Los Angeles lawyer KC Marie Knox explains the complex California and federal regulations on traveling with emotional support and service animals

Peacocks on a Plane

Los Angeles lawyer KC Marie Knox explains the complex California and federal regulations on traveling with emotional support and service animals
“I refinanced my student loans with First Republic and the financial impact cannot be overstated.”

YASMIN NAGHASH
Attorney

FIRST REPUBLIC BANK
It’s a privilege to serve you*
When you have a lot to lose, we have a lot to offer

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

walzermelcher.com
5941 Variel Avenue, Woodland Hills, CA 91367
(818) 591-3700

WALZER MELCHER LLP
EXCLUSIVELY FAMILY LAW
Keller/Anderle is delighted to welcome new partner

Reuben Camper Cahn

EXPERIENCE
Reuben Camper Cahn is one of the finest lawyers of his generation. In addition to trying more than 100 cases to jury verdict, Mr. Cahn has argued twice before the United States Supreme Court.

A graduate of Yale Law School, Mr. Cahn has defended a wide range of matters, involving tax, public corruption, fraud, money laundering, RICO, Continuing Criminal Enterprise prosecutions and virtually every other type of white collar case.

PRACTICE AREAS
Commercial Litigation
White Collar Criminal Defense
Appellate Litigation

949.476.8700
www.kelleranderle.com
18300 Von Karman Ave., Suite 930
Irvine, CA 92612

Keller/Anderle LLP
BUSINESS TRIAL LAWYERS

Commercial Litigation
Intellectual Property
Securities
Bad Faith
White Collar Criminal Defense
Class Actions
Entertainment/Sports
16 Peacocks on a Plane
By KC Marie Knox
The lines between what may be considered an emotional support versus a service animal are blurred thus the legal accommodations that must be applied to them may be confusing.

22 Experts Liberally Constrained
By Peter L. Choate and William H. Dance
Recent California cases have created a gray area concerning the admissibility of expert opinion evidence in opposition to a motion for summary judgment.

30 Who Will Pay?
By Jack J. McMorrow and Brian I. Friedman
California statutes provide for the assignment of debt liability regarding marital property, but the complexity involved in marital dissolution may change the rules drastically.

Special Membership Directory Pullout
2018-2019 Los Angeles County Bar Association
Recenty, a friend in the financial services industry told me he was auditing a course on the use of a cloud-based “customer relationship platform.” His company plans to use the platform to streamline interaction between its sales staff and potential and existing customers. The concept sounded great, but when he explained how it works, an alarm went off in my head.

Connectivity is the mantra of the technological age. Since Facebook launched in 2004, some 3.58 billion people have become “connected.” Over the past 10 years, that connectivity has increased by approximately 200-300 million each year. Connectivity gives over half of the earth’s population access to data. At the same time, information processing becomes more sophisticated. Some in the technology arena believe that within the next 20 years computers will be able to process and evaluate data faster than a human brain. Even more frightening, through connectivity computers will have access to the data of every brain on earth—every genius, every scientist, every mathematician, and every lawyer.

What does all of this mean? My friend said the platform he was studying is designed to provide a more seamless interface between the workforce and customers. What I also heard is that the platform permits a transition to “robotics” and “AI”—artificial intelligence technologies—in which human employees become obsolete as computers take over the heavy lifting.

If the financial services industry foresees that it will be able to replace its sales personnel with computers to provide quicker and better financial advice to its potential customers, can providing legal advice be that far behind? Our profession is based on analyzing facts and applicable legal authority coupled with experience. But through connectivity, computers will have access to all of that information, including the experience of the best lawyers in our profession.

We are already seeing the consequences of technological advancement in the legal arena: erosion of certain fundamental rights such as privacy, the ability of individuals to conduct their own legal research on the Internet, and online access to court documents and other information that permit nonlawyers to undertake tasks that 10 years ago were only performed by attorneys.

What can we do to ensure that our profession does not go the way of automation? The solution is pretty clear, but in today’s technology-based society, not easy. The last two generations have been raised on computer interaction. The art of conversation and discussion is being replaced by “snapchats” and “Instagram stories”—nothing more than soundbites.

The formation and maintenance of interpersonal relationships is the key to avoiding a robotic world. By creating such relationships, between attorney and client and attorney and fellow colleagues, we can offer something a computer cannot—emotional “connectivity.” As the human race moves further away from such contact, the very soul of not only our profession but also the unique human experience is facing extinction.
PROTECTION IS IN OUR NATURE.

For the past 40 years, Lawyers’ Mutual Insurance Company has been solely dedicated to protecting and advancing the practices of California lawyers. This is our expertise and we are proud to say that we have served over 40,000 lawyers and handled over 16,000 claims during this time.

Our reputation of stability, consistency, and strength has been cultivated over the past 40 years, and we’re constantly evolving to serve the lawyers of California with the premier professional liability coverage and continued legal education resources.

As a mutual with no outside shareholders, our members invest in and benefit from the Company’s stability. We have always valued our members above all, and we remain dedicated to protecting your future.

Contact us at 818.565.5512 or lmic@lawyersmutual.com ... so you can practice with peace of mind.
Nine Requests of LACBA’s 26 Practice Sections

ONE OF OUR BIGGEST CHALLENGES this year is setting the Los Angeles County Bar Association (LACBA) on a path to create more value for our members. We want members to understand the benefits of their membership and we need nonmembers to want to join LACBA because they see real value. Lawyers no longer automatically join, and many major firms have stopped routinely enrolling all of their lawyers. This is the world we live in. Like most other bar associations today, LACBA must make itself valuable to its members and prospective members before they will pay their hard-earned dollars to join.

LACBA’s 26 practice sections are one of the paths to achieving our goals. We bring real value to our members through the sections. It is also worth mentioning that the relationship between LACBA and its sections has been mixed. It is important to remember and explain the challenges we have faced to understand the way forward.

LACBA’s membership is down. That’s not a secret. In 2000, LACBA had almost double the number of dues-paying members that it has today, even though the legal community in Los Angeles County has grown substantially.

The sections were true agents of change and a catalyst for moving LACBA forward. Several years ago, a small group of section leaders and section members were troubled about the future of LACBA. They formed a council of sections specifically to voice their concerns. In a nutshell, and at the risk of oversimplifying a larger problem, the council of sections was worried that the sections were being too controlled by LACBA’s leadership and administration. They were being told how much they could charge for events, forced to contribute section profits to LACBA, and felt understaffed and underappreciated. The section leaders and council of sections demanded more accountability from LACBA leadership.

This brief history is key to understanding the power, influence, and importance of the sections. They banded together, created a voting bloc, and elected new LACBA leadership. The sections were integral to the changes at LACBA and will continue to be vital to LACBA’s overall health and growth.

Unprecedented Autonomy

Today, the sections have unprecedented autonomy, enjoy financial independence, and have the full support of the administrative staff. LACBA’s staff works hard to help the sections present networking opportunities, educational events, and leadership meetings on a regular basis. Some, such as the Litigation Section and Family Law Section, are incredibly active, while others are surprisingly inert, for example, the Small Firm and Sole Practitioner Section could accomplish a great deal more. (This would seem to present an important opportunity for growth for LACBA because about half of our members identify themselves as either sole practitioners or lawyers practicing in smaller firms).

Any lawyer can join any section, participate in section events, and grow his or her professional network. The sections also provide an environment for attorneys to learn about other practice areas should they desire a career change. Let’s be completely candid: one of the main reasons lawyers join bar associations is to develop business. Many sections provide the best opportunities for attorneys to learn how to build their practices and generate referrals. As a friend of mine once said, “There are many really smart, good lawyers in Los Angeles who have no work.”

The sections also have an added benefit: camaraderie. Many of us meet some of our best professional friends, who then become social friends, through the sections and through LACBA generally. LACBA provides an opportunity for all lawyers to have that kind of fellowship and interaction.

Nine Requests

As we come to the end of 2018, the sections have been given the well-deserved and unprecedented autonomy needed for them to run independently. LACBA is once again transparent in its operations. In exchange, all the sections have to do is break even by the end of the year. In addition, I have nine requests of the sections:

1) While there are many good reasons to belong to the great sections at LACBA, section leaders and LACBA leaders need to work together this year on training programs for younger lawyers and the Barristers Section. They deserve our attention because the nature of law firms has changed. Fewer firms are willing to invest in the resources to train and mentor younger attorneys because they know few of them will still be with their current firms in five years. This is a great opportunity for LACBA to fill the gap. The Barristers can and do provide a gateway for newer members of LACBA. We must also give them opportunities to meet other lawyers and find their own community.

2) The sections can help us all by breaking even financially and managing their own finances as closely as possible. With independence comes the responsibility to work hard to be fiscally sound.

3) The sections must continue to provide vibrant programs for their members, interesting and consistent programs that give members an opportunity to interact and network with each other. The sections should then promote these programs to the entire legal community.

4) Sections need to interact with each other where appropriate to

The 2018-19 president of the Los Angeles County Bar Association, Brian S. Kabateck is founder and managing partner of Kabateck Brown Kellner LLP in Los Angeles where he practices in the areas of personal injury, insurance bad faith, pharmaceutical litigation, wrongful death, class action, mass torts, and disaster litigation.
provide added value for their members. They should look for programs to coproduce and other opportunities to combine interests.

5) Sections must present programs throughout Los Angeles County, offering a better geographic reach for current and prospective members. For example, we are working with the Professional Responsibility Ethics Committee to present free programs downtown, in the South Bay, on the Westside, and in the Valley focusing specifically on the new Rules of Professional Conduct. These seminars will be free to our members.

6) Last year we instituted a “bring a friend” program in which any section member could bring a colleague who is not a section member, or even a LACBA member, to a CLE program. This year, we made that program free to first-time nonmember guests.

7) Sections must invest in increasing membership. In exchange for near-total autonomy, we ask in return that the sections designate a small group of lawyers tasked with rebuilding membership for LACBA. Explaining to nonmembers the value of LACBA and its opportunities for expanding networks and developing business is necessary for LACBA’s growth.

8) Sections must work with LACBA leadership to make LACBA important to young lawyers. Last year, we asked the sections to institute programs that offer a look into various practice niches and to market those programs to young lawyers. Some newer and younger lawyers today may be interested in developing a specialty practice they know little about. The next generation of attorneys wants vibrant careers. The sections provide no-cost opportunities to explore other areas of interest.

9) The sections and LACBA need to work together to develop a special dues structure for retired lawyers and lawyers who have been longtime, consistent members of LACBA. Together we can make LACBA affordable to retired lawyers and free to lawyers who have spent years paying membership dues to this association—a reward for their years of service to LACBA and the profession. In addition, we will expand our community of senior lawyers through opportunities for continuing education and friendship.

Finally, I want to publicly thank section leaders like Charles Michaels—whom I have known for 25 years—Nowland Hong, John Carson (like Charles, a former president of LACBA), and countless others who did see the value of the sections and were early in identifying the problems of the past. While LACBA is not only about the sections, these members and others like them also realize the value the sections bring to all lawyers.
Allison Margolin  Founder, Margolin & Lawrence

Weed, blunt, pot. What is today’s best term? Cannabis.

You are a part of NORML, which your father, Bruce Margolin, founded in Los Angeles in 1967. Is marijuana in your DNA? Yes, but my calling is more to end the drug war.

In 2004, you founded your own firm, which evolved to your current firm. Who is your typical client? Male, in his thirties.

Most of the lawyers in your firm went to Harvard. Yale won’t do? The Harvard alumni system makes it easy to recruit other Harvard grads, but I’d be happy with any top person.

Your current focus is on cannabis business regulation and compliance. How do you keep up with the changing legal landscape? I make the time. The main thing about keeping up is to make enough money to employ a staff.

Attorney General Jeff Sessions flipped former President Barack Obama’s executive order removing marijuana as a Class I drug. Later, President Donald Trump flipped it back. What is going on? The real deal is not what the president is saying, but what is going on in the streets and in the federal courthouses.

Dr. Sanjay Gupta, renowned neurosurgeon, wrote to Sessions outlining marijuana’s medicinal benefits. What doesn’t Sessions get? The drug war is basically another Jim Crow version to oppress minorities.

Opening a dispensary requires an influx of cash. Are the communities bearing the brunt of past laws able to share in the gains of this new industry? Cities are encouraged to adopt social equity partners, and Los Angeles has done this. This will require a lot of trust building.

Why? These communities do not trust the government.

Los Angeles City Controller Ron Galperin estimated that Los Angeles could bring in at least $50 million in cannabis-licensing tax revenue. Do you agree? Yes.

What is the tension between federal and California law regarding cannabis? It’s complicated, but California’s law technically violates the federal in as much as recreational marijuana is not protected under federal law.

From cultivation, growers’ products are labeled A for adult use or M for medical use. Are there dual licenses? As of May 2018, growers are allowed to grow both.

What is the basic difference between medical and adult-use cannabis? There’s no difference at all.

For medical cannabis, is a prescription required? No, a recommendation.

Is there a marijuana-equivalent test similar to Breathalyzer for alcohol? No.

What are protocols employed by law enforcement? They trick people into a swab test, taking saliva from the inside of your cheek, which may show use from days earlier.

Yelp reviews say you’re great but expensive. True? Yes.

What are your typical fees to open a marijuana dispensary? About $100,000 for local and state licensing.

Last year, the Los Angeles Daily News reported that California’s Department of Food and Agriculture said 2,718 companies were interested in seeking licenses in Los Angeles County. Are you pretty busy? Yes, we have about 50 licensing clients.

How do you envision the cannabis shop of the future? I am hoping that Los An-
geles will allow for onsite consumption. If we don’t, the cannabis shop will be something of the past, and there will be more licensed delivery.

How far away from Amsterdam pot bars are we? Less than a year. West Hollywood gave out eight lounge licenses within the last couple of months.

In November 2016, California’s Prop. 64 legalized recreational cannabis for people 21 and older. What else did it do? The major thing is that the smell of marijuana can no longer be used for probable cause.

For recreational use, what are the limits? Any adult can have under an ounce and grow up to six plants.

What is the most common way adults use cannabis? Smoke it.

Is the Bureau of Cannabis Control like the Department of Alcohol Beverage Control? Yes.

If you were handed $10 million tomorrow, what would you do with it? Buy an office building.

Why did you want to become a lawyer? To liberate people who deserve to be free.

You have been named a Super Lawyer Rising Star seven times. What makes you super? I listen to my clients.

What is one trait you like in yourself? Ability to focus.


Who is on your music play list? Taylor Swift, because of my daughter.

What was your favorite book as a child? Tess of the d’Urbervilles by Thomas Hardy.

Are you writing a book? Yes, with my coauthor, Erin Williams.

Title? “Just Dope: The Story of the Drug War and One Woman’s Mission to Legalize Everything.”

What do you do on a three-day weekend? Walk to La Cienega Park with my children, go to my grandmother’s house, and stop in at Champs Elysees for croissants.

What is your favorite vacation spot? The Claremont in Berkeley.

What is your favorite meal and where? I order the toro at Shunji. It’s a great place on Pico Boulevard, near Bundy.

What is your Starbucks order? Iced latte—two shots.

If Trump and you smoked marijuana together, what would you say to him? Let me be the drug czar.

Do you have your own “Golden Rule” by which you live? I try to do as much as I can to help other people, but a part of that is being conscious to preserve myself.

Which are your three favorite movies? I love Ronan Farrow so I don’t watch Woody Allen anymore, but Purple Rose of Cairo was a favorite. I also like Up and Coco.

Which two world leaders do you most respect? Barack Obama and Eric Holder.

What is the one thing you would like to change in the world? End the war on humans.

For The Record

Available Fall 2018

New ways to capture and access the court record

For The Record is proudly supporting the Superior Court of California, County of Los Angeles with our latest digital court recording and audio access platform.

Register to learn more: fortherecord.com/contact/lacourt

Los Angeles Lawyer October 2018
School Administrators’ Responsibility Concerning Cyber Bullying

SCHOOL ADMINISTRATORS have long been assigned the challenging task of moderating the interaction of children, but their responsibilities historically ended at the “schoolhouse gate.” However, in the age of social media, instant messaging, and smart phones, states such as California are requiring schools to extend their reach beyond their walls and into the vast expanse of the virtual world to help promote a safe learning environment and eliminate bullying among students. The rapidly changing landscape of social media has left school administrators, students, lawyers, and even judges struggling to keep up with the state of this unsettled area of law. School administrators are particularly challenged by this edict. While administrators feel a need to investigate and handle issues that may have an impact on the learning environment, they are reaching into the private lives of students regarding conduct that is not related to the learning environment.

California Education Code Section 48900 defines bullying as “any severe or pervasive verbal act or conduct, including communications made in writing or by means of an electronic act....” If these severe or pervasive acts cause a fear of harm, have a “substantially detrimental effect on [the student’s] physical or mental health,” or a “substantial interference with [the student’s] academic performance,” the offending student can be suspended or expelled for the actions.

In the past, a school’s authority to police this type of conduct was generally confined to the school grounds. The rise of cyber bullying in the past decade has extended a school’s responsibility into the electronic world of the student, and “electronic act” includes “creation or transmission originated on or off the school site by means of an electronic device.” Schools are now tasked with the responsibility to discipline students for conduct including text messages, photos, and posting on a social network.

The U.S. Supreme Court has not dealt with the issue of cyberbullying, despite several appeals requesting the Court take on the issue. This gap in authority is leaving states to set up a potential conflict between the well-being of some students versus the constitutional rights of others. This conflict is compounded by the absence of guidance or a test for a threshold showing of “pervasiveness” that causes many to believe that offensive speech may be protected unless it substantially interferes with a student’s educational goals or performance.

In general, a school may suspend or expel students for bullying conduct that occurs on school grounds or at school events. What happens, however, when the alleged bullying occurs off school grounds and is not related to school activities? Public education is a fundamental right and the California Sixth District Court of Appeal has ruled that disciplinary action is contingent upon whether the action causes a substantial disruption to schoolwork or school activities. If a school suspends a student whose actions did not cause substantial disruption, the suspension or expulsion risks violating the free speech protections of the aggrieved student.

Federal circuits are undecided as to how far administrators can reach into students’ private lives before it has gone too far. In J.S. ex rel. Snyder v. Blue Mountain School District, a student’s Myspace profile was the subject of debate. Five members of the eight-judge majority found that Tinker v. Des Moines Independent Community School District excludes authority to discipline or regulate off-campus speech. In other words, even if off-campus speech creates a “substantial disruption,” a school district has no authority to suspend or discipline a student for the conduct. Conversely, the Fourth Circuit has held that some actions are so disruptive that their origin does not matter.

Emerging law has suggested that speech rising to the level of bullying is unprotected thus many states are instructing administrators to undertake disciplinary measures as necessary. School administrators, however, remain skeptical of overreach. Many feel the need to investigate and handle issues that may have an impact on the learning environment. Yet, administrators risk reaching into the private lives of students regarding conduct that is not related to the learning environment. Given current California law, administrators should be encouraged to address cyber bullying when the conduct clearly interferes with school activities and the safety of students.

---

2 EDUC. CODE §48900(r)(1).
3 Id.
4 EDUC. CODE §48900(r)(2)(A).
8 J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F. 3d. 915 (3d Cir. 2011).
9 Id. at 926 n.3.
10 Id. at 926-27.

Brent J. Lehman is a senior associate at Olivan Madruga Lemieux O’Neill, LLP in downtown Los Angeles. He is a trial attorney in the firm’s litigation group.
Into the Breach: Progress on the Right to Counsel in Civil Matters

IN CRIMINAL CASES, the U.S. Supreme Court in Gideon v. Wainwright recognized over a half-century ago that:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law…. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings.1

The Court went on to hold in Gideon that the Sixth Amendment and the due process clause required the appointment of counsel at public expense for indigent criminal defendants.

In civil cases, however, no such right has been recognized by the U.S. Supreme Court,2 despite various compelling attempts. All states provide a right to counsel under state law or state constitutions in at least some civil areas, and the civil right to counsel movement has enjoyed some major successes. Nonetheless, the existing rights to counsel are still quite limited. As a result, low-income employees, tenants, parents, and other litigants can and regularly do lose jobs, housing, custody of children, access to healthcare or benefits, the ability to stay in the United States, and other vitally important legal interests in the courts, all without the assistance of counsel, despite a need every bit as compelling as a misdemeanor’s for Gideon’s “guiding hand of counsel.”

Certainly Legal Aid and other nonprofit service providers offer invaluable assistance but only to a “fortunate” few.3 According to the 2017 Justice Gap Report by the Legal Services Corporation, “71% of low-income households experienced at least one civil legal problem in the last year, including problems with health care, housing conditions, disability access, veterans’ benefits, and domestic violence.”4 However, low eligibility thresholds and funding constraints mean that 86 percent of the legal problems reported by families received inadequate legal help or none at all.5 The Legal Services Corporation anticipates that because of limited resources, fewer than half the potential clients who approach legal services programs will be served in 2018. Overall, the National Center for State Courts has found that at least three-quarters of all civil cases involve one unrepresented party.6 In California, it has been estimated that 80 percent of family law litigants7 and 90 percent of tenants in eviction proceedings8 are unrepresented. This access to justice crisis is reflected in the World Justice Project’s Rule of Law Index, which ranks the United States 94th out of 113 countries in access to and affordability of civil justice.9

At times there have been opportunities for the Supreme Court to extend the reasoning of Gideon to important civil cases, perhaps even recognizing what U.S. District Judge Robert W. Sweet famously termed a “civil Gideon,”10 or a broad right to counsel in most or all civil cases, analogous to Gideon’s command in criminal cases. For example, nearly 20 years after Gideon, the Supreme Court decided Lassiter v. Department of Social Services of Durham County.11 The case involved what many advocates thought was perhaps the most compelling case for a right to counsel in a civil case: the permanent severance by the state of a parent’s right to maintain a legal relationship with her child, an interest the Court had recognized as a liberty interest of the highest order. Unfortunately, bad facts can make bad law, and such was the case in Lassiter. By the time of the parental rights proceeding, Abby Gail Lassiter’s child was in foster care and she had little contact with him. A year later she was convicted of murder and sentenced to 25 to 40 years in prison.

Although Lassiter had little hope of maintaining legal custody, she sought to have her youngest son placed with relatives instead of strangers and to prevent permanent termination of her relationship with him. However, with no lawyer, Lassiter could not conduct successful cross-examination or exclude hearsay and utterly failed to make her case in North Carolina’s trial-like proceeding terminating her parental rights. Nonetheless, in a 5-4 decision, the Supreme Court held that the failure to appoint counsel in the termination proceedings did not violate due process and announced a “presumption that there is a right to appointed counsel”12 in such a proceeding.

Clare Pastore is professor of the Practice of Law at the University of Southern California Gould School of Law and serves on the Shriver Implementation Committee and the Access to Justice Commission’s Right to Counsel Task Force. John Pollock is a staff attorney at the Public Justice Center who serves as coordinator of the National Coalition for a Civil Right to Counsel.

BY CLARE PASTORE AND JOHN POLLOCK

Clare Pastore is professor of the Practice of Law at the University of Southern California Gould School of Law and serves on the Shriver Implementation Committee and the Access to Justice Commission’s Right to Counsel Task Force. John Pollock is a staff attorney at the Public Justice Center who serves as coordinator of the National Coalition for a Civil Right to Counsel.
counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.” The result, as Douglas Besharov famously remarked, means that “Lassiter, for all practical purposes, stands for the proposition that a drunken driver’s night in the cooler is a greater deprivation of liberty than a parent’s permanent loss of rights in a child.”

Thirty years after Lassiter, the Court in Turner v. Rogers considered the case of an indigent parent who had been jailed for civil contempt for over a year for failing to pay child support. While many believed that Lassiter meant that at least those indigent litigants threatened with prison were entitled to counsel, the Turner Court refruted that idea. Instead, it held that when the civil contempt proceeding is initiated by an unrepresented private party (here, the other parent) rather than the state, and the state provides some minimal “procedural safeguards” such as notifying the defendant parent that his ability to pay would be a critical part of the contempt hearing, it is not required to provide counsel for the defendant parent even when prison looms. While the Court suggested that a state-initiated civil contempt proceeding might yield a different result, there was no question that Turner was yet another setback in a federal constitutional right to counsel approach.

Lassiter and Turner have led advocates seeking an expansion of the availability of counsel in civil cases to turn away from federal court litigation. In contrast with the failed cases in federal court, a significant number of these efforts in legislatures, local governing bodies, and administrative arenas have succeeded in expanding access to counsel in certain types of litigation or for certain especially vulnerable litigants. Between 2000 and 2009, seven states legislatively expanded counsel rights in juvenile immigration, child custody, termination of parental rights, and abuse/neglect cases.

In 2017 alone, 14 states passed measures expanding counsel or establishing pilot projects to do so in areas that include housing, custody, dependency, guardianship, domestic violence, and criminal justice debt.

Recently, after studies determined that only 1 percent of its tenants were represented in housing courts, New York City passed a law, Introduction 214-B, guaranteeing legal representation to any low-income resident facing eviction, along with a $93 million increase of funding for eviction lawyers above the $60 million that the city added in 2014. The City of San Francisco designated itself as a “right to counsel city” in 2012, and in 2018 enacted via a ballot initiative a right to counsel for eviction cases regardless of income level. The City of Philadelphia appropriated $500,000 towards eviction defense after holding hearings on whether a right to counsel in housing cases could help prevent evictions, while the District of Columbia enacted its Expanding Access to Justice Act in 2017 and added $4 million for eviction defense.

In 2007, Washington state amended its rules of court to authorize appointment of counsel as a reasonable accommodation under the Americans with Disabilities Act for indigent litigants whose disabilities require it. This rule was then expanded in 2017 to cover administrative proceedings as well. In California, legislators approved over $45 million in state budget funds to expand legal services for immigrants in 2017, and the state has been engaged in a large-scale targeted experiment, created by statute, in providing counsel in certain critical areas of law for seven years.

ABA Resolution

These legislative efforts came on the heels of a 2006 resolution by the American Bar Association, unanimously adopted, which urged state and local jurisdictions to recognize a right to counsel in civil cases involving “basic human needs” such as those involving shelter, sustenance, safety, health or child custody. Notably, neither the ABA resolution nor the focus of the renewed movement is a true “civil Gideon,” in the sense of a close analogy to the criminal system, providing counsel for every indigent in every case. Instead, the efforts have focused on identifying areas of basic human need in which counsel is most important, because it will make the most difference and protect the most important interests.

On the litigation side, while the Supreme Court’s pronouncements have dampened enthusiasm for federal constitutional litigation, there have been many successes under state constitutions. Most significant of these is the fact that more than 10 state courts have rejected Lassiter and recognized a categorical right to counsel for parents in termination of parental rights proceedings under their state constitutions. Additionally, every state high court to rule on the issue has held that the equal protection clause requires states to provide counsel to indigent parents in contested adoptions if it does so in state-initiated termination of parental rights proceedings. Moreover, in 2015, Massachusetts joined New York and Alaska by establishing a right to counsel in certain custody proceedings, in this case private child guardianships.

All of these targeted efforts are backed by a considerable and growing body of legal scholarship and research about the costs and benefits of providing counsel. For example, a 2014 review of San Francisco’s pilot program suggested that the city could save up to $1.1 million each year in homeless services by helping to keep people housed. A 2012 Massachusetts Bar Association study of a pilot project in Quincy, Massachusetts found that two-thirds of the tenants receiving full representation were able to stay in their homes, compared with one-third of the control group that received limited “lawyer-for-the-day” assistance. The represented tenants also received almost five times the financial benefits, such as damages or cancellation of past due rent, as the control group. A study in the domestic violence context found that 83 percent of represented victims obtained a protective order, compared with 32 percent of those without a lawyer. A meta-analysis of other impact studies found that lawyers increased the likelihood of winning by about 540 percent on average.

California has been at the forefront of several important efforts both in expanding counsel and studying the effects of doing so. For example, in 2004, the California Commission on Access to Justice established the Right to Counsel Task Force, which drafted a “model statute” that could be used to implement a targeted right to counsel focused on the “basic human needs” framework in the ABA resolution. In 2009, then-Assembly Member Mike Feuer carried, and Governor Schwarzenegger signed, the Sargent Shriver Civil Counsel Act, which borrowed some of the language and framework of the model statute to create the largest pilot on civil counsel ever. To date, this program has provided over $58 million to seven legal aid programs and court partners under a competitive bidding program in a seven-county experiment studying the effects of increasing access to counsel in the areas of housing, domestic violence, conservatorships and guardianships, and child custody.

In a report to the legislature released in 2017, the California Judicial Council found that over the first four years of the Shriver pilots almost 30,000 litigants received services in the critical areas of housing, child custody, and guardianship or conservatorship. Most were women of color, and their average income was just over $1,000 per month. The evaluation (conducted by NPC Research, an outside contractor), found that in housing, few tenants were formally evicted and far more moved as part of a negotiated settlement
than in non-Shriver baseline cases, and settlement terms supported long-term housing stability through such measures as more time to move out, reduction of rental debt, and credit protection. Shriver custody cases settled far more often than comparison cases did, and Shriver custody orders were more durable over two years, increasing family stability and decreasing the demand on court resources. The probate project reduced court processing case costs by 30 percent through fewer continuances and faster resolutions. The Shriver projects—originally scheduled to last six years—were made permanent in 2016.

As a matter of international human rights as well, the importance of the right to counsel is achieving growing recognition. In its 2014 concluding observations, the U.N. Committee on the Elimination of Racial Discrimination (which monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination, or CERD) expressed a concern at the lack of a generally recognized right to counsel in civil proceedings (para.22), which disproportionately affects indigent persons belonging to racial and ethnic minorities, and hinders their seeking an effective remedy in matters such as evictions, foreclosures, domestic violence, discrimination in employment, termination of subsistence income or medical assistance, loss of child custody, and deportation. Moreover, the U.N. Human Rights Committee in 2014 urged the United States to ensure access to counsel for both immigrants and victims of domestic violence.

In the Shriver Civil Counsel Act, the state legislature adopted a remarkably stark and candid set of findings about the woeful state of justice when millions of litigants lack lawyers to adjudicate disputes over basic human needs, which include: Many Californians are unable to meaningfully access the courts and obtain justice in a timely and effective manner. Critical legal decisions are made without the court having the necessary information. There are significant social and governmental fiscal costs of depriving unrepresented parties of vital legal rights affecting basic human needs... and these costs may be avoided or reduced by providing the assistance of counsel where parties have a reasonable possibility of achieving a favorable outcome.

Many judicial leaders acknowledge that the disparity in outcomes is so great that indigent parties who lack representation regularly lose cases that they would win if they had counsel.

The Shriver projects, along with research and results from around the nation, are showing that counsel does make a difference, and the slow but steady growth of the recognition of a right to counsel in civil cases is reflective of this growing awareness. Let’s hope that just as we now look back to 1962 and before and think it barbaric that an indigent person could be arrested, charged, tried, convicted, sentenced, and imprisoned without ever seeing a lawyer, we will one day feel the same about the loss of basic human needs such as housing, income, employment, and family relationships, heeding the words of then-New York Chief Judge Jonathan Lippman made a few years ago:

In March 2013, we will reach the 50th anniversary of the Supreme Court’s decision in Gideon v. Wainwright. By then, it is my fervent hope... that it will be an obvious truth to all that those litigants faced with losing the roof over their heads, suffering the breakup of their families, or having their very livelihood threatened cannot meaningfully pursue their rights in the courts without legal counsel.
Who has glanced at the news or spent more than a microsecond on the Internet recently probably has noticed more than one sensationalized story about the increase in struggles of airline passengers traveling with their emotional support animal companions. For instance, in January, one airline denied boarding to a passenger and her “emotional support peacock.” Then, just a month later, another refused to board a young passenger and her “emotional support hamster.” The latter passenger decided that rather than miss her flight, she would have to dispose of the hamster, named “Pebbles,” down the nearest airport toilet, allegedly at the suggestion of a helpful airline employee.

Airlines and other service businesses are now forced to grapple with the laws and regulations surrounding disability accommodations and emotional support service animals, yet the accepted definitions and standards for compliance are currently somewhat unclear and confusing to the public. Exactly what right does a person have to bring a service dog, other “support” animal, or simply a pampered pet onto a plane or a train, or into a taxi? May a hotel ban paws on the premises altogether? May a residential landlord enforce lease provisions barring support animals of every kind? Can an employer prevent an employee from bringing a support animal to the office, and what if other employees are allergic or have a debilitating fear of that particular type of animal? And what difference is there between a “service animal” and an “emotional support animal” anyway? The answer to these questions is: “It depends.”

What is a “Service Animal”?

Earlier this year in the probate division of Ventura County Superior Court, I witnessed an issue brought before the court regarding an application for a protective order because a party to a lawsuit wanted to bring her “service animal” with her to a deposition, and the opposing counsel denied that request. The animal in
question was the witness’s pet goat, which traveled with her everywhere. There were even doctors’ declarations that confirmed the owner used the goat for therapeutic reasons and that it would be detrimental to the owner’s health to have to sit through a deposition without the goat present. Ultimately, the court determined that a goat did not fall within the definition of “service animal” and denied the application.

Under Titles II and III of the Americans with Disabilities Act (ADA), a “service animal” is any dog that is individually trained to do work or perform tasks for the benefit of a person with a disability, whether physical or mental, and the work or task that the dog performs must be directly related to the person’s disability.2 Apologies to cat and hamster lovers—it’s a dog’s world, except, that is, for miniature horses. That’s right, miniature horses are the sole exception to the “dogs only” rule. The critical element of qualifying as a service animal under the ADA is that the dog (or miniature horse) must be specifically trained to do a specific task for the specific individual’s disability. Some examples of different support dogs as identified by the ADA4 are:

- **Guide Dogs or Seeing Eye Dogs.** These animals are specifically trained to travel with and guide individuals with severe vision impairments or are blind.
- **Hearing or Signal Dogs.** These animals are specifically trained to alert a person who has severe hearing loss or cannot hear various noises (such as a ringing telephone or a knock on the door).
- **Psychiatric Service Dogs.** These animals are specifically trained to interact with individuals during specific psychiatric episodes to perform tasks such as “sweeping” a room before an individual enters the premises, turning on lights for an individual to take medications on a schedule or when alerted to do so by a timer, and reminding an individual to take medications on a schedule or when needed.
- **Seizure Response Dogs.** These animals will protect the individual during a seizure or go for help, depending on the severity of the seizure. A few have also been trained to predict when a seizure may occur and take the individual to a safe location.
- **Sensory Signal Dogs.** These animals are specific to those who are diagnosed with autism.

As with federal law, California Civil Code Section 54.1 includes definitions for “guide dog,” “signal dog,” and “service dog.” The definitions for “guide dog” and “signal dog” are really just species of the term “service dog,” which the provision defines as a dog individually trained to the requirements of a person with a disability, such as pulling a wheelchair, fetching dropped items, or alerting someone who is hard of hearing to the presence of intruders or some hazard.3 (California law makes no specific provisions for service miniature horses, but since federal law is supreme, the rules regarding mini-horses also should apply in California).

A dog may be trained to meet other requirements, such as providing emotional support, but that does not qualify the dog as a service animal. While dogs have been trained to provide companionship to their owners through eons of specific breeding and the steady accumulation of unconscious cues from their owners, these companionship skills are not enough to allow for additional accommodations to their owners. The ADA states that the “provision of emotional support, well-being, comfort, or companionship” does not constitute work or tasks for the purposes of the law.6 Thus, a dog lacking specific training to perform tasks related to its master’s disability is not a service animal.

Take Honey, the hypothetical Husky. Honey is the sweetest, gentlest, quietest, best-behaved lapdog in the world—a veritable living plush toy—who regularly visits patients as an emotional support dog in a hospital and who gives solace to her owner, who suffers from PTSD. Honey is nevertheless not a service animal because she has not been trained to perform at least one specific task related to her owner’s PTSD. Change those facts just slightly; if Honey were to be trained to wake her owner from night terrors or nightmares or to create space around her owner in crowded areas in a nonaggressive manner or to bring her owner medication on command, or when alerted to do so by a timer, Honey could legally be deemed a service animal.

Under current law, only a dog (or miniature horse) specially trained to assist its owner’s specific mental or physical disability qualifies as a service animal in California. Emotional support animals and highly trained animals other than dogs and miniature horses do not qualify. Yet anyone can buy a dog vest with lettering along the side proclaiming it to be a “service animal.” Thus, business owners have become skeptical about the credibility and authenticity of such vests. A business owner wishing to verify that a dog brought onto his or her premises is in fact a service animal is limited in the ability to query the owner. Only two questions may be asked when an animal enters place of public accommodation: 1) Is the animal required because of a disability? and 2) What task has the animal been specifically trained to perform?

These questions should not be asked if the training is obvious (for instance, a guide dog leading its owner). Under no circumstances is documentation or written proof of certification or training required. In addition, no additional fee may be charged for the animal (even if the place of business typically charges additional fees for other types of animals).

Employers wishing to inquire will not find clarification in regulations of the Equal Employment Opportunity Commission (EEOC) because that agency has no specific regulations concerning service animals. Instead, the EEOC enforces Title I of the ADA. Therefore, an employer may ask for and receive additional information concerning the individual and the service animal, including a detailed description of the person’s disability and the specific training the dog has received to assist with that disability (and more specifically how that assistance will help the employee perform his or her job responsibilities).

**Additional Questions**

Airlines are cognizant of the fact of the common fear of flying, confined spaces, crowds—all things that passengers must face when choosing air travel. In response, the Air Carrier Access Act gives airlines the option to make accommodations for those traveling with emotional support animals. However, under this circumstance, airlines are allowed to ask for additional information beyond the two restricted questions allowed for under the ADA.

Passengers wishing to bring emotional support animals on a plane should expect to be asked to show the following: Current documentation—not more than one year old—on letterhead from a licensed mental health professional stating: 1) the passenger has a mental health-related disability listed in the Diagnostic and Statistical Manual of Mental Disorders, 2) the animal accompanying the passenger is necessary to the passenger’s mental health or treatment, 3) the individual providing the assessment of the passenger is a licensed mental health professional and the passenger is under his or her professional care, and 4) the date and type of the mental health professional’s license and the state or other jurisdiction in which it was issued.7 The airline then has the discretion to determine on a case-by-case basis as to whether the animal should be (or can be) allowed in the cabin with the passenger.

Effective July 1, 2018, American Airlines updated its policy concerning service and
emotional support animals. Part of the revised policy contained a detailed list of animals it would not accept as an emotional support animal (mainly because they were not or could not be trained). The list included amphibians, ferrets, goats, hedgehogs, insects, reptiles, rodents, snakes, spiders, sugar gliders, non-household birds, animals with tusks, horns, or hooves, and any animal that is unclean or has an odor. American Airlines explained in their statement that they had seen a 40 percent increase in customers who were transporting a service or support animal onboard their aircrafts from 2016 to 2017 and needed to update their policy to accommodate these customers while protecting their other customers from disruptive or untrained animals. Industry group Airlines for America has reported that U.S. Airlines overall experienced an 80 percent increase in customers traveling with an emotional support animal between 2016 and 2017.

Surprisingly, carved out from the exclusions list were “miniature horses properly trained as service animals.” These miniature horses are allowed under the ADA and airlines regulations because they are most often only the size of a large dog and are better suited for those who are allergic to dogs. These miniature horses are specifically trained to be used as guides for the blind, can pull wheelchairs, and provide stability for those with balance issues.

Southwest Airlines is the latest to follow suit in publishing a specific list of restricted animals that can be allowed within the cabin of a plane. Their new restrictions go into effect on September 17, 2018 and limit each passenger to one emotional support animal, which can either be a dog, cat, or miniature horse, which must be on a leash or in a carrier. All airlines are still requiring a current letter from a doctor or licensed mental health professional.

Where may people take their service animals? The quick answer is almost anywhere. Under the ADA and California law, disabled people are entitled to “full and equal access,” as any other member of the general public, to all the places that members of the general public are allowed to go. The ADA gives the same rights to service animals; if a person has a legal right to be somewhere, the service animal comes along, too.

In addition to the allowance of service animals in an educational setting under the ADA, the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act allow a student to use an animal that falls outside the definition proscribed by the ADA if that animal is specifically approved as part of the student’s Individual Education Plan.

Of course, there are other considerations and rules, as well as limitations, on service animals’ rights of access based on health and safety. To cite the most common example, the service animal must always be under its owner’s control—unruly or poorly trained service animals lose their right of access and may get themselves and their owners booted from the premises. Likewise, service animals may be restricted from entering places in which their presence would fundamentally disrupt the services or activities provided in those places—service dogs may be barred from entering areas of a zoo in which their natural predators or prey are on display and may be made agitated or aggressive by the dog’s presence, for example. But, generally speaking, disabled people who make use of a service animal may rest assured that they may bring their service animals anywhere they themselves are welcome. Likewise, hoteliers, shop-keepers, and airline employees may take comfort in knowing that service animals must be accommodated but any other animals need not—for now.

What about keeping service animals in an apartment with a “no pets” rule? There are different rules depending on if the rented unit is privately owned or one that is subsidized by the federal government. For private rentals in California, disabled persons have the right to be accompanied by a service animal in the property they rent regardless of any other restrictions on keeping pets in the building, and without having to pay any additional pet charge or security deposit.

For federal property in California (or anywhere else in the United States), the rules are different. Along with the ADA, the Fair Housing Act (FHA), the regulations issued by the U.S. Department of Housing and Urban Development and the U.S. Department of Justice (DOJ) all govern the rights of individuals living in federally subsidized housing or accessing federal property. Some of these rules overlap, some dovetail, and some create unique exceptions that override other rules. As expected, the net effect is the creation of a complicated web of highly specific rules depending on the class of person (e.g., a disabled person or animal trainer), animal (service animal or emotional support animal) and place (public housing or federal property).

When it comes to federally subsidized housing, the rules, while complicated, are more expansive than the narrow definitions and rights granted by the ADA and California law. Crucially, the FHA requires that federally subsidized housing providers make “reasonable accommodations” in their rules, policies, practices, or services to afford disabled people the opportunity to use and enjoy a dwelling. In the last decade, DOJ regulations have also acknowledged that, in the context of residential housing, there may be compelling reasons to permit emotional support animals. Federal courts have been called upon to interpret these regulations many times in the last two or three decades, and in many decisions these courts have recognized, on a case-by-case basis, the...
right to keep emotional support animals in federal housing.20

Where is the Law Headed?

There are two separate and conflicting public policies battling each other in the debate concerning service and emotional support animals. On the one hand, everyone should be afforded the opportunity to enjoy public places without the restrictions of their individualized disability and having a service animal allows for that enjoyment. On the other hand, business owners and other members of the public should be afforded the opportunity to restrict access by animals that may be portrayed as service animals, but in fact have no specific training. Unfortunately, because of the restrictions of what questions may be asked to prove that an animal is truly a service animal, it is all too easy to take advantage of the situation.

In response to the concerns of business owners, states such as Arizona have passed legislation making it illegal to misrepresent a pet as a service animal.21 The fine for misrepresentation is up to $250 per violation. California’s law is much more severe, imposing a fine of up to $1,000 per violation and a possibility of up to six months in jail.22 There are approximately 19 states that have enacted legislation concerning fraud.23 The issue, however, is in enforcement. If a business owner is limited to the two questions under the ADA, how can fraud ever really be detected? That is for future legislation.
It’s Time to Renew Your LACBA MEMBERSHIP FOR 2019!

CELEBRATING A 140-YEAR LEGACY OF LEADERSHIP IN THE LOS ANGELES LEGAL COMMUNITY

Renew Now: 800.456.0416 or visit www.lacba.org/renew

New for 2019 Renewing Members

› Streamlined membership dues
› One free CLE program (up to two hours)*
› Introducing AutoPay, a fast and convenient way to automatically pay dues on a monthly or annual basis

**LACBA Daily eBriefs:** Appellate Opinions published in the previous 24 hours - a $249 value

**CLE-in-a-Box:** All your MCLE requirements in one convenient place - save $75

**Committees:** Over 20 Committees to choose from, have your voice heard in the legal community

**26 Practice Area Sections:** Access to industry leading legal professionals, including networking events and list-serves

**ICDA Panel:** LACBA members pay reduced dues

**Los Angeles Lawyer Magazine:** Award-winning magazine, written by lawyers for lawyers

**Lawyer Referral Service:** LACBA members pay reduced LRS panel dues

**CLE – Live, Video Streaming, Audio CD:** Save at least 25% on all programming - save over $100 (by attending at least three programs a year)

**Southern California Directory of Experts and Consultants:** The most comprehensive guide of legal experts in the region

**LACBA Member Lounge:** Space available to work from our DTLA offices - one-day value of $200

**Affinity Partner Discounts:** Member savings on eFiling, insurance, and other services for lawyers

*Not available to associate or non-lawyer members*
BY PETER L. CHOATE and WILLIAM H. DANCE

EXPERTS LIBERALLY CONSTRUED

The Garrett v. Howmedica decision laid open an exception to the Sargon opinion, which held that trial courts have a “gatekeeping” responsibility to exclude speculative and unreliable expert opinion testimony.

In Sargon Enterprises Inc. v. University of Southern California, the California Supreme Court clarified the standard that governs the admissibility of expert opinion testimony under California Evidence Code Sections 801(b) and 802. Following that decision, however, a conflict developed in the law governing the admissibility of expert opinion evidence offered in opposition to a motion for summary judgment.

For decades, courts in California had applied the rule that a party’s evidence in opposition to a summary judgment motion must be liberally construed when assessing its sufficiency to create a triable issue of fact. However, in Garrett v. Howmedica Osteonics Corporation, Division Three of the Second Appellate District held that this rule of liberal construction also applies when assessing the admissibility of an opposing party’s expert opinion evidence. In so holding, the Garrett court effectively imposed a relaxed admissibility standard that is at odds with the standard described in Sargon. Moreover, Garrett also created a conflict with an earlier decision in Bozzi v. Nordstrom, Inc., in which Division Eight of the Second Appellate District held that the rule of liberal construction applies only to sufficiency determinations, not threshold admissibility determinations. The supreme court has not yet resolved this conflict.

Given the extensive use of expert declarations in California summary judgment practice, it is important to examine the purported basis for the Garrett rule. The law as it existed before Garrett did not directly support the court’s decision to extend the rule of liberal construction to admissibility determinations in the summary judgment context. Moreover, two recent admissibility decisions—Perry v. Bakewell Hawthorne and Apple Inc. v. Superior Court—cast additional doubt on the Garrett rule.

A party moving for summary judgment should be aware of the conflict between Garrett and Bozzi. When presented with...
an argument that the trial court should apply a relaxed standard of admissibility pursuant to Garrett, the moving party at a minimum should seek to preserve the issue for appeal. Moreover, there are other practical steps that a moving party may take.

Sargon Clarifies Admissibility

Sargon arose from a dispute over damages purportedly suffered by a dental company following the University of Southern California’s alleged breach of a contract to conduct a clinical study of the company’s new implant device. Even though the company was small and had annual profits peaking at only slightly over $100,000, the company’s damages expert opined that had the university fulfilled its obligation, the company would have become a worldwide market leader within 10 years, eventually earning profits ranging from $220 million to $1.2 billion. The California Supreme Court held that the trial court properly excluded the expert’s lost profits testimony as speculative, given that the expert’s damages projections bore no relationship to the company’s actual profits and were not based on data from similarly sized and situated companies.6

Before the supreme court decided Sargon, there was confusion in California law concerning the extent to which a trial court could assess the foundation of expert opinion testimony. California Evidence Code Section 801(b) requires that an expert opinion be based on matter “of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.” But the courts of appeal did not agree on what this provision meant.

For example, in Roberti v. Andy Terminite & Pest Control, Division Four of the Second Appellate District suggested that it is improper under Section 801(b) for a trial court to evaluate the information that forms the basis for an expert’s opinion as a threshold to admitting that opinion.7 By contrast, in Lockheed Litigation Cases, Division Three of the same appellate district construed Section 801(b) to mean that a trial court must evaluate whether the information relied on provides an adequate foundation for the expert’s opinion.8

In deciding Sargon, the California Supreme Court resolved the conflict in the appellate courts’ interpretation of Section 801(b). In affirming the trial court’s exclusion of the plaintiff’s damages expert, the supreme court explicitly embraced the reasoning in Lockheed Litigation Cases, effectively rejected the reasoning in Roberti, and confirmed that trial courts have a “substantial ‘gatekeeping’ responsibility” under Section 801(b) to exclude speculative and unreliable expert opinion testimony.9 According to the supreme court, the trial court had correctly interpreted Section 801(b) to mean that “the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.”10

Significantly, the supreme court held that a trial court’s gatekeeping obligation derives not only from Section 801(b) but also from Section 802. Section 802 provides that an expert may state “the reasons for his opinion and the matter… upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion.” Section 802 also provides that the court “may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.”11 The Sargon court construed Section 802 to mean that trial courts may look beyond the types of matter on which an expert relies, assess whether an expert’s stated reasons support his or her opinion, and create and apply judge-made law restricting the reasons for an expert’s opinion.12

Although Sargon involved the admissibility of expert testimony at trial, the supreme court’s discussion of Sections 801(b) and 802 was not limited to that context. On the contrary, the court described the “applicable legal principles” that apply whenever a lower court exercises its discretion to admit or exclude expert opinion evidence.13 In discussing these principles, the court relied extensively on cases involving admissibility decisions made in the summary judgment context, including the court of appeal’s decision in Lockheed Litigation Cases and the U.S. Supreme Court’s seminal decisions in Daubert v. Merrell Dow Pharmaceuticals, Inc.,15 General Electric Company v. Joiner,16 and Kumho Tire Company v. Carmichael.17 By relying on these summary judgment cases, the court made plain that its interpretation of Sections 801(b) and 802 applies whenever a party seeks to admit expert opinion evidence, regardless of the procedural context.18

Garrett Creates an Exception

Less than four months after the California Supreme Court decided Sargon, the Second Appellate District decided Garrett. The Garrett court effectively created an exception to Sargon by imposing a relaxed standard of admissibility on declarations submitted in opposition to summary judgment motions. Garrett still remains the only published decision following Sargon to explicitly hold that the rule of liberal construction applies to threshold admissibility determinations.

The plaintiff in Garrett alleged that he was injured following the fracture of a femoral prosthetic implant. At issue on appeal was whether the trial court erred in granting summary judgment for the defendant after excluding a declaration submitted by the plaintiff’s metallurgist expert. In that declaration, the expert stated that he had conducted “extensive examinations” of the prosthesis and concluded that the fractured portion of the device was softer than the “minimum required hardness” in two of three specifications of the American Society for Testing and Materials (ASTM) and less than the “expected hardness” in the third specification.19 The expert, however, failed to describe the particular testing processes that he used, to more particularly describe the results of that testing, and to identify the ASTM specifications that he had considered.

On appeal, the defendant argued that the trial court properly excluded the expert’s declaration because these omissions made it impossible to determine whether the material on which the expert relied supported his opinion, as required by Sargon. The court of appeal rejected this argument and emphasized why, in its view, Sargon was distinguishable. Specifically, the court explained that “Sargon involved the exclusion of expert testimony at trial” following a multi-day evidentiary hearing pursuant to Evidence Code Section 802.20 The court then explained that “[u]nlike Sargon,” Garrett involved the exclusion of expert testimony presented in opposition to a summary judgment motion without a Section 802 evidentiary hearing.21

After distinguishing Sargon, the court cited Jennifer C. v. Los Angeles Unified School District,22 and Powell v. Kleinman,23 as support for its conclusion that the rule of liberal construction “applies in ruling on both the admissibility of expert testimony” submitted in opposition to a motion for summary judgment “and its sufficiency to create a triable issue of fact.”24 Relying on these two cases, the court then explained that “a reasoned explanation required in an expert declaration filed in opposition to a summary judgment motion need not be as detailed or extensive as that required in expert testimony presented in support of a summary judgment motion or at trial.”25 Ultimately, the court applied the rule of liberal construction to hold that the expert’s decla-
2019 CLE-in-a-Box
On-Demand, CD

Now Available on Flash Drive

Compliance Group 1 (A-G) deadline is February 1, 2019

25 HOUR CLE-PACK
Special Requirements Included
(Available in On-Demand, CD, and Flash Drive)

$224 PLUS TAX* OR $299 PLUS TAX*

LACBA Member Price Non-Member Price

6 HOUR CLE-BUNDLE
Special Requirements Only
(Available in On-Demand and Flash Drive)

$149 PLUS TAX* OR $199 PLUS TAX*

LACBA Member Price Non-Member Price

TO ORDER:
VISIT WWW.LACBA.ORG/CLEBOX
or 800.456.0416
› FREE ground shipping in continental US only

The 2019 CLE-in-a-Box is approved for use through 2020

Compliance Group 1 (A-G) deadline is February 1, 2019
Compliance Group 3 (N-Z) deadline is February 1, 2020
Compliance Group 2 (H-M) deadline is February 1, 2021

*Local and state taxes applied when applicable
ration was admissible even though the trial court “could not scrutinize the reasons for [his] opinion to the same extent as did the trial court in Sargon.”

Conflicts with Bozzi
In holding that the rule of liberal construction applies to admissibility determinations, Garrett created a conflict with Bozzi. The plaintiff in Bozzi sued a department store and an escalator manufacturer for personal injuries sustained when an escalator stopped as a result of a power outage. The issue on appeal was whether the trial court erred in granting summary judgment for the defendants after excluding a declaration of the plaintiff’s engineering expert. The trial court had held that the expert’s opinions were inadmissible because they lacked any factual foundation and were conclusory and speculative.

The court of appeal affirmed. It began its analysis by observing that “[t]he same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment.” After acknowledging the rule of liberal construction, the court confirmed that this rule “does not mean that courts may relax the rules of evidence in determining the admissibility of an opposing declaration.” As the court emphasized, “only admissible evidence is liberally construed in deciding whether there is a triable issue.”

Garrett Reexamined
The conflict between Garrett and Bozzi has been emphasized in two petitions for review to the supreme court. The court, however, has not yet resolved that conflict. Accordingly, there is value in reexamining the purported basis for the Garrett court’s ruling.

The court in Garrett relied on two cases—Jennifer C. v. Los Angeles Unified School District and Powell v. Kleinman—for the proposition that a trial court should apply the rule of liberal construction when assessing the admissibility of an opposing party’s expert opinion evidence. Nevertheless, neither case directly supports that proposition.

Jennifer C. involved a claim for negligent supervision filed against a school district by a student who was sexually assaulted at school. The issue on appeal was whether the trial court erred in granting summary judgment for the defendant after excluding the declaration of the plaintiff’s expert on school safety and supervision. The trial court excluded the declaration because the plaintiff’s expert was not qualified, and it also found that the expert’s opinions concerning the standard of care were conclusory and therefore insufficient to raise a triable issue of fact.

The court of appeal reversed. Significantly, the court did not apply or even mention the rule of liberal construction when reviewing the trial court’s qualifications-based admissibility ruling. Instead, the court referenced the rule only “[i]n considering whether [the expert’s] opinions were sufficient to raise triable issues of fact.” Moreover, the court cited Powell not for the proposition that the rule of liberal construction applies to admissibility determinations but rather for the proposition that the rule applies to sufficiency determinations.

Powell was a medical malpractice case arising from damages sustained when the defendants failed to promptly diagnose and treat an injury to the plaintiff’s spinal cord. At issue on appeal was whether the trial court properly granted summary judgment for the defendants after excluding the declaration of the plaintiff’s expert on the grounds that his opinions were based on unfounded assumptions and flawed reasoning.

As in Jennifer C., the court of appeal reversed. At the outset, the court suggested that it intended to conduct an admissibility analysis. However, the court sidestepped the issue of admissibility and conducted a sufficiency analysis instead. The court began that analysis by taking “guidance from cases analyzing the sufficiency of medical experts’ summary judgment declarations.”

After considering several such cases, the court reaffirmed the rule of liberal construction. The court then applied that rule and concluded that the expert’s declaration created “triable issues of fact which preclude summary judgment.” Having found triable issues of fact, the court reversed the trial court’s judgment without explicitly addressing the threshold issue of whether the expert’s opinions were admissible.

In short, while both Jennifer C. and Powell involved a challenge to a trial court’s exclusion of an expert declaration submitted in opposition to a summary judgment motion, the court of appeal in each case applied the rule of liberal construction in the context of a sufficiency analysis, not an admissibility analysis. Thus, neither Jennifer C. nor Powell directly supports the proposition that the rule of liberal construction should apply to admissibility determinations. At most, these cases exemplify the tendency of some courts to conflate the distinct concepts of admissibility and sufficiency—or as one court put it, they “show a confusion in the minds of some courts between the admissibility of a circumstance in evidence and its weight when admitted.” But admissibility and sufficiency are not the same. As the California Supreme Court explained nearly 150 years ago in Yates v. Smith, “[t]he question of the admissibility of evidence is quite different from the question of its value, weight or effect.”

In holding that the rule of liberal construction applies to admissibility determinations, the Garrett court therefore appears to have read Jennifer C. and Powell too broadly. The court also does not appear to have considered the history and purpose of the rule or the impact of legislative amendments to the Code of Civil Procedure.

Eagle Oil
The rule that a trial court must liberally construe the evidence submitted in opposition to a summary judgment motion was announced more than 70 years ago in Eagle Oil & Refining Co. v. B.H. Pretice. By explaining that “[t]he issue to be determined...is whether or not” the party opposing summary judgment “has presented any facts which give rise to a triable issue,” the Eagle Oil court confirmed that the rule as conceived applied to sufficiency determinations, not admissibility determinations. In fact, when the court announced the rule, there was no strict requirement that a declaration opposing summary judgment be based only on admissible evidence. It was not until the 1973 amendments to the Code of Civil Procedure that the legislature first required that declarations offered in opposition to summary judgment be based on admissible evidence.

Moreover, when it imported the rule of liberal construction into California law, the Eagle Oil court viewed summary judgment as a “drastic” procedure that should “be used with caution.” That view, however, changed in 1992 and 1993, when the legislature amended the Code of Civil Procedure to bring California summary judgment law “closer” to its federal counterpart and thereby “liberalize” the granting of summary judgment motions. Therefore, when the court decided Garrett, summary judgment was understood to be “a particularly suitable means to test the sufficiency” of the plaintiff’s case. Imposing a relaxed admissibility standard on a declaration submitted in opposition to a motion for summary judgment is inconsistent with the legislature’s intent that
trial courts should grant such motions more readily.

In addition, applying a rule of liberal construction to admissibility determinations is complicated by Evidence Code Section 300, which provides that the code “applies in every action” except as otherwise provided by statute. According to the Law Revision Commission Comments, Section 300 “makes the Evidence Code applicable to all proceedings conducted by California courts except those court proceedings to which it is made inapplicable by statute.”

As one court noted, “the Law Revision Comment to Section 300 resolves any conceivable ambiguity in the statutory language.” By operation of Section 300, therefore, Sections 801(b) and 802—as interpreted by Sargon—apply with as much force at summary judgment as at trial. Moreover, Civil Procedure Code Section 437c(d) states that declarations supporting and opposing summary judgment “shall set forth admissible evidence.” Neither that provision nor any other statute permits a trial court to “liberally” construe a declaration for admissibility purposes.

**Perry and Apple Considered**

The supreme court’s decision in *Perry* and the court of appeal’s decision in *Apple* now cast additional doubt on whether, following Sargon, it is appropriate to apply the rule of liberal construction when assessing the admissibility of a declaration submitted in opposition to a motion for summary judgment.

The issue in *Perry* was whether the trial court had erred in granting summary judgment for the defendant after refusing to consider the declaration of a plaintiff’s expert who had not been timely designated. On appeal to the supreme court, the plaintiff relied on *Kennedy v. Modesto City Hospital*. Unlike the court of appeal in *Perry*, which had affirmed the trial court’s judgment, the court in *Kennedy* reversed the trial court’s entry of summary judgment “shall set forth admissible evidence.” Neither that provision nor any other statute permits a trial court to “liberally” construe a declaration for admissibility purposes.

In affirming the court of appeal’s judgment in *Perry*, the supreme court expressly disapproved of *Kennedy* and rejected its underlying assumption that admissibility means something different at trial than at summary judgment. The court reasoned that under Section 437c(d), a declaration submitted in opposition to a summary judgment motion “‘shall set forth admissible evidence.’” The court then cited approvingly to *Bozzi* for the proposition that this provision “requires the evidence presented in declarations to be admissible at trial.” Based on this interpretation of Section 437c(d), the court concluded that if expert opinion evidence is subject to exclusion at trial based on a party’s noncompliance with the expert disclosure statutes, that evidence perforce cannot be considered at summary judgment.

By emphasizing that evidence cannot be considered at summary judgment unless it would be admissible at trial, *Perry* undermines the *Garrett* court’s reasoning. As explained, the *Garrett* court distinguished *Sargon* and applied the rule of liberal construction to hold that the plaintiff’s expert’s testimony was admissible at summary judgment.
judgment even though the court had no basis to assess whether the testimony would be admissible at trial. But Perry now makes clear that expert opinion evidence is admissible at summary judgment if and only if it would be admissible at trial. Because there is no basis to apply a rule of liberal construction when assessing the admissibility of expert opinion evidence at trial, there likewise is no basis to apply that rule when assessing the admissibility of expert opinion evidence submitted in opposition to a summary judgment motion.

Unlike Perry, Apple was not a summary judgement case. Instead, the issue in Apple was whether the Sargon admissibility standard applied to expert opinion evidence submitted in connection with class certification motions. The defendant challenged the materials and methodologies on which the plaintiffs’ experts relied for their damages opinions and repeatedly urged the trial court to apply Sargon. The court refused that invitation, however, and “expressed concern that applying Sargon would ‘turn class cert[ification] motions into these massive hearings.”’61 In granting class certification, the court reaffirmed its belief that Sargon did not apply and that the defendant’s expert challenges presented “issues for trial.”62

The court of appeal reversed. The court began its analysis by emphasizing that a trial court “may consider only admissible expert opinion evidence at class certification” and that “[t]he Evidence Code provides the framework for the admissibility” of such evidence.63 The court then explained that the supreme court in Sargon provided “definitive guidance to courts considering the admissibility of expert opinion evidence” and that the court’s interpretation of Sections 801(b) and 802 “applies wherever the Evidence Code does.”64 In holding that Sargon applies equally at class certification as at summary judgment and trial, the Apple court confirmed that “[t]here is only one standard for admissibility of expert opinion evidence in California, and Sargon describes that standard.”65 Moreover, the court reasoned that exercising a gatekeeping role in each of these procedural contexts “serves a similar salutary purpose.”

The Garrett Footnote

Although the Apple court did not purport to address the conflict between Garrett and Bozzi, the court did discuss Garrett in a footnote. The court noted that Garrett applied the rule of liberal construction to hold that “an expert declaration in opposition to summary judgment should not have been excluded even though the expert’s description of his methodology was relatively thin.”66 The court then explained that “[e]ven accepting Garrett’s analysis, no rule of liberal construction applies at class certification.68 By describing Garrett in this manner, the court suggested that it may view Garrett with disfavor.

More importantly, the reasoning in Apple is at odds with that in Garrett. In holding that the rule of liberal construction applies when assessing both the admissibility of expert opinion evidence submitted in opposition to summary judgment as well as the sufficiency of that evidence to create a triable issue of fact, Garrett conflated the distinct legal concepts of admissibility and sufficiency and created what effectively is a different and lower standard for admission of certain expert testimony than that described in Sargon. But similar to Bozzi, Apple reaffirms what the supreme court recognized in Yates more than a century ago—namely, that admissibility and sufficiency, while related, “are distinct” legal issues.69 Moreover, similar to Perry, Apple now confirms that following Sargon, “there is only one standard for admissibility of expert opinion evidence in California.”70 Moreover, by observing that Sargon applies “at class certification and otherwise,” Apple also
confirms that this singular admissibility standard applies regardless of the proce-
dural context in which expert opinion evidence is proffered.\[73\]

In addition, Apple explicitly rejects the rationale that led the Garrett court to dis-
tinguish Sargon and apply the rule of liberal construction to a threshold admissibility
determination. As explained, the Garrett court distinguished Sargon on the grounds
that the trial court there had conducted a Section 802 evidentiary hearing to assess
the admissibility of expert opinion testi-
mony at trial. However, the Apple court
reasoned that Sargon is not distinguishable
on that basis.\[74\] Indeed, the court confirmed
that the Sargon admissibility analysis is
“not limited” to the trial context but also
applies at summary judgment and class
certification, and that “nothing in that
opinion mandates or even encourages hold-
ing such a hearing for every expert, at trial
or otherwise.”\[75\] Because it rejects Garrett’s stated basis for distinguishing Sargon, Apple necessarily calls into question the Garrett court’s decision to extend the rule of liberal construction to admissibility assessments.

Implications for Practitioners

As noted, the California Supreme Court has not resolved the conflict between Garrett and Bozzi. When presented with an argument that the trial court should apply a relaxed standard of admissibility pursuant to Garrett, the moving party at a minimum should seek to preserve the issue for appeal. Nevertheless, there are other practical steps that the moving party could take, depending on the circumstances.

For example, when noticing its motion, the moving party might consider request-
ing that—before ruling on the motion—the court conduct an evidentiary hearing under Evidence Code Section 802 to assess the purported basis of any expert opinion evidence submitted by the opposing party. A court unquestionably has authority to conduct a Section 802 hearing in the sum-
mary judgment context. If the court con-
ducts the requested hearing, the rationale
that led the Garrett court to distinguish Sargon and liberally construe the opposing party’s expert declaration arguably should no longer apply.

Alternatively, the moving party might consider asking the court to defer ruling on its motion until after the party has had a reasonable opportunity to depose the opposing party’s expert. Courts have al-
lowed discovery in such circumstances.\[76\]

With a more developed evidentiary record, a party moving for summary judgment may be able to show why the opposing party’s

---


\[74\] See id. at 1332.

\[75\] See id.


\[77\] See id. at 122 (“Because the court sustained Dr. Kleiman’s evidentiary objections and excluded Dr. Meuh’s declaration, we review the court’s ruling for abuse of discretion.”).

---

Lois R. Levine & Nathaniel S. Turner, Los Angeles Lawyer, October 2018
When a tort is committed and there is a resulting liability, someone has to pay. Between spouses committed to a marriage, there may be little debate as to how a tort obligation is paid; however, when a dissolution action is initiated or pending, the question that undoubtedly arises is: Who will pay for this? The family law litigator must first understand how liability should be apportioned to fully advise his or her client in the dissolution matter. Moreover, to understand how liability should be apportioned, the family law litigator must understand the difference between torts that create community liability and those that create separate liability. While there are rules that provide a comprehensible general framework, there are nuances to the rules that could have a dramatic impact on a client’s finances if not identified. Understanding the community versus separate tort distinction provides only part of the picture. The family law practitioner must also understand the rights of third-party creditors to craft a strategy to address the debt in resolving the dispute, if any.

Family Code Sections 900 et seq. provide the rules for the liability of marital property. Family Code Section 902 provides that a “debt” is an obligation incurred by a married person before or during marriage, whether based on contract, tort, or otherwise. Family Code Section 903(b) provides that the time the debt is “incurred” is the time that the tort occurs.

In general, the community estate is liable for the debts incurred by either spouse before or during the marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt. However, the earnings of a spouse during the marriage are not liable for a debt incurred by the other spouse prior to the marriage. This eliminates a third-party creditor’s ability to collect against the nontortfeasor spouse through vehicles such as an earnings withholding order/wage assignment order. Further, after the earnings have been paid to the nontortfeasor spouse, the earnings will remain free from liability as long as they are held in a deposit account.

Family Code Section 2625 provides a test to determine whether a community estate has benefitted from the “fruits” of tortious conduct.
account in which the debt-incurring, tortfeasor spouse has no right of withdrawal and they are not commingled with other community property.\(^3\)

Upon divorce, the family law court has jurisdiction to assign the parties’ debts to either or both of the spouses. Family Code Section 916 enumerates the following rules concerning assignment of debt: 1) a married person is personally liable and his or her separate property and community property that the person receives is liable for a debt incurred by that person from before or during the marriage, regardless of whether the debt was assigned to them at the time of division; 2) a married person is not personally liable, nor is the separate property or the community property he or she receives at the time of division liable for the debts that the spouse incurred prior to or during the marriage, unless the debt was assigned for payment by the person in the division of the property; and 3) a married person is personally liable and his or her separate property and community property that the person receives is liable for a debt incurred by the person’s spouse prior to or during the marriage if the debt was assigned for payment by the person in the division of the property. If, after the property division, a money judgment from a subsequent debt collection case (i.e., a judgment from a tort case) is entered, the person and the property the person received are not subject to enforcement of the judgment unless that person is made a party to the judgment.

It is also important to note that while the family law court has jurisdiction to order one party to pay an obligation to a creditor, the creditor has no right to enforce the court’s order if the name of the spouse is not listed on the debt or the judgment for the debt.\(^4\) In this instance, it will likely fall to the spouse that was not required to pay the debt per the judgment to enforce the judgment.

### Guideline for Analysis

There is a two-step process to determine whether the community may be liable for the tort. Step one is determining when the tort occurred. Step two is determining whether the nature and purpose of the tort benefitted the community.

In the first step, the court, in adjudicating the apportionment of the tort-related debt or obligation, is charged with determining the character of the debt, community versus separate. Whether a debt is community or separate depends on the timing, nature, and purpose of the tortious conduct. A comprehensive understanding of the factors and analysis will allow the family law litigator to advise his or her client regarding the debt and the best course of action to resolve the issue within the dissolution action.

As a threshold issue, the community cannot be liable for a tort that was not committed during the marriage. The California Family Code provides that tort debt is deemed incurred at the time the tort occurs.\(^5\) Torts occurring before or after the marriage will per se be the obligation of the tortfeasor. This threshold applies to intentional as well as negligent conduct. The court in *In Re Marriage of Feldner* explained that when the liability arises out of a post-separation tort, “there is no need to make the distinction between intentional and negligent torts, as both categories are [the tortfeasor spouse’s] separate [debt] under [Family Code] section 903, subdivision b.”\(^6\) The *Feldner* ruling suggests that negligence occurring the day after the parties’ separation creates separate liability.

Because the timing rule is used to characterize debts, the family law litigator must identify the date of separation as a crucial, interrelated issue. The nontortfeasor spouse may wish to assert an earlier date of separation if it would force a tort to be categorized as a post-separation tort and separate obligation of the tortfeasor spouse. Often, a new client may be ignorant of his or her full liabilities or those of the spouse. As a practice point, a family law practitioner not confident he or she knows all the issues at the time of filing the client’s first appearance would be wise to write “To Be Determined” for the parties’ date of separation.

Not all negligence occurs at one particular moment. Sometimes the negligence can occur over months or even years (e.g., professional malpractice). Depending on the type of negligence that occurs, there may be specific authority determining when the “date of incident” occurred. However, when there is no way to pinpoint the specific date the tort occurred, the answer may be to determine the overall length of time during which the tort occurred in relation to the date of separation and assign the liability pro rata between the community and the tortfeasor.

Timing is only a threshold issue; therefore, the second step involves a more nuanced analysis once it is determined that the tort occurred during the marriage, signaling that the community may be liable. In fact, Family Code Section 1000 provides an order of preference for collecting debts from a married couple, and perhaps gives a hint as to how to apportion tort debt.\(^7\) As set forth in Section 1000(b), the order of collection depends on whether or not the tortfeasor spouse was “performing an activity for the benefit of the community.”

The collection statute states: (1) If the liability of the married person is based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the community estate and second from the separate property of the married person.

(2) If the liability of the married person is not based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the separate property of the married person and second from the community estate.

The benefit analysis suggests that timing is not always a controlling factor. The analysis applies post-separation based on the same reasoning. When the community estate benefitted from the tortious conduct, the community should be liable for the obligation.

These considerations are not meant to interfere with traditional notions of tort liability. Other concepts, such as vicarious liability or joint venture liability may result in liability to either spouse regardless of the aforementioned analysis. Third parties will not concern themselves with the apportionment analysis discussed herein; they will attempt to collect from either or both parties to the extent that they can. Regardless of how the obligation is satisfied (i.e., who has to pay), the appropriate apportionment of the obligation remains a question, and if a spouse is forced to pay a debt for which the other is liable, he or she will have to assert a reimbursement claim in the dissolution action.

### Intentional Torts

In apportioning debts associated with intentional torts, family law courts have centered their analysis on whether or not the community benefitted from the “fruits” of the tortious conduct.\(^8\) This “benefit-based test” is codified in the statute relating to the assignment of debts in divorce. Family Code Section 2625 provides that all separate debts—including those incurred by a spouse during marriage and before the date of separation that were not incurred for the benefit of the community—shall be confirmed without offset to the spouse who incurred the debt.

The initial framework for this analysis was set forth in *In Re Marriage of Stitt*.\(^9\)
In *Stitt*, the wife, Ida Mae Stitt, had worked as a manager of Zingo's, Inc. during the marriage. Zingo's filed suit against her for fraud and misappropriation of funds. To settle the civil suit, the wife agreed to pay $15,000 and give up all her stock. Although it is somewhat hard to believe given that she was tried and convicted of embezzling funds, at trial in the family law action the trial court found that no benefit to the community was shown and assigned the $15,000 liability to her.

The appellate court affirmed the trial court and reasoned:

Between the spouses, certain obligations which are properly characterized as separate may be assigned to the responsible person if unpaid, or reimbursement may be ordered in favor of the community if the debt was paid from community assets. In this instance the court found it appropriate to assign the full financial responsibility for the wife's embezzlement to the wife, preventing her assertion of “community debt” from diminishing husband's share of the community property. This was consistent with the general principle found in Civil Code Section 1714 that the actor is solely responsible for willful [sic] and negligent acts unless shared, mitigated or excused because of other principles of law.

The rule is clear and seems simple enough: a spouse's intentional conduct that provides no benefit to the community is his or her separate obligation. The *Stitt* court seemed quite happy to follow the “general principle” and hold the tortfeasor spouse 100 percent liable for the resulting debt.

What about intentional conduct that benefits the community? Is the tortfeasor spouse still 100 percent liable? The family law litigator likely already suspects that the answer is no. If the community benefitted from the tort, it must be liable to some extent.

The answer is found in *In Re Marriage of Bell*. There, the wife embezzled funds from her employer, Palm Springs Aerial Tramway (Tramway), from 1985 to 1990. She was arrested in 1990, and Tramway filed suit against the parties seeking to recover the embezzled funds. The parties settled that suit for $150,000, and the suit was dismissed. The parties separated in 1991, and there were $55,000 in attorney fees. The trial court in *Bell* followed the *Stitt* court's reliance on the “general principle” to hold the tortfeasor spouse liable. It assigned all of the debt, including the settlement amount and the attorney fees to the wife as her separate property obligations.

The appellate court overturned the trial court's whole-hearted reliance on the *Stitt* ruling, stating:

As to the $150,000 civil settlement, however, we find the considerations are different [than those in *In re Marriage of Stitt*]. Wife was still engaged in an intentional tort, and Husband still knew nothing about it. Here, however, there was uncontradicted testimony that the community received the benefit of the embezzlement. Even if the numbers were somewhat uncertain, it was apparent that the community had received a major infusion of funds over the years, and it was clear that all the embezzled funds had been put to community, and not separate, use. Mr. [X] testified that the amount of the settlement was based on estimates of the amount that had been taken, so the settlement was no more than an attempt at restitution. To that extent, directing payment of the settlement by the community would do no more than bring it back to where it had been.

However, the appellate court upheld the trial court's decision regarding the attorney fees:

In the present case we have an intentional tort (as well as a crime) but we also have benefit to the community. Applying the principles of the cited cases to the facts before us, we conclude that the trial court correctly decided that Wife should be held liable for the attorney fees required for her defense in both the civil and the criminal actions, and that she should be liable also for the state and federal tax liability arising out of the embezzlement, including interest and penalties. Wife engaged in intentional tortious and criminal activity and knowingly accepted the risk that she would be caught and would have to face the consequences. Husband, who knew nothing of the risk and could do nothing to avoid it, should not in fairness bear the same burden once it did go wrong. In this regard our decision here follows the ruling in *Stitt*.

The community thus is liable for intentional torts to the extent there is evidence it benefitted from the tortuous conduct. This aspect resembles restitution, but the community is not liable for the attorney fees and costs associated with the party's attorney fees if the nontortfeasor spouse was ignorant of the tortious conduct. *In re Marriage of Bell* does not address the situation in which the tortfeasor spouse is aided by the nontortfeasor spouse. If the parties are seemingly acting in concert, or if the nontortfeasor is knowingly enjoying the spoils, the story would likely be different. Then, the nontortfeasor certainly does not have sparkling clean hands.

The clean hands-innocent spouse exception also applies in criminal matters. In the case of Q-Soft, Inc. *v. Superior Court of Orange County*, the wife was convicted of embezzling from her employer. Under Penal Code Section 186.11 (the freeze-and-seize law) the employer submitted a claim seeking restitution by attempting to force the sale of the wife’s two residences, one which she owned as “tenants in common” with her first husband, and a second home that she owned with her second husband. Both husbands claimed that they were “innocent spouses” and were completely ignorant of the wife’s crimes and therefore their share of the property should not be seized. The court held that the burden of proof is on the noncriminal spouses to show that they were “innocent”—i.e., lacked knowledge of the other spouse’s crimes—and that they “will not reap the fruit of fraud.”

**Other Considerations**

For negligent tortious conduct committed during the marriage, it seems that the analysis is the same as it is for intentional tortious conduct. In *In re Marriage of Hirsch*, the court was forced to ignore the nature of the conduct altogether because the tort action was settled prior to the trial. In determining whether the community would be liable, the appellate court acknowledged that it did not know whether the conduct was negligent or intentional but stated “the characterization of the conduct alone does not resolve the question.” The court confirmed that the ultimate question was whether the conduct benefitted the community.

What if there is no benefit from the activity, and the activity is everyday negligence (e.g. driving a car)? The characterization of this debt would likely be solely tied to the timing of the conduct. (After all, there are very few “fruits” to be reaped in driving a car.) Then, the timing factor becomes all the more important. If the parties are married, the debt should be community property under Family Code Section 903(b).

However, in a situation in which the liability stems from activity that really should be a separate debt, liability for negligent conduct should mirror the concept.
of respondeat superior, as spouses are agents of the community. Under respondeat superior, an employer is vicariously liable for the negligent conduct of his or her employee when the employee is working within his or her capacity as an employee. The employer is not, however, liable when the employee commits intentional torts or is engaged in a “frolic.”

In establishing vicarious liability, there is an important distinction between a “frolic” or “detour.” If an employee is found to be taking a longer or less direct route in traveling from one place to another, but the travel is found to be in furtherance of employment, the employee is held to be on a “detour,” and the employer is liable. However, if the employee is on a dereliction of duty in his or her travels when a tort is committed, the employee is found to have been engaged in a “frolic,” and the employer is not liable for the tort.

Analogizing this concept to a marriage, in which the parties are presumed always to be working in furtherance of the marriage, the question becomes “how do you take a ‘frolic from a marriage’? More aptly phrased, what activities fall outside the scope of one’s spousal duties?

Management and maintenance of separate property certainly seems to fall into this category. If a spouse owned a rental property prior to marriage and maintained it as his or her separate property (and, taking it to the extreme for purposes of discussion, there was a premarital agreement providing that the community would not gain an interest in the property as a result of the spouse’s efforts to maintain and manage the property during the marriage) but failed to adequately maintain the property which then resulted in tort liability, the spouse’s negligent conduct belongs only to him or her under the benefit analysis as the community was not going to benefit from his or her rental income. Negligent conduct while on a vacation committing infidelity would also seem to fall outside the scope of the marriage. That would surely be a matter of contention in a dissolution proceeding.

Occasionally, the parties’ exposure for tort and contract liability is not completely known, even at the time of the final settlement or trial. In the case of In re Marriage of Nassimi, the parties reached a marital settlement agreement disposing of all issues, or so they thought.19 A few months later, the husband was sued for breach of contract by a third party to whom he had sold his business prior to the spouses’ date of separation. The husband filed a post-judgment request to have the lawsuit considered an “unadjudicated debt of the marriage” pursuant to Family Code Section 2556, seeking to have the wife contribute to attorney fees to defend the lawsuit. The court of appeal reversed the trial court’s ruling citing to Family Codes Sections 903 and 910 as well as Feldner in that the community entered into the contract and that the breach was a community obligation per Family Code Section 902.20 Further, the court gave no deference to the fact that the lawsuit was filed after the date of separation for the same reasons as in Feldner because the contract giving rise to the debt was made during the marriage.

It is important to note that the family court has the ability to award a spouse who is neither a tortfeasor or criminal offsetting assets in the event community property is wrongfully seized. In In re Marriage of Beltran, the husband, a member of the armed forces, was convicted of sexually molesting a child and was stripped of his retirement and other accumulated benefits.21 The parties had a five-year marriage, and there was a community interest in the lost benefits. The court of appeal affirmed the award of offsetting assets to the wife, holding that the wife was entitled to be reimbursed for her lost share of community property based on the husband’s criminal conduct. Obviously, this remedy is practical only when sufficient offsetting assets exist.

**Attorney Fees**

In the instance when the (alleged) tortfeasor spouse wins at the tort trial, there is no intentional or negligent tortious conduct. If the community would have been on the hook per the foregoing time and benefits analysis, then the (alleged) tortfeasor spouse successfully vindicated the community at trial, and as such, he or she should not be liable solely for the attorney fees incurred. Accordingly, the attorney fees are a community obligation, and a community debt. However, if the tortfeasor loses at the tort trial, the determination of the character of the debt associated with the tortious conduct rests on whether the community benefitted from the conduct.

If the conduct did not benefit the community, all costs, fees, and liability are the tortfeasor’s separate liability. Alternatively, if the conduct did benefit the community, the community is liable for the judgment or settlement. However, the attorney fees are the tortfeasor’s separate obligation.

If the community is found to be liable for the attorney fees in any form, Nassimi provides that the amount of fees should be scrutinized to see which portion is actually attributable to the defense of the community. In the event that the matter is settled, the tortfeasor spouse has the opportunity to have input regarding the terms of settlement. It would be in his or her best interest not to admit any negligence; however, the tortfeasor spouse has a fiduciary obligation to the community and must not act in his or her own self-interest to the detriment of the community’s interests. A tortfeasor spouse must not negotiate and avoid admitting to liability at the expense of the community. Regardless of the judgment or settlement, the analysis should not stop there. There must be an inquiry as to whether or not the community benefitted. If the matter is settled, a settlement or judgment will be available, which will likely establish whether the conduct was intentional or negligent.

As with many issues in family law, the family law attorney must inform his or her client that this is a somewhat unsettled and murky area of the law. The test—whether the conduct benefitted the community—is not necessarily a routine matter. It is a factual determination based on timing and an analysis of whether the community benefitted.

---

2. Fam. Code § 911(a).
3. Id.
5. See Fam. Code § 903(b); see also In re Marriage of Feldner, 40 Cal. App. 4th 617, 628 (1995) (“Either party might have requested the family court to retain jurisdiction to determine whether a part of the losses in the Allen action should be characterized as tort damages, and either separate or community, depending on when the tort occurred.”)
7. Fam. Code § 1000(b).
8. See In re Marriage of Bell, 49 Cal. App. 4th 300, 308-10 (1996) (“The community had shared in the benefit and could properly be asked to share in the cost. Although this was not exactly the outcome in In re Marriage of Hirsch, dictum in Hirsch indicated the court there would have approved such a result in this case; the court there stated, ‘For example, had wife put the embezzled funds into a community account or other community property, it would have been appropriate for the community to bear the corresponding loss.’” (internal citations omitted.).
10. Id. at 588.
12. Id. at 302-303.
13. Id. at 310.
14. Id. at 309.
16. Id. at 453.
18. Id. at 111.
20. Id. at 685-86.
## WELCOME TO OUR NEWEST MEMBERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hillel D. Abrams</td>
<td>Priya D. Mohan</td>
</tr>
<tr>
<td>Chinyere Abbey Abuka</td>
<td>David Douglas Monks</td>
</tr>
<tr>
<td>Mario Acosta, Jr</td>
<td>Matthew Morris</td>
</tr>
<tr>
<td>Shahriar Adorbehi</td>
<td>Amber N. Morton</td>
</tr>
<tr>
<td>Kiren Ahuja</td>
<td>Mikel David Muffley</td>
</tr>
<tr>
<td>Edwin I. Aimufua</td>
<td>Michael H. Nathans</td>
</tr>
<tr>
<td>Michael Alder</td>
<td>Karla P. Navarrete</td>
</tr>
<tr>
<td>Leila Alemi</td>
<td>F. Edward Navarro</td>
</tr>
<tr>
<td>Aarona A. Alexander</td>
<td>David Nazzaro</td>
</tr>
<tr>
<td>Cynthia A. Alexander</td>
<td>David Carlson Nealy</td>
</tr>
<tr>
<td>Peter Ian Altman</td>
<td>Ronald J. Nessim</td>
</tr>
<tr>
<td>Camila Lucero Alvarez</td>
<td>Brian A. Newman</td>
</tr>
<tr>
<td>Jonathan Brook Ambaye</td>
<td>Erik M. North</td>
</tr>
<tr>
<td>James Andrade</td>
<td>Dion J. O’Connell</td>
</tr>
<tr>
<td>Michael Benjamin Atkins</td>
<td>Nancy M. Olson</td>
</tr>
<tr>
<td>Gina Austin</td>
<td>Ifeoma Onuoha</td>
</tr>
<tr>
<td>James D. Bainbridge</td>
<td>Richard P. Ormond</td>
</tr>
<tr>
<td>Randi D. Bandman</td>
<td>Warren Paboojian</td>
</tr>
<tr>
<td>Keith Patrick Banner</td>
<td>Courtney A. Palko</td>
</tr>
<tr>
<td>Jared A. Barry</td>
<td>Nicole M. Perez</td>
</tr>
<tr>
<td>Michael H. Berg</td>
<td>Shane Phayakapong</td>
</tr>
<tr>
<td>William J. Bernfeld</td>
<td>Johannes Mitchell Ploeg</td>
</tr>
<tr>
<td>Robert Black</td>
<td>Jennifer A. Post</td>
</tr>
<tr>
<td>Robert Samuel Blonstein</td>
<td>June E. Poyourow</td>
</tr>
<tr>
<td>Alex R. Borden</td>
<td>Vidhya Ragunathan</td>
</tr>
<tr>
<td>Peter Hiller Borenstein</td>
<td>Kelly Megan Raney</td>
</tr>
<tr>
<td>Hon Kevin C. Brazile</td>
<td>Ron Reitshtein</td>
</tr>
<tr>
<td>Brian K. Brookey</td>
<td>Edward S. Renwick</td>
</tr>
<tr>
<td>Mackenzie M. Brown</td>
<td>Rehema Rhodes Williams</td>
</tr>
<tr>
<td>Michael Anthony Brown</td>
<td>Linda F. Rice</td>
</tr>
<tr>
<td>Hon Daniel J. Buckley</td>
<td>Kyle Berend Roybal</td>
</tr>
<tr>
<td>Mark B. Burnstein</td>
<td>Zacky P. Rozio</td>
</tr>
<tr>
<td>Liana C. Carter</td>
<td>David Verlin Russell</td>
</tr>
<tr>
<td>Greg James Chambers</td>
<td>Lillian Louisa Russell</td>
</tr>
<tr>
<td>Into B. Champon</td>
<td>Ellie Ruth</td>
</tr>
<tr>
<td>Eric W. Cheung</td>
<td>Lindsay L. Ryan</td>
</tr>
<tr>
<td>Christine C. Cohn</td>
<td>Delaram Sabzerou</td>
</tr>
<tr>
<td>Misty L. Colwell</td>
<td>Charles H. Samel</td>
</tr>
<tr>
<td>Bryce Michael Cullinane</td>
<td>Eduardo Santos</td>
</tr>
<tr>
<td>Jim Cunneen</td>
<td>Joanna Lauren Satcher</td>
</tr>
<tr>
<td></td>
<td>David Saunders</td>
</tr>
<tr>
<td></td>
<td>Jefferson Saylor</td>
</tr>
<tr>
<td></td>
<td>Barbara M. Scheper</td>
</tr>
<tr>
<td></td>
<td>Jeremy Scherwin</td>
</tr>
<tr>
<td></td>
<td>Julia Drey Schneider</td>
</tr>
<tr>
<td></td>
<td>Alik Segal</td>
</tr>
<tr>
<td></td>
<td>Michael F. Sfregola</td>
</tr>
<tr>
<td></td>
<td>Janice Lee Shen</td>
</tr>
<tr>
<td></td>
<td>Brittany Jane Shugart</td>
</tr>
<tr>
<td></td>
<td>Travis Siegel</td>
</tr>
<tr>
<td></td>
<td>Clarice F. Silva</td>
</tr>
<tr>
<td></td>
<td>Habiba Simjee</td>
</tr>
<tr>
<td></td>
<td>Ashley Margaret Simonsen</td>
</tr>
<tr>
<td></td>
<td>Robert Soo Song</td>
</tr>
<tr>
<td></td>
<td>Jayson T. Sullinger</td>
</tr>
<tr>
<td></td>
<td>David J. Swan</td>
</tr>
<tr>
<td></td>
<td>Oscar R. Swinton, Sr</td>
</tr>
<tr>
<td></td>
<td>Farzad Tabatabai</td>
</tr>
<tr>
<td></td>
<td>Mohammad V. Tehrani</td>
</tr>
<tr>
<td></td>
<td>Sinny B. Thai</td>
</tr>
<tr>
<td></td>
<td>Robert Michael Theofanis</td>
</tr>
<tr>
<td></td>
<td>Brian R. Tinkham</td>
</tr>
<tr>
<td></td>
<td>Paula Tobler</td>
</tr>
<tr>
<td></td>
<td>Victoria V. Tsylina</td>
</tr>
<tr>
<td></td>
<td>Jason M. Vogel</td>
</tr>
<tr>
<td></td>
<td>Samantha Kathleen Waller</td>
</tr>
<tr>
<td></td>
<td>Andrew K. Walsh</td>
</tr>
<tr>
<td></td>
<td>Jing Wang</td>
</tr>
<tr>
<td></td>
<td>Cynthia Weichelt</td>
</tr>
<tr>
<td></td>
<td>Diane C. Weil</td>
</tr>
<tr>
<td></td>
<td>Malcolm Elliot Weiser</td>
</tr>
<tr>
<td></td>
<td>Debra S. White</td>
</tr>
<tr>
<td></td>
<td>Susan E. Wiesner</td>
</tr>
<tr>
<td></td>
<td>Mary E. Work</td>
</tr>
<tr>
<td></td>
<td>Christina Tan Yang</td>
</tr>
<tr>
<td></td>
<td>Barbara J. Youngman</td>
</tr>
<tr>
<td></td>
<td>Max Yueh</td>
</tr>
<tr>
<td></td>
<td>Anthony J. Zaller</td>
</tr>
<tr>
<td></td>
<td>Elaine Zhong</td>
</tr>
</tbody>
</table>

## Members

- Glenn Danas
- Anahit Danielyan
- Alon Darvish
- Jennifer R. Dean
- Barbra W. Dillon
- Debby S. Doitch
- Roberto Dominguez
- Max Draitser
- Carol Dubron-Witlin
- Mark Perry Edson
- Jennifer S. Elkayam
- Lyric Enav
- Herman Enayati
- Joshua Roy Engel
- Julie A. Esposito
- Debra Fallek
- Jennifer Farrell
- Regina E. Filippone
- Robert W. Finnerty
- Rachel L. Fiset
- Todd Frelinger
- Noha Gabra
- Fritzie Galliani
- Vanessa Garcia
- Christy Gargalis
- Thomas Samuel Gelini
- Sharon E. Gerber
- Adena Gilbert
- Mark Gomez
- Valerie M. Goo
- David M. Haghighi
- Bradley Joseph
- Hamburger
- Mark S. Hardiman
- Eric P. Harmon
- Daniel C. Heaton
- Mark Alexander Hikin
- Reginald A. Holmes
- Mary Thornton House
- Marlin E. Howes
- Ann Hull
- Matthew S. Ingles
- Idan Ivri
- Arwen R. Johnson
- Stephen P. Jones
- David M. Kane
- Chris Gus Kanios
- Blake Makoa Kabawata
- Dennis L. Kennelly
- Shaun Khojayan
- Vandad Khosravirad
- David M. Kim
- Jessica Kronstadt
- Robert K. Lee
- Mindy J. Lees
- Diana Hughes Leiden
- Julie C. Lim
- Paul Locker
- Amos A. Lowder
- Liane K. Ly
- Rebecca E. MacLaren
- Arcine Mananian
- Monica Mansouri
- Daniel M. Mansuetto
- David D. Marsh
- Stephen Joel McIntyre
- Todd Randall Means
- Molly Nadja Melzer
- Adam P. Micale
- Alison Sara Minet Adams
Nexus of Kavanaugh and the President’s Emoluments Case

ON JULY 9, PRESIDENT DONALD TRUMP nominated Brett Kavanaugh to serve on the U.S. Supreme Court, and on July 25, a federal district judge ruled that a lawsuit accusing the president of violating the emoluments clauses of the U.S. Constitution asserted sufficient facts and legal theories to proceed. These events may have a profound impact on the Trump presidency.

In these pages a few months after President Trump was elected, I noted that despite his bold declaration that “I have a no-conflict situation because I’m president” (which sounded hauntingly like Richard Nixon’s infamous claim that “when the president does it, that means it is not illegal”), the president was facing very serious legal risks. Now, that prediction has been born out in a comprehensive 52-page decision by U.S. District Judge Peter J. Messitte.

The court agreed with the plaintiffs that “emoluments” means “any profit, gain, or advantage” and rejected the president’s more narrow definition meaning only a payment made as compensation for official services. It found his arguments “ unpersuasive,” and “misplaced,” reflecting a “cramped interpretation” of the Constitution, which ignored the “large accumulation of historical evidence” and would lead to an “essentially absurd result.”

Judge Messitte noted that the plain language broadly encompassed “any present, Emolument, Office, or Title, of any kind whatsoever,” without exception. Relying on historical scholarship, he found that “every English dictionary definition of ‘emolument’ from 1604 to 1806” included the plaintiffs’ broad definition, while only 8 percent included the president’s definition. Also, the word was often used in this broad sense by English Jurist William Blackstone, drafters of state constitutions, Supreme Court justices, legal and economic treatises, and the Framers themselves.

Judge Messitte found that plaintiffs’ definition addressed the Framers’ “profound concern” over “possible foreign influence” with “broad anti-corruption provisions.” Where “for example, a President maintains a premier hotel property that generates millions of dollars a year in profits, how likely is it that he will not be swayed, whether consciously or subconsciously, in any and all of his dealings with foreign or domestic governments that might choose to spend large sums of money at that hotel property?”

Having determined the legal definition of emoluments, Judge Messitte found that the plaintiff’s factual allegations, if proven, met that standard. The plaintiffs allege that “foreign governments or their instrumentalities have patronized the Trump International Hotel, spending government funds to stay at the Hotel, eat at its restaurants, and sponsor events in the Hotel’s event spaces.” The Kingdom of Saudi Arabia spent thousands of dollars at the hotel between October 1, 2016, and March 31, 2017, and a month after President Trump was inaugurated, the Embassy of Kuwait moved its National Day celebration from another hotel to the Trump International Hotel.

The plaintiffs also allege the hotel received an emolument in connection with its use of the Old Post Office Building under a lease with the General Services Administration (GSA). Before President Trump’s inauguration, the then-deputy commissioner of the GSA indicated he would be in violation of the lease unless he fully divested himself of all financial interests in the hotel. Instead, shortly after being sworn in, President Trump simply replaced the acting administrator of the GSA, who in an abrupt about-face promptly issued a letter determining that the president and the hotel were not in violation of the lease. But in doing that, the plaintiffs allege, the federal government bestowed an unconstitutional emolument upon the president. The plaintiffs also allege that the hotel has received substantial tax concessions from the District of Columbia and that the State of Maine and on information and belief, other states have patronized the hotel, all in violation of the Domestic Emoluments Clause.

Trump swore that he would “faithfully execute the office of President of the United States, and will to the best of [his] ability, preserve, protect, and defend the Constitution of the United States.” If, after discovery (which could well lead to the disclosure of the president’s tax returns) and trial, the court finds that he violated the emoluments clauses, it could issue declaratory and injunctive relief. In addition, subject to appellate review, the political climate, and who controls Congress, these constitutional violations could be deemed “high crimes and misdemeanors” and serve as articles of impeachment.

One man could change all that, however. According to an August report from the American Constitution Society and Citizens for Responsibility and Ethics in Washington, “the confirmation of Judge Kavanaugh would significantly undermine the ability of authorities “to conduct a credible, independent investigation of the President or the President’s campaign.”

Among the accusations of collusion and obstruction of justice swirling around the Trump presidency, the obscure emoluments clauses may play an unexpectedly prominent role.

3 Id. at 30.
4 Id. at 20-21.
5 Id. at 30.
6 Id. at 22.
7 Id. at 25.
8 Id.
9 Id.
10 Id.
11 Id.

Stephen F. Rohde is a constitutional lawyer and author of the books American Words of Freedom and Freedom of Assembly.
THE #1 PAYMENT SOLUTION FOR LAW FIRMS

Getting paid should be the easiest part of your job, and with LawPay, it is! However you run your firm, LawPay’s flexible, easy-to-use system can work for you. Designed specifically for the legal industry, your earned/unearned fees are properly separated and your IOLTA is always protected against third-party debiting. Give your firm, and your clients, the benefit of easy online payments with LawPay.

866-730-9212 or visit lawpay.com/lacba

LAWPAY IS FIVE STAR!

LawPay is easy, accurate, and so efficient - it has increased our cash flow tremendously. The recurring pay option for clients is the best! Can’t beat the rates and the website is easy to use! We love LawPay—it has really enhanced our firm!

—Welts, White & Fontaine, P.C., Nashua, NH

Trusted by more than 35,000 firms and verified ‘5-Star’ rating on ★ Trustpilot

LawPay is proud to be a vetted and approved Member Benefit of the Los Angeles County Bar Association.

LACBA LOS ANGELES COUNTY BAR ASSOCIATION Special offer for bar members. Call for details
They need money. You need time.
USClaims gives your clients the money they need to pay bills and supplement their income while they wait for a fair settlement.