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Statutory constraints on partnership agreements  
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I have never worked with an executive coach. As noted in the article, “Leading Lawyers,” by Cynthia Flynn and Anthony J. Mulkern on page 24, while relatively common in the corporate world, executive coaches are not widely used by the legal profession. In fact, my experience has been that should an attorney want to use an executive coach in a law firm setting, the attorney would be expected to pay for the expense of the coach out of pocket. A law firm normally would step up to pay for a coach or an advisor for an attorney only if that attorney was struggling. As a result, executive coaching has carried a bit of a negative connotation in the legal arena. The attitude has been that only a weak attorney would need to rely upon a coach for support.

Now, I wonder how much better my experience within the legal profession might have been had I taken advantage of the services of an executive coach. I did have mentors who helped to guide and assist me. However, I was drawn to them, and they likely were willing to serve as mentors to me, because of similarities in the way we approached the practice of law. They provided excellent guidance and training but served more to affirm my choices than to act as agents of change. How refreshing it would have been to receive input from a more objective observer—though it might also have been challenging and ego-deflating at times.

We can all get complacent. Anyone can fall into a rut. Not many of us truly enjoy operating outside our comfort zone. Yet, how much more rewarding might our practices be if we had someone to nudge us when we get stuck, and encourage and support us when we need to reach outside our comfort zone to achieve a worthwhile goal. In some cases, a good mentor could serve this role. Also, some of us are truly self-starters, but I can see where I would have benefitted from having an executive coach. At the very least, looking back, I can see times when I might have made changes that improved my practice more quickly had there been some outside guidance.

The legal profession seems to be opening up to a greater diversity of people and world views. This expansion of viewpoints should only make us more inclusive and, therefore, stronger as a profession. Hopefully, it also means that, as a profession, we are more open to alternative solutions for developing a healthy and satisfying legal practice. The practice of law remains a tough and demanding profession. We still face time pressures, economic pressures, and the expectations of our clients—great reasons to explore and adopt best practices from other fields that can help us perform better while reducing stress.
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LACBA Delegates Attend California Conference of Bar Associations

THE LOS ANGELES COUNTY BAR ASSOCIATION was among the 23 bar associations that sent delegates to the annual meeting of the California Conference of Bar Associations (CCBA) in San Diego September 13-16. The 200 delegates who attended considered 147 resolutions during the three-day conference. In the 2017-2018 legislative year, CCBA was involved in 40 bills as a sponsor, co-sponsor, or supporter. Among sponsored bills, 13 bills in which the conference played a role were signed into law by Governor Jerry Brown, and 13 more were on the governor’s desk at the time of the conference.

The CCBA was formed in 2002 as successor to the Conference of Delegates of the State Bar of California, which was formed more than 60 years ago to promote legislation propounded by individual delegates and California bar associations. The annual conference of CCBA is held in the fall to consider resolutions proposing amendments to existing laws and the adoption of new legislation by the California legislature. Resolutions approved in principle by the conference are eligible for inclusion in the annual CCBA legislative program. The CCBA engages a lobbyist in Sacramento who works to pair resolutions with legislators who can introduce them as bills. The lobbyist also provides advice and advocacy.

Since 2010, over 100 chaptered bills have originated from CCBA resolutions, an unparalleled record of achievement for a single organization. The CCBA provides a practical way for rank-and-file members to propose legislation that otherwise would not come to the attention of the legislature and to have a reasonable opportunity to see their proposal become reality.

Delegates may write a resolution, consider and report on resolutions proposed by others, attend the conference, engage in debate on the proposed legislation, and support the bills in the legislature.

The resolutions committee of LACBA’s delegation to the 2019 Conference of California Bar Associations will soon start drafting resolutions for consideration at the conference in Monterey in October. Members of LACBA who would like to participate should contact Michele Anderson, chair of the 2018-2019 delegation at https://www.lacba.org/delegation.

Tamila C. Jensen is senior vice president of the Los Angeles County Bar Association Board of Trustees. Alice Salvo is a member of the LACBA delegation to the Conference of California Bar Associations and was chair of the delegation in 2018.

### LACBA-SPONSORED LEGISLATION

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Increasing LACBA Membership is Everyone's Responsibility

BY BRIAN S. KABATECK

THE TIME HAS COME for us to have a real and serious discussion about membership. For the past 18 months, we have been focused on making the Los Angeles County Bar Association a better organization. Some of the accomplishments we have achieved include increased transparency, revitalized and energized sections, changing Los Angeles Lawyer magazine to be more engaging and diverse, making LACBA itself more diverse and inclusive, providing the sections with autonomy and encouragement to develop their own programs, turning around the fund-raising arm of the organization, developing programs that reach out to all parts of the county, offering free educational programs to our members, doing more with fewer resources, and forcing fiscal responsibility. We did all of this while developing a host of other membership benefits.

However, as we enter the second half of my one-year term as president, a significant problem remains endemic to LACBA: few take responsibility for building membership. There it is, plain, simple, and blunt. We have come institutionally to believe that increasing membership is somebody else’s responsibility. This, like so many other things, needs to change.

In the 1989 motion picture Field of Dreams, the lead character hears a voice that repeats, “If you build it, they will come.” That sums up the mantra that we in leadership at LACBA have adopted. From committee members appointed by the president and section leaders elected by their respective sections to Counsel for Justice, the board of trustees, and even the president, there is a general belief that if we build a better bar association and offer better benefits, if we are more inclusive, if we do the right thing, people will join. Unfortunately, they will not. Plain and simple, membership in LACBA is the responsibility of everyone. This means that you, reader, are also responsible.

A generation ago, a young lawyer would join a firm in Los Angeles out of law school and that firm would automatically pay for his or her membership in the State Bar and in LACBA. It was de rigueur. In most firms today, that is no longer the case. Many firms offer to pay for membership in one voluntary bar association; some do not even do that. Today, LACBA competes for membership in a crowded field of excellent affiliated and related bar associations. What can we do?

1) Take responsibility for membership. If you are in leadership in LACBA or have been in leadership or want to be in leadership, you should be out there getting your colleagues and friends to join. No excuses.

2) Promote the benefits of membership. We are launching a campaign in which the board of trustees and other LACBA leaders will reach out to firms to raise awareness of the many benefits of membership. With the assistance of our members in those firms, I am certain we will draw lawyers young and old to a 30-minute onsite lunchtime presentation about the benefits of belonging to LACBA.

3) Identify which firms offer to pay for one voluntary bar association membership and work to get in front of those firms so lawyers will exercise their option by selecting LACBA. Many lawyers do not select any bar association at all and may not even know about their firm’s policy.

4) Become salespeople. I am challenging every member of LACBA to bring in five new members in the next 60 days. It is not hard. If you are reading this magazine, you are interested in and care about LACBA. If you come to meetings, if you belong to a section, you care about LACBA. You are the best salespeople—not staff, not a call center, but you.

5) Reach out to lawyers who have dropped their LACBA membership in the last five years and get them interested in joining again.

6) Improve communications with the membership. This means providing members with more focused bulletins about great events. Our LACBA app is coming soon and it will allow members to design their own experience and receive information about events quickly.

7) Gain media and press attention for our good work. It is easier to promote LACBA to people who are already informed about the benefits we offer.

8) Be accountable. If you are involved in LACBA, membership is your responsibility, and all personnel and lawyers involved need to take on that responsibility.

We can no longer assume that membership development is somebody else’s responsibility. More important, we cannot expect paid staff to work on membership while we sit idly by and do nothing. There are many concerned and dedicated LACBA members who have devoted considerable time to increasing membership in the last three years. Moreover, there are scores of fine lawyers who have been actively involved in LACBA for the past 2.5 years and still care about it. Everywhere I go, people approach me and comment on the good work that our leadership team and senior staff have done to make LACBA a better bar association. While that is wonderful to hear, it is time to start asking our concerned members what they are doing to make this a better bar association.

Let’s stop talking and start doing what we can to bring in new members. Lawyers in Los Angeles County are not going to beat down our door. We must take the responsibility.

The 2018-19 president of the Los Angeles County Bar Association, Brian S. Kabateck, is founder and managing partner of Kabateck 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.
Looking back to the 2012-2013 bar year brings back many good memories. We were blessed with very talented officers and trustees who have become lifelong friends. We also had a very committed and hardworking staff for which I am personally thankful.

It was a challenging time. The courts were cutting back on services and staff due to the statewide budget cuts. We at the bar spent considerable time investigating how the bar could help ease the transition to a different court structure, and several sections and committees contributed significantly to that effort.

Working with lawyers throughout the state and the Open Courts Coalition, we sought increases in court funding from the legislature. We also struggled with our own budget problems resulting from the financial downturn that started in 2008, but with some hard budgetary decisions, we were able to maintain the robust offerings of events, services, and programming that LACBA was known for.

Year I was LACBA president there were no unexpected crises, and we were able to concentrate on substantive issues and programs. The Board of Trustees adopted a Pro Bono Policy urging law firms to ensure that their lawyers performed a minimum number of hours of pro bono service annually. All major firms in the city signed on. The board also passed professionalism guidelines that both the state and federal courts ultimately adopted as rules of court. In addition, we enacted goals and objectives for law firms’ hiring, retention, and promotion of lawyers of color that were well received in the community.

These are the highlights; we worked on lots of other issues, and we all had fun pulling together to make the profession stronger and better.

John D. Taylor
1978-1979

Sam Williams was president during the first half of LACBA’s Centennial Year and I was president during the second half. It was an exciting time. We had over 15,000 members and were the largest local bar association in the country.

Everyone seemed enthusiastic about celebrating the association’s 100th birthday. We had some excellent luncheon meetings. U.S. Attorney General Griffin Bell spoke to over 700 at the Biltmore Bowl. The big event was when President Jimmy Carter addressed over 3,000 at the Dorothy Chandler Pavilion.

The first issue of Los Angeles Lawyer was published. We published the largest (608 pages) pictorial directory ever printed. The cost of my very nice installation luncheon at the Biltmore, including tip, was $7.50.

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- One tee sign + Opportunity to provide and set up one piece of advertisement on a green

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Working together for a more just LA
Robert Ragland  Principal Deputy County Counsel, Los Angeles County Department of Public Health

Robert Ragland has served as Principal Deputy County Counsel of the Department of Public Health (DPH) since 2003. He has represented the DPH, including the Emergency Preparedness and Response Program, since 2000. Ragland also has represented the county’s Department of Health Services (DHS) and the Department of Coroner. He received his law degree from Southwestern University School of Law and undergraduate degree from the University of California at Santa Barbara.

**What is the happiest moment of your day?**

When I walk downstairs and see my wife on the couch, and she has a tea for me.

**You obtained your law degree in 1994. Why did you want to become an attorney?**

I was fascinated with how the law interacted with people on an everyday basis.

**You were raised in Seal Beach but commuted to Loyola High School. How was that?**

I got the benefit of being at a great high school in the heart of Los Angeles yet grew up in a small town.

**As Principal Deputy County Counsel, assigned as lead counsel for the DPH, what are your job duties?**

I handle the vast majority of legal issues, ranging from environmental threats to disease control and oversee litigation and general transactional matters.

**More than 10 million Los Angeles County residents are served by DPH. How are the finances?**

Many of the services provided are cost-neutral.

**How so?**

If you own a restaurant or large apartment building, you have to get a public health permit. Under Proposition 26 and other laws in California, the cost of the permit has to be reasonably related to the cost to run the program.

**With a budget of $893 million, does the Board of Supervisors give DPH enough money?**

Yes. This board has been very proactive and they want to give the community the health protection and health promotion services that it needs and deserves.

**How large is DPH?**

With approximately 4,000 employees, it is probably the first or second largest public health department in the nation, maybe the world.

**What accommodations are made for non-English speaking residents?**

There are Spanish speakers at the meetings, and many people working for DPH speak Spanish. DPH translates public documents in up to 11 languages.

**With more than 39 programs, which DPH program do you think is most important?**

They all do important functions that protect or promote the health of the citizens of Los Angeles County.

**Each program is equal?**

Every program has its time that it has to step up. Recently, DPH took heroic steps to limit the spread of hepatitis A among high-risk individuals. Staff from DPH walked the river where homeless people were encamped. That’s why an outbreak didn’t happen to us like it happened to San Diego.

**Is there a program you would add?**

DPH is ramping up its Environmental Justice program. The board has allocated some new positions, specifically for environmental toxicology, to work in the community to respond to and prevent exposure to toxic substances.

**Where do the toxic substances come from?**

They usually come from industry.

**For example?**

Chromium-6 emissions in Paramount from chrome platers.

**Do poorer communities suffer more from these issues?**

Yes.

**Another example?**

The California Department of Toxic Substance Control and DPH have determined that there is a 1.7-mile radius of lead pollution around the now-closed Exide Battery Recycling Center in Vernon. There is an effort to clean up the lead and hold the producing party responsible.

**Are you going to sue them?**

That’s not my decision.

**Who sues the wrongdoers?**

The county will sue private industry. One example of that is our long-standing lawsuit against former manufacturers of lead paint, which is People v. Con Agra. We are trying to collect our judgment and provide lead paint abatement for families within Los Angeles County.

**Any others?**

We filed an action against opioid manufacturers because of the addictive qualities of opioids and are trying to be able to help stem addiction and other issues with people who are now addicted to opioids.

**How big a problem is that in Los Angeles?**

Sizable.

**What are the powers of health officers?**

They may take action to stop the spread of contagious and infectious disease, protect people from exposure to hazardous and harmful emissions or substances, and to observe and enforce statues, regulations, and ordinances related to protecting the public’s health.

**Can they civilly detain a contagious tuberculosis patient who won’t take medication?**

Yes.
As to public health, what is the one thing Jack and Jill Public should do? Wash their hands.

Are we prepared for the next outbreak? For disease control purposes, there are mandatory reporters who are required to report from a list of communicable diseases within a certain period of time any lab test or diagnosis of a particular disease. DPH is on it every day.

What does DPH worry about more than anything else? A bioterrorism attack.

The DPH was once part of the DHS. What changed? The Board of Supervisors decided to remove the DPH from DHS. As that decision matures, we are seeing a DPH that is much better able to meet the need of individual communities.

To which codes do you most often refer? The California Code of Regulations and the Health and Safety Code is where I live.

From 2005 to 2016, you were the lead counsel to the Medical Examiner-Coroner. What was a routine legal issue? Helping them navigate issues that they were having with family about possessions of the decedent. Such as? Messy family situations—people who were trying to pretend they were relatives to gain access to the possessions of the decedent. Remember, we live in Hollywood.

When you go to court, what do you make sure to have with you? An outline of my argument on an old-school yellow pad.

In August 2018, the DPH announced the formation of Centers for Health Equity. Why? We noticed that there are certain areas where health outcomes of certain individuals are affected by their surroundings and race.

In the summer of 2018, the DPH website posted extreme heat warnings. How did you help? Heat is very dangerous for people who are elderly or otherwise compromised, and it’s only going to get worse with global warming. We have cooling centers that have air conditioning where people can go.

The West Nile virus has come to Los Angeles County via mosquito bites. Is it widespread? No, but there are spikes. People need to use DEET, wear long sleeves at dusk, and not allow standing water on their property.

What do you do in your free time? I coach flag football in Los Alamitos.

Is Chronic Traumatic Encephalopathy, or CTE, resulting from tackle football a public health issue? Absolutely.

What are your retirement plans? My wife has retirement plans for me.

What is your favorite three-day getaway spot? Santa Barbara.

Do you answer your e-mail while out of town? Yes. I am 24/7 for the department.

Where do you take your wife for a fancy dinner and what do you order? The Odium near the Broad, and I order the fried chicken.


What is your favorite movie? Casablanca.

What television shows do you binge watch? Downton Abbey and Friday Night Lights.

Who is your favorite music group and singer? U2 and Bono.

What are the three most deplorable conditions in the world? Poverty, starvation, and hubris.

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

What would you like written on your tombstone? Good internal compass.

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Legal Consequences of Failing to Manage Work Stress and Fatigue

The judge returned to the matter of determining sanctions but kept referring to the unbound papers. On the fifth reference, the defense counsel blurted out asking what it had to do with the sanctions, which only caused the judge to chastise the defendant and immediately move to the amount of sanctions. The judge did not question whether the amount the plaintiff requested was reasonable and lamented he was not able to increase the amount in order to punish the attorney. The judge awarded over $1,000 in sanctions, forcing the defendant to self-report the judicial sanctions imposed against him to the state bar.

Many Degrees of Disrespect

Attorneys are held to a higher standard of conduct and are expected to appropriately self-manage to avoid the three mistakes the defendant in this example made.

1) The defendant demonstrated a lack of courtesy and respect to the opposing party and counsel by telling the plaintiff he would send written confirmation but never doing so, despite further communications by the plaintiff.

2) The defendant disrespected the profession by blaming the secretary for errors in front of a judge—an amateurish mistake. Each attorney must demonstrate competence and ethics after over half a decade of graduate and postgraduate study before he or she can be admitted to the bar. Justifiably then, attorneys are expected to be the arbiters and last checkpoint for all items submitted to the court.

3) The defendant disrespected the court by interrupting the judge and failing to address him as “your honor.” The tone of his voice was anything but deferential. Besides the practical benefits of staying in the good graces of a judge, it is not easy to find a judge less experienced than oneself without decades of practice. Judges have earned the respect one is expected to show them.

Even competent, experienced attorneys can fall prey to these mistakes when overworked and under the high pressure and demanding lifestyle of a litigation attorney. To help avoid mistakes due to work fatigue, it is important to be aware of one’s own limitations and to communicate with superiors about the workload and one’s ability to handle it. Finally, one must never be afraid to ask others for help.

LAW PRACTICE IN THE UNITED STATES is adversarial and the average attorney will likely be overworked, but every attorney should strive to maintain a workload that allows him or her to give the proper respect to the parties, the profession itself, and the court. This maxim finds support in the Rules of Professional Conduct, requiring attorneys to withdraw when their mental or physical condition renders them unable to effectively represent a client. Failing to adhere to this advice is not only a potential ethics violation but leaves one open to the court’s inherent power to control proceedings before it, and to punish and redress litigation misconduct.

By way of example, a tired, overworked attorney allowed his workload to get the better of him, which led to sanctions. The ultimate act that led to the motion for sanctions by the plaintiff was the defendant’s forgetting to send an e-mail. It began when the defendant propounded a series of interrogatories late in the litigation. Prior to the due date for the plaintiff’s responses, the plaintiff notified the defendant by telephone she was going to dismiss a cause of action that made the interrogatories moot. The plaintiff requested that the defendant confirm in writing that he would withdraw the interrogatories, and the defendant verbally agreed.

A week went by with no follow-up by the defendant. The plaintiff reached out via phone and e-mail with no response. The due date for the responses to the discovery approached, and with no response by the defendant, the plaintiff rightly drafted objections to preserve her client’s rights. The plaintiff thereafter noticed a motion for sanctions, but the court did not have space available for a hearing until the final status conference.

Judge Unimpressed

At the final status conference, the judge heard arguments from both sides but was clearly in favor of the plaintiff from the beginning. When it was the defendant’s turn to argue, he had little to say. His fumbling rebuttal amounted to a defense of being so swamped with other work that he never found time for a response and somehow missed all the follow up communications. The judge was unimpressed, chastising defense counsel and stating that the bread and butter of legal work is the long hours, nights, and weekends.

The judge then pulled out a stack of papers so thick it barely fit clenched between his thumb and fingers. It was a motion in limine submitted by the defendant which was enlarged by the number of exhibits attached and held together by rubber bands. Thus, the judge reminded the defendant of the local rules. The defendant had submitted a courtesy copy of the motion; however, the local rules stated any courtesy copies should be properly bound and tabbed. The defense counsel stumbled on his words again and made some vague excuse essentially putting the blame on his secretary.

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Cost Factors Related to Code of Civil Procedure Section 998

SINCE A HIGH NUMBER OF CASES SETTLE before trial, an attorney’s familiarity with California Code of Civil Procedure Section 998 is mandatory. Yet, even an experienced attorney may be uncertain about the consequences of sending or receiving a second Section 998 offer that is lower than one previously sent.

Section 998 was created to promote early settlement. Whether one is counsel for the party serving a Section 998 offer or the party receiving one, every Section 998 offer requires careful consideration of the value of the case because a party rejecting a Section 998 offer who then fails to obtain a more favorable result at trial will be obligated to pay the opposing party’s post-offer costs—including expert costs, which can be extraordinary as trial approaches. These financial penalties should incentivize settlement.

Section 998 provides that any party to an action may serve a written offer to an opposing party allowing for judgment to be entered on specific terms up to 10 days before trial. The opposing party has 30 days from the date the offer is served or until the first day of trial (whichever occurs first) to accept the offer. Otherwise, the offer is deemed rejected. Rejection of a Section 998 offer has consequences.

If the defendant makes a timely Section 998 offer and the plaintiff wins at trial but does not obtain a more favorable judgment than the Section 998 offer, the plaintiff cannot recover post-offer costs (even though he or she is the prevailing party) but also must pay the defendant’s costs from the time the offer was made.1 Thus, the court has discretion to require the plaintiff to pay a reasonable sum to cover post-offer expert costs.2 This could represent a substantial financial detriment to the plaintiff. For example, if a Section 998 offer was made for $50,000 but the plaintiff only recovers $25,000 at trial, the plaintiff cannot file a cost bill and has to pay the defendant’s costs, which will reduce or even completely eliminate the plaintiff’s entire recovery.3

Pursuant to Code of Civil Procedure Section 1032(b), “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” However, parties may also stipulate to alternative procedures for awarding costs, such as agreeing that each party is responsible for his or her own costs.4 In some circumstances, a prevailing plaintiff is entitled to recover pre-offer costs irrespective of any Section 998 offer so long as it is allowed by statute or a controlling contract provision.5

In addition, the court has broad discretion when awarding the defendant’s costs to include costs from the time the complaint was filed and a reasonable amount to cover for any unpaid expert expenses in preparing for trial. Problems arise, however, when the prevailing plaintiff is not able to obtain more than the defendant’s Section 998 offer and the plaintiff’s recovery is less than the costs owed to the defendant, at which point the court may enter a judgment against the plaintiff for the difference.6

On the other hand, if the plaintiff makes a Section 998 offer that the defendant rejects and does not obtain a more favorable judgment at trial then the court can award a “reasonable sum” for all expert fees the plaintiff incurred in preparing for trial (pursuant to Code of Civil Procedure Section 1033.5 expert fees generally are not included in a prevailing party’s costs) and 10 percent prejudgment interest on the judgment from the date the first Section 998 offer was made.7

Although Section 998 seems simple, it is deceptively so. There are intricacies that affect the cost-shifting burden, particularly, in those circumstances when multiple Section 998 offers are made. Many of the challenges courts face revolve around whether the first or last offer controls. The general rule is that when a subsequent Section 998 offer is served, it extinguishes the first offer, and therefore the latter offer is the only offer triggering the Section 998 cost-shifting provisions.

For example, in Wilson v. Walmart Stores, Inc., the plaintiff served two Section 998 offers, the first was for $150,000 and the second was for $249,000, both of which were deemed rejected after the defendant did not respond within the statutory period of 30 days.8 At trial, the plaintiff obtained a judgment in her favor for $175,000 which was more than the first offer but less than the second.9 As a result, the plaintiff was not entitled to interest and costs.10 In Distefano v. Hall, the plaintiff obtained a verdict at trial for $12,559.96 which was more than the defendant’s...
second offer of $10,000 but less than the first offer of $20,000.11 The court found that the defendant was not entitled to interest and costs.12

However, there are certain circumstances when the first offer controls and the court will award costs incurred from the date of the first offer. In Martinez v. Bronco Construction Company, Inc., the plaintiff served two unaccepted and unrevoked Section 998 offers and the defendant failed to obtain a more favorable judgment than either of the offers.13 In this instance, the court awarded the plaintiff expert witness costs from the time the first Section 998 offer was made rather than from the second.14 Another example of when the first Section 998 offer controls is when a party withdraws a subsequent offer prior to its expiration.15 Thus, in personal injury cases, a plaintiff who makes several unaccepted Section 998 offers and obtains a judgment that exceeds all of them, the plaintiff is entitled to prejudgment interest from the date the plaintiff’s first offer was served.

There are also specific qualifying conditions when a case involves multiple plaintiffs or defendants. For example, only an offer made to a single plaintiff, without need for allocation or acceptance by any other plaintiff(s), qualifies as a valid offer under Section 998.16 An exception is made, however, when plaintiffs have a unity of interest, e.g., a married couple’s interest in community property.17

Similarly, a settlement demand by several plaintiffs jointly does not qualify as a Section 998 offer unless it is absolutely clear that the plaintiff recovers more at trial than would have been his or her share of the joint settlement.18 Likewise, a settlement offer by several defendants will permit them to recover under Section 998 only when they are sued on a theory of joint and several liability or stipulate that judgment be taken against them jointly and severally.19

The complexity that may arise in cases that involve awarding costs in connection with a Section 998 offer is well illustrated in a recent decision handed down in Division One of the Fourth Court of Appeal. In Etcheson v. FCA US LLC, the appellate court declared that the trial court had “[e]rrred as a Matter of Law” when applying Section 998 to a negotiation whereby FCA agreed to pay the plaintiffs $76,000 and to deem the Etchisons the “prevailing parties for purposes of seeking an award of attorney fees.”20

Subsequently, the plaintiffs moved for an award of $89,445 inlodestar fees with 1.5 enhancement, resulting in total fees of $134,167.50 and $5,039.05 in costs.24 Initially, the trial court found plaintiffs’ counsel’s hourly rates and time spent on services to be reasonable and ruled that plaintiffs were entitled to recover $81,745 in attorney fees and $5,039.05 in costs, thus excluding the multiplier.25 In the final order, however, the court substantially reduced this award to a mere $2,363.90 for both attorney fees and costs, arguing that the plaintiffs should not have continued to litigate the matter after the defendant’s first Section 998 offer.26

In December 2018 the appellate court reversed the trial court’s decision. Stating that Section 998 “is intended to encourage settlement by punishing the party who fails to accept a reasonable offer,” the court ruled that none of the factors that trigger a Section 998 penalty were to be found in this case.27 Therefore, the use of the first Section 998 offer on March 13, 2015, to eliminate the plaintiffs’ attorney fees was “arbitrary and unsupported.”28

Etcheson, thus, reaffirms a central point of Section 998, viz., when a defendant’s settlement offer in litigation under the Song-Beverly Act contains unfavorable provisions or is otherwise invalid (e.g., insufficiently specific), rejection of that offer will not trigger the penalty of Section 998 by reducing the award of the plaintiff’s costs.29

It is clear that while there is no harm in serving a Section 998 offer, parties must ensure the offer is reasonable and made in good faith. Reasonableness is determined by looking at the circumstances when the offer was made.30 For example, courts may look at whether the offeree was given a fair opportunity to evaluate the offer.31 However, a token or nominal offer made with no reasonable prospect of acceptance will not pass the good faith test and will not be a valid basis for an award of costs.32

Although Section 998 offers may not result in settlement as frequently as anticipated, they are a valuable tool that both plaintiffs and defendants should utilize. Because most costs are incurred closer to trial, the timing of when to serve a Section 998 offer is not always significant. Every Section 998 offer provides litigants an opportunity to take a step back and evaluate both their case and how the other side values theirs. Finally, a well-reasoned Section 998 offer serves as a useful tool to control client’s expectations and force settlement discussions early.

2 Id.
3 See, e.g., Litt v. Eisenhower Med. Ctr., Cal. App. 4th 1217 (2015) (losing defendant whose settlement offer exceeds judgment is treated for purposes of post-offer costs as if it were prevailing party).
5 See, e.g., Scott v. Blount, 20 Cal. 4th 1103 (1999) (finding that the plaintiff was entitled to pre-offer costs pursuant to Code of Civil Procedure Section 1032 despite receiving judgment less than the defendant’s Section 998 offer).
6 See Civ. Proc. Code §998(e) (the net amount is awarded to the defendant).
9 Id.
10 Id.
12 Id.
14 Id.
15 See One Star, Inc. v. Staa Surgical Co., 179 Cal. App. 4th 1082 (2009) (court awarded the defendant costs from the date of first offer when a second offer was withdrawn thirteen days after service and before plaintiff accepted).
21 Id. at 2.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id. at 3.
28 Id. at 30-31 (citing Elite Shows Svc., Inc. v. Staffpro, Inc. 119 Cal. App. 4th 263, 268 (2004) (element triggering Section 998’s penalty (failure by a plaintiff to accept an offer and subsequent failure to obtain a more favorable result at trial) not “warranted…here”).
29 Id. at 31.
30 Id. at 21 (citing Goglin v. BMW of North Am., 4 Cal. App. 4th 462, 471 (2016)).
32 Najera v. Huerta, 191 Cal. App. 4th 872 (2011); See also Aguilar v. Gostischef, 220 Cal. App. 4th 475 (2013) (plaintiff’s Section 998 offer for $700,000, which was knowingly made in excess of the defendant’s $100,000 insurance policy limit, was made in good faith and “realistically reasonable under the circumstances”).
In September 2018, Governor Jerry Brown signed Senate Bill 1421, amending sections of California’s Penal Code to allow the public to obtain some peace and custodial officer (collectively, peace officer) records with a California Public Records Act (PRA) request. This represents a departure from the status quo and could have significant impact on policing, governance, and records retention.

Prior to the passage of SB 1421, most peace officer personnel records had been considered confidential and would only be disclosed in limited circumstances. In fact, California had been considered one of the most secretive states in the country when it came to the disclosure of peace officer personnel and disciplinary records. A party in a criminal or civil action seeking the disclosure of personnel files was required to follow the Pitchess motion procedure, named for Pitchess v. Superior Court.

In Pitchess, the California Supreme Court held that a criminal defendant who is being prosecuted for battery on a peace officer is entitled to discovery of certain investigation records to show whether the officer had a history of using excessive force and that the defendant acted in self-defense. In 1978, the California Legislature enacted Penal Code Sections 832.7 and 832.8, as well as Evidence Code Sections 1043 and 1045, to codify “the privileges and procedures” for Pitchess motions.

Under this statutory framework, peace officer records could be obtained through a two-step process.

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In the first step, the requester must petition the court, showing good cause for release of the records or information sought and materiality to the subject matter of the pending litigation. Good cause must be presented in the form of an affidavit, in which the affiant must allege officer misconduct by providing a specific factual scenario establishing a plausible factual foundation for materiality.3

The second step commences if a judge believes the threshold issues of good cause and materiality are met. If so, a judge will hold an in camera hearing to review the pertinent documents and determine what information, if any, will be disclosed based on the statutorily defined standards of relevance defined in Evidence Code Section 915.4

If a judge determines that records shall be disclosed, the judge will release the records under a protective order that limits how the records may be used and attempt to balance the requester’s need for disclosure and the officer’s right to privacy.5 For example, the judge may issue a protective order that protects the officer or agency from unnecessary annoyance, embarrassment, or oppression.6

Beginning January 1, 2019, with passage of SB 1421, peace officer personnel records are disclosable in response to a PRA request if the records relate to use of force, sustained claims of officer sexual assault, or sustained claims of officer dishonesty. No underlying lawsuit is needed nor will a Pitchess motion or in camera review be required.

Public Records Act

Adopted in 1968, the PRA is one of California’s two sunshine laws enacted to hold public agencies accountable by allowing the public to inspect and copy records in the agency’s care. This includes police agencies.

The PRA states that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”7 After all, the purpose of the PRA was to create maximum disclosure of the government’s conduct.8 The California Legislature decided that the disclosure of records was necessary to help keep government accountable to the people,9 and the right was later enshrined in the state constitution.10 The people’s right to disclosure under the PRA is broad and, when the government resists disclosure and is challenged, the courts err on the side of disclosure of records to the public.11

Inherent in the PRA is the tension between the public’s right to access records and the privacy rights recognized by the statute. Recognizing the tension between the two sets of rights, the legislature inserted a number of exemptions in the act, including the personnel records exemption.12 Some of the other exemptions within this section of the Government Code include the medical records exemption,13 the pending litigation exemption,14 the tax payer information exemption,15 the voter information exemption,16 the library record exemption,17 and the public employee personal information exemption.18

Finally, the PRA provides for a “catch-all exemption” that can be invoked if no other exemption applies, but the agency must demonstrate that the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.19 This is a high showing for the agency, but courts will sustain this exemption if there is a clear cause to protect confidentiality.20

Reverse PRA Action

Another tool that protects privacy rights is the reverse PRA action, a legal action allowing a party to seek judicial restraint of the disclosure of a public record by a public agency.21 Admittedly, reverse-PRA actions do not arise from the PRA itself; these suits are a creature of judicial lawmaking. In essence, a private party must be notified of the public agency’s decision to disclose the records in question and permitted an opportunity to seek judicial review. However, agencies must be careful because the “purposeful delay” in disclosure even for this reason could violate the agency’s disclosure obligations under the PRA.22

Overall, the right to privacy is balanced against the public’s right to know and will carry different weight based on two factors: whether the information in the agency’s possession was voluntarily or involuntarily collected from the person holding the privacy interest. “If personal or intimate information is extracted from a person (e.g., a government employee or appointee, or an applicant for government employment/appointments a precondition for the employment or appointment), a privacy interest in such information is likely to be recognized.”23

Information, for example, collected by the government for purposes of issuing a license is not disclosable.24 However, if information is provided voluntarily in order to acquire a benefit—such as a public contract or a job with a public agency—a privacy right is less likely to be recognized. In essence, those who voluntarily enter the public sphere to obtain a public benefit—including public employees—should expect to lose some aspect of their individual privacy rights.25

SB 1421

As of January 1, 2019, SB 1421 makes a number of changes to Penal Code Section 832.7 to allow for the release of records that are related to three types of events: 1) use of force, 2) sustained claims of sexual assault, and 3) sustained claims of dishonesty. New Section 832.7 initially maintains the status quo by retaining the language that asserts that peace officer personnel records are confidential.26 However, subdivision b of new Section 832.7 marks the beginning of a number of exceptions to this general rule.

With regard to the use of force, new Section 832.7(b) makes records relating to peace officer use of force disclosable under the follow circumstances:

(A) A record relating to the report, investigation, or findings of any of the following:
(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
(ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.27

New Section 832.7 also allows the disclosure of records related to a sustained finding that a peace officer sexually assaulted a member of the public.28 For purposes of this section, both “sexual assault” and “member of the public” are specially defined. “Sexual assault” covers a broad range of acts including the initiation, or attempted initiation, of a sexual act by a peace officer, by force, under color of authority.29 The definition of sexual assault is broad, such that even a peace officer’s proposal to a member of the public to commit a sexual act will be considered sexual assault.30 In order for a record of a sexual assault with a member of the public to be disclosable, the victim of the assault must be a member of the public that is not an employee of the peace officer’s agency.31 However, if the sexual assault victim is a member of a youth organization affiliated with the peace officer’s agency, records related to such an incident will be disclosable.32

The final general category of peace officer records that can be obtained with a PRA request under SB 1421 are records related to sustained findings of peace officer dishonesty. New Penal Code Section 832.8(b) defines “sustained” as “a final determination by an investigating agency, commission, board, hearing officer, or arbitrator...following an investigation and
MCLE Test No. 285

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1. Prior to passage of Senate Bill 1421, California was considered one of the most secretive states regarding peace officer records.
   - True.
   - False.

2. SB 1421 gives the public a constitutional right to access all peace officer records.
   - True.
   - False.

3. When producing records under SB 1421, public agencies must release records or make them available for inspection pursuant to the Public Records Act (PRA).
   - True.
   - False.

4. Exemptions within the PRA attempt to strike a balance between the public's right to access and the private interests served by not disclosing the record.
   - True.
   - False.

5. Under the PRA, the “catch-all exemption” can be properly invoked if the agency demonstrates the public interest in the record is clearly outweighed by the public interest served by not disclosing the record.
   - True.
   - False.

6. The reverse PRA action is a legal mechanism codified within the PRA.
   - True.
   - False.

7. If a public agency refuses to disclose records requested pursuant to the PRA, the requester can bring an action seeking a writ of mandate, or injunctive or declaratory relief.
   - True.
   - False.

8. If a judge finds that the public agency's decision to refuse disclosure of a record pursuant to the PRA is not justified and determines that the requester is the prevailing party, the requester will be awarded court costs and attorneys’ fees.
   - True.
   - False.

9. Prior to SB 1421, a Pitchess Motion was the only means to obtain peace officer records.
   - True.
   - False.

10. Records or information that is not disclosable under SB 1421 may still be disclosable with a Pitchess motion.
    - True.
    - False.

11. In order to get information related to an officer’s conduct through a Pitchess motion, the petitioner must attest to the following:
    - Prior misconduct by the officer.
    - Materiality to the subject matter of the pending litigation.
    - Good cause for the release of the records or information requested.

12. SB 1421 changes the Penal Code to allow for the release of peace officer records that are related to:
    - Use of force.
    - Sustained claims of sexual assault.
    - Sustained claims of dishonesty.
    - B and C.
    - All of the above.

13. SB 1421 allows the disclosure of records regarding claims of sexual assault, regardless of whether the claims are sustained.
    - True.
    - False.

14. Records relating to a sustained finding that a peace officer lied in a police report are disclosable under SB 1421.
    - True.
    - False.

15. After SB 1421, the Penal Code makes records relating to peace officer use of force disclosable when the following incidents occur:
    - A peace officer discharges a firearm at a person.
    - A peace officer uses force that resulted in death.
    - A peace officer uses force that resulted in great bodily injury.
    - All of the above.
    - None of the above.

16. After SB 1421, peace officers have no means to stop the disclosure of their records.
    - True.
    - False.

17. After SB 1421, peace officer records will be disclosed if a sustained finding of officer dishonesty is still under appeal.
    - True.
    - False.

18. When records are released pursuant to SB 1421, the following information must be redacted:
    - Witness and victim information.
    - A peace officer’s personal identifying information.
    - Confidential medical or financial information.
    - All of the above.
    - None of the above.

19. After SB 1421, peace officer records will be disclosed if there are sustained findings that the officer sexually assaulted the following:
    - A member of the public.
    - A minor.
    - Another employee of the law enforcement agency.
    - Only (a) and (b).
    - All of the above.

20. SB 1421 specifically identifies instruments of force:
    - True.
    - False.

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1.   [ ] True   [ ] False
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4.   [ ] True   [ ] False
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6.   [ ] True   [ ] False
7.   [ ] True   [ ] False
8.   [ ] True   [ ] False
9.   [ ] True   [ ] False
10.  [ ] True   [ ] False
11.  [ ] A   [ ] B   [ ] C   [ ] D   [ ] E
12.  [ ] A   [ ] B   [ ] C   [ ] D
13.  [ ] True   [ ] False
14.  [ ] True   [ ] False
15.  [ ] A   [ ] B   [ ] C   [ ] D   [ ] E
16.  [ ] True   [ ] False
17.  [ ] True   [ ] False
18.  [ ] A   [ ] B   [ ] C   [ ] D   [ ] E
19.  [ ] A   [ ] B   [ ] C   [ ] D   [ ] E
20.  [ ] True   [ ] False
opportunity for an administrative appeal...that the actions of the peace officer or custodial officer were found to violate law or department policy.” When there has been a sustained finding that a peace officer was dishonest in the reporting, investigation, prosecution of a crime or the misconduct of a person or another peace officer, then any record relating to that incident of dishonesty is disclosable with a PRA request.35

The three events are the only events that trigger disclosure under the PRA. Once any of these three events occurs, a broad range of documents related to that event are disclosable under the PRA. If the records sought with a PRA request do not relate to one of these three events, the records are not disclosable under SB 1421 but may be disclosable through other means such as a Pitchess Motion.

Records and Production

The statute provides an exhaustive list of the types of records to be disclosed, including, but not limited to, all investigative reports, photos, audio and video recordings, transcripts, documents presented to the district attorney for review, and copies of disciplinary records. A complete list can be found at new Penal Code Section 832.7(b)(2).

Prior to disclosing records pursuant to SB 1421, public entities must redact certain categories of information as authorized by the statute to protect the privacy interest of certain individuals. For example, while a peace officer’s name is public, other personal identifying information for the peace officer or his or her family members must be redacted.34 A public entity must also redact information to protect the identity of a complaining party, witness, or victim as well as confidential medial or financial information, and information protected by federal law.35 Also, the statute provides a catch-all basis for redaction. Public entities must redact relevant information when there is an articulable risk of harm to the peace officer or another person that outweighs the public right to disclosure.36

Besides these mandatory redaction requirements, a public entity also has the discretion to redact other information. A public entity may redact information when the public interest in not disclosing the information clearly outweighs the public interest in disclosing the information.37

When producing records consistent with SB 1421, the public entity will need to comply with the production deadlines set out in the PRA. In addition to the options a public entity has under the PRA to extend the production deadline for a PRA request, SB 1421 provides additional options that allow a public entity to delay the disclosure of records. For example, a public entity may withhold records related to the incident that is the subject of an active criminal or administrative investigation.38 Generally speaking, this delay is limited to 60-120 days, but how long the public entity can delay disclosure will be dictated by the facts of each case.

Preparing for SB 1421

Although SB 1421 only took effect on January 1, 2019, its impact will be felt for years to come. To prepare for an increase in PRA requests for peace officer records, public entities should develop disclosure procedures and standards for ambiguous terms and proactively develop a process for identifying and gathering potentially responsive documents.

One way to minimize liability under the PRA and ensure a complete production of records is to create a procedure for record disclosure. Another benefit of establishing a procedure for disclosure is to ensure that employee privacy rights are properly protected, especially since an employee’s personnel file generally is not deemed a public record. Under SB 1421, the type of event that triggers the disclosure (use of force, sexual assault, or dishonesty) will dictate the procedures that the public entity needs to follow.

Trigging Event. When a public entity receives a PRA request for peace officer records, it is necessary to consider whether the records are related to an event of officer use of force, sexual assault, or dishonesty. If the records do not relate to one of these events, then they are not disclosable pursuant to SB 1421.

Reasonable Notice. Once a public agency has determined that one or more of the applicable events has been triggered, the public entity may consider providing notice to the office in which disciplinary records will be disclosed. The type of triggering event will dictate which procedure the public entity will follow:

- If the records sought include disciplinary records and relate to a peace officer’s discharge of a firearm or use of force that results in great bodily injury, an agency could provide reasonable notice in order to allow the officer to seek a reverse PRA action. If the officer fails to block the disclosure after notice is provided, the public entity may proceed with disclosure pursuant to SB 1421.

- If the records sought relate to a claim of sexual assault or dishonesty by a peace officer, public entities can only disclose records if a commission, hearing, or other body finds that the officer’s conduct violated agency policy or the law. The public entity may still need to apply these steps to give the employee notice; however, the public entity will first need to find a record demonstrating that there was a sustained finding that the misconduct occurred.

Record Identification. Once the notice procedures have been completed, the public entity will need to make a determination that all identified records are sufficiently related to the triggering event to justify disclosure.

Non-Responsive Information. The public entity must redact all sensitive information as required by the PRA and SB 1421 and produce the responsive records. Establishing and following a procedure similar to the one outlined above will allow public entities to identify and produce all responsive records in a timely manner. It also recognizes the balance between the right of the public to the records requested and the privacy rights of the officers whose records are being sought and gives them notice that their records will be released unless they take action.

Standards for SB 1421 Terms

As part of the disclosure process, public entities will want to have their own standards for how to determine and apply the terms used in SB 1421 since certain terms and events will trigger disclosures. Developing standards to address the following key terms will aid a public agency in complying with the PRA and producing records in a timely manner.

Great Bodily Injury. When an officer uses force that results in death or great bodily injury of a person, disclosure of records is required. While death is likely self-evident, great bodily injury is ambiguous. When debating this bill, the state senate specifically changed the language in the statute from serious bodily injury to “great bodily injury” because there is a large body of cases and statutes defining that term.39 By making this change it is likely that the legislature wanted the courts to interpret great bodily injury in SB 1421 consistently with existing case and statutory law.

Public entities should remember that what will constitute great bodily injury is fact-dependent. California statutes and cases have interpreted “great bodily injury” to mean “a significant or substantial injury.”40 “Great bodily injury” is more than a minor or trivial injury but does not require the victim to suffer a long-term or permanent injury.41 Additionally, a series of minor injuries when viewed in the aggregate can amount to great bodily injury. For example, bruising over multiple body parts, or swelling and pain can be
considered great bodily injury. Also, if there is a medical opinion that a particular injury is significant will also likely mean the injury suffered is a great bodily injury.

Use of Force. Regarding “use of force,” the legislative history originally discussed Taser™ and impact weapons the use of which would require disclosure of related records, but these sections were eliminated. Nevertheless, if the use of such devices results in great bodily injury, the records will likely still need to be disclosed.

The driving factor here is whether an officer’s use of force results in great bodily injury and not necessarily whether a particular action was “force.”

“Relates,” “Relating to,” and “Related to.” An example of use of these terms is when the statute provides “[a] record relating to the report, investigation, or findings of any of the follow: (i) an incident involving the discharge of a firearm....” When attorneys seek the production of documents related to a particular event the term is defined as a record that “mentions, discusses, reviews, criticizes, amplifies, explains, describes, etc.” a particular event. Use of this term, thus, is consistent with the PRA’s purpose of disclosing government records. Therefore, in preparing productions, a public entity should define this term broadly so that in the production stage when the entity is identifying records, it over identifies records. Then, when reviewing the documents with counsel prior to producing the records, determinations about what is sufficiently related to be produced can be made.

Sustained Finding. This term is defined in SB 1421 but that definition differs from that found in Penal Code Section 832.7. The term is relevant for documents related to claims of sexual assault or dishonesty by the officer. In order for documents related to these events to be disclosable, there must be a sustained finding that the officer engaged in this conduct. In this context, a “sustained finding” means “a final determination by an investigating agency, commission, board, hearing officer, or arbitrator...that the action of the peace officer or custodial officer was found to violate law or department policy.”

Identify Responsive Documents. On January 1, public entities were able to begin receiving requests for officer records. The universe of records that are potentially disclosable must be related to one of three events, and public entities could start identifying where and how those types of records are retained within their current document retention practices. Taking proactive steps to identify the location of records before requests are made could speed up response times to requests and minimize the risk of litigation.

Implications of SB 1421
In passing SB 1421, the California Legislature makes some fairly substantial changes to the law and seems to have responded to the growing pressure for more transparency in law enforcement: “The public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society.” However, even with this shift in the law governing law enforcement records, Pitchess motions will not disappear with the passage of SB 1421. Incidents triggering Pitchess motions are often broader than those that must be disclosed under SB 1421. If the records sought with a PRA request do not relate to one of the three trigger events enumerated under SB 1421, the records are not disclosable under SB 1421 but information may still be ordered disclosed through a Pitchess motion.

More importantly, by making this new legislation part of the PRA, the legislature has basically proclaimed that the public has a constitutional right to these records—a proclamation that has consequences. If a public agency refuses to disclose records and the requester disagrees with the determination, the requester can bring an action seeking mandamus, injunctive relief, or declaratory relief. In the Los Angeles Superior Court, these matters are handled by the Writs and Receiver courts. In these kinds of civil actions, the requester is asking a judge to enforce the right to receive a copy of the public record being sought—or seeking an order enjoining the agency from denying the requester access to the record. If a judge finds the public agency’s decision to refuse disclosure is not justified and determines the requester is the prevailing party, the requester will be awarded court costs and attorneys’ fees.

The change in this law may have the potential to lead to a significant increase in PRA requests for law enforcement records. Therefore, it is incumbent upon public entities to establish procedures and standards to minimize a public agency’s liability. When producing peace officer personnel records it is necessary to think in broad terms because the PRA favors the release of public records and courts will likely err on the side of disclosure when interpreting SB 1421.

2 City of Santa Cruz v. Municipal Ct., 49 Cal. 3d 74,
381 (1989).
4 EVID. CODE §1043(b)(3).
5 EVID. CODE §1045(b).
6 EVID. CODE §1045(c).
7 EVID. CODE §1045(d).
8 Gov’t. Code §6250.
9 CIV. CODE, §686.
10 Penal Code §644.
11 Cal. Const., art. I, §3(b).
12 Humane Soc’y v. Superior Ct., 214 Cal. App. 4th 1233, 1234 (2013) (stating that the statutory exemptions to the disclosure of records are construed narrowly).
13 Gov’t. Code §6254(c).
14 Id.
15 Gov’t. Code §6254(b).
16 Gov’t. Code §6254(i).
17 Gov’t. Code §6254(j).
18 Gov’t. Code §6254(k).
19 Gov’t. Code §6255.
20 ACLU Found. v. Superior Ct., 3 Cal. 5th 1032, 1043 (2017) (holding that the catch-all provision contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality);
21 See also Long Beach Police Officers Ass’n v. City of Long Beach, 172 Cal. 4th 59, 67 (2014); Michaelis, Montanari & Johnson v. Superior Ct., 38 Cal. 4th 1063, 1071 (2006);
25 Gov’t. Code §6254(n).
27 Penal Code §832.7(a).
28 Penal Code §832.7(b) (as amended 2018).
30 Penal Code §832.7(b)(1)(b)(iii) (as amended 2018).
31 Id.
32 Penal Code §832.7(b)(1)(c) (as amended 2018).
33 Penal Code §832.7(b)(5)(A) (as amended 2018).
34 Penal Code §832.7(b)(5)(B-C) (as amended 2018).
35 Penal Code §832.7(b)(5)(D) (as amended 2018).
36 Penal Code §832.7(b)(5)(E) (as amended 2018).
37 Penal Code §832.7(b)(5)(F) (as amended 2018).
38 Penal Code §832.7(b)(5)(G) (as amended 2018).
40 Penal Code §1202.7(f), People v. Cross, 45 Cal. 4th 58, 63-64 (2008).
41 People v. Escobar, 3 Cal. 4th 740, 746 (1992); Cross, 45 Cal. 4th at 64.
45 Penal Code §832.7(b)(1)(A).
46 Penal Code §832.7.
47 SB 1421 §4.
48 Gov’t. Code §6258.
49 CAL. R. CT. 2.7(b)(1)(G)
50 Gov’t. Code §6258(d).

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LEADING LAWYERS

The general focus of executive coaching for lawyers is not simply to solve problems but also to seek out, create, and make the most of opportunities.

In the past two decades, various changes in the practice of law have created strains on law firms and their managing partners that might be viewed as a virtual crisis in the profession. It is not clear, however, that law firms as a rule have successfully implemented the kind of sound management systems and organizational development that their corporate clients have long taken for granted.

One resource that some law firms recognize as the key to consistent high quality, efficiency, and outstanding leadership is executive coaching. Before discussing how executive coaching can be useful, it is essential to first discuss the alleged crisis. According to a Johns Hopkins University study, lawyers are 3.6 times as likely to be depressed as other professionals.¹ This is in line with a 2016 American Bar Association and Hazelden Betty Ford Foundation study that found that 28 percent of licensed, employed lawyers suffer from depression.² A Psychology Today article in 2011 says that lawyers have overtaken
dentists as the profession with the highest rate of suicide. The same article reports that seven in 10 lawyers responding to a California Lawyer magazine poll said they would change careers if the opportunity arose. Those who are in the top tier of their profession in earnings may find themselves in a virtual “golden cage,” as there is little or no opportunity to replace their high incomes by other means.

The ABA and Betty Ford Foundation study also found that lawyers have a higher rate of drinking problems than individuals in other professions. The study indicates that 36.4 percent of those in the legal profession may be problem drinkers, compared with about 12 percent of other highly educated professionals such as surgeons, for example. Women make up an increasingly higher percentage of the legal profession today, and women in the legal profession have much higher rates of problem drinking (39.5 percent) than women in the general population (19 percent), according to the study. Problem drinking among males in the legal profession (33.7 percent) is slightly higher than that of men in the general population (32 percent). The ABA and Betty Ford Foundation study also reveals that, as a group, lawyers tend to exhibit antisocial personality disorders and narcissistic personality disorders at two to five times the rate respectively of the general population. These facts would in themselves complicate the challenges of managing lawyers, but both personality disorders also appear to be correlated with addiction and substance abuse disorders.

The relatively high rates of suicide, alcoholism, and substance abuse in the legal profession are generally attributed to stress, competitiveness, and increased pressure for revenues and profitability. Although other professions may also have high or even higher rates of stress, the work of lawyers includes helping organizations manage risk and reduce liability; thus, one might expect that lawyers would be among the first to say that management (in other organizations outside the legal profession) has a serious responsibility to look after the emotional and physical welfare of their employees and to introduce enlightened management systems to address the stresses that go with the job. In law firms, however, a culture of apparent invincibility and invulnerability, together with underlying limiting beliefs, seems to inhibit most law firms from taking such measures. Perhaps it will take litigation and/or legislation to force the issue. For those managing partners—and those who aspire to that role—who want to do better, it is important to review in some detail the nature and sources of the pressures and stresses of the current practice of law.

One major force creating stress in law firms over the past two decades is merger and acquisition activity. This has produced some firms that now have on staff 1,000 or more lawyers. Staff from the merged entities must be integrated, with all the differences of expectations and habits that they bring with them. It is challenging for any organization to integrate staff from separate entities into one firm with one culture and set of values and ways of doing things. Yet many of the lawyers who now find themselves in management positions with this responsibility have no formal management training and no interest in or passion for managing at all.

A second factor is that the larger the firm, the more likely it is that it will be divided into various practice areas of specialization. As cases become more complex and the potential damages to the client increase, lawyers are increasingly required to work in teams composed of other lawyers with different areas of specialty and sometimes with nonlawyers such as accountants, financial planners, and communications specialists. Effective teamwork, however, may not come easy for those who have been educated and trained to primarily exhibit traits of independence.

Case Study

For senior partners to ensure the success of their less senior colleagues, it is critical that they better understand the pressures under which the latter function. One senior partner at a firm in described how a friend who was a newly hired associate at a firm in a neighboring county called him on several occasions for advice on case assignments rather than ask clarification from her own firm’s senior staff.

“Often the directions for research,” he said, “were so vague that they could go in 50 different directions. The associate had learned that to ask questions in her firm was to be judged as stupid or incompetent. Survival required finding the information elsewhere. Unfortunately, this kind of situation is not isolated.” Thus, brutal hours frequently were spent at this firm producing reports that often failed to satisfy what the senior partner wanted in the first place.

Several factors were at play in this situation that are at odds with a well-functioning organization and client satisfaction:

- Unclear communication as to the assignment’s requirements, its purpose in the overall case strategy, and expected results.
- Fear on the part of the associate to ask for clarification or to decline the assignment.
- Perception that senior partners were either inaccessible or intolerant of a need for assistance.
- Fear that with every assignment her job was at stake—i.e., operating in “survival mode” rather than with enthusiasm and creativity.

In short, the associate was mired in the nightmare scenario of having an assignment over which she had no choice, with no clear directions, no resources within the firm for clarification, and the prospect of being fired if she did not get it right. Even the advice of a more senior friend at another firm would at best be only an educated guess.

The cascading effect of such circumstances eventually reaches the firm’s client, who is seen as demanding perfection. For an associate with a heavy case load, working seven days a week, desperately striving to grasp that for which they need more guidance, the path of least resistance is to avoid communication as much as possible with clients on difficult cases. No one wants to deliver bad news, especially if it is seen as a potentially career-ending event, and so the client is left stewing while waiting for an update that never comes until an irate call is placed to the senior partner. The subsequent scene can be ugly and may involve the termination of an otherwise high-potential associate.

While the senior partner in this case study might survive in a traditional law firm, his or her style would be an even greater liability in managing a virtual law firm. There, the time allocated for communication is likely to be less and the importance of precision and clarity in each interaction is greater. There is no alternative to a change of style in which subordinates are encouraged to probe in the spirit of “there are no stupid questions.”
and competitiveness. These traits can certainly serve a client well when a case is being argued in court or a tough negotiation is underway. Exhibiting the same traits can be counterproductive when it is necessary to hammer out a consensus with one’s colleagues on the best defense or negotiation strategy.

Macroeconomics have multiplied the stresses. Before the economic crash of 2008 and subsequent recession, large law firms tended to employ large incoming classes of first-year associates. After 2008, corporate clients faced losses and cut themselves and were increasingly unwilling to pay large firm rates. These clients began demanding lower rates and alternative payment arrangements, and, importantly, they were no longer willing to pay the high cost of training junior associates. Some clients even refused to pay for first- and second-year associates’ work at all. Large firms that failed to adapt found themselves losing business to smaller regional law firms with lower hourly rates.

Effects of AI

Another major factor in the changing market, particularly for litigation, is automation. Document review software, powered by artificial intelligence (AI), is becoming the default practice. E-discovery vendors can use algorithms to turn a million-page privilege review into 10,000 pages, which in turn means fewer entry-level jobs for attorneys who mostly reviewed documents at larger firms. Many courts now accept the results of AI and predictive coding software for use in discovery. For example, in In re Broiler Chicken Antitrust Litigation, the court issued a detailed order describing how the parties were to proceed with “technology-assisted review,” including instructions on which search technologies to use and protocols for validating the document review. As one commentator noted: “Gone are the days when 50 to 70 junior employees would do this type of painstaking but important paperwork.”

By the end of 2009, first-year associate hiring was down 4 percent and it plummeted another 27 percent by the end of 2010. According to National Association of Law Placement (NALP) data, 2010 marked the first year since 1997 in which new jobs in small firms outnumbered those in firms of more than 100 lawyers. As of 2013, large law firms also employed fewer experienced attorneys than they did before 2009. Although large-firm hiring has rebounded to a degree, it has not returned to its pre-recession levels. Hiring data from 2017 shows that while firms of more than 500 lawyers “hired more law school graduates than at any time since the recession, the number of entry-level jobs at those firms is still off by nearly 600 positions compared with the peak hiring measured with the Class of 2008.”

Additionally, there is now greater diversity among the types and structures of law firms. A “virtual law firm” has no brick-and-mortar office (or perhaps a minimal one), and its attorneys work remotely from their homes. Although firms experimented with the concept earlier, virtual law firms began to make headlines in 2009. At that time, a number of virtual firms were founded by former large law firm partners, and a common feature was that attorneys in these “alternative” firms could set their own hours. In 2018 virtual law firms grew faster—in terms of attorneys and revenue—than traditional large firms. According to Law360, “The 400 largest law firms in the U.S. by domestic head count have grown between 1 and 2 percent a year on average over the past five years,” and revenue growth among the largest 100 firms was 4.3 percent in 2016, with the second 100 firms growing at only 1.2 percent that year. By contrast, the majority of “high-profile” virtual law firms have grown 15 to 30 percent a year, with revenue growth up to 50 percent a year.

Cloud-based technology has made it more convenient and more practical for attorneys to work remotely; virtual firms use these expanding technological capabilities to their fullest advantage.

Another lasting consequence of the recession is that “boutique” law firms of the traditional brick-and-mortar type continue to gain ground with corporate clients who previously worked with larger firms. A survey of 307 leaders of multinational companies found that 48 percent of them attributed problems with outside law firms to their fees and costs. Their top priorities included costs as well as the need for specialized skills. Accordingly, medium-sized and even small firms are getting work previously performed exclusively by large firms.

Finally, attorney priorities are shifting, particularly those with five to seven years’ experience who have large law firm backgrounds and who may be exploring their next career move. Post-recession, there are fewer attorneys in this sought-after category, and, accordingly, they can afford to be more selective. As a group, associates (at this level and others) tend to be more risk-averse and to place a high value on stability and predictability in their career paths. They are, therefore, more likely to expect “life balance”—shorthand for more time away from work for family and outside interests.

In light of these changes, best practices in law firm management from a decade ago may no longer apply. Even attorneys who may be well-versed in practice management at a large firm may not realize that the dynamics are different in a small firm, and attorneys who are accustomed to managing employees face-to-face may need to learn to adapt their management style should they choose to form a virtual law firm. Executive coaching can assist managing attorneys in making these transitions.

With major changes can come major stresses, which must be confronted and openly discussed if appropriate adjustments are to be made. Yet law firms tend to operate in a culture exhibiting perfectionism and infallibility with clients, skill at seeing the worst-case scenarios, no show of emotional vulnerability, and a win/lose mentality. Furthermore, law school does not teach executive management skills for senior partners, and the adversarial nature of law does not inculcate team work.

Executive Coaching Defined

To examine how executive coaching can help deal with these issues, some terms need to be clarified. Usually “executive” refers to senior level to mid-level managers or leaders in an organization. In a law firm, the partners are executives. The same principles also apply to the chief counsel in a company that has its own internal legal department.

“Coaching” is a process aimed at developing and enhancing the executive and leadership skills of clients. The general focus is not simply to solve problems, but also to seek out, create, and make the most of opportunities. This typically involves assessment, generating alternative solutions, and carefully observing or measuring the results of trying something new. This customized approach to executive coaching involves three facets.

First, it is typically conducted in private meetings between the executive coach and the client, allowing for Socratic-style dialogue. The private nature of executive coaching allows law firm clients to discuss in detail issues that may be inappropriate to air in a group. The executive coach’s role in the dialogue is to become the catalyst for the client’s own development and choice of plans for action. No coach can know a firm’s members and culture as well as a long-term partner. The successful coach is, however, an expert in eliciting the active engagement of the client in mastering his or her own situation. This is accomplished through insightful questioning and probing,
clear-headed assessment, clarifying the client’s values and objectives, and logically drawing out the implications of the alternatives that are generated. In these ways, the client arrives at solutions and commitments that have been formed with his or her own needs and priorities.

The second facet of effective executive coaching involves mentoring or giving advice. For the coach’s advice to have credibility, he or she must have a record of accomplishment in what it is that executives do that is different from what subject area specialists do, namely organizing, inspiring, leading, and developing people. The situation is analogous to hiring a golf coach to improve one’s average score. One would expect from such a coach more than a series of questions, but also guidance on how to actually hit the ball, as well as feedback on one’s stroke. As in sports, having a coach is not seen as a sign of weakness but rather as a commitment to excellence; all champions have one, and only amateurs do not.

A third facet of executive coaching is that of counselor. Leadership and team relationships can be among the most emotionally distressing issues clients face in their work lives. Open expression and exploration of these issues is essential to resolving them, and this requires the establishment of a high level of trust and rapport with the executive coach. This is established through empathetic listening, genuineness, and a profound respect for the client’s competence. Knowing how to challenge in a supportive way and to encourage emotional as well as intellectual expression are also key.

**Developing Leadership Skills**

Enhancing and developing leadership skills can mean different things for different clients. Some partners need to develop more flexibility in communication styles, with the ability to judge when to be blunt and candid and when to be more sensitive or subtle. Others need to learn to choose more carefully when and with whom to express strong emotions and how to communicate less destructively. For some, political pressures internal to the firm can seem overwhelming, and a coach can help the client develop perspective and effective strategies for exercising leverage. Lack of accountability may have created conflicts and disappointments, and action may be needed to “get the wrong people off the bus.” Some senior partners need development as team leaders, and others need to recognize that a work group is not the same as a work team and that trying to manage it as such is a waste of time and source of conflict. It is not unusual at the outset of an executive coaching engagement to find that a difficult situation was made worse by previous misguided attempts to resolve a problem.

**Alternative to Depression**

Earlier, some alarming statistics were cited regarding the presence in the legal profession of depression, which can take many forms, from mild and infrequent to severe and chronic, with many causes. While executive coaching is not the same as psychotherapy, which may be indicated for severe or clinical depression, it can have great value in addressing or preventing one commonly accepted cause of depression: repressed anger. Anger at an external cause that does not find adequate external expression or resolution is deflected inwardly, producing depression.

When conflict, confusion, or fear, are not resolved in open discussion, they can easily turn into depression, with all its accompanying symptoms. The latter may include difficulty concentrating, fatigue due to difficulty sleeping, loss of energy due to poor appetite, low self-esteem, decreased productivity, turnover and general loss of interest in work. All of these symptoms can jeopardize a career and undermine a firm’s effectiveness and reputation, especially when the lawyer in question self-medicates with alcohol and/or illegal drugs, thus producing a downward spiral.

Most law firms lack the processes or cultural acceptance for the airing of dissatisfaction, especially from associates. Executive coaching can help senior partners to clarify the sources of the dissatisfaction and facilitate the expression and resolution of the issue. Providing this coaching support is far less expensive to a firm than having to replace an associate in whom they have invested many years at great cost and whom they were hoping to develop to partner.

There is universal recognition among organizational development experts in the corporate world that the problem is not conflict itself, but the lack of skill in constructively confronting it and doing the hard work of finding solutions that all the firm’s members will commit to and implement. These same practices are no less needed in today’s law firms, and coaching can help to instill them.

It is difficult to say how many senior partners are likely to be fully aware of these dynamics. In fact, they may in some cases exist principally in the minds of perceptions of the associates. Perceptions, however, help determine outcomes, whether they are accurate or not. Therefore skillful leadership is sometimes informally defined as the “management of perceptions.”

Executive coaching provides the means to break this vicious cycle of unclear expectations, fear, and a sense of isolation, disappointment, and recrimination. One business law attorney explained that when he learned to explain in detail what he wanted and why, staff problems with ex uta minimal.

Senior partners and managers of a firm often know that something is badly amiss but have difficulty separating reality from rumor, hearsay, or mistaken impressions. The first step in successful executive coaching is obtaining good data, and sometimes the perceptions are the data. How can information on these perceptions be obtained if staff members feel it is too risky to openly express their concerns?

**Anonymous Feedback**

One singularly effective way is through an organizational assessment based on candid, anonymous feedback obtained in structured interviews conducted by the executive coach. Feedback is obtained on how the firm is faring on key effectiveness areas, such as conflict resolution, the way mistakes are treated, availability of needed resources, morale, supportiveness among team members, knowledge and skill utilization, among other areas. Once the pledge of anonymity has been made, the interviews in themselves can be a significant morale booster. Many staff say they feel the interviews are the first time in their work careers that they have ever been fully heard and listened to in depth.

After the needed data are obtained, a profile of the firm’s situation emerges and is described in a report to senior partners. This, together with accompanying recommendations, becomes the blueprint for a coaching plan to produce measurable results, according to the firm’s own priorities and agreed upon objectives. Numerous benefits flow from this process. With more clarity and focus on the “what and why” of assignments, for example, “24/7” work weeks may be fewer.

Life balance, a subject once taboo at law firms, has become increasingly important as young families more often than not and total two-career families. Could the higher percentage of problem drinking among women lawyers versus the general population of women cited earlier indicate that most law firms are failing to respond adequately to the fact that women make up an increasing percentage of the profession? One attorney who benefited from extensive executive coaching observed that
client satisfaction increased once associates learned to avoid surprises, i.e., even when the news was not the best, if candid, in-depth updates were provided on a regular basis, clients’ confidence could be maintained. The other “bottom line” he noted was an increase in associates’ loyalty and a reduction in turnover.

Executive Coaching in Smaller Firms

In boutique law firms, the senior partners are essentially entrepreneurs, and like most entrepreneurs, their formal leadership development is usually minimal. Take the process for hiring junior associates, for example. Most entrepreneurs spend most of the so-called interview describing the firm and what it needs from new hires, with a minimum of questioning and probing for information. Why? They have never learned to interview in a nonadversarial manner, and they do not want to offend. It is analogous to a trial lawyer representing a client in court without having been trained in cross-examination. As a result, they hire associates who tell them what they wanted to hear and are surprised that the fit is so often not right.

An executive coach can help the senior partners design a screening and interview process that will greatly enhance the chances of success and at a minimum reduce the expense and wasted time of bad hires. In the absence of this groundwork, positions are likely to remain open too long, hiring will be based upon insufficient information, and turnover will be high with a subsequent waste of training time and a shortage of capacity to grow.

Marketing a firm’s services is increasingly expected of lawyers, yet it is a function that may not come naturally to most. The communications skills that lead to more effective internal operations also tend to create the poise, enthusiasm, and persuasiveness essential for gaining interest, trust, and confidence with potential clients. Moreover, time freed from internal conflict and unguided research is time available for making the contacts necessary for business development.

Regardless of the changes to come, the practice of law will always be demanding, hard, exhausting work. It attracts highly intelligent, energetic people who relish the challenge of a good contest and the satisfaction of a well-designed line of argument that wins the day. But what is true for other corporations is also true for law firms. If two organizations are in a contest for clients and one of them is characterized by outstanding leadership, loyalty, mutual supportiveness, and unified focus while the other is
fraught with internal conflict, it is not difficult to imagine which one is most likely to come out on top. Success in a changing market requires a willingness to make the necessary changes.

5 Id.
6 Id.
7 Id.
13 Id. at 4.
14 See “Automation,” supra note 11.
15 Id.
17 See Fivel and Graff, supra note 9.
21 Id.
22 Id.
23 Reddan, supra note 10.
24 Id.
25 See Fivel and Graff, supra note 9.
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Notorious RBG: The Life and Times of Ruth Bader Ginsburg

The first museum retrospective of the beloved Supreme Court Justice Ruth Bader Ginsburg delivers a cross-generational crowd-pleaser

A VISIT TO A MUSEUM in Los Angeles the whole family will enjoy may be a hard sell—the Getty’s renaissance paintings, for example, may not click with the same family members whose definition of museum includes the Instagram-friendly candy or ice cream pop-up varietals. The Skirball Cultural Center’s exhibit on Ruth Bader Ginsburg, however, combines informative facts about the beloved associate justice of the U.S. Supreme Court, with inviting pop culture elements and tactile experiences for the museum goer, making the exhibit a cross-generational crowd-pleaser. A trip to the Skirball to learn about “RBG” just might leave one feeling inspired, informed, and stocked with Instagram-worthy content.

“Notorious RBG: The Life and Times of Ruth Bader Ginsburg” is on view now through March 10 at the Skirball Cultural Center in Los Angeles. Coinciding with the 25th anniversary of Justice Ginsburg’s appointment to the Court in 1993, the exhibit is based on the New York Times bestselling book of the same title, and was created in partnership with the book’s authors, attorney Shana Knizhnik, the creator of the viral Tumblr social media account that anointed Justice Ginsburg with the “notorious” moniker, and journalist Irin Carmon.

The Tumblr’s origins are worthy of their own exhibit. It began after the Supreme Court announced its decision in Shelby County v. Holder, in which the Court struck down two provisions of the Voting Rights Act of 1965, one of which required certain states and local governments to obtain federal preclearance before implementing changes to their voting laws or practices and the other containing the coverage formula that determined which jurisdictions are subjected to the preclearance based on

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their histories of voter discrimination.

In its 5-4 decision, the Court found that the coverage decision was based on 40-year-old data, rendering it no longer responsive to current needs and thus a burden on federalism. In her dissenting opinion, Justice Ginsburg famously wrote that eliminating the preclearance requirement when it has and continues to work to stop discrimination “is like throwing away your umbrella in a rainstorm because you are not getting wet.”

In the wake of this decision, then law student Knizhnik said someone on her Facebook feed referred to the justice as “The Notorious RBG,” and from there the Tumblr account was born, catapulting Justice Ginsburg from an esteemed legal mind to “RBG,” pop culture icon. The “Notorious RBG” is not only synonymous with civil rights and the fight for equality for all but also a Saturday Night Live character, a meme, a source of fitness inspiration, and the subject of both a recent documentary and a dramatized feature film.

Woven throughout the exhibit is a clear emphasis on how fiercely Justice Ginsburg fought and continues to fight for equality. From her early days as an attorney at the American Civil Liberties Union, she believed men and women deserved equal treatment under the law. In Weinberger v. Wiesenfeld, she represented a male plaintiff who was denied special benefits under the Social Security Act’s gender-based distinction of 42 U.S.C. Section 402(g) which permitted widows, but not widowers, to collect special benefits while caring for minor children. The Court found in a unanimous decision
that this distinction violated equal protection rights. The Skirball exhibit illustrates Justice Ginsburg’s long-held belief that gender equality improves the lives of everyone—not just women—and her home life, as well as her professional life, reflects this belief. For example, the exhibit shows that her husband, tax attorney and tax law expert Martin “Marty” D. Ginsburg, did the cooking in their marriage until his death in 2010 and supported Justice Ginsburg as a true partner.

The overall exhibit is a unique treat for the senses. Each section is artfully labeled with the name of or lyrics from a Notorious B.I.G. song (“Stereotypes of a Lady Misunderstood,” “I’ve Got a Story to Tell,” “Hypnotize”) printed in graffiti by feminist street artist Maria “TooFly” Castillo.

The exhibit includes a sample robe and collar, a “jabot” as they are officially called, from Justice Ginsburg’s Supreme Court wardrobe. We learn that her neckwear has meaning: one signals that she will announce the Court’s majority opinion, another signals her dissent, still others have personal meaning. Also on view is a 1996 portrait of the associate justice by American artist Everett Raymond Kinstler, on loan from the Smithsonian’s National Portrait Gallery.

Museum visitors are able to watch home videos of RBG with her husband, Marty, browse through yearbooks from her Brooklyn high school days to her time at Cornell, Columbia, and Harvard, and can visit “listening stations” to hear her deliver oral arguments, majority opinions, and dissents in landmark Supreme Court cases such as U.S. v. Virginia,3 Bush v. Gore,4 Ledbetter v. Goodyear Tire & Rubber Company5 and Shelby County v. Holder.6 Brightly colored exhibit areas tip off visitors that they may touch the items in those areas, including a yellow kitchen reminiscent of the one Justice Ginsburg shared with her husband, stocked with his recipes and cooking utensils. Visitors can also don a replica Supreme Court robe and jabot and sit at a mock SCOTUS bench, sure to delight the millennial museum-goer.

While the exhibit does a phenomenal job of informing visitors about Justice Ginsburg’s fascinating and inspiring life, the references to the Tumblr account and RBG’s status as a pop culture icon could be emphasized more. The exhibit includes just one small section with a few commissioned works by modern artists. With “RBG” having a virtual life quite disparate from the life of the real Justice Ginsburg, true RBG die-hards might have wished to see an SNL clip or two, scenes from her workouts with her personal trainer, or any one of the numerous RBG memes that have come to stand for the fight for civil liberties.

A visit to the Skirball to learn more about the life of this dynamic person is a worthwhile one and likely to be popular with people of all ages and interests. Everyone from hip-hop heads to attorneys to elementary school-aged children are likely to be impressed by and draw inspiration from RBG.

1 Shelby County v. Holder, 570 U.S. 529 (2013).
6 Shelby County, 570 U.S. 529.
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Statutory Constraints on Partnership Agreements

IT IS COMMON KNOWLEDGE that business partners have fiduciary duties to each other and the partnership, which fundamentally include a duty not to compete with the partnership.1 Similarly, managers and members in a member-managed limited liability company owe a fiduciary duty not to compete with the company.2 Disputes between partners and members typically involve claims that a partner breached his fiduciary duty by wrongfully competing with the company. The duty not to compete in the partnership context is so well established and ingrained that California’s strong public policy in favor of free competition is countervailing and thus often overlooked in partnership litigation.3 This is a mistake.

California Business and Professions Code Section 16600 “embodies the original, strict common law antipathy towards restraints of trade,” and establishes a “prohibition against restraints on trade as follows: ‘Every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.’”4 If “a contract creates an illegal restraint on trade, there is nothing that the parties can do that will in any way add to its validity,” and “it cannot be ratified.”5 Section 16600 permits noncompete agreements only “in two narrow situations: when a person sells the goodwill of a business, and when a partner agrees not to compete in anticipation of dissolution of a partnership.”6

A partner’s duty not to compete therefore can conflict with California’s settled policy in favor of open competition, and, when it does, Section 16600 will invalidate any restriction on a partner’s right to compete. Regarding Section 16600’s application to ongoing partnerships, Kelton v. Stravinksi is the law.7 In Kelton, the court found that a noncompete letter entered into in connection with a partnership constituted an illegal restraint on trade, and was, therefore, void.8 There was nothing about the partnership relationship that warranted an exemption from Section 16600. The court expressly held that “[i]n the partnership context, an ongoing business relationship does not validate the covenant.”9 Therefore, even between partners, “covenants not to compete in contracts other than for the sale of goodwill or dissolution of a partnership are void.”10

The plaintiff partner in Kelton did argue the noncompete letter was enforceable because it is consistent with a partner’s duty under Corporations Code Section 16404 not to compete. The court rejected this argument because the partners had consistently agreed to limit their fiduciary duties in other agreements that explicitly allowed them to engage in competitive real estate activities.11 The rights to compete were consistent with Section 16600’s prohibition of restraint on trade, and there was no basis for the plaintiffs to claim that his partner’s pursuit of a competing venture violated Corporations Code Section 16404 because the parties had expressly agreed in other agreements to permit competition.12

The Kelton Court’s refusal to enforce a noncompete agreement even between partners is consistent with the U.S. Supreme Court’s instruction against judicially created common law exceptions that undermine Section 16600’s broad applicability. “California courts have repeatedly held that Section 16600 should be interpreted as broadly as its language reads.”13 Accordingly, Kelton is widely cited for its holding that covenants not to compete between partners are void.14 Partnership agreements (and similarly operating agreements)15 often contain language limiting the duties or obligations of partners with regard to the right to compete or entitling the partners to compete with each other and the partnership consistent with Section 16600’s prohibition against restraint of trade. To circumvent such language, however, complaining partners and their attorneys resort to alleging broad partnership terms and even oral or umbrella (parent) type partnership agreements that purport to supersede free-to-compete language. For example, they may allege the partners agreed to do all business together as in Kelton, or that one partner cannot pursue an investment without the consent of the other. However, as Kelton makes clear, partnership agreements that create an illegal restraint of trade are invalid and unenforceable pursuant to section 16600.

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