of works made for hire as the creators must be individuals.
    True.  False.

16. Congress intended to preempt the California statutes with the Copyright Act of 1976 regarding works made for hire.
    True.  False.

17. There is an extensive and conflicting history of federal and state case law interpreting the conflict between the Copyright Act and the California statutes regarding works made for hire.
    True.  False.

18. Copyright ownership consists of the two distinct exclusive rights to reproduce and distribute a creative work.
    True.  False.

19. The provisions of the California Labor Code only apply to California residents who have relationships with California-based businesses.
    True.  False.

20. There are only civil penalties for a business’s failure to secure workers’ compensation insurance for its employees.
    True.  False.

MCLE Answer Sheet #255

WORK MADE FOR HIRING

Name ________________________________
Law Firm/Organization ____________________________
Address ____________________________________________
City ____________________ State/Zip ________________
E-mail ________________________________ Phone __________________
State Bar # ________________________________

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photographs of this answer sheet may be submitted, however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the $20 testing fee ($25 for non-LACBA members) to:
   Los Angeles Lawyer
   MCLE Test
   P.O. Box 55020
   Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.
4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
5. For future reference, please retain the MCLE test materials returned to you.

ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. □ True  □ False
2. □ True  □ False
3. □ True  □ False
4. □ True  □ False
5. □ True  □ False
6. □ True  □ False
7. □ True  □ False
8. □ True  □ False
9. □ True  □ False
10. □ True  □ False
11. □ True  □ False
12. □ True  □ False
13. □ True  □ False
14. □ True  □ False
15. □ True  □ False
16. □ True  □ False
17. □ True  □ False
18. □ True  □ False
19. □ True  □ False
20. □ True  □ False

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for each quarter. Failure to complete these steps on time may result in penalty and interest charges.20

An employer under California law has an affirmative legal obligation to secure workers’ compensation insurance covering employees before any agreement is even commenced.21 This law is deemed to be violated at the moment the work-made-for-hire agreement is executed without having the insurance.22 Injury to an employee during the term of engagement is not the trigger for the insurance requirement. Failure by an employer who knew, or because of knowledge or experience should be reasonably expected to have known, of the obligation to secure the payment of compensation, is a misdemeanor punishable by imprisonment in the county jail for up to one year, or by a fine of up to $10,000, or both.23

Further, the California Department of Insurance provides that employers that fail to purchase workers’ compensation insurance are in violation of the California Labor Code.24 The director of the Department of Industrial Relations has the authority to issue a stop order against any business that is discovered to be unlawfully uninsured for workers’ compensation. A stop order will close down business operations until workers’ compensation insurance is secured. In addition to issuing a stop order, the director can assess fines based on whether a business was unlawfully uninsured through normal investigation or through the filing of an injured worker’s claim with the Uninsured Employers Benefits Trust Fund.25 Failure to comply with a stop order can result in a $10,000 fine, and the fine for failure to carry workers’ compensation insurance is $1,000 per employee. Businesses can also be prosecuted for insurance fraud for willful failure to secure workers’ compensation insurance as prescribed by law.26

If a business elects not to purchase workers’ compensation insurance, the business opens itself up to potential liability lawsuits from injured employees. Further, a creative independent contractor may be deemed to be an employee for other purposes, including matters related to payroll taxes.27 The business may also potentially find itself exposed to claims by such employees for benefits offered by the business to its other employees.28 The primary problem with misclassifying an employee as an independent contractor is that the employer may wind up paying all the back employment taxes, including the employee’s share, plus interest and penalties.29

**Maintaining Independent Contractor Status**

What if a business merely removes the work-made-for-hire language from the independent contractor agreement in an effort to maintain the independent contractor relationship with its workers? Under the Copyright Act, ownership of the copyright in any work of authorship created by the independent contractor would immediately vest in the independent contractor. This is problematic if the business ultimately desires to use the intellectual property in a way that involves the display, reproduction, distribution, performance, or creation of derivative works of the copyrighted work of authorship.

In an attempt to secure copyright ownership in the creative work product of its independent contractors, some businesses have started inserting a provision in the independent contractor agreement that assigns all copyright created in the work of authorship to the business. Copyright ownership must be transferred in a written document and can be transferred to the business as an alternative means of ensuring that the business obtains copyright ownership.30 A business could also elect to insert a license provision which would transfer a limited right to the business to use the creative work product for a specific limited purpose or duration of time. These options are both effective in transferring the copyright, or a portion thereof, from the independent contractor to the business. A work of authorship generally created by a single author is protected by copyright for the life of the original author plus 70 years,31 so there could be sufficient benefits for a business to secure the copyright by virtue of an assignment or license. If the original creator were to die a day after making the assignment, the copyright would still last for 70 years, which may or may not be sufficient.

However, the significant risk with this approach is that copyright law provides that assignments of copyright and licenses granted in a work made by the author can be terminated under certain circumstances.32 The Copyright Act of 1976 allows certain authors who have transferred copyright by contract or otherwise to regain those transferred rights after 35 years.33 If an independent contractor is able to regain the copyright in the creative work after 35 years, it could serve a severe blow to a business if the work turns out to be highly valuable or critically integrated into the intellectual property of the business. Furthermore, this termination of transfer right cannot be waived in a contract, so a business cannot include a waiver clause in its contract with an independent contractor.34

While businesses may believe they are achieving the same end result as having a work-made-for-hire agreement, they are only guaranteeing control of the copyright for 35 years.

**Compliance**

Is it possible for a business to secure copyright through the benefits of the work-made-for-hire doctrine while maintaining independent contractor status for its creative workers? A novel argument that has yet to be tested would be to have the business engage the creator in a formal work-made-for-hire engagement but to specify that the creator retained some limited rights in and to the copyright interest. Section 335.5(c) of the Labor Code specifically defines “employee” to include:

> [a]ny person while engaged by contract for the creation of a specially ordered or commissioned work of authorship in which the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire, as defined in Section 101 of Title 17 of the United States Code, and the ordering or commissioning party obtains ownership of all the rights comprised in the copyright in the work.

Strictly interpreted, this appears to require that the business obtain all the copyrights in and to the creative work product. As copyright consists of a bundle of five distinct exclusive rights,35 it may be possible to have the creator retain ownership or a license in a limited copyright interest as a means to keep the business in compliance with the Labor Code as well as obtaining copyright in the creative work from the independent contractor. For example, the terms of the work-made-for-hire agreement could provide that the creator retains a license to reproduce his or her contribution to the work for non-commercial promotional purposes. As yet no case law interprets this approach; it is unclear if a business would be successful with this approach.

Businesses could attempt to make the contract subject to the law of a state other than California. That could give rise to the argument that neither the Labor Code nor the Unemployment Insurance Code applies to the parties of the contract. However, these laws may apply when either the creator or business are located in California.36 They would apply if the business is located in California and engaging the services of a creator residing in another state or even another country, or if the creator is located in California and the business is located in another state or even another country.37 This approach does not appear to give comfort to California creative businesses.

Businesses could also make the argument that the supremacy clause would appear to apply, which would rule in favor of the Copyright Act.38 The clause establishes that the U.S. Constitution, federal laws made pursuant to it, and treaties made under its authority constitute the supreme law of the land.39 Preemption can be either express or
implied. If Congress expressly preempts state law, the only question for courts becomes determining whether the challenged state law is one that the federal law is intended to preempt. In this case, the current Copyright Act was enacted in 1976.\textsuperscript{40} The California Labor and Unemployment Insurance Codes were enacted in 1982.\textsuperscript{41} Therefore, there does not appear to be any intended preemption by Congress. Implied preemption presents a more difficult issue because the state laws in question do not appear to directly conflict with federal law. To borrow a phrase from \textit{Pennsylvania v. Nelson}, we must then look to whether Congress has “occupied the field” in which the state is attempting to regulate, or whether a state law directly conflicts with federal law, or whether enforcement of the state law might frustrate federal purposes.\textsuperscript{42} Federal occupation of the field occurs when there is no room left for state regulation. Courts will look to the pervasiveness of the federal regulation, the federal interest at stake, and the danger of frustration of federal goals in making the determination as to whether a challenged state law can stand.\textsuperscript{43}

As there is no case law that addresses this issue, it is unclear how a court may rule. A case could be made that the purpose of the work-made-for-hire doctrine under the Copyright Act is to provide businesses with a mechanism to obtain copyright ownership in a work of authorship without the requirement to formally hire the creator as an employee. Under that argument, the state laws would frustrate that purpose because it eliminates the possibility of a business engaging a creative independent contractor in a work-made-for-hire agreement. A case could also be made that the state laws only add certain employment obligations on a business and otherwise do not affect copyright ownership in the work of authorship. When rules or regulations do not clearly state whether or not preemption should apply, the U.S. Supreme Court has tried to follow legislative intent and shown preference for interpretations that avoid the preemption of state laws.\textsuperscript{44} Until a court rules on this potential preemption issue, the uncertainty for California creative businesses will continue.

\textbf{Loan-Out Company}

In the case of many creative professionals, it is not unusual to have a loan-out shell company, either a limited liability company or corporation, for tax and liability purposes. This loan-out company provides limited liability and tax advantages to the creative professional, but it could also resolve this conflict of laws by providing creative businesses with an opportunity to obtain complete copyright ownership of a work of authorship created by an independent contractor, and maintain independent contractor status for the creative worker. One effective method to accomplish this is for a business to require any independent contractor to enter into the work-made-for-hire agreement as a limited liability company or corporate entity, and not in an individual capacity. Customarily, an artist or creative individual will enter into agreements in its corporate capacity, which then agrees to provide the services of the individual pursuant to the independent contractor agreement. Corporations and limited liability company entities are not considered employees under the California statutes for the purposes of works made for hire, as the creators must be individuals.\textsuperscript{45} Therefore, the terms of the California Labor and Unemployment Insurance Codes relating to works made for hire do not apply to limited liability companies and corporations.\textsuperscript{46} While many creative professionals already operate loan-out companies, it may pose a burden to require smaller independent contractors to form a limited liability company or corporation as a precondition to being awarded an independent contractor engagement. However, in light of the risks associated with either lack of complete ownership or copyright or the obligations of treating the creative worker as an employee, this precondition may be a necessity.

California businesses face a difficult choice when it comes to hiring consultants and independent contractors, especially if those consultants and independent contractors are creating or developing intellectual property as part of their services. California businesses face a critical decision in dealing with this conflict. Whichever decision the business makes could have lasting legal and practical consequences. As unpleasant and daunting as it may appear, California creative businesses are best served to enter into work-made-for-hire agreements only with corporate or limited liability company entities. This will ensure that the business obtains the entire copyright ownership interest in any intellectual property created by the contractor or employee for the full term of the copyright interest and will not trigger compliance requirements under California employment law.

\begin{enumerate}
  \item See \textit{LAB. CODE §3351.5(c)}; \textit{UNEMP. INS. CODE §5621(d)}, 686.
  \item \textit{17 U.S.C. §201(a).}
  \item \textit{17 U.S.C. §201(b).}
  \item \textit{Id.}
  \item \textit{Id.}
  \item See \textit{17 U.S.C. §106.}
  \item See \textit{LAB. CODE §3351.5(c); see also UNEMP. INS. CODE §5621(d)}, 686.
  \item \textit{LAB. CODE §3351.5.} (The definition of “employee” includes a person engaged by contract for the creation of a specially ordered or commissioned work of authorship in which the parties agree in writing that the work shall be considered a work made for hire as defined in 17 U.S.C. §101.).
  \item \textit{UNEMP. INS. CODE §668} (definition of “employer”).
  \item \textit{LAB. CODE §621} (definition of “employee”).
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{LAB. CODE §3700.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{See 26 I.R.C. §§3101-3128.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{17 U.S.C. §204.}
  \item \textit{17 U.S.C. §302(a).}
  \item \textit{17 U.S.C. §203.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{See 17 U.S.C. §106.}
  \item Narayan v. EGL, Inc., 616 F. 3d 895 (2010) (provisions of the Labor Code may apply to California residents who have relationships with out-of-state companies).
  \item \textit{UNEMP. INS. CODE §§602, 603} (tests to determine if services of employees are considered subject to California law for unemployment insurance, employment training tax, and state disability insurance).
  \item U.S. CONST., art. VI, §2.
  \item \textit{Id.}
  \item See \textit{LAB. CODE §3351.5(c); see also UNEMPLOYMENT INS. CODE §6621(d)}, 686.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{UNEMP. INS. CODE §623} (The term “employee” does not include any member of a limited liability company that is treated as a partnership for federal income tax purposes.); \textit{UNEMP. INS. CODE §621(f)} (“Employee” includes any member of a limited liability company that is treated as a corporation for federal income tax purposes.); \textit{UNEMP. INS. CODE §622} (“Employee” does not include a director of a corporation or association performing services in his or her capacity as a director.).
  \item \textit{Id.} See also \textit{LAB. CODE §§3354, 3351(d)}, 3715 (b).
\end{enumerate}
Appealing before Trial

In family law litigation, developing a pendente lite strategy that considers an appeal can serve the client’s interest

IN FAMILY LAW LITIGATION, no one approach to appellate planning is guaranteed to produce favorable results, but pretrial planning for the creation of an effective record can save a meritorious appeal. Following a pendente lite strategy that considers an appeal can yield significant returns on the time invested, even though in most civil cases the pendente lite phase does not take long. The Trial Delay Reduction Act’s fast-track rules require most complaints to come to trial within one year, and all others two years from filing. However, divorce cases and other family law matters are exempt from the fast track rules and often take years to reach trial.2

These years before trial can be used to implement an appellate strategy. It may seem that such preparation is not important, given that family law cases do not go up on appeal as frequently as other civil actions and that, even when appealed, dramatic reversals of trial court decisions are rare. Nevertheless, if pretrial planning lacks a vision for both winning the trial and preserving a solid foundation for appeal, the opportunity to mitigate or cure a less-than-satisfactory trial result may evaporate. A clear but flexible litigation plan should include steps to protect the client’s appellate position. Two important aspects of pendente lite planning are discovery and statements of decision (SODs).

A complex plan is unnecessary. A simple guideline may be created by asking early and often: 1) How will the case be positioned for appeal if the trial yields an unacceptable result? 2) What gaps exist in the supporting, impeachment, and rebuttal evidence? 3) Can a request for order (RFO) be filed to redress a problem area? and 4) Have all the factual, statutory, and case law elements of the case been identified so that an effective request for an SOD may be made?

Even if these questions are addressed well, when remittitur issues the parties will again face the anxiety and expense of appeal.3 Appellate decisions rarely cure all trial errors, craft a new (enforceable) judgment, or tie up all legal threads dangling from the case. Rather, appellate decisions point out the errors and leave the parties and lower court to correct them. Such dour prospects, however, do not diminish the need to consider the posttrial possibilities before trial begins. Many family law cases involve child custody disputes, domestic abuse (with victims often

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suffering from impaired decision-making capacity), breaches of fiduciary duty, and conflicts over valuable assets. Clients need counsel who can spot and correct errors in discovery or other aspects of the litigation long before appeal.

Setting the appellate stage before trial means that trial counsel should timely and effectively challenge statutory infringements, whether they are made by the opponent or the court. A short review of family law decisions reveals that most trial judgments survive appeal unscathed regardless of the presence of irregularities, sometimes even obvious error.3 Due process does not require perfection prior to and during trial; just a fair opportunity for the parties to present their claims. Failure to assert claims arising or associated with the alleged facts waives those claims.5

The standard of appellate review does not mandate reasonability under all facts and circumstances. The appellate court only considers whether the facts that the trial officer applied exist in the record, whether they are material and pertinent, and whether they are rationally employed in the judgment. As the court held in Marriage of Mosley: “Generally...an appellate court is not authorized to substitute its judgment of the proper decision for that of the trial judge. The trial court’s exercise of discretion will not be disturbed on appeal in the absence of a clear showing of abuse, resulting in...a manifest miscarriage of justice.”6

An appellate court will overturn a judgment only if it deviates so far from reason as to confound logic. As the court held in Marriage of Schroeder: “[A] trial court has broad discretion and an abuse thereof only occurs when it can be said that no judge reasonably could have made the same order.”7 A faultless performance in the lower court is not required. A different set of facts on record from those cited in the judgment, which could reasonably support an alternate decision, is insufficient to yield another trial. In Marriage of Ackerman, the court held: “To the extent that a trial court’s exercise of discretion is based on the facts of the case, it will be upheld ‘as long as its determination is within the range of the evidence presented...’ Conversely, a court abuses its discretion if its findings are wholly unsupported, since a consideration of the evidence ‘is essential to a proper exercise of judicial discretion.’8

Furthermore, the existence of error in important parts of the judgment will not always lead to a reversal. The errors must be so egregious as to substantially alter the outcome of the case and incurably infect the judgment. These errors must significantly impair important rights of the aggrieved party. This principle was explained in Marriage of Smith, a spousal support case:

The facts and the equities in one case may call for no spousal support, or for very short-term support for the purpose of financially assisting one spouse in the transition to single status or until the proceeds from an ordered property division or sale can be received... At the other end of the spectrum are cases where the purpose of spousal support is to provide financial assistance to the supported spouse until the death of one of the spouses.9

If a mistake by the trial court does not result in palpable injustice, the reviewing court will affirm on the basis of the harmless error doctrine.10 If a client’s case has facts that may be viewed from various reasonable perspectives, sufficient proof must exist to adequately support the client’s position. This process requires counsel to gather facts under-mining other arguments. In a sense, it is not enough to find proof of the client’s claim. Counsel must exert enough effort to find the evidence and law making his client’s position the weightier and more credible one.

To have a chance of overcoming these significant obstacles to a satisfactory result on appeal, painstaking accumulation of records and testimony in support of the client’s case is critically important. The opposition may lack the resources to amass an equivalent arsenal of evidence. Instead, the opposition may try to have evidence excluded. For this reason, it is also vital to organize the foundation and authority for entry of the client’s evidence in advance. If the other side object(s) to the client’s documents or testimony, an outline of the Evidence Code and case citations can be employed to support entry of the challenged evidence.

Likewise, the opponent’s exhibits and witnesses may be systematically challenged. State and local rules of court require the parties to exchange witness and exhibit lists prior to trial.11 Pretrial organization allows clear and effective challenges to improper offers of documents, things, and testimony. When stating an objection, it is important to request a definitive ruling by the judge. If the other side asserts a disputed material fact, counsel should test its foundation. The opposition may also attempt to substitute argument and opinion for proof. Impeachment facts and argument need to be organized by exhibit and witness so challenges to them are concise and convincing. The trial judge will be more inclined to sustain objections after a few successful demonstrations.

Another principle argues for building a well-oiled pretrial machine for defending and attacking evidence—the rule that failure to object on the record constitutes waiver of the error.12 Advanced organization of proof—written and testimonial—makes inadvertent waivers less likely. Objections and other procedural safeguards cannot be tacit. Counsel must state them on the record. Also it may benefit the appeal to insist on the grounds for the ruling or finding being on the record. Thus, if a well-reasoned argument at trial fails to achieve an appropriate result, the record will show it. In this manner, much of the appeal research will have already been done.

**Statement of Decision**

Another way to solidify the client’s appellate posture is with a request or demand for an SOD. With simple litigation, it will suffice to make an oral request on the record for an SOD at or before the end of the hearing. Counsel can quickly outline the issues and facts believed to be necessary for an effective SOD. On the other hand, when faced with a lengthy trial, testing numerous complex facts, substantial financial risk, or if there are splits or uncertainty in potentially applicable authority, a written request for an SOD is essential. The demand for an SOD must be made within the statutory timeframe and should clearly specify each material issue, fact, and legal authority requested in the SOD.13

The elements of the SOD should include the issues constituting each cause of action, a request to list the facts required to find and sustain each cause of action, and a request for the statutory and case authorities cited in support of the trial court’s rulings. As with well-crafted trial briefs, it is not unusual for trial court observers to see the judge following or referring to the outline in the request for an SOD during the closing arguments. In family law cases, the judge is the finder of fact. The law imposes no requirement that judges issue written findings of fact or conclusions of law sua sponte.14 If the litigation plan indicates that an appeal will be filed in the event that the trial does not yield an acceptable outcome, the SOD demand is a critical plank for the appellate stage. Without an SOD request on the record, the doctrine of implied findings permits the reviewing court to assume the judgment had sufficient evidence to support its rulings and findings. As the court held in Marriage of Ackerman:

We begin with the well-established rule that ‘[a] judgment or order of a lower court is presumed to be correct on appeal...presumptions are indulged in favor of its correctness....’ To the extent that a trial court’s exercise of discretion is based on the facts of the case, it will be upheld ‘as long as its determination is within the range of the evidence presented.”15

An SOD request and the judgment of the court, even if the judge does not prepare an SOD, provides the material for the appellant...
to pinpoint mistakes made during the trial. It forces the appellate court to consider each of them, subject to harmless error analysis. The value of the SOD request is greatest if complex facts are presented. If these are not rationally applied in the judgment, reversal will follow. As the Ackerman court also held: “Conversely, a court abuses its discretion if its findings are wholly unsupported, since a consideration of the evidence ‘is essential to a proper exercise of judicial discretion.’”

One family law opinion provides a guide for the analysis that may be expected from a trial judge. The case dealt with former Civil Code Section 4801—now Family Code Sections 4320 et seq.—yet applies to any case in which the lower court issues an SOD. In Marriage of Smith, the court held: “Weighing the factors specified in section 4801, subdivision (a), and by appellate case law, the trial court, in exercising its discretion on the issue of spousal support, must endeavor to make an order which will achieve a ‘just and reasonable’ result in each case.” With a demand for SOD, the court’s SOD, and the judgment, the client will commence the appeal process with many of the most troublesome hurdles already cleared.

With so much pretrial preparation to consider, counsel may wonder where to start. The answer to this problem is that the nature of the case determines what evidence is needed and how to assemble it. In particular, the proponent of any cause of action or issue must present sufficient evidence to prove each element of that claim. Securing and organizing the documentary and testimonial proof well in advance of trial will reduce problems of introduction and admission. An integrated plan for discovery and litigation usually produces superior results. In short, a pretrial plan that includes a plan for appeal may be based on the elements of the claim. In a family law case, in turn, that plan should address fiduciary duties under the Family Code in addition to the Civil Discovery Act (CDA).

The Family Code provisions increase the stakes for failure to make forthright disclosures. Commonly used discovery in family law cases includes demands for production of documents and things, interrogatories, and requests for admissions. Rules covering the use and abuse of discovery are found in various parts of the CDA. Demands for production of documents allow parties to obtain documents or categories of documents believed to be in the possession or control of the other party. If originals are necessary to a party’s case, this can be made a mandatory element of compliance. Documents, records, computer memory, and evidence of other things (for example, original art objects) may also be sought from third parties, such as banks, employers, doctors, and accountants.

An effective demand for production must comply with certain minimums. The type or description of each document or category of documents sought must be reasonably clear. The demand should state how the producing party should serve the document or thing. In the alternative, a general instruction applying to all documents or categories should be included in the demand for production’s introductory section.

Legible copies of documents may be allowed, but if this is not satisfactory as to all of the records or things demanded, it should be made clear in the introductory section or general instructions of the written demand. If only specific records or things need be originals, state that clearly in the particular demand for those items. Responses to a demand for production must be in writing and verified under oath by the party or person responsible for their accuracy and completeness under the CDA. It is good practice to include a formal reminder of that in the demand.

Interrogatories are questions that one party asks the other about facts relevant or possibly related to the case. However, these questions do not have to be directly relevant so long as the answer could lead to the discovery of relevant evidence. The breadth of discovery allowed for interrogatories also extends to demands for production. Interrogatories are directed to a party of the case, not unrelated persons, businesses, entities, or witnesses. Questioning of unrelated persons or agencies may be accomplished by deposition subpoenas. Unlike demands for production, which permit somewhat greater generality in category descriptions, interrogatories must be clear, complete, and self-contained. The inquiry cannot be made specific by reference to another document or verbiage

The same clarity and specificity required of each interrogatory applies to the answers provided; responses must be complete and truthful. If the responding party cannot address the entire scope of the inquiry, the response must provide as much information as the party has or can obtain through reasonably diligent effort. If a proper answer contains large amounts of data already set forth with sufficient detail in an existing document, the response may refer to that document as its answer. However, the exact pages or parts of a book or other long volume must be designated with sufficient precision to permit identification of the applicable information with reasonable ease. The response to interrogatories must also be verified under oath.

Like contention interrogatories, requests for admissions (RFAs) can effectively tie the opposing party to a specific, or at least much narrower, position if served later in the pendente lite phase. Counsel often wait until just a few months before trial so that responses and any necessary discovery motions can be completed prior to the end of the discovery period. With interrogatories, RFAs have strict limits on their form and content. Effective drafting of an RFA can be difficult. Each RFA must be whole and complete in itself,
depending on no other document, information, or condition to give it meaning. An RFA cannot be structurally convoluted, and each must deal with only one subject or aspect of a subject. Very little wiggle room is given for the response to an RFA. The only acceptable answers are “admit,” “deny,” or “don’t have enough information to admit or deny.” However, a partial admission or denial is acceptable, if only part of the RFA applies to the facts of the case. Also, if the responding party claims a lack of sufficient knowledge, the party must also affirm that he or she has made a thorough, good-faith effort to secure the information that would allow an admission or denial. Under the CDA, RFA answers must be verified by the responding party as accurate and complete.

The most common areas of discovery abuse involve responses or answers that skirt full compliance with the CDA. In those instances, counsel should move quickly to the meet-and-confer process. This requires counsel for the parties to discuss and negotiate solutions to their discovery disputes. If meeting and conferring does not produce workable solutions, the aggrieved party must file an RFO that seeks an order to compel compliance with the CDA. If the RFO is not timely filed, all objections and complaints about the discovery responses in question are waived.

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Even at the meet-and-confer stage, planning for a possible appeal is recommended. If the parties meet and confer, reaching what appear to be an acceptable compromise, they will save time and money. However, if problems continue to have a material impact on trial preparation or position, the client’s only reasonable alternative is to file an RFO to compel and to seek sanctions.

In making a pretrial discovery plan, however, counsel must balance considerations. As the court held in Deyo v. Kilbourne: “It is fundamental that the only objective of the pretrial discovery rules is to allow a party to obtain all of the facts relative to a claim or defense. Neither party may employ the discovery rules with the long-range objective of trapping the other party into the imposition of sanctions.” While neglecting specific steps in the discovery enforcement can cripple an otherwise meritorious appeal, it is possible to go too far, and appellate decisions in this area are inconsistent. Even if the trial court contributes to the noncompliance, the appellate court may reverse the resulting order.

The opinions of appellate courts are replete with examples of litigants who suffered the stonewalling of opponents during discovery, only to be penalized for their patience on appeal. Those decisions are reminders that counsel must protect the pendente lite record. Wandering from the path set by the CDA creates an avoidable risk on appeal. However, with seeming contradiction, another court affirmed the trial court’s decision when a litigant’s conduct demonstrated the pointlessness of progressive punishment. In that case inflicting the ultimate sanction was appropriate. In Do It Urself Moving and Storage v. Brown, Leifler, Slatkin and Berns, the court held: While...cases and treatises have interpreted the Civil Discovery Act...to require that, prior to the imposition of sanctions harsher than monetary sanctions, a party must have disobeyed a court order compelling discovery...these authorities are distinguishable....Here, it is conceded that plaintiffs are unable to provide the promised items of discovery...a formal order to comply, would have been futile.

Filing motions in limine—pretrial requests for orders limiting or granting evidentiary options at trial—may provide an alternative for mitigating or neutralizing the possible effect of omitted discovery enforcement. However, these motions face an uphill battle when filed over discovery issues that are not covered in earlier motions to compel, or at least meet and confer negotiations. They are
generally viewed as attempts to blindsight the opponent and gain unfair advantage. Trial judges do not favor such tactics when counsel could and should have filed a discovery RFO in the normal course.

This picture is further complicated by the fact that many trial courts express tacit or overt antipathy toward discovery RFOs. Some also give short shrift to SOD requests. Given the large calendars and caseloads faced by the trial judiciary, along with the staff reductions seriously decreasing the assistance available to the lower courts, impatience with the detailed, research-oriented, discovery motions and SOD requests is understandable. However, these procedures are part of the statutory discovery and trial structure. Therefore, in pretrial planning for a possible appellate filing, a balanced consideration of these factors is necessary.

Assuming that the complaining party has complied with the informal avenues of dispute resolution recommended in the CDA and Code of Civil Procedure, which can only be determined by careful review of the moving papers, attitudes of irritation and indifference by the trial court can harm litigants. It is unfortunate for a litigant to witness a court’s disfavor to an appropriate motion to enforce discovery. The same is true with respect to a request for SOD. It may be that filing a well-crafted SOD demand will allow identification and redress of a deficient SOD and judgment on appeal. However, that cannot always be said if insufficient redress for discovery violations are doled out by judges during the pendente lite phase of a case.

Regardless of the hostility of some judges to lawful attempts to redress discovery abuses, it remains the duty of trial counsel to provide zealous and effective representation, which could and should have filed a discovery RFO if insufficient redress for discovery violations is necessary.

RULES OF COURT. Assumption that the complaining party has complied with the informal avenues of dispute resolution recommended in the CDA and Code of Civil Procedure, which can only be determined by careful review of the moving papers, attitudes of irritation and indifference by the trial court can harm litigants. It is unfortunate for a litigant to witness a court’s disfavor to an appropriate motion to enforce discovery. The same is true with respect to a request for SOD. It may be that filing a well-crafted SOD demand will allow identification and redress of a deficient SOD and judgment on appeal. However, that cannot always be said if insufficient redress for discovery violations are doled out by judges during the pendente lite phase of a case.

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1 Gouv. Code §§68600 et seq.; Cal. R. of Ct. 3.700 et seq.
3 Cal. R. of Ct. 8.272.
Decriminalizing Prostitution in Recognition of Fundamental Rights

JOHN AND TYRON WERE TOGETHER in the privacy of John’s apartment when the police intruded and arrested them. They were later convicted of engaging in “deviate” sex. In 2003, the U.S. Supreme Court overturned their convictions in Lawrence v. Texas, assuring Americans that federal constitutional guarantees of liberty and privacy protect an individual’s right to engage in private same-sex intimacy. But if the police had discovered money on John’s coffee table, the court’s affirmation of John and Tyrone’s interests in liberty and privacy would not have protected either from a prostitution conviction under the laws of nearly every U.S. jurisdiction including California.

It is time for California courts to consider what it is about the money on the table that would have made John and Tyrone’s intimacy less private than it was. The right to privacy is explicitly articulated in the California Constitution. Also, in the context of abortion rights, the state’s high court said in American Academy of Pediatrics v. Lungren that the constitution protects a woman’s exercise of “personal control over the integrity of her own body” and “her social role and personal destiny.” Yet, set against that right are this state’s antipronstitution provisions: Penal Code Section 647(b), which broadly criminalizes any sexual touching for money, together with other provisions that criminalize any third-party involvement in such acts.

At the outset, any mention of decriminalizing the exchange of sex for money will have to confront the image of the trafficked sex slave. In the popular imagination, prostitution is increasingly thought of as in tandem with trafficking, and the passions generated by anecdotes of women and children forced or duped into prostitution hang in the air ready to sweep away any deliberative discussion of private, adult, consensual sex for money. But this image is a distortion of what characterizes prostitution itself in this country.

In California, trafficking involves the deprivation of the victim’s liberty through force or fraud or a minor’s involvement in commercial sex, while section 647(b) makes no reference to force, fraud, or minors. The latter is not an antitrafficking law, and its repeal would give no comfort to traffickers. In fact, neither the pimp who brutalizes or steals from a prostitute nor the kidnaper or defrauder of a naïve woman in prostitution is a prostitute or in violation of 647(b). Other criminal provisions address this contemptible and frightening behavior. For the adult prostitute demanding respect for autonomy and privacy rights, this conflation of his or her work with trafficking is both insulting and impenetrable. One is reminded of the red scare of the early 1950s and the effort of a blacklisted leftist playwright trying to defend against a rote association with Stalin’s purges.

Amnesty International can tell the difference between prostitution and trafficking. For example, the current fixation on trafficking tends to interpret any sex work as coercive and exploitive at some level, but studies do not support this generalized image of prostitution. From the available research, it appears that most street workers do not work for a pimp, and a 1991 study of Los Angeles County street workers found their average earnings were higher than the average for working women overall. About 80 percent of prostitutes, though, are not street workers. They work indoors. Former call girl and author Norma Jean Almodovar gives us a view of the high end of the market. She chose her own madams to work for and switched them as it suited her. They took 40 percent of the negotiated fee, but they provided a service, furnishing and screening clients as well as negotiating the fee. They also provided an element of security. She was always in control of her work, rejecting engagements as she chose. Her relationship with her “pimp” was not unusual for a call girl.

Author and former madam Maggie McNeil notes that, far from being coerced victims, sex workers half-jokingly criticize other women for giving sexual favors away, mocking them as “victims in need of rescue.” Almodovar writes of former clients as a “great bunch of guys,” recalling one who called between visits just to talk and another whom she might have married but for her choice of another man. But, in the end, she spent time in prison because she gave advice to another adult who asked her about becoming a call girl. Our lives are no better protected, our futures no brighter, and our children no safer because we imprisoned her. We just don’t like thinking about her, preferring to shift our gaze to an imagined sex slave driver and comforting ourselves that we are somehow fighting that monster.

Jerald L. Mosley is retired from practicing employment and constitutional law as a supervising deputy attorney general at the California Department of Justice.
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