Los Angeles legal scholars Aslı Bâli (right) and Jessica Peake analyze President Trump’s airstrikes against Syria within the context of international law and historical U.S. military intervention in the area.

The Force of Nations

Los Angeles legal scholars Aslı Bâli (right) and Jessica Peake analyze President Trump’s airstrikes against Syria within the context of international law and historical U.S. military intervention in the area.
WE’RE IN A DISABILITY LEAGUE OF OUR OWN.

Frank N. Darras, founding partner of DarrasLaw, has built the largest individual and long-term disability insurance litigation practice in America. DarrasLaw is dedicated to helping the disabled and disadvantaged fight Big Insurance.

Headquartered in Ontario, California, DarrasLaw helps hardworking individuals from all walks of life. The firm's client list reads like a “who's who” of elite professional athletes, doctors, dentists, chiropractors, lawyers, and entertainment professionals.

While these high-stake insurance fights are not for the faint of heart, DarrasLaw continues to take on America's toughest cases. The firm's century of collective litigation experience has yielded nine figures of wrongfully denied insurance benefits recovered for disabled clients across the nation.

(800) 458-4577 • www.DarrasLaw.com
When you have a lot to lose, we have a lot to offer

Divorce • Support • Premarital Agreements
Interstate & International Family Law
Litigation • Mediation

walzermelcher.com
5941 Variel Avenue, Woodland Hills, CA 91367
1820 14th Street, Santa Monica, CA 90404
(818) 591-3700
The Firm for High Stakes Business Litigation and Trials

$925 million in judgments in the last eight years

We’re different. Lean. Efficient. Smart. We win and win big.

With over 325 jury trials to verdict, we know our way around a courtroom. And we square off against some of the nation’s biggest firms.

We thrive on the tough cases: the ones where your company, fortune or liberty are on the line. Bring us your biggest problem to solve. We’ll get it done.
**FEATURES**

22 **The Force of Nations**  
BY ASLI BÂLI AND JESSICA PEAKE  
In assessing the legality of U.S. airstrikes in Syria, the law governing the use of force must be analyzed in the context of relevant measures in the United Nations Charter.

29 **Excepting Misconduct**  
BY TRACY LUU-VARNES  
The California Law Revisions Commission is considering a statutory revision allowing an exception to the confidentiality privilege in mediation proceedings.  
Plus: Earn MCLE credit. MCLE Test No. 273 appears on page 31.

36 **Special Section**  
Making a Difference: LACBA’s Domestic Violence Legal Services Project  
BY SANDY BANKS

**DEPARTMENTS**

10 **On Direct**  
Sheila Kuehl  
INTERVIEW BY DEBORAH KELLY

13 **Barristers Tips**  
Barristers set annual bench-meets-bar reception  
BY ROBERT GLASSMAN

14 **Practice Tips**  
California’s anti-SLAPP law in the Ninth Circuit  
BY COLLIN SEALS AND GARY D. BROPHY

18 **Tax Tips**  
Creative trust options for holders of substantial assets  
BY MEGAN LISA JONES

40 **Closing Argument**  
It takes diverse sources to fund LACBA’s charitable projects  
BY MARK GARSCIA

*Los Angeles Lawyer* (ISSN 0162-2900) is published monthly, except for a combined issue in July/August, by the Los Angeles County Bar Association, 1055 West 7th Street, Suite 2700, Los Angeles, CA 90017 (213) 896-6503. Periodicals postage paid at Los Angeles, CA and additional mailing offices. Annual subscription price of $14 included in the Association membership dues. Nonmember subscriptions: $38 annually, single copy price: $5 plus handling. Address changes must be submitted six weeks in advance of next issue date. POSTMASTER: Address Service Requested. Send address changes to Los Angeles Lawyer, P. O. Box 55020, Los Angeles CA 90055.
WIN YOUR TRIAL

The Trial Lawyer's College Presents -

THE VOIR DIRE SEMINAR

Gerry Spence, founder of the Trial Lawyer's College says, "Give me a good voir dire and the right opening statement and, so long as the lawyer retains credibility and tells the truth, the case is already won."

Join TLC's faculty team of trial lawyers and behavioral experts to learn how to become the leader of your tribe -- one composed of you and your jurors -- who together will win justice for your client. Learn how to identify the danger points in your cases, to reframe them into points of power, and how to approach potential jurors as an inclusive, rather than exclusive, process.

"This has to be one of the best seminars I have ever attended. The tools and techniques I learned are invaluable. I truly can't wait to attend the next seminar."

- Trial Lawyer's College Attendee

MARCH 2ND-4TH 2018  NEWPORT BEACH, CA

HYATT REGENCY

REGISTER @ TRIALLAWYERSCOLLEGE.ORG
DO YOU KNOW THIS GUY?

If Your Office Lease Expires In The Next 24 Months, You Will Benefit From Knowing Him

Because you’ll need to:

- Find a new location or work with your present space
- Relentlessly negotiate favorable lease terms
- Design/Redesign your space
- Oversee construction
- Annually audit the landlord’s expense bill and
- A hundred other details

Who is going to handle these details for you?

The Only Guy That Provides these Services at NO ADDITIONAL COSTS.

JEFF TABOR

26 Years Exclusively Representing Tenants In Los Angeles and Orange County

213-674-4340

“Be Represented... Not Brokered!”

LOS ANGELES AND ORANGE COUNTY


5055 West 7th Street, Suite 2700, Los Angeles CA 90017-2553

Telephone 213.627.2727 / www.lacba.org

LACBA EXECUTIVE COMMITTEE

President
MICHAEL E. MEYER

President-Elect
BRIAN S. KABATECK

Senior Vice President
TAMALA C. JENSEN

Vice President
PHILIP H. LAM

Assistant Vice President
JESSE A. CRIPPS

Assistant Vice President
JO-ANN W. GRACE

Treasurer
JOHN F. HARTIGAN

Immediate Past President
MARGARET P. STEVENS

Barristers President
JEANNE NISHIMOTO

Barristers President-Elect
JESSICA GORDON

Chief Financial & Administrative Officer
BRUCE BERRA

BOARD OF TRUSTEES

KRISTIN ADRIAN
HON. SHERI A. BLUEBOND
SUSAN J. BOOTH
RONALD F. BROD
TANYA FORSHIEH
JENNIFER W. LELAND
MATTHEW W. McMURTRAY
F. FAYE NIA
BRADLEY S. PAULEY
ANGELA REDDOCK
DIANA K. RODGERS
MARC L. SALLUS
MICHAEL R. SOHIGIAN
EDWIN C. SUMMERS III
KEVIN L. VICK
WILLIAM L. WINSLOW
FELIX WOO

AFFILIATED BAR ASSOCIATIONS

BEVERLY HILLS BAR ASSOCIATION
CENTURY CITY BAR ASSOCIATION
CONSUMER ATTORNEYS ASSOCIATION OF LOS ANGELES
CULVER MARINA BAR ASSOCIATION
GLENDALE BAR ASSOCIATION
IRANIAN AMERICAN LAWYERS ASSOCIATION
ITALIAN AMERICAN LAWYERS ASSOCIATION
JAPANESE AMERICAN BAR ASSOCIATION
JOHN M. LANGSTON BAR ASSOCIATION
THE LGBT BAR ASSOCIATION OF LOS ANGELES
MEXICAN AMERICAN BAR ASSOCIATION
PASADENA BAR ASSOCIATION
SAN FERNANDO VALLEY BAR ASSOCIATION
SANTA MONICA BAR ASSOCIATION
SOUTHBAY BAR ASSOCIATION
SOUTHEAST DISTRICT BAR ASSOCIATION
SOUTHERN CALIFORNIA CHINESE LAWYERS ASSOCIATION
WOMEN LAWYERS ASSOCIATION OF LOS ANGELES
Before cyber crime devastates your law practice ... be ready!

FREE $100,000 in Cyber Coverage – Our Latest Benefit – Included When You Buy a Malpractice Policy* with LMIC

Coverage Includes:
✓ Extortion ✓ Security Breach
✓ Ransom ✓ Network Asset Protection
✓ Costs of Notification & Remediation
✓ Online Prevention Training
Plus Cyber Emergency Help Line

...be safe ...be secure

LMIC

*All Programs except Bar Associations

Lawyers’ Mutual Insurance Company, The Premier Legal Malpractice Carrier

LMIC.COM or call (800) 252-2045
The course of a difficult year in the place where I attended law school. The University of California, Berkeley, which played a seminal role in the Free Speech Movement of the 1960s, has come to be viewed by many as the posterboy for efforts in academia to suppress minority (i.e., conservative) viewpoints.

Just this year, UC Berkeley has seen: extensive property damage from protests by masked “antifascists” protesting a speech by conservative provocateur Milo Yiannopoulos; violent clashes between these antifascists and Trump supporters; the university’s cancelling of a speech by conservative commentator Ann Coulter based on safety concerns; the Berkeley mayor’s request that the university cancel a “Free Speech Week” to which several conservative commentators were invited; complaints by the event’s organizers that administrators were imposing undue bureaucratic hurdles on them; the signing by over 100 Berkeley professors of an open letter calling for a boycott of all classes and campus activities during Free Speech Week; and the organizers’ last-minute cancellation of the event.

A few days after the event was cancelled, Los Angeles Times reporter Robin Abcarian visited Berkeley and spoke to students there. Abcarian was troubled by their views, which one student summed up thusly: “Free speech once sought to legitimize the oppressed, and now it has been appropriated to legitimize oppression. The right to free speech is different from the right to having a platform.”

These students are presumably unaware of long-standing First Amendment precedent dictating that state restrictions on speech should probably be speaker- and viewpoint-neutral. I imagine they are also unaware of the irony that their “no platform” principle was also held by former Governor Ronald Reagan, who objected to Stokely Carmichael and other supposed radicals speaking on campus by reasoning: “Free speech does not require furnishing a podium for the speaker,” and “I don’t think you should lend these people the prestige of our university campuses for the presentation of their views.”

While UC administrators deserve some credit for resisting the mayor’s call to cancel the event, it troubles me that the university gave tacit approval (or at least expressed no disapproval I know of) to its professors’ call for a complete boycott of campus that week based on concerns for students’ “physical and mental safety.” The first rationale must be discounted, coming from college professors from “The Peoples’ Republic of Berkeley,” when any threat to physical safety was attributable largely to masked “antifascists” whose acknowledged practice is to use violence to squelch what they view as oppressive conservative speech. The second rationale is more troubling. By co-opting concepts from the treatment of trauma survivors, the new left has gained traction on college campuses for conflating disfavored speech with dangerous speech. This has led to the spread of “safe spaces” where students can be shielded from ideas less “woke” than their own. By their letter, the professors created a “safe space” for their students to sit out Free Speech Week, denying a potential audience for opposing viewpoints in the same way their old ideological enemy Reagan would have.

Sometimes I wonder if we’ve learned anything at all.

The quotation, “I disapprove of what you say, but I will defend to the death your right to say it,” usually (albeit inaccurately) attributed to Voltaire, encapsulates the principle of freedom of speech, something I have been dismayed to see treated with increasing disregard over
I just had to form a new corporation, and it's just so damn perfect!

John McIlwee, Entertainment Business Manager
Shepherd McIlwee Tinglof

eMinutes®
Corporate Lawyers for Creatives & Entrepreneurs

First time is on us. The next time you need to form a corporation, eMinutes will charge costs only and waive its legal fees. Contact one of our attorneys to get the process started.
emirates.com

Attorney advertisement. Prior results do not guarantee a similar outcome.
Sheila Kuehl  Board of Supervisors, Third District

What makes you happiest each day? I love doing the Sudoku and the crossword puzzle in the morning. I love every minute of doing the Sudoku and the crossword puzzle.

You assumed office on December 1, 2014. What was the biggest surprise? The sheer amount of work.

You run against Bobby Shriver, a member of the Kennedy family. Tough race? Everyone but me thought so. I knew I would win. He had no experience in any of the areas that the county supervisors have to oversee.

What is the biggest misconception about your job? People think it is a local government, so they think it’s like being on city council. We are running health care, foster kids, jails, juvenile justice, libraries, parks…

What is the characteristic most important in a leader? Decisiveness.

The Third District spans 431 square miles from Santa Monica to Sylmar and up to Westlake Village. Too big for just one person? It is not about how many people you represent, but how well you represent them.

Your district alone has a population of more than two million people. Do you think five supervisors are enough? I do. It’s silly to add one or two supervisors because it actually doesn’t lower the number that much. We have gotten so much done; you only need three votes and you have a progressive majority. And, Kathryn [Barger], though she is a Republican, is often with us because she cares so much about people. We can propose, dispose, and spend without a lot of waiting.

As the first woman in California history to be named Speaker Pro Tempore of the Assembly and the first openly gay person to be elected to the state legislature. Before becoming an attorney, Kuehl famously portrayed the character of Zelda Gilroy on the popular television series The Many Loves of Dobie Gillis.

What was the biggest surprise? The sheer amount of work. You termed out of the California Assembly and Senate. Any big difference between the two bodies? The senate was much more experienced in those days. It was more deliberative and less reactive, more able to focus on very large issues.

As a legislator, you authored 171 bills that were signed into law. Is there one that is closest to your heart? I can’t pick one. You get to do a lot of stuff, and it affects 40 million people.

You were at UCLA and also working in television. How did you manage to do both? I had to get permission from all of my professors to miss more classes than usual.

Is it true that an unsold pilot for a Dobie Gillis spinoff called Zelda was dropped because someone thought your character was a “little too butch”? That’s what I heard. Allegedly, Jim Aubrey, the president of CBS said so. I don’t know if it’s true because no one talks to you directly.

You said that as a young actor, they didn’t treat you like a kid. How so? I was expected to be professional: showing up, knowing your lines, performing, interacting with other actors, and taking direction.

In 1959, you fell in love with a woman, though you were not out at the time. Were you afraid of people finding out you were gay? Totally frightened. You think your parents won’t love you, you think your friends will abandon you, you think your family will shun you, and you think your career is over. All of those things were very real.

You went to Harvard Law School at 34. Why the career change? My acting career fell apart. I went back to UCLA, and I learned a great deal from my students. They said, “You’re interested in the rules and fairness; you ought to go to law school.” For kicks, I took the LSAT.

Why did you want to become a lawyer? I wanted to study the law because if you didn’t understand the rules, you’d be at a disadvantage.
It’s Time to Renew Your LACBA MEMBERSHIP FOR 2018

Call 800.456.0416 or Renew Online at www.lacba.org/renew

Working together to meet the professional needs of lawyers and advance the administration of justice

As a 2018 LACBA member, you will enjoy member-only benefits including:

› Special pricing on live CLE programs, products, and events
› Daily eBriefs, appellate opinions published in the previous 24 hours
› Use of LACBA’s Member Lounge and Conference Room, including free WiFi and an eBranch of the L.A. Law Library
› Los Angeles Lawyer magazine and Southern California Directory of Experts & Consultants
› Networking with judges, attorneys, and other legal professionals
› Discounts on products and services to run your business: insurance, financial solutions, case resources, and more!

2017 LACBA membership will expire on December 31, 2017
disadvantage. It seemed like a good general degree that would serve you no matter what you did.

**Were you frightened the first time you were in front of a judge?** Not until he sent me home for wearing a pantsuit.

For many years, you hosted Get Used to It, a national cable show. Used to what? The chant at the time was, “We’re here, we’re queer, get used to it.”

**Are we used to it?** Yes, pretty much the country is used to it now.

**What was your best job?** The one I have now.

**What was your worst job?** Trying to be a consultant and piece together clients that I could feel good about representing.

You were voted the smartest California state legislator. Are you a smarty pants? I’m pretty smart. All of the members, all of the staff, all of the press, and the third house—the lobbyists—voted.

You have been an elected official for more than 17 years. What should people know about the government? We set, ratify, and change policy that affects virtually every minute of peoples’ lives.

You’ve long been a proponent of the single-payer health care system. Is the time ripe? Probably not. What I think is important for the country to understand is how well Medicare has served those of us over 65 and how much of a relief it would be not to have to worry about whether you’re going to have health insurance.

**What are your retirement plans?** Writing an autobiography.

**What characteristic did you most admire in your mother?** Her love of learning. She only finished the eighth grade because she had to work. It was a generalized being proud of learning things.

If you were handed $50 million tomorrow, what would you do with it? Invest it so it would grow.

**Do you have a hidden talent?** I’m a great singer. Every zero birthday, I give a concert, usually at the Neon Factory in the Valley.

**What songs do you sing?** It’s mostly Ella Fitzgerald, Frank Sinatra...that genre.

Who is on your music play list? It’s all classical.

**What book is on your nightstand?** *Lilac Girls.*

Which fictional hero would you like to be? Frodo Baggins is the quintessential hero, the unintended hero. He’s generally been my role model.

**Which magazine do you pick up at the doctor’s office?** I don’t read magazines.

Where do you go on a three-day weekend? Cayucos, near Morro Bay. But, a three-day weekend is not enough.

**What is your favorite vacation spot?** Every two years I go to Napili, Maui, for two weeks, and then on the year that’s not that year, I go somewhere I’ve never been before.

**Do your answer your e-mail while away?** Out of the country, no.

**What is your favorite holiday?** Christmas.

**What is the trait you’re most proud of?** My sense of humor.

**What is your favorite sport as a participant?** In the old days, I loved bowling.

**Spectator sport?** College basketball. I’ll always be a Bruin. Whatever UCLA does, I’m for them.

**Which television show do you record?** I like the different shows that Marvel Comics has put on. I will always love *Star Trek: Voyager* and *Star Trek: The Next Generation*.


**Is there a person from your past with whom you’d like to reconnect?** My parents.

**What do you make sure you have in your brief case?** My calendar.

In an interview for the Archive of American Television, you said you had “never been a star of anything.” Do you still feel that way? I do. I’ve learned the beauty of collaboration.

**What are the three most deplorable conditions in the world?** Hunger. Homelessness. Oppression.

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

**What is the one word you would like on your tombstone?** Already?
Barristers Set Annual Bench-Meets-Bar Reception

IT IS ALMOST THAT TIME AGAIN. On January 18, 2018, the Barristers Section of the Los Angeles County Bar Association will host its annual bench-meets-bar reception for our local, state, and federal judiciary at the Jonathan Club in downtown Los Angeles. As in years past, this will be a remarkable opportunity for young Southern California attorneys to mingle with judges and develop long-lasting relationships with them. Young attorneys sometimes think that judges are inaccessible or intimidating to approach, but that is not the case at this event. The judges do not show up wearing their robes or carrying their gavels. This is why we encourage everyone to attend. This is the time and place to speak with and get to know the judges on a personal level—something you cannot do inside the courtroom.

This event is not only set up to help lawyers. It is also an opportunity for the Barristers to express gratitude to our judges. Giving back to our judiciary is in fact one of our top priorities and has always been near and dear to our hearts at the Barristers. After all, some of LACBA’s most notable past presidents include the esteemed and very accomplished Honorable Lee Edmon and Honorable Margaret M. Morrow. As Justice Edmon (presiding justice in Division Three, Court of Appeal for the Second Appellate District) graciously expressed it when previously requested to describe her own Barristers experience:

Participating in the Barristers Section gave me the opportunity to meet and work with many lawyers whom I probably would not have met otherwise. Through the Barristers Section, I developed a network of colleagues who have provided support throughout my entire career. Perhaps most importantly, many of those people became lifelong friends.

Justice Edmon captures the essence of what it means to be part of this organization. This event in particular highlights our goal of bringing together not only lawyers but also judges and lawyers.

It is no secret that there are many pressing issues facing our judicial system at this time. From trying to operate under the constraint of budget cuts to striving to provide equal access to justice for members of our community, our hardworking judges in courtrooms throughout Los Angeles have a lot to deal with on a daily basis. That is why we take pride in hosting this event for them. We do it to thank them for their service and to show our sincere appreciation for everything they do to make our justice system work. I know I do not speak alone when I say if there is anything we as attorneys can do to help make their jobs easier, we stand ready, willing, and able. We are truly at their service.

At our last reception, more than 150 guests attended, including over 35 judges. This year we are expecting even more. We will also have the privilege this year of hearing from Los Angeles County Superior Court Presiding Judge Daniel Buckley and Central District Chief Judge Virginia Phillips. Judge Buckley was appointed to the Los Angeles bench in 2002 by Governor Gray Davis. Before being appointed presiding judge, he became the supervising judge of the civil courts in 2012 after serving as the assistant supervising judge. Prior to appointment to the bench, Judge Buckley spent 22 years in private practice where he represented defendants in tort and environmental litigation. He went to undergraduate school and law school at the University of Notre Dame. Judge Phillips attended the University of California at Riverside and obtained her law degree from Berkeley. She was in private practice for about 10 years before serving as court commissioner for Riverside Superior Court. After that, Judge Phillips served as federal magistrate judge and was appointed by President Bill Clinton in 1999 as federal judge for the U.S. District Court for the Central District of California. During her tenure as federal court judge, she has presided over many high-profile cases, including the “don’t ask, don’t tell” case that received national acclaim in 2010.

That Judges Buckley and Phillips have agreed not only to attend our reception but also to deliver their remarks speaks to their commitment to our young legal community. They are devoted to our advancement in this profession and recognize the importance of ensuring that we know what we can do to make ourselves better lawyers. We look forward to hearing them discuss these themes as well as touch on other important topics, including the current status of their respective courts and how young lawyers can be more engaged with the courts.

The reception starts at 6:30 P.M. and admission is free. Registration is required and will be offered online at www.lacba.org or by phone at (213) 627-2727. I am also happy to answer any questions you may have. E-mail me directly at glassman@psblaw.com or by phone at (310) 477-1700.

Robert Glassman is an attorney at Panish Shea & Boyle and was the 2015-16 president of the Barristers.
California’s Anti-SLAPP Law in the Ninth Circuit

ONE NEED NOT BE AN EXPERT in California’s anti-SLAPP law to recognize its disparity in treatment by state and federal courts in California. Although the U.S. Court of Appeals for the Ninth Circuit currently agrees that the anti-SLAPP statute confers an underlying substantive right, it has over time stripped away some of the law’s procedural protections while maintaining others. There are now several inconsistencies in how California state and federal courts treat issues that arise in the context of California’s anti-SLAPP law.

An acronym for “Strategic Lawsuit Against Public Participation,” SLAPP refers to lawsuits masquerading as ordinary lawsuits but which are in reality brought to deter people from engaging in constitutionally protected activities (including protesting, testifying, or making critical statements of a defendant) or punish them for doing so. The purpose of these lawsuits is to chill protected activities rather than to vindicate the plaintiff’s rights. In its pristine form, a plaintiff embarrassed by such protesting or criticism seeks retribution by filing a suit for the purpose of forcing the defendant to face the expense and attendant difficulties of litigation. The plaintiff may have no hope of success but uses the courts for as long as possible to exact some measure of revenge.

California’s anti-SLAPP scheme—like many others across the nation—addresses this problem by sparing the defendant from the expenses that are the core and purpose of the plaintiff’s retaliation. In general, a defendant may file a special motion to strike (commonly referred to as an “anti-SLAPP motion”) directed at any cause of action “arising from” a protected activity, and from that moment all discovery is stayed as to that cause of action. The motion must satisfy the defendant’s burden of establishing that the causes of action arise out of protected activity, and if it does the plaintiff’s opposition must contain admissible evidence establishing a “likelihood of success on the merits” of each challenged claim. Whatever the trial court’s decision following a hearing on the motion, the losing party has the right to an immediate appeal—with the discovery stay remaining in effect. Following the hearing—which must by statute take place no more than 30 days after service of the motion—the court is required to award reasonable attorneys’ fees to a prevailing defendant but also has discretion to award fees to a prevailing plaintiff if the motion was frivolous.

Taken as a whole, this statutory scheme effectuates the legislature’s intent of allowing a speedy resolution to punitive claims in order to spare those who engage in protected activity from facing baseless lawsuits designed to quash free speech and expression. Each element of the statutory scheme works to limit the damage such suits may have: the discovery bar limits the expense attendant to the discovery process, the quick time frame for hearing allows for speedy resolution, the right to immediate appeal allows speedy correction of a mistaken decision by the trial court, and the mandatory attorneys’ fees provision ensures that a prevailing defendant is not monetarily harmed and also stands as an implicit threat to any plaintiff contemplating such an action. However, in the federal context these protections have been curtailed and altered by a legal history stretching back 18 years.

The Ninth Circuit first approved and applied California’s anti-SLAPP law in 1999, in the landmark case of U.S. ex rel. Newsham v. Lockheed Missiles & Space Company. In Newsham, the Ninth Circuit held that the special motions to strike described by the law may proceed against state law claims before a federal court sitting in diversity, and a successful defendant is entitled to the attorneys’ fees mandated by the statute.

The Ninth Circuit was not alone in recognizing the substantive nature of the anti-SLAPP scheme. When presented with the same issue, the First and Fifth Circuits reached the same conclusion, viz. that state anti-SLAPP statutes confer new and substantive rights, allowing such motions to proceed against plaintiffs seeking to punish defendants’ rights of free speech and access to the courts. Despite this acceptance, many attorneys remain unaware of the significant differences in anti-SLAPP procedure in federal court as opposed to California state court.

In applying California’s anti-SLAPP procedure to federal courts sitting in diversity, the Newsham court considered only two aspects of the law: the right to bring a special motion to strike before a federal court sitting in diversity and the right to attorneys’ fees. For both questions, the Newsham court sided with the defendant, ruling that California had identified a substantive right and determined that Federal Rules of Civil Procedure 8, 12, and 56 were not meant to “occupy the field” for procedural purposes.

Collin Seals is an attorney with Baute Crochetiere & Hartley LLP. Gary D. Brophy is an attorney in the complex litigation department of the Los Angeles office of Arent Fox LLP.
Accordingly, the *Erie* doctrine did not prevent the court from hearing a challenge to California laws based on California's anti-SLAPP statute.13

As to the issue of attorneys' fees, the court concluded that they were a necessary component to vindicate the right to be free from baseless suits, by serving as a threat to potential plaintiffs and ensuring that successful defendants were not unduly harmed by the expense associated with litigation.14 It is important to note that in federal court, anti-SLAPP motions are only viable when the court is exercising diversity jurisdiction or when supplemental state law claims are joined in federal question cases.15 Under no circumstances can it be used to challenge a federal claim in federal district court.16

Later decisions examining other aspects of the anti-SLAPP law have not been as generous as *Newsham*, complicating litigation in federal courts. Even cases that at first glance appear inclusive often, on closer review, significantly limit the anti-SLAPP scheme. For example, in 2003, in *Batzel v. Smith*, the Ninth Circuit held that the denial of an anti-SLAPP motion constitutes a collateral order that is immediately appealable, thus upholding a key aspect of the anti-SLAPP scheme. For example, in 2003, in *Batzel v. Smith*, the Ninth Circuit held that the denial of an anti-SLAPP motion constitutes a collateral order that is immediately appealable, thus upholding a key aspect of the anti-SLAPP scheme: the right to an immediate appeal.17 The court explained that the immediate appeal provision “demonstrates that California lawmakers wanted to protect SLAPP defendants from the trial itself rather than merely from liability” and reasoned that if a defendant is forced to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, even a reversal “would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression.”18 The court concluded that “a defendant’s rights under the anti-SLAPP statute are in the nature of immunity; they protect the defendant from the burdens of trial, not merely from ultimate judgments of liability.”19

But other cases have added an extra wrinkle that does not exist in state court. In district court, federal pleading standards apply, and if the anti-SLAPP motion hinges on the adequacy of pleading, the district court will treat it as a Rule 12(b)(6) motion to dismiss (rather than as an early Rule 56 motion for summary judgment).20 The court may grant leave to amend and deny an otherwise meritorious anti-SLAPP motion. In this case—and in this case only—the defendant may not immediately appeal the decision but must wait for the amended complaint, revive the motion, and proceed accordingly.21

More importantly, under California's anti-SLAPP scheme, the right to immediate appeal is a right of both parties, not just the defendant.22 Nevertheless, cases following *Batzel* recognize only the defendant’s right to an immediate appeal. Last year, the Ninth Circuit confirmed that when an anti-SLAPP motion is granted, the plaintiff cannot appeal, because a plaintiff does not face the same denial of a substantive right as would a losing defendant.23 Of course, if the successful anti-SLAPP motion disposes of all causes of action, the plaintiff may timely appeal from the final judgment just as with any other case; however, if any claims survive, the plaintiff has no recourse and must presumably litigate the matter to its conclusion before challenging the district court’s determination on the motion to strike.

While the cases on the right of appeal stripped anti-SLAPP plaintiffs of an important procedural protection, other decisions stripped protections from the defendants as well. In state court, the filing of an anti-SLAPP motion automatically stays all discovery related to the SLAPP causes of action until the court has ruled on the motion, and the motion must be heard within 30 days of filing.24 California state courts recognize these provisions as necessary to protect SLAPP defendants by minimizing the potential costs and burdens of protracted litigation and standard discovery methods.25 Although the Ninth Circuit recognized the substantive necessity of the attorneys’ fees provision in protecting a defendant’s rights, it has not applied the same logic to these protections. In *Metabolife Intern., Inc. v. Wornick*, the Ninth Circuit rejected the discovery bar as conflicting with Rule 56, and although the timing requirements were not directly at issue in the case, the court noted that they were similarly incompatible with the Rule.26 Last year, in *Sarver v. Charter*, the Ninth Circuit explicitly confirmed that the anti-SLAPP timing requirements conflicted with the federal rules.27 As a result, the filing of an anti-SLAPP motion in federal court will not delay discovery, and the motion need not be heard quickly.

As a practical matter, doing away with the timing requirements may not substantially affect the actual time for hearing an anti-SLAPP motion. Section 425.16(l) only requires the trial court to schedule the hearing within 30 days “unless the docket conditions of the court require a later hearing.”28 Anecdotal evidence suggests that hearings within that 30-day time frame are the exception, rather than the rule, in most urban state courts. However, the discovery bar exists in part to insure that such delays will not drain the defendant’s resources, so such extensions tend not to prejudice the parties. In federal courts, which do not recognize the discovery bar, extended delays can potentially have devastating consequences, allowing the plaintiff to enjoy the fruits of the exact situation the anti-SLAPP statute was adopted to prevent.

Still, the defendant does enjoy one benefit stemming from the rejection of the anti-SLAPP timing requirements. Under the statute, the defendant must file an anti-SLAPP motion within 60 days after service of the complaint.29 By doing away with all timing requirements and treating the anti-SLAPP motion as a proxy summary judgment, the Ninth Circuit extends the time for filing all the way to the deadline for motions for summary judgment.30 This may benefit defendants who do not enjoy ready access to lawyers familiar with anti-SLAPP law and who might struggle to meet the statutory 60-day deadline. As the case law now stands, defendants facing California state law claims in district courts in the Ninth Circuit may bring a motion pursuant to California’s anti-SLAPP statute but must do so without benefit of the discovery stay provided for in that statute and with the knowledge that the hearing on the motion may be substantially delayed. Still, if the motion is denied, defendants do enjoy a right of immediate appeal unless the district court allows the plaintiff to amend the complaint. If the motion is granted, the plaintiff does not have the same immediate right of appeal, and the prevailing defendant is entitled to attorneys’ fees and costs.

There are no assurances, though, that the current state of affairs will continue, as the acceptance of anti-SLAPP motions in the Ninth Circuit is not without its discontents. Most prominently, Judges Alex Kozinski and Paul Watford have called for the Ninth Circuit to reassess *Newsham*, particularly in light of the U. S. Supreme Court’s decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company.*31 Judge Kozinski in particular has called *Newsham* “wrong even on its own terms,” and argues that “the Rules provide an integrated program of pre-trial, trial and post-trial procedures,” through which “[t]he California anti-SLAPP statute cuts an ugly gash.”32

In 2015, the District of Columbia Circuit rejected the application the D.C. anti-SLAPP law in federal court in *Abbas v. Foreign Policy Group, L.L.C.*, creating a circuit split.33 The *Abbas* court, applying the Supreme Court’s decision in *Shady Grove*,34 held that a federal court exercising diversity jurisdiction may not apply the D.C. anti-SLAPP act because it “answers the same question” as Rules 12 and 56, viz. “the cir-
cumstances under which a court must dismiss a plaintiff’s claim before trial.”35 Similar to California, the D.C. anti-SLAPP act imposes a higher burden on the nonmoving party, and the court reasoned “the D.C. Anti-SLAPP Act’s likelihood of success standard is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56.”36 The decision in Abbas prompted further calls by Judge Kozinski to overturn Newsham, saying the Ninth Circuit was “on the wrong side” of the circuit split and that the court “should follow the D.C. Circuit’s lead in giving these trespassing procedures the boot.”37 To date, the Ninth Circuit has resisted calls to overturn Newsham, but the issue is unlikely to go away, particularly if other circuits choose to follow the D.C. Circuit rather than joining with the First, Fifth, and Ninth Circuits. Even as pressure builds to remove state anti-SLAPP protections from federal courts, a movement has emerged advocating for a federal anti-SLAPP law to end the debate. In 2015, Republican Congressman Blake Farenthold of Texas’ 27th Congressional District introduced HR 2304, the “SPEAK FREE” Act of 2015.38 Although the bill languishes in committee, it has gained 32 cosponsors from across the ideological spectrum. 

Potentially codified as 28 USC Section 4201, et seq., H.R. 2304 is similar to California’s anti-SLAPP statute, with only a few distinguishing features. For instance, the proposed federal anti-SLAPP legislation requires a movant to file a motion within 45 days of service of the complaint, or 30 days following removal to federal court.39 California’s anti-SLAPP statute allows a motion to be brought within 60 days from service.40 Both statutes require a hearing on the motion be held within 30 days of service, if possible.41 The proposed federal act arguably protects broader forms of speech than does California’s anti-SLAPP law. California’s law specifically enumerates four areas of protected speech concerning political speech and speech that is of public concern.42 The federal bill more broadly defines speech that is protected as “an oral or written statement or other expression by the defendant that was made in connection with an official proceeding or about a matter of public concern.”43 The difference could expand protection to a type of speech considered outside the scope of California’s anti-SLAPP law. For now, the Ninth Circuit will continue to interpret California’s anti-SLAPP law, the evolution of which could further erode the procedural protections afforded under the state statutory scheme. District court litigants considering whether to bring an anti-SLAPP motion and those deciding whether to remove a case based on diversity jurisdiction should consider this distinguishing treatment between state and federal courts. Practitioners should be aware of these differences and would be wise to monitor the Ninth Circuit’s treatment of California’s anti-SLAPP law in the months and years to come.

---

3 See, e.g., Vogel v. Felice, 127 Cal. App. 4th 1006, 1016 (2005) ("The term “chill,” which in this context refers not to a direct interference with ongoing speech by injunctive or similar relief but to the inhibiting effect on speakers of the threat posed by possible lawsuits.")
4 Metabolife Int’l, Inc. v. Wornick, 264 F. 3d 832, 839 (9th Cir.2001); Batzel v. Smith, 333 F. 3d 1018, 1024 (9th Cir. 2003).
5 Code Civ. Proc. §425.16(b), (g).
6 Equilon Enters., 29 Cal. 4th at 67.
7 Code Civ. Proc. §425.16(g).
8 Code Civ. Proc. §425.16(c), (f).
10 See, e.g., Godin v. Scheneks, 629 F. 3d 79, 81, 85–91 (1st Cir. 2010); Henry v. Lake Charles Am. Press, L.L.C., 566 F. 3d 164, 168–69 (5th Cir. 2009).

11 Newsham, 190 F. 3d at 972.

12 Id. at 972-73.

13 Id. See also Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

14 Newsham, 190 F. 3d at 973 (“California’s ‘special motion to strike’ adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is enhanced by [an] entitlement to fees and costs.”)


17 Batzel, 333 F. 3d at 1023-24.

18 Id. at 1025.

19 Id.

20 See, e.g., Verizon Delaware, Inc. v. Covad Communications Co., 377 F. 3d 1081, 1091 (9th Cir. 2004).

21 Greensprings Baptist Christian Fellowship Trust v. Cilley, 629 F. 3d 1064, 1068 (9th Cir. 2010).

22 CODE CIV. PROC. §425.16(i).

23 Hyan v. Hummer, 825 F. 3d 1043, 1047 (9th Cir. 2016) (“The denial of an anti-SLAPP motion to strike is not fully reviewable on appeal after final judgment because the statute provides an important right, ‘immunity from suit’ that would be ‘effectively lost if a case is erroneously permitted to go to trial.’ No such loss of rights occurs when the review of a grant of an anti-SLAPP motion to strike is delayed until the appeal of final judgment.” (Emphasis in original, internal citations omitted.))

24 CODE CIV. PROC. §425.16(f)-(g).


26 Metabolife Intern., Inc. v. Wornick, 264 F. 3d 832, 845–47 (9th Cir. 2001).

27 Sarver v. Chartier, 813 F. 3d 891, 900-901 (9th Cir. 2016).

28 CODE CIV. PROC. §425.16(f).

29 Id.

30 Sarver, 813 F. 3d at 900 (allowing an anti-SLAPP motion to proceed even though it was filed almost a year after the complaint).


32 Makaeff v. Trump Univ., LLC, 715 F. 3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring); see also Makaeff v. Trump Univ., LLC, 736 F. 3d 1180, 1188–92 (9th Cir. 2013) (Watford, J., dissenting).

33 Abbas v. Foreign Policy Grp., LLC, 783 F. 3d 1328 (D.C. Cir. 2015).

34 The Court in Shady Grove held that a federal court exercising diversity jurisdiction should not apply a state law or rule if: (1) a Federal Rule of Civil Procedure “answers the same question” as the state law or rule, and (2) the federal rule does not violate the Rules Enabling Act.

35 Abbas at 1333.

36 Id. at 1335.

37 Travelers Cas. Ins. Co. of Am. v. Hirsh, 831 F. 3d 1179, 1183 (9th Cir. 2016) (Kozinski, J., concurring).


40 CODE CIV. PROC. §425.16(f).

41 Proposed 28 U.S.C. §4202(e); CODE CIV. PROC. §425.16(f).

42 See CODE CIV. PROC. §425.16(e).

Creative Trust Options for Holders of Substantial Assets

**TRUSTS CAN BE USED IN CREATIVE WAYS** to help those who own businesses or other substantial assets to pass wealth to the next generation. Estate planning basics focus on keeping assets outside the taxable estate, freezing asset values using various trust structures, making strategic use of gifts, shifting income tax back to the settlor, creating holding structures to buy life insurance that provide liquidity but are outside the taxable estate, and utilizing discounts. Trusts are a holding entity that can be tailored to individual goals by drawing on a variety of these basic principles. In terms of tax planning, some of the methods discussed may utilize the laws of other states, and there are areas in which California’s trust laws are less clear than they are in other jurisdictions.

Trusts can be broken down into grantor and nongrantor trusts, with further refinement into revocable and irrevocable trusts. Essentially, with a grantor trust, the grantor of the trust is treated as the owner of the trust for tax purposes because the grantor has retained beneficial enjoyment or control of the trust property, including retaining a reversionary interest, administration powers, or beneficial enjoyment of the trust assets.1 Grantor trusts are commonly created by the grantor retaining a reversionary interest in the trust assets greater than five percent of the value of trust assets at the time of the asset transfer to the trust.2 The trust is considered a disregarded entity for tax purposes, and, as a result, income from the trust is taxed to the grantor, not the trust. In contrast, the tax liability for income from nongrantor trusts (trusts in which the grantor is not considered the owner for tax purposes) is divided between the trust and the trust’s beneficiaries, as specified in the trust documents.3

Trusts can be revocable or irrevocable. With a revocable trust, the grantor retains powers that include those of revocation and alteration. These trusts are grantor trusts and their assets remain part of the grantor’s estate at death. During life, tax attaches to the grantor, not the trust itself. With an irrevocable trust, the grantor does not have the power to revoke the trust and regain ownership of the trust assets, generally allowing for protection of the assets from creditors. The trust is taxed as a separate legal entity, and at rapidly higher rates that reach just under 40 percent for ordinary income over $12,400.4 Because transfers to an irrevocable trust are completed transfers to the beneficiaries at the time the transfer is made, assets can be subject to a gift tax when assets are transferred to an irrevocable trust.

Trusts are planning vehicles that separate legal ownership of property from equitable ownership.5 Effectively, this means that the property in the trust is the legal property of the trustee—who can be either the grantor or a third party—but is held for the benefit of the trust beneficiaries. Once the grantor dies, any assets held in either a grantor or a nongrantor trust escape probate, as the assets are not part of the decedent’s estate under California probate law.

**Holding a Business in a Trust**

Assets that can be transferred to a trust include a grantor’s interest in a closely held business, which allows for several beneficial estate planning opportunities for the grantor when a business is transferred to a nongrantor trust. While trusts are subject to the modern portfolio theory of investing, which requires diversification in many instances, a trust can specify that a family business be retained in the trust despite a resulting lack of diversification. The Restatement of the Law (Third), Trusts6 contains guidelines for prudent investing, including situations in which the trust instrument includes a retention clause—a provision that requires the trustee to retain an investment or a group of investments. State laws vary in their application of the prudent investor rule, with some states being more prone to support diversification under the Prudent Investor Act even when the trust holds a family business.7

Retention clauses, including those related to businesses, can be either mandatory or permissive. If the former, the trustee can only sell a concentrated position by petitioning the court. Permissive provisions allow for discretion with respect to holdings and can be either specific or general. Specific provisions identify the security to be retained while general provisions do not mention specific securities. Individuals setting up a trust to house their business should think through the possibility that the beneficiaries might at some point want to sell the business and provide that option as they see fit.

The benefits of using a trust to hold a business include potential protection from creditors, greater flexibility in dividing income of the business among beneficiaries of a trust than among shareholders of a corporation, and facilitating the transfer of wealth among generations. For example, contrasted with a regular corporate structure in which shareholders must be treated the same, the trustee may treat beneficiaries differently if the terms of the trust permit, such as distributing income to only some beneficiaries and excluding others. Income and capital (stock shares) can also

---

**The California Probate Code specifically allows delegation of investing activities to an investment advisor.**

---

**Megan Lisa Jones** is a tax attorney who advises on business and estate planning at ClarkTrevithick A.P.C. She was previously an investment banker at firms including Lazard Frères & Company.
be divided among beneficiaries. For tax purposes, a complex set of rules set forth in Subchapter J of the Internal Revenue Code govern the taxation of income to the trust from the business. Generally, the income is taxed either to the trust, usually at a high rate, or to the beneficiaries at their marginal rate, depending on whether the trust distributes the income to the beneficiaries.

Unit trusts and discretionary trusts are two options available to a grantor when structuring such a trust to achieve the grantor’s individual estate and succession planning goals. A unit trust houses trust assets for the beneficiaries in proportion to the number of units each holds. A discretionary trust (or family trust) does not specify how assets are to be apportioned to the beneficiaries, thus allowing the trustee greater discretion in distributing assets among beneficiaries. Alternatively, individual trusts can be created for each family member, with the shares or interests in the business allocated among the beneficiaries’ trusts as desired. This latter structure might complicate the running of the business if the trusts have different trustees or if the trustee has to balance diverging beneficiary interests, because ownership of the business (and thus the decision-making power) is divided among multiple trusts. To minimize the complications that can result, a decanting provision in the trust instrument allows a trustee to distribute shares from one trust to other trusts should circumstances so dictate due to the existing balance becoming too precarious to manage further. California does not have a decanting statute, but a trustee may petition the court regarding this matter. Exit provisions can allow the trustee to buy out family members who no longer want to retain ownership of the business or are troublesome in other ways.

A trustee does not have the same freedom as the grantor in exercising its powers over the business. Instead, trustees have a fiduciary duty to the trust beneficiaries and are responsible for investing trust assets for the benefit of beneficiaries, administering the trust and determining and making distributions. A trustee must be chosen carefully and can be an individual, a corporate trustee, or a private trust company. A protector can also be designated—either an individual or a committee—and given certain oversight powers over the trustee. Each will require compensation, which can add significantly to the costs of the trust.

With caref ul planning, corporate control can be centralized with the trustee for the benefit of the beneficiaries for several generations. Governance processes should be put in place to ease the transition from the business being run by the grantor to one run in a (potentially) more structured way by a trustee, as well as provisions dealing with the management of the business for years to come. Common clauses include those that deal with excunciation and delegation. An excunciation clause specifies protection for the trustee should he or she not diversify, or if the business does not perform well. This is another area in which a wise trustee may petition the court for approval. A delegation clause allows the trustee to hire competent advisors and to delegate running certain functions to someone better suited to doing so. The California Probate Code specifically allows delegation of investing activities to an investment advisor. Another common device is to create two classes of stock—voting and nonvoting—and to fund the trust only with nonvoting stock to limit what actions the trust can take with respect to the business.8 In such cases, while the nonvoting stock held by the trust would be excluded from the grantor’s estate, the voting stock retained by the grantor would then be includable in the estate.

Thinking through not only the estate planning aspects of this structure but also the business management realities is key to avoiding numerous future problems. Local governing law and the terms of the trust can have a big impact on how successful a trust structure is in achieving an individual’s estate planning goals. Thus, they should be chosen carefully and with the assistance of an experienced professional.

**Freezing the Value of Assets**

The estate planning concept of “freezing” the value of an asset is to transfer the asset by gift or sale to a beneficiary in such a way that any further appreciation no longer attaches to the grantor but rather to the beneficiary. Historically, this would be achieved by having the older generation retain a nonappreciating interest in the asset while transferring an interest expected to appreciate, using structures including corporate or partnership recapitalizations, buy or sell agreements, split purchase agreements, lapsing rights, and restrictions on liquidations. Various trust structures today continue to enable this type of transfer by adhering closely to current statutory requirements, such as the grantor retained annuity trust (GRAT). Another structure, less statutorily based, is the intentionally defective grantor trust (IDGT).

With a GRAT, an asset expected to
appreciate is transferred by a grantor to an irrevocable trust in exchange for an annuity paid at least annually for a period of years, without potentially incurring any gift tax on the transfer and creating the potential for gain on the asset to escape both gift tax and estate tax on the grantor’s death.9

In a zero out GRAT, the gift value is essentially zero. If the annuity is valued the same as the asset, there would be no gift tax owed on the transfer. Strategies used to mitigate the risk of a challenge by the Internal Revenue Service to the value of the annuity include expressing the annuity payment as a percentage of the value of the asset transferred. With the annuity, the grantor receives back from the trust the full value of the asset transferred, plus interest at the required Internal Revenue Code Section 7520 rate,10 which is currently 2.2 percent (October 2017; used for some GRATs). As long as the assets appreciate more than this typically low interest rate, then the benefit of the irrevocable trust takes the excess appreciation amount without its being subject to either gift or estate tax. If the grantor dies before the GRAT period is done, the GRAT “fails” and both the transferred asset and the annuity will be includable in the decedent’s estate. If the grantor survives the GRAT period, the beneficiaries take the appreciation with no tax and the grantor has not used up any of his or her gift tax exemption amount, if structured correctly.

A gift to an IDGT is another common structure. With an IDGT, the trust is created as an irrevocable trust with a purposeful flaw that causes it to be a grantor trust for tax purposes, ensuring that the individual continues to pay income taxes on income earned by the trust because the trust will be considered a disregarded entity for tax purposes. Yet, for estate tax purposes, the value of the grantor’s estate is reduced by the amount of the asset transfer. The individual will sell assets to the trust in exchange for a promissory note of some length, such as 10 or 15 years. Because the trust is considered a disregarded entity for income tax purposes, this sale will not have any income tax consequences. The note must pay enough interest to classify the note as paying market rate interest,11 so the transfer is treated as a sale for fair market value and not a gift subject to gift tax. It is generally recommended that when the trust is first created, the grantor should fund the trust with cash equal to at least 10 percent of the face value of the promissory note. This initial seed money can be subject to gift tax, which means the grantor must use up some of his lifetime exclusion amount.

Essentially, the value of the asset is frozen so the appreciation in excess of the interest rate on the promissory note accrues to the beneficiaries and not the grantor. Some risks and options exist within the structure. If the value of the assets decreases, children do not benefit and parents have still used a part of their lifetime exclusion. However, assets can be swapped in and out of an IDGT, or rolled over into a new one to maximize tax options, if the trust provisions so allow.

Choosing between a GRAT or an IDGT is a matter for a tax professional to assess and implement based on the grantor’s individual circumstances. Since the GRAT rules are defined statutorily,12 and IDGT rules are essentially based on case law and IRS rulings, the former are more certain. Valuation and generation-skipping issues can arise if the trust is not structured correctly. Currently, with such low interest rates, choosing assets that are likely to appreciate at a higher rate than the required interest rate is simpler than it has been historically. The Obama administration had been looking at these planning tools, and a real risk had existed that they would be disallowed. With the change in administrations, that risk seems less likely to result in material changes to these structures.

Applying Discounts
When determining the fair market value of assets in a decedent’s gross estate or an asset transferred by gift or sale, courts have consistently applied discounts in arriving at the fair market value of the asset at issue when appropriate to reflect, for example, the diminished value of an illiquid asset when there is not a ready market for the sale of the asset (a lack of marketability) or when the interest being valued is only a minority interest (a lack of control). The amount and applicability of the discounts vary depending on the type of entity and nature of the interest, with discounts in some cases exceeding 30 percent.13

This creates a planning opportunity for structuring the ownership of assets inside an estate and the gift of transfers out of an estate. For example, when transferring an asset out of an estate, by splitting the asset being gifted such that no one person has control, the aggregate value of the fractional interests being gifted is less than the value of the whole, even though collectively the family still might retain control. However, complicating the impact of this discount is that it will also apply for purposes of determining the recipient’s basis in the asset. Thus, any analysis of discounting must factor in the potential capital gains tax consequences should the asset be sold in the near term.

In 1990, Chapter 14—the “Special Valuation Rules”—was added to the Internal Revenue Code to prevent excessive estate tax reduction measures. While the added rules do somewhat limit freezing and certain forms of discounts and dual value stock, numerous options still exist and discounting is still widely used and well established. Discounting remains an effective estate-planning tool. However, anyone utilizing the option should be mindful of the proposed regulations and recognize that any transfers subject to a discount could be eliminated under them should the transferor die within three years of making the transfer and the regulations become final.

Long-term planning includes not only strategies to decrease the amount and value of assets in a decedent’s gross estate but also succession planning. Trusts often offer the optimal structure to balance numerous competing interests and challenges. While asset freezing and discounting options can also reduce estate tax liability, they must be used as part of a holistic strategy that accounts for successive planning realities.

Given the complexity of the rules relating to these strategies and the potential risks involved, an experienced professional should be consulted to determine the most appropriate approach for achieving an individual’s long-term planning goals.
2018 CLE-in-a-Box
On-Demand or CD
AVAILABLE NOW!

Compliance Group 2 (H-M) deadline is February 1, 2018

25 HOUR CLE-PACK
Special Requirements included

$224
PLUS TAX*
LACBA Member Price

OR

$299
PLUS TAX*
Non-Member Price

SPECIALTY CREDITS CLE-BUNDLE
Required Subjects

$169
PLUS TAX*
LACBA Member Price

OR

$199
PLUS TAX*
Non-Member Price

TO ORDER:

Visit www.lacba.org/clebox
or call 800.456.0416

FREE ground shipping in continental U.S. only

The 2018 CLE-in-a-Box is approved for use through 2019

Compliance Group 2 (H-M) deadline is February 1, 2018
Compliance Group 1 (A-G) deadline is February 1, 2019
Compliance Group 3 (N-Z) deadline is February 1, 2020

*Local and state taxes applied when applicable
Absence internationally approved guidelines, unilateral retaliatory acts of aggression can erode the protection of collective security provided by the United Nations

ON APRIL 6, 2017, President Donald J. Trump authorized the launch of 59 Tomahawk missiles to strike Al-Shayrat Air Base in Syria in response to an alleged chemical weapons attack by Syrian President Bashar al-Assad against civilians in the Syrian town of Khan Sheikhoun on April 4, 2017. The latter attack ultimately claimed more than 80 lives. It was reported that President Trump’s action came in response to horrific images of hundreds of victims, dead or dying, as a result of the nerve gas strike—described by some as the “CNN Effect.”

The U.S. cruise missiles were launched from destroyers USS Porter and USS Ross in the eastern Mediterranean. The target was selected because several top officials, including Secretary of State Rex Tillerson, told the president that it was important to strike the exact airfield where the gas was made and from which the planes flew to make the action easier to justify and to seem “proportional.” That the Trump administration mobilized action over only two days reflects the depth of the president’s horror at Assad’s actions and their results. However, it also begs the question, why did President Trump choose to react so swiftly to these attacks over others?

The answer to this question is better understood when put into context: these strikes were not an isolated incident, i.e., they were not the first use of force by Trump. In fact, he has dropped an astonishing number of bombs during his presidency—“about 20,650 bombs through July 31, or 80 percent the number dropped under [former President Barack Obama for the entirety of 2016.” Thus, the fact that this attack has been the focus of so much commentary over other uses of force by the Trump administration speaks to the spectacular scale of the attack by Assad and Trump’s response but is also notable for other reasons.

First, Trump has a long history of cautioning against intervention in Syria; he repeatedly urged Obama not to attack Syria so as to avoid the United States’ becoming enmeshed in yet

Aslı Bâli is faculty director of the Promise Institute for Human Rights, director of the UCLA Center for Near Eastern Studies, a professor in the International and Comparative Law Program at the UCLA School of Law, and also currently serves as cochair of the Advisory Committee for Human Rights Watch—Middle East. Jessica Peake is assistant director of the Promise Institute for Human Rights at the UCLA School of Law and director of the International and Comparative Law Program. Before joining UCLA, Peake worked in prosecution at the International Criminal Tribunal for the former Yugoslavia, the Hague, and in the Defense Services Section at the Extraordinary Chambers in the Courts of Cambodia.
another international conflict. Indeed, Trump ran a campaign of “America First,” and frequently criticized the hawkishness of his opponent, former Secretary of State Hillary Clinton, and Obama’s involvement in conflicts without a connection to the United States.

Second, prior to the attack in early April, President Trump had shown very little interest in Syria, beyond destroying ISIS. There did not seem to be any coherent political strategy on Syria coming from the White House. In fact, these strikes marked a stark departure from statements made by the Trump administration in late March indicating that the White House had abandoned the goal of forcing Assad out of power—a complete reversal of the Obama administration’s policy that was aimed at getting Assad to step aside.

Third, given Trump’s reversal of Obama’s Syria policy, it is particularly striking that the April 6 attack was the first direct military action by the United States against Assad’s forces. All other military actions undertaken by the Trump administration in Syria were consistent with earlier targeting choices by the Obama administration, intended to strike Islamic State fighters or al-Qaeda affiliates rather than the regime. The April 6 strike also ran the risk of a confrontation with the Russian government, whose forces are operating in Syria in support of the Assad regime. Russia was quick to condemn the attacks.

There is no doubt Trump wanted to project a strong image through a round of quick strikes; he had made a cottage industry out of criticizing Obama’s slow movements on reacting against hostile statements and actions by other states and armed groups during his campaign and prior to his run for office. He was also highly critical of Obama’s drawing a “red line” and then failing to act when that line was crossed by Assad. It is likely that he viewed this strike as a final vindication for the United States following Obama’s perceived failure on that front. In any event, the strikes also presented Trump with an opportunity to act in a way nearly guaranteed to garner support from the American public. In light of the many failed policy initiatives of his first 100 days in office, punitive strikes against the Assad regime may well have been motivated by Trump’s need for a “win.”

Indeed, the strikes succeeded in earning Trump plaudits from across the political spectrum domestically. From liberal hawks to neocons, Trump was celebrated for the decision with one prominent commentator exclaiming that the strikes represented the moment that Trump truly
“became president.”16 The strikes also drew praise from across the media17 and from world leaders.18 With all the fanfare, however, one glaring problem was rarely acknowledged or addressed: the air strikes were likely illegal under international law.

International Law on the Use of Force

When the United States engages in airstrikes abroad, there is rarely much concern domestically with the legality of the action. What little debate does take place centers on whether the authorization for the strikes came from Congress or the president. The fear that Congress has increasingly ceded its war-making authority to the executive branch has been raised repeatedly in the last few years in response to a range of actions from airstrikes in Libya to the fight against ISIS.19 While the constitutional debate about the extent of power delegated by Congress in the 2001 Authorization for Use of Military Force (AUMF) is a fascinating one for most American lawyers, the attention given to that question is a diversion from the deeper question of how and why the United States is permitted to use force under international law. While constitutional debates rage on at home, much of the world views the United States as an increasingly lawless actor abroad.20, 21

The law governing the use of force—jus ad bellum—is found in Article 2(4) of the United Nations Charter, which prohibits the threat or use of force by states in their international relations against the territorial integrity or political independence of any state. The prohibition upholds and ensures the sovereignty of states; it is customary law, reaches the level of a jus cogens norm—a special category of international law deemed so fundamental that no derogation is permitted—and is at the “very cornerstone of the human effort to promote peace in a world torn by strife.”21

The UN Charter framework provides two exceptions to the prohibition on the use of force. The first exception is the “inherent right to individual or collective self-defense if an armed attack occurs against a member of the United Nations,”22 found in Article 51. (See Article 51 of the UN Charter on page 25.) There are competing debates as to the scope of Article 51 action: the first insists that the “inherent” right of self-defense allows for anticipatory self-defense, and the second asserts that the language of Article 51 requires that “an armed attack occurs” before the right to self-defense can be exercised.

The second exception exists under Chapter VII of the UN Charter, whereby the Security Council can determine the existence of a threat to or breach of the peace, or an act of aggression, and can decide what measures to take to maintain or restore international peace and security.23 These can be economic measures and other sanctions under Article 41 or a use of force by the armed forces of members of the United Nations, authorized under Article 42.

Exceptions also exist outside the charter regime. The first allows a state to use force whenever the state whose territory is affected provides genuine (uncoerced) consent.24 Thus, for instance, when the Iraqi state requested assistance in fighting ISIS on its territory, it also provided the United States with authority to use force within Iraqi borders for that purpose.25 Some commentators suggest that there is an even more expansive authority as a corollary of the war on terror. On this interpretation, a state may use force in self-defense against a nonstate actor on the territory of a third state, without the consent of that third territorial state,26 if the third state is “unwilling or unable” to staunch the threat from the nonstate actor.27 The United States has cited this theory in expanding its activities against ISIS from Iraq, which has consented to American forces operating on its territory, to Syria where the United States conducts airstrikes against ISIS and other extremist groups without the consent of the government.28

A final, evolving exception to the prohibition on the use of force is found in the responsibility to protect (R2P) doctrine. The R2P doctrine was a political commitment made by member states at the 2005 high-level UN World Summit meeting, adopted by the General Assembly in its resolution 60/1,29 and permits intervention on humanitarian grounds to prevent the four mass atrocities of genocide, war crimes, ethnic cleansing, and crimes against humanity.

The R2P doctrine comprises three pillars: the first requires every state to protect its population from mass atrocity crimes; the second recognizes that the broader international community has the responsibility to encourage and assist individual states in meeting that responsibility; the third pillar requires that if a state is manifestly failing to protect its population, the international community must be prepared to take appropriate collective action in a timely and decisive manner and in accordance with the UN Charter. Pillar three envisages the possibility of a collective use of force through the UN Security Council under Chapter VII but does not give states a unilateral right to use force, absent Security Council action.

The doctrine of R2P was used for the first time in Libya, when the Security Council adopted a resolution focused on protecting the civilian population, demanding an immediate ceasefire and the cessation of all violence against civilians.30 It also authorized member states to take all necessary measures to protect civilians and civilian-populated areas under threat of attack.31 This led to the now much criticized intervention by a NATO-led coalition, led by France and the United Kingdom, which was joined by 19 states, including the United States.32 That intervention resulted in the ouster and eventual killing of Libyan President Muammar Qaddafi, leading critics to view R2P as legal cover for an act of unauthorized coercive regime change.

Obama’s Response in 2013

At much the same time that the United States was participating in R2P-based strikes in Libya, the Syrian uprising was underway and quickly transforming from a nonviolent movement against the regime to a full-blown civil war.33 Within two years, Syria became a major humanitarian crisis with hundreds of thousands of civilian casualties, millions of refugees fleeing the country, and a well-documented record of atrocities and war crimes being committed on a daily basis.34 The Obama administration took the position that Syrian President al-Assad must go to enable a peaceful resolution to the conflict.35 This complicated UN efforts at conflict-resolution and placed the United States increasingly at odds with Russia, a major supporter of the Assad regime.

In August 2013, President Obama faced a serious dilemma over how to respond to chemical weapons attacks by Assad. Reports were emanating from Syria about a sarin gas attack against civilians in Damascus and its suburbs.36 This was the deadliest chemical weapons attack since Saddam Hussein’s use of sarin gas against Kurds in 1988, and the Obama administration had to grapple with how to respond. Obama had already issued the “red-line” statement on August 20, 2012, threatening force against Syria if there were signs that unconventional weapons were used.37 However, Obama did not have the support of the United Nations under a Chapter VII Security Council authorization, and there was no legitimate exercise of self-defense argument possible under Article 51. There had been no request for assistance from Syria—indeed the governmental forces were the ones mounting the attacks—and Obama was wary of a humanitarian intervention. In the end, Obama supported strikes against Syria invoking “vital national security interests” as the justification but
sought the backing of Congress and the international community before acting.  

Obama’s entreaties to Congress to pass an AUMF to allow action against Assad met with stiff opposition. This led Obama to back off from a strike and instead seek to work with the Russian proposal for international monitors to take over and destroy Syria’s arsenal of chemical weapons, saying “we cannot resolve someone else’s civil war through force.”

During the Obama administration’s deliberations, Trump took to Twitter to urge Obama to seek congressional approval to carry out strikes against Syria, calling it a “big mistake if he does not!” Once Congress refused to consent, Trump rebuked Obama’s actions stating on Twitter that “Obama really bungled this.” He asserted that Assad was “stronger today than before Obama threatened military action.”

Despite urging Obama to seek authorization from Congress for his actions in 2013, Trump did not heed his own advice when contemplating the actions on April 4, 5, and 6 of 2017. The strike action taken by President Trump on April 6 was unilateral. Moreover, it was not preceded by a UN Security Council authorization, nor was it authorized by Congress through an AUMF.

**U.S. Justifications for April 6**

In the absence of UN Security Council authorization for the April 6 strikes, one line of reasoning offered by the Trump administration appeared to be an invocation of the right of self-defense. President Trump himself, as well as his press secretary, Sean Spicer, stated that the strikes were in the “vital national security interest” of the United States. The argument offered was that the proliferation and use of chemical weapons represents a “grave threat” to American national security by raising the possibility that such weapons may, in future, be used against Americans.

This argument, however, fails to meet the basic test under international law for asserting a right of self-defense to justify use of force. A lawful unilateral use of force in self-defense depends on the existence of an imminent threat. Concerns about proliferation and a potential future attack on the United States do not meet this threshold requirement under Article 51 of the UN Charter. Similar arguments about the proliferation of weapons of mass destruction as a basis for self-defense were presented by the George W. Bush administration in defending the “preemptive” use of force against Iraq in 2003 and were widely rejected by international lawyers, analysts, and leaders of the countries allied with the United States.

A second line of argumentation in defense of the American prerogative to use force in Syria may have been suggested by U.S. Ambassador to the United Nations Nikki Haley. “When the United Nations consistently fails in its duty to act collectively, there are times in the life of states that we are compelled to take our own action,” she said. Ambassador Haley may have been alluding to the idea that the United States was acting in collective self-defense on behalf of Syria’s neighbors. Yet, here again, the basic prerequisites for such a claim are not met. There was neither evidence that countries neighboring Syria were at imminent risk of an attack by the Syrian regime (let alone a chemical weapons attack) nor that they had requested action in their collective self-defense.

The contrast with the ongoing U.S. strikes on Syrian territory against the Islamic State is instructive. Iraq did formally request support for its self-defense against ISIS, and the United States offered a legal justification for expanding strikes beyond Iraqi territory as a matter of collective self-defense against the Islamic State. With respect to the Syrian regime, no neighboring country invoked self-defense in response to the chemical weapons attack, and the U.S. has not formally claimed that it is acting in collective self-defense.

Moving beyond the UN Charter grounds for the legality of American airstrikes, might the strikes be justified as a form of humanitarian intervention under the R2P doctrine? Spicer, White House press secretary at the time, did say that there was “a huge humanitarian component” to the justification for the airstrikes. Moreover, domestic and international support for the strikes were clearly related to worldwide humanitarian concerns and indignation in the face of the atrocities regularly committed by the Assad regime. Yet, it was neither the scale of the humanitarian disaster in Syria nor the general pattern of mass atrocity crimes but rather the apparent use of chemical weapons that triggered the American strikes.

In assessing the potential validity of a humanitarian justification, it is worth bearing in mind that the United States has never formally recognized a right of unilateral humanitarian intervention under international law. Moreover, while the chemical weapons attack to which the United States responded on April 6 undoubtedly caused extreme humanitarian distress, the much greater humanitarian catastrophe occasioned by the toll on civilian lives and property of the conflict as a whole has not resulted in humanitarian intervention in Syria by the United States or any other country. Pinprick strikes on a single location in response to a single instance of the targeting of civilians by the regime, in the absence of broader intervention to protect civilians in a context in which they are being targeted on a daily basis falls short of any conventional or doctrinal definition of humanitarian intervention. That said, some legal analysts have argued that citing humanitarian grounds to justify the April 6 strikes is “illegal but not unprecedented.”

Where each of these potential justifications for the airstrikes under international law has failed, however, an entirely novel theory has emerged and garnered some support. This theory would treat the airstrikes against Syria as an enforcement action to uphold the *jus cogens* norm prohibiting the use of chemical weapons.

There are two variations of this argu-

---

**Article 51 of the UN Charter**

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
ment, each of which has its proponents. The first is a straightforward argument that the use of chemical weapons violates a cardinal rule banning chemical weapons. For example, the NATO Secretary-General stated, in response to the April 6 strikes, that “any use of chemical weapons is unacceptable, cannot go unanswered and those responsible must be held accountable.” The notion that the use of chemical weapons must not go unpunished was echoed by several other world leaders. This view hinges on the somewhat contested claim that the prohibition on the use of chemical weapons has attained *jus cogens* status. Thus, one explanation of U.S. airstrikes would be as an enforcement action to punish the violation of a *jus cogens* norm.

The second variation on a logic of enforcement to justify the strikes turns on the earlier history of the Obama administration’s efforts to deter chemical weapons use in Syria. The agreement brokered by the Obama administration and the Russians in 2013 included assurances that the Syrian regime would never again use chemical weapons. The attack on Khan Sheikhoun was widely seen as violating those assurances. Thus, some commentators have deemed the strikes authorized by President Trump as a form of enforcement of the earlier agreement negotiated by the Obama administration. One further variant on this logic might be the argument that the strikes served the purpose of deterring further uses of chemical weapons and preventing such weapons from falling into the hands of other extremists operating in Syria.

Because only Iran and Russia joined Syria in denouncing the April 6 strikes, there is some evidence that the international community viewed the airstrikes as legitimate if not legal. Some scholars argue that this may indicate international support for the creation of a new international norm that permits the use of unilateral force to punish those who use chemical weapons against civilians. The strikes were limited to a military base allegedly used for the chemical weapons attack, civilian casualties were avoided, and the Russians were given advance warning. As a result, the strikes were perceived by proponents of the enforcement justification to be narrowly tailored to legitimate goals.

Yet, such an argument for permitting unilateral use of force in response to a chemical weapons attack raises significant problems in international law. First, the prohibition on unilateral uses of force outside of the narrow exceptions sanctioned by the UN Charter is itself a *jus cogens* norm—one that enjoys broader support than the prohibition on chemical weapons. Second, by displacing the Security Council as the arbiter of enforcement actions in response to threats to peace and security, the United States risks undermining the authority of a global institution in which it enjoys the asymmetric privilege of being a permanent, veto-wielding member.

Moreover, the claim that the United States is effectively creating a new customary international law norm in favor of unilateral uses of force to punish chemical weapons use requires evidence of both state practice and *opinio juris* (the view that the practice is grounded in legal obligation). While the April 6 strikes may be evidence of an emerging state practice, the failure of the Trump administration to offer a formal international legal justification for the strikes, let alone one citing the emergence of a new international norm, cuts against the view that the strikes were understood by the United States or other international actors as evidence of the emergence of new law.

**Legality of the April 6 Strikes**

The U.S. strikes against Syria do not appear consistent with any of the basic parameters for the lawful use of force under international rules. Unauthorized by the Security Council, without a basis in self-defense (individual or collective), and not motivated primarily by humanitarian considerations, the strikes appear to have been illegal.

Perhaps the most troubling aspect of the April 6 strikes from the perspective of international law is the Trump administration’s failure to offer any clear rationale to defend its lawfulness. While different members of the administration, from the president to the press secretary to the secretary of state offered different accounts of the purposes served by the strikes—including “vital national security interests,” “humanitarian concerns,” “deterring the future use of chemical weapons” and even sending a strong message to the Assad regime—none provided a clear legal justification. In a War Powers Act report sent by President Trump to Congress, Trump asserted that he “directed this action in order to degrade the Syrian military’s ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons.”

While this may be a moral justification, it is not a legal one. Indeed, such is the lack of clarity on the legal basis of the strikes, that the Trump administration is being sued by a government watchdog, Protect Democracy, to compel the administration to disclose the legal basis for Trump’s actions on April 6. Filing a Freedom of Information request, the group has requested all emails, memos, and supporting records relating to the legal basis for Trump’s actions.

As others have argued, the failure to provide a legal basis creates the impression that “the President may have acted without assessing domestic or international legal justifications for his actions.” Such a failure projects to the rest of the international system a fundamental disregard for legal constraint. If powerful actors can engage in unilateral uses of force based on their own judgment concerning which rules may be enforced coercively or which actors must be punished, there is every reason to expect other states will follow suit. Engaging in such unilateral uses of force without legal rationale undermines the integrity of the collective security order—of which the United States was once the principal architect and guarantor—and erodes the UN Charter rules on the lawful use of force. To the extent that the strikes in Syria stand for the proposition that the United States will resort to unilateral uses of force at its own discretion and without regard to international law, the precedent set will have worrying consequences for the sovereignty of all countries and the sustainability of the global system for international peace and security.

---


2 Id.


5 Donald J. Trump@realDonald Trump: “AGAIN, TO OUR VERY FOOLISH LEADER, DO NOT ATTACK SYRIA—IF YOU DO MANY VERY BAD THINGS WILL HAPPEN & FROM THAT FIGHT THE U.S. GETS NOTHING!” Twitter (Sept. 5, 2013), https://twitter.com/realdonaldtrump/status/3756094033
Successful Mediations
Don’t Just Happen.

Whatever the dispute, from trademarks to personal injury, discover how JAMS neutrals empower the resolution process by crafting mutually agreeable solutions with economy and efficiency.

Resolving Disputes Worldwide

800.352.5267
jamsadr.com/mediation
Los Angeles Lawyer
December 2017

by Tracy Luu-Varnes

Excepting Misconduct

Many jurisdictions outside California provide for an exception to privileged mediation communication when the communication can prove or disprove misconduct that occurred during mediation.

California’s existing laws, a person who files a malpractice action against his or her attorney is prohibited from using evidence of conduct or communications that occurred during a mediation against the attorney to prove the case. Unlike California, other jurisdictions provide for an exception to the mediation-confidentiality doctrine with attorney malpractice claims. There may be changes in the near future that will make California laws in this regard more like those of other jurisdictions. In response to a call from the California legislature, the California Law Revision Commission is analyzing the relationship between the state’s statutes regarding the mediation confidentiality privilege and attorney malpractice.1 This year—nearly five years after the initial request from the legislature—the commission issued a preliminary recommendation on this topic. On the horizon is the possibility of a new statute that would provide for an exception to the mediation confidentiality privilege in situations involving attorney misconduct during mediation.

Mediation is an interactive form of dispute resolution in which a neutral facilitates communications between disputants to assist them in reaching a mutually acceptable agreement.2 Although voluntary, mediation continues to be a popular avenue for those interested in resolving a dispute, both during and before litigation. There is a broad consensus that one of the appeals to mediation is the guarantee of confidentiality during the mediation process.3

Tracy Luu-Varnes is an employment and complex litigation attorney in the Los Angeles office of Arent Fox LLP.
Currently, California’s mediation statutes make any statements and writings that occur during the mediation confidential and protected from disclosure. Statutes governing mediation confidentiality are found in the California Evidence Code.4 Section 1119—perhaps the crux of the mediation confidentiality privilege—provides that:

[No] evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or any noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.5

There are limited exceptions to the mediation confidentiality privilege. Outside of the family law and criminal context, these exceptions include contempt proceedings, criminal conduct, and conduct being investigated by the State Bar or Commission on Judicial Performance disqualification proceedings.6 Notably absent are exceptions based on attorney malpractice, misconduct, or abuse during mediation.

The mediation confidentiality privilege encourages participants (including attorneys) to speak openly and freely and to engage in robust discussions with the assurance that if a settlement is not achieved, their words and any discussion that took place during the mediation would not be used against them at a later time. However, suppose a dispute settles at mediation, but one of the participants alleges that his attorney committed malpractice or engaged in misconduct during the mediation. In addition, suppose that this participant alleges that he would never have settled at mediation but for the attorney’s misconduct. Under California’s existing mediation confidentiality privilege laws, since the evidence to support the malpractice action derives solely from the conduct of the aggrieved party and communications during mediation, the aggrieved party will find that he has no recourse against the attorney as that evidence is subject to the mediation confidentiality privilege and thus inadmissible.

Current California laws shield attorneys from malpractice actions if the alleged misconduct occurred during a mediation. This is a harsh line in the sand for a mediation participant who is seeking recourse for an attorney’s malpractice at mediation. Interestingly, this protection for attorneys does not exist in other jurisdictions. For example, states have adopted the Uniform Mediation Act (UMA), which has carved out an exception to the mediation confidentiality privilege for attorney malpractice and misconduct.

Malpractice Context

Several California courts have examined the intersection between the protections afforded by the mediation confidentiality privilege and attorney malpractice arising from conduct during mediation. In every California case thus far, the courts have broadly construed and applied the mediation confidentiality privilege to exclude the admission of evidence of communications or conduct that occurred during mediation, despite the knowing inequity that results from such a decision.

In 2004, the California Supreme Court broadly interpreted the mediation confidentiality privilege to preclude exceptions other than those expressly contained in the statutes. In Rojas v. Superior Court,7 contractors and subcontractors settled a construction defect case brought by the owner of an apartment complex at mediation. Thereafter, hundreds of tenants of the apartment complex sued several of the entities who had been involved in the development and construction of the complex for numerous health problems associated with the construction defects.9 The tenants demanded production of several items prepared in the prior litigation including the files relating to the construction defect case.10 The supreme court concluded that the requested items were not discoverable because they were “prepared for the purpose of, in the course of, or pursuant to, [the] mediation” in the underlying action.10 Even acknowledging that without the requested discovery the tenants might not have been able to obtain much of the necessary evidence, the supreme court held that the mediation confidentiality privilege is not subject to a “good cause” exception.”11 In reaching this conclusion, the supreme court focused on the strong public policy favoring mediation and the need for confidentiality in the mediation process.12

In Wimsatt v. Superior Court, Corey Kausch, a mediation participant, filed a legal malpractice case against his former attorneys regarding their representation of him during a mediation in a personal injury lawsuit.13 Among other allegations, Kausch alleged that his attorneys breached their fiduciary duty by submitting an unauthorized settlement demand to the opposing party, which Kausch allegedly learned from the confidential mediation brief during mediation.14 The law firm sought a writ of mandate to compel the trial court to vacate its order denying the firm’s application for a protective order and instead to enter an order that would protect all mediation-related communications, including the brief, which was the critical evidence for Kausch’s malpractice action.15

The court of appeal acknowledged that the California Supreme Court has consistently held that “the mediation statutes are to be broadly construed to effectuate the legislative intent, even if there are conflicting public policies and even if the equities in a particular case suggest a contrary result.”16 Therefore, in light of dicta and the supreme court’s analysis of the scope of mediation confidentiality privilege, and despite the fact that the ruling would likely deprive Kausch of his ability to prove the purported legal malpractice action, the court of appeal found that the mediation brief and e-mail referring to sections of the mediation brief were absolutely and completed protected from disclosure by the mediation privilege.17

Similarly, in Amis v. Greenberg Traurig LLP, a mediation participant brought a legal malpractice action against his former attorneys. Amis alleged that at mediation his attorneys failed to advise him of the potential for personal liability under the proposed settlement agreement.18 Specifically, Amis alleged that the settlement included a stipulated judgment that converted the corporate obligations to Amis’s personal obligations.19 During the trial, Amis admitted that his damages stemmed entirely from the settlement agreement and that any communication he had with his former attorneys regarding the settlement agreement occurred in the course of mediation.20 Based on those facts, the trial court concluded, and the court of appeal affirmed, that the mediation confidentiality privilege precluded Amis from presenting evidence of communications during the mediation, including the settlement agreement, thus preventing Amis from being able to prove his malpractice action.21

Perhaps the most recognized California case on this issue was one that reached the California Supreme Court in 2011, Cassel v. Superior Court.22 Petitioner Cassel brought a malpractice action against his former attorneys because “by bad advice, deception, and coercion, [by his] attorneys,” Cassel alleges he was induced to settle the case “for less than the case was worth.”23 Specifically, during the 14-hour mediation, Cassel alleged that despite feeling increasingly tired, hungry, and ill, his attorneys insisted that he remain until the mediation concluded and that he was pressed by his attorneys to accept an offer
1. Mediation involves a neutral who facilitates a discussion between disputants.
   True. False.

2. California’s mediation statutes make statements and writings that occur during the mediation confidential and protected from disclosure.
   True. False.

3. California’s mediation statutes do not include protection for conduct that occurs during a mediation.
   True. False.

4. California laws provide an exception to the mediation confidentiality statute for attorney malpractice actions.
   True. False.

5. California laws currently do not provide exceptions to the mediation confidentiality privilege.
   True. False.

6. In California, an attorney’s conduct during mediation may be used as evidence in a subsequent malpractice lawsuit by the attorney’s former client.
   True. False.

7. In California, communications between an attorney and client may be used as evidence in a subsequent malpractice lawsuit because not allowing them would be against public policy.
   True. False.

8. California courts have broadly construed the mediation confidentiality privilege to exclude evidence of communications that occurred during mediation.
   True. False.

9. In deciding whether evidence of misconduct during mediation should be allowed in a subsequent malpractice lawsuit, the California Supreme Court only considers public policy.
   True. False.

10. In Cassel v. Superior Court (51 Cal. 4th 113 (2011)), the Supreme Court permitted evidence of the communications between Cassel and his attorneys during mediation.
    True. False.

11. California is considering a change to the state’s current mediation confidentiality statutes to allow for an exception for attorney malpractice.
    True. False.

12. The California Law Revision Commission is studying the relationship that exists under current law between mediation confidentiality and attorney malpractice, as well as other misconduct, to determine if an amendment to the mediation confidentiality statutes should be recommended.
    True. False.

13. There is unanimous support to amend California’s current mediation confidentiality statute and add an exception for attorney malpractice.
    True. False.

14. The Uniform Mediation Act provides for an attorney malpractice exception to the mediation privilege.
    True. False.

15. The Uniform Mediation Act has been adopted in California.
    True. False.

16. The Uniform Mediation Act has been enacted by all 50 states.
    True. False.

17. In an attorney malpractice action brought against an attorney in a state that has adopted the Uniform Mediation Act, the former client will be allowed to introduce evidence of communications that occurred during mediation to prove its claim.
    True. False.

18. In an attorney malpractice action brought against an attorney in New York, the former client will be allowed to introduce evidence of communications that occurred during mediation to prove its claim.
    True. False.

19. In an attorney malpractice action brought against an attorney in California, the former client will be allowed to introduce evidence of communications that occurred during mediation to prove its claim.
    True. False.

20. If Evidence Code Section 1120.5 were adopted by the California Legislature, in an attorney malpractice action brought against an attorney in California after the enactment of Section 1120.5, the former client would be allowed to introduce evidence of communications that occurred during mediation to prove its claim.
    True. False.
by allegedly calling him greedy if he insisted on more.24 In addition, Cassel alleged that during mediation, his attorneys harassed him, threatened to abandon him at the imminently pending trial if he did not accept the settlement, misrepresented certain significant terms of the proposed settlement, and falsely assured him that they could and would negotiate a side deal to recoup the deficits in the settlement while waiving or discounting a large portion of the legal bill if he accepted the offer. At midnight, Cassel’s attorneys presented him with a written settlement agreement, and evaded his questions about the terms of the agreement. Feeling cornered with no time to find new counsel before trial, Cassel said he felt that he had no choice but to sign the agreement, which he did.25

Following the settlement, Cassel initiated a malpractice action against his attorneys. During deposition, Cassel testified about the conversations he had with his attorney before and during the mediation.26 Thereafter, the attorneys moved in limine pursuant to the mediation confidentiality privilege to exclude all evidence of communications between Cassel and his attorneys. The trial court granted the motions and determined that all conversations were inadmissible pursuant to the mediation confidentiality privilege.27

The court of appeal reversed, finding that the mediation confidentiality privilege statutes were “not intended to prevent a client from proving, through private communications outside the presence of all other mediation participants, a case of legal malpractice against the client’s own lawyers.”28 The attorneys petitioned review in the California Supreme Court, arguing that the mediation-related discussions with the client were inadmissible in the malpractice action even if the discussions were private and away from any other mediation participants.29

The supreme court granted review, and consistent with its prior decisions, characterized the mediation confidentiality privilege statutes as “clear and absolute” and thus must be strictly construed.30 The supreme court further held that the mediation confidentiality privilege statutes are not subject to a judicially created exception when a client sues for legal malpractice and seeks disclosure of private attorney-client discussions relating to a mediation.31

The supreme court stated that the statutes “must govern, even though they may compromise” the ability of a person to prove a legal malpractice action against a former attorney.32 Recognizing the inequitable results of the case, the California Supreme Court indicated that it was up to the legislature to consider reform.33

Allowing Exception

Most privileges, like the attorney-client privilege or spousal privilege, are treated consistently by courts throughout the country. That is not the case for the mediation confidentiality privilege. In California, and as exemplified in the cases above, the mediation confidentiality privilege has been broadly applied as courts have categorically prohibited judicially crafted exceptions, even in situations when justice seems to call for a different result.34 In taking this position, California courts have echoed that a hard line is necessary “[t]o carry out the purpose of encouraging mediation by ensuring confidentiality.”35

At the opposite spectrum of California’s treatment of the mediation confidentiality privilege—which provides for nearly absolute confidentiality to mediation communications—are the mediation confidentiality privilege statutes of New York, which provide minimal confidentiality to mediation communications. The governing statute, New York Civil Practice Law and Rules 454.7, provides that settlement offers and demands as well as evidence of conduct or statements made during a mediation “shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages.” The statute continues by stating that “the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose,” which will include purposes to show attorney malpractice or misconduct during mediation.

The UMA has been enacted in the District of Columbia and 11 states.36 Section 4 of the UMA provides that unless otherwise specified “a mediation communication is privileged...and is not subject to discovery or admissible in evidence in a proceeding unless waived.”37 The UMA allows several exceptions to the mediation confidentiality privilege, including when the communication can prove or disprove a claim or complaint of professional misconduct or malpractice that occurred during mediation.38 The UMA’s exception is restricted only to evidence of misconduct that allegedly occurred “during a mediation” and does not apply to evidence of misconduct in a nonmediation setting.

Proposed Revisions

At the direction of the legislature, the California Law Revision Commission has been conducting a study, Study K-402, to analyze “the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct.”39 The commission has acknowledged several tentative proposals to revise the Evidence Code, with the objective of allowing parties to discover and offer into evidence mediation communications that are relevant to proving or disproving claims that attorneys committed malpractice in connection with a mediation.

On April 13, 2017, the following proposed statute was presented to the commission for consideration:

Evidence Code § 1120.5 (added).

Alleged misconduct of lawyer when representing client in mediation context

(a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or procured or obtained in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(C) A dispute between a lawyer and client concerning fees, costs, or both including a proceeding under the State Bar Act, Chapter 4, Article 13– Arbitration of Attorneys’ Fees, Business & Professions Code Sections 6200-6206.40

This proposal has not been unanimously supported. There are concerns that allowing for a malpractice exception to the mediation confidentiality privilege would change the effectiveness of mediation as it makes participants less willing to be open and honest since the reassurance of confidentiality will no longer be absolute. This concern, while legitimate, was not persuasive in other jurisdictions. Mediation is still popular and widely used, even in states that have adopted the UMA.41 With the exception of the potential change in con-
fidentiality, the other acknowledged benefits of mediation will not change. Compared with going to trial, mediation is a quicker and more cost-effective way to resolve a dispute. Mediation also provides the participants more control of the outcome of the case and allows participants to craft creative resolutions.

In addition, the availability of an attorney malpractice exception to the mediation confidentiality privilege should not change the way attorneys conduct themselves during mediation. Attorneys have a fiduciary duty to competently and diligently advocate for their clients. An attorney’s standard of care to a client should not be different in a mediation. In fact, the addition of an attorney malpractice exception to the mediation confidentiality privilege should provide more confidence for clients as well as attorneys, for both will be able to present evidence from the mediation should a situation like a malpractice claim arise. The evidence will be treated like any other malpractice action and left for the trier of fact to make a determination if there was malpractice.

California is a leader in the alternative dispute resolution domain but may have fallen behind with respect to carve-outs to protect mediation participants from attorney misconduct. At this point, it is unclear what the commission will recommend to the legislature: new Evidence Code Section 1120.5, a different statute, or no change at all. For the time being, participants in mediation can still expect that all communications and writings that occurred during the mediation (with few exceptions) will be absolutely privileged.


2 Section 1115(a) defines mediation as “a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.”

3 Blackmon-Malloy v. United States Capitol Police Bd., 575 F. 3d 699, 711 (D.C. Cir. 2009) (“Congress understood what courts and commentators acknowledge, namely, that confidentiality play a key role in the informal resolution of disputes.”).

4 See EVID. CODE §§1115-1118. Sections 1152 and 1154 are based on the public policy favoring settlement of disputes by encouraging candid discussions while restricting the admissibility of evidence of settlement negotiations and providing some assurance that statements made by a party during negotiations will be inadmissible to prove (or disprove) liability.

5 This includes writing, communications, negotiations, or settlement discussions. See Evid. Code §1119.


14 Id. at 141.
15 Id.
16 Id.; Rojas, 33 Cal. 4th at 415-16; see also Foxgate Homeowners’ Assn. v. Bramalea Califonia, Inc., 26 Cal. 4th 1 (2001). In Foxgate, a mediator’s report that indicated the attorney for one party had engaged in a pattern of tactics that were in bad faith was submitted in support of a motion for sanctions. By crafting a nonstatutory exception to the mediation confidentiality privilege, the court of appeal held that the report was admissible. The California Supreme Court disagreed, holding that the motion and the trial court’s consideration of the motion and attached documents violated the mediation confidentiality privilege as EVID. C ODE §1119 expressly prohibits any person, mediator, and participants from revealing any written or oral communication made during mediation.
17 Wimsatt, 152 Cal. App. 4th at 155.
19 Id. at 335.
20 Id. at 336.
21 Id. at 343-44.
22 Cassel v. Superior Ct., 51 Cal. 4th 113 (2011).
23 Id. at 118.
24 See id. at 120.
25 Id.
26 Id. at 121.
27 Id.
28 Id. at 122.
29 Id. at 119.
30 Id. at 117.
31 Id. at 123-33
32 See id. at 119.
33 See id. at 136.
38 Id. §6(a).
39 Cal. L. Revision Comm’n, supra note 1.
40 Minutes from the California Law Revision Commission on the Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Draft Tentative Recommendation) 5 (April 2017).
41 There is no evidence that enactment of the UMA, for example, has led to a decline in the use of effective mediation in jurisdictions that have adopted UMA. See, e.g., James R. Cohen, My Change of Mind on the Uniform Mediation Act, DISP. RESOL. MAG., Winter 2017, at 8 (“To my knowledge not a single empirical study suggests that the UMA has triggered a decline in the use of mediation.”)
42 Id.
LACBA SmartLaw Flat Fees are an affordable way for clients to address legal issues. Clients get an affordable Flat Fee, but with the advantage of having a lawyer answer questions and complete the process correctly.

- Bankruptcy, Chapter 7: $850
- LLC Business Formation: $800
- Trademark Registration: $500
- Uncontested Divorce: $800

Flat fee rates cover attorneys’ fees related to the matter. Filing fees and other costs are extra.

More information: (866) SMARTLAW, SmartLaw.org/flatfee

Attorneys interested in receiving flat fee referrals from LACBA: (213) 896-6571
It’s early Monday morning. The courtrooms on the second floor of the Stanley Mosk Courthouse are still dark, but the court’s Restraining Order Center in room 245 is already busy. A line of desperate people is forming outside the Los Angeles County Bar Association (LACBA) Domestic Violence Legal Services Project a few doors down the hall. For the next six hours, volunteers in the project’s office will listen to the stories of abuse survivors and walk them through the thick pile of paperwork that civil restraining orders for domestic violence require.

There’s Diana, who showed up after a former boyfriend broke into her home in the middle of the night, blackened her eye, and choked her until she thought she was going to die. She was able to escape by poking him in the eye, then dousing him with the pepper spray she kept nearby.

James asked for help because he’s afraid of his 29-year-old son, a meth addict who punched him in the face and beat him with a belt buckle after James told him to find a job or move out.

Cynthia came because her ex showed up in a drunken rage, terrifying her and their nine-year-old son. He said he’d make off with the boy and set her on fire if she didn’t take his telephone calls. In the past he’d slashed her tires and threatened her with a gun.

Like a dozen other people that day, they arrived at the Domestic Violence Legal Services Project worried and fearful, but left relieved and empowered—thanks to a program that’s made a big impact on more than 100,000 lives in its 35 years.

The Domestic Violence Legal Services Project—sponsored by LACBA’s charitable arm, Counsel for Justice—relies on volunteer attorneys to help more than 4,000 people every year navigate the legal process that can protect them from elder or domestic abuse.

The process is straightforward: victims detail the abuse that occurred and the relief they desire. A judicial officer reviews the application and can issue a temporary protective order that same day. A few weeks later, a hearing can lead to an extension that lasts for up to five years.

Sandy Banks is a senior fellow at the USC Annenberg Center on Communication Leadership and Policy. She spent 36 years as an award-winning journalist at the Los Angeles Times and has written widely about legal issues, the justice system, and domestic violence.
The application packet, however, can be a monumental hurdle for victims of abuse. It runs more than 30 pages, with questions on everything from whether the abuser owns a gun to the names of family pets that might need protecting. Their answers dictate not just whether a judge grants their request for protection but also what their lives will look like in the aftermath: What bills need paying? What happens to the kids?

For a lawyer, the paperwork is a cinch: “Like falling off a log,” said Scott Lord, a litigation attorney who has volunteered at the project since 2009. “One thing you learn from being in court is what judges want to know.”

Without guidance some victims botch the process and others give up. “These people are coming in at a really emotional time in their lives,” said Geoffrey Moss, a commercial litigation attorney who has volunteered for the Domestic Violence Legal Services Project for more than five years. “Having us there to walk them through it helps them achieve something that would be very difficult to do alone.”

**Primary Role**

Their primary role is helping the victims tell their stories. The volunteers listen to their accounts, ask questions, and craft declarations that tell judges exactly why and how they need protection. A lawyer’s mindset and training is a perfect fit for that. “The victim might want to give you the details of every fight they’ve had, all the bickering, everything they’ve been through,” said Mark Garscia. “A lawyer can hone in with a clear mind and recognize the facts that are important for the judge to know.”

A patent attorney and current president of LACBA’s Counsel for Justice, Garscia began volunteering six years ago. “It is gratifying to help people who’ve mustered the courage to change their lives,” he said. And the rewards of volunteering flow both ways. “These clients are so grateful that someone is willing to hold their hand through this process,” he said. “You walk out thinking about how tough some people have it and how fortunate you are.”

The Domestic Violence Legal Services Project began in borrowed space in a Fairfax-area legal clinic in 1982. It was launched by then-Barristers president Margaret M. Morrow to help victims of domestic violence find safe havens and get their lives back on track. “Back in the day, if you were being abused, it was just your secret that you carried around with you for the rest of your life,” she said. “Now people are more willing to come forward, but that reflects developments that happened over many, many years.”

Until the women’s movement gained steam in the 1970s, domestic violence had been considered a family matter. Stories were rarely shared, police were reluctant to make arrests, and the courts were seldom involved. Then, shelters for “battered women” began to crop up, and civil courts began giving victims options to protect themselves. But the legal process was unnerving and left many women adrift. “The shame was beginning to lift,” recalled Morrow, who would go on to serve as a federal judge and now heads the nonprofit law firm, Public Counsel. “But a lot of the victims had difficulty leaving because they didn’t have the resources to secure the immediate legal relief that would keep the abuser away.”

She recruited a few volunteers and worked with shelters and law enforcement officials to connect women to options. A few years later, the program outgrew its space and moved into the downtown Los Angeles courthouse, with one desk at the back of a busy courtroom for victims who needed help with paperwork. Later, one desk became three, and the program kept expanding.

By 1994, the project had hired an attorney, added a clinic in Pasadena, and enlisted paralegal Sara Rondon to manage the office, triage the clients, and recruit volunteers. “We had to hand-write the forms in triplicate, using carbon paper,” Rondon recalled. “We couldn’t afford computers.”

One week after she was hired, a crime occurred that would change the face of domestic violence and raise the profile of the project. On June 13, 1994, Nicole Brown Simpson was found stabbed to death outside her Brentwood condominium. Her former husband, football icon O.J. Simpson, was charged with murder, and details of her tortured life with him began to trickle out. Police reports, hospital records, and accounts from her personal journal detailed years of threats, beatings, and other abuse. Friends said she had expressed fears that she would wind up dead by her husband’s hand.

**Wake-Up Call**

“The explosion of media around that was like a wake-up call,” Rondon said. The Domestic Violence Legal Services Project was featured on national news reports. “We went from seeing a trickle of people to wall-to-wall. Women were saying, ‘If this could happen to her, it could certainly happen to me.’”

The attention produced a flurry of accolades and a sudden financial influx for the project. There were grants to hire a second attorney, a second paralegal, and a social worker. A fund-raiser generated enough money to outfit the office with computers. Dozens of new volunteers signed up to work with victims. By the
time Simpson went on trial in 1995, the clinic was seeing almost three times as many clients as it had the year before.

For the next decade or so, funding kept pace with the growing need for services, Rondon recalled. Then came the 2008 recession when grants disappeared and private giving dried up. By 2014, the project’s Pasadena office had closed, the flow of volunteers had slowed, and the staff had shrunk to two.

Today the Domestic Violence Legal Services Project has a staff of three—Rondon, paralegal Mireya Perez, and attorney Monica Bustos—and a roster of more than 100 volunteers. They work out of an office with four cubicles, a table, and eight plastic chairs for clients who are referred by social workers, police officers, domestic violence shelters, and the court’s Restraining Order Center.

Last year, 162 volunteers—attorneys, law students, paralegals, interpreters, legal secretaries—donated more than 5,500 pro bono hours and served 4,254 clients.

“And yet,” Rondon said, “there are some days we can’t get to everyone who’s waiting for help because we don’t have enough volunteers. I need to be able to fill every cubicle every day. The need is so great, and the problem is not going away.”

Their service has been hailed as a boon to the family law court, which handled more than 21,000 petitions for domestic violence restraining orders in the previous fiscal year.

“From the court’s perspective, they provide an integral service,” said Thomas Trent Lewis, supervising judge of the Los Angeles Superior Court Family Law Division. “If the written story is easy to understand and well-written—and typically it is when it’s done by them—that helps provide efficient and meaningful access to justice. “We’re always trying to balance efficiency and fairness. Generally, victims are better able to tell their stories when caring and compassionate volunteer lawyers help them develop the facts. That advances both goals.”

It costs about $250,000 a year to run the Domestic Violence Legal Services Project, which gets no government money because that would place limits on clients’ income, and the project doesn’t reject any victims of domestic violence or elder abuse. Much of its funding comes from money set aside from class-action settlements in California, funneled through LACBA’s Counsel for Justice, which also supports legal services programs for veterans, immigrants, and people with HIV and AIDS. But with its resources vulnerable to broad social and economic forces, the project has begun to struggle financially. The once-reliable pool of settlement money is shrinking, and the project’s shortfall will expand each year without an infusion of donations.

It’s clear from the “wish list” on their website that the project is a bare-bones operation: They need books, crayons, and coloring books to occupy children while parents are meeting with lawyers; Starbucks gift cards for clients who wait all morning and have to come back in the afternoon because their turn hasn’t come; pens, pads, and paper clips because the office supply budget doesn’t stretch far enough. And boxes of tissues, because every day someone is likely to wind up crying.

Monica Bustos spent five years as a victims’ advocate with the Los Angeles County District Attorney’s Family Violence Unit before joining the Domestic Violence Legal Services Project in June. She understands how much courage it takes for a victim to walk through the door, and the swirl of emotions that make some want to turn and run. Domestic violence is rarely a single, random event, she explained. It is a cycle that both victim and abuser get acclimated to. “There’s a violent outburst, then a cooling off period,” she said. “The victim softens, there’s a period of calm, then tensions rise again. It may start with cursing and swearing, then pulling and shoving, then kicking and screaming. It will progressively get worse each time.”

Seven Attempts

It takes a victim, on average, seven attempts to leave a relationship for good. Some feel trapped because the abusive partner is the sole provider or father of their children. Some love their abuser, cling to memories of better days, and believe he or she will change. Some are so beaten down that they’re held hostage by feelings of fear, guilt, and shame. Project volunteers learn to navigate the shifting emotional terrain.

“I’ve had folks who are very ambivalent about whether they actually want to go through with filing the order,” said Ann Fromholz, an employment lawyer who has volunteered since 2012. “Others are dead set on being done. They’re kicking the person out, moving on with their lives. You can’t know what

LACBA’s Domestic Violence Legal Services Project is in immediate need of volunteers to help victims of domestic violence at the Stanley Mosk Courthouse. Volunteers help clients prepare the complicated and lengthy legal documents that are required in order to file for Temporary Restraining Orders and other legal protection from their abusers. No prior experience is necessary and onsite training is provided.

Help continue this vital service to protect victims of domestic violence by donating the equivalent of one billable hour of your time at www.LACBA.org/donate. Every billable hour you contribute provides thousands of dollars in pro bono legal services.
brought them to that point of certainty. I wind up using a lot of my deposition-taking skills.”

Eighty percent of the clients are women, but that hasn’t been a stumbling block for male volunteers. In fact, their presence can be particularly comforting, said Carlos Dominguez, a criminal appellate lawyer who has been volunteering with domestic violence programs since he was in law school at the University of Southern California. “I think it’s especially important for these women to have a positive experience with a man who’s there to help them out,” he said. “It takes a lot of courage for them to come and seek help. We’re here for them at one of the hardest times in their lives. We’re helping them get a new start.”

It has been a surprise to some that 20 percent of the project’s clients are men. Many are victims of elder abuse, but others are seeking protection from male or female domestic partners.

“I thought it would be 100 percent women, but I’ve seen a lot of men over the years,” said Scott Lord, who volunteers once or twice a month. “They’re embarrassed much of the time. They’re willing to confide in me, but they’re thinking, ‘I’m a man. I should be able to handle this.’ Coming in for something like this in an intimate relationship is a little tough for some guys, and we have to be sensitive to that.”

Elder Abuse

It is also tough on elderly parents seeking protection from adult children. Volunteers sometimes have to work hard to draw them out.

“You can see the sort of conflict they have,” said Rashida Adams, a research attorney for the California Court of Appeal who began volunteering last year. “They feel enough fear to come into the clinic for help. But there’s still the instinct to protect their children. That can take a lot of probing on our part. Their inclination is to say the bare minimum. It’s difficult for them to confront some things, to acknowledge how bad the situations are.”

In some ways, that might be the volunteers’ most important role: reconciling the truth with what victims have for years willed themselves to ignore, bearing witness to pain that’s been unacknowledged and unresolved.

“I have often found that people will come into the clinic and can tell me their story and get through it just fine,” Adams said. “Then we read it back to them, going over the declaration to make sure everything is right, that it reflects what they said. And that’s when the emotion sets in, when people break down and cry. Hearing it back and seeing it on paper has a real impact. It helps them realize how serious it is, how abusive their situation has been over a period of years.”

That can be eye-opening and empowering, but hard to absorb—for both the victims and the volunteers. “There are all sorts of terrible things that happen. That’s the gig,” Lord acknowledged. “But the people who’ve been going on like this for so long that they can recite, with a flat voice and no emotion, details that would have most people recoiling in horror—that’s hard to take for me.”

And yet, he said, the volunteer experience is inevitably both heartening and humbling. “You go into the office and you know you’re going to wind up helping somebody. You’ll do something that they couldn’t do for themselves. That’s a pretty good feeling. I leave the project every time thinking there are two or three people who got a hand today when they needed it. And that’s all I can do. As big as my ego is as a lawyer, that’s probably the best I can do.”
It Takes Diverse Sources to Fund LACBA’s Charitable Projects

BATTERED WOMEN AND MEN, unemployed veterans, immigrants seeking legal status through lawful means, and people living with HIV/AIDS—these are the individuals the lawyers of the Los Angeles County Bar Association (LACBA) have been helping for more than 50 years.

Thank you to each of you who has donated regularly over the years and to those new donors who have given recently to LACBA’s Counsel for Justice (CFJ), the charitable fundraising arm of LACBA. Your support has been essential. Unfortunately, the funding received is not enough. LACBA desperately needs the help of all of its members, and Counsel for Justice is working towards this by getting the word out to the community about the thousands of lives helped by the LACBA projects.

Funding for LACBA’s four projects—the Domestic Violence Legal Services Project, the Immigration Legal Assistance Project, the Veteran’s Legal Services Project, and the AIDS Legal Services Project—comes from many diverse, and sometimes unexpected, sources.

Cy Pres. The LACBA projects have been fortunate to benefit from several cy pres awards, which arise from the distribution of unclaimed funds from class action settlements. This past year, LACBA’s Domestic Violence Legal Services Project received $165,000 in cy pres funds from the Spearmint Rhino Gentleman’s Club. The award was the result of a settlement of a class action wage and hour dispute with the club’s dancers. Cy pres awards, however, do not occur by chance. They require the timely and effective intercession of an advocate for the LACBA projects. We are thankful for the watchful eye and efforts of those who have succeeded in obtaining such awards. Unfortunately, the awards are not sustaining, and when they run out, there is a budget gap.

Grants. Grants from the State Bar of California’s Equal Access Fund and its Interest on Lawyers’ Trust Account (IOLTA) program have provided a substantial stream of income to the LACBA projects over the years. We are also fortunate that next year’s California state budget includes an increase in those funds. Private foundations also support the LACBA projects. For example, the Land of the Free Foundation, the Wells Fargo Foundation, the Roy and Patricia Disney Family Foundation, the David Bohnett Foundation, and the Elizabeth Taylor AIDS Foundation have given generously over the years. These grants are critical to the sustained operation of the projects, and we are thankful to the foundations and to the LACBA attorneys who developed those relationships.

Events and Awareness. In October, several Los Angeles law firms combined to raise funds for LACBA’s AIDS Legal Services Project by participating in the AIDS Walk Los Angeles. Campaigns also were conducted to highlight National Domestic Violence Awareness Month in October, Veterans Awareness Month and #GivingTuesday in November, and year-end giving in December. An awareness campaign for the Immigration Legal Services Project is planned for early next year. CFJ is also pleased to obtain funding from the arts community, such as the Los Angeles Lawyers Philharmonic, Legal Voices, and Gary Greene, Esq. and His Big Band of Barristers. If your musical preference is rock, CFJ has been sponsored by the law firm of Reed Smith and the band Down by Law at the annual Law Rocks charity event at Hollywood’s Whisky a Go Go. Please support these groups and events. They are wonderful musicians and well worth the time.

In the spring, attention turns to outdoor events, and on May 21, 2018, CFJ will hold its ninth Annual Charity Golf Tournament at Mountain Gate Country Club. Last year, under perfect weather, nearly 100 golfers attended, and thanks to our sponsors, CFJ netted almost $50,000. Please show your appreciation and give your support to the following sponsors when you are able: Decision Quest, TSG Reporting, Fronteo, Wells Fargo, Personal Court Reporters, Veritext, Staples Center Premium Seating, Coalition Court Reporters, Esquire Deposition Solutions, and First Legal Network.

Board Members. Counsel for Justice is fortunate to have so many energetic and dedicated volunteer board members. Each member makes a significant personal financial donation to the LACBA projects and also seeks a corresponding commitment from his or her firm or company and from colleagues. Board members participate in outreach to the LACBA community by encouraging attendance at CFJ events, following up on leads to major donors and grants, building awareness by publishing articles about the projects, and thanking those who have donated and encouraging their continued support. If you are interested in becoming a board member, please go to our webpage to learn more.

How Can I Help? The LACBA projects are still in jeopardy. The cy pres award for the Domestic Violence Legal Services Project runs out this year, leaving a large budget gap to fill. Each project has also reported that the need for services has increased. Many volunteers are donating their own money to keep the projects running at their current level. To all LACBA attorneys: Please include CFJ in your year-end giving. All of your dollars will go to support legal services for those in Los Angeles County who cannot afford them.

If you have not donated before, please go now to the LACBA website and press the “Donate CFJ” button. If you have not yet paid your LACBA dues, include a generous amount for the projects. If you have made a donation, please consider if you are able to supplement. It is very much needed. If every LACBA member gives the dollar equivalent of “one billable hour,” we will continue to make a lasting impact on the lives of thousands here in our own community.

Mark Garscia is president of LACBA’s Counsel for Justice and a partner in Lewis Roca Rothgerber Christie’s intellectual property practice group in Los Angeles.
THE EXPERTS IN LEGAL PAYMENTS

The proven payment solution for lawyers.
Managing payments and growing revenue for over 40,000 law firms in the United States, LawPay is the only payment solution offered through the ABA Advantage program. Developed specifically for law firms, LawPay guarantees complete separation of earned and unearned fees, giving you the confidence and peace of mind that your credit card transactions are handled the right way.

LawPay.com/LACBA | 866.730.9212

LawPay is a registered ISO of Merrick Bank, South Jordan UT
They need money. You need time. USClaims gives your clients the money they need to pay bills and supplement their income while they wait for a fair settlement. Which gives you more time to work.

USCLAIMS

Plaintiff/Attorney/Surgery Funding

1-888-746-6087 | usclaims.com/attorneys/