Los Angeles lawyers Robert M. Heller and Todd M. Lander survey the potential risks involved in avoiding corporate dissolution through the procedures afforded by Corporations Code Section 2000.
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Chapman University’s Dale E. Fowler School of Law has received a $1.125 million gift from the personal injury firm Bergener Mirejovsky, APC. This represents one of the largest gifts in the history of the Fowler School of Law. James M. Bergener and alumnus Samuel Mirejovsky (JD ’14) have been long-time supporters of the law school, previously making annual gifts of $180,000 to support the Bergener Mirejovsky Scholarship.

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John Keith is the 2017-18 chair of the Los Angeles Lawyer Editorial Board. He practices business litigation with the law firm of Fenigstein & Kaufman in Century City.
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Differentiating Mass Torts from Class Actions

DESPITE THE PREVALENCE OF MASS TORTS, laymen and practitioners commonly mistake these cases for class actions. A mass tort is a civil action that consists of numerous lawsuits filed against one or multiple defendants. The lawsuits either 1) involve exposure to the same alleged defective or toxic pharmaceutical, medical device, or other product (e.g., a cosmetic or asbestos) or 2) stem from a single catastrophic event (e.g., a mass transit accident).1 Mass tort litigation, however, is largely associated with large-scale product liability actions.

Mass torts and class actions differ due to the effect on individual cases and the nature of the relief. A class action is a single lawsuit filed by one or more plaintiffs who agree to act as a representative of a group against one or more defendants. Once a class is certified, the outcome of a class action binds the entire class. In contrast, a mass tort involves separate lawsuits filed by multiple plaintiffs. Although mass tort cases are organized in coordinated proceedings, each mass tort plaintiff maintains a separate suit, and the outcome of a single plaintiff’s case informs, but does not bind, the other cases in the litigation.

Moreover, variance among individual cases within a mass tort presents a challenge to class certification. In California, Code of Civil Procedure Section 382, Civil Code Section 1781, and Rule 3.760 et seq. of the Rules of Court provide the requirements to maintain a class action. California courts mirror many federal class certification requirements.2

To obtain class certification—among other requirements—questions of law or fact common to the class must be substantially similar and predominate over questions affecting the individual members. Plaintiff-specific factors (including the method, length, and degree of exposure, manifestation of a disease, disparity in damages, and other factual and legal issues) set each case within a mass tort apart. As a result, courts have consistently ruled that common issues do not predominate in mass tort litigation and that mass torts fail to satisfy the predominance requirement for class certification.3 Therefore, class action treatment of mass torts is uncommon.

California Process

In California, mass torts are coordinated into Judicial Council Coordinated Proceedings (JCCP) under Code of Civil Procedure Section 404 and Rule 3.520 et seq. of the Rules of Court. This process brings together cases pending in different counties that share a common question of fact or law to a single court. Other states have their own statutes and guidelines for case coordination. Multidistrict litigation (MDL) is the federal equivalent to a JCCP. Mass tort cases pending in different federal district courts are coordinated or consolidated in multidistrict litigation pursuant to section 1407 in Title 28 of the United States Code. Similar to JCCPs, MDLs are coordinated for pretrial purposes.

Mass torts require coordination and judicial oversight to avoid unnecessary burdens on litigants and the courts. Coordination permits effective control over discovery to expedite the process and manage costs. It also promotes judicial economy and ensures that early rulings are consistent and made by the judge most familiar with the complexities of the litigation.

In addition to the local laws and rules of court, case management orders that are drafted and agreed to by the parties and approved by the court govern coordinated proceeding. Case management orders established the leadership and framework of the litigation, the pretrial and initial discovery plan, the protocol for adding newly filed cases to the proceeding, and the procedure for future filings.

Leadership Structure

The court appoints the leadership structure in a mass tort proceeding after coordination. Lead counsel and liaison counsel for each side are designated to manage communication between the court and all the parties in the litigation. The court also typically appoints a plaintiffs’ steering committee or a plaintiffs’ executive committee, or both.

The parties’ leadership group acts on behalf of the respective parties at pretrial conferences and hearings and bears the responsibility for prosecuting common issues. In addition to conducting discovery on common liability issues and selecting and trying bellwether cases, the parties’ leadership must oppose and argue common motions, negotiate and enter into stipulations with the other litigants as to pretrial matters, and negotiate global resolution of the litigation.

State and federal jurisdictions commonly litigate similar mass tort cases, e.g., the Johnson & Johnson Talcum Powder Cases (JCCP No. 4872), a mass tort action pending in the Los Angeles County Superior Court, is also active in the U.S. District Court for the District of New Jersey4 and the 22nd Judicial Circuit Court of Missouri. Leadership groups from different jurisdictions stay apprised of developments in the other proceedings and may coordinate efforts for efficiency, but each coordinated action is subject to legal principles and procedures of the local jurisdiction. Thus, mass tort cases share common questions of fact and law similar to class actions, but they are not class actions.

2 Civ. Code §1781(b).

Cherisse Heidi A. Cleofe is an associate at Kiesel Law LLP. Her practice focuses on mass tort litigation against pharmaceutical companies and medical device manufacturers. She serves on the Barristers Executive Committee.
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A New Law Reorganizes California’s Tax System

CALIFORNIA RECENTLY ENACTED ASSEMBLY BILL 102 (AB 102), dramatically shifting power from the state Board of Equalization (BOE). Also known as The Taxpayer Transparency and Fairness Act of 2017, AB 102 reorganizes the BOE and creates two new California taxing agencies that replace the BOE in appeals of state tax cases.

For 138 years, the BOE has had broad authority over California tax matters. It has heard appeals of California tax matters and provided opinion letters to taxpayers seeking guidance over a variety of state tax issues. Although originally tasked with property tax functions, such as assessment of public utilities and county assessor oversight, the BOE’s power grew as California added new revenue streams. The BOE began hearing tax appeals in 1930 soon after the corporation franchise tax was implemented. In 1933, when the legislature instituted California’s sales tax, the BOE was called upon to assess and collect it. In 1935, when California added an income tax, the legislature again turned to the BOE for administrative appellate review. In 1955, the legislature gave the BOE the responsibility to administer local sales taxes through the Bradley-Burns law.1 The BOE’s authority continued to grow over the decades with the addition of new taxes and fees. In one way or another, the BOE touched nearly every type of state or local tax in California; however, this came to an abrupt halt this past June with the tax agency shakeup under AB 102.

Under AB 102, the BOE’s power is limited almost entirely to functions specifically enumerated under the California Constitution. These functions include property tax assessment for public utilities,2 review, equalization,3 and adjustment of local property tax assessments,4 assessing property tax on lands owned by local government outside its boundaries,5 assessing tax on insurance companies,6 and assessment and collection of alcoholic beverage taxes.7

The BOE will retain any statutory powers under AB 102 “in connection with” these constitutional functions.8 The act provides that the BOE will maintain its authority to adopt property tax regulations and to provide guidance to county assessors as part of its equalization function. The BOE’s other remaining statutory powers include setting the motor vehicle fuel tax rates and maintaining its seat on the Franchise Tax Board (FTB).9

While these duties are important, there is no mistaking that most of the BOE’s authority is gone. As of July 1, 2017, the BOE will no longer administer California’s sales tax and over 30 other tax and fee programs.10 As of January 1, 2018, the BOE will no longer hear administrative appeals regarding these taxes,11 nor will it hear appeals from the FTB.12

Effective July 1, 2017, AB 102 also restricts ex parte communications between BOE members and constituents.13 This impacts not only the quasijudicial hearings the BOE will conduct under its constitutional functions but also the cases the BOE will continue to hear until December 31, 2017.14

While the individual BOE members will continue to serve as taxpayer advocates, it is uncertain how this will be implemented from a practical standpoint. One possibility is that the BOE will interact with members of the legislature, the governor, the Franchise Tax Board, and the new taxing agencies on behalf of its constituents.

New Agencies

Under AB 102, the BOE’s former duties have been divided among two new government agencies. The California Department of Tax and Fee Administration (CDTFA) will handle the day-to-day administration and collection of over 30 different taxes that the BOE previously administered, generating nearly one-third of California’s state revenue. The Office of Tax Appeals (OTA) will take over the BOE’s administrative appellate function. These agencies are not related to and have no connection with the BOE.

The CDTFAs duties will include taxpayer audits, issuance of tax bills, and collections.15 In addition, the new agency will handle all the BOE’s previous duties ancillary to these functions.16 For instance, CDTFA will promulgate regulations, provide taxpayers with legal opinions, and draft forms, instructions, and guidance. As the BOE once did, CDTFA will process petitions and refund claims, hold appeals conferences, and conduct settlement proceedings for disputed liabilities. Although the structure of the rank-and-file staff is unlikely to materially change—if at all—the governance of the CDTFA is significantly different from the five-member, elected BOE. The CDTFA will have a single director who reports to the governor.17 Also, the director will have a chief deputy and a chief counsel. All three positions are gubernatorial appointees.18

Effective July 1, 2018, the OTA will succeed to the BOE’s adjudicatory duties.19 California taxpayers will see significant change in this process. As with the CDTFA, the OTA director, chief deputy, and chief counsel are gubernatorial appointees.20 The OTA is a sister agency of the Government Operations Agency—which includes both the FTB and CDTFA—and will adjudicate tax disputes related to state taxes and fees.21 The OTA has until January 2018 to promulgate its rules of practice.22

Although AB 102 describes some of the key features of these changes, it is uncertain how the new agency will handle appeals. Instead of elected officials, panels consisting of three administrative law judges (ALJ) will sit to decide tax appeals.23 Because the statute requires hearings to be held in Sacramento, Fresno, and Los Angeles,24 it is possible that at least nine ALJs will be selected to decide appeals. This remains to be determined, however, and the same panel may travel to the three different locations.

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There are three requirements to become an ALJ: the candidate must 1) be an active member of the California Bar for at least five years immediately before designation to a tax appeals panel,25 2) have “knowledge and experience regarding the administration and operation of [federal and California] tax and fee laws...,” 26 and 3) subscribe to the Code of Judicial Ethics adopted by the California Supreme Court.27 The qualifying tax experience is vague and hopefully will be clarified through regulations. Assembly Bill 102 also requires the OTA to adopt the Administrative Procedure Act (APA),28 which allows litigants to disqualify judges for cause.29 It is unclear, though, whether parties will have peremptory challenge rights similar to Code of Civil Procedure Section 170.6.

**Hearings and Procedures**

The APA has other important features that will impact hearings and procedures. Under the APA, formal hearings are generally conducted,30 although there is an exception that allows for informal hearings when there is no disputed issue of material fact.31 APA hearings are generally open to the public, but protective orders may be granted to close the hearings under certain circumstances.32 Taxpayers with privacy or confidentiality concerns should consider whether to proceed to hearing, and if so, whether to seek to close the hearing.

In APA hearings, parties have a right to call, examine, and cross-examine witnesses.33 While the formal rules of evidence do not apply, timely objections to hearsay evidence will prevent a factual finding based solely on hearsay.34 Oral testimony is not allowed except under oath or affirmation.35 In this regard, affidavits are allowed but must be provided to all parties at least 10 days before a hearing.36 Within seven days after service of an affidavit, an opposing party can request cross-examination of the witness.37 Prehearing considerations are also critical. While the APA provides for written discovery between the parties,38 there is no apparent provision for deposition testimony. A party may file a motion to compel when the other side refuses to comply with a discovery request.39 However, the administrative discovery provisions seem superfluous given the broad discovery authority the tax agencies already have to issue document requests. For taxpayers considering prehearing settlement, the APA provides opportunity for referrals to mediation or arbitration.40 If this option is selected, an open issue is whether it will impact administrative settlement functions at the FTB or CDTFA (which will presumably inherit the BOE’s functions).

In addition to incorporating the APA, AB 102 calls for the new tax appeal rules be consistent “to the extent possible” with the American Bar Association’s Model State Administrative Tax Tribunal Act (ABA Model Act) dated August 2006.41 The ABA Model Act sets 10-year terms for judges with a salary on par with trial court judges.42 Judges can be removed for good cause, which includes neglect of duty, inability to perform duties, malfeasance in office, or other good cause.43

In terms of qualifications, judges must be knowledgeable of tax law and have experience creating a record for judicial review.44 While the salary guidelines will not be adopted due to state civil service rules, the fixed term and removal provisions could give taxpayers comfort in knowing that ALJs can be held accountable for poor performance. Experience creating a reviewable record may not be necessary since AB 102 calls for de novo review of OTA decisions in superior court.45 The ABA Model Act also calls for a clerk and an official court reporter.46 It is unclear whether the OTA will provide for these positions or try to incorporate some of
An area of uncertainty with respect to the ABA Model Act relates to its provision that a tribunal can decide whether application of statute is constitutional, but not whether a statute is constitutional on its face.47 This may conflict with Section 3.5 in Article III of the California Constitution, which states that administrative agencies cannot refuse to enforce a statute on constitutional grounds absent an appellate court ruling. If the OTA follows the BOE’s longstanding policy of “abstention” on constitutional issues, this provision of the Model Act will not apply.48 However, the ABA Model Act also permits the tribunal to decide whether department regulations are constitutional.49 This does not appear to conflict with the language of Section 3.5, which extends only to statutes.

State constitutional provisions may prove to be an obstacle to adopting other provisions of the ABA Model Act. For example, the ABA Model Act permits the filing of a declaratory relief action in court on a constitutional issue while nonconstitutional issues are pending before the tribunal.50 There should be no issue in applying this provision in the case of refund claims, but declaratory relief actions for deficiency assessments may need to be reconciled with Section 32 in Article XIII of the California Constitution, which courts have interpreted to require payment of a tax before judicial litigation.51 By explicit reference to the ABA Model Act, the legislature has arguably authorized the OTA to depart from Section 32 in the case of declaratory relief actions—even for deficiency assessments—and may override some contrary case law regarding the “pay first, litigate later” rule.52

The ABA Model Act provides for broader discovery rights than the APA, including deposition testimony. Section 11(c) provides:

Subject to reasonable limitations prescribed by the Tax Tribunal, a party may obtain discovery by written interrogatories; requests for the production of returns, books, papers, documents, correspondence or other evidence; depositions of parties, non-party witnesses and experts; and requests for admissions. The Tax Tribunal may provide for other forms of discovery.

Thus, subject only to “reasonable limitations prescribed by the Tax Tribunal,” parties would have essentially the same discovery rights they would have in a civil action.

Aside from incorporating both the APA and the ABA Model Act, AB 102 contains other important procedures. Unlike the BOE, the OTA is required to publish a written opinion in each case.53 This must be published within 100 days of when a tax appeal decision becomes “final”;54 however, what is meant by “final” is unclear. If the goal is to emulate judicial decisions, the trigger for publication of the decision should be when the matter is submitted presumably after oral argument.55 The criteria for precedential decisions are also unclear. If the OTA publishes precedential decisions liberally, the accumulation of decisional law over time should serve taxpayers well and help keep the taxing agencies from taking inconsistent positions. It would also help if the OTA decided to recognize the existing jurisprudence of the BOE so taxpayers can take comfort in knowing there is some precedent to reply upon at the OTA’s inception.

As with current BOE practice, AB 102 makes clear that taxpayers may be represented by lawyers and nonlawyers alike.56 Because of what should be a more formalized OTA process, nonlawyer practitioners should familiarize themselves with evidentiary and procedural rules. Another aspect of BOE practice that has carried over to the OTA is that the tax agency will not have the right to appeal...
adverse decisions, while taxpayers will have full de novo review rights in superior court.

Open Questions
Several aspects about the new tax system remain unclear, and government officials face numerous challenges implementing the new rules. State tax officials will be tasked with the massive challenge of setting up two new tax agencies in six months. There is potential for improvement upon the existing tax appeals system, but there is also potential for error and confusion due to the abrupt nature of the changes and the level of discretion given to the tax agencies to detail these changes. These changes raise far more questions than answers for taxpayers and require the participation of taxpayers and their representatives to help shape the new process into one that is fair and efficient.

For example, one issue is timing. Will the OTA be able to provide adequate new rules of practice and form the initial ALJ panels given that it only has until January 2018 for these changes to be implemented? Will taxpayers face any delay in having their cases heard by the OTA?

There are also questions relating to overall fairness. Will the OTA panels consist of ALJs who are mostly former government tax agency lawyers? If so, will those lawyers be able to set aside years of government advocacy and look at cases objectively? Are lawyers with five years of experience sufficiently competent to hear complex tax appeals?

Another question is whether the new system will be efficient. Will the new, more litigation-oriented system make the appeals process more costly? Will taxpayers who had cases pending before the BOE have to start the review and briefing of their case from scratch before the OTA? Will there be a small claims division? Perhaps a pro se program, as exists at the federal level in conjunction with local bar associations, should be instituted to help smaller taxpayers. Will there be a specific time frame, as currently applies to state court judges, for the issuance of a decision upon submission?

The legislature attempted to address some of these questions through cleanup legislation. On September 15, 2017, it passed AB 131. The legislature required, “to the extent applicable and not in conflict, regulations adopted under the jurisdiction of the board to continue in force and apply to all appeals hearings and proceedings.”57 But it also requires the OTA “to amend, repeal or add to the regulations to govern these hearings and proceedings as necessary or proper.” This at least pro-
provides the OTA with an existing regulatory framework to ease the transition for taxpayers and helps the OTA hear appeals sooner rather than later.

To address concerns regarding the ability of unrepresented taxpayers and non-lawyer representatives to prosecute appeals, the clean-up legislation “would require the office to adopt regulations regarding the presentation of evidence and preparation for hearings and proceedings before a tax appeals panel that do not require application of specialized knowledge.”

It is unclear how this will mesh with AB 102’s requirement that the OTA follow APA procedures, or what is meant by “specialized knowledge” as the APA does not require representation by counsel. It is unclear how this will mesh with AB 102’s requirement that the OTA follow APA procedures, or what is meant by “specialized knowledge” as the APA does not require representation by counsel.

Assembly Bill 131 also contains provisions to allay concerns by certified public accountants who questioned whether they would be able to practice before the new panel. Whether these provisions are sufficient to address independence and professional responsibility issues for account representatives remains to be seen, however.

Finally, AB 131 states that appeals conferences—previously conducted by the BOE—will be conducted by the CDTFA, not the OTA. While this was anticipated, it also clarifies some vague language in AB 102.

Although most California taxpayers are likely unaware of the new state tax system, many may be significantly affected now and in the future. The impact will often depend on where taxpayers are currently in the process, and some will be more affected than others. Those who are at the audit or protest stage should consider whether the new evidentiary rules impact how they prosecute these earlier proceedings. Those who are in settlement discussions should consider whether to reassess the risk profiles of their respective cases. Those who have appeals pending before the BOE should reconsider their approach before the new tribunal. No matter the status of a particular case, counsel will need to master the new rules in order to competently advise clients.

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1 REV. & TAX. CODE §§7200 et seq.
2 CAL. CONST. art. XIII, §19, et.
3 Hence, the name “State Board of Equalization.”
4 CAL. CONST. art. XIII, §18.
5 CAL. CONST. art. XIII, §11(g).
6 CAL. CONST. art. XIII, §28 (b).
7 CAL. CONST. art. XX, §22.
8 GOV’T CODE §15600(b).
9 REV. & TAX. CODE §7361(b); GOV’T CODE §15700.
10 REV. & TAX. CODE §20.
11 GOV’T CODE §15674.
12 Id.
13 GOV’T CODE §15609.5.
14 Counsel for the BOE has opined that while ex parte discussions before July 1, 2017, were clearly legal, the individual board members must disclose the communications on the record in public hearings through the rest of the year. The attorney general concluded the opposite in an opinion dated August 4, 2017, holding that the BOE was not required to disclose communications before July 1, the effective date of AB 102.
15 REV. & TAX. CODE §20.
16 Id.
17 GOV’T CODE §15570(b).
18 Id.
19 GOV’T CODE §15674.
20 GOV’T CODE §15670(b).
21 Payroll tax disputes will still be handled separately. The first level of protest is before a single administrative law judge, and the second level is before the California Unemployment Insurance Appeals Board. UNEMP. INS. CODE §§1223, 1224.
22 GOV’T CODE §15679(a)(1).
23 GOV’T CODE §15570(c).
24 GOV’T CODE §15673.
25 GOV’T CODE §15670(e)(1)(A).
26 GOV’T CODE §15670(c)(1)(B).
27 GOV’T CODE §15670(e)(2).
28 Assembly Bill 102 requires the OTA to, “except as otherwise provided in this part, conduct all adjudicative hearings and proceedings under the Administrative Procedure Act.” GOV’T CODE §15674(a)(3).
29 GOV’T CODE §§11425.10, 11512.
30 GOV’T CODE §11445.20.
31 Id.
32 Hearings may be electronically broadcast to comply with this requirement. GOV’T CODE §11425.20. Similarly, BOE hearings are public meetings that have been broadcast online for several years.
33 GOV’T CODE §11513.
34 GOV’T CODE §11513(d).
35 GOV’T CODE §11513(a).
36 GOV’T CODE §11514(a).
37 Id.
38 GOV’T CODE §11507.6.
39 GOV’T CODE §11507.7.
40 GOV’T CODE §11420.10.
42 ABA Model Act §3(b), (c).
43 ABA Model Act §3(g).
44 ABA Model Act §4(a).
45 GOV’T CODE §15677.
46 ABA Model Act §6(a).
47 ABA Model Act §7(e).
49 ABA Model Act §7(e).
50 ABA Model Act §7(e)(1), (3).
51 Section 32 states: “After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.”
53 GOV’T CODE §15675.
54 Id.
55 CAL. CONST. art. VI, §19.
56 GOV’T CODE §15676.
57 GOV’T CODE §15679.5(a).
58 GOV’T CODE §15679.5(b)(2).
60 AB 102, §2(b), (c).
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2017 LACBA membership will expire on December 31, 2017
THE LAW of unintended consequences is a frequent companion to the legislative process. Such is the case concerning California Corporations Code Section 2000, enacted in 1977. This statute affords a corporation or its nondissenting shareholders the option of avoiding a corporate dissolution by purchasing a dissenting shareholder’s ownership interest. In practice, however, the statute has often proven impenetrable to the lawyers charged with navigating its terms and the appraisers responsible for valuing the shares to be purchased.

In involuntary dissolution, if one-half of the board of directors or one-third of the shareholders (excluding shareholders who personally participated in the alleged wrongdoing) files a claim for involuntary dissolution of a corporation,1 or, alternatively, in voluntary dissolution, if 50 percent of the shareholders elect to voluntarily dissolve a corporation,2 under Section 2000, the remaining 50 percent (or possibly lesser percentage in an involuntary dissolution) may avoid dissolution by acquiring, for cash, the shares of the parties initiating that action. On its face, this process seems straightforward; however, the legislature requires that the acquired shares be purchased at “fair value.” This is an appraisal metric foreign to most appraisers and the corporate world at large, and one that can, and sometime does, wreak havoc for clients, lawyers, and appraisers navigating the often complex terrain of shareholder disputes in the context of dissolution.3

Section 2000 and the buyout process that it prescribes raise a myriad of issues, including, but not limited to 1) deciding whether to opt for a Section 2000 valuation/buyout, 2) selecting appraisers and obtaining a court order appointing these appraisers, 3) evaluating whether to challenge the appraisal process and the findings of the appraisers after the report is completed, and 4) explaining what may transpire after the appraisal report is issued, specifically whether and how to request an evidentiary hearing concerning the report’s findings. Any client facing a prospective dissolution—voluntary or involuntary—must be aware of the protections and risks in opting to acquire shares in lieu of dissolution. The result is a tale of caution and lawyerly restraint in advising clients on a complicated process in which success and failure can sometimes be difficult to distinguish.

Taking the Section 2000 Leap

Section 2000, and its related statutes, Sections 1800 and 1900, generally come into play when there is a dispute or deadlock by Robert M. Heller and Todd M. Lander

A fair value appraisal of shares required under California Corporations Section 2000 in shareholder buyouts is quite different from a fair market value appraisal

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between shareholders resulting in litigation and possibly even claims for involuntary dissolution. One common scenario, for example, is the sudden and unannounced departure of a prominent shareholder. This most often involves closely held corporations with two or more equal shareholders in which one of them surreptitiously plots his or her separation from the business and abruptly—without advance notice—secretly decamps to a new and directly competitive business. The remaining shareholder, usually stunned and harboring a sense of betrayal, moves to protect the business and challenge the departing shareholder’s conduct, particularly if that departure involves the taking of corporate opportunities and other assets. Other scenarios occur when the shareholders or board are deadlocked or accusations of fraud or mismanagement arise. In these situations, litigation often ensues, with claims and cross-claims asserted by the now competing shareholders, frequently including derivative and direct counts for wrongful conduct.

In the midst of this already contentious environment, a shareholder (or group of shareholders) may seek to dissolve the corporation that is the corpus of the dispute. The mechanics of initiating dissolution are not complicated. Under Section 1900, 50 percent of the shareholders may file with the secretary of state to voluntarily dissolve the corporation. Alternatively, Section 1800 permits one-half or more of the directors or one-third of the shareholders to file a lawsuit for involuntary dissolution.

Involuntary dissolution is not self-executing, however, and Section 1800 demands that the filing shareholder allege that one of the following four delineated grounds for involuntary dissolution exists: 1) the business has been abandoned, 2) the directors are deadlocked, 3) the shareholders are deadlocked, or 4) there is fraud or mismanagement involving the company. Based on their decisions, courts consider this form of dissolution a drastic remedy and view these claims with a critical eye; consequently, they impose a heavy burden on those seeking to implement it.

To Dissolve or Not

Against that backdrop, shareholders faced with dissolution confront a difficult dilemma—whether to allow the company to dissolve, fight dissolution on the merits, or acquire the filing party’s shares to maintain the existence of the corporation. The last option is superficially appealing but it is also a potential minefield and requires lawyers to advise their clients on its pros and cons.

At least three issues should be addressed at the outset of the process. First, Section 2000 is unambiguous that the purchase price must be paid in cash; the statute does not permit a structured payment or a payment-in-kind arrangement. Accordingly, before considering proceeding down this path, the client must be certain it has or will have the funds to buy the filing shareholder’s shares when the time arrives to do so. If the client does not have the money or is uncertain that it will have the cash, Section 2000 serves more as a false panacea than an escape from dissolution. Moreover, if the acquiring shareholder initiates this process and is unable to see it through to completion, this can have severe consequences, including certain dissolution of the corporation and liability for payment of all appraisers’ fees and opposing party’s attorney’s fees in connection with the Section 2000 proceeding.

Second, the fair value evaluation, which is distinctly different from “fair market value,” precludes a minority or noncontrolling interest discount. This means that the acquiring shareholder(s) is (are) compelled to pay a purchase price predicated strictly on the filing shareholder’s percentage interest in the company. That proscription may inversely increase the purchase price and should inform the client’s determination of whether it has the financial wherewithal to purchase that shareholder’s shares.

Third, there is the obvious but sometimes unasked question of whether the time, expense, and risks of a Section 2000 proceeding are justified under the circumstances. In other words, does the business have sufficient value to justify the time and expense of valuing and purchasing the filing shareholder’s shares? If not, defending the lawsuit on the merits or permitting dissolution may be the wiser course of action.

If these various issues are addressed and resolved in favor of acquiring the filing shareholder’s shares, the next question is whether the parties can agree on a price for those shares. If so, the purchaser simply proceeds in accordance with that agreement. If not—and a meeting of the minds on the purchase price is a rarity—the purchaser may exercise its right of election to acquire the filing shareholder’s shares under Section 2000(b). This requires that a bond be posted “with sufficient security to pay the estimated reasonable expenses (including appraisers’ and attorneys’ fees) of the moving party if such expenses are recoverable under subdivision (c).”

The mechanics of initiating a Section 2000 proceeding are straightforward. In an involuntary dissolution proceeding, the purchaser applies to the court to 1) stay the winding up and dissolution proceeding and 2) commence the process of determining the fair value of the shares owned by the party seeking dissolution. (In a voluntary dissolution, the purchaser simply serves notice of election to buy the shares on the other shareholder(s) and files that notice with the secretary of state.) The courts notably lack discretion to deny these applications; if the conditions under Section 2000(b) are met, the statute requires a court to stay the pending dissolution proceedings in favor of valuation.

This right comes at a price, however. The appraisal process is a special proceeding and is assigned priority over any existing litigation between the shareholders, irrespective of whether that litigation extends beyond the subject of dissolution. If the shareholders have filed direct or derivative claims seeking damages or other remedies, the claims will be stayed or otherwise relegated in priority until the Section 2000 proceeding is completed. Thus, taking the example above when a 50 percent shareholder suddenly leaves without notice, if the purchasing shareholder is invested in prosecuting litigation against that shareholder, the litigation likely will be stayed until the appraisal of the shares is complete and the court enters its decree.

Selection of Appraisers

Once the Section 2000 proceeding is initiated, the most critical component of the appraisal process follows immediately: the selection of appraisers and the negotiation and entry of the court order appointing them. The statute provides that the “Court shall appoint three disinterested appraisers to appraise the fair value of the shares owned by the moving parties, and shall make an order referring the matter to the appraisers so appointed for the purposes of ascertaining such value.” The order “shall prescribe the time and manner of producing evidence, if evidence is required.” As the statute suggests, this forms a roadmap for the appraisal process.

In selecting the appraisers, certain issues must be considered. First, identifying and retaining genuinely impartial and unbiased appraisers is not only required statutorily, but essential for practical purposes. This mandate is intended to foster a panel that works collaboratively and reaches a conclusion that is fair and, hopefully, unanimous. The latter decreases the possibility of a later dispute over the valuation found in the report and may reduce the degree of post-report contentiousness. Thus, selecting a party’s retained expert as an appraiser is almost certainly a bad
idea. Although retained experts are considered disinterested, it needlessly introduces a concern about bias into the valuation and invites the other side to argue that the party-affiliated appraiser is compromised and his or her conclusions concerning valuation are necessarily questionable. The resulting risk also creates a more partisan panel in which one appraiser appears affiliated with a party and the other two diminish the credibility of his or her contribution as a consequence. This circumstance will give rise to additional expense and possibly a muddled and wavering valuation conclusion.

Second, few appraisers have actually participated in a Section 2000 panel (particularly in the context of litigation in which the matters to be valued will likely include claims—both direct and derivative), emphasizing the importance of the vetting process. The peculiarity of Section 2000’s valuation metric—i.e., fair value—is material here because many appraisers have never conducted an analysis based on this standard. Many do not recognize the distinction between this and the fair market value standard governing most of their work. These distinctions are considerable; therefore, the safest course is selecting appraisers with Section 2000 experience (especially in the litigation context).

The order appointing appraisers must also be drafted with great care because it prescribes the manner in which the appraisers will proceed and, if the parties agree, any evidentiary hearing concerning the resulting report as there is no absolute right to a hearing after the report is issued. A handful of practical considerations deserve particular attention. For example, this includes the parties’ right to communicate with the appraisers (and the manner of doing so), the appraisers’ ability to request and receive information from the parties, how the appraisers will address the claims in the litigation (when there are assets or liabilities that must be factored in), and whether the panel will prepare one or multiple reports. If each of these issues is not clearly addressed in the order, the risk of a compromised process—and the court’s ultimately rejecting the report—increases.

A hypothetical scenario demonstrates the risk. The parties neglect to specify in the order what communications with the appraisers are or are not permissible. After the report is issued, it is disclosed that one party had ongoing communications with one or two of the three appraisers and that their conclusions trumped those of the third appraiser, favoring the party with whom they communicated. The other party, feeling prejudiced, then disputes the report and contends that the appraisers were influenced by the ex parte communications. Although it is not entirely certain how a court would respond under these circumstances, the risks of a tainted and rejected report are increased. On the other hand, if the order had explicitly permitted these communications, and one party merely exercised its right to communicate while the other demurred, the report would likely be shielded from scrutiny.

Setting practical considerations aside, legal concerns must also be addressed. If any derivative claims are pending, the claims are an asset of the corporation being appraised and must be considered as part of the fair value evaluation. The order should specify that any such claims must be valued; otherwise, the court may order a further report and convene a hearing to resolve the issue. Similarly, any direct claims for damages against the filing shareholder, claims against the corporation, or claims for indemnity of officers or directors should be delineated or identified and directed to be considered by the appraisers. Less is not more in this context—it simply invites greater scrutiny later.

The Appraisal Process

If the order is properly drafted, it should be comprehensive and detailed, leaving little to the discretion of the appraisers aside from the specific task of assessing and valuing the company and the filing shareholder’s interest. Once the order is entered and the matter is handed over to the appraisers, the task turns to identifying and interviewing qualified appraisers. The nuances of the fair value determination are many and sophisticated, and experienced appraisers are essential to ensure that client interests are appropriately protected during the appraisal.

Section 2000(a) directs that “fair value shall be determined on the basis of liquidation value as of the valuation date but taking into account the possibility, if any, of the sale of the entire business as a going concern in a liquidation.” On its face, the statutory language is hardly precise, but the courts have provided some clarity. As the court of appeal explained, Section 2000 “necessarily requires that the appraisers contemplate a hypothetical sale scenario: a sale of the entire corporation, in a liquidation setting, on the valuation date. Further, since the corporation will sometimes be closely held, ‘there will be no actual market value or any actual cash sales by which the market value could be determined. Therefore, the value to be determined must necessarily be a constructed or hypothetical market value at which the hypothetical willing seller would sell and the hypothetical willing buyer would purchase.” The hypothetical value should not be presumably guided by the prospect of future competition from the selling shareholder. As the appellate court observed, the “goodwill of a business is the indivisible property of the corporation and the value of that asset must be reflected in the fair value determination.” In sum, appraisers must assume noncompetition in this hypothetical construct.

Accordingly, the appraisers must create a clear prospective transaction under the statute, i.e., a business capable of being sold as a going concern, though in a liquidation context, with a willing buyer and willing seller where the seller will be subjected to a noncompete covenant after the close of the transaction. These assumptions serve the statutory purpose and corollary obligation on appraisers to “consider the manner in which the parties to such a hypothetical sale are most likely to maximize their return.”

Reality, however, can intrude on this example. If the corporation cannot feasibly be sold as a going concern, the court of appeal held that Section 2000 “necessarily anticipates the piecemeal valuation of the corporation’s existing assets and liabilities as of the valuation date, without consideration of any winding-up period.” When the departing shareholder/seller is already in competition—as in the secret departure scenario—it appears the appraisers may dispense with the assumptions underlying the going concern hypothesis and proceed to a piecemeal analysis.

Further, the fair value approach precludes any minority or noncontrolling discount. The rationale supporting this prescription—as one appellate court noted—is that the purchasing shareholder already has control, thus the question becomes irrelevant. Whatever its basis, a client considering a purchase should evaluate this factor because its inherent facility increases the purchase price.

Finally, the appraisers must consider any direct or derivative claims pending between the shareholders because they are assets or liabilities of the corporation and must be accommodated in the valuation. This is a potentially complex circumstance for lawyers and appraisers to confront—a complexity that is beyond the scope of this article. Nevertheless, this consideration provides additional support for the necessity of engaging in a thorough interview of appraisers to ensure that they are capable of addressing this facet of the valuation.

Because of judicial precedents, the con-
tours of the fair value analysis is less byzantine than the statute might otherwise suggest. The appraisers must assume, if feasible, a going concern sale with no reduction based on prospective competition and without any minority discount. If a going concern sale is not practical, a piecemeal liquidation of assets prevails with the understanding that no discount is imposed by the seller's lack of control. While the mechanics of the analysis are the province of the appraisers, a lawyer's command of these standards is essential to protecting client interests because it is incumbent on counsel to challenge any report not conforming to the statutory requirements.

Post-Appraisal Hearing
Once the appraisers' reports have been lodged with the court, the parties' rights are dependent on how the order first appointing the appraisers was drafted.23 If the order provides for an evidentiary hearing to examine the methodology employed by the appraisers, the court should hold one. Otherwise, if it was omitted in the order, the parties have no statutory right to a hearing.24 A hearing is the only opportunity to question one or more of the appraisers in the court's presence. At the same time, Section 2000 is a summary proceeding, and the parties may not depose the appraisers or otherwise take evidence. The right to test the appraisers' work is, in short, a limited one in time and scope.

On the other hand, a court is not bound by the appraisal report.25 It may decide the matter de novo, order further information from the appraisers, require an amended report, and consider additional evidence. This is not to suggest that courts frequently exercise these rights, but there are examples in which courts have intervened to refine and supplement the record.26 The parties may, of course, attempt to facilitate intervention by moving to have the report vacated, amended, or simply not confirmed. The decision rests with the court in its sound discretion.

In contrast, a court does not have discretion as to the mechanics of the purchase of the shares. If the court issues a decree permitting the purchase based on the appraised price, it may not impose any conditions on the purchaser's right to buy.27 However, a court cannot compel the purchase. Instead, the decree will provide that if the purchase price is not paid by a specified date, the corporation will be wound up and dissolved. If the shares are purchased as intended, the dissolution is avoided and the company continues.

The question remains as to what would happen if the prospective buyer concludes that the fair value is too high or cannot raise the required cash payments and thus ultimately decides not to proceed with the purchase of the shares. First, in an involuntary dissolution, the purchaser defendant may no longer contest the grounds for involuntary dissolution and a judgment on that count will follow. Second, the court can and will order judgment on the bond. More importantly, the purchaser may be responsible for the seller's costs, including appraisers' and attorneys' fees, regardless of whether they exceed the value of the bond.28 In this scenario, the purchasing shareholder not only will face the disposition (dissolution) that he or she will have expended significant time and money ostensibly to avoid but also will be compelled to pay the full costs incurred by the selling shareholder regardless of whether the bond was sufficient to satisfy these costs.

Avoiding Risks
Section 2000 offers clear benefits to clients hoping to avoid dissolution but also imposes certain risks. These risks must be assessed at the outset of the process in order to avoid proceeding down an expensive, time-consuming path that may lead only to wasted time, significant cost, and defeat. A few prophylactic steps may help avoid these risks. First, lawyers need to fully grasp the mechanics of the process—including its consequences—and provide clients with a realistic analysis of the scope, time, and expense involved. Equally important, clients need to make an honest assessment as to whether the costs and risks of a Section 2000 appraisal and acquisition are justified by the value of the corporation itself. This may include, for example, retaining a consulting expert to conduct a short form appraisal of the fair value of the company and guide the client on the utility of electing a buyout under the statute. The appraisal can support a more comprehensive cost-benefit analysis, which affords the client an opportunity for greater informed consent in initiating the process. Perhaps most significantly, the client (buyer) must have the hard cash to fund the purchase as required by Section 2000.

All of which is to say, again, that all those involved—from the lawyer to the client to the court-appointed appraiser—must understand what is involved before choosing to embark down the path of a Section 2000 proceeding. Hope may spring eternal when the process begins, but reality could bite at the end of it.

1 CORP. CODE §1800
2 CORP. CODE §1900

1 In contrast, limited liability companies are not governed by the fair value standard. Section 17707.03 of the Corporations Code provides that a member's interest in a limited liability company is valued at the more widely understood fair market value.
2 If there are allegations of fraud or mismanagement—as there almost invariably are—the requirement that one-third of shareholders are needed to initiate involuntary dissolution excludes those who are accused of the mismanagement. Thus, if a corporation has four equal shareholders and three are alleged to have committed malfeasance in running the business, the fourth, representing only 25 percent of the shares, may nonetheless file a claim for involuntary dissolution because he or she represents more than one-third of the shares excluding those shareholders alleged to have engaged in fraud or mismanagement. CORP. CODE §1800(a)(2).
5 Brown v. Allied Corrugated Box Co., Inc., 91 Cal. App. 3d 477, 486-87 (1979); see also CORP. CODE §1800, cmt.
6 The bond is another potential peril. The purchaser party must post it to cover the costs to the dissolver in the event the purchaser ultimately declines to go forward with the acquisition—the purchaser can decide to back out after appraisal of the shares. The purchaser's obligation, however, is not limited to the bond amount. It must instead pay all the costs and fees, even if they exceed the amount of the bond. See v. Pacific Health Servs., 179 Cal. App. 4th 522, 531 (2009).
7 CORP. CODE §2000(b).
8 CORP. CODE §2000(c).
9 Id.
10 The most typical mechanism for selecting an appraisal panel is that each side nominates its own appraisers, and these two then identify a third. The statute does not compel any particular methodology, but this is the most common and sensible means of proceeding.
11 See, e.g., Cotton v. Expo Power Sys., Inc., 170 Cal. App. 4th 1371, 1380-1381 (2009) (appraisers indicated in report that they did not attempt to value the plaintiff's derivative claims, and the "report therefore failed to appraise the value of a potential asset of the corporation").
12 Id.
13 The valuation date for purposes of the appraisal is the date of election in a voluntary dissolution and the date the complaint is filed in an involuntary dissolution. See CORP. CODE (2000). On motion and for good cause, the date can be changed.
14 Id.
15 Id.
16 Id.
18 Id. at 532.
21 See Brown, 91 Cal. App. 3d at 487.
24 Id.
25 Id.
26 Id.
Joseph is a U.S. Army veteran. After his service, Joseph struggled with drug addiction and homelessness. During this time, he received several traffic tickets and warrants, which could have prevented him from pursuing a career in social services. He hopes to help young people who also suffer from addiction, as he did.

Joseph came to the LACBA Veterans Legal Services Project (Veterans Project) to address the outstanding tickets and warrants that would prevent him from getting a job in social work after graduation. A Veterans Project volunteer advised Joseph on how to get a list of all his outstanding tickets and the steps he could take to clear his record. With help from the Veterans Project, Joseph was able to clear his tickets and warrants and now has a stable life: sobriety, housing and a career in social work.

November 11 is Veterans Day and LACBA salutes the men and women who have sacrificed so much for our country.

Did you know?

- Los Angeles has:
  - The highest concentration of Veterans in the country
  - 4,828 homeless Veterans
  - A Veteran unemployment rate of 10.5%, double the non-Veteran rate and far outpacing national unemployment numbers
- Legal barriers to employment continue to be among the most under met needs identified by Veterans
- Specifically, assistance with driver’s licenses and clearing tickets and warrants consistently rank within the top 10 of legal needs

The Veterans Project clinic at Bob Hope Patriotic Hall in downtown Los Angeles is held the third Wednesday of each month. The clinic assists Veterans in removing barriers to employment, including clearing outstanding tickets and warrants and clearing criminal records.

Make a donation today to support our Veterans at www.LACBA.org/donate

To learn more about the LACBA Veterans Legal Services Project, visit www.LACBA.org/veterans
by Ashley B. Jordan

THE LANGUAGE OF LOSS

Anti-Montrose provisions may significantly impact commercial general liability coverage, especially construction defect and products liability claims

Sometimes called known loss, “anti-Montrose” provisions are typically found in an insurance policy’s insuring agreement and aim to collapse coverage for a continuing/progressive injury/damage into a single policy year. These provisions have been included since the 2001 revision of the Insurance Services Office (ISO) standard policy, (form CG 00 01).1 (See “Anti-Montrose Provisions” sidebar on page 26.)

The California Supreme Court’s seminal decision in Montrose Chemical Corporation v. Admiral Insurance Company2 was the impetus for the crafting of the language. In Montrose, the issue was whether a commercial general liability (CGL) carrier was obligated to defend lawsuits alleging continuous and progressive damage and injury resulting from hazardous chemicals the insured manufactured before and during the policy period at issue. The California Supreme Court answered the question in the affirmative, ruling that with respect to successive third-party liability policies, “bodily injury and property damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods.”3

In other words, the court ruled the “continuous injury” trigger applies to third-party liability cases involving continuous or progressively deteriorating losses.

The court also determined, “with respect to the ‘loss-in-progress’ rule codified in Insurance Code sections 22 and 250,”4 knowledge of prior or progressive bodily injury or property damage would not defeat coverage under a CGL policy “as long as there remains uncertainty about damage or injury that may occur during the policy period and the imposition of liability upon the insured, and no legal obligation to pay third party claims has been established.”5 The court emphasized the requirement in Insurance Code Sections 22 and 250 that the loss be “unknown” or “contingent” is stated in the disjunctive. Accordingly, the court interpreted Sections 22 and 250 to mean that “all that is required to establish an insurable risk is that there be some contingency.”6 The court continued: “Even where subsequent damage might be deemed inevitable, such inevitability does not alter the fact that at the time the contract of insurance was entered into, the event was only a contingency or risk that might or might not occur within the term of the policy.”7 Thus, so long as liability was uncertain, a policyholder would be able to claim coverage under successive policies—multiplying the total amount of

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available coverage.

The 2001 ISO revisions sought to limit Montrose by collapsing coverage for a continuous/progressive injury/damage into a single policy year, thus shielding the insurer from claims against successive policies.

**Recent Cases**

California courts have and continue to address the implications of anti-Montrose language in unpublished opinions and district court orders. These decisions offer guidance as to how the courts are analyzing these provisions in the context of carriers’ defense and indemnity obligations. In *St. Paul Fire & Marine Insurance Company v. Insurance Company of the State of Pennsylvania,* the Insurance Company of the State of Pennsylvania (ICSP) sought reimbursement from other carriers for its payment toward settlement of a construction defect action. The ICSP moved for summary judgment against Zurich American Insurance Company, arguing Zurich wrongly contributed toward settlement under its 2006-2007 policy, which carried a $1 million limit, rather than its 2012-2013 policy, which carried a $2 million limit. Zurich’s policies covered the time period 2006 to 2014. The parties did not dispute that the insured’s negligent actions as a housing project subcontractor caused continuous/progressively deteriorating property damage during the entire 2006-2014 time frame.

The 2012-2013 Zurich policy contained the standard ISO anti-Montrose provision.9 (See Anti-Montrose Provisions sidebar below.) The insured was held liable in the underlying action for having caused interior damage to the bathrooms caused by improper installation of green board10 and exterior damage caused by improper stucco installation. The ICSP claimed the insured did not have knowledge of the exterior damage until after the inception of the 2012-2013 Zurich policy.

The court denied the ICSP’s motion, finding a triable issue of material fact as to whether the insured was “aware by any other means” (subsection d(3) of the anti-Montrose provision) of the exterior property damage prior to the 2012-2013 Zurich policy. The court stated there was record evidence supporting both carriers’ positions: On the one hand, the communications from [the project’s general contractor] to [the insured] only discussed an investigation into “potential exterior defects” and did not provide knowledge specifically of any property damage. On the other hand, although the Court doubts that notice of “potential exterior defects” constitutes knowledge of property damage, [the insured’s] responses to interrogatories specifically state that “[The insured] became aware of allega-

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**Anti-Montrose Provisions**

b. This insurance applies to “bodily injury” and “property damage” only if:

(1) Prior to the policy period, no insured listed under Paragraph 1. of Section II—Who is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. Of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.

d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:

(i) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;

(ii) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or

(iii) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or begun to occur.2

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1 Some carriers are using language similar, but not identical, to this ISO wording to limit coverage for continuous/progressive injuries/damages.

2 See Commercial Gen. Liability Coverage Form CG 00 01 10 01, ¶1.b.[3], 1.c.-d.
MCLE Test No. 272

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

1. “Anti-Montrose” language is usually found in the “Conditions” section of an insurance policy.
   True.
   False.

2. Anti-Montrose provisions have been included in commercial general liability insurance policies since the 2005 revision of the Insurance Services Office standard policy (form CG 00 01).
   True.
   False.

3. Anti-Montrose language was drafted in response to the California Supreme Court’s decision in Montrose Manufacturing Corporation v. Liberty Insurance Co.
   True.
   False.

4. In Montrose, the court ruled that with respect to successive third-party liability policies, bodily injury and property damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods.
   True.
   False.

5. In St. Paul Fire & Marine Insurance Co. v. Insurance Co. of the State of Pennsylvania, et al., the court found a triable issue of material fact as to whether the insured was “aware by any other means” of the exterior property damage prior to the 2012-2013 Zurich policy.
   True.
   False.

   True.
   False.

7. In State v. Continental Insurance Co., et al., the court determined the insured could “stack” its policies.
   True.
   False.

8. In St. Paul Fire, the court ruled an anti-stacking provision did not preclude the insured from stacking successive commercial general liability policies to cover continuing/progressive property damage.
   True.
   False.

9. In Atain Specialty Insurance Co. v. Sierra Pacific Management Co., et al., the court determined the commercial general liability policies’ plain language prohibited stacking.
   True.
   False.

10. Continuous or progressive injury and damage exclusions preclude coverage for all previously occurring bodily injury/property damage known to the insured.
    True.
    False.

11. In Saarman Construction, Ltd. v. Ironshore Specialty Insurance Co., the court granted the carrier’s motion for summary judgment, ruling paragraph 1 of the continuous or progressive injury and damage exclusion precluded potential coverage and, in turn, the carrier’s defense obligation.
    True.
    False.

12. American Zurich Insurance Co., et al v. Ironshore Specialty Insurance Co. involved an action in which defending carriers alleged a nondefending commercial general liability carrier wrongly refused to defend their mutual insureds against construction defect lawsuits based on a continuous or progressive injury and damage exclusion.
    True.
    False.

13. When interpreting an insurance policy in California, the ordinary rules of contractual interpretation apply.
    True.
    False.

14. In California, a policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.
    True.
    False.

15. California law dictates that coverage provisions are interpreted narrowly so as to afford the greatest possible protection to the insurer.
    True.
    False.

16. In California, the duty to defend is excused only when the third-party complaint cannot by any conceivable theory raise a single issue that could bring it within the policy coverage.
    True.
    False.

17. Under California law, insurers are not obligated to defend the entire action if the action includes uncovered and potentially covered claims.
    True.
    False.

18. To determine whether an insurer owes a duty to defend, California courts will compare the allegations of the complaint with the terms of the policy.
    True.
    False.

19. California law dictates that allegations in the complaint are liberally construed toward potential coverage.
    True.
    False.

20. Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insurance company’s favor.
    True.
    False.

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

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ANSWERS

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

1. □ True □ False
2. □ True □ False
3. □ True □ False
4. □ True □ False
5. □ True □ False
6. □ True □ False
7. □ True □ False
8. □ True □ False
9. □ True □ False
10. □ True □ False
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13. □ True □ False
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15. □ True □ False
16. □ True □ False
17. □ True □ False
18. □ True □ False
19. □ True □ False
20. □ True □ False
steel at the onshore facilities until after the policy’s inception. This testimony alone creates an issue of fact about the [insured’s] knowledge.16

It further ruled that an issue of fact remained regarding whether the corrosion to the underlying steel at the onshore facilities and pipelines was a “continuation, change or resumption” of the known corrosion to the offshore facilities (pre-policy inception):17

[AHAC] argues that “continuation, change, or resumption” refers to the same type or same cause of damage, regardless of how widespread or physically separated that damage is. Under this definition, [AHAC] argues that the later corrosion at the onshore facilities and pipelines qualifies as a “continuation, change, or resumption” of the offshore property damage because the same paint continued to fail in the same ways giving rise to the same type of damage. However, even assuming that [AHAC’s] interpretation of the policy is correct, there are issues of fact as to whether the corrosion at the various locations shared a common cause.18

In sum, because it was possible the damage to the underlying steel at the onshore facilities and pipelines was neither known to the insured pre-policy inception nor a “continuation, change or resumption” of the known offshore facility damage, the anti-Montrose provision did not preclude AHAC’s duty to defend.

Restrictive Endorsements
The insurance industry has also drafted noncumulation of liability/anti-stacking endorsements in an effort to limit the effect of Montrose, by restricting liability for continuing/progressive injuries/damages to the limits of one policy. Differently manuscripted versions of these endorsements have appeared in CGL policies.19 One such version provides:

If the same occurrence gives rise to... property damage—which occurs partly before and partly within any annual period of this policy, the limit of liability of this policy shall be reduced by the amount of each payment made by [the carrier] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof.20

Another states:
Regardless of the number of insured persons, injured persons, claims, claimants or policies involved, our total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability for Coverage X shown on the declarations page. All bodily injury, personal injury and property damage resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one loss.21

In State v. Continental Insurance Company,22 the California Supreme Court addressed whether excess carriers were obligated to indemnify for an action holding the insured liable for continuous and progressive damage. The damage stemmed from the insured’s operation of a hazardous waste site and spanned numerous successive policy periods.

The court determined that each carrier was required to indemnify for all the damage, subject to its policy limits, as long as some of the continuous/progressive damage occurred during its policy period (the “all sums” principle). The court also concluded the insured could “stack” its policies—i.e., include “the insurance coverage from different policy periods to form one giant ‘uber-policy’ with a coverage limit equal to the sum of all purchased insurance policies”—because the policies did not contain anti-stacking language. In other words, each policy was required to respond to the claim (up to its limits) and upon exhaustion of one carrier’s limits, indemnity could be sought from the other carriers. The court emphasized that “standard policy language permits stacking” but noted “an insurer may avoid stacking by specifically including an ‘anti-stacking’ provision in its policy.”24

Several California federal courts recently grappled with these provisions. In St. Paul Fire, the court concluded that an anti-stacking provision precluded the insured from stacking its successive CGL policies to cover continuing/progressive property damage. The provision stated in relevant part:

11. Two or More Coverage Forms or Policies Issued by Us
If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same “occurrence,” the maximum Limit of Insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy and only that limit shall apply to that occurrence....25

The court ruled that because the policies with the highest limits within the series afforded $2 million limits, the aggregate limit for all the policies within the series, per the anti-stacking provision, would be $2 million.

In Atain Specialty Insurance Company v. Sierra Pacific Management Company,26 California Capital Insurance Company (CCIC) sought a declaration that coverage under its successive CGL policies was limited to $1 million per an alleged anti-stacking provision. Since CCIC paid $1.9 million to settle a lawsuit involving a continuous/progressive bodily injury, the carrier also sought $900,000 in reimbursement from its insureds. Each of the six policies afforded $1 million per occurrence and $2 million aggregate limits. The parties disputed whether the following section in the policies constituted an anti-stacking provision:

D. Liability and Medical Expenses
Limits of Insurance
....
2. The most we will pay for the sum of all damages because of all:
a. “Bodily injury,” “property damage” and medical expenses arising out of any one “occurrence”....is the Liability and Medical Expenses limit shown in the Declarations.27
That section also stated “the limits of this policy apply separately to each consecutive annual period and to any remaining period of less than 12 months.”28

The court granted the insureds’ motion for summary judgment against CCIC, reasoning the policies’ plain language did not prohibit stacking:

True, each policy states that its per-occurrence coverage is capped at $1 million, but the policies do not state that the per-occurrence limit applies across policy periods. Just the opposite: as the [insureds] point out, each policy refers to its per-occurrence limit on an annual basis. For example, each policy states “the limits of this policy apply separately to each consecutive annual period.” That language makes plain that the policy limits “apply separately” to each policy period. That is precisely the point of stacking.29

The court stated even if the policies were ambiguous, the insureds still prevailed per California principles of insurance policy interpretation; the carrier failed to clearly prohibit stacking. The court concluded the insureds could stack their limits, and that the amount of the settlement thus did not exceed their coverage.

CP Exclusions
Commercial General Liability carriers are also including manuscript continuous or
November 17, 2014

Jack Trimmerco & Associates
Polygraph / Investigations, Inc.
9454 Wilshire Blvd., 6th Floor
Beverly Hills, CA 90212

Dear Mr. Trimmerco:

In the winter of 2010, an environmental disaster occurred off the west coast of the island of Oahu in the state of Hawaii. Heavy rainfall caused millions of gallons of contaminated water—including toxic soil, trash and human medical waste—to pour from the Waimanalo Gulch Sanitary Landfill into the ocean waters. Federal officials launched an investigation into the landfill’s operator, Waste Management of Hawaii (“WMH”). The U.S. Attorney’s Office alleged there was a conspiracy between members of the WMH and its environmental consulting firm to submit false information to regulators about the adequacy of the landfill’s storm water management system.

I represented an employee of the environmental consulting firm hired by WMH to perform construction quality assurance. During the investigation, all evidence pointed to the fact that my client was innocent of any wrongdoing. Nevertheless, the Assistant U.S. Attorney insisted that my client pass a polygraph, or else risk being indicted as a participant in the criminal conspiracy.

In 2012, you conducted a polygraph examination of my client, unequivocally establishing that no deception was indicated. The Assistant U.S. Attorney then demanded that my client pass a polygraph examination administered by FBI agents in Honolulu. The FBI alleged my client failed their polygraph examination, but you responded with a thorough and compelling critique demonstrating how the FBI’s polygraph examination was deficient and should be disregarded.

Last year, I was notified by the U.S. Attorney’s Office of the District of Hawaii that their office would not seek an indictment of my client, nor would any charges against him be pursued. I believe your carefully and competently constructed polygraph examination and critique of the FBI’s polygraph results played a central role in our advocacy that prosecution should be declined in my client’s case.

Sincerely,

[Signature]
LAW OFFICES OF BROOK HART
A Law Corporation

BROOK HART

Jack Trimmerco & Associates
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9454 Wilshire Blvd., 6th Floor, Beverly Hills, CA 90212
progressive injury and damage exclusions (CP Exclusions)\textsuperscript{30} in their policies to counter the effect of Montrose, for example:

This insurance does not apply to any damages because of or related to “bodily injury,” “property damage,” or “personal and advertising injury”:

1. which first existed, or is alleged to have first existed, prior to the inception date of this policy; or
2. which are, or are alleged to be, in the process of taking place prior to the inception date of this policy, even if the actual or alleged “bodily injury,” “property damage,” or “personal and advertising injury” continues during this policy period; or
3. which were caused, or are alleged to have been caused, by the same condition which resulted in “bodily injury,” “property damage,” or “personal and advertising injury” which first existed prior to the inception date of this policy.

We shall have no duty to defend any insured against any loss, claim, “suit,” or other proceeding alleging damages arising out of or related to “bodily injury,” “property damage,” or “personal and advertising injury” to which this endorsement applies.

This exclusion, unlike the anti-Montrose/know loss language, excludes all previously occurring bodily injury or property damage or both regardless of the insured’s knowledge. It thus may operate to severely limit or eliminate coverage traditionally afforded by CGL policies, as only a single policy would respond to a single injury or instance of damage.

Two recent California federal decisions illustrate the sweeping effect these exclusions may have on coverage. Saarman Construction, Ltd. v. Ironshore Specialty Insurance Company\textsuperscript{31} involved an action by an insured against its CGL carrier, claiming the carrier wrongly refused to defend it against a construction defect lawsuit based on the policy’s CP Exclusion. The CGL policy covered the time period June 30, 2010 to June 30, 2011 and contained the following CP Exclusion:

This insurance does not apply to any “bodily injury” or “property damage”:

1. which first existed, or is alleged to have first existed, prior to the inception of this policy. “Property damage” from “your work,” or the work of any additional insured, performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such “property damage” is sudden and accidental and takes place within the policy period [sic]; or
2. which was, or is alleged to have been, in the process of taking place prior to the inception date of this policy, even if such “bodily injury” or “property damage” continued during this policy period; or
3. which is, or is alleged to be, of the same general nature or type as a condition, circumstance or construction defect which resulted in “bodily injury” or “property damage” prior to the inception date of this policy.\textsuperscript{32}

The court granted the carrier’s motion for summary judgment, ruling that paragraph one of the CP Exclusion precluded potential coverage and, in turn, the carrier’s defense obligation. The court reasoned that because the insured did not dispute that it finished its work by 2007, or at the latest several years before the policy incepted, the CP Exclusion “automatically deems that damage to have first existed prior to the policy inception” and precluded a defense.\textsuperscript{33}

The court rejected the insured’s argument that the CP Exclusion was unenforceable because it rendered the policy ambiguous as to trigger of coverage, reasoning the endorsement containing the CP Exclusion clearly and unambiguously modified the policy. The court also rejected the insured’s argument that the CP Exclusion was unenforceable because it was an undisclosed exclusion of completed operations coverage. It concluded the CP Exclusion did not render completed operations coverage illusory and the carrier properly warned the insured via language in the policy that the CP Exclusion modified completed operations coverage.

American Zurich Insurance Company, et al. v. Ironshore Specialty Insurance Company\textsuperscript{34} involved an action by defending CGL carriers against a non-defending CGL carrier, Ironshore Specialty Insurance Company (Ironshore). The defending carriers alleged Ironshore wrongly refused to defend their mutual insureds (Matt’s Roofing and Sherman Loehr) against construction defect lawsuits based on a CP Exclusion in the Ironshore policies.\textsuperscript{35} The Ironshore policies issued to Matt’s Roofing covered the time period January 1, 2009 to January 1, 2011; the policy issued to Loehr covered the time period October 31, 2009 to October 31, 2010.

The court granted Ironshore’s motion for summary judgment, concluding that the CP Exclusion precluded a defense as to all but one of the lawsuits.\textsuperscript{36} As to the lawsuits against Matt’s Roofing, the court concluded: 1) paragraph one of the CP Exclusion precluded a defense as to several lawsuits filed before the policy inception date, since those plaintiffs, by filing when they did, were aware of the alleged defect/damage pre-policy inception; and 2) paragraphs one and/or two of the CP Exclusion precluded a defense as to other lawsuits in which the complaints alleged that the defect existed at the time the homes were completed and/or purchased (pre-policy inception) and continued to cause damage until the plaintiffs performed repairs, and there were no allegations of “sudden and accidental” damage. As to the lawsuits against Loehr, the court determined paragraphs one and/or two of the CP Exclusion precluded a defense since it was alleged that Loehr completed its work pre-policy inception (thus the defect existed at the time the work was completed and/or the homes purchased) and there were no allegations of “sudden and accidental” damage.

\textbf{Policyholder Defenses}

Although specific defenses will depend on the precise policy language and facts at issue, policyholders have several generally applicable defenses at their disposal.

Each continuing/progressive injury/damage component is analyzed separately. First, such language is unlikely to preclude coverage unless the carrier can demonstrate that the insured was aware of the specific injury/damage for which coverage is being claimed prior to the policy’s inception date.\textsuperscript{37} Second, it is the type of injury/damage that matters—the injuries/damages at issue should be treated separately for purposes of analyzing these provisions under successive policies. In other words, while each injury/damage component may be continuing or progressive in nature, each continuing/progressive injury/damage component should be analyzed separately—the policies require only that each continuing/progressive injury/damage component must commence during one of the policy periods.

If there is a single series of continuing/progressive injuries/damages, the insured can argue the injuries/damages do not share the same cause. California courts have determined “[f]or property damage to be a ‘continuation, change or resumption’ of earlier property damage,...the earlier and later property damage must ‘share the same cause.’”\textsuperscript{38} California principles of insurance policy interpretation dictate the language is inapplicable. In California, when interpreting an insurance policy “the ordinary rules of
contractual interpretation apply.”39 “The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.”40 “Such intent is to be inferred, if possible, solely from the written provisions of the contract.”41 “If contractual language is clear and explicit, it governs.”42 “A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.”43 If the court finds that a policy provision is ambiguous, it will interpret it “against the party who caused the uncertainty (i.e., the insurer) in order to protect the insured’s reasonable expectation of coverage.”44

Coverage provisions are “interpreted broadly so as to afford the greatest possible protection to the insured, [whereas]...exclusionary clauses are interpreted narrowly against the insurer.”45 “Provisions that purport to exclude coverage or substantially limit liability must be set forth in plain, clear and conspicuous language.”46

The language does not preclude a carrier’s duty to defend. Such provisions may not preclude a carrier’s defense obligation, given the broad nature of the duty under California law and the likelihood that most pleadings will not eliminate the possibility that the insured was unaware of the specific injury and/damage at the time the policy incepted.

California law requires an insurer to defend its insured against claims that create even a potential for indemnity.37 The duty to defend is excused only when “the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.”48 Insurers must defend the entire action if there is any potentially covered claim.49 “The determination as to whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy.”50 Extrinsic evidence may defeat the duty to defend only if “such evidence presents undisputed facts which conclusively eliminate a potential for liability.”51 The allegations in the complaint are “liberally construed” toward potential coverage.52 “Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured’s favor.”53

Risk Management
In the more than two decades since the California Supreme Court’s decision in Montrose, the cycle continues: policyholders employ various defenses to avoid application of anti-Montrose and similar language. And when the courts side with policyholders, the insurance industry reacts by drafting new language intended to null the effects of those decisions. Policyholder and corporate counsel should be aware of these provisions and their potential implications, as they may significantly impact coverage available for a given injury/damage. Policyholders associated with various industries are routinely impacted, as carriers frequently cite these provisions to deny coverage for a spectrum of claims—especially construction defect and products liability claims. Counsel should consider advising his or her clients to consult their brokers regarding removing or restricting, to the extent possible, this language.

1 See SCOTT C. TURNER, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES §6:50 (2d ed. 2016) [hereinafter TURNER].
3 Id. at 655.
4 The common law doctrine/rule known as the Known Loss Rule, Known Risk Rule, Loss-in-Progress Rule, or Fortuity Doctrine flows from the principle that insurance covers only contingent and unknown events. California has codified this doctrine/rule. See INS. CODE §§22, 250. A comprehensive discussion of the history and status of this doctrine/rule is beyond the scope of this article.
5 Montrose, 10 Cal. 4th at 655.
6 Id. at 690 (emphasis in original).
7 Id. (emphasis in original).
9 See id. at *9-10.
10 ICSCP conceded the insured had knowledge of the interior damage prior to the inception of the 2012-2013 Zurich policy.
14 See id. at ¶¶ 13.
16 The court determined the record conclusively showed the insured knew of the damage to the underlying steel at the offshore facilities before the policy inception.
17 Ameron, 625 Fed. Appx. at 805.
18 See TURNER, supra note 1, at ¶4:10. The ISO has yet to promulgate a standard noncumulation of liability/anti-stacking endorsement. See id.
22 Id. at 201.
23 Id. at 201-02 (emphasis in original).
25 Montrose, 4th 645 (Cal. 1995).
26 Atain Specialty Ins. Co. v. Sierra Pac. Mgmt. Co., No. 14-cv-00609-TLN-DB, 2016 WL 6568678 (E.D. Cal. Nov. 3, 2016). The appeal of this Order was pending in the Ninth Circuit Court of Appeal as of the date this article was prepared. See Atain Specialty Ins. Co. v. Sierra Pac. Mgmt. Co., No. 16-17221 (9th Cir.).
28 Id.
29 Id. at *5.
30 Also sometimes called the Prior Incident(s) Exclusion, Prior Construction Defects Exclusion, Pre-Existing Injury or Damage Exclusion, Pre-Existing and Progressive Damage Exclusion, or Claims in Progress Exclusion.
32 Id. at *2.
33 Id. at *9. The insured did not contend the damage was “sudden and accidental.”
35 The policies contained the same CP Exclusion as that at issue in Saarman. See Saarman, 2017 WL 312343 at *3.
36 The court denied the parties’ summary judgment motions as to one lawsuit because it did not have the operative complaint, and thus could not determine whether the plaintiffs alleged a “sudden and accidental” occurrence (that may have precluded application of the CP Exclusion).
37 See, e.g., TURNER, supra note 1, at §6:50 (“One point that has been developed somewhat by the courts and commentators to have considered the Montrose Provision thus far is the requirement for enforcement of the provision that the insured be aware of the exact same property damage as that for which the insured later seeks coverage.”).
38 St. Paul Fire & Marine Ins. Co. v. Ins. Co. of the State of Pa., No. 15-CV-02744-LHK, 2017 WL 897437, at *10 (N.D. Cal. Mar. 7, 2017); see also Jardine v. Maryland Cas. Co., Nos. 10-3335 SC, 10-3336 SC, 10-3318 SC, 10-3191 SC, 2011 WL 6778798, at *11 (N.D. Cal. Dec. 27, 2011), aff’d, 532 Fed. Appx. 662 (9th Cir. 2013) (concluding damage caused to front section of south wall was a continuation of damage sustained to rear section of south wall, as the same defective plaster treatment caused the damage to both wall sections).
40 Id.
42 Bank of the W., 2 Cal. 4th at 1264.
44 La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co., 9 Cal. 4th 27, 37 (Cal. 1994).
50 Id. at 1080.
51 Montrose, 6 Cal. 4th at 298-99.
53 Montrose, 6 Cal. 4th at 299-300.
In addition to many new Rules of Professional Conduct, the State Bar has proposed various changes to existing rules, several of which may be controversial or even disruptive.

**THE STATE BAR** of California recently submitted 70 proposed new and amended Rules of Professional Conduct to the California Supreme Court for approval. If approved, these proposed rules would replace the 46 Rules of Professional Conduct that currently govern the conduct of attorneys in California. Several of the proposed rules contemplate controversial or important changes to the current rules or impose new obligations in California. As a result, California attorneys should be aware of these proposed changes.

The California Rules of Professional Conduct apply to all attorneys in California. Failure to comply with them may result in discipline, including being disbarred from the practice of law. Failure to comply in a litigation matter may also result in disqualification from that matter.

All states other than California have rules of professional conduct that are based on the Model Rules of Professional Conduct, which were developed by the American Bar Association. However, California is the only state with its own unique set of rules of professional conduct. The last comprehensive revision of the rules in California was submitted to the California Supreme Court in 1987 and became operative in 1989. Since that time, numerous changes have influenced the practice of law, including technological advances, multijurisdictional practices, and a focus more on the practice of law as a business—all with potential ethical implications.

In 2001 and 2002, the ABA Model Rules were revised, which prompted the board of governors of the California State Bar to appoint a commission to perform a comprehensive review of the Rules of Professional Conduct. After more than a decade of work, however, in 2014, the California Supreme Court granted the State Bar’s request to restart the effort.
In January 2015, a second commission for the revision of the Rules of Professional Conduct (commission) was appointed. The commission began an expedited process, with the goal of submitting proposed rules by the end of March 2017. The commission carefully reviewed the California Rules of Professional Conduct and related law, compared these rules against the Model Rules, and examined how the Model Rules had been adopted and interpreted in other jurisdictions. After soliciting public comment, the commission presented a set of proposed rules to the board of trustees of the California State Bar. The board of trustees then submitted the proposed rules to the California Supreme Court before the March 31, 2017, deadline.

One of the most significant—although nonsubstantive—changes reflected in the proposed Rules of Professional Conduct is a change to the current numbering scheme. The commission determined that the rules should generally conform to the organization and rule numbering of the Model Rules. This change allows for easier comparison and review across various jurisdictions.

A number of the proposed rules contemplate material changes from the current regulatory scheme. They fall into three main categories: 1) amended rules containing controversial or potentially disruptive measures, 2) amended rules that, while less controversial, are still important to understand, and 3) rules that are entirely new. This is not a comprehensive review of all of the changes reflected in all of the proposed rules, and the proposed rules discussed herein are not effective, and will not become effective, unless and until approved by the California Supreme Court.

Controversial Changes
The first possibly controversial or disruptive change involves current Rule 3-120 of the California Rules of Professional Conduct, which effectively permits a lawyer to engage in “sexual relations” (as defined in the rule) with a client, provided that the lawyer does not: “(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; (2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or (3) Continue representation of a client with whom the lawyer has sexual relations if such sexual relations cause the member to whom the lawyer has sexual relations if the sexual relationship was consensual and existed at the time the lawyer-client relationship commenced.

Proposed Rule 1.8.10 reflects a major shift from current Rule 3-120, and substantially adopts the bright-line prohibition approach of Model Rule 1.8(j): “A lawyer shall not engage in sexual relations with a current client who is not the lawyer’s spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.”

This proposed change has been very controversial and has attracted much commentary during the public review process and in the press. The commission itself recognized that the change represents a significant departure from California’s current rule, and may implicate important privacy concerns. The members of the commission, however, concluded that the current rule has not worked as intended. This was evidenced by the fact that, in the 25 years since the adoption of Rule 3-120, virtually no successful disciplinary proceedings under this rule as currently formulated have taken place.

Another potentially disruptive rule, proposed Rule 8.4.1, like current Rule 2-400 (which it would replace), would prohibit unlawful discrimination, harassment, and retaliation in connection with the representation of a client, the termination, or refusal to accept the representation of any client, and law firm operations. However, proposed Rule 8.4.1 reflects a fundamental change from Rule 2-400. Proposed Rule 8.4.1 would eliminate the current requirement that there be a final civil determination of such unlawful conduct before a disciplinary investigation can commence or discipline can be imposed. The current rule requires a prior adjudication by a tribunal of competent jurisdiction (not the State Bar court): “No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction...shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred.”

A majority of the members of the commission said they believed that the prior adjudication requirement rendered the current rule difficult to enforce. The commission cited to the fact that no discipline has ever appeared to have been imposed under the current rule. Further, no other rule contains a similar limitation on the original jurisdiction of the State Bar court.

Proposed Rule 8.4.1 is one of the more controversial rules being proposed by the commission. In fact, the State Bar’s board of trustees, on its own initiative when considering the commission’s proposal, mandated that an alternative version of this rule be sent out for public comment—the only rule on which the board of trustees took such action. In its final vote on the proposal, the board of trustees was evenly split 6-to-6, with the State Bar president breaking the tie in favor of the version of the rule proposed by the commission.

Various concerns have been raised by the elimination of the prior adjudication requirement. First, State Bar complaints may be filed by aggrieved clients and employees without the usual concern for the negative consequences typically associated with filing complaints in litigation, such as being subject to claims for malicious prosecution or attorneys’ fees. Second, the State Bar court is not properly experienced or staffed to become the forum of first resort for a victim of discriminatory, harassing, or retaliatory conduct committed by a lawyer. Third, the disciplinary process before the State Bar court does not provide the same due process protections to lawyers as a tribunal of competent jurisdiction. (For example, lawyers are afforded only limited discovery in matters before the State Bar court.) On the other hand, the deficiencies identified in the current rule (with respect to enforceability) led several commission members, as well as members of the public (as reflected in public commentary), to view the current rule as discriminatory in and of itself.

In response to the public concern with respect to the elimination of the prior adjudication requirement, the commission modified the proposed rule to impose a self-reporting obligation on a lawyer who receives notice of disciplinary charges for violating the rule. This modification would require the lawyer to provide a copy of a notice of disciplinary charges pursuant to proposed Rule 8.4.1 to the California Department of Fair Employment and Housing, the Coordination and Review Section of the U.S. Department of Justice, or to the U.S. Equal Employment Opportunity Commission, as applicable. The purpose of this modification is to provide to the relevant governmental agencies an opportunity to become involved in the matter so they may implement and advance the broad legislative policies with which they have been charged. Further, a comment to the proposed rule clarifies that the rule would not affect the State Bar court’s discretion in abating a disciplinary investigation or proceeding in the event that a parallel administrative or judicial proceeding arises from
the same lawyer misconduct allegations, thus giving a tribunal of competent jurisdiction an opportunity to adjudicate the matter before the State Bar court takes action.

The third such potentially disruptive proposal concerns changing current Rule 4-100, which requires that funds received or held for the benefit of clients by a lawyer or law firm be deposited into a client trust account. Such funds include settlement payments and other funds received from third parties as well as advances for costs and expenses. While best practices may dictate otherwise, the current rule does not require the lawyer or law firm to deposit into a client trust account advance fee retainers or deposits. These payments are not currently required to be segregated from the lawyer’s or law firm’s funds, and may be deposited into a firm operating account. By including the word “fees,” proposed Rule 1.15 would mandate that advances for legal fees be deposited into a client trust account.

The permissive nature of current Rule 4-100 has led many lawyers and law firms to simply deposit all such fees into their operating accounts, some due to the operational needs of the type of practice at issue. In fact, lawyers in certain practice areas have not even needed to maintain a trust account due to the nature of their practices. This will change under proposed Rule 1.15.

Similar to current Rule 4-100, proposed Rule 1.15 would apply to funds “received or held” by a lawyer or law firm, and would require that the bank account into which funds are deposited be “maintained in the State of California” (subject to a limited exception). As a result, the addition of a simple four-letter word to the rule may cause material disruption to practitioners in California. First, because the proposed rule is not just prospective (by applying to funds received following enactment of the proposed rule), but applies to funds “held” by a lawyer or law firm for the benefit of a client, funds received prior to the enactment of the proposed rule and deposited into the firm’s operating account presumably would have to be identified, traced, and deposited into a trust account. Because of the formulation of the proposed rule, it would essentially be given retroactive effect. Second, because the trust account must be maintained in California, firms that are based outside of the state or otherwise maintain their banking relationships outside of the state would be required to establish new banking relationships within the state.

It is important to note that the requirement to deposit advance fees into a trust account would not apply to a “true retainer,” which is defined in proposed Rule 1.5 as “a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter.” This type of fee is earned upon receipt, not as compensation for legal services to be performed, and as such may be deposited directly into a firm’s operating account. Similarly, proposed Rule 1.15 permits a flat fee paid in advance for legal services to be deposited into an operating account, but only if the lawyer discloses to the client in writing that: 1) the client has a right to require that the flat fee be deposited into a trust account until the fee is earned, and 2) the client is entitled to a refund of any unearned amount of the fee in the event the representation is terminated or the services for which the fee has been paid are not completed, and if the flat fee exceeds $1,000, the client must consent in writing.

Changes to Existing Rules

While not as controversial or potentially disruptive as the foregoing proposed rules, attorneys in California should be aware of the following four proposed rules which would create important changes to current rules.

Proposed Rule 1.2.1 provides that a “lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.” Proposed Rule 1.2.1 carries forward the substance of current Rule 3-210, but proposed new comment [6] clarifies that a lawyer may counsel a client in the client’s compliance with a state law that conflicts with federal law.

The addition of Comment [6] apparently was intended to provide some clarity on the provision of legal services to medical marijuana dispensaries, which are not permitted under federal law, but generally are lawful in California. Arguably, due to the absence of language similar to Comment [6], the wording of current Rule 3-210 might be read to preclude advising clients with respect to such issues (although two ethics opinions have concluded otherwise).

Current Rule 3-500 articulates a broad requirement likely intuitive to most practitioners: lawyers must keep their clients “reasonably informed about significant developments relating to the representation.” But this rule provides little guidance as to precisely what and how much information lawyers must share.

Proposed Rule 1.4 is generally consistent with Rule 3-500 but it adds clarifying language from the corresponding Model Rule that has been adopted by most other states. This language is intended to enhance public protection by more clearly stating a lawyer’s obligations to clients with regard to communication.

Proposed Rule 1.4 requires that lawyers must promptly inform their clients of any decision or circumstance with respect to which disclosure or the client’s informed consent is required by the rules, and advise the client of any relevant limitation on the lawyer’s conduct when the lawyer knows the client expects assistance that may not be permitted under the rules. As a result, lawyers must not only inform clients as to what they will do, but also, now, under the proposed rule, lawyers would be required to advise clients as to what they cannot do.

Proposed Rule 1.4 provides that a lawyer must explain matters to the extent reasonably necessary for clients to make informed decisions regarding the representation and would also require that a lawyer reasonably consult with the client about the means employed to accomplish the client’s objectives. These obligations help to ensure that the client understands the information conveyed and to empower the client to be an active participant in the matter.

Current Rule 3-310 governs conflicts of interest among current clients. The provisions of the rule are viewed as taking a “checklist” approach to identifying conflicts because they describe discrete situations that might arise in representations that trigger a duty to provide written disclosure to a client or obtain a client’s informed written consent in order to continue the representation. For example, these situations include a representation in which a lawyer has a relationship with a party or witness in the case, or in which a lawyer has a financial interest in the subject matter of the representation.

Proposed Rule 1.7 would replace the current “checklist” approach with generalized standards that follow the Model Rule approach to current client conflicts. Under this new approach, the inquiry for assessing whether a conflict is present is to simply ask whether there is either direct adversity “to another current client in the same or a separate matter” or “a significant risk that the lawyer’s representation of a current client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client, or by the lawyer’s own interests.”

As is the case under Rule 3-310, proposed Rule 1.7 provides that, if such a conflict of interest exists, the lawyer shall
not proceed with the conflicted representation without informed written consent from each affected client.

Both proposed Rule 1.13 and our current Rule 3-600 make clear that, in representing an organization, it is the organization itself—and not its directors, officers, employees or other constituents—that is the client of the lawyer. As an entity, the organization can only act through its authorized officers, employees, and other individuals, and such individuals are not the client even though the lawyer may take direction from such persons. Proposed Rule 1.13, however, makes four substantive changes to Rule 3-600.

First, Rule 3-600 permits a lawyer to refer a matter to a higher authority within the organization under certain circumstances, including when the lawyer becomes aware that a constituent of the organization is acting, or intends to act, in a manner that either may be a violation of law imputable to the organization or is likely to result in substantial injury to the organization. (Such a referral by the lawyer is often referred to as “reporting up the corporate ladder.”) Proposed Rule 1.13 would mandate reporting up in certain circumstances. This mandate is consistent with the ABA Model Rule and the rules of many other states, but it diverges from current Rule 3-600 which permits, but does not require, a lawyer to take such action.17

Second, while the circumstances that trigger reporting up the corporate ladder under Rule 3-600 are based on the lawyer’s actual knowledge, a lawyer's duty to report under proposed Rule 1.13 would be triggered by two separate scienter standards: a subjective standard that would require actual knowledge by the lawyer that a constituent is acting, intends to act, or refuses to act, and an objective standard that asks whether the lawyer knows or reasonably should know that the constituent’s actions would be 1) a violation of either a legal duty to the organization or law reasonably imputable to the organization, and 2) likely to result in substantial injury to the organization. (Such a referral by the lawyer is often referred to as “reporting up the corporate ladder.”) Proposed Rule 1.13 would mandate reporting up in certain circumstances. This mandate is consistent with the ABA Model Rule and the rules of many other states, but it diverges from current Rule 3-600 which permits, but does not require, a lawyer to take such action.17

Third, unlike Rule 3-600, which permits a lawyer to take corrective action if there is either a violation of law or likely to be substantial injury to the organization, proposed Rule 1.13 would require that both be present before a lawyer’s duty to report up the corporate ladder is triggered.

Fourth, under proposed Rule 1.13, a lawyer would be required to notify the highest authority in the organization if the lawyer has been discharged or forced to withdraw as a result of his or her reporting...
New Rules

Proposed Rule 1.10 represents an important development for California lawyers. It sets forth the noncontroversial concept that, subject to certain limited exceptions, the conflicts of interest of an attorney in a law firm may be imputed to all attorneys in the firm: “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [the conflict of interest] rules.”

However, the proposed rule goes further and establishes—for the first time in the Rules of Professional Conduct—an acknowledgment that ethical screens may be effective (in limited circumstances) to cure what would otherwise be an imputed conflict of interest. Although support exists for the effectiveness of ethical screens in case law, ethical screens are not sanctioned in the current Rules of Professional Conduct. These types of cases typically involve disqualification of conflicted counsel. This proposed rule would clarify that the use of ethical screens may mitigate against discipline under the rules (although the circumstances in which an ethical screen may be utilized are limited to those specified in the rule).19

Proposed rule 1.18 would impose duties upon lawyers relating to consultations with a prospective client, i.e., a “person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal services or advice from the lawyer in the lawyer’s professional capacity.”20 In particular, lawyers would have the obligation to preserve the confidentiality of information acquired during a consultation prior to the establishment of an attorney-client relationship. Even if no attorney-client relationship is established, under this proposed rule, a lawyer is prohibited from using or revealing confidential information learned as a result of the consultation.

Although concepts articulated in this proposed rule are already the law in California and do not establish new standards,21 the commission acknowledged the importance of including these concepts in the rules so as to alert lawyers to this important duty and provide lawyers with guidance via a clearly articulated disciplinary standard on how to comport themselves during a consultation.

The proposed rule would further prohibit a lawyer from representing a client with interests adverse to those of the prospective client in the same or substantially related matter, absent informed written consent from the prospective client, if the lawyer has obtained confidential information material to the matter. Moreover, the prohibition in this proposed rule would be imputed to the lawyer’s law firm, such that no lawyer at the firm may knowingly undertake or continue representation in such a matter, unless the lawyer is properly screened from participation in the matter.

It has long been recognized in California that attorneys may be disciplined for intentionally deceiving a tribunal or opposing counsel, and that attorneys may be civilly liable to a third party for making false statements of material fact on behalf of a client. Further, the Business and Professions Code provides that attorneys may be disciplined for committing acts involving “moral turpitude, dishonesty or corruption.”22 Proposed Rule 4.1 would prohibit lawyers, in the course of representing a client, from knowingly making a “false statement of material fact or law to a third person,” or failing to disclose to a third person a material fact necessary to avoid assisting in a client’s criminal or fraudulent conduct.

This proposed rule reflects an important change by expressly including in the Rules of Professional Conduct a disciplinary standard for misrepresentations to third parties when no such disciplinary standard currently exists. Further, it differs from the legal standard applicable to civil liability for fraudulent representation because a violation under the proposed rule does not require proof of reliance or damages.

No current rule exists that addresses a lawyer’s duties to third persons when presented with inadvertent disclosure of privileged materials. Proposed Rule 4.4 provides:

Where it is reasonably apparent to a lawyer who receives a writing relating to a lawyer’s representation of a client that the writing was inadvertently sent or produced, and the lawyer knows or reasonably should know that the writing is privileged or subject to the work product doctrine, the lawyer shall: (a) refrain from examining the writing any more than is necessary to determine that it is privileged or subject to the work product doctrine, and (b) promptly notify the sender.

While the proposed rule is consistent with California case law,23 the commission concluded that adopting this proposed rule would help protect the public and the administration of justice, as well as inform attorneys of their ethical obligations. Consistent with such case law, comment [1] to the rule provides the lawyer with the following options when a lawyer determines the proposed rule applies to a transmitted writing: “[T]he lawyer should return the writing to the sender, seek to reach agreement with the sender regarding the disposition of the writing, or seek guidance from a tribunal.”

The only reference to a lawyer’s duty to supervise subordinates is contained in a comment to current Rule 3-110 (Failing to Act Competently): “The duties set forth in Rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents.” Proposed Rules 5.1, 5.2 and 5.3 would detail what that duty to supervise requires.

Proposed Rule 5.1 would provide that lawyers who manage law firms—individually and collectively—“shall make reasonable efforts to assure that all lawyers in the firm comply” with the Rules of Professional Conduct. Proposed Rule 5.1 also requires lawyers who supervise other lawyers, whether or not a member or an employee of the same law firm, to make similar “reasonable efforts to ensure compliance by the lawyer supervised.” A lawyer will be vicariously responsible for another lawyer’s violation of the Rules of Professional Conduct if: “(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

Consistent with case law in California,24 proposed Rule 5.2 makes it clear that, notwithstanding the vicarious responsibility imposed on a managing or supervising lawyer by proposed Rule 5.1, a subordinate lawyer has an independent duty to comply with the Rules of Professional Conduct. The proposed rule further provides that “[i]f the subordinate lawyer believes that the supervisor’s proposed resolution of the question of professional duty would result in a violation of these rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.”25

Proposed Rule 5.3 would hold lawyers similarly responsible for nonlawyer employees. Managerial and supervisory lawyers must make reasonable efforts to ensure that the conduct of the nonlawyers they supervise is compatible with the professional obstiga-
The proposed changes and additions to the Rules of Professional Conduct are currently under consideration by the California Supreme Court for approval. Attorneys in California will be subject to these rules if and when approved by the high court.

3 See current CAL. RULES OF PROFESSIONAL CONDUCT R. 1-100(a); proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 8.5(a).
5 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 1.8.10(a). The proposed prohibition carries forward the exceptions in current Rule 3-120 for spousal and preexisting sexual relationships. Also, under this rule (current and proposed), when the client is an organization, the person overseeing the representation is considered to be the client. Current CAL. RULES OF PROFESSIONAL CONDUCT R. 1-120, Discussion; Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 1.8.10, cmt. [2].
6 In addition, Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 8.4.1 would expand the scope of current Rule 2-400, which only applies to “the management or operation of a law practice,” and does not expressly cover retaliation.
7 Current CAL. RULES OF PROFESSIONAL CONDUCT R. 2-400(C).
8 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 8.4.1(e).
9 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 8.4.1, cmt. [7].
10 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 1.15, cmt. [2], defines “advances for fees” as “a payment intended by the client as an advance payment for some service or operation of a law practice,” and does not expressly cover retaliation.
11 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 8.4.1(a): “or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client’s business and the other jurisdiction.”
12 Although the State Bar has requested that the rules not become effective for at least 180 days after approval (to allow the State Bar sufficient time to notify and educate lawyers, judges, and the public about the changes implemented by the new rules), as currently worded, proposed Rule 1.15 would still apply to “held” funds.
13 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 1.15(b).
14 Comment [6] provides as follows: “Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.”
15 Current CAL. RULES OF PROFESSIONAL CONDUCT R. 3-210 provides: “A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.” But see Los Angeles County Bar Ass’n Prof’l Responsibility & Ethics Comm., Formal Op. No. 527 (2015) [Legal Advice and Assistance to Clients Who Propose to Engage or Are Engaged in the Cultivation, Distribution, or Consumption of Marijuana] (“A member may advise and assist a client regarding compliance with California’s marijuana laws provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law”); Bar Ass’n of San Francisco Legal Ethics Comm., Formal Op. No. 2015-1 (June 2015) (a California lawyer cannot ethically represent a client in respect to a medical marijuana enterprise in California); “[A California attorney may ethically represent a California client in respect to lawfully forming and operating a medical marijuana dispensary and related matters permissible under state law, even though the attorney may thereby aid and abet violations of federal law.”
16 Current CAL. RULES OF PROFESSIONAL CONDUCT R. 3-310(B) provides: “A member shall not accept or continue representation of a client without providing written disclosure to the client where: (1) the member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; [...] or (4) the member has or had a legal, business, financial, or professional interest in the subject matter of the representation.”
17 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 1.13 would carry forward the requirement in CAL. RULES OF PROFESSIONAL CONDUCT R. 3-600 that a lawyer must maintain his or her duty of confidentiality when taking action pursuant to the proposed Rule. In particular, it is important to note that while lawyers may be permitted or obligated to report misconduct up the corporate ladder, they are generally precluded by their duty of confidentiality from “reporting out” such misconduct, (e.g., to a regulatory body or prosecutor).
19 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 1.10(a): “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9, unless (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or (2) the prohibition is based upon rules 1.9(a) or (b) and arises out of the prohibited lawyer’s association with a prior firm, and (i) the prohibited lawyer did not substantially participate in the same or a substantially related matter; (ii) the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (iii) written notice is promptly given to any affected former client [...].”
20 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 1.13(a).
21 See, e.g., Evid. Code §951 and Bus. & Prof. Code §6068(e).
22 “The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.” Bus. & Prof. Code §6106.
23 See, e.g., Rico v. Mitsubishi, 42 Cal. 4th 807, 817 (Cal. 2007).
25 Proposed CAL. RULES OF PROFESSIONAL CONDUCT R. 5.2, cmt.
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**Dubitante: a Dubious Decision for Determining Appeals**

**EARLY IN MY FIRST YEAR IN LAW SCHOOL,** a professor asked the student next to me to explain a case we had been assigned to read. The classmate’s explanation sounded wrong to me. I must have been frowning because the professor turned to me and asked what was wrong with my classmate’s answer. My mind went blank, and all I could say was it sounded wrong but I was not sure why. Not good. The professor looked at the rest of the class and marveled, “Mr. Poster thinks the answer is wrong, but he can’t say why!”

An answer that is not good enough for first-year law school surely is not good enough for a judicial decision, is it? Actually, it is. It’s called a decision dubitante, from the Latin word for “doubting.” A judge voting dubitante signifies that he or she doubts the decision rendered but is unwilling to state it is wrong. It might also be called an “indecision.”

There are many varieties of dubitante opinions, with more or less usefulness. It can be a concurrence dubitante, or acquiescing dubitante, or just dubitante. An opinion may not say dubitante, but that is what it means. One Federal Circuit judge recently said he was concurring “Unfortunately; and I think the opinion must be stamped with a large ‘MAYBE.’” Not very enlightening.

Professor Lon Fuller put a positive spin on it: “[E]xpressing the epitome of the common law spirit, there is the opinion entered dubitante—the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent.” Indeed, a dubitante decision can advance the law. A Sixth Circuit judge used a dubitante opinion to cast doubt on his own majority decision: “Sixth Circuit precedent compels this interpretation,” but “I am inclined to think it is not” the correct one and he explained why. His doubts were warranted. The Supreme Court adopted his dubitante view in a later case.

There may be other reasons for a dubitante opinion. In one case, an appellate judge frankly admitted he was just too busy to look further into the matter: “[I]f I were deciding this case alone, my reasoning and conclusions might differ from the majority’s in several material respects. That said, I am satisfied that my colleagues have carefully and seriously studied this case... Unfortunately, our constitutional duty to resolve this appeal today...precludes me from engaging in the type of extended study necessary to achieve a high degree of confidence that my experienced, able colleagues are right. As such, I defer to the conclusions they have reached in this case, albeit with considerable reservations.”

Sometimes, an appellate judge will use a dubitante concurrence to vent anger at an outcome the law requires: “I cannot conclude that the majority’s decision is wrong.... However, since the Board’s actions ‘make me wanna holler and throw up both my hands,’ I write separately to set forth my concerns and concur in the judgment—dubitante.”

Politics can incite a dubitante opinion. In one remarkable case, the New Jersey Supreme Court issued a decision authored by a trial court judge appointed by the chief judge temporarily to fill a seat on the seven-judge court left open due to a political impasse between the governor and the legislature. Five judges concurred, but one abstained on the ground that the chief judge lacked constitutional authority to appoint the pro tem judge unless absolutely necessary and the court so constituted acted without authority. She vowed to abstain whenever the court included a pro tem judge so appointed. The chief judge, joined by three colleagues, wrote a concurrence justifying his exercise of the appointment power whenever necessary to the efficient operation of the court.

A fifth concurring judge, however, wrote dubitante, expressing “grave doubts” that the chief judge should exercise his authority only when the court lacked a quorum. In later cases, the abstaining judge was persuaded by the dubitante opinion, and announced she would abstain only when a pro tem judge cast the deciding vote. The political impasse was eventually broken when the abstaining judge chose not to seek renomination and the governor filled the two vacant seats.

Despite my rough start in law school, I learned not just to doubt but also to analyze a case and argue whether it was right or wrong. As a lawyer, too, it is never good enough to suspect a case was rightly or wrongly decided yet be unable to explain why. For better or worse, however, appellate judges have that luxury. *Dubitante.*

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5 World Outreach Conference Ctr. v. City of Chicago, 787 F. 3d 839, 845 (7th Cir. 2015 (Cudahy, J., concurring).
6 See Governor’s Historic Appointments to the State Supreme Court Remind Us of Politics Can Incite Dubitante Opinions, 63 Seton Hall L. Rev. 511, 534 (2013).

Marc J. Poster is a partner at the appellate law firm of Greines, Martin, Stein & Richland LLP in Los Angeles.
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