Los Angeles lawyer Jeremy M. Evans analyzes the various possible ramifications of the newly passed Fair Pay to Play Act permitting college athletes to pursue profitable sponsorship and endorsement deals in the future.

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ON RETURNING from the Los Angeles County Bar Association’s October 27 to November 3, 2019 trip to Morelia, the state capitol of Michoacán, to experience Día de los Muertos (Day of the Dead), I couldn’t help but appreciate just how committed entire communities are to this celebration. It permeates the daily activity of thousands once the actual day arrives. Commitment to this festival runs the gamut: some are there to follow along in the celebrations while others are decked out in full Catrina costume worthy of a Hollywood studio production. The skeleton figure of La Catrina is the Mexican representation of death.

For our Sunday-to-Sunday trip, we stayed at the Hotel Virrey de Mendoza in the heart of the city center. Like most colonial cities, Morelia is old. The city was founded in 1541. The streets are barely wide enough to fit a single row of cars, which means lots of traffic at peak times and lots of one-way streets, but the beauty of the baroque architecture throughout the city speaks to the age as well as to the fact that at some point in the distant past, a lot of wealth had influence here.

During our first evening in the city, we were treated to quite a foodie’s delight. I was pleasantly surprised at the venues and the food choices in almost every establishment we visited. This was thanks to the efforts of retired Judge Teresa Sanchez-Gordon and LACBA Executive Director Stan Bissey. Both had been to Morelia previously. We were greeted warmly by local bar leaders, the mayor, and representatives of the governor of the state of Michoacán, and other local leaders. They presented us with awards recognizing our presence in their city, and we looked forward to local events that were to follow in the coming days.

Our second day was all about local artisans and art. We met with a local art legend at his hacienda and workshop in the village of Capula: Maestro Juan Torres, whose Catrina figures are legendary. That evening, as a follow-up to the welcome reception the night before, our group was joined by local attorneys, bar leaders, and representatives of local political figures, for a question-and-answer session.

Michoacán Courts

Our third day was an excursion to the courts. We visited the superior court, appellate court, and supreme court of the state of Michoacán. We were able to meet the chief justice of the state supreme court. Mexico recently underwent a gestalt shift in their legal system, moving away from their civil law system to be more like our common law system. To see the new system in

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place and working was quite a treat. A single building housed all of these institutions. We were able to meet with judges and justices as well as practicing attorneys. The mezcal tasting that evening was a special treat. Words cannot do justice to the fine food paired with different types of mezcal. Truly exceptional.

**Arts and Crafts**

Michoacán boasts many unique arts and crafts villages, some devoted to one particular art or craft. Santa Clara del Cobre, as its name implies, is all about copper. Our group was treated to a tour of a family copper business, with some of us taking turns pounding on a piece of very hot copper with a hammer. This is one of many *Pueblos Mágicos* (magic villages) in Mexico, towns selected for the designation because their cultural, historical, and aesthetic qualities offer visitors a “magical” experience.

In Santa Clara del Cobre, all commercial buildings must be painted in two col-
ors, a dark brick red on the bottom and white on the top. Lettering on the buildings is also regulated: the first letter must be painted red and the rest black. No deviations are allowed. The effect and the beauty that comes with those rules was not overlooked.

We visited another Pueblo Mágico called Pátzcuaro. We visited during the annual artisans market in the center of the village. One thing that stood out is the number of people who were putting up decorations for Día de los Muertos. It seemed as if every person in the village was participating in preparations.

We took a quick detour to Tupácaro where a very old chapel is located. The locals know it as the Sistine Chapel of Michoacán. It is small inside. The old wood panels covering the entire ceiling serve as a canvas for paintings of significance to the local community. It was an impressive sight, especially given the age of the chapel.

The place where I truly felt immersed in the celebration of Día de los Muertos was the Purépecha village of Santa Fe de la Laguna, where the native language of the villagers sounds nothing like Spanish. The village is famous for its hospitality and home alters decorated with marigolds and other flowers and we were able to see many of the alters up close. Although I felt as if we were invading the workers’ personal space, they were very welcoming to strangers. One local resident said he felt proud that we were there to appreciate their culture and customs.

On the main day of Día de los Muertos, professional makeup artists applied fantastic Catrina face paint to almost everyone in our group before we headed to the Purépecha village of Tzintzuntzán (in the native language, it means “place of the hummingbirds”). This village has great importance because it was the capital of the Purépecha empire until the Spanish arrived in 1522. In terms of food, this was by far the best and most surprising treat. We ate at the restaurant La Cocina de Blanca where we had local fare that was, hands down, one of the best culinary experiences of my life. We were treated to a buffet of different items and each dish was delicious.

After our meal, we watched the procession of people going to the church to celebrate Día de los Muertos. It was fascinating to see how the Purépecha culture and the Catholic traditions surrounding All Saints Day blended together in this unique celebration of food and culture that was our LACBA trip for 2019, a truly memorable experience.
Left: Exquisite catrinas in the studio of artist Maestro Juan Torres.

Right inset: Lunch at restaurant La Cocina de Blanca.

LACBA travelers embrace Día de los Muertos.
National Conference Examines the Evolving Role of Bar Associations

I recently returned from the midyear meeting of the National Conference of Bar Presidents held in Austin, Texas. I brought along Los Angeles County Bar Association President-Elect Tamie Jensen to ease her transition into the conference as our leader next year.

Why bother attending? Isn’t this just a group of egos celebrating themselves? No, not at all. This group affords us a unique opportunity to have open and frank discussions with state and local bar leaders from throughout the country about the key issues we each face in the evolving role of bar associations as we begin the 2020s.

To put our participation into perspective, LACBA is out of the ordinary in that we are neither a state nor a local city or metropolitan bar association. Since we draw our members from the over 4,750 square miles of Los Angeles County, our geographic boundaries are larger than most city bar organizations, and larger than many state bars as well. With over 10 million residents in Los Angeles County, our demographic population base exceeds many states.

Differences aside, I am impressed with the similarity of issues facing the bars of the states, metropolitan areas, and other cities represented at the conference. Even more impressive is the willingness to share openly about problems and solutions, both those that have not worked and those that have. While the origin of the statement is in doubt, I have heard it said that while a smart man learns from his mistakes, a wise man learns from the mistakes of others. We have much to gain by learning from the successes and less-than-successes of others, and we have much to offer from our own experiences.

There are no wallflowers at these events. Everyone either has been, is, or will be a bar president. All have already succeeded to a significant extent. Thus, rather than a celebration of egos, I found the conference to offer an extraordinary resource from which our own evolving LACBA can learn. What did we learn? First, notwithstanding some apparent differences, the challenges we face at LACBA are similar to the difficulties experienced by bar associations across the country at the national, state, and local level.

Among the core issues are membership attrition in general, difficulty in attracting participation from younger lawyers, and a steady decline in participation by Big Law. The fundamental question that demands urgent attention is: Why should a lawyer, particularly a younger lawyer with limited available time or money, participate in a voluntary bar association?

I will share some of the wisdom emanating from the collective experiences shared by our colleagues, but there is no easy fix and no single, cure-all answer. The solution to our challenges may be as much about process as anything. We must open ourselves to a new willingness to think outside the box, engage in a dialogue with those we wish to serve, and try new creative solutions.

Developing a philosophy of “innovate and collaborate” will foster new solutions. At nearly any cost, we must overcome the fear that we may not have it exactly right, or the fear that a proposed solution may not work. Wherever it comes from, we must be mindful that perfect is the enemy of good.

There is a consensus among bar leaders that we must become far more active in reaching out to students at local law schools. Simply creating a category of law student membership is not enough. There was a difference of views as to whether a law student should be charged a small fee for dues (ten or twenty dollars). Many associations allow law students to join for free, though others believe “free” implies no value. Regardless, we at LACBA need a far better coordinated and more concerted presence at our several law schools in Los Angeles County. We should consolidate board and Barrister Section law student outreach committees, assign staff for support, and create a specific plan to take LACBA to all local law schools. Our student members should be allowed low-cost or no-cost membership to our sections and should be granted low-cost or no-cost admission to our programs. Section leaders should join in the effort for early exposure and participation as well.

Two Years’ Free Membership

For our newer lawyers, we must be willing to re-examine our current policy of two years’ free membership. Frankly, I did not hear of any other bar association that offers two years of free membership, and I was at a loss to explain how adding a second year free has helped either LACBA or its members. There
appears to be a growing trend toward no- or low-cost CLE as an association benefit, at least for newer lawyers. While this concept is challenging under our current section organizational system, no idea should be discarded, especially when open CLE appears to have helped other organizations stabilize.

**Mentorship Program**
A robust mentorship program also has helped other bar organizations throughout the United States. While I have tried to implement a mentorship program at LACBA, we are not yet ready to roll out the program. We must do better and get this program going without further delay. Next, several associations report that student loan refinancing programs were enthusiastically received by law students and young lawyers. LACBA already has such a program in development, and I look forward to announcing this formal program in the very near future. Another program for younger lawyers that has met with success is a job placement resource. This type of benefit can be as simple as a job listing board, or as sophisticated as actual career counseling as offered by the Chicago Bar Association. Regardless of the form, providing some type of an employment resource has been well received.

**Networking Hubs**
Networking opportunities at formal events or at social gatherings have become one of the most useful benefits offered by the organized bar, particularly for young lawyers and those in smaller practices. LACBA is at the forefront in this regard. We have several networking hubs that will soon open for operation in various locations throughout Los Angeles County. Our goal is to have 20 networking hubs filled with lawyers from our many and varied practice sections. The opportunities for referrals from this resource are virtually unlimited.

Tamie and I have already brought back to LACBA many more ideas that were discussed at the conference. Most important to the process is the willingness to listen to our lawyer and law student members. We must be willing to hear what they have to say and to try new ways to deliver what they need and want from us. We have some of the brightest and most creative minds within the LACBA family. I know that many of our members share my enthusiasm and my vision for our association. Please let me hear from you. Share your ideas. Help us innovate. Be with us as we collaborate. Join us.
Conducting and Documenting Proper Evidence Collections

**EVIDENCE IS AT THE HEART OF A CASE.** Proper evidence collection is key to understanding a case’s merits and potential weaknesses. Evidence collection can be broken into three simple steps: 1) planning the collection, 2) conducting the collection, and 3) documenting the collection.

Planning is important to ensure a complete collection of potentially relevant materials and to control discovery costs. The planning stage may include issuing an evidence preservation or litigation hold if one has not already been sent. Planning requires discussion with the client and any IT department about their data systems to understand where and how information is stored and what may be collected. Attorneys must also strategize regarding the types of evidence to be collected and the scope of collections to ensure a complete collection and to control discovery costs by preventing multiple collections.

Planning collections requires considering the types of evidence in the case—witness statements, tangible evidence, and documentary evidence. Witness interviews are best conducted first to determine which individuals possess information or documents and which individuals should be deposed or called at trial.

Attorneys should also recognize the unique challenges inherent in collecting tangible evidence. Planning is required not only to locate and obtain tangible evidence but also to maintain the chain of custody, which is critical to prevent challenges to its authenticity or admissibility. The chain of custody should be documented in real time, tracking the item, date, location, and name and signature of the persons releasing and receiving the item. Taking a few minutes to document the chain of custody can save hundreds of hours later on in the case when trying to establish an unbroken chain of custody for a particular item.

Collecting documentary evidence—e-mails, text messages, and other documents—also requires planning. While electronic discovery has become routine, attorneys must still carefully consider which custodians to collect from and whether search terms can be used. Attorneys also need to consider collecting sources other than e-mail, including social media, text messages, cellular phones, and smart devices that may contain relevant data. Each of these sources presents its own challenges to ensure all relevant information is retained.

Once planning is complete, attorneys must arrange for the collection. Best practices include tailoring the method of collection to the specific evidence. For example, electronic documents and information must include collection and preservation of associated metadata. Thus, attorneys should engage in standard e-mail collection practices that provide e-mail accounts in .pst files or as electronic .msg files. In many cases, e-mails will be collected by a custodian by either printing the e-mail to hardcopy or forwarding the e-mail to the attorney. Both methods result in a complete loss of metadata and should be avoided whenever possible.

A key decision in conducting collections is whether to engage in a professional collection or self-collection. Professional collections tend to cost more but have lower associated risks. By contrast, self-collections—when custodians search and collect their own documents—cost less but involve a much higher risk that collections will be insufficient or challenged. While it is not possible to guarantee that every discoverable document is captured, self-collection invites the issue of whether willful spoliation has occurred. This can prolong litigation and increase costs through motion practice, and it exposes the client to serious sanctions.

In an ideal world, discovery collections would be handled by experienced third-party vendors to prevent unnecessary exposure to the client. Self-collection, however, remains prevalent in cases of all sizes. Common reasons for self-collection include cost-sensitivities or the size of a case. These are valid concerns as discovery costs can be difficult to control, but attorneys must always evaluate whether the risk of a self-collection outweighs the potential cost savings.

When analyzing whether a professional collection is necessary, attorneys should consider 1) the complexity of the collection and whether there are any unusual file types or data repositories involved; 2) the size of the collection, including the number of custodians and expected size of the data; 3) the importance of maintaining metadata integrity, which can be compromised during self-collections as most custodians are inexperienced at collecting intact metadata; 4) the custodian’s role in the litigation, including whether the custodian has a stake in the litigation or his conduct may have been embarrassing which heightens the risk of an incomplete collection; and 5) whether opposing counsel engages in aggressive discovery and motion practice.

If self-collection is necessary, attorneys can mitigate associated risks by educating clients about the importance of a complete collection, and providing clear and concise instructions on how to perform collections, including what information to look for, search terms, locations to search, and how to collect the information. Attorneys should avoid conducting collections themselves as it exposes the attorney to risk where a collection is incomplete, and could expose attorney-work product.

Finally, documenting the collection is critical, regardless of the type of evidence or the size or method of collection. Documentation provides an attorney with a summary of the collection, which can be relied upon later to analyze whether additional collections may be required, to defend the propriety of past efforts, and to aid authentication and admissibility of evidence at trial. Conducting and documenting proper evidence collections is paramount to avoid pitfalls down the road, to increase efficiencies for the client, and to allow attorneys to focus on litigating the merits of the case.

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AB 2684, THE UNIFORM PARENTAGE ACT (UPA) is the framework that defines the legal relationship between parents and children. In 1975, California adopted the UPA to eliminate the legal distinction between legitimate and illegitimate children and to focus instead on the parent and child relationship defined as the “legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations.” The relationship extends equally to every child and to every parent, regardless of the parents’ marital status. The UPA has evolved since its adoption in California in 1975. In 2013, for instance, the UPA was amended to allow the courts to find a child to have more than two parents in the appropriate case. However, when constitutional guarantees for same-sex couples were finally recognized, it was clear that the UPA was in need of further reform.

In Obergefell v. Hodges, the U.S. Supreme Court held that laws barring marriage between two people of the same sex are unconstitutional. In June 2017, in Pavan v. Smith, the Supreme Court held that, consistent with Obergefell, a state may not deny married same-sex couples recognition on their children’s birth certificates that the state grants to married different sex couples. In Pavan, two married same-sex couples had jointly planned their children’s conception by means of an anonymous sperm donor. State officials listed the biological mothers on the children’s birth certificates but refused to list their female spouses, saying that the female spouses were not entitled to a husband’s presumption of paternity.

The case went to the Arkansas Supreme Court, which ruled that same-sex parents did not have to be included on birth certificates because “it does not violate equal protection to acknowledge basic biological truths.” The U.S. Supreme Court disagreed, pointing out that Obergefell gives same-sex couples marriage rights “on the same terms and conditions as opposite-sex couples,” including the right to appear on birth certificates. After Obergefell and Pavan, California parentage laws needed to be updated to recognize the rights of same-sex couples.

New Amendments
On September 28, 2018, California Governor Jerry Brown signed into law AB 2684 to update the UPA to address these and other issues by revising the terms, presumptions, and procedures to ensure that parents and children of same-sex couples are treated equally and to improve genetic testing laws to ensure they apply equally to men and women.

Some of provisions of AB 2684 were made effective in 2019. For example, in 2019, many terms in the UPA were amended to be more inclusive, such as replacing “paternity” with “parentage,” “birth parent” instead of “mother,” “other parent” instead of “father,” and changing pronouns to make them gender neutral. Additionally in 2109, genetic testing was prohibited to challenge the parentage of a person who is a parent through assisted reproduction under Family Code Section 7613 or 7962. In 2019, genetic testing was banned for in utero genetic testing, which can cause significant problems in the pregnancy. Moreover, the amendments specified that, if a genetic specimen is not available from the person sought to be tested, and good cause is shown, the court may order testing of relatives, genetic testing for identical siblings, and genetic testing of a deceased person. These changes made genetic testing more available for determining parentage.

Substantial changes are made under AB 2684 to the presumptions of parentage, the voluntary declaration of parentage, and other provisions beginning January 1, 2020. The effective date of these changes was delayed until 2020 to give the agencies practice tips

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time to revise forms, publications and procedures and to give the public and legal community time to understand these changes.

**Presumed Parents**

Family Law Section 7541 has been amended by AB 2684 to extend the presumption of parentage to children born during a marriage of same-sex couples. Before the amendment, a child born to spouses cohabiting at the time of conception was presumed to be a child of the marriage and that presumption was conclusive after two years. Children born to a woman who attempted to marry the other parent were also presumed to be children of the marriage, though that presumption was not conclusive after two years.

Section 7541 now provides that a presumption of parentage based on marriage or attempted marriage under Section 7611 cannot be challenged after the child is two years of age, and an action to challenge the presumption may only be filed by either spouse, or by a person who is a presumed parent or by the child through a guardian ad litem. If the court finds that the spouse who is the presumed parent is not the genetic parent, the court must determine what is in the child's best interest, considering factors such as whether the child resided with the presumed parent, whether the presumed parent ever held out the child as his or her own and, in the case in which there are two or more presumptions, whether it would be detrimental to recognize more than two parents.

The statute also provides that genetic testing may not be used to challenge parentage when a final judgment was reached prior to September 30, 1980, or when challenging the parentage of a spouse who is a parent through assisted reproduction agreements under Section 7962, or through assisted reproduction when the woman conceives with semen or ova donated by a donor not her spouse with the consent of the other intended parent. These amendments are intended to provide more security to children born to same-sex couples and families that have used assisted reproduction.

**Voluntary Declaration of Parentage**

The voluntary declaration of parentage (VDOP) is a simple process to establish parentage for unmarried parents by signing a declaration. The declaration is a form usually provided at the hospital, by the court, or by the local child support agency. Once the VDOP is signed and filed with the state Department of Child Support Services (DCSS), this declaration is equivalent to a judgment of parentage issued by a court.

AB 2684 amended Section 7571(a) to expand the scope of individuals eligible to sign a VDOP to include persons identified by the woman giving birth as either the only possible genetic parent or the intended parent of the child conceived through assisted reproduction.

Section 7573(a) was also amended to permit the following persons to sign a VDOP to establish the parentage: 1) an unmarried woman who gave birth to the child and another person who is a genetic parent and 2) a married or unmarried woman who gave birth to the child and another person who is an intended parent of a child under Section 7613 conceived through assisted reproduction. This expansion of the VDOP to include the “intended parent” makes room for a more expansive definition of parentage and family.

In addition, the statute allows the VDOP to be signed before or after the birth of the child but specifies that the effective date of the VDOP occurs when it is filed with the DCSS. Previously, the effective date was undefined by statute, but as a practical matter, was the child's birth date. Previously, Section 7573 stated that a VDOP had the “same force and effect” as a judgment of paternity. Section 7573 now states that a completed VDOP is “equivalent to” a judgment of parentage and confers all rights and duties of a parent on the declarant. Section 7578 states that, by signing the VDOP, the signatory submits to the personal jurisdiction in any proceeding challenging the VDOP. While the legislation expanded the use of the VDOP for same-sex couples, it narrowed the time frame in which a VDOP can be challenged by a signatory. Prior to the enactment of the legislation, a signatory could move to set aside the VDOP within two years of the birth of the child, or within six months of initial order if the moving party could show mistake, inadvertence, surprise, or excusable neglect under Code of Civil Procedure Section 473, or longer based on equitable considerations.

Under new Section 7576, a signatory may commence a proceeding to challenge the validity of a VDOP within two years of the “effective date” of the VDOP, that is, the date the VDOP is filed with DCSS as specified in section 7573(c). Omitted are the exceptions based on Section 473 and equity.

Additionally, the statute radically alters the grounds on which a signatory may challenge a VDOP.

Under the prior Section 7575, a court could set aside the VDOP unless it determined that the set-aside action would not be in the best interest of the child based on a number of factors, including the age of the child, the length of time since the declaration was signed, the nature and quality of the relationship between the child and the man who signed the declaration, if the signatory is not the biological father, whether the biological father opposes preserving the relationship between the child and the signatory, and other factors that the court determined to be relevant to the best interest analysis.

**Limited Grounds to Challenge**

Section 7576(a) now limits the grounds to challenge a VDOP solely on the basis of fraud, duress, or material mistake of fact. One view holds that the standards sets a higher bar for challenges to a VDOP to the extent that it gives the court less discretion based on the best-interest factors. Others argue that the standard is potentially more expansive to the extent that a material mistake of fact may be open to interpretation.

A challenge based on fraud is clearly a higher standard to meet. There may be fraud in the making of a contract, as defined in Civil Code Section 1572, and, in many ways, a VDOP is like a contract. Civil Code Section 1709 defines fraud as “one who willfully deceives another with intent to induce him to alter his position to his injury,” but that is defined as deceit and not fraud. Section 7576(a) does not include negligent misrepresentation, which is the more likely situation, when the child's mother knows that the signatory may not be the father but fails to disclose that fact to him.

Similarly, duress may be more difficult to prove. Civil Code Section 1569 defines duress to include: 1) unlawful confinement of the person of the party, or of the spouse of such party, or of an ancestor, descendant, or adopted child of such party or spouse; and 2) confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive. Is confinement a likely element when a child is born to two people in a relationship? That said, there may be circumstances when the signatory feels compelled to sign by the mother or the family of the mother giving birth or by hospital staff.

**Mistake of Fact**

Mistake of fact may be the easier standard to meet. Civil Code Section 1577 states that a mistake of fact is a mistake, not
caused by the neglect of a legal duty on the part of the mistaken person, consisting in: 1) an unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2) belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed. The signatory may have an easier time proving a material mistake, such as when the mother or father or both mistakenly believe that he is the biological father. The law does not allow for a challenge based on a mistake of law, that is, the signatory claims he or she did not understand the legal effect of the VDOP.

Lawyers may find Section 7576(a) a new territory to explore; however, the vast majority of litigants challenging a VDOP are self-represented litigants who are without the benefit of representation or knowledge of the law. In many cases, these litigants merely seeking the assurance of a DNA test to confirm their relationship to the child. It is unclear whether these changes, which notably omit all mention of genetic testing for signatories and consideration of the best interest of the child, actually serve the best interests of the child.

Non-Signatory Rights

Beyond the broad changes to the set-aside rules for signatories, the new statute now recognizes the right of a non-signatory to challenge a VDOP. Section 7577(a) states: “A person has standing under this section if he or she is an alleged genetic parent who is not a donor under Section 7513, or any person who has standing under Section 7530.” This could include an alleged genetic parent who is not a donor, anyone with UPA standing (Section 7630) (includes all statutory “presumed” parents), or a person seeking to be adjudicated a parent, not merely a donor.

Under this section, the non-signatory must file a petition stating specific facts in support of his or claim of standing. If a hearing is needed to determine standing, then it must be expedited and, if the person claiming standing is alleging a genetic connection, the court must order genetic testing on an expedited basis. In these cases, the person seeking to set aside the VDOP has the burden of proof by a preponderance of the evidence, and the court may grant the petition only if it finds that it is in the best interest of the child considering the age of the child; the length of time since the VDOP was effective; the nature, duration and quality of the relationship between the signatory and the child. Additionally, every person who signed the VDOP shall be made a party to the proceeding.

New Section 7578(c) provides that, duringpendency of any proceeding challenging a VDOP, the court “shall not suspend the legal responsibilities arising from a voluntary declaration of parentage including the duty to pay child support, unless the party challenging the declaration shows good cause.” What constitutes “good cause” is not defined in the statute, but if the VDOP appears to be void (as defined in new Section 7573.5), that would appear to be good cause. The sections regarding VDOPs signed by minors (Section 7577) and pre-1997 VDOPs (Section 7576) remain the same but are renumbered to sections 7580 and 7581.

Void VDOPs

Under AB 2684, new Section 7573.5 provides that a VDOP is void in the following circumstances:

- At the time of the signing, the child has a presumed parent under Section 7540 (parents married and cohabiting); or a presumed parent under Section 7611(a), (b) or (c) (married or attempted to marry the natural mother or who took the child into his or her home and held the child out as his or her own);
- There is already a judgment of parentage; another person has signed a valid declaration; the child has a parent as the result of assisted reproduction other than the signatories; or
- The person seeking to establish parentage is a sperm or ova donor; or, the person seeking to establish parentage asserts he or she is a parent under Section 7613 and the child was not conceived through assisted reproduction.

Previously, under Section 7612(f), a VDOP was “invalid” if the child had a presumed parent under sections 7540 or 7611 or if the man signing the VDOP was a sperm donor through assisted reproduction. Under the present scheme, according to Section 7573.5, the VDOP is not merely invalid, it is void. One unresolved question is: voided as of what date? Voided ab initio? One can imagine a scenario in which this could be questioned, such as when there is a judgment against the signatory and money was collected and distributed or when the signatory made decisions on the child’s behalf that had legal effects. These questions will have to be resolved by the courts.

Operative Dates

One major issue unresolved by the statute is the operative date for the new rules relating to the VDOP. Section 4(c) governs the operative dates of new laws and states, in relevant part: “the new law [enacted under the Family Code] applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstances existed before or on the operative date, including the commencement of a proceeding, making of an order or taking an action.” Section 4(d) states that “[i]f a document is filed before the operative date, any subsequent proceedings after the operative date, including any objection or response, hearing or order, is governed by the new law and not the old law. Section 4(e) states “[i]f an order is made or action taken before the operative date, the validity of the order or action is governed by the old law and not the new law.” With the VDOP equivalent to a judgment under the new law (and having the same force and effect under the previous law), it is unclear how to apply the effective date in each case.

Disclosure of Donor Identity

Beginning January 1, 2020, a gamete (sperm or ova) bank that provides reproductive services in California is required to collect and maintain various identifying and medical information from a donor at the time of the donation. The bank must also obtain from the donor a declaration either agreeing or not agreeing to disclose the donor’s identity to the child at 18 years or age. If the donor initially decides to keep his or her identifying information confidential, the donor can change his or her mind, but if the donor agrees to release identifying information, that decision cannot be changed. At 18 years of age, the child conceived as a result of the donation may, if he or she so chooses, receive identifying information from a donor who agreed to the release of that information. Nonidentifying medical information is accessible immediately by the child, or the child’s parent or guardian if the child is a minor.

The intent of AB 2684 was to modernize the UPA and to update the parentage laws to provide equal treatment of same-sex parents. The law, in fact, does so much more to modernize and improve California’s parentage laws.

2 Fam. Code §7601.
3 Fam. Code §7602.
4 Fam. Code §7612(c); In re LJ 13 Cal. App. 5th 1302, 1314 (2017).
Obergefell, 576 U.S. at 5.

FAM. CODE §7551(b)(1).

FAM. CODE §7551(c).

FAM. CODE §7551(d)(4).

FAM. CODE §7540.

FAM. CODE §7611 states in substance the person is presumed to be the natural parent if a) the presumed parent and the child’s natural mother are or were married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death, annulment, divorce or judgment of separation; b) before the birth, the presumed parent and the child’s natural mother attempted to marry; c) after the child’s birth, the presumed parent and the child’s natural mother attempted to marry; or d) the presumed parent receives the child into his or her home and holds the child out as his or her child.

FAM. CODE §7541(b).

FAM. CODE §7541(a), referring to factors outlined in Section 7612(c).

FAM. CODE §7613(a)(1).

FAM. CODE §7570.

FAM. CODE §7573.

Prior to this amendment, the form of the declaration, as developed by DCSS, provided for, among other things, the name and signature of the mother, the name and signature of the father, the name of the child and the birthdate. WITKIN, supra note 1, at §21, 54.

Section 7613 states: “If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived. The other intended parent’s consent shall be in writing and signed by the other intended parent and the woman conceiving through assisted reproduction.”

FAM. CODE §7573(c).

FAM. CODE §7573(d).

Section 1572 generally requires acts by a party to a contract, with the intent to deceive or intent to induce the party to enter the contract, to suggest facts that are not true, or suppression of facts that are true, or a promise without intent to perform, or other acts fitted to deceive.

CIV. CODE §1709.

CIV. CODE §1569.

CIV. CODE §1577.

FAM. CODE §7577(a). There are additional categories of standing under the UPA, including an adoption agency who has the child or a prospective adoptive parent. See FAM. CODE §7630(e)(1).

FAM. CODE §7577(c).

FAM. CODE § 7573.5(a) states: “A voluntary declaration of parentage is void if, at the time of signing, any of the following are true: (1) A person other than the woman who gave birth to the child or a person seeking to establish parentage through a voluntary declaration of parentage is a presumed parent under Section 7540 or subdivision (a), (b), or (c) of Section 7611. (2) A court has entered a judgment of parentage of the child. (3) Another person has signed a valid voluntary declaration of parentage. (4) The child has a parent under Section 7613 or 7962 other than the signatories. (5) The person seeking to establish parentage is a sperm or ova donor under subdivision (b) or (c) of Section 7613. (6) The person seeking to establish parentage asserts that he or she is a parent under Section 7613 and the child was not conceived through assisted reproduction.”

HEALTH & SAFETY CODE §1644.2.
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<tr>
<td>9:00 AM</td>
<td>Registration, continental breakfast, putting contest and all practice areas are open, + tournament package sales</td>
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<tr>
<td>11:00 AM</td>
<td>Shotgun start, lunch, and on-course snacks</td>
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<td>4:30 PM</td>
<td>Networking dinner for golfers and guests</td>
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In September 2019, California Governor Gavin Newsom signed into law the Fair Pay to Play Act (FPPA). Otherwise known as Senate Bill 206, the legislation allows college athletes playing a sport at a qualified academic institution in California that makes $10 million or more in media rights annually to enter the marketplace and profit from their names, images, and likenesses. The law forbids educational institutions from suspending or otherwise penalizing a student for pursuing such sponsorship or endorsement deals. It also allows student athletes to retain the services of an agent and/or attorney to help them obtain and secure such deals. The law, which becomes operative January 1, 2023, exempts the California Community Colleges system until 2021, when a report will be submitted to the California Legislature to determine whether community colleges should be subject to the FPPA.

In October 2019, the Atlanta-based National Collegiate Athletic Association (NCAA) Board of Governors voted to remove restrictions on student athletes competing at member institutions, allowing them to profit from their names, images, and likenesses. The NCAA's decision followed that of the California Legislature, the first in the nation to pass such a law, and the introduction or discussion of similar legislation in the U.S. House of Representatives and in Florida and New York. NCAA President Mark Emmert said, “There's no question the legislative efforts in Congress and various states has been a catalyst to change.”

This foundational change of course pursuant to the California legislative effort and the NCAA will indeed open opportunities for student-athletes to make money while playing college sports. It is also a complete change from the NCAA's historical stance. In addition, the FPPA raises five important sets of concerns or issues:

1) The law raises questions about implementation when looking at how the NCAA, the conferences, states, individual universities, and student-athletes will or will not be regulated, and, as important, what regulatory scheme will be in place, and when?
2) What about minor league player development? The NCAA has received a lot of criticism for not being student-athlete friendly, but it is the National Basketball Association (NBA) and the National Football League (NFL) that forbid high school students from entering their drafts, requiring them to go through the NCAA or a foreign league.
3) Does the Fair Pay to Play Act go far enough or too far? The implementation and enforcement of the Fair Pay to Play Act raises many questions about NCAA involvement in regulation under the new rules.
act raises questions about caps on student-athlete dollars made from their names, images, and likenesses and whether such money should be placed in a trust until the student leaves college. The law also raises questions about limitations on existing deals made with apparel, beverage, and tech companies with the universities that are mostly exclusive. For example, in the collegiate environment, generally, should protections be in place to allow amateurism to still exist or should the free market determine all?

4) The ability of a student athlete to retain an attorney or an agent is a game changer, but it also raises regulation issues and questions about whether the agent or attorney is now full or partial service. How can one administrator or court of law distinguish between advising on signing an endorsement deal and advising for the upcoming draft, and should there be a distinction?

5) What is amateurism in the wake of SB 206? Essentially, student athletes are being treated like Olympic athletes who can earn revenue while participating in the Olympics during school but do not lose their collegiate eligibility. What does this mean going forward? Will tension build in the locker room between the haves and have nots?

What type of athlete does the law affect?

Minor League Development

The lack of an established minor league system for the NBA and NFL and the rules governing professional drafts are the main reasons the California Legislature and the NCAA chose to move forward with granting student athletes the ability to profit from their names, images, and likenesses. However, NBA Commissioner Adam Silver has discussed the possibility of removing the “one-and-done” rule for the NBA by 2021. Under this rule, players who have played at least one year of college basketball are eligible for the NBA draft. Current NFL rules permit only players who are three years out of high school to enter the draft. Thus, high school student athletes playing basketball and football are required to go to an NCAA institution to be drafted by a professional sports franchise in the NBA and NFL. The NFL has dallied with the Alliance of American Football (AAF) and has challengers like the XFL, twice, and the Arena Football League (AFL), among others, but it does not have—and has never really had—a true minor league. However, the NBA and the NFL utilize the NCAA talent as its minor league pool for talent.

The NBA has the G-League (named for its lead sponsor, Gatorade), formerly the D-League (short for Development League), but it is not a development league like the minor and development leagues of Major League Baseball (MLB), the National Hockey League (NHL), or Major League Soccer (MLS). For these leagues high school athletes have a choice to go professional (get drafted) or go to college. If the player is drafted, the player goes into the minor league or development system to train for the highest level. Because the NBA and NFL have been unwilling to change, California and the NCAA wanted to find a way to compensate student athletes for their, names, images, and likenesses as they attend college. That said, the new system in which student athletes can profit from their names, images, and likenesses may be incomplete unless college athletes have a say in where and when they go pro or go to college.

In New York, one state senator proposed legislation that would require the universities to pay student athletes directly. More specifically, the law “allows student-athletes to receive compensation including for the use of a student’s name, image or likeness; allows student-athletes to seek professional representation; requires colleges to establish an injured athlete fund to provide compensation to athletes for career-ending or long-term injuries” and was amended to give a “15% share of annual revenue to student-athletes, which would be divided equally.” The provisions on paying for university-sold merchandise and use of the student athlete’s name, image, or likeness, compensation for post career-ending or long-term injuries, and 15 percent of annual revenue are clear departures from the California’s FPPA and not likely what the NCAA envisioned when it voted yes to change in October.

FPPA Compromise

Did the FPPA go far enough? The FPPA was a compromise considering the limitations on trade pursuant to the NBA and NFL drafting rules, understanding that, for the most part, academic institutions generally are debt-ridden as research universities not focused on business development, and that beyond student fees, generally, the moneymaking athletic departments are in the Power Five Conferences, while most athletic programs are subsidized by the university. Requiring universities to pay student athletes directly or for past or current sales is a much larger type of request and a longer debate, especially given the history of student athlete attempts at unionization and, more important, what the market will bear when it comes to paying student athletes to endorse a product. That said, if the NBA and NFL eliminated their draft rules, it would significantly diminish the effectiveness of the argument that student athletes should be paid when there is a choice to go pro or enroll in college. Without that rule in place, the California Legislature and the NCAA made a compromise to free student athletes to seek money-making ventures from their names, images, and
lions of dollars in their proverbial pockets. If a student athlete does land a deal, how much money can be made and/or should the money be placed in a trust until the student athlete graduates from college? The question is whether student athletes should have limitations on how they are able to compete in the market.

It also is conceivable to see student athletes enter into deals that are completely off the field, but the fine print of the underlying contracts with the universities will have precedence over the student athlete deals. In the marketplace, without a national or even a local television audience to see a player wearing or discussing a product, marketability is limited to the social media following of the player, which could be substantial for select individuals.

**Student Athlete Deals**

If a student athlete does land a deal, should those deals be capped in terms of how much money can be made and/or should the money be placed in a trust until the student athlete graduates from college? The question is whether student athletes should be able to walk around campus with thousands, hundreds, or millions of dollars in their proverbial pockets. Will this affect team morale? Will it cause issues with performance? Regarding these last points, a trust is something that the Ed O’Bannon NCAA/EA Sports litigation discussed, but it could be a great solution to protect amateurism while allowing the free market to determine value.

When the NCAA allows student athletes to profit from their names, images, and likenesses while enrolled in school and playing sports, what are the repercussions of that financial benefit? Professional sports include both have and have-not athletes considered, which may alleviate some of the issues discussed here. The trust idea will also be discussed alongside caps on revenue from the student athlete’s name, image, and likeness, but setting caps will be the more difficult request because that will essentially do, in effect, what opponents claimed of the old system: prevent a free-market and individual decision-making process.

Somewhat lost in the shuffle of the FPPA is the allowance of attorneys and agents to enter the picture, working with student athletes at an earlier stage. An example of how the FPPA might play out is illustrated by former Duke University basketball player and New Orleans Pelicans phenomenon Zion Williamson and his deal with Gatorade. The deal was signed after he was drafted and signed with the Pelicans. Under the FPPA, if Duke were in California instead of North Carolina and the year was 2023, Zion would have been able to sign the Gatorade deal while in college and collect its proceeds. Again, however, had Zion not been forced to go to college, one could surmise that choosing to be drafted over the NCAA would have been the choice anyway.

**Representation**

In addition to timing, representation is an important issue that has evaded student athletes by law, regulation, and possibly the fear of getting into trouble. Under the existing scheme, agents and attorneys must register with a school as an advisor, register with the underlying union of the professional league, and file agent paperwork with the state in which they are doing business and representing athletes. There are differences between attorneys and agents in terms of requirements, registrations, and sometimes education, but, under the existing sports agent scheme, both are treated equally. However, student athletes are forbidden by the NCAA and individual university regulations from signing a contract with an agent or attorney or receiving anything of value (down to and including a car ride, lunch, a T-shirt, and the like). Communication is allowed, but without signing a contract and having the ability to make a deal, what would be the point?
The issues that arise are: How will agents and attorneys be regulated? Should universities and the NCAA, the likely enforcement arm of the FPPA, care about whether the agent or attorney’s services expand beyond endorsements or sponsorships? What if the agent or attorney gives advice on entering the draft? Should someone be disciplined? An important additional concern is how best to protect some of the most vulnerable. Those who are leaving home for the first time with little to no real-world experience need protection, and the implementation and enforcement arm of the FPPA and any NCAA, state, or federal legislation will help create that structure. Some of that protection should also come from the agent or attorney in terms of giving advice when anything seems misplaced if there is a proper regulation scheme in place.

Amateurism

Concerning the FPPA legislation in California and the NCAA decision, what is the definition of amateurism now? One argument is that student athletes in non-Olympic sports are being treated exactly like student athletes competing in Olympic sports in which professionals do not play. This is a sound argument because Olympic athletes in college can get paid for endorsements. The FPPA and NCAA are expanding the pool of available talent. However, practically speaking, how many student athletes are really going to take advantage of the FPPA or changed NCAA rules in general? Before answering that question, it is necessary to consider the NAB and NFL rules regarding restrictions of age/experience on entering the draft. Also, athletes who receive the largest sponsorship and endorsement dollars generally are playing in sports that do not require helmets or hats so that visually the stars are more recognizable.22 In addition, individual sport athletes generally earn more in endorsements than team sport athletes23 because there is no salary being paid by a team or franchise.

Competitive Drive. This arena also is where agents and attorneys can help to land certain deals, but, ultimately, talent wins the day. Nevertheless, companies are more inclined to be inclusive today, so it is likely that a company would enter into endorsement deals with the top female and male basketball stars at certain colleges, or, possibly with more streaming options for less watched sports, companies might see value in lacrosse, volleyball, water polo, swimming, and even baseball, soccer, and hockey, which do have established minor league systems creating options. However, the pool of talent will likely be small. The option for the company paying the money and/or giving the product, or even ownership to the student athlete, must be profitable and that pool will be limited.

The Fair Pay to Play Act in California has indeed sparked a great conversation. Many are excited about the prospects of business development. However, implementation and enforcement, the idea of minor league development and draft rules, compensation, representation, and the amateurism rules and regulations present issues that need to be resolved. The structure of the FPPA, similar laws at the federal level or in other states, and ultimately the NCAA and university regulations and policies will determine the success of this new frontier.

1 Enacted as Educ. Code § 67456, with parts added and repealed to Educ. Code § 67457.
5 Id.
14 EDUC. CODE § 67456(a)(1).
23 Kathleen Joyce, These athletes make more money through endorsements than sports, FOX BUSINESS (June 14, 2019), https://www.foxbusiness.com/feature/these-elite-athletes-make-more-money-through-endorsements-than-sports.
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The year 2019 saw charges of high-profile misconduct by a justice on the Second District Court of Appeal and by lawyers for the City of Los Angeles. Associate Justice Jeffrey W. Johnson was accused by the Commission on Judicial Performance of “willful misconduct [and] conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” The commission heard testimony by fellow Justices Victoria Chaney and Elizabeth Grimes, court employees, lawyers, and highway patrol officers that Johnson had asked for sex, touched them inappropriately, exposed himself, and made salacious remarks. Johnson tearfully denied the charges. In a 316-page report issued on January 3 of this year, a panel of special masters found 15 incidents constituting prejudicial misconduct. If removed from the bench, Johnson would be the first justice ousted for misconduct since the commission was formed in 1961.

Private lawyers hired to defend the City of Los Angeles in class action litigation concerning Department of Water and Power (DWP) overbilling were accused of conflicts of interests, breaching their duty of candor to the court, and fraud when it was revealed they had secretly colluded with the plaintiff’s counsel to draft the complaint against the city and negotiated a $67 million settlement before any discovery was taken. Paul Kiesel, former Los Angeles County Bar Association president and special counsel to the city, contended the Office of the City Attorney authorized the scheme, but an investigation by ethicist Ellen A. Pansky found a lack of corroborating evidence and concluded City Attorney Mike Feuer committed no ethical violations in settling the case. Her report was less than a full exoneration because, in the face of an FBI investigation, former attorneys for the city and a former DWP chief pleaded the Fifth Amendment, as did the plaintiff’s lawyer when Judge Elihu M. Berle asked if he had shared his $19 million fee with anyone.

The July bar exam pass rate climbed back to 50.1 percent after recent record lows. Officials insisted the improvement had nothing to do with the State Bar’s mistaken disclosure of the essay topics and subject of the performance test five days before the exam. After the American Bar Association adopted a rule requiring that 75 percent of a law school’s graduates pass the bar exam within two years of graduation, Thomas Jefferson School of Law lost its ABA accreditation and University of La Verne College of Law voluntarily became a state-accredited school.

Who Is Your Client?

In Sprengel v. Zyblut, one of two 50-percent owners of a limited liability (Sprengel),
outraged at the outcome of a lawsuit she filed against the company and other 50-percent owner (Mohr) for misappropriating her intellectual property rights as author to a guidebook on the side effects of chemotherapy, sued the company’s lawyers for legal malpractice. Sprengel alleged that while the lawyers purported to represent the company, they really represented Mohr, from whom they received their information and instructions with respect to the litigation. The company’s operating agreement provided that neither had “the authority to bind the Company without the consent and approval of the other.” Nevertheless, it also designated Mohr as the “sole manager” authorized to “[e]xecute instruments and documents” and to “do and perform all other acts as may be necessary or appropriate to the conduct of the Company’s business.”

Sprengel alleged that the lawyers violated fiduciary duties owed her, as a 50-percent owner, and ethical rules on avoiding conflicts of interests. The superior court granted the attorney-defendants’ motions for summary judgment. The appellate court affirmed. Citing former Professional Conduct Rule 3-600 (now Rule 1.13), the appellate court found that the attorney-defendants did not have an implied attorney-client relationship with Sprengel based on the totality of the circumstances. Sprengel never believed, nor had reason to believe, that the lawyers were acting to protect her personal interests. She never spoke directly with the lawyers or shared confidential information with them, and she had separate counsel. The lawyers made clear from the beginning that they represented only the company and that their representation was adverse to her.

In Jarvis v. Jarvis,12 one 50-percent general partner of a partnership owning two parcels of real property sued the partnership and the other 50-percent general partner, his brother, to partition one parcel on the grounds that the brothers could not agree on what to do with the property. The defendant brother had the partnership retain attorney William P. Roscoe III, who had no previous professional relationship with either brother. The plaintiff moved to disqualify Roscoe. The trial court granted the motion. The Sixth District Court of Appeal affirmed, concluding the trial court did not abuse its discretion.13 The partnership agreement was silent on delegating selection of the partnership’s counsel or decision-making regarding litigation. If Roscoe could not take instructions from either brother, how would he represent the partnership without usurping the client’s role? Would he be inclined to support the brother who selected him? Wouldn’t his services merely deplete the partnership’s assets? Under the unique circumstances of this case, the Sixth District concluded that, on remand, the trial court had discretion to determine whether separate counsel for the partnership would be necessary at all.14

Conflicts of Interests

A court’s decision to disqualify lawyers with a conflict of interest is discretionary, and cases last year illustrated the difference that a change of court or facts can make. In The National Grange of the Order of Patrons of Husbandry v. California Guild,15 the Third District Court of Appeal considered the case of an associate lawyer who billed 26 hours for the plaintiff National Grange at Porter Scott, and then joined Ellis Law Group, which was defending California Guild in the same state court case and a related Lanham Act lawsuit. In 2017, the federal district court in Sacramento declined to disqualify the Ellis firm from the Lanham Act suit because it had screened the lawyer from all litigation between the parties, thereby rebutting the presumption of shared confidences.16

Notwithstanding the ethical screen, the state court took an opposite view and disqualified Ellis Law Group in two related cases in 2019. The Ellis firm cited Kirk v. First American Title Ins. Co.,17 for the efficacy of ethical walls, but the appellate court relied instead on Henricksen v. Great American Savings & Loan,18 decided 18 years before Kirk, which held that disqualification is automatic when an attorney possessing actual confidential information switches sides in the same case. Ignoring the fact that the lawyers in Kirk essentially joined the opposing law firm in the same case, too, it concluded: “The effectiveness of the ethical wall is irrelevant to our inquiry here.”19

In a second suit brought against the Ellis firm’s client by National Grange’s new state charter, California Grange, the lawyers argued there was no conflict because the prior firm had never represented California Grange. The appellate court disagreed, holding that, since California Grange’s master had shared confidential information with National Grange’s lawyers before it was chartered and retained its own counsel, Porter Scott also represented California Grange.20 Finally, the Third District rejected the Ellis firm’s ethical wall because though allegedly put in place when the lawyer was hired, written evidence for the wall was created later.21

When two disqualification motions were brought against the same law firm in related lawsuits, the Second District Court of Appeal reached different results. O’Gara Coach Company and its former employees Joseph Ra and Thomas Wu were sued for fraud, conversion, and unfair business practices in connection with the sale of luxury vehicles. O’Gara and Ra filed cross-claims against each other, and Ra retained a former O’Gara President Darren Richie to represent him. Richie had graduated from law school before he worked for O’Gara and, after he left the company, was admitted to practice and formed his own law firm. In O’Gara Coach Co., LLC v. Ra,22 O’Gara moved to disqualify Richie as Ra’s counsel on the grounds that while president, Richie was privy to privileged information and coordinated substantially similar matters with outside counsel, including the investigation of employees that formed the basis for O’Gara’s cross-claim. Richie argued there was no side-switching because he was not an attorney when he worked for O’Gara and any fiduciary duty he owed as an officer could not be the basis for disqualification.

The superior court denied the motion, but the Second District reversed. Presiding Justice Dennis M. Peruss wrote that a lawyer must protect the integrity of the judicial process and disqualification is not limited to situations in which an adversary’s privileged communications were acquired through a former attorney-client relationship. Though no longer an officer, Richie had no right to disclose privileged information without O’Gara’s consent, and now that he was a member of the California State Bar, he had a duty to refrain from representing former employees against O’Gara in matters as to which he possessed material confidential information.23

Seven months later, the panel reached a different result in Wu v. O’Gara Coach Co., LLC,24 an employment discrimination case. O’Gara moved to disqualify Richie from representing its former sales advisor Wu, contending that as president Richie was responsible for the company’s anti-discrimination policies and would be a percipient witness at trial. Again, writing for the court of appeal, Justice Peruss reversed the lawyer’s disqualification because there was no evidence Richie had investigated Wu’s complaints of a hostile work environment or discussed them with O’Gara’s outside counsel. He was privy to the company’s business practices and litigation philosophy, but knowledge of a party’s “playbook” does not disqualify
1. Within two years of graduation, 75 percent of graduates from a law school accredited by the American Bar Association must pass a bar exam.
   True. False.

2. An attorney for a company always also represents the individual shareholders.
   True. False.

3. If the partnership agreement is silent, there may be no one who can instruct the partnership’s lawyer in a dispute among the partners.
   True. False.

4. A court’s decision to disqualify a lawyer based on a conflict of interest is discretionary.
   True. False.

5. An effective ethical screen may rebut the presumption of shared confidences among lawyers in a law firm.
   True. False.

6. If an ethical screen is not effective, disqualification is automatic when an attorney possessing actual confidential client information switches sides.
   True. False.

7. A member of the California State Bar cannot represent former employees against a company when he possesses material confidential information of the company.
   True. False.

8. Knowledge of an opposing party’s playbook—i.e., its business practices and litigation strategy—disqualifies a lawyer.
   True. False.

9. An attorney who approves a client’s settlement agreement “as to form and content” may also be bound by the terms of the agreement.
   True. False.

10. A lawyer’s duty of zealous advocacy in a civil case means he or she must allow a client to lie on the witness stand.
    True. False.

11. If a lawyer suspects, but does not know, that a witness’s intended testimony may not be true, he or she is entitled to resolve doubts about credibility in the client’s favor.
    True. False.

12. When a lawyer is compelled to withdraw from a representation, he or she no longer has a duty of confidentiality and does not need to avoid prejudice to the client.
    True. False.

13. Unlike the American Bar Association Model Rules of Professional Conduct, in California, the duty of candor to the court does not override the duty of confidentiality to a client.
    True. False.

14. A lawyer may not contact an employee of an opposing represented party if the communication concerns an act by the employee that is binding on the employer for purposes of liability.
    True. False.

15. As officers of the court, lawyers should avoid haste in seeking an opposing party’s default.
    True. False.

16. California courts will refer lawyers who engage in gender bias to the State Bar for discipline.
    True. False.

17. Compliments on a female judge’s appearance are appreciated and do not constitute gender bias.
    True. False.

18. To avoid the one-year statute of limitations for legal malpractice claims, a client may have to sue his or her former lawyer before a final ruling in the underlying case.
    True. False.

19. The attorney-client privilege may prevent a party from obtaining evidence to prove the element of malice in a defamation claim against a lawyer.
    True. False.

20. A mediator’s ownership interest in the mediation service is never material to a party’s choice of mediator.
    True. False.

INSTRUCTIONS FOR OBTAINING MCLE CREDITS
1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the $25 testing fee ($35 for non-LACBA members) to:

Los Angeles County Bar Association
Attn: Los Angeles Lawyer Test
P.O. Box 55020
Los Angeles, CA 90055

Make checks payable to: Los Angeles County Bar Association.
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ANSWERS
Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. □ True □ False
2. □ True □ False
3. □ True □ False
4. □ True □ False
5. □ True □ False
6. □ True □ False
7. □ True □ False
8. □ True □ False
9. □ True □ False
10. □ True □ False
11. □ True □ False
12. □ True □ False
13. □ True □ False
14. □ True □ False
15. □ True □ False
16. □ True □ False
17. □ True □ False
18. □ True □ False
19. □ True □ False
20. □ True □ False
a lawyer. Richie’s likely testimony did not justify disqualification because he obtained his client Wu’s informed written consent under Rule of Professional Conduct 3.7(a)(3). Settlement Agreements

Is a lawyer bound by terms memorialized in a settlement agreement between his client and another party? In Monster Energy Company v. Schechter, the California Supreme Court concluded that he might be, depending on the agreement’s wording and the parties’ intent. Along with co-counsel, attorney Bruce Schechter filed a wrongful death action against Monster Energy on behalf of the parents of a 14-year-old girl who died from cardiac arrest after drinking two energy drinks. The case settled. The settlement agreement’s confidentiality clause provided:

The parties understand and acknowledge that all of the terms, conditions and details of this Settlement Agreement including its existence are to remain confidential. Plaintiffs and their counsel agree that they will keep completely confidential all of the terms and contents of this Settlement Agreement, and the negotiations leading thereto, and will not publicize or disclose the amounts, conditions, terms, or contents of this Settlement Agreement in any manner. Specifically, Plaintiffs and their counsel of record agree...to not publicly disclose to any person...including...Lawyers & Settlements...certain facts related to the settlement.

The settlement agreement also reflected that its provisions were binding on “the parties and a litany of related persons, including the “attorneys.” Schechter was later quoted in an article titled “Substantial Dollars’ for Family in Monster Energy Wrongful Death Suit” posted on the website LawyersandSettlements.com. The article remarked that Schechter could not reveal the exact amount paid because “Monster wants the amount to be sealed.”

The article mentioned three other lawsuits Schechter had filed against Monster Energy because of concerns that its products were unsafe and concluded with a link and phone number for “Monster Energy Drink Injury Legal Help.”

Monster Energy sued Schechter and his law firm for breaching the settlement agreement, breaching an implied covenant of good faith and fair dealing, unjust enrichment, and promissory estoppel. The attorney-defendants moved to strike all four claims. The trial court granted the motion except as to the breach of contract claim. The Fourth District Court of Appeal reversed the trial court’s denial of the motion with respect to the breach of contract claim, but otherwise affirmed. The California Supreme Court reversed. That the attorneys signed the settlement agreement under the notation “approved as to form and content” did not preclude a factual finding that the parties intended the attorneys to be bound by provisions in the agreement, such as the confidentiality provision.

The Fourth District Court of Appeal was not amused. It helpfully explained that a succubus is a demon assuming female form that has sexual intercourse with men in their sleep, and concluded: “[G]ender bias by an attorney appearing before us will not be tolerated period.”

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rules, he must withdraw under rules 1.16(a)(2) and 3.3, comment [8]. Since a request to withdraw may be denied, and merely seeking withdrawal, whether or not granted, may prejudice the client's credibility, the lawyer should warn the client of the consequences of refusing to correct the record.

**Litigation Privilege**

The litigation privilege, codified in Civil Code Section 47, generally applies to communications made in judicial or quasi-judicial proceedings by litigants and their lawyers to achieve the objects of the litigation and have some connection or logical relation to the action. In *Strawn v. Morris, Polich & Purdy, LLP*, a couple sued the attorneys representing State Farm after State Farm denied coverage for fire damage to the couple’s home and pickup truck on the ground that the husband had set the fire. The couple sued State Farm’s attorneys for invasion of privacy, among other claims, because the attorneys had disclosed the couple’s tax returns to State Farm and its forensic accountants. The couple alleged that the tax returns were inadvertently given to State Farm’s attorneys when State Farm was assessing the couple’s insurance claim.

The First Appellate District concluded that the trial court erred in sustaining the attorney-defendants’ demurrer to the invasion of privacy claim. The trial court erroneously relied on the litigation privilege. Although the couple’s invasion claim was based on a communication (disclosing their tax returns), whether the communication was made at a time when imminent litigation was actually contemplated was a factual issue precluding the trial court from deciding the applicability of the litigation privilege on demurrer.

**Contact with a Represented Party**

In *Doe v. Superior Court*, a female student-employee in the campus police department of Southwestern College sued the community college district and three district employees for sexual harassment and assault. She alleged that two other district employees had also been harassed. Plaintiff’s attorney contacted one of them in advance of her deposition. The district had offered to provide counsel to the witness, but at the time of the contact she had not accepted or retained counsel. The trial court disqualified plaintiff’s lawyer for communicating with “a person the lawyer knows to be represented by another lawyer in the matter” in violation of Rule of Professional Conduct 4.2.39

The court of appeal reversed, finding that the trial court had abused its discretion. Because the college district is a governmental organization, Rule 4.2 only prohibited plaintiff’s attorney from contacting a current district employee if “the subject of the communication [was] any act or omission of such person—which may be binding upon or imputed to the organization for purposes of civil or criminal liability.” The person contacted was a purported percipient witness to another employee’s wrongful act. The witness herself did not commit any act or omission that could be binding upon or imputed to the district. Thus, rule 4.2 was inapplicable.

**Civilty**

Justice William Bedsworth of the Fourth District Court of Appeal delivered a lesson on civility in *LaSalle v. Vogel*.40 LaSalle sued her lawyer Vogel for malpractice after her lawsuit was defaulted as a terminating sanction for failure to provide discovery. Thirty-six days after serving the complaint, having received no response, LaSalle’s lawyer sent Vogel a letter and an e-mail stating that her response was past due and threatening to take her default unless a responsive pleading was filed by the next day, a Friday. He waited until Monday afternoon and then filed a request for entry of default and e-mailed it to Vogel. Too late, Vogel asked for an extension of time, so she filed a motion to set aside the default, explaining she was a single mother in the middle of a divorce and was preoccupied because her husband had failed to pay their property taxes or mortgage, putting her home in jeopardy. Taking note of her previous instances of discipline, the court denied the set-aside motion, and a default judgment was entered against Vogel for $1 million.

The court of appeal held the superior court had abused its discretion and reversed. It chastised opposing counsel for failing to heed Code of Civil Procedure Section 583.130: “[A]ll parties shall cooperate in bringing the action to trial or other disposition.”41 Though this chain of events might not offend the average litigator, that was the problem, Justice Bedsworth suggested: Courts and counsel “have lost sight of the fact that the practice of law is not a business. It is a profession.”42 The order must be reversed because it overlooked the significance of being an officer of the court, “with all of the assumptions of honor and integrity that appertain to it.”43

The appellate court decreed what it viewed as the unseemly haste with which default had been sought and without sufficient notice.44 Using unreliable e-mail to give warning is hardly distinguishable from stealth, and the court noted the lack of prejudice to LaSalle from a set-aside, and the inappropriate damage award in a complex malpractice case. The superior court was faulted for giving less weight to Vogel’s personal troubles than to her prior discipline, which should not have colored whether she deserved an extension.45

**Lawyers Behaving Badly**

Under Business and Professions Code Section 6068(b), an attorney has a duty to maintain respect for judicial officers. Last year, lawyers paid a price for manifesting gender bias towards judges, by both snarky insults and fulsome praise. In *Martinez v. O’Hara*, plaintiff’s counsel Benjamin Pavone filed a notice of appeal from a “disgraceful order” by the female trial judge. Letting rip with a purple pen, he continued: “The ruling’s succubistic adoption of the defense position, and resulting validation of the defendant’s pseudo-hermaphroditic misconduct, prompt one to entertain reverse peristalsis unto its four corners.”47

The Fourth District Court of Appeal was not amused. It helpfully explained that a succubus is a demon assuming female form that has sexual intercourse with men in their sleep, and concluded: “[G]ender bias by an attorney appearing before us will not be tolerated, period.”48 The lawyer also falsely suggested the trial judge had attempted to thwart service of the signed judgment to evade appellate review, and without any evidence, repeatedly accused the judge who denied his motion for attorneys’ fees of “intentionally” refusing to follow the law.49 Citing its duty under Canon 3D(2) of the California Code of Judicial Ethics to report lawyer misconduct, the appellate court referred Pavone to the State Bar for discipline.50

After Keith Chow posted a Facebook comment that motivational speaker Cynthia Briganti was a convicted criminal and had stolen the identities of thousands of people, Briganti sued him for defamation and intentional interference with prospective economic advantage. In *Briganti v. Chow*, the trial court granted Chow’s anti-SLAPP motion to strike the intentional interference claim but denied the motion as to the defamation claim. On appeal, the order was affirmed by the Second District Court of Appeal, which concluded its opinion with “A Note on Civility, Sexism and Persuasive Brief Writing.”52 Saying it was taking advantage of a teachable moment, and “not to punish or embarrass,” the court referred to the brief of Chow’s counsel Jan Stanley Mason which...
described the trial judge as “an attractive, hard-working, brilliant, politically well-connected judge on a fast track for the California Supreme Court or Federal Bench.”

At oral argument, the lawyer said he intended to compliment the judge, but the Second District concluded the brief reflected gender bias and disrespect for the judicial system. It explained that calling a woman judge “attractive” is inappropriate because it is both irrelevant and sexist. Objectifying a member of the profession “is uncivil and unacceptable” and “denies[s] the serious business of this court.” The court said it would not report the lawyer to the State Bar but would call out gendered incivility for what it is and insist it not be repeated, adding that it did not find the peculiar style and content of the paragraph “appropriate, helpful, or persuasive.”

**Malpractice**

If a matter involves a client’s investment, the lawyer’s engagement letter should explicitly exclude from the engagement’s scope giving investment advice, as illustrated in *Shim v. Laufer.* The U.S. Immigrant Investor Program (also known as the EB-5 program) provides legal permanent residency in the United States to foreign nationals who invest in a qualified U.S.-based project. In *Shim,* three foreign nationals, who ultimately obtained green cards, sued their immigration lawyer and law firm in federal court for legal malpractice, breach of fiduciary duty, fraud, violations of California’s securities law and Unfair Competition Law, among other claims, for monetary losses on their investments in EB-5 projects. The lawyers and law firms moved for summary judgment. Citing the engagement letter, Judge Edward M. Chen of the Northern District of California granted the motion. In addition, there was no evidence of misrepresentations by the lawyers about the project’s business prospects, an intent to defraud, or causation.

Obtaining a default judgment can be tricky, as illustrated in *Sharon v. Porter.* In 2008, attorney Porter obtained a default judgment for Sharon. In 2014, Sharon retained a new attorney to enforce the judgment. In October 2015, the judgment debtor’s lawyer wrote Sharon’s new lawyer a letter claiming the default judgment was void because the underlying complaint failed to specify the amount of damages sought. In November 2015, Sharon’s new lawyer told attorney Porter about the problem. In October 2016, the superior court vacated the default judgment. In May 2017, Sharon sued Porter for malpractice. Following a bench trial on stipulated facts, the superior court entered judgment for Sharon. The Fourth Appellate District reversed. Sharon’s claim was barred by the one-year statute of limitation under Code of Civil Procedure Section 340.6(a). Sharon had discovered the relevant facts by October 2015. By November 2015, she had suffered actual injury because the value of the default judgment became impaired, even though the default judgment itself was not vacated until October 2016. In reaching this conclusion, the court admitted that it put Sharon in the awkward position of having to file a malpractice lawsuit about a default judgment prior to the superior court’s confirming that the judgment was indeed void.

**Anti-SLAPP Statute**

The anti-SLAPP statute empowers a court to strike a cause of action based on protected petitioning activity, including written statements made in a public forum in connection with an issue of public interest. If a moving party establishes the claim arose from protected petitioning activity, the burden shifts to the nonmoving party to establish a probability of prevailing on the challenged claim by showing the claim has minimal merit.

In *Abir Cohen Treyzon Salo, LLP v. Lahiji,* a law firm sued Arta Lahiji, the daughter of a former client, Nahid Lahiji, for defamation based on Internet posts criticizing the law firm’s handling of a homeowner’s insurance claim for the mother. Calling the firm “underhanded and shady” and “unprofessional and unethical,” a Yelp post by “AI L.” with the daughter’s photo, complained that the law firm used a law student “case manager” to negotiate with the insurer, did not communicate appropriately with respect to expenses, improperly deducted expenses, and withheld disbursements longer than necessary. The post warned readers to “stay away from this firm.”

A couple days later, an anonymous user posted an identical review on Avvo. A few weeks later, identical reviews appeared on the firm’s Facebook page, purportedly by “Angela Helder,” on Ripoff Report by “Nancy” in Redondo Beach, and on Google by Nahid. The law firm believed that the daughter created the postings. Although Nahid (the mother) advised the law firm that she had posted the reviews, the law firm did not sue her. The daughter filed a special motion to strike under the anti-SLAPP statute. The trial court granted the motion, struck the defamation claim, and awarded the daughter about $37,000 in fees for prevailing on the motion. The appellate court affirmed. Given the complaint’s allegations, the conduct arose from protected petitioning activity. The law firm failed to demonstrate minimal merit to its claim. It failed to make a prima facie showing that the daughter, as opposed to the mother, was legally responsible for the postings.

In *Dickinson v. Cosby,* a former model/television personality sued disgraced comedian Bill Cosby and his former attorney, Martin Singer, for defamation based on statements in Singer’s demand letter and three press releases attacking women, including plaintiff, claiming to have been drugged and raped by Cosby. On remand following an initial appeal, Singer and Cosby moved to strike Dickinson’s amended defamation claim under the anti-SLAPP statute. The trial court granted attorney Singer’s motion because Dickinson failed to prove that Singer acted with malice, a necessary element of her defamation claim. The trial court noted that Dickinson probably could not prove malice because Dickinson would essentially have to show that Cosby admitted to Singer that he had drugged and raped the women—an admission, even if it happened, would be shielded from disclosure by the attorney-client privilege or the work product doctrine. Dickinson did not appeal this ruling.

The trial court denied in part and granted in part Cosby’s motion to strike the defamation claim. Citing the law-of-the-case doctrine, the trial court declined to revisit alleged statements that the court of appeal previously found Dickinson could probably prove. With respect to the other allegations, the trial court reasoned that its ruling as to the lack of evidence proving Singer’s malice “does not automatically let Cosby off the hook.” Rather, analyzing each allegedly defamatory statement, the trial court found some to be nonactionable opinions. For others, Dickinson provided sufficient evidence that Cosby approved, authorized, and/or ratified Singer’s statements and that the statements were false and defamatory.

**Arbitration**

In *Monster Energy Co. v. City Beverages, LLC,* the Ninth Circuit vacated an arbitration award in a commercial arbitration because of evident partiality. Monster Energy terminated one of its exclusive distributors, Olympic Eagle. Olympic Eagle claimed the termination was wrongful and without good cause. The distributorship agreement required adjudication of disputes through JAMS. The parties chose the Honorable John W. Kennedy, Jr., a retired
judge from the San Bernardino Superior Court, to serve as arbitrator. Prior to his selection, Judge Kennedy submitted a disclosure statement in accordance with JAMS’s rules. Among other things, it disclosed that Kennedy had arbitrated a dispute between Monster Energy and another distributor, resulting in a $400,000 award against Monster, that he or JAMS had been contacted by one of the parties regarding prospective employment, and that, like all JAMS neutrals, he had a financial interest in JAMS’s success.53

Consistent with JAMS’s practice, however, Kennedy did not disclose that, like about one-third of all JAMS neutrals, he was a shareholder-owner of JAMS, nor the fact that within the last five years JAMS had administered 97 arbitrations involving Monster Energy.54

At the conclusion of the arbitration, Kennedy denied Olympic Eagle’s claim and awarded Monster Energy its fees. The Ninth Circuit vacated the award. Judge Kennedy’s ownership in JAMS was sufficiently substantial and JAMS’s business dealings with Monster Energy were nontrivial. Therefore, these facts should have been disclosed. The failure to disclose created an impression of possible bias. Circuit Judge Michelle T. Friedland dissented, reasoning that the additional information would not have made any material difference in the parties’ arbitrator selection.55

9 Id. at 1032.
10 Id. at 1032-33.
11 Id. at 1047-48.
13 Id. at 121.
14 Id. at 14.
Everyone has seen the headlines: the bicyclist who ends up in the emergency room (ER) after an accident, and then wakes up to a $20,243 hospital bill, or the patient who carefully selects an in-network hospital for a planned surgery but still receives a substantial invoice from a doctor who is out-of-network. These are examples of “surprise billing,” when a patient has health insurance but is responsible for a significant out-of-pocket, unexpected liability. It is an increasingly hot topic, so much so that since mid-2018, National Public Radio has published a special series that it calls the “Bill of the Month.” Moreover, the online publication Vox devotes an entire section of its website to ER bills, which, in fact, helped generate recent legislative interest in surprise billing.

To understand why surprise billing happens and what can be done to minimize it, it is important to understand the complexities of the law that governs health insurance in California. Due to the fragmented way in which private health care is financed in the United States, there is no single answer as to how surprise billing can be avoided. Proposed legislative solutions at both the state and national levels have also been caught up in a debate about the appropriate solution. Is it enough to hold the patient harmless from surprise bills? Or should the state legislature (or Congress) also regulate the default reimbursement rates that are paid to healthcare providers in a surprise billing scenario? Short of rate regulation, what kind of alternative dispute resolution options should be made available for providers and payors to work out their disagreements over payment? Which solutions will drive the best outcomes for patients? And which solutions will get the greatest support from health providers and insurers? These are the key questions.

What is Surprise Billing?
There are two traditional surprise billing scenarios. The first occurs when a patient is treated in an emergency room and the hospital does not have an agreement with the patient’s health insurer on rates (e.g., is out-of-network). Patients do not have complete control over which hospital they will be taken to in an emergency, especially if they arrive by ambulance. Because the hospital is not under contract with the insurer, if the insurer does not pay a fair or adequate amount, the hospital can send a bill to the patient for the balance of its charges that are not paid by the insurer. The unpaid balance often far exceeds the patient’s “cost sharing” responsibility (i.e., co-insurance, deductibles, and copayments).

For example, after a patient is seen in a hospital’s emergency room, the hospital bills the patient’s health plan $8,000 for the services it provided, which may include the use of an observation room, as well as charges for an x-ray and CT scan. The hospital is not contracted with the insurance plan. The plan “allows” $5,000, issues a check to the hospital for $4,000, and assigns the remaining $1,000 to the patient’s co-insurance. That $1,000 is the patient’s “cost sharing” responsibility. However, depending on the circumstances, the patient may also be responsible for the unpaid balance of the hospital’s bill, in this instance, $3,000.

A second scenario is represented by a patient who is seen at an in-network hospital but is treated by a doctor who is out-of-network with the patient’s health insurer. Again, the patient does not have complete control over the doctors that end up treating him or her. Thus, the patient may not know whether those doctors are in-network. Because individual physicians bill for their medical ser-
services separately from the bill the hospital sends, a patient may receive a bill for the balance of the physician’s charges that the insurer has declined to pay.

There are nuanced variations on each of these scenarios (as well as other scenarios not discussed here, e.g., those that involve elective medical procedures on an outpatient basis), but these two examples are the primary ways in which surprise billing arises. On September 23, 2016, California Governor Jerry Brown signed Assembly Bill 72 into law.9 The protections of AB 72 became effective on July 1, 2017, and they apply to both DMHC-regulated and CDI-regulated health insurance policies. AB 72 prohibits surprise billing by out-of-network physicians—for example, anesthesiologists, radiologists, and surgeons—when they provide nonemergency care to a patient at an in-network hospital.10

As one example, a patient may go to a hospital facility that is in-network with the patient HMO in order to undergo a surgical procedure. Prior to AB 72, if the anesthesiologist for the procedure was not contracted with the patient’s health plan and the health plan failed to pay a fair and reasonable amount, the anesthesiologist could send a bill for the balance to the patient, which might very well be a surprise to the patient who believed he or she was choosing in-network healthcare providers. Under AB 72, however, “non-contracting individual health professionals” are prohibited from collecting more than the “in-network cost-sharing amount”—meaning the co-payments, deductibles, and co-insurance—from patients.11 This is significant because out-of-network cost-sharing levels are often much higher than in-network levels.

Furthermore, AB 72 also requires insurers to reimburse noncontracting physicians at a specified rate, namely, the greater of the average commercial contracted rate or 125 percent of the amount Medicare reimburses on a fee-for-service basis for the same or similar services in the general geographic region in which the services were rendered.12 Doctors who believe higher payment is warranted must participate in an “Independent Dispute Resolution Process” (IDRP) before the applicable regulator, CDI or DMHC.13 Under the IDRP, the out-of-network provider must complete the health plan’s internal process for submitting and reviewing claims.14 Subsequently, if the provider still disagrees with the amount of reimbursement, it can appeal the decision to IDRP. The decision obtained through IDRP is binding on both parties and must be implemented by the plan.15 However, if either party remains dissatisfied, either the provider or plan may pursue any right or remedy established under other applicable law.16

A challenge to AB 72 was immediately launched in federal court by a physicians’ association, which argued that the law violated the Due Process, Takings, and Equal Protection clauses of both the U.S. and California constitutions.17 The plaintiff had two primary concerns: first, that the specified payment rate (the greater of the average contracted rate or 125 percent of Medicare rates) would unfairly limit what physicians could be paid under the new law; and, second, that such default rate-setting would incentivize health plans to stop contracting with doctors or terminate existing contracts or possibly both. In March 2018, the district court ruled that the challenge by the plaintiff was premature.18 It agreed that certain aspects of AB 72 “appear troubling at this early stage” and that “from a practical perspective, it seems more likely that in practice those rates will end up acting as a ceiling rather than a floor.”19 However, because the association did not plead that it was “unable to reach agreements with health-insurance plans or pursue the dispute-resolution process,” the court held that the doctors’ claims were speculative.20

The association then added another plaintiff, a doctor who alleged that her revenues had declined by 25 percent following the passage of AB 72.21 The district court again rejected the claims because the plaintiffs had still failed to plead facts that would tend to show that the rates set by AB 72 were confiscatory.22 For instance, plaintiffs had not shown an “inability... to reach agreements for reasonable compensation with health care service plans.”23 Nor had they pled that attempts to engage in the IDRP had been unsuccessful.24 Thus, the court was unable to find, on the facts that had been pled, that the IDRP was so “cost-prohibitive” or “burdensome” as to deprive plaintiffs of due process.25 It acknowledged that plaintiffs “may eventually be proven correct once the Act is actually applied to certain physicians” but held that it was not enough, without more, that the physician’s revenue had declined.26 The court ultimately agreed to dismiss the challenge without prejudice, given that plaintiffs in large part had failed on stand-

Regardless of the ultimate outcome in the California Legislature, a state-only solution will not be a complete answer to surprise billing because many kinds of private health insurance are not governed by California law (or the law of other states).

According to a January 2017 study, approximately one in five inpatient emergency department cases may lead to surprise bills.3

Prospect Medical and AB 72

California has been a leader in the country in placing restrictions on surprise billing. In 2009, the California Supreme Court issued a landmark decision, Prospect Medical Group, Inc. v. Northridge Emergency Medical Group.4 In Prospect, the court held that health care providers may not bill patients who are covered by health plans covered by the Knox-Keene Health Care Service Plan Act of 1975, which includes most health maintenance organizations (HMO) plans in California.5 The supreme court reached this result because it found that the Knox-Keene statutory scheme, when viewed as a whole, “intends to transfer the financial risk of health care from patients to providers.”6 Thus, it concluded that “doctors may not bill a patient for emergency services that the HMO is obligated to pay. Balance billing is not permitted.”7 While the Prospect decision provides significant protections for HMO patients in California, it does not extend to all commercial health insurance issued in California.8 Notably, it does not apply to health insurance policies governed by the California Department of Insurance (CDI)—California is possibly the only state to have two health insurance regulators; the other being the Department of Managed Healthcare (DMHC), which oversees health care service plans regulated by the Knox-Keene Act. Similarly, Prospect does not extend to bills for nonemergency care. Nor does Prospect extend to patients with out-of-state health coverage or coverage under an employer-sponsored, self-funded plan. Recent California legislation, however, provides a partial answer to these sizeable gaps.
ing grounds. This procedural resolution leaves the door open to potential future challengers who are able to plead and prove such facts.

In the two and a half years since AB 72 went into effect, a number of trends have become apparent. First, the law does seem to have reduced the incidence of surprise billing by out-of-network physicians in in-network hospitals with respect to DMHC- and CDI-governed health insurance policies. Nevertheless, there is also significant anecdotal evidence that, at least for doctors in certain specialties, AB 72 has caused plans to be less willing to contract with physicians in lieu of paying the default rates set by the statute. In a letter to the U.S. Congress, dated July 10, 2019 (which characterized AB 72 as a “failing law”), the California Medical Association provided numerous examples of medical groups who either faced steep rate cuts, contract termination, or both.

Additionally, a number of physicians have begun utilizing the IDR, though data on outcomes are not yet publicly available.

The results of California’s enactment of AB 72 have been hotly debated, in part, because the results inform the debate over similar legislation at the state and national level. It is important to keep this larger context in mind when examining the state of legislation on surprise billing.

**AB 1611 Fails to Pass**

On February 22, 2019, Assemblyman David Chiu (D-San Francisco) introduced a bill, AB 1611, that would prohibit surprise billing by out-of-network hospitals. The bill was spurred, in part, by Vox’s coverage of surprise billing by Zuckerberg San Francisco General Hospital.

The design proposed for AB 1611 was to expand the framework established by AB 72 and Prospect. As with AB 72, the new bill would limit out-of-network hospitals from collecting more than the in-network cost-sharing amount from patients. Furthermore, similar to AB 72, it would impose a default rate for hospital emergency services and require hospitals to engage in the IDR mechanism if they were dissatisfied with payment. The bill was the subject of intense controversy. It was amended several times and was successfully voted out of the appropriations and health committees before ultimately ending up stalling midyear.

The key sticking point was not the prohibition on surprise billing, which everyone, including hospitals, agreed was a good thing. Rather, the trade association for California hospitals objected to the rate-setting provisions, which it viewed not only as unnecessary but also as creating a strong disincentive to health plans to enter into contracts with hospitals. In fact, the California Hospital Association indicated that if the rate-setting provision were removed, it would support the bill. According to Assemblyman Chiu and his co-sponsor, California State Senator Scott Wiener, responded by withdrawing the bill from consideration, and promising that it would become a “two-year bill” that would be considered further in 2020.

**Debate Over a National Solution**

Regardless of the ultimate outcome in the California Legislature, a state-only solution will not be a complete answer to surprise billing because many kinds of private health insurance are not governed by California law (or the law of other states). Employer-sponsored insurance, in particular, is governed by federal law, primarily the Employment Retirement Income Security Act (ERISA). Private employers frequently choose to purchase group health insurance coverage for their employees, which is subject to state regulation, though ERISA applies as well. However, many large employers, especially in the 1,000 to 5,000+ employee market, choose to self-fund their employee health benefits. ERISA vigorously preempts state laws that seek to regulate such self-funded health plan arrangements, especially those that “intrude[] upon ‘a central matter of plan administration’ [or] ‘interfere[] with nationally uniform plan administration.’” Moreover, as a general proposition, balance billing by healthcare providers is permitted under ERISA. Thus, any comprehensive solution to surprise billing cannot rely on state legislation alone but will also require legislation enacted at the national level.

The Affordable Care Act, passed in 2010, provides some baseline protections. Section 2719A of the Public Health Services Act, in particular, requires that when emergency services are provided out-of-network, the patient’s cost-sharing must be limited to no more than the in-network level. This is not a complete solution because, as noted above, patients can still be balance-billed in most out-of-network situations. If a health plan sets the level of out-of-network payment too low, that defeats the purpose of Section 2719A. Modest in-network cost sharing aside, a large balance bill would still result. Thus, the implementing regulations for Section 2719A also establish a minimum level of payment that a plan must provide for out-of-network emergency services based on the greatest of three payment amounts (the “Greatest of Three” Rule). The Greatest of Three Rule was intended to establish a floor on reimbursement for out-of-network emergency services. This, however, is not the same as prohibiting surprise or balance billing in its entirety.

A great deal of federal surprise billing legislation was proposed in 2019, but none was ultimately passed. In the first half of 2019, there were several major bipartisan proposals, including the No Surprises Act, sponsored by the House Energy and Commerce Committee; the Stopping the Outrageous Practices of Surprise Medical Bills (STOP) Act, sponsored by Senator Bill Cassidy (Republican from Louisiana), Maggie Hassan (Democrat from New Hampshire), and others; and the Lower Health Care Costs Act of 2019, sponsored by the Senate Health, Education, Labor and Pensions Committee. These proposals varied in the range of services covered (including emergency in addition to post-stabilization and other nonemergency services), the level of payment to out-of-network providers, and the processes available for dispute resolution. Despite the widespread bipartisan agreement on the need for surprise billing legislation, none of the proposals advanced beyond Congress’s August recess.

Then, unexpectedly, in November and December, there was a renewed push to pass surprise billing legislation as part of a federal funding package due at the end of December. After high-level talks involving numerous House and Senate committees, and the reported personal involvement of Speaker Nancy Pelosi and Senator Chuck Schumer, among others, no agreement on a final proposal was reached. Congress nonetheless has resumed work on surprise billing in 2020.

Not surprisingly, the proliferation of proposals has led to a wide variety of approaches. A key question facing any surprise billing legislation is whether and how to set “benchmark” or “default” payment rates for out-of-network providers or whether instead to require providers and payors to engage in arbitration to resolve payment disputes. Another important issue is how any federal legislation will interact with existing state regulations and state surprise billing solutions.

Surprise billing is a complicated problem with many causes and, to date, a patchwork of incomplete solutions. A few things are clear, though. First, California’s experience with AB 72 has and will continue to serve as a source of practical experience for future legislation, both here and across the country.

Second, much of the debate around surprise billing legislation has been around
the setting of default or benchmark reimbursement rates. It is very much worth asking whether such efforts are truly necessary to stop surprise billing. It is very hard to set rates correctly by statute; if rates are set too low, health plans may very well decide not to contract with hospitals and doctors—surely an unintended side effect. There is also no guarantee setting default or benchmark rates will lead to lower insurance premiums. While setting a default level of reimbursement may make sense in a context in which balance billing is allowed (for instance, as with the Greatest of Three methodology), that is not an issue here, where any proposed legislation will ban surprise billing itself. It seems that legislative rate-setting is directed towards the much broader issue of health care affordability and that one should not necessarily become a proxy for the other.

Finally, the inability to pass surprise federal billing legislation last year, despite rare bipartisan agreement on the issue, is eye-opening: If it is this hard to reach a deal on what should be a consensus issue, that may not bode well for even broader or more comprehensive health reform, such as the so-called “Medicare for All.” The best outcome would be to pass narrow and targeted legislation that ensures that as many people as possible are protected from surprise billing. Stay tuned—new legislation may yet pass both at the California and federal level.

5 Id. at 507-508.
6 Id. at 507.
7 Id.
10 Id.; see also HEALTH & SAFETY CODE §§1371.9, 1371.30, 1371.31 and INS. CODE §§10112.8, 10112.81, 10112.82.
11 HEALTH & SAFETY CODE §§1371.9(a)(3).
12 HEALTH & SAFETY CODE §1371.31(a)(3); INS. CODE §10112.82(a)(4).
13 HEALTH & SAFETY CODE §1371.30; INS. CODE §10112.81.


Id. Notably, the proposed default rate changed over time as the bill was amended, as did the services to which such default rate would apply.


Id.

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Improving Health and Well-Being in the Legal Community

THE AMERICAN BAR ASSOCIATION’S 2017 National Task Force on Lawyer Well-Being report highlights a “parade of difficulties” facing the profession, including mental illness, substance abuse, work addiction, social alienation, incivility, work-life conflict, job dissatisfaction, and negative public perception. The report and its supporting research suggest that these issues represent a significant threat to the profession’s ability to “preserve the public’s trust and maintain our status as a self-regulating profession, and truly become our brothers’ and sisters’ keepers.”

The ABA report served its purpose: The legal community is starting to take notice of the well-being issue. Firms are designating well-being officers, instituting wellness programs, and offering employees new wellness-related benefits. Like most complex problems, though, well-being cannot be patched with a single quick fix. New well-being programs, however well-intentioned, often present a one-size-fits-all approach that ignores the unique talent profile and culture of each law firm. Further, because measuring improved well-being is difficult, many law firm programs conflate participation with effectiveness.

From the perspective of a firm seeking to heighten performance, lawyer well-being is about “promoting sustainable careers, increasing workplace social support, and safeguarding against work intensification.”

As consultants to law firm management, attorneys recognize that this definition poses a significant challenge for firms and recognize the legal community needs to take a more holistic, systems-oriented perspective. In short, a new approach to enhancing professional well-being is needed: one that looks less like a program and more like a process.

First, it is helpful to frame the challenge as a design problem, focusing on firm efficiency and individual well-being and adopting an approach that engages a firm’s lawyers to find out what really matters to them. A firm must understand how its lawyers define well-being and what interventions and policies they would find helpful to increase and sustain it. One firm’s associates may value a focus on mental health while another’s may emphasize physical health or work-life balance. By finding out what matters most—before attempting to design interventions—firms can create a system of action that is meaningful to employees and tailored to their organizational values and culture.

This design process creates an ongoing conversation that engages associates, partners, and firm management. It also ensures that well-being programs and policies are aligned with the current priorities of employees with the expectations of the firm’s leadership to build and implement solutions that fit the firm’s vision and existing culture while addressing the firm’s challenges.

Once the well-being program and policies are in place, the next step is to develop metrics to validate their impact with empirical data. For example, in 2013, the city of Santa Monica won a Mayors Challenge grant from Bloomberg Philanthropies for the city’s Wellbeing Project, which used a “data-driven approach to measuring and managing wellbeing,” using a “sophisticated index focused on economic vitality, social relationships, health, education, local environment.” The city’s Wellbeing Index was the key to gaining an understanding of what policies actually made a difference in the quality of life of its residents.

The fourth step in the design process is ongoing feedback and iteration because very few effective processes are designed in the first take. Ultimately, addressing the well-being challenge will take a system of policies and programs working together to foster incremental improvements. Addressing lawyer well-being will undoubtedly cause ripples across a firm as legacy processes and entrenched partner expectations come into conflict with new policies. By analogy, when Alcoa made workplace safety its priority, new routines “moved through the organization, costs came down, quality went up, and productivity skyrocketed.”

A law firm may not operate like a factory assembly line, but if a firm embraces change, it will ultimately benefit.

The legal community has recognized the well-being problem and has started down the path of taking some initial steps. However, simply spotting the issue and instituting a few well-intended programs is not going to suffice for the systematic change that is required to fully address what can become an existential threat. Law firms that pay attention to the process of designing, implementing, and constantly improving well-being initiatives among their attorneys will likely have an advantage in the future.


Fred Kipperman, J.D., is president of Bay Cities Technology & Consulting and advises HealthPiper, a virtual psychiatry company. Anita Bhappu is a professor and chair of the Management of Innovation, Sustainability and Technology group in the School of Engineering at UC Merced. Dave Baiocchi is the managing partner at Imaginative Futures. All three have participated in recent well-being events concerning the legal community in Los Angeles.
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