Assumption of Jurisdiction
page 20

Elder Care Alternatives
page 24

Exemptions to Obamacare
page 40

Preserving the Golden Years

Judge Melissa Biederman Zubi presents a comprehensive account of the current state of elder abuse and the strategies to combat it in California
page 12
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
“I refinanced my student loans with First Republic and the financial impact cannot be overstated.”

YASMIN NAGHASH
Attorney

FIRST REPUBLIC BANK
It's a privilege to serve you®

(855) 886-4824 | firstrepublic.com | New York Stock Exchange symbol: FRC
MEMBER FDIC AND EQUAL HOUSING LENDER ®
12 Preserving the Golden Years
BY JUDGE MELISSA BIEDERMAN ZUBI
As California law enforcement agencies strive to investigate and prosecute elder abuse cases, the state office of the Long Term Care Ombudsman reports an annual increase in the level of complaints
Plus: Earn MCLE credit. MCLE Test No. 268 appears on page 15.

20 Assumption of Jurisdiction
BY MURRAY B. GREENBERG AND BROOKE SCHAFFER
Succession planning is crucial to safeguard a law practice in the event an attorney is unable to continue to practice due to death, disability, incapacity, or other inability to act

24 Caring Options
BY JILL SWITZER AND CARLA A. FORD
Choosing among licensed facilities offering skilled nursing, intermediate care, and residential care for the elderly presents unique challenges requiring legal counsel

30 Special Section
2017 Lawyer-to-Lawyer Referral Guide

FEATURES

DEPARTMENTS

8 Barristers Tips
Legal access to a deceased account-user's digital assets
BY JESSICA G. GORDON

9 Practice Tips
Procedural analysis of responses to a complaint
BY MATTHEW C. SAMET

38 By the Book
Constitutional Governance and Judicial Power: The History of the California Supreme Court
REVIEWED BY DENNIS HERNANDEZ

40 Closing Argument
Religious and abortion exemptions enforced in the Affordable Care Act
BY VICTOR ORTIZ
WHAT ARE LAW FIRMS SAYING ABOUT THIS GUY?

“...excellent results...”
Stuart J. Liebman, Liebman, Quigley & Sheppard

“My experience ... was exceptional.”
William S. Waller, Pillsbury Winthrop Shaw Pittman LLP

“...saved my firm thousands...”
Brian D. Chase, Bisnar | Chase

“I reached out to you and you delivered!”
Jennifer L. Keller, Keller/Anderle LLP

The #1 Expert Representing Law Firms In Office Lease Negotiations
213-674-4340

“Be Represented... Not Brokered!”

AttorneysLeaseSpecialist.com
DOWNTOWN LOS ANGELES • CENTURY CITY • ORANGE COUNTY
The stated mission of the Los Angeles County Bar Association is to “meet the professional needs of Los Angeles lawyers and advance the administration of justice.” Access to current, reliable information on legal precedents whether from judicial, legislative, or administrative sources, as well as trends in the legal profession, is a fundamental professional need for lawyers. If the members of a legal trade association practice within a specific field, keeping those members abreast of new precedents is a relatively straightforward task. For associations like LACBA whose membership covers a range of practice areas, satisfying this need is a complex undertaking. LACBA has established individual sections dedicated to specific practice areas and allowed these sections to present CLE programs as one means of keeping their members current.

Los Angeles Lawyer also plays an integral role in providing LACBA with the means to meet its mission. The magazine provides members with an information resource relevant to their various practices and adds value to their pocketbooks. Over the past 33 years, the magazine has run annual issues devoted to what some may consider the sine qua non of L.A. legal practice, namely, entertainment and real estate. Other topics covered by the magazine this past year include streamlining discovery, recovering property in bankruptcy proceedings, reviewing surrogacy issues for same-sex couples, and suing in-house counsel. The magazine also has presented articles on current hot topics like terrorism, medical marijuana, and the patent fight between Samsung and Apple.

Our award-winning magazine enjoys an excellent reputation for the quality of its articles and the depth of knowledge of its contributors. Without the support of members like you, the Los Angeles County Bar Association’s most widely read CLE publication would not have the practical, up-to-date legal analysis and information that is so valuable to our readers. Recognizing that, the magazine offers generous CLE credits to its authors. In accordance with Rule 2.83(C) of the California State Bar’s MCLE Rules and Regulations, authors may take up to 12.5 hours of self-study credit for articles published in Los Angeles Lawyer.

Lawyers once researched and read decisions in hardbound case books and used Dictaphones to dictate briefs and secretaries transcribed tapes by typing on IBM Selectrics. Those days are virtually gone, replaced with online research services and computers with considerable memory and word processing software. Because of these changes, the question must also be asked if readers still want to pick up a print magazine. Contrary to what some may believe, print magazines are not an anachronism. According to an August 2016 study reported by Folio magazine, “70 percent of adults in the U.S. read a print magazine in the last 30 days, and 51 percent read at least two.... The findings seem to indicate that digital magazines...still have work to do to catch up to their print counterparts: 41 percent of respondents reported having read at least one digital magazine, but that’s up from 37 percent a year ago.”

We live today with the expectation that technology will improve our lives, both personally and professionally, but that expectation sometimes goes unfulfilled. However, we can be assured that because of Los Angeles Lawyer’s high editorial standards, it will continue to be a reliable and trusted source of legal information to LACBA members and an integral part of LACBA’s mission to meet the professional needs of its members.
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
Legal Access to a Deceased Account-User’s Digital Assets

**GONE ARE THE DAYS** when heirs identified the possessions of a late spouse, parent, or sibling by rummaging through their home and opening their mail. The safe deposit boxes of 15 years ago, as keepers of our most prized and sensitive items, have been replaced by password-protected smartphones and online accounts, as our lives migrate to the digital world. From vacation photos, e-mail, and musical collections to credit rewards programs, airline miles, and hotel points, ensuring access to a loved one’s complete legacy requires advance preparation and comprehensive planning.

Until recently, heirs and fiduciaries were armed with little power to access the digital haven of invaluable information stored in a late loved one’s smartphone and online accounts, that is, unless the decedent planned ahead and provided a list of vigilantly updated usernames and passwords in a secure yet accessible location—assuming access under the deceased’s username is permitted. However, in practice, this was rarely the case. Heirs and fiduciaries were routinely “locked out” of digital accounts, leaving innumerable digital casualties (of both monetary and sentimental value) and causing additional grief to those already suffering from a loss. Given the widespread nature of the problem, Internet service providers and lawmakers agreed that a legal framework for accessing and collecting digital assets of the deceased (as has long been the case for physical assets) was necessary.

After more than a year of sparring among Facebook, Google, and other powerful Internet companies, on the one hand, and the ACLU and California lawmakers, on the other, a version of the Uniform Law Commission’s Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) was enacted in September 2016. This law was added to the California Probate Code as Sections 870-83, which took effect on January 1, 2017. The RUFADAA seeks to ensure that a mourning family member will no longer be required to battle an Internet giant to find closure in settling the affairs of the loved one’s estate. Nevertheless, the framework provided by the legislation fails to apply to the majority of situations it was supposed to address.

The recent change establishes a three-tiered approach to allowing fiduciary access to a deceased account-user’s digital assets. Prevailing above all else is the user’s direction via “online tool” (for example, within Facebook settings, one may select an authorized person to handle the account upon death). Next, if the user has provided no instruction, authorization to handle digital assets under the user’s will or trust controls. In the absence of instruction, the terms of instruction, authorization to handle digital assets under the user’s handle the account upon death). Next, if the user has provided no

**The Revised Uniform Fiduciary Access to Digital Assets Act** seeks to ensure that a mourning family member will no longer be required to battle an Internet giant to find closure.

While versions of the uniform law in other states apply during a user’s incapacity, California’s version applies only after the death of the user. This means, under current law, that an agent with a power of attorney is powerless with respect to managing the online affairs of an incapacitated California user. Consequently, it is even more important in California to plan ahead outside the four corners of the statute.

Taking into account the shortcomings of the three-tiered system, particularly as it only applies in California after a user’s death, clients must articulate goals concerning their digital assets to minimize the challenges that their heirs and fiduciaries will face. Clients should specify what should be done with the asset, the level of fiduciary authorization granted with respect to each asset, and any privacy concerns, considering the differences between accounts with monetary value (online banking, airline miles, and credit rewards programs, for example) and accounts of a more personal nature such as social media with private messaging features.

Estate planners should be prepared to speak to these issues, offering alternatives to a sweeping grant of access for clients with privacy concerns (e.g., with respect to an e-mail account, the suggestion that a fiduciary may have access to a catalog of e-mail communications but not the content of these communications). Finally, it is essential that an inventory of digital accounts, along with usernames and passwords—ideally updated and with answers to security questions—is deposited with the estate plan in a secure location. In so doing, heirs and fiduciaries are provided the best opportunity of honoring the decedent’s legacy of digital assets, as the management and value of the assets are passed on to them with minimal stress and heartache during a difficult time.

Jessica G. Gordon is an associate in the private client group at Thompson Coburn in Los Angeles. She also serves as the assistant vice president of outreach for the Barristers and was recently elected as the upcoming year’s president-elect.
Procedural Analysis of Responses to a Complaint

WHEN FACED WITH A COMPLAINT in California, a defendant has a variety of ways to respond. He or she may file a demurrer, a motion to strike, a special motion to strike, a traditional answer, or a combination of these. While these responses are all meant to attack the causes of action pleaded, they differ on which grounds they may dispute the pleading and whether they must seek to strike an entire cause of action or merely a portion of the cause of action. Since each response to a complaint has distinct procedures and deadlines by which it must be filed, knowing these differences is key to avoiding a procedurally defective response, or worse, a waived defense.

The most common response is the answer, which either admits or denies the material allegations set forth in the complaint. It must contain a general denial or specific denials of each of the allegations in the complaint, as well as all affirmative defenses. Additionally, objections to the complaint that are not apparent on its face must be made in the answer. Failure to answer any allegation or to raise a required objection will cause these allegations to be taken as true. Consequently, a defendant must be careful to clearly state which causes of action the defenses are intended to answer or else risk inadvertently admitting important allegations. Otherwise, a defendant is free to answer only specific portions of a cause of action, with that risk in mind.

Demurrers, on the other hand, dispute the legal sufficiency of any or all pleaded causes of action in the complaint. A demurrer does not challenge the veracity of the factual allegations since the reviewing court will deem all of a plaintiff’s allegations as true without regard to any evidence. Thus, any deficiencies must appear on the face of the complaint. In a general demurrer, a defendant may argue the pleading fails to allege facts sufficient to state a cause of action or lacks subject matter jurisdiction, which are grounds for general demurrers. However, even if the facts do not support the cause of action alleged by the plaintiffs, it may be sufficient that they support any cause of action. Therefore, when filing a general demurrer, a defendant would be wise to eliminate other causes of action from the realm of possibility in the grounds for demurrer. Note that objections on the grounds of failure to state a cause of action and lack of subject matter jurisdiction are never waived, even if they are not made in a demurrer or answer.

Special demurrers challenge the complaint on the grounds that the claimant lacks legal capacity, there is misjoinder of parties, required certificates are missing, it is duplicative of another pending action, or it is otherwise uncertain, for example whether a contract at issue is written, oral, or implied. In limited civil cases—when the amount in controversy is $25,000 or less—only general demurrers are allowed, and grounds raised in special demurrers must instead be raised as affirmative defenses in the answer. It is important to note that when special demurrer objections are not made in a demurrer or answer, they are waived, so a complaint should be examined carefully to find all possible objections before responding.

The rules for demurrers are also specific in regard to format and proper procedures. Each ground for the demurrer must be stated in separate paragraphs, indicating whether it applies to the entire pleading or a single cause of action. If the demurrer alleges the pleading is uncertain, it must specifically state how the pleading is uncertain and where the uncertainty appears with reference to the page and line numbers of the complaint. Uncertainty is a particularly useful ground to assert demurrers to pleadings filed by pro se litigants or largely meritless lawsuits that are often unclear. Furthermore, as a result of recent amendments to the statute, a defendant must meet and confer with the plaintiff at least five days before a response is due to reach an agreement that would obviate the need for filing the demurrer. The statute also requires the demurring party to attach a declaration showing compliance with the meet-and-confer requirement.

No other response has a similar meet-and-confer requirement.

Motion to Strike

A motion to strike targets any “irrelevant, false or improper matter” and matters “not drawn or filed in conformity” with the laws of California or any court rule or court order. While a motion to strike can therefore address the veracity of the allegations in the complaint, the falsity must appear on the face of the pleading or be based on information that the court may employ to take judicial notice. In practice, this means that “it must clearly appear that the allegations of the complaint are false,” without regard to outside information except judicially noticeable legal rules, court documents, and universally known matters. Additionally, a motion to strike may allege the applicable statute of limitations has been violated or claim that punitive damages or other remedies are improper, either of which is not grounds for demurrers. In limited civil cases, however, motions to strike are limited to attacks on remedies.

One of the key distinctions between a motion to strike and a demurrer is that a motion to strike may attack any part of a cause of action—even single words or phrases. While a demurrer can attack all or some of the causes of action, it may only target a cause of action in its entirety and not portions of it. If a defendant does decide to target only some causes of action in a pleading, care must be taken to direct the demurrer specifically to those specific causes of action, because a demurrer that refers to the complaint generally will be sustained only when all causes of action are defective. Since objections that appear on the face of the complaint must be raised by a demurrer or motion to strike—and those that do not must be discussed in the answer—a defendant should examine the complaint for any objections that can be based on the pleading by itself or risk waiving them.

As with the rules for demurrers, California rules are also specific regarding the format and procedure of a motion to strike. Defendants must quote in full the portions desired to be struck unless the motion is to strike an entire paragraph, cause of action, or count or defense.

Matthew C. Samet is an appellate fellow at Horvitz & Levy LLP in Burbank.
and each specified portion must be numbered consecutively. A motion to strike, as well as a demurrer, must be filed within the time to answer, which is typically 30 days after service of the complaint unless the court has extended that period. Most importantly, if a defendant wishes to respond with both a demurrer and a motion to strike, they must be filed and noticed for hearing at the same time. Failure to file a demurrer before a motion to strike will render a later demurrer procedurally defective, and vice-versa. Moreover, a motion to strike based on an alleged defect, which is the proper subject for a demurrer, will be denied outright. Therefore, if a motion to strike is mistakenly filed on grounds that are appropriate for a demurrer, a defendant not only wastes a response but also will have lost the opportunity to respond with a demurrer. Accordingly, it is paramount to understand the differences between a motion to strike and demurrer.

When a motion to strike is filed without a demurrer, however, it will extend the time in which to answer. If a defendant only seeks to strike one cause of action, it is not obligated to answer the remaining causes of action until the motion is ruled upon. This extension allows a defendant an opportunity to attack some of a pleading while also earning more time to develop a coherent and more effective answer to all the claims than it would have otherwise. On the other hand, if a demurrer is filed without a motion to strike, or vice versa, and is overruled completely or is not sustained as to all the causes of action, a defendant has only 10 days to answer the complaint. In instances of forcible entry, forcible detainer, or unlawful detainer, that period is reduced to five calendar days. Given this short time frame, defendants will want have an answer ready in case of a dispositive ruling even if they are seeking to dismiss a complaint in its entirety.

While these responses may help combat a deficient complaint, California courts grant leave to amend freely, unless there is truly no way for a complaint to be amended to state a viable claim. It has been repeatedly and consistently held that courts should liberally exercise their discretion in allowing amendments so that cases may be decided on the merits. For leave not to be granted, the complaint must be so poorly written that responding would be practically impossible. However, recent amendments to the statute limit the number of times to three that a pleading may be amended in response to demurrers, absent a showing that there is a reasonable possibility that the defect can be cured. Still, in the case when a lawsuit is truly baseless, demurrers and motions to strike are an effective way to avoid the costs of litigation and dismiss a frivolous lawsuit at the earliest stage—as long as defendants know when and how to use them.

A special motion to strike, otherwise known as an anti-SLAPP motion, attacks causes of action that target activity protected by the freedom of speech. This can include causes of action for defamation, malicious prosecution, abuse of process, and numerous other claims. Under this motion, a defendant must establish that the cause of action arises from its own conduct in furtherance of the right to petition or free speech under the U.S. or California Constitution in connection with a public issue. If the defendant can make this requisite showing, the burden shifts to the plaintiff to show there is a probability that the claim will succeed on the merits through introduction of admissible evidence establishing a prima facie case. Covered conduct includes statements made before a legal proceeding or government body and comments made in public about public issues.

Unlike a demurrer, motion to strike, or answer, a plaintiff is not permitted to file an amended complaint while the special motion to strike is pending or if the motion is granted, overcoming the general policy of California courts to freely grant leave to amend. Unlike the other responses, a special motion to strike automatically stays discovery pro-
ceedings upon filing notice of the motion until the order ruling on it is entered.35 Furthermore, the grant or denial of the motion is subject to an interlocutory appeal, which is not the case with the other responses.36 Therefore, a special motion to strike is the strongest response a defendant can file, especially if it is successful.

A special motion to strike may be filed up to 60 days after service of the pleading.37 Accordingly, although it is sometimes a response of last resort, it is also used to give defendants twice as much time to craft an effective pleading. However, if a defendant uses the time to file a special motion to strike towards its natural end, one of the other responses has to be filed within 30 days unless an extension is granted. Otherwise, the plaintiff can obtain a default judgment.38

While there was previously a split among appellate courts, the California Supreme Court recently clarified in Baral v. Schnitt that just as a typical motion to strike, a special motion to strike can attack all or a portion of a cause of action.39 This is particularly important in complaints alleging a mixed cause of action, or a count alleging both protected and unprotected activity, when a defendant would be able to strike only protected activity as irrelevant material. Otherwise, a plaintiff could include unprotected conduct on purpose to avoid a special motion to strike because the defendant would not be able to strike the entire cause of action.

Given the relatively short 30-day or 60-day time frame to respond to a complaint, a defendant must carefully consider all possible options to respond. Understanding the differences between these available responses is key to avoiding a defective response or waiving potential objections to a complaint. With a grasp on these differences, however, an attorney can craft an effective response to potentially dismiss any complaint.
PRESERVING the Golden Years

The aging population, as well as the settings in which long-term care services are administered, have exploded since California’s enactment of criminal elder protection laws in the 1980s. In California, more than 400,000 individuals reside in licensed skilled nursing facilities (SNF) and nursing homes, assisted living facilities (also known as licensed residential care facilities for the elderly (RCFE)), or unlicensed living facilities that may or may not be able to care for them. Women make up 60 percent of the residents in nursing homes. The California Department of Finance projects that between 2010 and 2030 the number of Californian residents who are likely to need nursing home care or other long-term care—those aged 65 and older—will nearly double.

Given the increasing number of elders aging in community and home-based settings, application of elder mistreatment protection laws and programs to these settings is crucial. Elders are a vulnerable population, and, as they age over 65, they are more at risk for developing Alzheimer’s disease and other forms of dementia. Many existing elder protection laws stem from abuse, neglect, and financial exploitation cases reported in nursing homes and SNFs. Since these institutional settings generally receive federal reimbursement funds for long-term care services, they must comply with federal Medicaid-Medicare oversight laws and regulations, in addition to state licensing laws. In California, 66 percent of SNF residents rely solely on Medi-Cal (the state’s Medicaid program) to pay for their care. In stark contrast, most RCFEs are for profit, and, in general, residents pay privately for long-term personal care services. Absent state participation in the Assisted Living Waiver program that allows reimbursement for “nursing facility services” provided to Medicaid-eligible, low-income seniors in RCFEs or subsidized

The Honorable Melissa Biederman Zubi is an administrative law judge with the California Department of Social Services. She previously was an elder abuse prosecutor with the California Department of Justice’s Bureau of Medi-Cal Fraud and Elder Abuse.
public housing, RFCEs and subsidized public housing are not subject to Medicaid and Medicare laws and regulations. In California, only 14 of California’s 58 counties participate in the Assisted Living Waiver program—and not all of these counties have participating providers. Irrespective of federal oversight, RFCEs remain subject to state licensing laws and regulations. In California, RFCEs are mandated to provide basic services to ensure safe and healthful living accommodations. Recent licensing reforms—including a Resident’s Bill of Rights substantial daily fines, program exclusion, and licensure exclusion—have the potential to deter elder mistreatment. Under existing law, penalties for violating any provision of the act concerning RFCEs include misdemeanor conviction and incarceration. Critics contend that licensing laws do not go far enough to strengthen elder protections. Yet, these laws impact the criminal prosecutions for elder abuse and neglect in that the looming possibility of exclusion from the Medi-Cal or Medicare program and loss of license to practice—or to function as a nursing facility—results in many of these cases proceeding to trial. Even though license revocation or program exclusion does not drive the decision to charge a crime, it may have an impact on the provider’s decision to plead to criminal charges.

 Licensing laws for RFCEs, however, do not extend to subsidized public housing, private homes, or senior housing complexes that provide only housing, housekeeping, and meals. Whether elders live in these settings by choice or necessity, these facilities are unlicensed. Elders living in private retirement villages, retirement hotels, or subsidized public housing frequently employ unlicensed individuals or agencies to provide assistance with daily living activities, although skilled nursing services provided in the home by a home health agency and hospice facilities are subject to California’s licensing laws and regulations. In 2016, California began licensing home care organizations (HCO) that “arrange home care services” by a registered home care aide (HCA). Under the Home Care Services Consumer Protection Act (HCSCPA), which is administered and enforced by the Department of Social Services (CDSS), HCAs working independently of an HCO are not required to be registered, and individuals may employ HCAs “not listed on the home care registry” maintained by CDSS. Since many of the basic services that HCAs provide in the home overlap with the basic services that RFCEs provide in the community, and the HCSCPA lacks the deterrent impact of the criminal and civil enforcement penalties of the RFCE act, there is a risk that abuse and neglect in the home will remain undetected.

The degree of elder abuse, neglect, and financial exploitation in private and subsidized public housing is unknown, but the unfortunate reality is that serious and widespread abuse, neglect, abandonment, and exploitation persist in all long-term care facilities. In 2009, the California Senate Office of Oversight and Outcomes found that 13 percent of complaints to the California Office of the State Long Term Care Ombudsman alleged abuse, gross neglect, and exploitation, more than twice the national rate of 5 percent. In 2014, the number in California rose to 18 percent. Elder abuse complaints for SNFs were twice, and in some instances more than three times, that for RFCEs with respect to physical, sexual, and verbal or psychological abuse, as well as gross neglect and resident-to-resident physical or sexual abuse. Both SNFs and RFCEs had the same number of financial abuse complaints.

These numbers likely underrepresent the actual instances of abuse and neglect. Vulnerable seniors and people with disabilities often are unable to report abuse and neglect because of limited communication skills, physical or cognitive impairments, or reluctance to report the attendant upon whom they depend for care. Forty-three percent of Californians residing in RFCEs suffer from Alzheimer’s or other forms of dementia, as do an unknown number living in unlicensed residences (e.g., senior housing complexes) that provide only housekeeping, meals, and housing. These residents may be given “dangerous antipsychotic drugs to sedate or restrain them improperly.” Reported cases of abuse and neglect of Medicaid recipients include death, hospitalization, and fraud. Other cases involve attendants providing care while impaired—sometimes by the drugs prescribed to their care recipients.

Criminal Penalties for Elder Abuse

Since 1986, California has recognized that elders and dependent adults are “deserving of special consideration and protection, not unlike the special protections provided for minor children, because [they] may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.” Elders, 65 years and older, and dependent adults, 18 to 64 years, are defined as those persons who have “physical or mental limitations that restrict [their abilities] to carry out normal activities or to protect [their] rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.” To enable the number of agencies to whom suspected abuse must be reported to investigate suspected abuse, criminal elder and dependent adult abuse prosecutions are subject to a five-year statute of limitations.

Among the various crimes that occur in nursing facilities, the most frequent elder crimes prosecuted are theft, neglect by others, and physical abuse. In addition to prosecutions for murder, rape, and larceny, they carry death and felony prison sentences up to twenty-five years to life, willful infliction of physical pain or mental suffering on an elder under circumstances or conditions likely to produce great bodily harm or death results in incarceration in county jail for one year to four years in state prison. Enhancements for great bodily injury and death are increased even further when the victims are over 70 years of age. Misdemeanor convictions for willfully causing or permitting an elder to suffer unjustifiable physical pain or mental suffering under circumstances or conditions other than those likely to produce great bodily harm or death carry a maximum sentence of six months county jail. Misdemeanor and felony penalties also apply to caretakers and non-caretakers who embezzle or steal property of an elder. Willfully or repeatedly violating the licensing regulations and rules relating to operating and maintaining long-term care facilities subjects the provider to a misdemeanor incarceration of up to six months.

Abuse. Staff and facilities who cause or permit a resident to die may also face potential charges for manslaughter if it can be proven that their action or negligence was the proximate cause of the resident’s death. Negligence is contemplated within the manslaughter statute, described as action “without due caution and circumspection.” Such negligence is judged on an objective, reasonable person standard. Manslaughter charges have been brought against staff and facilities for neglecting to treat or improperly treating pressure ulcers which resulted in septicemia, for permitting or for not attempting to prevent severe weight loss and dehydration, and for failure to provide the proper medication or for giving the wrong medication that led to the resident’s death. Also, there are three- and five-year enhancements for elder abuse victims who are under 70 and over 70, respectively. The same age split occurs with enhancements for injuries resulting in death.

Incidents of sexual assault abuse in long-term care facilities include both patient-to-patient and staff-to-patient assaults. Cases of sexual abuse have included the attempted sexual assault of an autistic 21-year-old woman by a fellow resident who was a known sex offender and was not properly supervised; sexual conduct between staff members and long-term care residents; and staff engag-
1. Residential care facilities for the elderly (RCFES) are not subject to state licensing laws and regulations.
   True
   False

2. A dependent adult is a person between 18 and 65 who has physical or mental limitations that restrict the individual’s abilities to carry out normal activities or to protect his or her rights.
   True
   False

3. The statute of limitations on theft does not begin to run until the crime is discovered.
   True
   False

4. There is a five-year enhancement for felonies against elders over 70.
   True
   False

5. Reportable incidents of abuse need only be reported to law enforcement.
   True
   False

6. Both the Health Insurance Portability and Accountability Act (HIPAA) and California law require disclosure of privileged information to law enforcement.
   True
   False

7. Only the staff of RCFEs, and not the facilities themselves, who cause or permit a resident to die may face potential manslaughter charges.
   True
   False

8. A charge of sexual battery on an institutionalized victim requires that the victim be an in-patient receiving medical or psychiatric care and either seriously disabled or medically incapacitated.
   True
   False

9. Criminal neglect of an elder or dependent adult is defined as simple negligence.
   True
   False

10. HIPAA forbids all sharing of private information.
    True
    False

11. A criminal jury may be instructed on the theory of undue influence.
    True
    False

12. Long-term facility patient records are not obtainable by search warrant per HIPAA.
    True
    False

13. In a case of felony elder abuse, juries need not unanimously agree on one action that was likely to produce great bodily harm or death.
    True
    False

14. Chemical restraint is a form of false imprisonment.
    True
    False

15. Negligence in a manslaughter case is judged subjectively.
    True
    False

16. Neglect is defined, in part, as permitting an elder or dependent adult to endure mental suffering.
    True
    False

17. Falsification of medical records is a specific intent crime.
    True
    False

18. It is a defense to a charge of criminal neglect that the victim was resistant to care.
    True
    False

19. Licensing laws for RCFEs extend to subsidized public housing, private homes, and senior housing complexes.
    True
    False

20. A facility that does not comply with records requests from law enforcement is immune from charges of obstruction of justice.
    True
    False
ing in sexual acts with residents who are comatose or in stages of advanced dementia. A recent prosecution involved patient-to-patient sexual assault caught on video surveillance, in which the video also established the facility’s failure to conduct the required status checks every 15 minutes on the suspect.\(^{37}\) In this type of case, the state may charge sexual battery on an institutionalized victim, which requires that the victim be an in-patient receiving medical or psychiatric care and either “seriously disabled or medically incapacitated.”\(^{58}\)

Inadequate staffing exacerbates elder mistreatment. Regulations mandating nurse-patient hours are a preventative step, but these apply only to SNFs,\(^{59}\) not to RCFEs, even though similar care may be provided in both settings. Federal law requires long-term care facilities receiving Medicare or Medicaid funds to have a registered nurse (RN) as the director of nursing (DON), an RN on duty at least eight hours a day, seven days a week, and a licensed nurse (RN or LVN) on duty the rest of the time. California requires 3.2 hours of a patient’s day to be covered by direct care staff, which includes all staff except the DON.\(^{60}\) Despite these requirements, facilities are historically understaffed, getting by on the bare minimum or less.

Adequate staffing is not necessarily a guarantee of freedom from abuse as an overwhelming number of alleged perpetrators have been facility staff members.\(^{61}\) The legislature set forth enhanced penalties for assault on an elder or dependent adult to address this situation, in which the statutes have been tied to their beds with stray pieces of rubber, supposedly for their safety but without the required doctor’s order.\(^{66}\)

False imprisonment through chemical restraint also may occur when the administration of sedating drugs is for staff convenience, as a disciplinary measure, or for any other nonmedical reason.\(^{59}\) Another misuse of medications is the diversion of controlled substances, such as pain medication, for a staff member’s personal use. In one egregious case, a nurse used a syringe to drain the narcotic pain medication from a dying resident’s pain pump, and she pocketed the IV prescription narcotic for her own use, even though the patient was riddled with cancer.\(^{70}\)

**Neglect.** Not an uncommon charge in long-term care facilities, neglect is defined as “causing or permitting a resident to experience unjustifiable pain or mental suffering,” or in the felony context, causing or permitting the resident to face great bodily injury, to actually suffer great bodily injury, or to have his or her health endangered.\(^{71}\) Neglect is somewhat harder to prove, as the standard is not simple negligence but gross negligence, or an unreasonable and “reckless” disregard for the victim’s health or safety.\(^{72}\) However, the People may bring evidence (subject to Penal Code section 352 analysis for undue prejudice or consumption of time) of uncharged elder or dependent adult abuse to help make its case.\(^{73}\)

Elderly or dependent residents with limited mobility are at risk for developing opportunistic infections, dehydration, or malnutrition, or for developing pressure sores (typically found on an area of the body subjected to pressure for long periods of time, e.g., the ankles and buttocks).\(^{74}\) The injury is often not the result of one instance of neglect; rather, it is a course of conduct, a series of wrongful acts that were “successive, compounding, and interrelated.”\(^{75}\) In one instance, staff were given instructions on the treatment of a resident’s pressure sores, which included keeping the area clean and dry and providing pressure-relieving devices such as air mattresses and boots. They failed to install the mattress and did not try alternatives when the resident removed the pressure-relieving boot the doctor prescribed for her. They also failed to properly monitor and treat her malnutrition. When the resident became unresponsive, she was taken to an emergency room, where the necrotic heel fell off and the smell cleared the ER.\(^{76}\) Not all cases are that severe, but something as seemingly benign as failing to replace a device used to alarm staff when a resident walks out of the facility has resulted in residents’ leaving the facility, falling outside, and breaking a hip.\(^{77}\) It should be noted that it is not a defense that the elder or dependent adult was resistant to care.\(^{78}\)

**Theft.** Institutionalized adults are prime targets for all manner of theft. Many of these cases, while constituting theft from an elder,\(^{79}\) carry a host of separate charges from forgery to unauthorized use of an access card and grand theft. There have been cases of a staff member’s stealing a resident’s checkbook and forging checks,\(^{80}\) a certified nurse’s aide’s stealing ATM cards and obtaining the pin
number from the vulnerable resident,81 and an assistant administrator’s squatting in a resident’s house while the resident was unable to leave the facility.82 One of the most troubling, yet not uncommon, acts of fraud and theft occurred in Pasadena to a resident who was not oriented to time or person and was instructed by a friend to sign five blank checks, which were eventually negotiated for over $11,000. The suspects went a step further and brought along a notary who witnessed the resident signing a new power of attorney and new will in which all powers and all her estate were given to the friend’s caretaker.83 Residents with cognitive limitations are especially vulnerable. They are easily led to believe the story given by the suspect (e.g., needing an operation or in danger of losing a home), or they may be so impaired as to be wholly unaware that money is being stolen from them at all. The civil law concept of undue influence84—defined as an “unfair advantage taken of another’s weakness or distress”85—may be used in prosecuting these cases; however, the court must be careful not to instruct on that issue and it must not be the sole theory upon which the prosecutor rests. Courts have found that undue influence is “not a rule of evidence”86 and therefore not a legally supportable theory when used as a theory of guilt in criminal cases.87 The court’s determination does not prevent the prosecution from raising the issue of undue influence, but it must not be the basis upon which guilt is determined.88

FRAUD. Many times additional charges emerge from an initial investigation into suspected elder or dependent adult abuse, such as false charting or failure to report. In a false charting case, the People must prove not only that the material placed in the patient’s chart was inaccurate but also that the person charting did so with fraudulent intent.89 This can take the form of charting care that was not provided when it was later found that the resident was dying unattended in his or her room,90 charting that a patient had no complaints of pain and was lying in bed when video surveillance shows him or her sitting motionless in the hallway after having thrown up from discomfort,91 and charting that full measures were taken for a resident who requested all measures be taken to save his or her life when, as was later determined, staff made the independent decision to let the patient die and not to resuscitate him.92 As false charting is a specific intent crime, proof may be hard to come by, although the advent and increasingly common practice of electronic charting makes detecting false charting easier than ever before.93

There are also potential fraud charges for false claims to the Medi-Cal program. A pharmacist, for example, faced criminal charges for Medi-Cal false claims for drugs purportedly ordered for and distributed to a resident which, in fact, were kept in the pharmacy’s inventory.94

**Mandated Reporters of Elder Abuse**

A mandated reporter of elder abuse includes any person who has assumed full or intermittent responsibility for the care or custody of an elder, whether or not the person receives compensation, as well as “administrators, supervisors, and any licensed staff or a public or private facility that provides care or services for elders, or any elder care custodian, health practitioner, clergy, or employee of a county adult protective services agency or local law enforcement agency.”95 Reportable incidents include physical abuse,96 abandonment, abduction, isolation, financial abuse, and neglect.97 Mandated reporters who observe or have knowledge of such a reportable incident, or are told by an elder that he or she has experienced such an incident—whether by commission or omission—must report the known or suspected abuse immediately by telephone, followed by a written report, or through the confidential Internet reporting tool.98 If the suspected abuse is physical abuse that resulted in serious bodily injury and it occurred in a long-term care facility, the report must be made immediately to a local law enforcement agency and, within two hours, in writing to the local ombudsman.99 When the suspected physical abuse does not result in serious bodily injury, reports to both law enforcement and the long-term care ombudsman must be made within 24 hours.100 Where the suspected or alleged abuse is other than physical abuse occurring in a long-term care facility, a telephone and a written report must be made to either the local ombudsman or law enforcement, which requires further reporting by these entities to other state and local agencies, depending on the category of abuse alleged.101 Reportable incidents in nursing homes are reported to local law enforcement and the county adult protective services agency.102

Inadequate or untimely reporting allows abuse and neglect to flourish, and impedes the provision of services to the elder population in need of help. Failing to report, or impeding or inhibiting a report of physical abuse, abandonment, abduction, isolation, financial abuse, or neglect of an elder also may lead to conviction or conviction of a misdemeanor, punishable by a maximum six-month county jail sentence, or a felony conviction with an enhanced one-year sentence103 for a willful failure to report abuse that results in death or great bodily injury.104

The California Department of Justice designed three programs to combat elder abuse. The Violent Crimes Unit prosecutes physical elder abuse committed by individual employers against patients in elder care facilities. The Facilities Enforcement Team prosecutes corporate entities, including SNFs, residential care facilities, and hospitals for adopting or promoting policies that lead to neglect and poor quality of care. The Operation Guardians program helps protect and improve the quality of care for California’s elder and dependent adults residing in California’s SNFs. The Operation Guardians team identifies instances of abuse or neglect for civil and/or criminal prosecution by the Bureau of Medi-Cal Fraud and Elder Abuse.105

**Privacy Concerns**

Upon receiving an allegation of elder abuse, law enforcement often comes upon the concern of facilities and their owners with their obligations regarding patient privacy under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)106 and the Lanterman Developmental Disabilities Act.107 The former act requires facilities to protect their patients’ “individually identifiable health information,” including the patients’ past, present, and future physical or mental health or condition.108 This not only includes actual identifying information but also information that would provide a “reasonable basis” to identify the individual, such as a patient’s address, birth date, or Social Security number.109 This act is not a blanket prohibition on sharing identifying information but does prohibit sharing that information unnecessarily.110

It may appear that HIPAA throws a road block in front of investigators; however, there are express exceptions within HIPAA that permit law enforcement to obtain information necessary for their investigations.111 Covered entities “may disclose” protected information to government authorities looking into cases of abuse, neglect, and domestic violence.112 Facilities concerned about safeguarding patient information may ask for a court to review the information to ensure the patient’s privacy is being preserved. A court will then determine what information, if any, may be disclosed, and if there is a need for a protective order.113 Law enforcement may obtain protected information through court order or subpoena, through grand jury subpoena, or through written authorization from the patient.114 This information may then be used for identifying or locating a suspect, fugitive, material witness, or missing person,115 or for obtaining information about a crime victim.116 Facilities may also disclose otherwise protected information to law enforcement if there is suspicion a death is the result of a criminal conduct.117

Further, a facility may reveal protected information if it believes, in good faith, that a crime occurred on the premises that included the covered patient or other patients.118 Any emergency medical care provided off premises...
may also be shared with law enforcement when necessary to inform them about a crime that occurred on the premises.\textsuperscript{119} This information includes the nature of the crime, location of victims, and identification, description, and location of the suspect. Lastly, facilities may safely disclose information to law enforcement to help avert a serious threat to health or safety.\textsuperscript{120} In this instance, sharing the information is permitted if it will “prevent or lessen” a serious threat, or it must be critical to the ability of law enforcement to identify or apprehend an escapee or someone who made an admission to a violent crime.\textsuperscript{121} This can be done without the patient’s prior approval so long as the facility shows reasonable efforts to contact the patient or his or her legal guardian.\textsuperscript{122} In this last instance, the prosecutors or law enforcement may agree to a protective order and an agreement not to disseminate the information and to destroy the information at the conclusion of litigation.\textsuperscript{123} Although litigation is anticipated, the Code of Federal Regulations currently is silent on what constitutes dissemination and what can be considered the end of litigation.

While HIPAA does not require disclosure to law enforcement (covered entities “may disclose”), California law requires disclosure under certain circumstances. Any mandated reporter, such as a facility and all health care and administrative staff, must report suspected elder abuse. The report must include, but is not limited to, the name of the injured person, where the injured person resides, the nature and extent of any injuries, and the identity of any suspect, if there is one.\textsuperscript{124}

Other code sections require that mandated reporters report not only cases of actual physical injury but also any situation in which there is a reasonable belief that abuse has occurred.\textsuperscript{125} No subpoena is required. In situations in which a mandated reporter is not involved, law enforcement may reach the necessary information without patient consent if a court so orders it after finding good cause and after the facility has had notice and an opportunity to appear.\textsuperscript{126} The disclosure may only be made to law enforcement—including prosecutors—and encompasses all identifying information about the patient as well as his or her prognosis or treatment. Of course, records are also obtainable via search warrant, although records of a physician may require a special master (as defined in the statute) to review the sealed documentation.\textsuperscript{127} If the facility receives Medi-Cal funds, it must retain records and make them available to the Bureau of Medi-Cal Fraud and Elder Abuse.\textsuperscript{128} Failure to do so exposes the facility to potential sanctions.\textsuperscript{129} There is also the potential for criminal charges for obstruction.\textsuperscript{130}

With the population of elderly Californians growing exponentially, the need for protection from and prevention of abuse and neglect takes on increasing importance. California’s licensing and criminal laws strike the balance between the competing issues of privacy of and protection for the elderly. The role of long-term care providers, law enforcement, and regulatory agencies in combating elder mistreatment requires reporting and enforcement of elder protection laws in long-term care settings.

1 Long-term care historically referred to services and supports to help frail older adults and younger person with disabilities maintain their activities of daily living such as bathing, dressing, eating, toileting, medication management, and health maintenance tasks. The U.S. Department of Health and Services now uses the term to include both health-care-related and nonhealth care-related services.\textsuperscript{126} LONG-TERM CARE PROVIDERS AND SERVICES USERS IN THE UNITED STATES: DATA FROM THE NATIONAL STUDY OF LONG-TERM CARE PROVIDERS, 2013-2014, Centers for Disease Control and Prevention, 2015, available at https://www.cdc.gov [hereinafter DEHNS NATIONAL PROFILE]. The US Department of Health and Human Services’ Office of Inspector General refers to nonmedical assistance to the elderly and persons with disabilities as “personal care services.”\textsuperscript{127} Investigative Advisory on Medicaid Fraud and Patient Harm Involving Personal Care Services, Office of Inspector General, U.S. Dep’t of Health and Human Servs., at 2 (Oct. 3, 2016), available at https://oig.hhs.gov [hereinafter Investigative Advisory].

2 WELF. & INST. CODE §15600(a).


7 The Centers for Medicare and Medicaid released a comprehensive review of nursing home regulations in September 2016, which include a prohibition against employing an individual whom a court has found guilty of elder abuse, neglect, exploitation, misappropriation of property, mistreatment, or a person entered into the state registry for the same, or a licensed individual with a pending disciplinary action. 42 C.F.R §483.12(a)(3)(i)-(iii).

8 Facts and Statistics, supra note 4.

9 DEHNS NATIONAL PROFILE, supra note 1, at 8 n.13 (citation omitted).

10 A facility in one of the states participating in a waiver program allowing Medicare-Medicaid reimbursement for community- and home-based residential care and accepting federal reimbursement as a source of payment is subject to federal oversight.

11 The goal of the Assisted Living Waiver Program is to enable low income, Medi-Cal-eligible seniors to remain in a SNF or to relocate to a community setting in a RCFE or subsidized public housing. California’s Assisted Living Waiver, California Advocates for Nursing Home Reform, www.canhr.org. See also Assisted Living Waiver Program Participating Facilities, Cal. Dep’t of Health Care Servs., http://www.dhcs.ca.gov/services/fsc/Documents/ListofRCFEFacilities.pdf (last viewed Apr. 24, 2017).

12 Id.

13 42 C.F.R. CODE REG. tit. 22, §87452(i)(1)-(6).

14 HEALTH & SAFETY CODE §1569.269(a)(1)-(30).

15 Id.

16 See, e.g., CARLSON & GORDON, supra note 3.

17 A mandated reporter who fails to report suspected abuse may be classified as an “excluded individual” under the Social Services Act. Any facility employing him or her after the exclusion is not eligible to receive federal funds. Nursing Facilities’ Compliance with Federal Regulations for Reporting Allegations of Abuse or Neglect, Office of the Inspector General, U.S. Dep’t of Human & Health Servs., OEI-07-00010 (Aug. 2014), available at https://oig.hhs.gov [hereinafter OIG].

18 Id.

19 ALZHEIMER’S FACTS AND FIGURES, supra note 6.

20 HEALTH & SAFETY CODE §1725(b).

21 Id. §§1339.40-44.

22 Id. §1796.12(j).

23 Id. §1796.12(n).

24 Id. §1796.12(o).

25 Id. §§1796.10, 11796.12.

26 Id.

27 Id. §1796.15.

28 Compare definition of basic services for RCFEs, HEALTH & SAFETY CODE §1569.312 with the definition of basic services for HCOs, HEALTH & SAFETY CODE §1796.12(n).

29 Elder Abuse, supra note 3, at 5 (Executive Summary).

30 John Adkisson et al., California’s Elder Abuse Investigators: Ombudsmen Shacked by Conflicting Laws and Duties California Senate Office of Oversight and Outcomes, A report prepared for the California Senate Rules Committee at the request of the Subcommittee on Aging and Long-Term Care (Nov. 3, 2009) 7, available at http://fcomбудsmann.org [hereinafter OMBUDSMAN REPORT].

31 Long-Term Care Ombudsman: Annual Report - FY 2015, Cal. Dep’t of Aging (July 2016) at 7, available at https://www.ageing.ca.gov. The Long-Term Care Ombudsman program identifies, investigates, and resolves complaints in long-term care facilities. WELF. & INST. CODE §57912.5(a). The office gives priority to investigations of complaints by residents in 24-hour, long-term care facilities. Id. §57920.5.

32 Id.

33 Id.

34 Investigative Advisory, supra note 1, at 5.

35 Elder Abuse, supra note 3.

36 Id.

37 Investigative Advisory, supra note 1, at 5.

38 Id.

39 PENAL CODE §368(a); People v. Matye, 158 Cal. App. 4th 921, 924 (2008).

40 Should an elder or dependent adult testify at trial, CALCrim 331 instructs the jury that “that does not mean he or she is any more or less credible than another witness.” Jurors are instructed that they should not discount or distrust the testimony of an impaired individual “solely because he or she has…a disability or impairment.” People v. Catley, 148 Cal. App. 4th 500, 508 (2007).

41 PENAL CODE §5801.6, 803(c). The statute of limitations on theft does not begin until the crime is discovered.

42 Theft includes fraud. People v. Cleaver; see also Robin Allen, Protecting Our Elders, L.A. LAWYER, Feb. 2009, at n.5 [hereinafter Allen].

43 People v. Hong, No. KA073441 (L.A. County Superior Ct. Apr. 10, 2007); see also Allen, supra note 42, at n.13.

44 Allen, supra note 42, at 14.


46 Id.

47 PENAL CODE §368(c).
exerted undue influence over . . . Roussey, you may but are not required to find that . . . Roussey did not consent to the subject transactions. Your finding that . . . Roussey did not consent to the subject transactions must be found beyond a reasonable doubt. The court held that “These instructions are far too inclusive to act as a standard for negating apparent consent in a criminal prosecution for theft by larceny.” Id.

89 Penal Code §471.5.

90 People v. Cull et al., No. MSB1505177, (San Bernardino County Superior Ct. Dec. 5, 2016).


92 People v. Phan, No. 12WMO2616 (L.A. County Superior Court May 8, 2012).

93 Penal Code §471.5.

94 Penal Code §550(a)(6); Social Security Act, codified at 42 U.S.C. §§1320(a) et seq. Depending on the case facts, facilities or individuals may also be charged under Penal Code §487(a) for taking funds improperly under the Medicare program. Potential federal charges that also may be brought are not discussed herein.

95 WELF. & INST. CODE §15610.63.

96 PENAL CODE §11160.

97 PENAL CODE §1543.

98 Id.

99 Id.

100 Id.


102 Penal Code §§536(e) et seq.


110 Id., at 1282.

111 Id. n.13. The appellate court’s concern in Brock was not the presentation of the concept of undue influence but the additional instruction given by the court: “If you find, beyond a reasonable doubt, that defendant
leaves her law office after working all day and is looking forward to getting home. While driving through an intersection, a drunk driver runs a red light and hits her car. She dies instantly. Sheri’s receptionist arrives at the law office the next morning and learns of her employer’s death. The receptionist informs the sole practitioner’s clients that their attorney is dead, but otherwise, she has no advice to offer the clients regarding their files. Amidst the feelings of shock and disbelief, mail goes unread, court hearings are missed and settlement checks need to be deposited into the client trust account. Feeling overwhelmed, the receptionist turns off the lights, locks the door, and leaves. Before long, Sheri’s clients are complaining to the State Bar of California that the voicemail is full, the office is dark, and their e-mail is unanswered.

In a similar matter, the state bar received a call from Bob’s mother, who explained her son is an attorney hospitalized with a stroke and cannot serve his clients. The mother received numerous calls from clients but was unable to assist them. Bob, in his early 40s, had an average-sized solo practice in Los Angeles, specializing in immigration law as well as family law and criminal cases. Due to Bob’s sudden incapacitation and inability to communicate, his mother was unaware of computer passwords, bank account information, or the full extent of Bob’s law practice. She contacted the state bar to step in and “take” the client files. Unfortunately, all she could tell the state bar was that some client files were in a small office and some were in Bob’s home.

When an attorney is unable to continue the practice of law by reason of death, disability, incapacity, or other inability to act, the failure to properly close down a law practice can have serious consequences for clients, the attorney, and even the attorney’s family. An attorney’s failure to plan for the unforeseen exposes family members and associates to an unnecessary burden as clients, courts, and even the state bar look to them to address the disarray. Even when there is a willingness to assist the attorney, family members and colleagues often do not have access to crucial information, including the attorney’s client lists and court calendaring, as well as client trust and operating account information. In the case of family members, these issues are often the last things on their minds in a time of personal crisis.

In addition, there are potential liability issues. For instance, a solo practice may have liability for client abandonments, which inure to others. Further, an attorney may provide assistance to an incapacitated colleague as a Good Samaritan, but without the authority to wind down the practice the attorney could face civil liability for providing assistance.

When an attorney dies or becomes incapacitated, the most immediate consequence, professionally speaking, is to the clients. Their cases may be dismissed or otherwise linger in limbo once their attorney is unable to perform on their behalf. Cases often will advance as courts, parties, and other counsel are unaware for some time that an attorney has died or is otherwise unavailable. There is little incentive for opposing counsel to investigate when a case appears abandoned.

An essential concern for every sole practitioner is determining who will take care of the law practice and protect client funds absent the only lawyer. When an attorney is unable to practice, preserving client funds in the client trust account is a priority. Under the Rules of Professional Conduct client funds and other property must be preserved and accountings provided to clients. Without oversight, client funds may be converted if there are other signatories on the account or if someone forges the attorney’s name to a check. It could happen and has happened.
Thus, succession planning for a law practice is crucial. Without an appropriate plan in place, an attorney’s incapacity will often lead to clients contacting the state bar searching for their attorney, their file, and their funds. Under some circumstances, the state bar may have to step in and seek court jurisdiction over the practice.

State Bar Intervention

Ideally, if a sole practitioner becomes incapacitated, another attorney will already be designated to assume responsibility for pending matters, conditioned on obtaining the permission of the clients. Unfortunately, there is often no one designated to assist in winding down a practice. In these cases, the state bar may elect to take over the practice. The decision to do so is not made lightly and is the exception rather than the rule; however, the law does provide the state bar with the ability to take over a law practice for clear and limited reasons, subject to superior court approval and oversight.

If the state bar chooses, it may apply to a superior court for orders necessary to avoid prejudice to clients or other interested persons. The superior court of the county in which the attorney last had a practice may “assume jurisdiction” over the office and appoint the state bar, or another party in some circumstances, to wind down the affairs of the law office. The triggering events for an assumption of jurisdiction include death, resignation, disbarment, suspension, or a more general incapacity due to alcohol, drugs, mental or physical illness, or “other cause.”

Once the state bar decides to go forward with seeking court jurisdiction over a practice, it petitions the superior court for orders allowing it to take over and shut down a law practice. However, these actions are rare and will depend on a number of factors, including the existence of open client files and the state bar’s own resources. An attorney should not rely on the state bar’s stepping in as an alternative to proper planning.

Pursuant to applicable statutes, the court has broad powers to deal with an unattended law practice, and the court may order any or all of the following: that notice be given to courts, clients, and opposing parties; the physical seizure and return of client files; that the state bar take possession and control of the office’s bank accounts; and the forwarding of an office’s mail and telephone numbers. In certain circumstances, a receiver may be appointed to assist with the disbursement of funds. However, the state bar is not obliged to, and under no circumstances does it, become the clients’ new attorney.

Before seeking court jurisdiction, the state bar must establish that supervision of the court is warranted because 1) the attorney has left at least one unfinished client matter for which no other active member of the state bar has agreed to assume responsibility, or 2) the interests of one or more clients of the attorney or other interested person will be prejudiced if the proceeding is not maintained. A common example is when an attorney dies suddenly, leaving behind an active law practice and nobody is able or willing to take care of clients or to return client files. With over 188,000 active attorneys in the state, this is not as uncommon as one might assume.

In order to begin an action requesting the superior court assume jurisdiction over a law practice, the state bar must establish that supervision of the court is warranted because 1) the attorney has left at least one unfinished client matter for which no other active member of the state bar has agreed to assume responsibility, or 2) the interests of one or more clients of the attorney or other interested person will be prejudiced if the proceeding is not maintained. A common example is when an attorney dies suddenly, leaving behind an active law practice and nobody is able or willing to take care of clients or to return client files. With over 188,000 active attorneys in the state, this is not as uncommon as one might assume.

Murray B. Greenberg is a senior trial counsel for the State Bar of California, Office of Chief Trial Counsel, and served as president of the National Organization of Bar Counsel. Brooke Schafer is a former supervising senior trial counsel for the State Bar of California, Office of Chief Trial Counsel. He has participated on a number of panels regarding professional responsibility and handled assumption of jurisdiction matters on behalf of the state bar.
practice, several statutory requirements must be met. The action must be filed in the county in which the attorney had his or her practice. The application also must be verified and state whether the attorney died, resigned, or was disbarred, suspended, or placed on inactive status. Furthermore, it also must state that either there is an unfinished client matter for which no other member of the state bar will assume responsibility or the interests of one or more clients or other interested persons will be prejudiced if the action is not maintained.

When an application to assume jurisdiction is filed, the state bar frequently will file an ex parte petition concurrently, asking for interim orders due to the time-sensitive nature of most active client files. In most cases, it is easy to establish a need to preserve clients’ rights since the state bar generally can establish the need by showing the attorney had open and active client matters. There are circumstances under which the state bar might not provide notice of the ex parte petition, especially when a law enforcement action might be jeopardized by advance notice or when there is particular concern that client files or records might be destroyed or removed if notice is given. This concern may be greater when the state bar seeks court jurisdiction over a sham law practice in which nonattorneys are improperly performing, or holding themselves out as being able to provide, legal services.

Assuming everything is satisfactory, the court issues interim orders at the ex parte hearing, allowing the state bar or an appointed attorney to act under its direction in carrying out the duties necessary to wind down a practice. Once the state bar obtains interim orders, it moves immediately to seize files, reroute telephone lines, forward the mail, and freeze bank accounts.

Within days after the state bar recovers the files, computers, and other materials, it conducts an inventory and notifies clients, courts, opposing parties, and other interested parties that a court has assumed jurisdiction over the practice. After bank accounts are frozen, bank records are obtained, and an accounting is performed to determine who may be owed the funds in accounts. In some instances, a forensic accountant is retained to examine bank records. If clients request their files, the state bar releases the files to them.

Following the ex-parte hearing, copies of the pleadings—including the interim orders and the order to show cause—are served on the attorney (if any), the attorney’s counsel, and, in some cases, family members. For example, the state bar may serve the order on the spouse of a deceased attorney as he or she is often the party handling the attorney’s estate. An order to show cause hearing generally occurs several weeks later, and the matter is decided on the briefs, supported by declarations, akin to motions practice. Generally, the court issues permanent orders consistent with the interim orders. However, if the state bar discovers circumstances have changed since the ex parte hearing, it may modify the permanent orders accordingly. For instance, if, after assuming jurisdiction of the practice, the state bar discovers additional bank accounts, it would modify the permanent order to freeze the subsequently discovered accounts. Note that whether the state bar or another attorney is appointed under a Section 6180 order to assume jurisdiction, unless court approval is first obtained, the appointee is forbidden from representing the clients.

In addition to the reasons enumerated in Business and Professions Code Section 6180, the state bar may also seek court jurisdiction of a law practice when an attorney more generally lacks the capacity to properly serve his or her clients. Section 6190 of the Business and Professions Code states that a court may assume jurisdiction over a law practice when an attorney has, for any reason (including drugs, alcohol, physical or mental infirmity, or other cause), become incapable of devoting the necessary time and attention to the practice required to protect the interests of a client. If there is an unfinished client matter for which no other active member of the state bar has agreed to assume responsibility, the court may assume jurisdiction over the practice of an attorney largely to the same extent as that provided in Section 6180. In other words, Section 6190 proceedings will generally begin with a petition and ex parte proceeding, followed by an order to show cause hearing, and the court’s resulting orders will confer similar powers to the state bar over the law practice as in a Section 6180 proceeding.

When a court assumes jurisdiction over a law practice, the process also provides additional protections for clients affected by the disruption. The law provides for an extension of the statutes of limitations in client matters by up to six months so a client may find successor counsel. Also, relief from a judgment, order, or other proceeding may be obtained due to the assumption of jurisdiction over the law practice, provided relief is requested within a reasonable time, however not exceeding six months. For example, if a client loses a discovery motion around the time of the assumption of jurisdiction because no response was filed on the client’s behalf or no attorney showed up on the client’s behalf, the client may subsequently have the order set aside due to the superior court’s intervention in the attorney’s law practice.

Organizing the takeover of a law office requires significant resources, both before and after obtaining an order. These resources include attorneys, investigators, paralegals, and other staff assistance. Depending on the size and nature of the practice, these actions could also require rental trucks, movers, locksmiths, and the assistance of law enforcement agencies. One recent case involved a simultaneous shutdown of multiple offices in four different cities over two counties, requiring the assistance of approximately 20 state bar employees to seize and recover client files. Considering the resources involved, the state bar does not undertake these proceedings lightly.

The state bar files only a small number of these actions a year. The vast majority of law practices left unattended due to death, illness, or other causes are wound down without state bar involvement, hopefully as a result of a planned succession of the practice. The state bar will not collect accounts receivable or provide for the billing of services rendered but not paid. The state bar also will not necessarily determine whether the member’s family or any other third parties are entitled to funds in the member’s general business accounts. When reviewing the law practice accounts, the state bar’s primary concern will be restitution to clients as the focus of the state bar’s efforts in seeking court assumption of jurisdiction actions is public protection.

Advance Planning Strategies

When the state bar takes over a practice, it does so with the purpose of protecting clients and not necessarily to assist the attorney. Attorneys nevertheless can take steps to protect clients as well as their practice in the event of death or incapacity. Effective advance planning is essential to an orderly transition.

One of the most important and straightforward steps an attorney can take is to create a succession plan whereby the attorney obtains the commitment of another attorney to assist in winding down his or her law practice. For example, two attorneys may agree to act as each other’s “buddy,” agreeing to wind down the other’s practice if either is unable to practice. Under this informal arrangement, the buddy attorney will have sufficient information to assist the family, staff, other attorneys, or a personal representative upon the death or incapacity of the planning attorney.

To assist the succession, a law firm’s client information should be organized in a way to facilitate notification. The information, which ideally is separate from the client file, should include: 1) file name and variations; 2) clients’ addresses, home and work telephone numbers; 3) the name, address, and
telephone number of an alternate contact in case the client moves; 4) a general description of the work done for the client; 5) a designation as to whether the file is active or closed; and 6) what original documents are in the attorney’s possession.

The planning attorney should also arrange for notice as required by Business and Professions Code Section 6180 when possible (e.g., courts and opposing counsel) and provide the law office’s landlord or property manager with the name of a designated emergency contact.

Initial client engagement letters can inform clients as to what arrangements an attorney has made for coverage of the client’s matter in the event of death or disability. The letter can also provide for the client’s consent to a named third-party attorney reviewing the client’s file in the event of an emergency. In this way, the client can consent in advance to a particular successor attorney.

Finally, as an additional protection and to lessen the impact an attorney’s incapacity would have on clients, attorneys should consider releasing the entire original file to clients once matters are closed.

**Appointment of a Practice Administrator**

Attorneys who fail to plan for succession of practice may find their practices wound down by a practice administrator. The Probate Code permits a practice administrator to take control of a law practice after an attorney’s death and when an attorney becomes disabled. The two sections are virtually identical. In addition, parallel provisions were added to the Probate Code for practices that have assigned their economic interests to a trust.

If the superior court approves an application by the personal representative of the estate or any other interested party, the court will appoint a practice administrator to take control of the files and assets of the member’s practice. The petition to appoint an administrator must allege the value of the assets that are to come under the control of the practice administrator, including, but not limited to, the amount of funds in all accounts held by the disabled member. The court also requires the filing of a surety bond in the amount of the value of the personal property. No action may be taken by the practice administrator unless a bond has been duly filed with the court.

Powers that can be provided to a practice administrator include:

- Taking control of the business and trust accounts of the firm, as well as equipment, files, client directories, the firm premises, and any and all other assets.
- Taking control of the client files.
- Contacting the member’s clients and discussing options for the appointment of successor counsel.
- Contacting the court or administrative agencies in front of which the member has appeared or intended to appear as well as contacting opposing counsel in order to seek further time to reply to outstanding matters.
- Ascertaining and paying the obligations of the member’s practice, and if necessary, asking for contributions from the estate to pay the practice’s obligations.
- Employing any person, including, but not limited to, the employees of the member.
- Creating a plan for dissolution of the practice or for its sale, including any goodwill value to another member subject to the approval of the personal representative.
- Reaching agreements with successor counsel for allocation of fees on existing matters.

The practice administrator may not act as the attorney for the personal representative or conservator of the attorney. This is designed to avoid a conflict of interest over the question of allocation of fees or the disposition of the practice. However, the practice administrator may be entitled to a fee for his services and may apply to the court for payment of the fee. Upon conclusion of services, the practice administrator will prepare a final accounting of the law practice and petition the superior court for its approval in order to be discharged as the administrator. Any surety on any bond posted will then be exonerated.

The focus of these proceedings is to allow a member’s beneficiaries to retain as much value of the member’s practice as possible. The ability to protect the receivables and unbilled work of the member may provide substantial benefits for his or her care, if disabled, or for his or her beneficiaries. In addition, enabling a practice administrator to work with the member’s files and transfer them to successor counsel with the permission of the clients may allow the practice’s goodwill value to be preserved. In particular, the practice administrator is allowed under the statute to become the successor counsel for the member. This allows the practice administrator to negotiate with the estate for a purchase of the practice subject to consent of the clients and the personal representative. This differs from the state bar proceedings concerning assumption of jurisdiction in that the person appointed to control the files is not allowed to become successor counsel in the absence of a court order. In contrast to the goal of a practice administrator, the primary focus of the state bar’s seeking court jurisdiction is to protect the interests of the clients, including the return of client files as soon as possible.

In order to take full advantage of the procedures offered by these statutes, it is beneficial to a practice to designate an attorney willing to act as practice administrator well in advance of any emergency.

The State Bar of California provides a model surrogacy agreement for the designation of an attorney to administer a lawyer’s law practice in the event that the lawyer becomes disabled or incapacitated. The agreement details the typical responsibilities of the lawyers involved in an “Agreement to Close Law Practice in the Future” and is intended to facilitate compliance with Business and Professions Code Section 6185, allowing for a practice administrator, and other relevant provisions of the Probate Code. In the absence of designating someone to step into the shoes of an incapacitated or deceased attorney, a personal representative may be required to petition to have a practice administrator appointed or ask the state bar to wind down practice. In either event, the value of the practice may be impaired.

---

1 Actual names and events have been changed to protect the parties’ privacy.
2 CAL. RULES OF PROF’L CONDUCT, Rule 1-400.
3 See BUS. & PROF. CODE §§6180 et seq. The state bar customarily refers to these proceedings as “assumption of jurisdiction” actions.
4 See BUS. & PROF. CODE §§6190 et seq.
5 See BUS. & PROF. CODE §§6180.5, 6190.1.
6 BUS. & PROF. CODE §6180.5.
7 Id.
8 BUS. & PROF. CODE §6180.6.
9 BUS. & PROF. CODE §6180.3.
10 See Member Demographics, The State Bar of California, https://members.calbar.ca.gov (last viewed Apr. 27, 2017).
11 BUS. & PROF. CODE §6180.2.
12 BUS. & PROF. CODE §6180.3.
13 See CAL. RULES OF PROF’L CONDUCT, RULE 3.1200.
14 See CAL. RULES OF PROF’L CONDUCT, RULE 3.1204(b). (Allowing for no notice to be given if good cause is shown.)
15 BUS. & PROF. CODE §§6180.8, 6190.3.
16 Cf. BUS. & PROF. Code §6185, giving a practice administrator broader power over the disposition of the law practice, including under some circumstances, acting as successor counsel for clients of a deceased or disabled member.
17 BUS. & PROF. CODE §6190.
18 BUS. & PROF. CODE §6190.1.
19 CODE CIV. PROC. §353.1. Six months begins at the time the order is entered, assuming the statute of limitation has not expired.
20 CODE CIV. PROC. §473.1.
21 See PROB. CODE §9764.
22 See PROB. CODE §2468.
23 One distinction concerns the ability of a disabled attorney who has recovered sufficiently to resume the practice of law. If the petition is successful, the court will terminate the appointment of the practice administrator and restore the disabled attorney to his or her practice. See PROB. CODE §2468(b).
24 PROB. CODE §17200(b)(2)(2)-(23).
25 BUS. & PROF. CODE §6185.
26 PROB. CODE §2468(d).
27 PROB. CODE §2468(e).
28 PROB. CODE §2468(g).
29 PROB. CODE §2468(b).
So said the actress Bette Davis. So stipulated.

As the population ages, the issue is what is best for an aging parent, spouse, or sibling: Age in place by staying in the family home as long as possible? Downsize? Move to a retirement community? If there are health issues, is there a need for a skilled nursing facility? Questions like this are all too familiar. What’s best? Like other answers that lawyers give clients, that answer is often, “It depends.”

After losing her husband and selling the family home, Eleanor moved to a townhouse condominium. Although it was three stories, Eleanor, in the pink of health, was undaunted by the stairs between the various levels. No problem, she thought, even though her adult children thought a single-level condominium would be better for her as she aged. Eleanor didn’t want that, as she didn’t want anyone above or below her, and so the townhouse style fit the bill.

Eleanor had just returned from an overseas tour and as she was going up to her bedroom, lugging her suitcase, she made a misstep and fell down the stairs, landing face down. She felt a sharp pain in her right foot when she stumbled and now she had pain in her shoulder and her wrist. Eleanor’s cell phone was in her pocket, so she called 911, but she had to wait helplessly as the paramedics broke down her door to find her at the bottom of her staircase.

At the hospital, Eleanor learned that she had fractured her foot and her wrist and that she had sprained her shoulder. She needs crutches, but can’t walk for long with her injured shoulder. She can’t climb stairs and do simple things like get to the bathroom or dress herself without help. In other words, Eleanor needs help with her activities of daily living (ADLs). She also needs physical therapy to build up her strength and to learn how to move around until her injuries heal. Eleanor’s goal is to return to her townhouse as soon as possible, but what are her options? The answer depends on the needed level of care.

Three types of facilities may be appropriate for Eleanor: a Skilled Nursing Facility (SNF), an Intermediate Care Facility (ICF), or a Residential Care Facility for the Elderly (RCFE). Before deciding where to go, Eleanor will need to research the facilities in her area to make an informed decision as to whether the facility she chooses is certified, licensed, and in good standing with state and federal authorities.

Ten thousand Baby Boomers, the generation born 1946 to 1964, turn 65 every day and more and more of them will need to find answers to the same questions that Eleanor is facing now.

Healthcare facilities in California are licensed, regulated, inspected, and/or certified by public and
Choosing a nursing home or other elder care facility can be an anguishing decision often made under difficult and highly emotionally charged circumstances. While placement services exist to help clients locate appropriate facilities for their loved ones for a referral fee (paid by the facility that receives the placement), trying to make this decision is especially fraught when the prospective resident or patient cannot make the decision and others—e.g., a spouse or other family members—are at odds as to which facility to choose or even whether to place a loved one in an elder care facility. The first step toward grappling with such challenges is to become educated about the nursing home options. As a starting place, the California Department of Public Health (CDPH) website provides very good consumer information. The CDPH provides guidance regarding advance planning, if there is time to plan for nursing care in the future. The website also has information on what to look for in good elder care facilities and how to choose a nursing home.

Citations and Violations

The CDPH website provides information on the spectrum of citations that can be issued against long-term care facilities and skilled nursing care facilities with state and federal oversight. Citations may range from low level, minor deficiencies, which have no more than a minor impact on the residents, to the most serious Class AA violations, which signify that conditions or practices at the subject institution were “determined to have been a direct proximate cause of death of a patient or resident.” The CDPH website reports that information by county and name of facility.

Even if facilities have no citations or violations in the public record, more information about elder care facilities can pop up through court filings and other public records, as well as internet searches. Internet research can produce results that include recent legal proceedings, news articles, and postings by individuals about their experiences with the subject facility. For example, if a SNF has filed for bankruptcy protection (and this has happened more than once), many issues arise in the context of the bankruptcy filing that either interfere or will interfere with the continuation and quality of care for the facility’s residents. Some of those issues may include inadequate staffing, interruptions in care, lowered standards of cleanliness and upkeep, among others. Revelations of this sort can be red flags that the nursing home may not be acceptable or, at least, may prompt further investigation.

Resident and Patient Rights

Nursing homes are obligated to honor the resident’s rights, which include, among others, a right to privacy, to choice, to refuse medication, to be free from abuse, and to be free from restraints. To oversee these obligations, California has a Long-Term Care Ombudsman Program (LTCOP) that advocates on behalf of residents to assist them in resolving issues without fear of retaliation. The LTCOP is a local, community-based program that is staffed with both paid staff and volunteers trained by Ombudsman Program Coordinators in 35 of California’s 38 counties. Ombudsman services are free and confidential. The primary responsibility of the LTCOP is to investigate and make efforts to resolve complaints made by, or on behalf of, individual residents in long-term care facilities, which includes nursing homes, residential care facilities for the elderly, and assisted living facilities. The LTCOP also investigates elder abuse complaints in SNFs and RCFEs. Authorized by the federal Older Americans Act of 1965 and its state companion, the Mello-Granlund Older Californians Act, the ombudsman program is codified in the California Welfare and Institutions Code.

What choice should Eleanor make?

SNF. A SNF, also commonly referred to as a nursing home, is a healthcare facility that provides 24-hour skilled nursing care and related services on an extended basis for injured, disabled, or sick individuals. Patients at a SNF may be chronically ill or recuperating from illness and in need of regular nursing care and other health-related services. A SNF has medical and social services for people whose needs cannot be met in a less restrictive setting. The SNF also provides dietary and pharmaceutical services, as well as access to dental care and social services. Such facilities place emphasis on rehabilitation and most offer ancillary services such as physical therapy, occupational therapy, speech therapy, and podiatry services. Some SNFs also have a specialized care unit for patients with dementia. Patients are admitted to the SNF at the direction of the patient’s personal care physician or the facility’s medical director. Patients must have an individual plan of care developed by the resident, her physician, and facility staff.

ICF. ICFs provide inpatient care to ambulatory or non-ambulatory patients that have the recurring need for skilled nursing and supportive care, but who do not require availability of 24-hour, continuous skilled nursing care. In this way, the ICF differs from the SNF; however, like the SNF, the care is directed by a physician. ICFs care for people who need restorative nursing and personal care, treatment for minor illness, or routine treatment for major disorders. Most ICF populations serve those who are disabled and need in development of habilitative, and/or supportive health care services (the developmentally disabled (DD)). The three types of ICFs are:

- ICF/DD-habilitative, with 4-15 beds, for patients who have an intermittent, recurring need for nursing services and who are certified by a physician and surgeon as not requiring the availability of continuous skilled nursing care.
- ICF/DD that offer 24-hour personal care, habilitation, developmental, and supportive health services to patients whose primary needs are for development and recurring but intermittent skilled nursing services.
- ICF/DD-nursing, with 4-15 beds, that offer 24-hour personal care, habilitation, developmental services, and nursing supervision.
I just had to form a new corporation, and it’s just so damn perfect!

John McIlwee, Entertainment Business Manager

Shepherd McIlwee Tinglof

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.

eminutes.com
to medically fragile persons with significant developmental delay.20

Like the SNF, the ICF provides pharmaceutical services and access to dental care. They may also have activity programs and they provide emergency services. Demographically, SNF/ICF patients are 75 years of age and older, they do not have a spouse, they are non-ambulatory, they have chronic disabilities and need help with ADLs, and some have a degree of dementia. But demographics do not tell the whole story, as more young people (age 45 to 74) are being admitted for stays of three months or less.21

RCFE. RCFEs provide nonmedical care and supervision for people over 60 who need assistance with ADLs (e.g., help with dressing, toileting, bathing, eating and monitoring). Sometimes RCFEs are also called “board and care” or “assisted living” facilities. In addition to assisting residents with ADLs, RCFEs provide other services that facilitate daily living, such as transportation, meals, housekeeping and laundry services, activity programs, and assistance with medication. In facilities that serve those with Alzheimer’s and dementia related diseases, often called “memory care” units, the RCFE also prevents wandering. Residents of RCFEs need minimal care and supervision, but their functional levels may vary widely. Some are non-ambulatory, meaning that patients are unable to leave a building unassisted under emergency conditions. Others may be unable to respond physically or mentally to a sensory signal.

RCFEs range in size from small facilities with six residents to large facilities with hundreds of residents.

Visit Facilities

The prospective resident or patient (if he or she is able) should tour facilities with family and others to see each place and ask the relevant and hard questions. The test is what makes the most sense for the future resident, be it a SNF, an RCFE, or a Continuing Care Retirement Community (CCRC). Just as clients interview prospective lawyers, the same holds true for elder care facilities. Due diligence is essential. One issue to consider is the size of the facility. Should Eleanor move to a CCRC, which is often a larger facility that houses dozens, scores, or even hundreds of residents? Or would she prefer a smaller board-and-care facility that houses up to six residents? A CCRC can provide the continuum of care from assisted living (sometime starting even with independent living) to skilled nursing home and memory care, if needed.


Check the activities calendar, which should be posted, to see what kinds of daily activities there are for the residents and perhaps be there during that time to see how the activities are conducted. Are they mainly in the facility or are there excursions to local places of interest, concerts, shopping? Are the residents engaged in those activities or merely plunked down in front of a television set?

It is critical to get a sense of the issues that the prospective resident may encounter in daily life. How are the residents spending their time? It’s also important to meet with the administrator to ask about staffing ratios and the schedule and routines. Menus should be posted weekly. Try to visit at mealtimes; look at the quality of the food and whether residents are eating. Oftentimes, the facility will have a guest table for the sampling of meals.

Eleanor needs significant rehabilitation and occasional medical care on a temporary basis and so her needs will be best served in a SNF, which provides 24-hour skilled nursing care to residents whose primary need is for the availability of skilled nursing on an extended basis.22 After 12 weeks, Eleanor recovered from her fall and returned to her two-story home, albeit reluctantly. She can climb the stairs to her bedroom, but it is arduous and Eleanor fears falling again. Accustomed to being independent, Eleanor doesn’t want to leave her townhouse, but this episode of prolonged serious disability prompts her that it might be time to move to a place where she would have support on site if anything else happens that affects her ability to care for herself. Eleanor decided to sell her townhouse and move to a CCRC to get the full continuum of care from independent living, to assisted living, to skilled nursing, and beyond.

Continuing Care Communities

In the world of elder care facilities, a popular choice is the Continuing Care Retirement Community that offers graduated levels of care in one location. Most often, such communities provide independent living; assisted living, like RCFEs, which have non-medical care available; and nursing care facilities, like SNFs, which provide some level of medical care. For example, a resident may move into independent living quarters initially but move into the site’s SNF if he or she becomes disabled and needs medical services. If the resident’s disability abates or improves, he or she wants the security of having non-medical services available, assisted living housing may be the next step. A resident who begins to experience cognitive decline could move to the site’s memory care community.

Having the ability to stay in the same retirement community as circumstances change has benefits. A resident who continues to live in familiar surroundings can continue to enjoy social groups and activities with friends who live inside and outside the community. For many, however, the greater obstacle to moving to a CCRC is not deciding where to live, but determining what is affordable. The daily average cost to reside in a skilled nursing care facility in California is $194 for a semi-private room, yielding an average monthly cost of $5,820.23 Medicare does not pay for any kind of assisted living. To finance the cost, many must use their own resources (e.g., bank accounts, stocks) or long-term care insurance (if they have it), or qualify for Medi-Cal.24 Advance planning can determine the range of choices.

The fee arrangements for CCRCs vary and generally include an entrance fee, which may or may not be refundable.25 Refundable fees will be held by the CCRC. However, if the resident needs to apply for Medi-Cal (California’s Medicaid program), the fee will be counted as an available asset. This is true even if the resident cannot access the money.

In addition to the entrance fee, a monthly fee is charged based on the size of the independent living unit.26 A menu of other services usually is available for additional per-service fees, which increase the monthly cost. Paying out-of-pocket the costs of residing in a CCRC or other elder care facility is the easiest option if one can afford it. As long as the bills can be paid with available resources, the resident can enjoy the services and amenities, but it is important to remember that costs usually increase over time.

Another way to pay for accommodations in a CCRC is to use long-term care insurance. However, if one does not already have a policy before the need for it arises, such insurance may not be available or may be prohibitively expensive. The older one is at the time of purchase, the more expensive it is. Those who qualify for and who can afford long-term care insurance receive reimbursement for a pre-determined daily amount for services to assist them with ADLs. Health insurance, Medigap insurance, and disability insurance do not cover these kinds of services for the long-term.27

Life Changes Again

Since her fall a few years ago, Eleanor has enjoyed living on the campus of her CCRC. For the first five years, she lived independently in her two-bedroom apartment, but last year
she moved into a one-bedroom unit in the assisted living building. Eleanor stopped cooking for herself because she didn’t want to do that anymore, so she took her meals in the dining room. Eleanor also began to feel unsteady when she walked, so she used a cane and came to rely upon an aide to help her get dressed and get around the campus when she went out for walks.

In recent weeks, Eleanor’s aide and the van driver who takes her shopping with other residents noticed that Eleanor was having trouble remembering things and there were times when she seemed momentarily confused and disoriented. The aide mentioned these observations to Eleanor’s oldest daughter who admitted that Eleanor occasionally seemed not to recognize her. Eleanor’s children spoke with the Director of Nursing (DON) in the CCRC’s memory care unit who suggested that Eleanor undergo a complete medical assessment, including: a) taking a thorough medical history; b) mental status testing; c) a physical and neurological exam; and d) other medical tests such as blood tests and brain imaging to rule out other causes of dementia-like symptoms.28

Eleanor’s medical assessment resulted in a diagnosis of Alzheimer’s, a type of dementia. The disease was diagnosed at an early stage so the children determined to do all they could to keep Eleanor engaged. But Eleanor had already taken the best step under her new circumstances: she planned for this day by learning about her care options years earlier.

Advance Planning

Emily Dickinson observed that “old age comes on suddenly and not gradually as one had thought.”29 That’s why the importance of helping clients choose the right place to live for themselves or for aging loved ones —under current and, potentially, changing circumstances—cannot be overstated. When considering the appropriate choice of elder care facility, if the client has the luxury of time, advance planning is critical. As counsel, in addition to advising clients on issues, such as estate planning, asset management and tax planning, clients need information on options for use of Medicare and Medi-Cal, as well as guidance on how to evaluate and decide between type and quality of facility.

The goal is for lawyers to guide clients toward making well-considered, informed choices at a critical time in life.

2 See Chapter 3: Equipping California Long-Term Care, Ombudsman Representatives for Effective Advocacy: A Basic Curriculum, California’s Long-Term Care Setting, Office of the State Long-Term Care Ombudsman (Aug 2007), available at http://htcouncilman.org/uploads/files/support/Chapter_3_California_LTC _Setting(1).pdf [hereinafter California Long-Term Care].
5 Cal. CODE. REGS., tit. 22, Div. 5, Chs. 3-4.
7 Social Security Act (Assuring Quality of Care), 42 C.F.R. §§483.1 et seq.
9 Cal. CODE. REGS. §§87100 et seq.
10 Internet searches can identify these services in the local area. Using the criteria discussed in this article, the services usually have specific information on particular facilities that they use to help clients make informed choices.
14 Id.
18 Id.
19 42 U.S.C. Ch. 35.
20 WEL & INST. CODE §§9720.5-9726.1.
21 See California Long-Term Care, supra note 2.
23 Some SNFs also have specialized care units for patients with Alzheimer’s and other dementia-related diseases.
27 Id.
28 Diagnosis of Alzheimer’s Disease and Dementia, alz.org (Alzheimer’s Ass’n), http://www.alz.org (last viewed Apr. 27, 2017).
29 Emily Dickinson Quotes, Brainy Quotes; https://www.brainyquote.com/quotes/authors/e/emilydick119451.html (last viewed Apr. 27, 2017).

Los Angeles Lawyer June 2017 29
ADMINISTRATIVE LAW

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

ADOPTION—DOMESTIC, STEPPARENT, ADULT, INDEPENDENT, RELATIVE AND AGENCY

THE LAW OFFICES OF DAVID H. BAUM, APC

ANTITRUST

PEARSON SIMON & WARSHAW, LLP
15165 Ventura Boulevard, Suite 400, Sherman Oaks, CA 91403, (818) 788-8300, fax (818) 788-8104, e-mail: dwarshaw@pswlaw.com. Website: www.pswlaw.com.
Contact Daniel Warshaw. Pearson, Simon & Warshaw, LLP is a nationwide leader in antitrust litigation. PSW’s veteran legal team has obtained over $2 billion in settlements and verdicts on behalf of plaintiffs in both class action and individual cases. Our firm has the skills and expertise to handle the most complex legal issues and has the resources to pursue litigation against the largest corporations in the world. See display ad on page 31.

CERTIFIED FAMILY LAW SPECIALIST

BRANDON LAW GROUP
3020 Old Ranch Parkway, Suite 300, Seal Beach, CA 90740, (562) 901-9600, fax (562) 799-5700, e-mail: lisabrandon@brandonlaw.net. Website: www.bradonlaw.net. Contact Lisa Brandon. Dissolution of marriage/legal separation; custody and/or child support issues; spousal support; and marital agreements (litigation and mediation).

LAW OFFICE OF KAREN S. BROWN
10866 Wilshire Boulevard, Suite 400, Los Angeles, CA 90024, (323) 274-2657, e-mail: karen@ksbfamlaw.com. Website: www.ksbfamlaw.com. Contact Karen S. Brown. Certified family law specialist handling divorce, complex custody, and financial matters for working families and high net worth individuals. I provide quality service for my clients and have extensive experience as a civil litigator and trial attorney for all family law related matters both prior to dissolution and postjudgment. Also, I handle prenuptial and postnuptial agreements. I work toward resolution of all matters and resort to litigation only when necessary. If that is the only option, I am a tenacious litigator and strive to get my clients the very best results in the court system after fully explaining the process and reviewing cost/benefit issues beforehand. Please refer to the testimonials on my website from clients for whom I have handled complex matters of many years’ duration.

CIVIL APPEALS

BENEDON & SERLIN, LLP
22708 Mariano Street, Woodland Hills, CA 91367-6128, (818) 340-1950, fax (818) 340-1990, e-mail: douglas@benedonserlin.com; gerald@benedonserlin.com. Website: www.benedonserlin.com. Contact Douglas G. Benedon or Gerald M. Serlin. Our firm specializes in all aspects of civil appellate litigation and substantive trial motions. We appear in both state and federal court. Both firm members have been certified as appellate law specialists by the State Bar of California Board of Legal Specialization. Our firm and both members are AV rated by Martindale-Hubbell. In addition, our firm has been recognized for professional achievement in the area of appellate law.

CIVIL RIGHTS

THE LAW OFFICES OF DALE K. GALIPO
21800 Burbank Boulevard, Suite 310, Woodland Hills, CA 91367, (818) 347-3333, fax (818) 347-4118. Specializing in police shootings, excessive force, and other police negligence. See display ad on page 35.

CLASS ACTIONS

PEARSON SIMON & WARSHAW, LLP
15165 Ventura Boulevard, Suite 400, Sherman Oaks, CA 91403, (818) 788-8300, fax (818) 788-8104, e-mail: dwarshaw@pswlaw.com. Website: www.pswlaw.com.
Contact Daniel Warshaw. Pearson, Simon & Warshaw, LLP is a nationwide leader in class action litigation. PSW’s veteran legal team has obtained over $3 billion in settlements and verdicts on behalf of plaintiffs. Our firm has the skills and expertise to handle the most complex legal issues and has the resources to pursue litigation against the largest corporations in the world. See display ad on page 31.

CONSTRUCTION LAW

HUNT ORTMANN PALFFY NIEVES DARLING & MAH
301 North Lake Avenue, 7th Floor, Pasadena, CA 91101, (626) 443-5200, fax (626) 795-0107, e-mail: info@hortmann.com. Website: www.hortmann.com, Contact Travis Watson. Hunt Ortman counsels owners, contractors, subcontractors, vendors and materials providers regarding legal issues that affect the bottom line and their ability to do business in the construction industry. The firm’s lawyers know the construction industry from the ground up, many of them having served as architects, engineers, project managers or consultants. They represent both plaintiffs and defendants in disputes ranging from simple matters such as recording mechanic’s liens and stop payment notices, to preparation and trial of complex construction disputes involving multiple parties and myriad legal claims.

CONSUMER PROTECTION

PEARSON SIMON & WARSHAW, LLP
15165 Ventura Boulevard, Suite 400, Sherman Oaks, CA 91403, (818) 788-8300, fax (818) 788-8104, e-mail: dwarshaw@pswlaw.com. Website: www.pswlaw.com.
Contact Daniel Warshaw. Pearson, Simon & Warshaw, LLP is a nationwide leader in consumer law.
Primary areas of practice include:

- Antitrust and Securities Fraud
- Business Litigation
- Consumer Protection
- Employment Practices

Our firm has won some of the largest and most significant class action lawsuits filed in the United States. This includes major settlements and verdicts like the recent ten-figure settlement of the In Re Credit Default Swaps Antitrust Litigation.

In addition to representing individuals and companies on both sides of the “v,” the firm refers clients to and accepts referrals from other attorneys. Such referral arrangements, as allowed by law, have led to outstanding results in many cases. Our firm also consults with clients on pre-litigation matters, and has resolved cases before filing.

Named as one of the top 20 boutique law firms in California for 2016 by the Daily Journal.

protection. PSW’s veteran legal team has obtained significant settlements and verdicts on behalf of our plaintiffs in both class action and individual cases. Our firm has the skills and expertise to handle the most complex legal issues and has the resources to pursue litigation against the largest corporations in the world. See display ad on page 31.

COPYRIGHT LAW

LAW OFFICE OF PAUL D. SUPNIK
9401 Wilshire Boulevard, Suite 1250, Beverly Hills, CA 90212, (310) 659-0100; fax (310) 388-5645, e-mail: paul@supnik.com; Website: supnik.com; www.NotSoBIGLAW.com. Federal court litigation; local counsel for out-of-town firms; infringement, fair use, subject matter issues, ownership, registration, public domain, termination of transfer and duration issues; past chair of both LACBA’s Entertainment and Intellectual Property Section as well as International Law Section; past chair Los Angeles Copyright Society; author “Copyright Infringement” in CEB publication Proof in Copyright Law. See display ad on page 32.

CORPORATE, SECURITIES, & GOVERNANCE

GIRARDI | KEES
1126 Wilshire Boulevard, Los Angeles, CA 90017, (213) 977-0211, fax (213) 481-1554. Website: www.girardikeese.com; Contact Tom Girardi, Specialties: ADR, class action practice, and product liability. Recognized as one of the leading trial firms in the country. Professional affiliations: LACBA; Beverly Hills Bar Association; American Board of Trial Advocates; International Academy of Trial Lawyers; Inner Circle. See display ad on page 33.

CRIMINAL DEFENSE LAW

HUTTON & WILSON
1055 East Colorado Boulevard, Suite 225, Pasadena, CA 91106, (626) 397-9700, fax (626) 397-9707, e-mail: huttonandwilson@gmail.com; Website: www.Hutton-Wilson.com; Contact Robert J. Wilson. Hutton & Wilson specialize in driving under the influence, vehicular manslaughter, and DUI murder. We also represent persons accused of other types of crimes, including political corruption, drug possession, theft, and juvenile crimes. Additionally, we represent drivers before the Department of Motor Vehicles involving drivers’ license suspensions of all kinds. Prosecution without compulsion is legal blasphemy.

EATING DISORDER INSURANCE ISSUES

KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2525, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net; Website: www.kantorlaw.net; Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work. Free consultations and all cases are taken on a contingency fee basis. See display ad on page 36.

EMPLOYMENT & LABOR LAW

HUNT ORTMANN PALFFY NIEVES DARLING & MAH
301 North Lake Avenue, 7th Floor, Pasadena, CA 91101, (626) 440-5200, fax (626) 796-0107, e-mail: info@hortmann.com; Website: www.hortmann.com; Contact Travis Watson. All businesses operating in California have employment-related challenges and concerns. Hunt Ortman has a blue chip team of employment attorneys with diverse areas of focus to address the employment needs of any business, regardless of size or type. They provide training seminars and help create, implement, and assess HR policies for owners, managers and HR professionals to minimize risk of litigation. Further, the attorneys have extensive experience with wage-and-hour class actions, as well as single-plaintiff employment claims, ranging from discrimination and harassment to breach of contract and employment torts.

LAW OFFICE OF ELI M. KANTOR
9959 Wilshire Boulevard, Suite 405, Beverly Hills, CA 90212, (310) 274-8216, fax (310) 273-6016, e-mail: eli@kantorlaw.com; Website: www.beverlyhillsemploymentlaw.com; Contact Eli Kantor. We specialize in all aspects of labor and employment law, including sexual harassment, wrongful discharge, employer discrimination, wage and hour, as well as class action litigation.

PEARSON SIMON & WARSHAW, LLP
15165 Ventura Boulevard, Suite 400, Sherman Oaks, CA 91403, (818) 788-8300, fax (818) 788-8104, e-mail: dwarshaw@pslaw.com; Website: www.pswlaw.com; Contact Daniel Warshaw. Pearson, Simon & Warshaw, LLP is a nationwide leader in employment litigation. PSW’s veteran legal team has obtained significant settlements and verdicts on behalf of plaintiffs in both class action and individual cases. Our firm has the skills and expertise to handle the most complex legal issues and has the resources to pursue litigation against the largest corporations in the world. See display ad on page 31.

STEPHEN DANZ & ASSOCIATES
11661 San Vicente Boulevard, Suite 500, Los Angeles, CA 90049, (818) 789-9707, fax (310) 207-5006, e-mail: stephen.danz@employmentattorneyca.com; Website: www.employmentattorneyca.com; Contact Stephen Danz. Over 30 years of trial and settlement experience, Stephen Danz and Associates is California’s largest employee-only, statewide law firm with offices in Los Angeles, San Diego, Sacramento, Fresno, Orange County, San Bernardino, and San Francisco. Our firm is dedicated to representing employees in disputes against their employers. Our attorneys represent employees and workers in class actions, wrongful termination cases, discrimination (age, sex, race, national origin, religion, and physical or medical condition) harassment cases, wage disputes, overtime pay cases, and rest and meal period cases. Our experienced lawyers have represented thousands of employees throughout the state of California and have won numerous trials and arbitrations on their behalf. If you think you have a possible claim please contact our office immediately. We don’t make empty promises; we deliver results. We provide free initial consultations. No attorneys’ fees unless we make a recovery on your behalf. Paying highest referral fees (per State Bar rules). See display ad on page 32.

ENVIRONMENTAL

GIRARDI | KEES
1126 Wilshire Boulevard, Los Angeles, CA 90017, (213) 977-0211, fax (213) 481-1554. Website: www.girardikeese.com; Contact Tom Girardi, Specialties: ADR, class action practice, and product liability. Recognized as one of the leading trial firms in the country. Professional affiliations: LACBA; Beverly Hills Bar Association; American Board of Trial Advocates; International Academy of Trial Lawyers; Inner Circle. See display ad on page 33.

ERISA BENEFITS

KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2525, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net; Website: www.kantorlaw.net; Contact Glenn Kantor or Alan Kassan. Administrative appeals,
DEDICATED TO HELPING...

These are the areas of our practice:

**Intellectual Property**
- Antitrust
- Class Actions
- Environmental Liability

**Pharmaceutical Liability**
- Mass Torts
- Product Liability
- Professional Liability

Almost 90% of our cases are referred by other lawyers who know GIRARDI | KEENE. We will take a meritorious case even when other lawyers have declined for financial considerations. Many of these same firms will refer these cases to us because they know that if a case has merit, we have the will and resources to take it on.

Our referrals aren't just limited to mass torts or complex litigation. We constantly receive calls from attorneys who are pleased to learn we have the time, interest and expertise to handle the claims of the family injured in the auto accident, the single mom coping with a child wounded by medical negligence or the elderly resident hurt by the neglect of a nursing home.

GIRARDI | KEENE

TEL 213.977.0211 / FAX 213.481.1554
1126 WILSHIRE BOULEVARD
LOS ANGELES, CA 90017

TEL 909.381.1551 / FAX 909.381.2566
155 W HOSPITALITY LANE, SUITE 260
SAN BERNARDINO CA 92408

www.girardikeese.com
litigation, and state and federal court, appellate work. Free consultations and all cases are taken on a contingency fee basis. See display ad on page 36.

EXPERT WITNESS

OSTROVE, KRANTZ & ASSOCIATES
5757 Wilshire Boulevard, Suite 535, Los Angeles, CA 90036, (323) 339-3400, fax (323) 399-3500, e-mail: davidstrove@gmail.com. Website: www.lawyers.com /ok&alaw. Contact David Ostrove. Expert witness for over 47 years. Specializes in lawyer/accountant malpractice, forensic accounting, tax matters, business valuation, value of services, computation of damages, mediator, and arbitrator. Professor of law accounting. See display ad on page 36.

FAMILY LAW

WALZER MELCHER LLP
21700 Oxford Street, Suite 2080, Woodland Hills, CA 91367, (818) 591-3700, fax (818) 591-3774, e-mail: ccm@walzermelcher.com. Website: www.walzermelcher.com. Contact Christopher C. Melcher. Complex marital dissolution litigation at trial court level or on appeal involving property disputes, businesses, or marital agreements. Certified Family Law Specialist. See display ad on page 1.

GOVERNMENT (ELECTION LAW)

THE SUTTON LAW FIRM
22815 Ventura Boulevard, #405, Los Angeles, CA 91304, (818) 593-2949, fax (415) 732-7701, e-mail: bhertz@campaignlawyers.com. Contact Bradley W. Hertz. The Sutton Law Firm and Los Angeles-based partner Bradley W. Hertz represent businesses, individuals, candidates, ballot measures, PACs, and nonprofit organizations involved in the political and legislative processes on the local, state, and national levels.

HEALTH INSURANCE CLAIMS

KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2525, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net. Website: www.kantorlaw.net. Contact Eli Kantor. Specializes in all aspects of business, entertainment, investor, and family immigration law.

INSURANCE LAW

HUNT ORTMANN PALFFY NIEVES DARLING & MAH
301 North Lake Avenue, 7th Floor, Pasadena, CA 91101, (626) 440-5200, fax (626) 796-0107, e-mail: info@huntortmann.com. Website: www.huntortmann.com. Contact Tracy Watson. Hunt Ortmann provides a full range of insurance consulting and litigation services, such as counseling on the application and scope of insurance policies to all types of claims. This includes policy interpretation, analysis of obligations, duties, rights and remedies of the parties. Hunt Ortmann is well qualified to handle all types of insurance disputes, including breach of contract, declaratory relief and bad faith lawsuits. The attorneys represent clients in insurance disputes in all forums: mediation, fee arbitration, court-ordered settlement processes and litigation.

KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2525, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net. Website: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work. Free consultations and all cases are taken on a contingency fee basis. See display ad on page 36.

HEALTHCARE LAW

BUCHALTER
1000 Wilshire Boulevard, Suite 1500, Los Angeles, CA 90017, (213) 891-0700, fax (213) 896-0400, e-mail: clucas@buchalter.com. Website: www.buchalter.com. Contact Carol Lucas. Buchalter’s healthcare attorneys counsel health systems, hospitals, including specialty hospitals, independent practice associations, medical groups, physicians, healthcare lenders, drug and device companies, academic medical centers, FQHCs, ambulatory surgery centers, management services organizations, emergency room and hospital staffing companies, and med-spas. Our attorneys also have extensive experience litigating actions on behalf of healthcare service plans, management services organizations (MSOs), and healthcare providers involved in commercial and managed care disputes, and government investigations.

LIFE INSURANCE CLAIMS

KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2525, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net. Website: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work. Free consultations and all cases are taken on a contingency fee basis. See display ad on page 36.

LONG TERM CARE

KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2525, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net. Website: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work. Free consultations and all cases are taken on a contingency fee basis. See display ad on page 36.

LONG TERM DISABILITY

KANTOR & KANTOR LLP
19839 Nordhoff Street, Northridge, CA 91324, (818) 886-2525, fax (818) 350-6272, e-mail: gkantor@kantorlaw.net. Website: www.kantorlaw.net. Contact Glenn Kantor or Alan Kassan. Administrative appeals, litigation, state and federal court, appellate work. Free consultations and all cases are taken on a contingency fee basis. See display ad on page 36.

MEDIATION

AIKINS MEDIATION
4401 Atlantic Avenue, 2nd Floor, Long Beach, CA 90807, (877) 495-4529, e-mail: aikinsmediation.com. Website: www.aikinsmediation.com. Contact Dr. Lenton Aikins. Mediation services in the following areas of law: employment law; personal injury; real estate; elder law; school/education; and police misconduct mediation. See display ad on page 36.

NURSE LIFE CARE PLANNER, LEGAL NURSE CONSULTANTS

JANSE LLC
324 South Diamond Bar Boulevard, #644, Diamond Bar, CA 91765, (909) 590-3909, fax (909) 591-2712, e-mail: carol@janselawconsulting.com. Website: www.janselawconsulting.com. Contact Carol Janse. Areas of expertise are: spinal cord, traumatic brain and multiple trauma injuries, CRPS/RSD, personal injury/falls, MVAs,
amputation and psychiatric disorders, including long-term acute care gero-psych, developmentally disabled/cerebral palsy, and sensitive issues such as elder abuse. Ms. Janse provides expert testimony supporting plaintiff or defense counsel. Carol has 25 years of clinical and administrative hospital experience. She is masters prepared with an MPH, specializing in health education and program planning.

REAL ESTATE LAW

HUNT ORTMANN PALFFY NIEVES DARLING & MAH
301 North Lake Avenue, 7th Floor, Pasadena, CA 91101, (626) 440-5200, fax (626) 796-0107, e-mail: info@huntortmann.com. Website: www.huntortmann.com. Contact Travis Watson. Hunt Ortmann’s real estate attorneys negotiate and draft agreements for all types of business leases, and negotiate and draft agreements for purchase and sale of properties, development agreements, financing agreements, guarantees, and other related contracts. They represent owners, tenants, and prospective purchasers in disputes relating to real property disclosures or concealment of conditions on the property, covenants on title, easements, boundary disputes, trespass, violations of leases such as waste by tenants, creation of a nuisance, and the breach of applicable conditional use permits, leases and lease-back agreements.

SECURITIES (ARBITRATIONS)

JONATHAN W. EVANS & ASSOCIATES
12711 Ventura Boulevard, Suite 440, Studio City, CA 91604, (818) 768-9880, fax (818) 768-9881, e-mail: dukejwe@stocklaw.com. Website: www.stocklaw.com. Contact Jonathan W. Evans. Taking on Wall Street’s best attorneys, we represent customers of securities brokerage and investment advisor firms who have suffered financial losses resulting from one or more forms of broker misconduct. With extensive experience recognizing investment losses and identifying illegal activities through in-depth analysis, we can quickly ascertain if losses are the result of churning, unauthorized trading, unsuitable securities, over-concentration, selling away, fraud or other misconduct, and bring the appropriate claims in court or in arbitration.

SECURITIES FRAUD

PEARSON SIMON & WARshaw, LLP
15165 Ventura Boulevard, Suite 400, Sherman Oaks, CA 91403, (818) 788-8300, fax (818) 788-8104, e-mail: dwarshaw@psalaw.com. Website: www.psalaw.com. Contact Daniel Warshaw. Pearson, Simon & Warshaw, LLP is a nationwide leader in securities fraud litigation. PSW’s veteran legal team has obtained significant settlements and verdicts on behalf of plaintiffs in both class action and individual cases. Our firm has the skills and expertise to handle the most complex legal issues and has the resources to pursue litigation against the largest corporations in the world. See display ad on page 31.

TAXATION LAW

OLINCY & KARPEL
10866 Wilshire Boulevard, Suite 375, Los Angeles, CA 90024, (310) 478-1213, fax (310) 478-1215, e-mail: dan@olincykarpel.com. Website: www.olincykarpel.com. Contact Dan Olincy. As noted under the Trusts and Estates category, Dan Olincy is also a certified tax specialist. With Dan at the helm, Olincy & Karpel have done sophisticated tax planning for many clients—both inter vivos and after death. The firm offers a full spectrum of tax preparation and tax planning, but refers out foreign, complicated tax controversy, and complex corporate tax matters. The firm has advised clients on other tax issues, including going businesses, and creating LLCs and exempt organizations. Dan was the
last chair of the State Bar Tax Committee, and with Bob Kopple and Judd Klein, formed the Tax Section, and was involved in bar association tax committees for many years.

TRADEMARK LAW

LAW OFFICE OF PAUL D. SUPNIK
9401 Wilshire Boulevard, Suite 1250, Beverly Hills, CA 90212, (310) 859-0100; fax (310) 388-5645, e-mail: paul@supnik.com. Website: www.supnik.com www .NotSoBIGLAW.com. Trademark litigation in federal courts; local counsel for out-of-town firms; trademark registration in the United States; trademark registration internationally in association with foreign counsel; trademark availability searches; Trademark Trial and Appeal Board proceedings; licensing; right of publicity; domain name matters. Past chair of both LACBA’s Entertainment and Intellectual Property Section as well as International Law Section. See display ad on page 32.

TRUSTS AND ESTATES

OLINCY& KARPEL
10866 Wilshire Boulevard, Suite 375, Los Angeles, CA 90024, (310) 478-1213, fax (310) 478-1215, e-mail: dan@olincykarpel.com. Website: www.olincykarpel.com. Contact Dan Olincy.
Dan Olincy is one of approximately 53 lawyers in Los Angeles County dually certified as both a tax specialist and trust and estates attorney. This duality offers Olincy & Karpel’s clients full-service in their estate planning process by careful and imaginative drafting of documents to meet their needs, but also helping with their tax planning. Dan and his firm have also excelled in settling disputes with family members in trust administrations and thereby avoiding litigation. The firm has also been involved in large estate administration issues involving various complex matters.

WATER LAW

BEST BEST & KRIEGER LLP
300 South Grand Avenue, 25th Floor, Los Angeles, CA 90071, (213) 617-8100, fax (213) 617-7480, e-mail: info@BBKlaw.com. Website: www.BBKlaw.com. Contact Eric L. Garner.
From its roots helping to implement the California State Water Project, Best Best & Krieger is now a nationally and internationally recognized force in water law. The firm represents agencies that serve water to more than 21 million people, in addition to advising developer, agricultural and manufacturing clients. We aid in the acquisition, development, and maintenance of surface and groundwater rights, and navigate issues related to regional management of water supplies and water transfers. BB&K also provides critical counsel in regulation compliance, and identifying and developing innovative funding strategies for water supply, conveyance, quality, treatment and reclamation, flood control, investment, and recycling projects.

WORKERS’ COMPENSATION

LAW OFFICES OF WILLIAM J. KROPACH
Specializing in police shootings, excessive force, and other police negligence. See display ad on page 35.

WRONGFUL DEATH

THE LAW OFFICES OF DALE K. GALIPO
21800 Burbank Boulevard, Suite 310, Woodland Hills, CA 91367, (818) 347-3333, fax (818) 347-4118. Specializing in police shootings, excessive force, and other police negligence. See display ad on page 35.
FLAT FEE LEGAL SERVICES FROM LACBA!

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
Constitutional Governance and Judicial Power: The History of the California Supreme Court

A history book on the California Supreme Court may sound like a volume headed for the back shelf of a law library or the bargain bin at Barnes and Noble, but the California Supreme Court Historical Society has published a comprehensive history of the court that is readable, educational, and enjoyable for lawyers and lay persons alike. Edited by Harry N. Scheiber, the Stefan A. Reisenfeld Professor of Law and History at the University of California at Berkeley, Constitutional Governance and Judicial Power: The History of the California Supreme Court is co-written by Scheiber and five other distinguished authors, each of whom focuses on a distinct period of the court.

In its early days of statehood, frontier California built new legal institutions combining American legal traditions with the laws and traditions of Mexico and the Californios who owned large land grants from Spain and Mexico in the early 1800s. Much of the early court’s energy focused on reconciling the rights of the Californios with the demands for land by settlers and newcomers who were flocking to California. Among the newcomers were the Chinese whom white settlers viewed as competition for land and gold. Generally, the early court had a mixed record on racial issues. For example, a Chinese person could not testify against a white person in court; however, in 1857, the court ruled in In re Archy that a slave passing through California was free under the California Constitution. Nevertheless, Archy had to be returned to his owner in the South. The court also held that black children had the right to attend public schools, albeit segregated public schools.

During this important formative period, Justice Stephen Field sat as the chief justice from 1859 to 1863. He would later serve as a justice on the U.S. Supreme Court.

During that period, what was good for the railroads was good for the public. However, a populist revolt in response to the power of the railroads and the anti-immigrant sentiment against the Chinese led to the formation of the Workingmen’s Party. The Workingmen’s Party dominated the state constitutional convention in 1878 that adopted the California Constitution still in effect today (with about 480 amendments along the way). The convention delegates—progressive in many ways—were virulently racist against the Chinese and pushed for a government by and for white men. The supreme court was increased from five to seven with six of the seven justices holding membership in the Workingmen’s Party.

The period after the turn of the century was known as the “Progressive Era” as Governor Hiram Johnson and legislators enacted laws affecting employer-employee relations, property rights, and the power of corporations. The Progressives sought to reform the court—perceived as a tool of the Southern Pacific Railroad—by enacting the recall of judges. While the Progressives were not completely off base in their opinion of some of the justices, there were justices such as Frederick Henshaw who were known for their independence and intellectual abilities. In the 1920s, the Asian community was again the target of nativist laws as voters used the initiative process, recently obtained in the Progressive era, to enact a poll tax on alien men and to pass the Alien Land Law of 1920, closing loopholes of the 1913 law prohibiting the sale or leasing of property to the Japanese. Although the court found the poll tax to violate the Fourteenth Amendment, it upheld the Alien Land Law for the most part.

During the 1920s and 1930s, the supreme court focused on stability and reform and on establishing independence from the political arena. Included in a headnote of the official reports. During this period, the court also affirmed a woman’s right to access to employment and extended the law of torts by finding strict liability involving dangerous instrumentalities.

The period after the turn of the century was known as the “Progressive Era” as Governor Hiram Johnson and legislators enacted laws affecting employer-employee relations, property rights, and the power of corporations. The Progressives sought to reform the court—perceived as a tool of the Southern Pacific Railroad—by enacting the recall of judges. While the Progressives were not completely off base in their opinion of some of the justices, there were justices such as Frederick Henshaw who were known for their independence and intellectual abilities. In the 1920s, the Asian community was again the target of nativist laws as voters used the initiative process, recently obtained in the Progressive era, to enact a poll tax on alien men and to pass the Alien Land Law of 1920, closing loopholes of the 1913 law prohibiting the sale or leasing of property to the Japanese. Although the court found the poll tax to violate the Fourteenth Amendment, it upheld the Alien Land Law for the most part.

During the 1920s and 1930s, the supreme court focused on stability and reform and on establishing independence from the political arena. During the Depression, the court balanced the need for government regulation with a strained economy and demands of labor. In spite of a general hostility to labor, the court affirmed the right of workers to strike. The court, however, was less sympathetic to the right of workers to picket for a closed shop. Labor strikes brought before the court complicated the issues of speech and press and, in particular, the con-

Dennis Hernandez is a Los Angeles attorney who specializes in the areas of intellectual property, business litigation, and education law. He also is a member of the editorial board of Los Angeles Lawyer.
In the following period of the court, known as the “Gibson Era,” Chief Justice Phil Gibson presided over a court of monumental intellect confronted with sweeping economic, social, and demographic changes in the state. Among the associate justices was Roger Traynor, generally recognized as one of the great justices of the twentieth century. The Gibson court transformed the law of torts in the state, significantly easing the burden of proof in causation for certain tort plaintiffs and establishing the theory of product liability. The Gibson court also made significant progress in race relations knocking down racially restrictive covenants and ending segregation in unions. In particular, challenges to the Alien Land Law, used to exclude and marginalize persons of Japanese ancestry, were finally successful, and the court struck down the law.

The next period is called the “Liberal Court.” It began when Governor Edmund G. (“Pat”) Brown elevated Roger Traynor to chief justice and included the chief justice appointments of Ronald Wright by Governor Ronald Reagan and Rose Elizabeth Bird by Edmund G. (“Jerry”) Brown, Jr. The liberal period from 1964 to approximately 1987 was marked by enormous political and social changes. During this period, the court faced challenges to housing discrimination and school segregation, forcefully establishing that neither de facto nor de jure racial segregation would be tolerated in California schools. The court split, however, on the issue of affirmative action with Justice Stanley Mosk’s writing for the majority that the University of California admissions policy amounted to a racial quota and thus violated the Fourteenth Amendment. Justice Mathew Tobriner, representing the countervailing view, took the position that a previous decision requiring parental consent for a minor to have an abortion. In 2001, Justice Mosk, who had served 37 years on the supreme court, died in office. Carlos Moreno, the second Latino to serve on the court, was nominated to fill his seat.

This book is a worthwhile read not only for lawyers and legal historians but also for persons interested in California history and politics. The book is well-researched—even the footnotes are interesting. If there is a weakness in the book, it is the discussion of the liberal court period and the fallout after the defeat of Justices Bird, Grodin, and Reynoso. Scheiber’s discussion of the Wright and Bird tenure does not do justice to their accomplishments and their efforts to build on the jurisprudence established by the Traynor and Gibson courts. In addition, the success of the campaign against “Jerry’s judges” was a severe blow to the court that threatened judicial independence in California and across the nation. However, these criticisms do not diminish the accomplishments of Scheiber and the other contributors to this historical and informative book. Readers will reach for it for pleasure and information over and over again.

3 People v. Anderson, 6 Cal. 3d 628 (1972).
Religious and Abortion Exemptions Enforced in the Affordable Care Act

IN 2010, THE AMERICAN HEALTHCARE LANDSCAPE underwent an enormous overhaul with the passage and implementation of the Affordable Care Act (ACA). Since then, the ACA has been praised as much as it has been criticized. Despite challenges to its validity since its inception, the U.S. Supreme Court upheld the law in 2012. Simultaneously, those in Congress who opposed the ACA repeatedly vowed to repeal it as soon as the opportunity arose. That opportunity came with the 2016 congressional and presidential elections when the Republican Party won the presidency and retained its majority in the House and Senate. Immediately, Republican lawmakers proposed legislation that would have either dismantled or mortally wounded the legacy left by the Obama administration.

In addition, in December 2016, a federal district court in Texas dealt a blow to certain controversial provisions of the ACA. In Franciscan Alliance v. Burwell,1 Judge Reed O’Connor of the Northern District of Texas issued a nationwide injunction against the Department of Health and Human Services (HHS) prohibiting enforcement of the ACA’s Section 1557 nondiscrimination rules pertaining to coverage of transgender surgery and abortions. The court concluded that the final rule implementing the mandate under Section 1557 overstepped the authority given to HHS by Congress. The court noted that Congress did not intend to include gender identity under the law’s prohibition of discrimination based on sex, as Congress had previously clarified such intention in other legislation and failed to do so under this section. Additionally, the court found that Congress intended to protect religious institutions from Section 1557 requirements that conflict with their religious beliefs. The court based its reasoning on Congress’ use of the language “et seq.” (indicating the inclusion of all subsections that follow the citation). The court found that the use of the citation 20 USC Sections 1681, et seq. showed that Congress intended for the religious and abortion exemptions under Sections 1681, et seq. to be followed despite the mandates of Section 1557.

While the Franciscan court may have issued a national injunction, this action will likely have a less profound impact than originally thought. Even though HHS cannot enforce certain provisions of Section 1557, it does not preclude state governments from issuing similar requirements, nor does it defeat any private rights of action. Also, the Northern District of Texas is not the sole battleground hearing matters on Section 1557. Tovar v. Essentia Health2 is up for consideration before the Eighth Circuit (which, in the District of Minnesota, found a mother lacked standing to bring a suit against her insurance provider and failed to support a claim of discrimination against her employer when her son’s attempt to seek gender reassignment was denied).

If the Eighth Circuit issues a ruling that conflicts with the decision in Texas, there would be an issue regarding dueling decisions without Supreme Court intervention. While the Texas court’s argument that Congress failed to specifically state its intention to include specific protections is flimsy at best due to its failure to provide specific examples and despite what decisions may come from the various courts, the Texas court provided one solid argument that could change Section 1557’s impact: The use of “et seq.” created the ability for religious entities to lawfully refuse to comply with portions of Section 1557 that would cause a moral and/or religious dilemma. The religious and abortion exceptions under Sections 1681, et seq. constitute an established exemption overlooked by HHS when it issued its final rule and regulations under Section 1557, but were nonetheless clearly included in their scheme, whether intentionally or unintentionally.

The courts are not the only front where blows to healthcare access can be dealt. When Title X was first enacted under the Nixon administration, funds allocated by Congress for family planning services could not be dispersed to entities and programs that considered abortions a means of family planning. However, in December 2016, HHS published a rule circumventing that restriction, but Congress used its authority to overturn federal rules within 60 legislative days of their publication in the Federal Register. On March 30, 2017, the U.S. Senate deadlocked in a 50/50 vote to overturn this federal rule. Vice President Mike Pence cast his tie-breaking vote in favor of overturning the rule. As a result, the original funding restrictions under Title X were once more effective. The Senate’s actions show access to healthcare services can also be altered by the legislature.

The Department of Health and Human Services can play a significant role in redefining access and nondiscrimination efforts. While Section 1557 was enacted by Congress—passed the deadline for Congress to review—and is currently being tested in the courts, the final rule and regulations created under it can be altered or abandoned by their creator, HHS. All that needs to be done is for the new HHS Secretary to issue a new rule or amend the current rule and circumvent the judiciary, but this will require time to comply with the rule-making process. This tactic to change Section 1557 has yet to become highly publicized, but it will be if and when it does occur.


Victor Ortiz is an in-house healthcare attorney in downtown Los Angeles.
The proven payment solution for lawyers.

Managing payments and growing revenue for over 35,000 law firms in the US, LawPay is the only solution recognized by the ABA. Designed specifically for the legal industry, LawPay guarantees complete separation of earned and unearned fees, giving you the confidence and peace of mind your credit card transactions are handled the right way.

LawPay.com/LACBA | 866.376.0950
LITIGATION FUNDING

PRE-SETTLEMENT • SETTLED CASES • ATTORNEY AND SURGERY FUNDING

USClaims is here to help throughout the litigation process.

THE USCLAIMS ADVANTAGE

FAST - cash within 24 hrs of approval.
NO RISK - non-recourse advances.
CAPPED FEES - limits costs.
LOW RATES - industry leading.

Not available in all states. Call for details.

REPEATEDLY VOTED THE BEST!

2016
BEST OF
THE NATIONAL LAW JOURNAL
Winner | USClaims | Litigation Funding Provider

CALL TODAY
1.888.722.1552
www.USClaims.com