

Los Angeles Lawyer

JUNE 2016 / \$5

EARN MCLE CREDIT

**LIABILITY OF
IN-HOUSE
COUNSEL**

page 23

**On Direct:
Paul Kiesel**

page 8

FCRP Changes

page 11

**Digital
Copyright**

page 14

PAGA Performance

Los Angeles lawyer
Laura Reathaford studies issues of
manageability and class certification
in PAGA litigation

page 18

PLUS

**RECEIVERSHIPS
FOR BLIGHTED
PROPERTIES**

page 28





GIRARDI | KEESE LAWYERS

DEDICATED TO HELPING...

THESE ARE THE AREAS OF OUR PRACTICE:

INTELLECTUAL PROPERTY
ANTITRUST
CLASS ACTIONS
ENVIRONMENTAL LIABILITY

PHARMACEUTICAL LIABILITY
MASS TORTS
PRODUCT LIABILITY
PROFESSIONAL LIABILITY

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

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

GIRARDI | KEESE

TEL 213.977.0211 / FAX 213.481.1554

1126 WILSHIRE BOULEVARD, LOS ANGELES, CA 90017

www.girardikeese.com

Experience matters.



Divorce • Support • Premarital Agreements

WALZER
MELCHER^{LLP}
EXCLUSIVELY FAMILY LAW.
walzermelcher.com



“I love the personalized service at First Republic, and the low interest rates make my student loan payments manageable.”

KIANDRA KANG, M.D.


*Kindercare Pediatrics
Pictured with Quinn*



FIRST REPUBLIC BANK

It's a privilege to serve you®

(855) 886-4824 or visit www.firstrepublic.com New York Stock Exchange Symbol: FRC

Member FDIC and Equal Housing Lender 

CONTENTS



Los Angeles Lawyer
the magazine of
the Los Angeles County
Bar Association
June 2016
Volume 39, No. 4

COVER PHOTO: TOM KELLER

LOS ANGELES LAWYER (ISSN 0162-2900) is published monthly, except for a combined issue in July/August, by the Los Angeles County Bar Association, 1055 West 7th Street, Suite 2700, Los Angeles, CA 90017 (213) 896-6503. Periodicals postage paid at Los Angeles, CA and additional mailing offices. Annual subscription price of \$14 included in the Association membership dues. Nonmember subscriptions: \$38 annually; single copy price: \$5 plus handling. Address changes must be submitted six weeks in advance of next issue date. POSTMASTER: Address Service Requested. Send address changes to Los Angeles Lawyer, P. O. Box 55020, Los Angeles CA 90055.

FEATURES

18 PAGA Performance

BY LAURA REATHAFORD

Issues of class certification and manageability continue to preclude a one-size-fits-all approach to litigation under the Private Attorney General Act

23 Trouble at Home

BY DAVID B. PARKER, ELLIOTT BENJAMIN, AND JOEL A. OSMAN

While the same ethical rules apply to outside and in-house counsel, public policy considerations of the employment relationship are also implicated

Plus: Earn MCLE credit. MCLE Test No. 258 appears on page 25.

28 The Right Receiver

BY ANDREW FITZGERALD ADAMS

The increasing application of receiverships indicates that concerns about notice, documentation, and political repercussions may be properly addressed

32 Special Section

2016 Lawyer-to-Lawyer Referral Guide

DEPARTMENTS

8 On Direct

Paul Kiesel

INTERVIEW BY DEBORAH KELLY

10 Barristers Tips

Guidance on post-ATRA estate planning—portability and A-B trusts

BY ZACHARY S. DRESBEN

11 Practice Tips

Changes to the FRCP highlight need for e-discovery expertise

BY A. MARCO TURK

14 Practice Tips

Consideration of the DMCA exemption for documentary filmmakers

BY CHRISTOPHER L. PEREZ

36 Closing Argument

Proposals for bridging the justice gap across the nation

BY MARY E. KELLY

06.16

JUDGE LAWRENCE W. CRISPO

(RET.)



Mediator

Arbitrator

Referee

213.926.6665

judgcrispo@earthlink.net

www.judgcrispo.com

COURT QUALIFIED - AUTOMOBILE EXPERT WITNESS



Jack G. Cohen

*30 Years Experience in the
Automobile Business*

- ◆ Plaintiff and Defense
- ◆ Consulting with attorneys, dealers, consumers, insurance companies
- ◆ Industry standards
- ◆ New and used auto transactions
- ◆ Dealer fraud
- ◆ Vehicle sales and leasing
- ◆ Dealership practices
- ◆ Auto warranty issues
- ◆ Lender-dealer relationships
- ◆ Appraisals
- ◆ Finance documentation and analysis
- ◆ Wholesale and Retail
- ◆ Diminished value cases

OFFICE 747.222.1550 | CELL 818.445.5500

jack@coheninv.com

Los Angeles Lawyer

VISIT US ON THE INTERNET AT WWW.LACBA.ORG/LALAWYER
E-MAIL CAN BE SENT TO LALAWYER@LACBA.ORG

EDITORIAL BOARD

Chair

DONNA FORD

Articles Coordinator

TED M. HANDEL

Assistant Articles Coordinator

JOHN C. KEITH

Secretary

SANDRA MENDELL

Immediate Past Chair

MARY E. KELLY

JERROLD ABELES (PAST CHAIR)

ETHEL W. BENNETT

SCOTT BOYER

CHAD C. COOMBS (PAST CHAIR)

HON. MICHELLE WILLIAMS COURT

GORDON K. ENG

STUART R. FRAENKEL

MICHAEL A. GEIBELSON (PAST CHAIR)

CHRISTINE D. GILLE

SHARON GLANCZ

STEVEN HECHT (PAST CHAIR)

DENNIS HERNANDEZ

ERIC KINGSLEY

KATHERINE KINSEY

DANIELLE LACKEY

JENNIFER W. LELAND

PAUL S. MARKS (PAST CHAIR)

COMM'R ELIZABETH MUNISOGLU

PAUL OBICO

TYNA ORREN

CARMELA PAGAY

DENNIS L. PEREZ (PAST CHAIR)

GREGG A. RAPOPORT

GARY RASKIN (PAST CHAIR)

JACQUELINE M. REAL-SALAS (PAST CHAIR)

DAMON THAYER

THOMAS H. VIDAL

STAFF

Editor

ERIC HOWARD

Art Director

LES SECHLER

Director of Design and Production

PATRICE HUGHES

Advertising Director

LINDA BEKAS

Administrative Coordinator

MATTY JALLOW BABY

Copyright © 2016 by the Los Angeles County Bar Association. All rights reserved. Reproduction in whole or in part without permission is prohibited. Printed by R. R. Donnelley, Liberty, MO. Member Business Publications Audit of Circulation (BPA).

The opinions and positions stated in signed material are those of the authors and not by the fact of publication necessarily those of the Association or its members. All manuscripts are carefully considered by the Editorial Board. Letters to the editor are subject to editing.



Will Hanley
Account Manager
213.283.0629



Q: Why choose Jurisco when you
need a **Surety Bond?**

A: Because we offer the finest
Service in Southern California

"Will at Jurisco was straightforward and up-front about all costs associated with my bond, unlike other firms I have used in the past, and whenever I call, I always talk to a real person not a voicemail prompt."

—Attorney, St. Louis, MO

All applications and rates available at: www.jurisco.com | Tel: 800.274.2663
Fax: 800.587.4726

Located in Los Angeles to better serve your practice

LOS ANGELES LAWYER IS THE OFFICIAL PUBLICATION OF THE LOS ANGELES COUNTY BAR ASSOCIATION

1055 West 7th Street, Suite 2700, Los Angeles CA 90017-2553
Telephone 213.627.2727 / www.lacba.org

LACBA EXECUTIVE COMMITTEE

President

PAUL R. KIESEL

President-Elect

MARGARET P. STEVENS

Senior Vice President and Treasurer

MICHAEL K. LINDSEY

Vice President

DAVID K. REINERT

Assistant Vice President

BRIAN K. CONDON

Assistant Vice President

DUNCAN W. CRABTREE-IRELAND

Assistant Vice President

HON. BRIAN S. CURREY

Immediate Past President

LINDA L. CURTIS

Barristers President

ROBERT S. GLASSMAN

Barristers President-Elect

DAMON A. THAYER

Chief Executive Officer/Secretary

SALLY SUCHIL

Chief Financial & Administrative Officer

BRUCE BERRA

General Counsel & Chief Administrative Officer

W. CLARK BROWN

BOARD OF TRUSTEES

HARRY W.R. CHAMBERLAIN

NATASHA R. CHESLER

REBECCA A. DELFINO

MIGUEL T. ESPINOZA

KENNETH C. FELDMAN

JO-ANN W. GRACE

HARUMI HATA

STACY R. HORTH-NEUBERT

SAJAN KASHYAP

MARY E. KELLY

LAVONNE D. LAWSON

F. FAYE NIA

ANNALUISA PADILLA

JUAN A. RAMOS

SARAH V.J. SPYKSMA

DAVID W. SWIFT

JEFF S. WESTERMAN

ROXANNE M. WILSON

AFFILIATED BAR ASSOCIATIONS

BEVERLY HILLS BAR ASSOCIATION

CENTURY CITY BAR ASSOCIATION

CONSUMER ATTORNEYS ASSOCIATION OF LOS ANGELES

CULVER MARINA BAR ASSOCIATION

GLENDALE BAR ASSOCIATION

IRANIAN AMERICAN LAWYERS ASSOCIATION

ITALIAN AMERICAN LAWYERS ASSOCIATION

JAPANESE AMERICAN BAR ASSOCIATION

JOHN M. LANGSTON BAR ASSOCIATION

LESBIAN AND GAY LAWYERS ASSOCIATION OF LOS ANGELES

MEXICAN AMERICAN BAR ASSOCIATION

PASADENA BAR ASSOCIATION

SAN FERNANDO VALLEY BAR ASSOCIATION

SANTA MONICA BAR ASSOCIATION

SOUTH BAY BAR ASSOCIATION

SOUTHEAST DISTRICT BAR ASSOCIATION

SOUTHERN CALIFORNIA CHINESE LAWYERS ASSOCIATION

WOMEN LAWYERS ASSOCIATION OF LOS ANGELES

BUSINESS OPPORTUNITY

Want to purchase minerals and other oil/gas interests.

Send details to:

P.O. Box 13557
Denver, CO 80201

LAW FIRM FOR SALE

Northern California Personal Injury Practice

Established firm with stable gross revenue of \$1.75 million/year. Multiple offices in Northern California and Central Coast. Experienced staff and marketing make this a turn-key opportunity.

For more information, call or e-mail:
800.837.5880
forsale@lawbizregistry.com

FAY ARFA · A LAW CORPORATION



CERTIFIED SPECIALIST

CRIMINAL LAW & APPELLATE LAW

WWW.BESTDEFENDER.COM

PRACTICE AREAS:

- CA STATE BAR CERTIFIED - CRIMINAL LAW
- CA STATE BAR CERTIFIED - APPELLATE LAW (CRIMINAL)
- NBTA CERTIFIED CRIMINAL TRIAL ADVOCATE
- FEDERAL & STATE
- TRIALS AND APPEALS
- POST CONVICTION - HABEAS CORPUS

FAY ARFA

TEL: **310.841.6805**

FAX: **310.841.0817**

info@bestdefender.com



10100 SANTA MONICA BOULEVARD, SUITE #300
LOS ANGELES, CA 90067

ERISA LAWYERS

- Long Term Disability
- Life Insurance Claims
- Health and Eating Disorder
- Long Term Care

We handle claim denials under both ERISA and California Bad Faith laws.

- ✓ State and Federal Courts throughout California
- ✓ More than 20 years experience
- ✓ Settlements, trials and appeals

KANTOR & KANTOR 818.886.2525

www.kantorlaw.net

Referral fees as allowed by State Bar of California

Dedicated to Helping People Receive the Insurance Benefits to Which They Are Entitled.

ADR FOR THE WORLD'S MOST INTRACTABLE DISPUTES

BUSINESS • EMPLOYMENT • INTELLECTUAL PROPERTY
FRANCHISE • INTERNATIONAL

DEEP Subject Matter Knowledge
EFFICIENT Party Driven Process
FIERCELY Fair and Impartial
SUPERB Judicial Temperament



REGINALD ANDREW HOLMES, ESQ.

*"...Holmes is unsurpassed at customizing the parties' chosen resolution process to ensure speed, economy and justice"—Russell Fransen, Esq.,
The Business Legal Group*

- Large Complex Case Panel, American Arbitration Association (AAA) National Roster of Neutrals
- International Panel, International Center for Dispute Resolution (ICDR)
- Former Director, College of Commercial Arbitrators (CCA)
- Former President, California Dispute Resolution Council (CDRC)
- Mediation Practice Director, Resolute Systems, LLC
- Fellow, California Academy of Distinguished Neutrals
- President and Executive Director, Neutrals Diversity Alliance

THE HOLMES LAW FIRM, APC



To schedule your Mediation, Arbitration or other ADR process with Reg Holmes, please contact:

For American Arbitration Association administered matters: serenalee@adr.org

For independently administrated matters: rholmes@theholmeslawfirm.com

For Resolute Systems, LLC administered matters: mweinzierl@resolutesystems.com

1.877.FAIR.ADR | 1.877.324.7237

www.theholmeslawfirm.com

California • Chicago • New York • Atlanta
Toronto • Shanghai

FROM THE CHAIR

Public service has been a theme of From the Chair over the last several months, covering a variety of public service opportunities for Los Angeles lawyers, including LACBA's Veterans Project and Lawyer Referral Service, Judge Pro Tem service, and the State Bar's Justice Gap Fund.

For my last column I would like to discuss another form of public service—government employment.

I am a retired Assistant U.S. Attorney who served nearly 25 years. I worked for less money than my counterparts in law firms, but the work was engaging and challenging. Even run-of-the-mill immigration or FOIA cases were interesting. For instance, one of my first FOIA cases involved a Russian sailor who jumped ship on the Mississippi River to seek asylum and was returned to the Russian vessel by U.S. authorities. U.S. officials interviewed the sailor to determine if he really wanted to stay in Russia, as he later declared, and a government watch group sought the tape of that interview. In another case, I represented former President Ronald Reagan. The parties sought to depose Reagan to determine his involvement in the exodus of the Marcos family from the Philippines through Hawaii, allegedly with CIA assistance, taking a golden Buddha with them. In civil employment discrimination cases, I represented an army general in a deposition, and in a case brought by a former covert operative against the CIA, one of my main witnesses who testified in court was the Director of Operations—the guy in charge of the spies. At one point in that case, I told my husband that I had to go out of town on a trip “to a place that doesn't exist,” to talk to a man “who isn't really who he is.” My husband, a very understanding man, just smiled, shook his head, and asked that I call him periodically to let him know that I was OK. In the early 1990s, I represented a number of government agencies involved with the installation of Nexrad Doppler radars across the country. The Coalition of Ojai and actor Larry Hagman sued, resisting the installation of a radar on Sulphur Mountain. I also handled civil rights, Fair Housing Act cases, and what I have been told was the largest quiet title action in the country, concerning approximately 3.5 million acres of government land.

On the criminal side I prosecuted alien trafficking and bribery of a government official for false citizenship documents used to obtain U.S. passports. Internationally, there were countless Mutual Legal Assistance Treaty (MLAT), letters rogatory, and extradition cases involving theft, rape, sex trafficking, and fraud. The MLAT cases were filed under seal, so I cannot be specific about the facts—but one involved a multiday interview of a former head of a foreign state, with high-ranking officials from that country present.

I also had the opportunity to work in Washington, D.C., with the Attorney General's Advisory Committee on Native American issues, the White Collar Crime Council, and securities, bank, telemarketing, and healthcare fraud. I attended meetings at the Federal Reserve and gave presentations at the White House Annex.

The rewards are not just subjective. I received commendations from many agencies, including the Department of Homeland Security, the navy, the army, the Department of Labor, and the Civil Rights Division of the Department of Justice, as well as special achievement awards from Attorney General Janet Reno.

Public service employment is certainly something to consider at any point in your career—it is rewarding, fulfilling, and can be very interesting. Many lawyers leaving the USAO say that it was the most fun job. For me, it was my disc jockey job at a radio station on the east coast—that was pure fun! ■

Donna Ford is a retired Assistant U.S. Attorney.



😬 I just got served with a complaint for malpractice... I can't believe it!!!

You know what you should do?...right???

I did everything RIGHT for this client...
I got them great results!!! THIS IS CRAZY!!!

No worries... 😊 just send it to your malpractice carrier... they will take care of it!

Hmmmmmm...

You don't carry malpractice insurance???

NOW WHAT 😱

are you going to do??!!

Being RIGHT doesn't protect you...

**CALL
LMIC
NOW!**

**Lawyers' Mutual
Insurance Company**

The Premier Legal Malpractice Carrier

LMIC.COM or call **(800) 252-2045**

Paul Kiesel Partner, Kiesel Law LLP



PAUL KIESEL | The 2015-16 president of LACBA and past chair of its Litigation Section, Paul Kiesel is also the cochair of the Open Courts Coalition, a bipartisan committee of California attorneys advocating for funding of the civil justice system. His practice is devoted to representing plaintiffs in personal injuries and consumer class actions.

What is the perfect day? I live it most days. If there was a glass of water and it had 10 percent liquid in it, I would tell you it's 90 percent away from being full. I feel so fortunate to have the opportunity to practice law every day in this country.

At your firm, Kiesel Law, you specialize in representing consumers. What kind of case is closest to your heart? Catastrophic personal injuries, representing individuals and families who have either suffered a catastrophic loss themselves or have had loved ones who have passed. It allows me to take care of someone who needs help.

In 2013, your own firm emerged after 14 years with partners Boucher and Larson. What happened? Two partners went through devastating divorces. One wound up on the front page of the *Los Angeles Times*. Family law issues permeated the practice for over seven years.

You are consistently selected as a top plaintiff attorney in California. What sets you apart? It's probably my willingness to make a contribution to the legal community as a whole. I have never had an insular practice, and that allows me to interact with other lawyers.

You teach many CLE classes. Do you have a favorite war story? No. What I like the most is teaching technology, when they are all good lawyers, graying lawyers, who are stretching themselves rather than living in an age of carbon paper and typewriters.

Are you a techie? For at least 20 years, I've been the technology columnist for the *Daily Journal*. Technology has always been one of my passions. The only way to really do big things is to use technology.

It's hard to find a big case you're not involved in—Miramonte sex abuse, Metrolink, Porter Ranch homeowners. How do you get these important matters? I hope that I have a leadership style that is not abrasive, but is built on consensus. I am able to work with large teams of firms, in concert.

What is misunderstood about being a tort attorney? Most people view us as preying on the misfortunes of others and capitalizing on peoples' worst moments, and not really on the best of why lawyers do the work. I try to proclaim what I do for a living, embrace it.

You won a California Supreme Court case about organic food labeling. Are you a healthy eater? I am incredibly conscious of my physical activity, but I am the worst eater.

If you had to choose only one entree for the rest of your life, what would it be? Raisin Bran.

What is your favorite exercise? Elliptical or stair master.

Your client reviews call you the "easiest lawyer to reach in the country." Why? Wherever I am in the world, I always get the message. If I'm not there to reach out to a client, then I'm doing something wrong.

Why did you choose this profession? I wanted to do this since I was eight years old. We had a dear friend of the family who was a personal injury lawyer, and he had the best stories.

Whittier College of Law now has the Kiesel Advocacy Center. How involved were you in its design? The school ran the plans by me. It's a spectacular facility. It's gorgeous; the use of wood, stone, and light appeals to my aesthetic. This was hard for me because I was taught that true giving is anonymous giving.

You are a senior fellow of the Litigation Counsel of America, a trial honorary society. What advice do you give to new lawyers? The same advice to old lawyers; be a part of the community, stay involved.

What was your best job? I'm livin' it.

What was your worst job? I was a cashier at Shop Rite Supermarket. It was a union job and it paid pretty well, but the manager told me to stop having so much fun. I actually drew pictures on the paper grocery bags; my boss was unhappy.

What characteristic do you most admire in your mother? Her capacity to love.

You are currently president of the Los Angeles County Bar Association. What is your major duty? Managing the financial obligations of an organization with a staff of 74 and an annual budget of \$13 million. I try to make recommendations in the operation of the bar like the running of my practice, which is be mindful of your pennies because your dollars will take care of themselves.

How is it going? It's not been easy, because there are folks that have a historic memory of an organization that, maybe, had different priorities or was at a different time. The organization has survived for over 100 years, but it needs to change to survive the next 100 years. We need to develop the tools to make the bar relevant for the next century.

Bar Associations across the nation are experiencing membership problems. What has changed? People don't feel the need to be connected to bar organizations that they did 50 years ago. Today, social networking and live-streaming seminars have replaced, in part, the benefit that the bars used to provide. Now we need to figure out what the next step is, what is the future.

A Metropolitan News headline said that LACBA "fleeces" its attendees at events. What's going on? I think everyone would agree that the organization should not run at a loss. The perception of some is that if the cost of a program is \$2,000 and you recover \$2,000 from the people who attend, you are breaking even. You are not. We need to have more revenue than the actual cost of the program. You have to run the organization. That's not fleecing anyone—that's being responsible stewards of an institution.

What is the biggest challenge facing LACBA? Attracting new, young lawyers and establishing the value added that the bar organizations have. An extraordinary value added, in California, is the relationship between the bar and the bench. If you are part of a bar organization, you have the opportunity to engage with a judicial offi-

cer in a much different way.

Should the bench attend bar events for free? There are certain events that judicial officers should not have to pay to attend. The more engagement we have with judicial officers as a bar organization, the better our organization will be.

You are cochair of the Open Court Coalition (OCC), a bipartisan committee advocating full funding of the civil justice system. What is the biggest challenge facing the courts? How to deliver services in the new century that is different than the way the services were delivered in the last couple of centuries.

Who is on your music play list? Classical music fills my soul.

What book is on your nightstand? *The Verdict*, by English author Nick Stone, in the vein of Turow and Grisham. It's a fun book.

Which fictional hero would you like to be? Dirk Pitt, a spy extraordinaire created by author Clive Cussler.

Which magazine do you pick up at the doctor's office? *Esquire*.

What is your favorite vacation spot? I really like

to see different parts of the world.

What do you do on a three-day weekend? Stay in bed, snuggle with my wife of 27 years, and watch TV that was recorded.

Which television shows do you record? Reality TV—*Survivor*, *The Amazing Race*—mindless shows.

What are your retirement plans? When I stop enjoying it, I'll walk away.

If your house were on fire, what would you grab on your way out? First, the family and our dog, Zoe. Ten years ago, I'd have said my photographs. Today I'll say my computer's hard drive—it's all there.

Which president would you most like to take out for a beer? Bill Clinton. He's been at our house, and he's fun.

What are the three most deplorable conditions in the world? Poverty, ethnic warfare, lack of medical care in much of the world.

Who are your two heroes? Martin Luther King and Golda Meir.

What is the one word you would like on your tombstone? Honest.

2016 INSTALLATION & AWARDS DINNER

THURSDAY, JUNE 23, 2016
Dorothy Chandler Pavilion

TICKETS AVAILABLE NOW

Call LACBA Member Services at
800.456.0416
or visit
www.lacba.org

Please join us for the installation of:
2016-2017 LACBA President

MARGARET P. STEVENS
AND THE OFFICERS AND BOARD OF TRUSTEES

Also honoring:
SUPERVISOR SHEILA KUEHL
Shattuck-Price Outstanding Lawyer Award

PRESIDING JUSTICE ARTHUR GILBERT
Outstanding Jurist Award



Guidance on Post-ATRA Estate Planning—Portability and A-B Trusts

PASSAGE OF THE AMERICAN TAXPAYER RELIEF ACT of 2012 (ATRA) established rules for the estate tax that include a relatively new transfer tax rule known as portability. While portability contributes to the complexity of the estate planning process, the rule also provides for new estate planning opportunities that were previously unavailable. It is particularly relevant in estate planning for married couples with estates of less than \$10.9 million, since this year the estate tax exemption has been raised to \$5.45 million for individuals (thus \$10.9 million between the spouses) with an estate tax rate of 40 percent.

Portability allows the surviving spouse (SS) to use the unused estate tax exemption, if any, of the deceased spouse (DS) if a portability election is made on a timely filed estate tax return and the DS has passed away after December 31, 2010. In other words, if the DS has not used his or her permitted estate tax exclusion in its entirety, the unused portion, referred to as deceased spousal unused exclusion (DSUE) amount can be transferred to the SS for his or her use in addition to the SS's own exclusion amount at death. If the community estate is \$8 million and the DS deceases in 2016 bequeathing his or her \$4 million to the adult children, \$1.45 million of exclusion may be used by the SS spouse at his or her death in addition to his or her own exclusion amount. Although simple in concept, portability has many nuances. For instance, if the SS remarries, the applicable DSUE amount is the one belonging to the last DS, meaning the SS may use his or her former-late-spouse's DSUE amount if he or she predeceases the current spouse but may not if he or she survives the new spouse. Portability cannot be used to transfer the DS's unused generation-skipping transfer (GST) tax exemption.

Portability vs. A-B Trust Plans

Before the introduction of portability, if the DS did not use his or her entire estate tax exclusion, the DSUE amount was wasted. Before ATRA, the traditional A-B trust plan was regarded as the best estate planning tool for a married couple that desired that the SS receive benefits of the DS's estate without subjecting those assets to estate tax. Under an A-B plan, the community trust estate is divided into two shares upon the DS's death. The share representing the SS's one-half interest in the community estate and any of his or her separate property is allocated to the survivor's trust or A, which is a revocable trust for the SS's benefit. The SS serves as trustee and retains the power to amend and revoke A, the unlimited right to withdraw income and principal, and the power to dispose of assets in favor of any third parties either during lifetime or at death. The community property passing to A will receive a step-up in basis on the DS's death, and upon the SS's death, all assets of A will be subject to estate tax and receive another step-up in basis.

The share representing the DS's one-half interest in the community estate and any of his or her separate property is allocated to the bypass trust or B, which is an irrevocable trust. The SS will not have the power to revoke B nor amend any of B's provisions, including those provisions regarding B's remainder beneficiaries. The DS may

provide the SS with a limited power of appointment over B, allowing the SS to dispose of B's assets to permissible third parties, either during the SS's lifetime or upon death. Generally, B will provide that the SS may act as sole trustee and that the SS shall receive all of the net income and a right to invade principal, limited to an ascertainable standard for the SS's reasonable health, education, maintenance, and support in his or her accustomed manner of living.

There are advantages to the A-B plan in lieu of making a portability election. B places restrictions on distributions to the SS to ensure that the DS's assets are ultimately distributed to the DS's remainder beneficiaries. This may be a factor when the DS has children from a prior marriage. B's assets will receive a step-up in basis only upon the DS's death and not on that of the SS. This may be a factor when the DS's estate is anticipated to appreciate in excess of his or her DSUE amount given the life expectancy of the SS. If basis considerations are significant, A-B trusts may be drafted to confer upon an independent trustee the power to grant the SS a general testamentary power of appointment over a portion or all of B so that those assets may receive a step-up in basis by virtue of their inclusion in the SS's estate. Another advantage of B is that all appreciation will pass to the remainder beneficiaries free of estate taxes. B offers some level of asset protection from the SS's creditors and has the ability to preserve the DS's GST tax exclusion for tax planning for more remote descendants.

Married couples, post-ATRA, may plan to utilize the unlimited marital deduction, make a portability election, and allocate the entire community estate to A for the benefit of the SS. This plan achieves a step-up in basis in the community assets at both deaths, avoids any estate tax upon the DS's death, and minimizes or avoids the estate tax upon the SS's death. One advantage—or disadvantage—of this plan is that the SS will have unfettered control over the community estate and any of the DS's separate property, including the power to disinherit the DS's issue in favor of a new spouse and new children. The SS will have no duty to segregate assets or account to remainder beneficiaries. This plan may be desirable when the settlors care more about the financial security and welfare of the SS than that of any surviving children. This plan is less desirable with blended families, when the SS will almost certainly be remarried, or the DS's estate is anticipated to appreciate in excess of his or her DSUE amount.

There will likely be a tension between the SS's control over the DS's estate, opportunities to receive a step-up in basis, and other tax and nontax considerations. Nonetheless, successful estate planning requires a fundamental understanding of the couple's objectives, needs, values, the nature and character of their assets, and some speculation as to what the remainder beneficiaries will do with the inherited assets. ■

Zachary S. Dresben practices estate planning, trust administration, and probate with Kramer Law Group in Los Angeles.

Changes to the FRCP Highlight Need for e-Discovery Expertise

RECENT AMENDMENTS to the Federal Rules of Civil Procedure (FRCP) concerning electronic discovery have a wide-ranging procedural impact, yet a recent survey of federal jurists indicates that judges lack confidence in the capacity of lawyers appearing before them to understand and efficiently advise their clients on e-discovery issues.¹ Thus, it behooves litigators to acquire or learn about the legal and technical expertise necessary to provide the requisite e-discovery counsel and preparatory education to their clients, particularly in terms of the major recent amendments that affect e-discovery. This is especially true in California where electronic-discovery statutes are relatively new.²

In 2010, the *Daily Journal* underscored the need for lawyers to get up to speed in this emerging critical area of the pretrial process.³ If any doubters still remained in 2015, the recent amendments to the FRCP confirmed that e-discovery is not going away, largely because an e-mail trail is now a significant part of nearly every kind of case. As experts have noted, the courts recognize and enforce this “commitment to finding the crucial evidence” that rejects the contrary objection to “fishing expeditions.”⁴

The results of the survey of jurists make it clear that “disruptive change is needed for lawyers to become e-discovery competent.”⁵ The participants in the survey, including 14 federal judges and 22 attorneys proficient in e-discovery, responded that in this day, “being undereducated and underprepared is no longer an option,” yet an “expectation gap still exists” between what judges look for and what attorneys consider appropriate in the age of e-discovery.⁶ A significant proportion of survey participants reported encountering problems of lack of cooperation by counsel and clients (32 percent), miscommunication (27 percent), and a lack of education on e-discovery issues (27 percent). Fully 81 percent were of the opinion that most e-discovery mistakes are made in the early stages of a case, before judicial intervention. The survey also indicated that a “cultural change” is necessary to make all this work. Lawyers need to “get smarter” and become better educated in handling e-discovery or find someone else who is competent to assist, and above all cooperate with opposing counsel instead of acting in a combative manner.

In a *2015 Year-End Report on the Federal Judiciary*, Chief Justice John Roberts highlighted what he considered the more significant FRCP amendments, and emphasized what they represent for the e-discovery bench and bar. Roberts stressed that while “the amendments may not look like a big deal at first glance...they are.”⁷ His comments make clear that lawyers are expected to resolve e-discovery disputes through cooperation. Comparing the early history of dueling in this country to competition between lawyers, Roberts noted that our “civil tribunals, far more than the inherently uncivilized dueling fields they supplanted, must be governed by sound rules of practice and procedure.”⁸ The new rules 1) “encourage greater cooperation among counsel,” 2) “focus discovery...on what is truly necessary to resolve the

case,” 3) “engage judges in early and active case management,” and 4) “address serious new problems associated with vast amounts of electronically stored information (ESI).”⁹ The message of the chief justice is clear that the intent of the amendments is to move the discovery process along while at the same time controlling costs.

Roberts asserts that the amended language in Rule 1—the section titled Scope and Purpose—requires that bench and bar “work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow.”¹⁰ He goes on to make the point that “lawyers though representing adverse parties

Failure to be adequately prepared to conduct e-discovery qualifies as “ethical incompetence.”

have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolution of disputes.”¹¹ Failure to proceed accordingly can have serious consequences. In contrast to a discovery process historically permeated by an attitude of annoyance and drudgery, cooperation has become the order of the day in e-discovery because of the various issues surrounding volume, formatting, readability, and searchability of ESI. A lack of cooperation can cause difficulties that result in e-discovery disputes that are time-consuming and expensive. The goal is to make e-discovery “easier, less costly and more productive,” encouraging an understanding that “‘playing fair’ is worth it.”¹²

Rule 16, which is titled Pretrial Conferences; Scheduling; Management, requires that, unless exempted by local rule, a scheduling order must be issued either after receiving the report from the parties under Rule 26(f) or after a scheduling conference.¹³ The scheduling order must be issued as soon as practicable, but within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared, unless there is good cause for delay.¹⁴ The order may provide for disclosure, discovery, or preservation of ESI.¹⁵ It may also include “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502” (i.e., use of court orders to protect the parties from the consequences of waiver in producing electronic and other information in discovery).¹⁶ Moving parties will be required to have a conference with the court before seeking an order relating to discovery.¹⁷

A. Marco Turk, a professor and director emeritus of the Negotiation, Conflict Resolution and Peacebuilding program at CSU Dominguez Hills, writes a monthly column on e-discovery for *The Daily Journal* and serves as a neutral.

The scheduling order is based in part on what the parties report, containing deadlines and possibly provisions dealing with retrieval and production of ESI. The purpose is to provide an opportunity for the parties to prepare themselves for the Rule 16 pretrial conference, so they can demonstrate to the court that they have made diligent, good-faith efforts to comply with the rules and the court's policies, and that they are therefore "deserving of its confidence."¹⁸

Rule 26(b)(1), which bears the title Duty to Disclose; General Provisions; Governing Discovery, explains the "concept of reasonable limits" using "increased reliance on the common-sense concept of proportionality." The guiding principle of this rule requires "that lawyers must size and shape their discovery requests to the requisites of a case," providing "parties with efficient access to what is needed to prove a claim or defense" while eliminating "unnecessary or wasteful discovery." In other words, as Roberts asserts, the "key here is careful and realistic assessment of actual need."¹⁹ Six requirements are set forth for litigants that parties must adhere to in answering the important question concerning how discovery is proportional to the case: 1) importance of the issues at stake, 2) amount in controversy, 3) relevant access to pertinent information, 4) resources of the parties, 5) importance of the discovery in resolving the issues, and 6) whether the burden or expense of the proposed discovery outweighs the likely benefit.²⁰

Roberts insists that judges need to assume the role of stewards, "managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation."²¹ Courts "can be tempted to postpone engagement in pretrial activities," but those "who are knowledgeable, actively engaged, and accessible early in the process...[will be] far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing."²² Rules 16 and 26(f) demand agreement by the parties concerning preservation and discovery of ESI in the conduct of "their case management plan and discovery conferences."²³

Here, it is important to consider the necessity of entering into a "clawback agreement" under Federal Rules of Evidence 502 to retract mistakenly produced privileged ESI. Without this type of agreement there is no obligation under the rules to immediately return all apparently privileged information that was inadvertently produced electronically—e.g., by CD—unless the producing party first notifies the receiving party of the mistaken disclosure, in which case the ESI must be

promptly returned, sequestered, or destroyed by the latter.²⁴

Because proportionality is critical to the cases of both sides of the litigation, there must be a dialogue between the parties, and perhaps with the court, with respect to the amount of discovery reasonably necessary in view of the claims and defenses in the case. The allowance of virtually unlimited discovery is eliminated, although the rule continues to permit discoverability of information that may not be admissible in evidence. It is all the more critical to start planning for discovery as early as possible, and to anticipate an increased use of the meet-and-confer process. It may make sense for counsel and their clients to consider a mediation procedure for negotiation and informal settlement of all discovery issues.

Rule 34—Production of Documents; Electronically Stored Information; and Tangible Things, or Entering onto Land, for Inspection and Other Purposes—deals with production and objections. While the parties may stipulate to a different period, or the court could change the time limit, it is generally 30 days from a specified date for written responses and objections to requests for production.²⁵ The response must be to each item or category and specifically state whether inspection will be permitted, or the grounds for objection with reasons. The response may state either that inspection will be permitted or that copies of documents or ESI will be produced. Production must take place within the time specified in the request or another time that is reasonable as set forth in the response.²⁶ Objections must state whether any responsive materials are being withheld on the basis of the objection. Partial objections are permitted so long as they are specific and permit inspection of the rest.²⁷

Rule 34 is important today because employees increasingly use their own digital equipment for work purposes—e.g., Hillary Clinton's use of her private e-mail for government business—as well as their participation on social media. In such circumstances, how does one delineate under Rule 34 what information an organizational party has in its "possession, custody, or control"?²⁸

Rule 37(e) concerning sanctions for failure to make disclosures or to cooperate in discovery recognizes the common practice of producing ESI instead of simply permitting inspection of documents and sets forth the consequences for failure to preserve information when litigation is foreseeable. A motion to compel may thus now be for either production or inspection. If there is a loss of discoverable ESI because of a party's failure to take reasonable precautions to preserve it, the court must first determine whether alternative discovery efforts can be used to restore or replace it. The court may cure the resulting

prejudice by ordering additional measures "no greater than necessary" to accomplish that end.²⁹ When the loss of ESI is due to the intent to deprive a party of the use of the information in the litigation, prescribed sanctions may be imposed, such as an adverse jury instruction, dismissal of the action, or entry of a default judgment. The question of good faith and reasonableness may be relegated to obtaining an early negotiated preservation agreement from the opposing party, which takes arguments for sanctions off the table in most situations.³⁰ In cases of spoliation, when the destruction of records, for example, may have relevance to an ongoing or anticipated litigation, government investigation, or audit, the courts have not established a uniform required level of intent before sanctions are warranted.³¹ However, the courts generally look at the culpability of the offending party, prejudice to the injured party, and what remedies may be appropriate under the circumstances.³²

Courts are cautioned to exercise restraint in applying the sanctions specified in Rule 37(e)(2) because the remedy should match the wrong, and the severe measures provided should not be applied when the information lost was relatively unimportant or when lesser measures would provide a sufficient remedy for the loss. These measures may include forbidding the party who failed to preserve information from putting in certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions assisting in the evaluation of the evidence or argument, other than those for intentional deprivation to which Rule 37(e)(2) applies.³³

Roberts sums up the new amendments as follows: "We should not miss the opportunity to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result."³⁴ If lawyers and their clients keep in mind this spirit, negotiating through the increasingly complicated world of ESI will be made easier, more successful, and capable of achieving the goals of the new amendments without unreasonable challenges to all concerned. After all, it has been said that technology-assisted review can be 50 times more efficient than human review.³⁵ As Susan Beck has observed, "The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results."³⁶ Moreover, Roberts emphasized that lawyers need to be focused on what is necessary to resolve a case and encourage cooperation among the parties. This has been underlined by issuance of Opinion 2015-193 by the California State Bar's Standing Committee on Professional Respon-

sibility and Conduct, which defines an attorney's ethical duties concerning discovery of ESI. The opinion clearly states that ESI is now an accepted part of a law practice, and may not be ignored simply because counsel may be "highly experienced" in other aspects of litigation. Failure to be adequately prepared to conduct e-discovery qualifies as "ethical incompetence."³⁷

Litigation is a contest in which there will be a winner and loser, whereas in advocacy both parties speak in favor of cooperation and compromise. Therefore, successful utilization of the mediation process and application of its appropriate advocacy—vis-à-vis litigation—skills will go a long way towards achieving the cultural change ensuring that lawyers will get smarter when it comes to e-discovery. ■

¹ See Aebra Coe, *Judges Lack Faith In Atty's E-Discovery Skills, Survey Says*, LAW360, Jan. 28, 2016, <http://www.law360.com>.

² See MICHAEL F. KELLEHER ET AL., CAL. E-DISCOVERY AND EVIDENCE §2.03[3] (2015).

³ See A. Marco Turk, *The Brave New World of Mediation and e-Discovery*, DAILY J., Oct. 1, 2010, VERDICTS/SETTLEMENT, at 2.

⁴ See SHIRA A. SCHEINDLIN, DANIEL J. CAPRA, AND THE SEDONA CONFERENCE, ELEC. DISCOVERY AND DIGITAL EVID., CASES AND MATERIALS 23 (2015) [hereinafter SCHEINDLIN].

⁵ See 1st Annual Fed. Judges Survey: E-Discovery Best Practices & Trends, EXTERRO, <http://www.exterro.com/judges-survey> (last viewed Apr. 11, 2016).

⁶ *Id.*

⁷ See CHIEF JUSTICE JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FED. JUDICIARY 5 (2015), available at <http://www.supremecourt.gov> [hereinafter 2015 REPORT].

⁸ 2015 REPORT, *supra* note 7, at 3.

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² SCHEINDLIN, *supra* note 4, at 256, 270.

¹³ FED. R. CIV. PROC. 16(b)(1)(A)-(B).

¹⁴ FED. R. CIV. PROC. 16(b)(2).

¹⁵ FED. R. CIV. PROC. 16(b)(3)(B)(iii).

¹⁶ FED. R. CIV. PROC. 16(b)(3)(B)(iv).

¹⁷ FED. R. CIV. PROC. 16(b)(3)(B)(v).

¹⁸ SCHEINDLIN, *supra* note 4, at 257.

¹⁹ 2015 REPORT, *supra* note 7, at 6-7.

²⁰ FED. R. CIV. PROC. 26 (b)(1).

²¹ 2015 REPORT, *supra* note 7, at 10.

²² *Id.* at 10-11.

²³ *Id.* at 8.

²⁴ SCHEINDLIN, *supra* note 4, at 921-22.

²⁵ FED. R. CIV. PROC. 34(b)(2)(A).

²⁶ FED. R. CIV. PROC. 34(b)(2)(B).

²⁷ FED. R. CIV. PROC. 34(b)(2)(C).

²⁸ SCHEINDLIN, *supra* note 4, at 4.

²⁹ FED. R. CIV. PROC. 37(e)(1).

³⁰ FED. R. OF CIV. PROC. E-Discovery GUIDE, 35 (2015).

³¹ SCHEINDLIN, *supra* note 4, at 656.

³² *Id.* at 631-57.

³³ *Id.* at 1047.

³⁴ 2015 REPORT, *supra* note 7, at 12.

³⁵ Susan Beck, *The Wachtell Way of E-Discovery*, THE AM. LAWYER, Feb. 1, 2016, available at <http://www.americanlawyer.com>.

³⁶ *Id.*

³⁷ See A. Marco Turk, *Ethics and e-discovery*, DAILY J., Oct. 2, 2015, at 5.

Judge Michael D. Marcus (Ret.)

Daily Journal "Top Neutral"

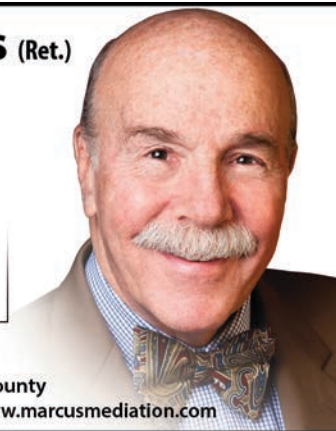
- Top Neutral 2007, 2009 - 2013
- Super Lawyer, Dispute Resolution 2008 - 2016

Available to Mediate, Arbitrate & Referee Disputes Including:

- Employment
- Business/Commercial
- Personal Injury
- Fee Disputes
- Legal Malpractice
- Real Property
- Medical Malpractice



Century City | Downtown LA | Orange County
(310) 201-0010 | mdmesquire@gmail.com | www.marcusmediation.com



THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

The Nation's Top Litigator-Rated Civil Mediators & Arbitrators

View 900+ detailed bios and available dates calendars, free roster at

www.NADN.org

Proud ADR Partner to the
National Plaintiff & Defense
Bar Associations



EXPERT WITNESS - CLAIMS CONSULTANT

— Over 45 Years Experience as a Claims Adjuster —
LICENSED IN THREE STATES AND QUALIFIED IN STATE AND FEDERAL COURTS

EXPERT IN GOOD FAITH/BAD FAITH, STANDARDS AND PRACTICES and standard in the industry. Specialties in property/casualty construction defect, fire/water, uninsured/underinsured motorist, warehouse and cargo claims. Failure to defend and/or indemnify. Litigation support, case review and evaluation claim consultation, coverage review and valuations. Appraisal, Arbitration and Claims Rep. at MSC & MMC.

Contact Gene Evans at E. L. Evans Associates

Tel 310.559.4005 • Fax 310.559.4236 • E-mail elevans66@yahoo.com

9854 NATIONAL BOULEVARD, SUITE #225, LOS ANGELES CA 90034



EXPERIENCE
—
INTEGRITY
—
HONESTY

REAL ESTATE DISPUTE CONSULTING

WARONZOF ASSOCIATES

Timothy R. Lowe, MAI, CRE, FRICS

- economic damages
- fair compensation
- property valuation
- lost profits
- lease disputes
- land use disputes
- partnership interest value
- reorganization plan feasibility



Waronzof Associates, Incorporated
400 Continental Boulevard, Sixth Floor
El Segundo, CA 90245

310.322.7744 T 424.285.5380 F
tlowe@waronzof.com
www.waronzof.com

Consideration of the DMCA Exemption for Documentary Filmmakers

IN 2015, THE U.S. COPYRIGHT OFFICE issued an exemption from the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA) for documentary filmmakers seeking to make fair use of content from DVDs, Blu-ray discs, and online sources.¹ It was the third consecutive time that the Copyright Office had issued a DMCA exemption for documentary filmmakers in its triennial Section 1201 rulemaking, and the exemption was the broadest yet granted. While the Copyright Office declined to extend this exemption to narrative filmmakers, the office considered the issue for the first time in earnest. (The entertainment industry often uses the terms “narrative film” and “fictional film” interchangeably.)

Every three years, the Copyright Office reviews exemptions for certain types of uses of copyrighted works from the anticircumvention provisions of the DMCA, which makes it a crime to circumvent technological measures employed by or on behalf of copyright owners to protect their works. The purpose of the Section 1201 rulemaking is to strike a balance between copyright and digital technologies.² Through a public proceeding that involves the submission of proponent comments, reply comments by both proponents and opponents, hearings before members of the Copyright Office, and additional commentary from interested parties, the rulemaking allows the Librarian of Congress to consider granting limited exceptions to the prohibition on circumventions to ensure that the public can still engage in fair and other noninfringing uses of works. The Register of Copyrights has acknowledged that while Section 1201 of the DMCA has been important for the secure development of digital platforms, the anticircumvention laws also have a powerful impact on other types of consumer activities that have little to do with the concerns of copyright holders.³ For example, interested parties have advocated for a variety of acts to be exempt from anticircumvention laws, including unlocking or “jailbreaking” electronic devices, classroom teaching, and online education.⁴

While Section 1201 has provided an avenue for certain uses and users to obtain exemptions to the DMCA, many have criticized its anticircumvention provisions as overbroad, thus stifling a wide array of legitimate activities rather than stopping copyright infringement.⁵ These parties have generally argued that the DMCA jeopardizes fair use, impedes competition and innovation, and chills free expression.⁶ Since 2000, Section 1201 rulemaking has provided a safe harbor from DMCA liability for many different parties, although the safe harbor has a time limit. The exemptions granted under the Section 1201 rulemaking last for three years.

Well in advance of the rulemaking in late 2015, the Library of Congress issued a public notice of inquiry and request for written comments from proponents of a proposed exemption to be received no later than November 2014.⁷ The library later issued a call for written comments from the members of the public.⁸ In April 2015, the Library of Congress issued a notice of public hearing in which proponents and opponents of proposed exemptions were invited to take part in Los Angeles and Washington, D.C., in May.⁹

Before then, in 2008, a coalition of independent film and media



organizations had requested that the Copyright Office consider documentary filmmakers—who often use archival footage—as a class of users that required an exemption from the DMCA under the fair use doctrine. After interested parties were allowed to present evidence of documentary filmmakers’ substantial need for an exemption request, a round of comments and responses, and then finally a public hearing, the exemption request was granted for documentarians who needed material from encrypted DVDs to take advantage of fair use.

The initial comment submitted in December 2008 presented the following scenario: A documentary filmmaker, familiar with the fair use doctrine, wishes to use a small portion of a copyrighted work in a documentary for purposes of criticism and commentary. In order to illustrate the point being made in the documentary, the filmmaker needs to use the archival material contained on a DVD. There is no way to access the material other than to license it from the copyright holder, which may not be a viable option for a variety of reasons. Perhaps the copyright owner is unwilling to license the material based on the subject matter of the documentary, or the copyright holder may want to charge an exorbitant fee. Alternatively, the copyright owner may propose a nonnegotiable license agreement that contains nondisparagement clauses and other provisions unacceptable to an independent journalist.

While the material may be available from lower-quality sources, for example a VHS tape, this material will not meet the technical requirements of broadcasters in the U.S. and abroad. Thus, for this type of filmmaker, fair use becomes the only option. Although the filmmaker would normally be able to rely on the fair use doctrine for the use of the material without the permission of the copyright owner,

Christopher L. Perez is a partner with Donaldson + Callif LLP in Beverly Hills, a transactional entertainment firm advising independent filmmakers in film and television production.

EMPLOYMENT LAW REFERRALS



Stephen Danz, Senior Partner

Paying Highest Referral Fees (Per State Bar Rules)

Representing executive, technical, and administrative employees statewide with integrity, passion and expertise!

Honored to receive regular employment referrals from over 100 of California's finest attorneys
Super Lawyers 2012

Stephen Danz | 877.789.9707
& Associates

Main office located in Los Angeles and nearby offices in Pasadena, Orange County, Inland Empire & San Diego

11661 San Vicente Boulevard, Suite 500, Los Angeles, CA 90049



NotSoBIGLAW.com

copyright • trademark

NOT SO BIGLAW® is a service mark of Paul D. Supnik



The world's leading immigration law firm
right here in Los Angeles

FRAGOMEN WORLDWIDE

A world of difference in immigration. From visas and work permits, to advisory services and corporate compliance, we work with each client to understand their business and immigration priorities. As the industry leader in immigration law, we're here in Los Angeles working with individuals, investors (EB-5), families, small start-ups, mid-size local companies and large corporations in the state's most prominent industries.

Fragomen, Del Rey, Bernsen & Loewy, LLP
444 South Flower Street | Suite 500 | Los Angeles, CA 90071

Mitch Wexler, Partner • mwexler@fragomen.com
Chad Blocker, Partner • cblocker@fragomen.com
Michael Boshnaick, Partner • mboshnaick@fragomen.com

at the 2015 rulemaking hearings, despite the presentation of relevant case law and nonlitigated examples of fair use in narrative filmmaking, the Copyright Office decided that the potential damage to copyright holders outweighed the need for narrative filmmakers to make fair use of content on Blu-ray discs.²¹

While the Copyright Office's decision not to expand the exemption to fictional filmmakers may have made it difficult for some of them to view fair use as a realistic option, it is clear from a review of the 2015 hearings that the Copyright Office seriously considered expanding the exemption to narrative filmmakers.²² During the hearings, the interested parties engaged in lengthy discussions regarding the application of fair use in films. The truth is that in Hollywood the line between a true story and a story based on true events has always been blurred. Moreover, and especially in the digital era, filmmaking allows for documentaries that use reenactments, insertion of fictional content in old scenes (factual or fictional), and creative mixing of real events or settings in otherwise fictional stories.

It has thus been difficult even for the opponents of the exemption to define categories for exemption. The DVD Copy Control Association (DVD CCA), for example, wrote in its comment that a biopic is a documentary, while other opponents insisted on a much narrower definition of documentaries.²³ Ultimately, the distinction between documentary and narrative filmmaking may not matter. Filmmakers on both sides of that line are creating artistic works that use material in a transformative way to tell new stories. In fact, one of the reasons the expansion of the exemption to narrative filmmakers is so important is precisely because the line between documentary and narrative films is so blurred.

While the Copyright Office chose not to expand the exemption to narrative filmmakers, the expanded exemption granted to documentary filmmakers should have a significant impact on their ability to take advantage of fair use within their films. Before this rulemaking, a filmmaker could take advantage of the fair use doctrine in a documentary, but if the only way to source the copyrighted material was from encrypted sources, there was always the danger of liability from a violation of the DMCA.

Now that the exemption has been granted, what does this mean for the documentarian? If the documentary filmmaker has made a fair use of third-party material from an access-controlled DVD, Blu-ray disc, or online source, he or she will not be in violation of the DMCA. On the other hand, if the copyrighted material is not used pursuant to fair use, the access will also likely be a violation of the DMCA. From a practical perspective, the documentary filmmaker will want to secure an E&O insur-

ance policy for the film with a fair use endorsement. The endorsement may be secured after a clearance attorney, authorized by the E&O provider, reviews the film and provides a legal opinion on the fair use materials.

The coalition of filmmakers will likely return in 2018 to argue for an exemption that applies to narrative filmmakers. Whether that exemption is granted will depend in large part on the fair use case law that develops in the next three years as well as the demonstration by fictional filmmakers that there is a substantial need for such an exemption. ■

¹ See 80 Fed. Reg. 65944-64 (Oct. 28, 2015); <http://www.copyright.gov/1201>.

² REGISTER OF COPYRIGHTS, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, 2 (Oct. 2015).

³ *Id.*

⁴ U.S. COPYRIGHT OFFICE, RULEMAKING ON EXEMPTIONS FROM PROHIBITION ON CIRCUMVENTION OF TECHNOLOGICAL MEASURES THAT CONTROL ACCESS TO COPYRIGHTED WORKS, available at <http://www.copyright.gov/1201/anticirc.html> (last visited Jan. 13, 2016). See also Haochen Sun, "Fair Use As a Collective User Right," 90 NORTH CAROLINA LAW REV. 125 (2011), available at <http://papers.ssrn.com>.

⁵ See, e.g., Fred Von Lohmann, *Unintended Consequences: Twelve Years under the DMCA*, ELEC. FRONTIER FOUND., Mar. 3, 2010, <https://www EFF.org>.

⁶ See *id.*

⁷ U.S. COPYRIGHT OFFICE, NOTICE OF INQUIRY AND REQUEST FOR PETITIONS, available at <http://copyright.gov/fedreg/2014/79fr55687.pdf> (last visited Mar. 30, 2016).

⁸ U.S. COPYRIGHT OFFICE, NOTICE OF PROPOSED RULEMAKING, available at <http://copyright.gov/fedreg/2014/79fr73856.pdf> (last visited Mar. 30, 2016).

⁹ U.S. COPYRIGHT OFFICE, NOTICE OF PUBLIC HEARING, available at <http://copyright.gov/fedreg/2015/80fr19255.pdf> (last visited Mar. 30, 2016).

¹⁰ Transcript of Record at 9-10, Sixth Triennial 1201 Rulemaking Hearings Proposed Classes: 19, 20, 23, 6, available at <http://copyright.gov/1201/2015/hearing-transcripts/1201-Rulemaking-Public-Roundtable-05-20-2015.pdf> (last visited Jan. 13, 2016) [hereinafter Transcript].

¹¹ See, e.g., MICHAEL C. DONALDSON & LISA A. CALLIE, CLEARANCE & COPYRIGHT (4th ed. 2015); PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE (2011).

¹² *Id.* at 25-26.

¹³ *Id.*

¹⁴ SOFA Entm't, Inc. v. Dodger Prods., 709 F. 3d 1273 (9th Cir. 2013).

¹⁵ *Id.* at 1278.

¹⁶ Arrow Prods., Ltd. v. Weinstein Co. LLC, 44 F. Supp. 3d 359 (S.D. N.Y. 2014).

¹⁷ *Id.*

¹⁸ *Id.* at 368.

¹⁹ Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc., 953 F. Supp. 2d 701 (N.D. Miss. 2013).

²⁰ *Id.* at 711.

²¹ See 37 C.F.R. §201.40 (2015).

²² Transcript, *supra* note 10, at 9-43.

²³ DVD COPY CONTROL ASS'N, COMMENTS OF THE DVD COPY CONTROL ASSOCIATION ON PROPOSED CLASS 6, 13-14, available at http://copyright.gov/1201/2015/comments-032715/class%206/DVDCCA_class06_1201_2014.pdf (last visited Apr. 12, 2016).

The Best Real Estate Advisor For Your Office Space Needs!

WHAT YOUR ASSOCIATES ARE SAYING:

*"Corporate Realty Advisors made my job as
Managing Partner much easier."*

Clifford L. Schaffer

Schaffer, Lax, McNaughton & Chen

*"Corporate Realty Advisors is a most forceful
advocate on behalf of tenants..."*

Robert Spraker

Latham & Watkins

*"My experience working with Corporate Realty
Advisors was exceptional."*

William S. Walker

Pillsbury Winthrop Shaw Pittman LLC

The Attorneys' Lease SpecialistSM

Downtown Los Angeles, Century City
and Orange County

800-507-6673



Jeff Tabor

**Call Me For The
Best Tenant Representation
In Our Industry
(and we'll prove it)**

800-507-6673

"Be Represented...Not Brokered!"SM

AttorneysLeaseSpecialist.com

BY LAURA REATHAFORD

PAGA Performance

COURTS AND COUNSEL MAY APPLY JUDGMENT, CREATIVITY, AND EXPERTISE TO DETERMINE THE MOST EFFICIENT MEANS OF RESOLVING DISPUTES UNDER THE PRIVATE ATTORNEY GENERAL ACT

WHEN it comes to litigating a representative action under the Private Attorney General Act (PAGA), there is no “one size fits all” approach. There is no requirement that it proceed as a class action, so parties and courts are left to their own creativity—and common sense—in determining how to proceed. Some courts have dismissed PAGA claims outright because the parties and the claims are too numerous or complex to be litigated, or tried, in any efficient manner.¹ Other courts have refused to do so even when the number of individual issues to be tried could result in clogging the court’s docket for months.² Some courts have allowed a subset of the proposed group to proceed through discovery—and trial—while holding in abeyance the claims of the others.³ Still other courts have considered allowing a statistically significant sample of employees to represent the larger group in proving liability at trial.⁴

In a time when more plaintiffs are filing “PAGA-only” cases—arguably to avoid class certification, federal court, and arbitration—and court dockets and state budgets are overburdened, it seems logical that judges and litigants should consider whether a PAGA action can be efficiently tried despite its status as nonclass action. As a representative enforcement action, plaintiffs who bring these lawsuits do so to remove the burden from state labor agencies and seek to collect civil penalties for current or former

employees. However, this strategy does not always translate into efficient litigation. Instead, it may result in the potential to overburden another critical state agency: the courts.

The representative adjudication of claims has been held to accomplish judicial economy by avoiding multiple suits and to protect the rights of persons who might not be able to present claims on an individual basis.⁵ There are two forms of representative actions: those that are brought as class actions and those that are not.⁶ Class actions are generally authorized if the questions to be tried are “of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.”⁷

Class actions must be certified as such before they can be tried.⁸ In California:

[A] party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members. The community of interest requirement involves three factors:

LAURA REATHAFORD IS A PARTNER AT VENABLE LLP IN CENTURY CITY, WHERE HER PRACTICE FOCUSES ON MANAGEMENT-SIDE EMPLOYMENT LITIGATION, EMPHASIZING WAGE AND HOUR COLLECTIVE AND CLASS ACTIONS, INCLUDING REPRESENTATIVE ACTIONS UNDER PAGA.

HADI FARAHANI



(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.⁹

The California Supreme Court has recognized that trial courts must also determine that any individual issues presented in the case can be managed at trial.¹⁰ When a class action would “denigrate into a multitude of mini-trials,” class certification should not be granted.¹¹

In *Arias v. Superior Court*, the California Supreme Court ruled that civil actions brought under PAGA need not be certified as class actions in order to proceed to trial.¹² PAGA allows employees to bring civil actions as a proxy of the state labor law enforcement agencies to collect civil penalties for purported violations of the California Labor Code.¹³ Because PAGA does not explicitly require lawsuits to be filed as class actions, the court held that the legislature must have intended that these actions proceed to trial without plaintiffs’ having to meet class certification requirements.¹⁴

PAGA and Manageability

Some courts have extended the “no class certification” rule in *Arias* to conclude that trial courts need not require that PAGA actions be manageable in order to proceed to trial.¹⁵ However, *Arias* does not consider whether a court should or could consider manageability simply because it carries the PAGA representative action label. *Arias* does not discuss manageability at all, nor does it preclude a trial court from determining whether individual issues render a PAGA trial unmanageable. Therefore, defendants may attack PAGA actions as unmanageable, when applicable, despite the fact that plaintiffs do not have to certify them as class actions.

In *Amey v. Cinemark*, the court stated, “There is no per se rule that should be applied to PAGA claims that do not meet [class certification] requirements....[W]hen the evidence shows...that numerous individualized determinations would be necessary to establish whether any class member has been injured by [a defendant’s] conduct, then allowing a representative action to proceed [to trial] is inappropriate.”¹⁶ When faced with a representative action containing potentially thousands of employees, why should a court not be permitted to consider whether a PAGA trial will result in hundreds (if not thousands) of minitrials, potentially clogging its docket for months? While courts faced with PAGA actions may not be required to weigh class certification factors such as commonality or numerosity, both state and federal court procedures require an understanding of the estimated length and scope of any trial.¹⁷

Therefore, by design, courts may consider whether a PAGA action—as with any other action—can and should proceed to trial in some manageable way.

In most cases, it might be naïve to expect a definitive resolution of this issue as early as the case management conference. Most conferences typically occur within 90 days of the action’s having been filed, and the parties are typically at odds about which aggrieved employees should be included in the group. The PAGA plaintiff typically defines the group as “all aggrieved employees in California,” although in general only a small fraction of the putative employees may have potential claims or have been subject to the purportedly unlawful policy or practice.¹⁸ Conversely, the employer defendant typically argues that the group should be more specific and contained within, for example, the work location and job category in which the PAGA plaintiff worked.¹⁹

The parties are also typically at odds about which purported Labor Code violations should be tried. It is common for PAGA plaintiffs to file a complaint alleging a whole host of Labor Code violations, including missed meal and rest periods, unpaid vacation, unreimbursed business expenses, overtime, and minimum wage, not to mention derivative claims for inaccurately itemized wage statements, untimely payment of wages, and waiting time penalties.²⁰ These purported violations, according to many employers, usually lack merit and are experienced, if at all, only by the named party bringing the claim.²¹

Prior to the supreme court’s decision in *Arias*, litigants—and the courts—believed that PAGA cases should be litigated in the same way as class actions because PAGA litigants, like class actions, represent other current and former aggrieved employees for purported Labor Code violations.²² If this theory had been affirmed in *Arias*, manageability in these cases could be an essential consideration.²³

Notwithstanding that PAGA representative claims need not be certified, courts have been willing to strike PAGA claims altogether when they are found to be unmanageable or so infused with individualized inquiries that proceeding to trial would be inefficient or unwieldy. In *Ortiz v. Caremark Corporation*,²⁴ a California district court dismissed a PAGA claim by granting the defendants’ motion to strike. The court had already denied class certification, but the plaintiffs wanted to proceed to trial on their PAGA representative action nonetheless.²⁵ After concluding that class certification requirements are not required to maintain a PAGA action, the court considered whether the PAGA overtime and expense reimbursement claims at issue would be manageable at trial.²⁶ The court noted that in order to prove an off-the-clock

claim, for example, the plaintiff needed to demonstrate that she actually worked off the clock, that she was not compensated for it, and that the employer was aware or should have been aware that she was performing off-the-clock work.²⁷ The court then held that “proof of this claim would be unmanageable and could only be accomplished with detailed inquiries about each employee claimed to have done so and her manager’s knowledge thereof.”²⁸

The *Ortiz* court also held that the plaintiffs’ unreimbursed mileage claim would require individualized inquiries about whether the claimed expenses were necessary and incurred in direct consequence of the discharge of the employee’s duties, whether the employee actually sought reimbursement from the defendants for the expenses, and whether the defendants reimbursed the employee for the expense.²⁹ The court held that gathering inquiries for each of these expenses would be nothing short of unmanageable.³⁰

Following *Ortiz*, the district court in *Litty v. Merrill Lynch & Co., Inc.*,³¹ dismissed a PAGA claim on a motion to strike where the lawsuit would have required many individualized assessments of overtime and wage statement claims and would therefore be unmanageable.³² In *Litty*, defendants brought a motion to strike a PAGA action after class certification was previously denied. The court held that where it had already decided that the plaintiff’s state law claims could not be certified as a class because “individualized issues predominate[d],” the PAGA claim would also be unmanageable given the “multitude of individualized assessments” that would be required to try the case.³³

In *Bowers v. First Student, Inc.*, the court struck the plaintiff’s PAGA allegations based on a failure to satisfy Rule 23’s class certification requirements but stated that “[e]ven if Rule 23 did not apply...[PAGA] claims can be stricken if they are found to be ‘unmanageable...A PAGA claim can be considered unmanageable when a ‘multitude of individualized assessments would be necessary.’”³⁴ The court in *Bowers* cited both *Ortiz* and *Litty*.³⁵ This finding was adopted by the same court in *Raphael v. Tesoro Refining and Marketing Co., LLC*,³⁶ holding that:

Raphael’s claims are on behalf of himself and thousands of other current or past employees. Tesoro provided a nonexhaustive list of twenty-six relevant inquiries and requirements the court finds essential to assess in order to determine the appropriate penalties. The Court would have to engage in a multitude of individualized inquiries making the PAGA action unmanageable and inappropriate.³⁷

Interestingly, the court in *Amey* considered manageability from the standpoint of ascertainability—the ability or inability to determine who is an aggrieved employee under PAGA.³⁸ In *Amey*, the plaintiffs alleged Cinemark failed to provide meal and rest breaks, wages for all hours worked, accurately itemized wage statements, and other related derivative claims.³⁹ There were more than 10,000 class members in this case, many of whom worked for managers who followed Cinemark’s compliant wage and hour policy. The court dismissed the PAGA claims because the plaintiffs were unable to “offer no easy way to identify those who may actually be aggrieved.”⁴⁰ While the complaint alleged that the plaintiff—and each and every other class member—is each an “aggrieved employee,” as defined by California Labor Code Section 2699(c), the actual aggrieved employees were not defined with sufficient particularity to give Cinemark notice of the scope of the PAGA claim.⁴¹ Accordingly, the court dismissed the PAGA claim finding that “it would require too great a number of individualized assessments to determine the scope.”⁴²

These types of decisions are not unique to California federal courts. For instance, in *Zhang v. Amgen, Inc.*, the Ventura County Superior Court granted Amgen’s motion to deny PAGA representative status due to the court’s inability to effectively manage a case involving more than 350 plaintiffs.⁴³ In *Zhang*, the plaintiffs brought suit for PAGA penalties, arguing that they were misclassified as exempt employees. The plaintiffs were senior associate scientists in various areas of specialization: biologists, microbiologists, zoologists, chemists, and biochemists. Amgen had shown that the work habits of the employees varied, as did the nature of their duties. The court found that their work habits varied to such an extent that it denied class certification. Amgen then moved to deny representative status of the PAGA claims, and the court granted the motion. The court stated:

The court believes that the variance in what the plaintiffs do is sufficiently varied that using Mr. Zhang, and what he does, is not a valid measure of what the others do. Plaintiffs have submitted a declaration from Devon Porter that an analysis based on questions to the plaintiffs can lead to a valid statistical consensus of what all of these employees have in common. As presented, it is not convincing. The affidavits of the various scientists as submitted by Amgen are more persuasive as to what is actually occurring on a day by day basis in the conduct of the work of a SAS.⁴⁴

Of course, some courts have rejected these decisions, finding, for example, that the

“defendant’s manageability argument inconsistent with PAGA’s purpose and statutory scheme.”⁴⁵ As the court in *Zackaria v. Wal-Mart Stores, Inc.*, held “The fact that proving his claim may be difficult or even somewhat burdensome for himself and for defendant does not mean that he cannot bring it at all.”⁴⁶ At the same time, the court seemed to recognize that it had an obligation to manage the proceedings efficiently and ordered the plaintiff to file a trial plan that 1) identified the aggrieved employees for purposes of the PAGA claim, 2) proposed a plan for the court’s evaluation of the aggrieved employees’ claims—with citations to relevant case law, and 3) described the evidence he plans to put forth in support of his claim that each aggrieved employee has suffered a violation.⁴⁷

The UCL Analogy

Analogous rulings addressing proposed representative actions brought under California’s Unfair Competition Law (UCL) arguably provide guidance for determining whether PAGA actions should be subjected to a manageability requirement. Prior to 2004, plaintiffs similarly did not have to obtain class certification in pursuing representative claims on behalf of the general public under the UCL. Thus, California courts considered manageability as a prerequisite before allowing the representative actions to proceed to trial.

In *Bronco Wine Company v. Frank A. Logoluso Farms*,⁴⁸ a grape grower sued a winery for breach of contract and sought recovery for “all growers under contract to [defendant] in 1982.”⁴⁹ The winery moved to strike the claims asserted on behalf of nonparty growers or, alternatively, to require that the matter proceed as a class action.⁵⁰ The trial court denied the motion and entered judgment for the plaintiff. The court of appeal affirmed, expressing concerns about the manageability of the representative action and listing the following factors for a trial court to consider when determining if a case should proceed in a representative capacity: 1) whether adjudication of the unfair business practice claim requires resolution of complex factual issues, 2) whether determining the amount of restitution would require something other than a straightforward calculation, 3) whether the amount of restitution that might be awarded nonparties is nominal, 4) whether the amount of restitution to which each nonparty would be entitled is identical, and 5) whether entering judgment for or against nonparties would pose insurmountable control and management problems.⁵¹

Several courts applied *Bronco Wine* to disallow representative actions when proof of liability would require individualized inquiries. In *South Bay Chevrolet v. General Motors Acceptance Corporation*,⁵² the plain-

tiff challenged GM’s method of interest calculation on contracts it had signed with various independent dealerships. In affirming judgment for the defendant, the court found that the putative plaintiffs were of varying levels of sophistication. The contracts did not all contain precisely the same terms, since GM had made different oral representations to the various dealerships, and each dealership generally had a different “course of dealing” with GM. The issues were “not sufficiently uniform to allow representative treatment and thus any factual findings about statewide dealership knowledge would require presentation of evidence about each dealership’s individual understanding based upon the unique disclosures received by such dealership and the written, oral and implied terms of the dealership’s loan agreements.”⁵³

Another case, *Marshall v. Standard Insurance Company*, has a similar effect.⁵⁴ In that case, the named plaintiffs claimed that the defendant, a disability insurance carrier, violated the UCL by unlawfully denying his claim for disability benefits.⁵⁵ The defendant filed a motion to dismiss as to the representative claims only.⁵⁶ The court applied the five *Bronco Wine* factors and found the case ill suited for representative action, as there was no “simple, straightforward mathematical calculation” that could be used to resolve all claims.⁵⁷ Instead, the court would have to review the individual medical records, prior earnings, length of disability, and any offsetting income of each claimant. This would “pose enormous control and management problems for the court” and could raise due process concerns regarding the potentially affected, but unrepresented, class members.⁵⁸

Some courts have rejected the UCL analogy to PAGA claims because PAGA claims seek civil penalties on behalf of the state as opposed to individual equitable relief, which is the only remedy under the UCL—the damages component of which might arguably support greater individualized assessments.⁵⁹ However, these courts did not consider how a plaintiff will try the case and are therefore arguably of little value to the manageability analysis.

Conversely, in *Alakozai v. Chase Investment Services Corporation*,⁶⁰ the court found that the “Plaintiffs’ claims for penalties under the Labor Code and PAGA...necessitate[d] the same underlying showing as their restitution claims: that the defendants misclassified its employees as exempt” and denied the representative action to proceed to trial.⁶¹ Since PAGA plaintiffs are required to prove “Labor Code violations with respect to each and every individual on whose behalf plaintiff seeks to recover civil penalties,”⁶² the *Alakozai* court logically concluded that where a plaintiff cannot establish manageability with

respect to any class claims, her PAGA representative claims should also be dismissed.⁶³

Statistics and Sampling

In the face of manageability concerns, plaintiffs have argued that they should be permitted to offer statistical sampling evidence to prove liability for all aggrieved employees.⁶⁴ Generally, to be representative, the proposed witnesses must be a random, statistically significant sampling of multiple class members holding each of the various positions within the class and working each of the various shifts.⁶⁵ And, at least in the class action context, if representative testimony or random samplings are being relied upon, a preliminary assessment must be conducted by the trial court to determine how much variability there is in the evidence.⁶⁶ If the variability is too great, individual issues are more likely to swamp common ones and render the class action unmanageable.⁶⁷

In *Delgado v. New Albertson's Inc.*,⁶⁸ the plaintiff alleged that the weekly wage statements he received while an Albertson's employee violated Labor Code Section 226(a) because they inaccurately stated the total number of hours worked by the plaintiff in the pay period and did not state the overtime rate of pay.⁶⁹ In order to proceed to trial, the plaintiff requested that a sample size of 10 percent of the represented group be used, or about 4,200 employees.⁷⁰

The defendant opposed this request, stating that:

[O]ne must examine each wage statement received by each class member to determine liability. For example, two separate class members may each receive 60 wage statements, one or more of which allegedly did not technically comply with some provision of Labor Code Section 226(a). One of the two class members may have one non-compliant wage statement, while the other class members may have 59.⁷¹

The court agreed and rejected the plaintiff's request for statistical sampling, stating that "[a] sampling methodology would not be able to differentiate between employees who never worked premium or overtime hours and those that did."⁷²

On the other hand, *Garvey v. Kmart Corporation* was tried to a judge based on a sample of employees. The plaintiff claimed that she was denied a suitable seat when she worked as a cashier at Kmart.⁷³ Initially, the plaintiff sought to represent a class of Kmart cashiers throughout California that amounted to approximately 5,600 individuals from 100 stores.⁷⁴ Due to manageability concerns concerning statewide certification, the court denied class certification, in part, and certified a narrower class of 71 cashiers who worked in a

single Tulare Kmart store in which the named plaintiff worked (within the applicable limitations period).⁷⁵ The order also held in abeyance "the extent, if at all, any other Kmart stores will be certified."⁷⁶ Notably, the court explained in a posttrial order that "no class manageability issues arose and, indeed, it became apparent that class treatment for at least the Tulare store was entirely appropriate."⁷⁷ One reason for this ruling could be the fact that the evidence was based on the design of the store and not on testimony of any of the 71 employees.⁷⁸

In *Rix v. Lockheed Martin Corporation*,⁷⁹ the plaintiff brought a class action and a PAGA representative action for the misclassification of security guards as exempt employees.⁸⁰ The operative complaint alleged 15 causes of action, including purportedly unpaid overtime, missed meal and rest periods, and the defendant's failure to provide accurate wage statements.⁸¹ The court denied class certification and noted with respect to the PAGA claim that "[the] Plaintiff will have to prove Labor Code violations for each and every individual on whose behalf he seeks to recover."⁸²

The defendant moved to dismiss the PAGA case as unmanageable.⁸³ Rather than proposing a statistical sampling, the plaintiff attempted to shift the burden to the employer to prove that all 88 employees were properly classified and stated simply that "[the] Defendant remains free to call any and all witnesses that Defendant believes is required to defend the PAGA claim and the alleged Labor Code violations."⁸⁴ The court rejected this approach and granted the motion to dismiss, stating that "[the] Plaintiff's PAGA claim requires Plaintiff to prove Labor Code violations for over one thousand claims. The Court is not persuaded that this can be done through common evidence."⁸⁵

Finally, in the context of awarding a default judgment, the court in *Guifu Li v. Perfect Day Franchise, Inc.*, accepted the statistical survey evidence submitted by the plaintiff to establish the amount of PAGA penalties due.⁸⁶ The plaintiff's economic expert interviewed 24 out of 127 randomly selected class members.⁸⁷ The results of these interviews were averaged with respect to the plaintiff's claims for unpaid minimum wages, unpaid overtime wages, inaccurate wage statements, and unreimbursed work-related expenses, and the average calculation was applied to the remaining 103 class members.⁸⁸ With respect to the PAGA penalties, in particular, the expert analysis included a 100 percent-rate violation for a total PAGA penalty amount of \$3,283,744.⁸⁹ Except for the wage statement PAGA claim—which the court found would be unnecessarily duplicative—the court accepted these calculations and awarded the plaintiff \$2,764,896.⁹⁰

In the face of *Arias*, class certification of

PAGA claims is a nonissue. However, that does not mean that California courts are required to ignore obvious case management concerns underlying large PAGA cases. Counsel are encouraged to use their judgment, creativity, and expertise to assist the courts in determining the most efficient use of court resources for resolving the specific PAGA claims at issue. While plaintiffs will likely continue to advocate against a procedural review of collective treatment for PAGA cases, the survival of unmanageable PAGA claims is not a foregone conclusion. ■

¹ See, e.g., *Ortiz v. CVS Caremark Corp.*, No. 12-CV-5859 EDL, 2014 WL 1117614, at *3-5 (N.D. Cal. Mar. 18, 2014).

² See, e.g., *Zackaria v. Wal-Mart Stores, Inc.*, No. 12-CV-1520 FMO, 2015 WL 6745714 at *6 (Nov. 3, 2015).

³ See, e.g., *Jeske v. Maxim Healthcare Servs, Inc.*, 11-CV-1838 LJO, 2012 WL 78242, at *19 (Jan. 10, 2012) (limiting discovery to the claims in the complaint where plaintiff has knowledge of actual labor code violations); *Garvey v. Kmart Corp.*, 11-cv-2575 WHA, 2013 WL 1284321, at *1 (Mar. 28, 2013) (limiting trial to one store of 71 employees).

⁴ See, e.g., *Delgado v. New Albertson's Inc.*, No. 08-CV-806 DOC (Jun. 21, 2010).

⁵ *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

⁶ See *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 126 n.10 (2000); *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App. 3d 117, 129 (1973).

⁷ CODE CIV. PROC. §382.

⁸ *Id.*

⁹ *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000).

¹⁰ *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 29 (2014).

¹¹ *Id.*

¹² *Arias v. Superior Ct.*, 46 Cal. 4th 969 (2009). Notably, however, the court left open the possibility that a PAGA plaintiff could seek to certify the claims. See *id.* at 981 n.5.

¹³ *Id.* at 930.

¹⁴ *Id.*

¹⁵ See, e.g., *Zackaria v. Wal-Mart Stores, Inc.*, No. 12-CV-1520 FMO, 2015 WL 6745714, at *6 (Nov. 3, 2015) ("as the Court concluded with respect to defendant's argument regarding Rule 23, the court finds defendants manageability argument inconsistent with PAGA's purpose and statutory scheme").

¹⁶ *Amey v. Cinemark USA Inc.*, 13-CV-5669 WHO, 2015 WL 2251504, at *16 (N.D. Cal. 2015).

¹⁷ See, e.g., CAL. R. CT. 3.725, 3.727(15); FED. R. CIV. P. 1 ("[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."); *Thompson v. Housing Auth. of City of Los Angeles*, 782 F. 2d 829, 931 (9th Cir. 1986) ("District courts have inherent power to control their dockets.").

¹⁸ See, e.g., *Amey*, 2015 WL 2251504, at *2; *Ortiz v. CVS Caremark Corp.*, No. 12-CV-5859 EDL, 2014 WL 1117614, at *1 (N.D. Cal. Mar. 18, 2014); *Jeske v. Maxim Healthcare Servs., Inc.*, 11-CV-1838 LJO, 2012 WL 78242 (Jan. 10, 2012).

¹⁹ See, e.g., *Jeske*, 2012 WL 78242, at *19.

²⁰ See, e.g., *Rafael v. Tesoro Ref. & Mktg. Co., LLC*, No. 15-CV-2862 ODW, 2015 WL 5680310 (C.D. Cal. Sept. 25, 2015), (alleged violations of Labor Code §§201, 202, 203, 204, 226(a), 226.7, 510, 512(a), 1174(d), 1194, 1197, 1197.1, 1198, 2800, and 2802)

(Continued on page 35)



BY DAVID B. PARKER, ELLIOTT BENJAMIN, and JOEL A. OSMAN

TROUBLE AT HOME

In California, an employer cannot sue an in-house attorney employee for malpractice negligence arising from acts that are within the scope of employment

ALTHOUGH in-house lawyers have an attorney-client relationship with their employers and in-house counsel and outside counsel owe the same duties to their clients, cases decided under California law demonstrate that an employer cannot sue its in-house lawyer employee (or other employees) for malpractice or negligence arising from the acts (or omissions) of the in-house lawyer that are within the scope of the employee's employment. The doctrine of respondeat superior renders an employer's claim of liability for the professional negligence of in-house counsel unavailable. It appears that employers must respond to in-house counsel who commit malpractice in the course of their employment the same as they would treat any other employee who caused damage or injury to the employer—suing in-house counsel for malpractice is simply not an option.

There can be no doubt that an attorney-client relationship is created when a nonattorney employer hires an in-house lawyer, and that outside counsel and in-house lawyers have the same duties to their employer clients. Among these duties are the duty of loyalty and the duty of confidentiality.¹ Lawyers are bound not to reveal or

disclose the confidential information of a client,² but in addition lawyers are required 1) to avoid the representation of adverse interests,³ 2) not to limit the lawyer's liability to the client,⁴ and 3) to communicate with the client and keep the client reasonably informed about significant developments relating to the representation.⁵

Although the duties are the same, the exposure for in-house attorneys and outside attorneys breaching duties or committing malpractice are very different. California courts have recognized the similarity of the obligations. In citing *General Dynamics Corporation v. Superior Court*,⁶ the court in *Gutierrez v. G & M Oil Company, Inc.*,⁷ stated that "The important thing about *General Dynamics* for our purposes is that there is no way one can read it without coming away with this basic thought: In-house attorneys employed as attorneys for their employer do indeed have an attorney-client relationship with their employers."⁸ The court in *Gutierrez* also cited *PLCM Group v. Drexler*,⁹ in which it was held that both in-house counsel and outside counsel are "bound by the same fiduciary and ethical duties to their clients."¹⁰

These notions were further reinforced by the *Gutierrez* court's application of provisions relating to certain procedural

David B. Parker is a founding partner in the Los Angeles law firm of Parker Mills LLP. His practice emphasizes business litigation, professional liability, and risk management. Elliott Benjamin is a partner at Parker Mills LLP, where he focuses on transactional real estate and general business and corporate matters. Joel A. Osman is a senior counsel at Parker Mills whose practice emphasizes business litigation, professional liability, and risk management.

requirements of litigation contained in Section 473 of the California Code of Civil Procedure to in-house lawyers. In applying Section 473, the court stated: “There is nothing in Section 473 that suggests corporations or other business entities who elect to have an in-house lawyer represent them in litigation should be at some disadvantage vis-à-vis the negligence of their attorneys that would not apply when they elect to retain outside counsel.”¹¹

Despite the similarity of the obligations and duties of in-house counsel and outside counsel, employers do not have the same recourse against in-house counsel for malpractice that is available against outside counsel. However, one possibility for an employer to recover for the malpractice of an employee attorney can be found in Section 2865 of the California Labor Code, which provides that “[a]n employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer.” Section 2865 has seldom been cited on the issue of malpractice liability. Notwithstanding the fact that in-house counsel and outside counsel have the same duties to their clients, there is a paucity of appellate authority, both in California and in other states, on the issue of whether an employer has the ability to sue their in-house counsel for professional negligence.¹²

Cahuenga Partners

A recent unpublished decision, *1538 Cahuenga Partners, LLC v. Jacqueline M. Fabe*,¹³ which covers a number of issues, including whether an employer can sue its in-house counsel employee for malpractice, surveyed the landscape relating to the ability of employers to sue employees. In sustaining a demurrer to a malpractice claim, the *Cahuenga Partners* court rejected the argument that Section 2865 permits an employer to sue an employee for negligence.

Specifically, *Cahuenga Partners* strongly rejected two cases, *Division of Labor Law Enforcement v. Barnes* and *Dahl-Beck Electric Company v. Rogge*,¹⁴ both of which were cited by the employer for what the court of appeal declared to be “the rather startling proposition that a corporate employer may sue its in-house counsel for malpractice.”¹⁵ In rejecting these two cases, the court of appeal pointed out that “[i]n the nearly 50 years since *Barnes* was decided, it has only been cited by one other court as support for the proposition that an employer may sue an employee for negligence”¹⁶ and that “[n]o court has cited *Dahl-Beck* in the 41 years since it was decided for the proposition that an employer may sue an employee for negligence.”¹⁷

The *Cahuenga Partners* court was thus unwilling to accept the proposition that a

corporate employer may sue its in-house counsel for professional negligence, stating that “Cahuenga offers no reasoned argument why we should interpret the term ‘culpable degree of negligence’ in Section 2865, for the first time since its enactment in 1937, to include the professional negligence of in-house counsel” and indicating that no other credible authority exists in support of such a position.¹⁸

Respondent Superior

Under the well-established doctrine of respondent superior in the law of agency, the principal (an employer) is responsible for the actions of its agents (employees) in the course of employment. The court in *Harris v. Oro-Dam Constructors*¹⁹ stated that “Although in a sense Respondent Superior imposes strict liability upon the employer, its foundation is the imputation of the employee’s fault to the employer because of the special relationship between them.”²⁰ Citing several cases only one of which was a California appellate decision,²¹ the court in *Harris* stated that “activity ‘within the scope of employment’ is the pivot of the employer’s responsibility, but the pivoting action responds to two primary inquiries: (1) the activity’s benefit to the employer’s enterprise and (2) his right to control it.”²²

It is certainly clear that in-house counsel for a corporation is an employee and agent of that corporate employer, and so long as any wrongful acts by the in-house lawyer occur in the scope of employment, the doctrine of respondent superior applies and the employer is vicariously liable to third parties harmed by the lawyer’s conduct. Relying on this tenet, the *Cahuenga Partners* court concluded that an employer does not have the capacity to and cannot sue its employee in-house counsel for professional negligence, because the doctrine of respondent superior makes the employer responsible for the negligence of the employee lawyer.

Any analysis of the issue should take into account that there is the ethical prohibition found in Rule 3-400(A) that lawyers may not prospectively limit their liability to the client for malpractice which states that an attorney shall not: “(A) Contract with a client prospectively limiting the member’s liability to the client for the member’s professional malpractice.” However, notwithstanding the fact that there appears to be no liability imposed on in-house counsel for malpractice, in addition to relying on the current legal standards applicable to in-house lawyers, cautious attorneys may seek, in advance, to contractually limit potential exposure to their employer client. While they cannot accomplish this objective by entering into an agreement with their employer client, there may

be a way for the in-house lawyer to achieve this additional protection.

Notwithstanding the provisions of Rule 3-400(A) and without violating any duties thereunder, in-house counsel may obtain contractual indemnification from a nonclient, such as an entity or individual affiliated with the employer,²³ but for which the in-house lawyer does not perform any services and has not previously represented in an attorney-client capacity. While this is not a proven method, there seems to be no prohibition.

Under Labor Code Section 2802, an employer is required to indemnify an employee “for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties...including reasonable costs and attorney’s fees.” However, Section 2802 only applies to general employer-employee relationships and to third-party claims against the employee and has been held not to apply to claims by an employer against its own employees. Therefore, if an employer were to sue an employee attorney for malpractice and the employee is ultimately held liable for malpractice, the employee attorney will not be able to recover for the cost of defending the action brought by the employer. The court in *Cahuenga Partners* rejected the defendant’s assertion that she could be indemnified for expenses incurred in a suit her own employer filed against her, although the court found that the employer was responsible to indemnify her for expenses in a third-party suit against her.

In *Nicholas Laboratories, LLC v. Chen*,²⁴ the court held that Labor Code Section 2802 does not require an employer to reimburse its employee for attorney fees incurred in the employee’s successful defense of the employer’s action against the employee. After the employer filed a complaint against its employee, the employee responded with a cross-complaint, claiming that he was entitled to indemnification under Section 2802 of the Labor Code for the expenses and attorneys’ fees he incurred in defending himself against claims that related to his service as an employee or agent of the employer plaintiff. The court of appeal rejected the employee’s rationale for attorney fees, stating “Labor Code 2802 is applicable to third party claims against an employee, but not as to claims by an employer against its own employees.”²⁵ In so ruling, the court of appeal cited *Cassady v. Morgan, Lewis & Bockius LLP*, which held:

Section 2802...requires an employer to indemnify an employee who is *sued by third persons* for conduct in the course and scope of his or her employment, including paying any judgment entered and attorney’s fees and costs

MCLE Test No. 258

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

- An attorney-client relationship is created when a nonattorney employer hires an in-house lawyer.
True.
False.
- Outside counsel and in-house lawyers are bound by the same fiduciary and ethical duties to their clients.
True.
False.
- Labor Code Section 2865 provides that employees who are guilty of a culpable degree of negligence are liable to their employers for the damage.
True.
False.
- Labor Code Section 2865 has been found to support the imposition of malpractice liability on in-house counsel.
True.
False.
- An employer may not, pursuant to Code of Civil Procedure Section 473, seek relief from a court from a judgment, dismissal, order, or other proceeding taken against it as result of a mistake of its in-house counsel.
True.
False.
- Liability for the malpractice of an in-house attorney is imputable to the employer of the in-house attorney by virtue of the doctrine of respondeat superior.
True.
False.
- An outside counsel may not prospectively limit his or her liability to a client for malpractice.
True.
False.
- An in-house attorney may not prospectively limit his or her liability to a client for malpractice.
True.
False.
- Labor Code Section 2802 requires an employer to indemnify an employee for necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, including reasonable attorney fees and costs.
True.
False.
- Labor Code Section 2802 has been held to apply to claims by an employer against its own employees.
True.
False.
- If an employer were to successfully sue an in-house attorney for legal malpractice, Labor Code Section 2802 would allow the employee attorney to recover from the employer the costs of defending the action.
True.
False.
- Labor Code Section 2802 has been found to require an employer to pay the fees and costs incurred in an employee's affirmative litigation against the employer.
True.
False.
- An employer may sue an in-house attorney for legal malpractice.
True.
False.
- Employers generally obtain legal malpractice insurance to protect them from the potential malpractice of their in-house attorneys.
True.
False.
- Historically, a client's power to discharge an attorney has been absolute.
True.
False.
- A client's power to discharge an attorney is not subject to any limitation as a matter of public policy.
True.
False.
- In the context of a wrongful termination of an in-house attorney, a client's power to discharge an attorney is not absolute.
True.
False.
- An in-house attorney may assert a claim for wrongful discharge against his or her employer based upon his or her status as a whistleblower.
True.
False.
- A retaliatory discharge claim may be available to in-house attorneys when the ethical norms of the Rules of Professional Conduct conflict with an illegal demand of the attorney's employer.
True.
False.
- Being a whistleblower automatically absolves an in-house attorney from his or her ethical duty to maintain client confidences.
True.
False.

MCLE Answer Sheet #258



TROUBLE AT HOME

Name _____

Law Firm/Organization _____

Address _____

City _____

State/Zip _____

E-mail _____

Phone _____

State Bar # _____

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

- Study the MCLE article in this issue.
- 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.
- Mail the answer sheet and the \$20 testing fee (\$25 for non-LACBA members) to:

Los Angeles Lawyer
MCLE Test
P.O. Box 55020
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

- Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
- For future reference, please retain the MCLE test materials returned to you.

ANSWERS

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

- | | | |
|-----|-------------------------------|--------------------------------|
| 1. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 3. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 4. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 5. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 6. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 7. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 8. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 9. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 10. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 11. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 12. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 13. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 14. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 15. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 16. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 17. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 18. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 19. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 20. | <input type="checkbox"/> True | <input type="checkbox"/> False |

incurred in defending the action....As long as the employee is acting within the scope of his or her employment, the right to indemnity is not dependent upon a finding that the underlying action was unfounded.²⁶

In addressing the employee's argument that statutory indemnification is owed if the employee successfully defends the employer's claim, the court in *Nicholas Laboratories* acknowledged that "[n]o court has directly addressed this precise issue." The court of appeal went on to state that the employee's "interpretation of Section 2802 conflicts with the common understanding of the word 'indemnify' as applied to litigation (i.e. an oblig-

ation to pay for judgments suffered and/or expenses incurred in a lawsuit brought by a third party against the indemnitee, not a one-sided attorney fee provision in a dispute between the indemnitor and the indemnitee)."²⁷

Two federal cases discussed in *Nicholas Laboratories* come closer than any California case in addressing the issue relating to indemnification by the employer. In the first of these cases, *O'Hara v. Teamsters Union Local No. 856*,²⁸ employees were successful in their claim for indemnification under Section 2802 for costs in defending a lawsuit by a third party, notwithstanding a cross-claim by the employer seeking indemnification for defend-

ing and settling the third-party action on the grounds that the employees' actions had been illegal. The employees also succeeded in obtaining indemnification for fees and expenses incurred in enforcing their claims against the employer. The court in *O'Hara* held that defending against an employer's claim can (at least in some circumstances) provide the basis for indemnification under Section 2802. However, the court in *Nicholas* distinguishes this case because it "involved an underlying third party claim that was the basis for the monetary dispute between the parties over who was required to indemnify whom."²⁹

The second federal case, *Freund v. Nycomed Amersham*,³⁰ held that an employee who

Wrongful Termination of In-House Counsel

IN addition to not being subject to malpractice claims by their clients, in-house lawyers differ from outside lawyers in other respects. As the California Supreme Court observed in 1972 in the case of *Fracasse v. Brent*, "a client should have both the power and the right at any time to discharge his attorney with or without cause."¹ In fact, this is still technically a true statement. However, developments in employment law and the law of public policy have placed limits on a client business's absolute right to discharge its in-house lawyer.

This principle was recognized by the same court in 1994 in its decision in *General Dynamics Corporation v. Superior Court*.² The case arose out of the 1991 termination of Andrew Rose, an in-house attorney in the employ of General Dynamics. When Rose sued General Dynamics for wrongful termination, the company demurred, asserting that because Rose had been employed as an in-house attorney he could be fired for any reason or for no reason based upon the principles enunciated in *Fracasse*.³ When *General Dynamics* came before the court, it acknowledged that the principle it had enunciated 22 years earlier as an absolute in *Fracasse* best fit a traditional form of the attorney-client relationship that was fundamentally different from what existed in the modern world of in-house lawyers. The court reasoned:

The sources of contract and tort claims in wrongful termination cases are analytically distinct from the circumstances confronting the contingent-fee plaintiff that propelled our analysis in *Fracasse*. Given these disparate origins, it is unlikely that the client's undoubted power to discharge the attorney at will is one that can be invoked under all circumstances without consequence.⁴

The court recognized that an unqualified immunity from any liability for terminating in-house counsel would be inconsistent with both the implied and in-fact contractual limitations that underlie the principles of wrongful termination law as well as the underlying fundamental public policies that underlie antidiscrimination law and statutory rights to collective bargaining. The *General Dynamics* court concluded that "an in-house attorney may pursue a wrongful discharge claim for damages against his corporate employer *even though* a judgment ordering his reinstatement is *not* an available remedy."⁵

In declaring the right of an employer to terminate in-house counsel at will to be subject to limitations based upon considerations of fundamental public policy, the court stated:

[T]he in-house professional may be trapped between a laudable

desire to further the goals of the client-employer and restrictions on conduct imposed by the ethical norms prescribed by the Rules of Professional Conduct. Of course, the potential for such a dilemma is common to outside counsel as well. But, unlike their in-house counterparts, outside lawyers enjoy a measure of professional distance and economic independence that usually serves to lessen the pressure to bend or ignore professional norms. Here again, the distinguishing feature of the in-house attorney is a virtually complete dependence on the good will and confidence of a single employer to provide livelihood and career success.⁶

By extension, therefore, the court found that the in-house attorney's right to be a whistleblower and to pursue a claim of retaliatory discharge as the circumstances require should be protected if and when an attorney's adherence to his or her professional ethical responsibilities place them at odds with his or her in-house employer.⁷

The court sought to balance the right under common law of an in-house attorney to pursue a claim for wrongful or retaliatory discharge with the professional ethical obligations of an attorney to maintain client confidences. In achieving this balance, the court made it clear that an in-house attorney is not absolved from the ethical obligation to maintain client confidences.

Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client. In any event, where the elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege.⁸

Thus, while public policy may permit in-house attorneys to sue former employers for wrongful discharge, it does not resolve the ethical dilemmas attorneys may face in doing so.—**D.B.P., E.B., & J.A.O.**

¹ *Fracasse v. Brent*, 6 Cal. 3d 784, 790-1 (1972).

² *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164 (1994).

³ *Fracasse*, 6 Cal. 3d 784 (1972).

⁴ *General Dynamics*, 7 Cal. 4th at 1175.

⁵ *Id.* at 1177 (emphasis in original).

⁶ *Id.* at 1182.

⁷ *Id.* at 1186.

⁸ *Id.* at 1190.

successfully sues an employer for wrongful termination is not entitled to recover attorney fees in that action under Section 2802, stating, “As the language of the statute makes clear, [Section] 2802 is designed to indemnify employees for the legal defense costs when they are sued for actions arising out of their employment...It does not require an employer to pay the fees to support an employee’s affirmative litigation against the employer.”³¹

The court in *Nicholas* stated that “any interpretation of Section 2802 which would allow the statute to become a unilateral attorney fee statute in litigation between employees and employers would be incompatible with that larger body of law.”³² The court concluded that attorney fees incurred by the employee in defense of an employer’s claim do not fall within the domain of Section 2802 of the Labor Code, stating:

We are not persuaded that the Legislature, in drafting Section 2802, intended to depart from the usual meaning of the word ‘indemnify’ to address ‘first party’ disputes between employers and employees. The Legislature could have specifically provided in Section 2802 that attorney fees incurred defending an action by the employer were recoverable by a prevailing employee. The fact that the Legislature did not do so suggests disputes between employers and employees are subject to the ordinary rules applying to the recovery of attorney fees in California litigation.³³

It is interesting to note that malpractice insurance is not generally available to cover claims by employers for professional negligence against in-house lawyers. Malpractice liability insurance generally covers the negligence of a lawyer to clients and third parties and does not cover intentional torts or punitive damages.³⁴ Moreover, employment practices liability insurance provides coverage for wrongful acts arising from the employment process, with the most frequent types of claims covered being wrongful termination, discrimination, sexual harassment, and retaliation. Some insurance carriers, such as Chubb, provide a form of employment practices liability insurance for law firms, which offers coverage for punitive damages and claims by partners. It is unclear as to whether the coverage extends to protections for in-house counsel.

Although an attorney-client relationship exists between in-house lawyers and their employers, in which the in-house lawyers owe the same duties to their employers as outside counsel owe to their clients, the few relevant California cases demonstrate that an employer cannot sue its in-house lawyer employee (or other employees) for malpractice

negligence arising from the acts or omissions of the in-house lawyer that are within the scope of the lawyer’s employment. Furthermore, it appears that employers are not required to indemnify in-house counsel (or other employees) under Section 2802 of the Labor Code for expenses incurred by the in-house lawyer in a suit filed by his or her employer, successful or not. Thus, an employer may not hold its in-house counsel responsible for professional negligence through claims for damage. Instead, employers should look to follow traditional employment-related alternatives to in-house lawyers whose errors cause injury to the employer. ■

¹ BUS. & PROF. CODE §6068(e)(1) imposes the duty on an attorney to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

² CAL. RULES OF PROF’L CONDUCT R. 3-100.

³ CAL. RULES OF PROF’L CONDUCT R. 3-310.

⁴ CAL. RULES OF PROF’L CONDUCT R. 3-400.

⁵ CAL. RULES OF PROF’L CONDUCT R. 3-500.

⁶ *General Dynamics Corp. v. Superior Court*, 7 Cal. 4th 1164 (1994).

⁷ *Gutierrez v. G & M Oil Co., Inc.*, 184 Cal. App. 4th 551 (2010).

⁸ *Id.* at 559.

⁹ *PLCM Group v. Drexler*, 22 Cal. 4th 1084 (2000).

¹⁰ *Id.* at 1094.

¹¹ *Gutierrez*, 184 Cal. App. 4th at 561.

¹² See MALLEN & SMITH, *LEGAL MALPRACTICE* §26:8 (2014).

¹³ 1538 *Cahuenga Partners, LLC v. Jacqueline M.*

Fabe, et al., No. B222023 (2d Dist., Div. 8 Jan. 5, 2012).

¹⁴ *Division of Labor Law Enforcement v. Barnes*, 205 Cal. App. 2d 337 (1962); *Dahl-Beck Elec. Co. v. Rogge*, 275 Cal. App. 2d 893 (1969).

¹⁵ 1538 *Cahuenga Partners, LLC v. Jacqueline M. Fabe, et al.*, 2012 WL 19519, at *16 (2d Dist., Div. 8 Jan. 5, 2012).

¹⁶ *Id.* at *17.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Harris v. Oro-Dam Consts.*, 269 Cal. App. 2d 911 (1969).

²⁰ *Id.* at 915.

²¹ *Standard Oil Co. v. Anderson*, 212 U.S. 215, 220-21 (1909); *Robinson v. George*, 16 Cal. 2d 238, 244 (1940); *Gosset v. Simonson*, 243 Or. 16, 411 P. 2d 277, 279-82 (1966).

²² *Harris*, 269 Cal. App. 2d at 915.

²³ The Fourth District Court of Appeal, in *Brooklyn Navy Yard Congregation Partners, L.P. v. Superior Court*, 60 Cal. App. 4th 248 (1997) confirms the general rule that a corporate affiliate is a distinct entity except in limited circumstances, including those in which one corporation is the alter ego of the other.

²⁴ *Nicholas Labs., LLC v. Chen*, 199 Cal. App. 4th 1240 (2011).

²⁵ *Id.* at 1246.

²⁶ *Id.* at 1247 (citing and adding emphasis to *Cassady v. Morgan, Lewis & Bockius LLP*, 145 Cal. App. 4th 220, 230 (2006)).

²⁷ *Nicholas Labs.*, 199 Cal. App. 4th at 1248.

²⁸ *O’Hara v. Teamsters Union Local No. 856*, 151 F. 3d 1152 (1998).

²⁹ *Nicholas Labs.*, 199 Cal. App. 4th at 1250.

³⁰ *Freund v. Nycomed Amersham*, 347 F. 3d 752 (2003).

³¹ *Id.* at 766.

³² *Nicholas Labs.*, 199 Cal. App. 4th at 1251.

³³ *Id.*

³⁴ See INS. CODE §533.



**Xerox 55-page per minute
B&W MFP with Color Scan,
B&W Print, Fax and Copy
Features as well as 2 cassettes
and a stapling finisher.**

\$95 PER MONTH

Details: WorkCentre 4265xf, 60-month lease, FMV Lease-end option. Service and Support are not included, but available and encouraged.



Lease or purchase any Xerox MFP/Copier and get an **Apple Watch!***



Mercury
DOCUMENT IMAGING CO., INC.
XEROX 2014 Partner Of The Year

800-350-1672 • mercurydoc.com
Providing Excellent Products and Services to Law Firms
* Offer valid 30 days from publication cover date.



4xForensic
ENGINEERING LABORATORIES, INC.
www.4xforensic.com

BY ANDREW FITZGERALD ADAMS

THE RIGHT RECEIVER

The Health and Safety Code offers local governments a means of remediating blighted properties through receiverships

EVERY city has nuisance properties that exasperate code enforcement officers and city attorneys for years. These are not just properties with overgrown lawns or unpermitted sheds; they present an actual daily threat to local communities. They are abandoned or foreclosed homes, or houses dangerously filled with newspapers and cats. It usually starts with an owner unable to remedy the situation, due to some incapacity, such as aging or mental illness, or an owner who has made the business decision that ignoring citations by the city is cheaper than bringing the property into compliance. When the threat to the community becomes pressing and there appears to be no other solution, the answer is often a receiver appointed under the Health and Safety Code.

A receiver is an agent of the court appointed to carry out some goal that the court believes is necessary.¹ When some condition of a property presents a dangerous condition or threat to a community, upon the petition of a tenant group or city a court may find it necessary to appoint a receiver as its agent to remedy the nuisance under the specific authority found in Health and Safety Code Sections 17980.6 and 17980.7. This remedy is often for the most pressing threats and dangerous properties, since it involves removing the property from the owner's control

due to a failure or unwillingness to address the nuisance.²

With the rising incidence of municipalities seeking to remediate problem properties, Health and Safety receiverships have taken on a new importance in recent years.³ Several prominent cities in California, including Los Angeles and San Diego, are now in the process of establishing their own receivership programs.⁴ Mortgage banks and municipal or land use attorneys are also becoming more familiar with this remedy, and any attorney practicing in this field should be aware of the remedy and how it is used.

The Nuisance

Statutorily, any property nuisance is a viable candidate for the receivership remedy. Sections 17980.6 and 17980.7 make it clear that there are limitations set on the time necessary by which an owner can fix the property, but there are none set on the size or value thresholds for the properties themselves. Nor does

ANDREW FITZGERALD ADAMS IS GENERAL COUNSEL FOR CALIFORNIA RECEIVERSHIP GROUP, PBC (CRG) IN SANTA MONICA, CALIFORNIA. CRG WAS THE RECEIVER IN *CITY OF WHITTIER V. SOUTHLAND DISPLAY COMPANY*. THE AUTHOR WISHES TO THANK TYLER HUXTABLE, EDDIE GAO, AND CHRISTMAS MYERS FOR ASSISTANCE IN REVIEWING THE ARTICLE.

the property have to collect income to be put into receivership. The types of property range from burned-out houses in the desert valued at less than \$10,000⁵ to multimillion-dollar apartment buildings in some of the largest urban areas in the state.⁶ The question is not one of size or value but whether or not the property presents a substantial danger.

Section 17980.7(c) authorizes the appointment for any substandard building while Section 17980.6 defines as substandard any building that violates the Health and Safety Code, the State Building Standards Code, local ordinances, and municipal codes when “the violations are so extensive and of such a nature that the health and safety of residents or the public is substantially endangered.”⁷ A nuisance has been found due to accumulation of trash, faulty wiring, faulty windows, immobile vehicles parked on-site, and fire hazards.⁸ Also, a dilapidated roof, lack of landscaping, structural maintenance issues, dried brush as fire hazard, and deterioration and vandalism damage have been found to constitute nuisance property conditions.⁹ Every city code enforcement team or official knows which properties are nuisances in their communities, and in making these showings to the court, a photo can be more effective than 10 declarations describing the problem.

The Receiver

Once the showing of a nuisance is made, and the notice provisions met, the receiver can be appointed under Section 17980.7(c). Specific portions of the statute govern what a receiver can do;¹⁰ however, the powers and duties start with Code of Civil Procedure Sections 564 et seq. So the statute governs, but the appointment order and later orders of the court set the course for the receiver: “Generally, the functions and powers of a receiver are controlled by statute, by the order of appointment, and by the court’s subsequent orders.”¹¹ Moreover, the receiver’s powers can be ratified after the fact by order of the court if necessary.¹² The theory underlying the statute is that the receiver presents recommendations and options to the court, for all parties to comment on, with the court’s making the final decision as to the course of action. Thus, in principle, the court stays out of the day-to-day decisions that have to be made to correct violations and instead relies upon the recommendations of its agent or cedes specific decisions to the receiver who is effectively the instrument of the appointing court.¹³

Who may serve as a receiver is mostly undefined by statute but governed by real-world practicalities. Receivers cannot have any interest in a property or a prior agreement with the parties;¹⁴ however, the proper receiver and necessary skills are as varied as



the properties over which receivers are appointed. Although receivers are often attorneys, a law degree is not required. Receivers can be accountants or construction managers, for example. For matters that involve complex legal issues or require many court appearances and complicated requests, however, an attorney is advisable, just as for any other party engaging in complex matters before a judge. The authority for a receiver to hire an attorney is in Rule 3.1180 of the Rules of Court, and even attorney receivers are often expected to retain their own counsel when necessary: “The receiver...although himself a member of the bar, [] could hardly be expected to act in propria persona, conducting a trial of such gravity and complexity, examining witnesses and making objections and arguments.”¹⁵

The decision that most cities have to make when nominating a receiver is to find a balance of experience, skill, and cost. An increasing number of courts are looking with a jaundiced eye towards billing rates of \$600-800 per hour, but on the other hand, courts are reluctant to appoint individuals without any experience. In the end, the court has to approve the fees and billing rates,¹⁶ so it is wise for the requesting party and the court to ensure that the recommended receiver is a match for the duties of the appointment.

The Abatement Process

The work that a receiver is authorized to do is governed by the appointing court and the need that the receiver was appointed to remedy, thus the end of the receivership comes when that work is completed.¹⁷ Each case has its own scope of work or list of things that have to be done. This may be a full-scale, total demolition,¹⁸ or it may simply be repairing a stairway or connecting a sewer line.¹⁹ In some cases, it means selling the property to a buyer that has shown an ability to remedy the violations.²⁰ The approach and the recommendation on what work has to be done and how best to do it is left up to the receiver, and then the court as to whether to accept the recommendation.

As discussed at length in the preeminent Health and Safety Code receivership case, *City of Santa Monica v. Gonzalez*, demolition is proper in the circumstances that call for it and that use of discretion will not be disturbed on appeal absent “evidence of fraud, unfairness or oppression.”²¹ That same deferential standard does not apply only to demolition but also may apply for determinations to sell the receivership property to address the violations,²² or even a court’s denial of the recommendation and a refusal to pay for the work.²³ The appointing court reviews the receiver’s recommendations and chooses whether or not to act on them. Thus, appellate review of these determinations, even when

as drastic as ordering the sale or demolition of the property, is done only to search for an abuse of discretion.

The challenge for the receiver is the balance of the work necessary as well as value and equity. The receiver must evaluate the condition of the property and make recommendations to the court that are reasonable based on the economic realities that exist and the interested parties’ concerns. The work recommended by the receiver and approved by the court must be capable of being financed either by the owner’s willingness to pay for the work or through a receiver’s certificate, which is secured to the property itself and can be funded to pay for the work necessary. This is where the experience and skill of a receiver comes into play, because a lot of people can recommend or solicit bids from contractors, but a receiver has to be able to arrange financing for that work.

The Costs

The fees and costs, including the city’s enforcement and abatement costs, are generally paid by the receivership property.²⁴ This transaction is usually at the expense of an owner’s equity or a secured lender, but the costs are in some way paid out of the receivership property. Thus, the property owner or interest holders that created the nuisance pays for the remediation, and the costs are not passed on to the taxpayers burdened with the nuisance. A nuisance property not only pays its own remediation costs but also pays the costs of obtaining the appointment of the receiver, as well as the administrative costs incurred by the receiver.

The process of paying receivership fees and costs is a simple matter when a property is creating income but can be difficult when there are no readily available funds to cover the fees and costs. If there is insufficient income, the party responsible for the condition of the property can be ordered to pay the unpaid fees and costs personally.²⁵ Obviously, owners that refuse to cooperate to bring a property into compliance are also unlikely to cooperate to pay the fees and may be ordered by the court to pay the fees and costs. If there is insufficient income generated by the property and the owner will not or cannot pay to correct the existing violations, the court is authorized to issue a receiver’s certificate.²⁶

The receiver’s certificate authorizes a lien against the property and is funded by a private lender with a deed of trust. The certificate can be granted priority over prior secured lenders if the court sees fit to do so.²⁷ The difficult task is to find lenders for the certificate, as lenders are often unfamiliar with it, and often only hard-money lenders are willing to put up funds. The seminal case on

this aspect of receivership is *Title Insurance & Trust Company v. California Development Company*, which involved certificates for a railroad line and allegations that the appointed receiver was instead seeking to extend the line.²⁸ The necessity for a court to prioritize a certificate was left entirely to the discretion of the particular superior court.²⁹

If a certificate or owner-funding are not options, the court can order the property be sold as part of the actions necessary to remedy the violations, and the manner in which the property is sold can be altered to achieve receivership goals.³⁰ The court can even “strip” the existing liens from the property, and place them on the sale proceeds if need be.³¹ While a sale is usually only necessary at the end of the process—and only in certain cases—it sometimes can be a useful tool to accomplish the goal of the receivership.

All of these powers are tools of the receivership court to be utilized when necessary and appropriate in order to achieve the purpose for which the receivership was established. Obviously, stripping liens off properties or subordinating existing liens is not a trifling matter and may not be done without substantial findings in highly contested motions. Just as a receivership is a “drastic remedy to be employed only in exceptional circumstances,”³² these extreme methods to pay for the work performed in a receivership are to be used carefully and only when necessary. Many judges are hesitant to utilize these methods to pay for the receivership, but they are available options when conditions support their use.

The End of the Receivership

Health and Safety receiverships end when the conditions that required the appointment are remedied.³³ The end of a receivership requires the preparation and filing of final accounting, when all expenses, including the receiver’s interim fees and costs, are reviewed.³⁴ The receiver will file a motion for discharge, which is the last call for claims against the receivership estate and the receiver.³⁵

There are often dubious claims made against the receiver and the receiver’s administration when the motion for discharge is made. For example, the derelict property owner ironically could find fault in the work performed by the receiver that the owner previously refused to do. Also, owners missing in action for months or years often finally show up for the distribution of whatever remains in the receivership account, or to dispute the final accounting. As this is a common occurrence, there is some case law on the issue, mostly protective of the receiver.

In *City of Whittier v. Southland Display Company*, a property owner was denied leave to sue the receiver,³⁶ and the legal fees for

defending against the suit brought in direct defiance of that denial were awarded and affirmed.³⁷ In *Builders Bank v. Carbon Beach Partners, LLC*, some ex post facto challenges to motions and requests for the receiver were denied, and the court affirmed.³⁸ In *Hemaratatarn v. Pasternak*, an appointed receiver was supported by all parties (who even opposed his request to step down as receiver) until the bill came due.³⁹ In both of the latter cases, the courts found that these late challenges were unwarranted. Just as the reasons for appointment are left to the judge's discretion, so is the review of the alleged claims and procedure for allowing those claims to be made.

The appointing court retains jurisdiction up to 18 months after discharge.⁴⁰ While this can be helpful if the property was sold to a new owner in order to remedy the violations, often that much time is not necessary. Any lingering or expected issues—like continued hoarding or the living conditions of owners—can be planned for at discharge. For example, service contracts to haul away junk can be set up or arrangements made for an owner to be placed into a care facility. Usually, the matter is then complete, requiring no more action, but Section 17980.7(c)(10) acts as a backstop in case any further action is required later.

Reluctance to Seek Appointment

While the receivership remedy is a conclusive, inexpensive, and effective way to deal with the most pressing and persistent nuisance properties, some cities or counties are reluctant to utilize the Health and Safety receivership remedy. First, the procedures and showing required to obtain an order granting a receivership are detailed. The notice requirements are strict and there are fact-intensive findings that have to be made to the judge. Also, all this has to be done by a city that is often frustrated by years of prior enforcement on a property that has already been a constant drain on public resources.

Second, the receivership remedy can be difficult politically. While the most dire and dangerous properties are clear-cut, not every receivership property is an abandoned drug squat. Obviously, a nuisance property used to cook meth or sell drugs does not have many defenders, but there are some hoarder properties whose owners may have supporters. City councils might misunderstand the process and be wary of paying more attorney fees to remedy a lingering problem. Addressing these concerns requires an adept and nuanced solution, undertaken with sensitivity for these issues.

Each situation obviously presents a different set of circumstances and requires a varied set of tools. If the appointed receiver does not handle a sensitive situation carefully, it can

cause problems for the city, the owner, and the court. However, there is no reason that the problems cannot be avoided by a capable and experienced receiver and city prosecutor.

Health and Safety receiverships are a growing remedy, and cities all over the state are beginning to realize that this tool is a useful way to attack the most pressing and dangerous properties that burden a community. Larger cities with lists of hundreds of code-violating and nuisance properties are finding that instead of letting these properties languish, they can employ the Health and Safety receivership to remedy the nuisance—and that, in fact, pursuing these remedies can pay for themselves. The Health and Safety receivership statute is an example of the legislature's creating a very useful and valuable remedy, and even if it took a few years, a legal community has now grown around that remedy to the point that it does what it was intended to do. While larger cities are starting to utilize the remedy more, it is actually the small to mid-sized cities that have led the way in putting the statute to work. That may be because smaller cities have the political responsiveness to convince a city attorney to take action, or it may be that their code enforcement departments are not large enough or simply lack the substance to obtain enforcement without court action or a neutral third party's involvement. Whatever the cause may be, as use of the remedy grows, so does the body of law around it, and the necessity for practicing attorneys to learn about it. ■

¹ *People v. Riverside Univ.*, 35 Cal. App. 3d 572, 583 (1973) (citing *Lesser & Son v. Seymour*, 35 Cal. 2d 494, 499 (1950)). See also CAL. R. OF CT. 3.1179; *Takeba v. Superior Ct.*, 43 Cal. App. 469, 475 (1919); 6 WITKIN, CAL. PROC., PROV. REM. §451 (5th ed. 2008); 55 CAL. JUR. 3d RECEIVERS §58 [hereinafter CAL. JUR.].

² See *City and County of San Francisco v. Daley*, 16 Cal. App. 4th 734, 744 (1993).

³ A Westlaw search showed that of the 28 cases citing §17980.7, 26 are less than 11 years old.

⁴ The City of Oakland has long used receivers for some of the most dangerous properties.

⁵ See, e.g., *City of Cathedral City v. Estate of Madeline R. Faber*, No. INC1205106 (Riverside Super. Ct. July 18, 2012).

⁶ See, e.g., *People v. Emyrean Towers, LLC*, No. RG15765195 (Alameda Super. Ct., Apr. 6, 2015).

⁷ HEALTH & SAFETY CODE §17980.6.

⁸ *City of Santa Monica v. Gonzalez*, 43 Cal. 4th 905, 915 (2008).

⁹ *City of Riverside v. Horspool*, 223 Cal. App. 4th 670, 674, 677 (2014).

¹⁰ See, e.g., HEALTH & SAFETY CODE §17980.7(c)(4)(H).

¹¹ *City of Santa Monica v. Gonzalez*, 43 Cal. 4th 905, 930 (2008) (citing *Cal-American Income Prop. Fund VII v. Brown Dev. Corp.*, 138 Cal. App. 3d 268, 273 (1982)).

¹² *People v. Riverside Univ.* 35 Cal. App. 3d 572, 582 (1973); MILLER & STARR, 12 CAL. REAL ESTATE §41:9 (4th ed.) [hereinafter MILLER & STARR].

¹³ *Free Gold Mining Co. v. Spiers* 135 Cal. 130, 132 (1901).

¹⁴ CAL. R. OF CT. 3.1179.

¹⁵ *Macmorris Sales Corp. v. Kozak*, 249 Cal. App. 2d 998, 1005 (1967).

¹⁶ CAL. R. OF CT. 3.1184(d).

¹⁷ HEALTH & SAFETY CODE §17980.7(c)(9): "The receiver shall be discharged when the conditions cited in the notice of violation have been remedied in accordance with the court order or judgment and a complete accounting of all costs and repairs has been delivered to the court."

¹⁸ See, e.g., *City of Santa Monica v. Gonzalez*, 43 Cal. 4th 905 (2008).

¹⁹ See, e.g., *City of Yorba Linda v. Sinan Shabandar, et al.*, No. 30-2014-00719215-CU-OR-CJC (Orange Super. Ct. Apr. 25, 2014); *City of Tustin v. Thomas V. Boyles*, No. 30-2014-00726109 (Orange Super. Ct. June 2, 2014).

²⁰ See, e.g., *City of Cathedral City v. Estate of Madeline R. Faber*, No. INC1205106 (Riverside Super. Ct. July 18, 2012).

²¹ *Gonzalez*, 43 Cal. 4th at 929, 931. See also *City of Riverside v. Horspool* 223 Cal. App. 4th 670, 683 (2014).

²² *City of Whittier v. Southland Display Co.*, No. B250819, 2015 WL 800059, at *15 (Cal. Ct. App. Feb. 25, 2015), modified on denial of reh'g (Mar. 16, 2015), rev. denied (May 13, 2015).

²³ *City of Chula Vista v. Gutierrez*, 207 Cal. App. 4th 681, 688 (2012).

²⁴ *Id.* at 685 (citing *Andrade v. Andrade*, 216 Cal. 108, 110 (1932) and *McCarthy v. Poulsen* 173 Cal. App. 3d 1212, 1219–20 (1985)).

²⁵ HEALTH & SAFETY CODE §17980.7(c)(15). A relatively recent addition, as part of the 2012 Homeowner's Bill of Rights, the statute codifies existing law regarding the courts' authority to direct the parties to pay unpaid fees and costs and makes clear that the legislature intends derelict owners to pay the costs of the receivership. See *Andrade*, 216 Cal. at 110; *Baldwin v. Baldwin* 82 Cal. App. 2d 851, 856 (1947).

²⁶ *Title Ins. & Trust Co. v. California Dev. Co.*, 171 Cal. 227, 233 (1915); MILLER & STARR, *supra* note 12, §41:12.

²⁷ *Id.*; 55 CAL. JUR., *supra* note 1, §71. See also *Title Ins. & Trust Co.*, 171 Cal. at 231; *City of Riverside v. Horspool*, 223 Cal. App. 4th 670, 684 (2014).

²⁸ *Title Ins. & Trust Co.*, 171 Cal. at 231.

²⁹ *Id.* at 233.

³⁰ *People v. Stark*, 131 Cal. App. 4th 184, 205 (2005) (citing *Lesser & Son v. Seymour*, 35 Cal. 2d 494, 499 (1950)).

³¹ *Horspool*, 223 Cal. App. 4th at 684 (citing *Spreckels v. Spreckels Sugar Corp.*, 79 F. 2d 332, 334 (2d Cir. 1935) and *Miners' Bank of Wilkes-Barre v. Acker*, 66 F. 2d 850, 853 (3d Cir. 1933)).

³² *City and County of San Francisco v. Daley*, 16 Cal. App. 4th 734, 744 (1993).

³³ HEALTH & SAFETY CODE §17980.7(c)(9).

³⁴ CAL. R. OF CT. 3-1183-84.

³⁵ See *Jun v. Myers*, 88 Cal. App. 4th 117, 124 (2001); *Aviation Brake Sys., Ltd. v. Voorhis*, 133 Cal. App. 3d 230, 234 (1982).

³⁶ *City of Whittier v. Southland Display Co.*, No. B250819, 2015 WL 800059, at *15 (Cal. Ct. App., Feb. 25, 2015), as modified on denial of reh'g (Mar. 16, 2015), rev. denied (May 13, 2015). Case nos. B255573, B257744, B260292, and B250819 are included in this case; the order was affirmed in case no. B250819.

³⁷ *Id.* Legal fees were awarded and affirmed under case no. B260292.

³⁸ *Builders Bank v. Carbon Beach Partners, LLC, et al.*, No. B259539 (L.A. County Super. Ct. Feb. 18, 2016).

³⁹ *Hemaratatarn v. Pasternak*, No. B245701 (Cal. Ct. App. May 14, 2014).

⁴⁰ HEALTH & SAFETY CODE §17980.7(c)(10).

ADMINISTRATIVE LAW**LAW OFFICES OF MICHAEL GOCH, APC**

5850 Canoga Avenue, Suite 400, Woodland Hills, CA 91367, (818) 710-7190, fax (818) 710-7191, e-mail: gochmichael@aol.com. Web site: MichaelGoch.com.

Contact Michael Goch. Licensing and related disciplinary proceedings with emphasis on healthcare practitioners, as well as Department of Health Care Services matters and related issues, from investigatory stage through trial and writ proceedings. Degrees/licenses: JD Southwestern University School of Law, Cum Laude, 1978; admitted in California since 1978. Also admitted in Central, Eastern, Northern, Southern District and Ninth Circuit.

APPELLATE LAW/CIVIL APPEAL**HONEY KESSLER AMADO**

261 South Wetherly Drive, Beverly Hills, CA 90211, (310) 550-8214, fax (310) 274-7384, email: honeyamado@amadolaw.com. Web site: www.amadolaw.com. **Contact**

Honey Kessler Amado. Ms. Amado (AV-rated) is a Certified Appellate Law Specialist (California State Bar Board of Legal Specialization). On the trial level, she joins the litigation team to assist with identifying issues, creating a sufficient record for appeal, and drafting complex briefs or postjudgment pleadings and motions. On the appellate level, Ms. Amado prepares all briefs and argues the case to the court. When retained as a consultant on appeal, Ms. Amado assists counsel with identifying issues, strategizing the appeal, and drafting or editing the appellate briefs and motions. Ms. Amado has been counsel in a number of landmark cases and has written and lectured extensively in the area of appellate law.

BUSINESS LITIGATION**GIRARDI | KEESE**

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

CERTIFIED FAMILY LAW SPECIALIST**LAW OFFICE OF KAREN S. BROWN**

10866 Wilshire Boulevard, Suite 400, Los Angeles, CA 90024, (323) 274-2697, e-mail: Karen@ksbfamlaw.com. Web site: www.KSBFamlaw.com. **Contact Karen S.**

Brown. Certified family law specialist handling divorce, complex custody, and financial matters for working families and high net worth individuals. I provide quality service for my clients and have extensive experience as a civil litigator and trial attorney for all family law related matters both prior to dissolution and postjudgment. Also, I handle prenuptial and postnuptial agreements. I work toward resolution of all matters and resort to litigation only when necessary. If that is the only option, I am a tenacious litigator and strive to get my clients their very best results in the court system after fully explaining the process and reviewing cost/benefit issues beforehand. Please refer to the testimonials on my web site from clients for whom I handled complex matters of many years' duration.

CIVIL APPEALS**BENEDON & SERLIN, LLP**

22708 Mariano Street, Woodland Hills, CA 91367-6128, (818) 340-1950, fax (818) 340-1990, e-mail: douglas@benedonserlin.com. Web site: www.benedonserlin.com. **Contact Douglas G. Benedon.** Our firm specializes in all

aspects of civil appellate litigation and substantive trial motions. We appear in both state and federal court. Both firm members have been certified as appellate law

specialists by the State Bar of California Board of Legal Specialization. Our firm and both members are AV rated by Martindale-Hubbell. In addition, our firm has been recognized for professional achievement in the area of appellate law.

COMPLIANCE & ETHICS (POLITICAL)**THE SUTTON LAW FIRM**

22815 Ventura Boulevard, #405, Los Angeles, CA 91364, (818) 593-2949, fax (415) 732-7701, e-mail: bhertz@campaignlawyers.com. **Contact Bradley W. Hertz.** The Sutton Law Firm and Los Angeles-based partner Bradley W. Hertz represent businesses, individuals, candidates, ballot measures, PACs, and nonprofit organizations involved in the political and legislative processes on the local, state, and national levels.

COPYRIGHT LAW**LAW OFFICE OF PAUL D. SUPNIK**

9401 Wilshire Boulevard, Suite 1250, Beverly Hills, CA 90212, (310) 859-0100; fax (310) 388-5645, e-mail: paul@supnik.com. Web site: supnik.com; www.NotSoBIGLAW.com. Federal court litigation; local counsel for out-of-town firms; infringement, fair use, subject matter issues, ownership, registration, public domain, termination of transfer and duration issues; past chair of both LACBA's Entertainment and Intellectual Property Section as well as International Law Section; past chair Los Angeles Copyright Society; author "Copyright Infringement" in CEB publication Proof in Competitive Business Litigation. **See display ad on page 16.**

CORPORATE, SECURITIES, & GOVERNANCE**GIRARDI | KEESE**

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

DEFENSE BASE ACT (INJURIES OVERSEAS)**CANTRELL, GREEN, & A PROFESSIONAL CORPORATION**

444 West Ocean Boulevard, Suite 1750, Long Beach, CA 90802, (562) 432-8421, fax (562) 432-3822, e-mail: newclient@workercomplaw.com. Web site: www.workercomplaw.com. **Contact Justine Schierberl.** Employees of contractors or sub-contracts of the Department of Defense or other U.S. government agencies injured working overseas are entitled to workers' compensation benefits under Defense Base Act (DBA), which applies the provisions of the federal Longshore and Harbor Workers' Compensation Act (LHWCA) to these overseas workers. Overseas workers residing locally may file here in California. The DBA is the exclusive remedy for injured overseas workers.

EMPLOYMENT & LABOR LAW**BONONI LAW GROUP, LLP**

301 North Lake Avenue, Suite 820, Pasadena, CA 91101, (213) 553-9200, fax (213) 553-9215, e-mail: Ibononi@bononilawgroup.com. Web site: www.bononilawgroup.com. **Contact Lisa Bononi.** We are California's leaders in employment law. We are highly experienced in handling negotiations and in litigating cases in court. When you need experienced counsel for an employment dispute, call Bononi Law Group, LLP.

LAW OFFICE OF ELI M. KANTOR

9595 Wilshire Boulevard, Suite 405, Beverly Hills, CA 90212, (310) 274-8216, fax (310) 273-6016,

e-mail: eli@elikantorlaw.com. Web site: www.beverlyhillsemploymentlaw.com. **Contact Eli Kantor.** We specialize in all aspects of labor and employment law, including sexual harassment, wrongful discharge, employment discrimination, wage and hour, as well as class action litigation.

ENVIRONMENTAL**GIRARDI | KEESE**

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

FAMILY LAW**WALZER MELCHER LLP**

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

FRANCHISE LAW**MOHAJERIAN APLC**

1901 Avenue of the Stars, Suite 1100, Los Angeles, CA 90067, (310) 556-3800, fax (310) 556-3817, e-mail: info@mohajerian.com. Web site: www.mohajerian.com. **Contact Al Mohajerian.** Specialties: Franchising & licensing. Mohajerian Inc. is a multipractice law firm in Century City. It proudly offers efficient, innovative, and proactive legal services throughout the USA. Representative cases or clients: Burger King, Quiznos, Vestar, Carl's Jr., Jack in the Box, Medicine Shoppe, Pizza Man, Peter Piper Pizza. Professional affiliations: Franchise Law Committee of State Bar, INTA, ABA, Super Lawyer 2008-2013. Law school attended: UWLA. Billing arrangements: Hourly. **See display ad on page 33.**

GOVERNMENT (ELECTION LAW)**THE SUTTON LAW FIRM**

22815 Ventura Boulevard, #405, Los Angeles, CA 91364, (818) 593-2949, fax (415) 732-7701, e-mail: bhertz@campaignlawyers.com. **Contact Bradley W. Hertz.** The Sutton Law Firm and Los Angeles-based partner Bradley W. Hertz represent businesses, individuals, candidates, ballot measures, PACs, and nonprofit organizations involved in the political and legislative processes on the local, state, and national levels.

HEALTHCARE LAW**LAW OFFICES OF MICHAEL GOCH, APC**

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

IMMIGRATION AND NATIONALITY LAW**FRAGOMEN WORLDWIDE**

444 South Flower Street, Suite 500, Los Angeles, CA

A FULL SERVICE DEFENSE FIRM SERVING CLIENTS NATIONWIDE

MOHAJERIAN

A PROFESSIONAL LAW CORPORATION

AN AGGRESSIVE AND RESPONSIVE PROVIDER OF LEGAL SERVICES, WITH A TOTAL COMMITMENT TO EXCELLENCE

We are dedicated to the interests of our clients and delivery of extraordinarily responsive, creative, practical and high quality solutions to their problems, developed from their point of view. We are also dedicated to providing our clients with quality service at a competitive cost.

We believe that the problems facing many individuals and corporate clients today can be addressed by taking a preventive approach. We assist clients in identifying potential problems prior to them maturing into litigation. If appropriate, we take advantage of settlement opportunities before litigation, but if we have to litigate, then that what we do.

We also stress risk avoidance services, including the evaluation of clients' business, IP and HR practices, policies and procedures and regulatory compliance issues. All of these strategies are designed to maximize recovery and enhance the client's position.

We represent manufacturers, distributors, franchisors, pharmaceutical companies, compounding pharmacies, healthcare providers, retail/food chains and developers.



AL MOHAJERIAN, SUPER LAWYER 2008-2016

- COMPLEX LITIGATION
- FRANCHISE & DISTRIBUTION
- INTELLECTUAL PROPERTY
- TRADE SECRETS
- TRADEMARKS
- EMPLOYER DEFENSE
- CLASS ACTION DEFENSE
- FOOD SAFETY & LIABILITY
- REGULATORY COMPLIANCE
- FDA, USDA, TTB

EFFICIENT, INNOVATIVE & PROACTIVE LEGAL SERVICES

1901 AVE OF THE STARS, STE 1100, LOS ANGELES, CALIFORNIA 90067

TEL: 310.556.3800 ■ FAX: 310.556.3817 ■ E-MAIL: info@mohajerian.com

www.mohajerian.com

90071, (310) 820-3322, fax (310) 820-2702, e-mail: mwexler@fragomen.com. Web site: www.fragomen.com/losangeles. **Contact Mitch Wexler.** Full-service immigration law practice: Fragomen is the leading immigration law firm. We have been in Los Angeles for over 35 years. We handle all types of work permits/green card/U.S. citizenship issues as well as asylum and all deportation/removal cases. We represent individual, small and large domestic and multinational companies. We also represent high net worth foreign investors in E-2 and EB5 applications. **See display ad on page 16.**

LAW OFFICE OF ELI M. KANTOR

9595 Wilshire Boulevard, Suite 405, Beverly Hills, CA 90212, (310) 274-8216, fax (310) 273-6016, e-mail: eli@elikantorlaw.com. Web site: www.beverlyhillsmigrationlaw.com. **Contact Eli Kantor.** Specializes in all aspects of business, entertainment, investor, and family immigration law.

HIRAM W. KWAN, A PROFESSIONAL LAW CORPORATION

200 South San Pedro Street, Suite 400A, Los Angeles, CA 90012, (213) 680-0122, fax (213) 680-4210, e-mail: HiramKwan@aol.com. **Contact Hiram W. Kwan.** Applications for immigration benefits for families, parents, brothers, and sisters, children; naturalization, defense of deportation actions. In immigration and U.S. federal courts.

INTELLECTUAL PROPERTY

GIRARDI | KEESE

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

MOHAJERIAN APLC

1901 Avenue of the Stars, Suite 1100, Los Angeles, CA 90067, (310) 556-3800, fax (310) 556-3817, e-mail: info@mohajerian.com. Web site: www.mohajerian.com. **Contact Al Mohajerian.** Specialties: Franchising & licensing. Mohajerian Inc. is a multipractice law firm in Century City. It proudly offers efficient, innovative, and proactive legal services throughout the USA. Representative cases or clients: Burger King, Quiznos, Vestar, Carl's Jr., Jack in the Box, Medicine Shoppe, Pizza Man, Peter Piper Pizza. Professional affiliations: Franchise Law Committee of State Bar, INTA, ABA, Super Lawyer 2008-2013. Law school attended: UWLA. Billing arrangements: Hourly. **See display ad on page 33.**

INTERNATIONAL

TANIGUCHI GJB OFFICE

3-20-1 Minami Azabu, Azabu Green Terrace 5F, Minato-Ku, Tokyo, Japan, (81) 3-6859-8548, fax (81) 3-6859-8401, e-mail: taniguchilaw@gmail.com. California lawyer admitted to practice in Japan as a foreign legal consultant, along with correspondent Japanese law firms. Provide legal services to U.S. and other foreign businesses in Japan.

LABOR/EMPLOYER DEFENSE

MOHAJERIAN APLC

1901 Avenue of the Stars, Suite 1100, Los Angeles, CA 90067, (310) 556-3800, fax (310) 556-3817, e-mail: info@mohajerian.com. Web site: www.mohajerian.com. **Contact Al Mohajerian.** Specialties: Franchising & licensing. Mohajerian Inc. is a multipractice law firm in Century City. It proudly offers efficient, innovative, and proactive legal services throughout the USA. Representative cases or clients: Burger King, Quiznos, Vestar, Carl's Jr., Jack in the Box, Medicine Shoppe, Pizza Man, Peter Piper Pizza. Professional affiliations: Franchise Law Committee of State Bar, INTA, ABA, Super Lawyer 2008-2013. Law school attended: UWLA. Billing arrangements: Hourly. **See display ad on page 33.**

LITIGATION

GILCHRIST & RUTTER PROFESSIONAL CORPORATION

1299 Ocean Avenue, Suite 900, Santa Monica, CA 90401, (310) 393-4000, fax (310) 394-4700. Web site: www.gilchristrutler.com. **Contact Frank Gooch.** Represent clients as plaintiffs and defendants in trial and at appellate courts in state and federal courts, as well as mediations/arbitrations. Practice areas include business (unfair competition, trade secret, antitrust, shareholder disputes, entertainment/intellectual property litigation), real estate (breach of lease and sales agreements, quiet title, easement, owner-contractor and landlord-tenant disputes, environmental clean-up) securities, employment and insurance (e.g., coverage disputes, breach of contract, bad faith and punitive damage actions).

LITIGATION (POLITICAL)

THE SUTTON LAW FIRM

22815 Ventura Boulevard, #405, Los Angeles, CA 91364, (818) 593-2949, fax (415) 732-7701, e-mail: bhertz@campaignlawyers.com. **Contact Bradley W. Hertz.** The Sutton Law Firm and Los Angeles-based partner Bradley W. Hertz represent businesses, individuals, candidates, ballot measures, PACs, and nonprofit organizations involved in the political and legislative processes on the local, state, and national levels.

LONGSHORE AND HARBOR WORKERS' COMPENSATION CLAIMS

CANTRELL, GREEN, A PROFESSIONAL CORPORATION

444 West Ocean Boulevard, Suite 1750, Long Beach, CA 90802, (562) 432-8421, fax (562) 432-3822, e-mail: newclient@workercomplaw.com. Web site: www.workercomplaw.com. **Contact Justine Schierberl.** For over 40 years, our Long Beach firm has represented injured workers under the federal Longshore and Harbor Workers' Compensation Act (LHWCA). LHWCA covers workers who are injured loading and unloading ships in the harbor and other workers performing maritime work. An LHWCA claim may be filed concurrently with a California State Workers' Compensation claim. A LHWCA claim is a highly specialized subset of workers' compensation. Referral fees paid at the conclusion of the case.

MARIJUANA BUSINESS LAW & LITIGATION

BROOKE LAW GROUP

225 South Lake Avenue, #300, Pasadena, CA 91101, (626) 375-6702, fax (626) 389-5463, e-mail: brookelawgroup@gmail.com. Web site: www.brookelawgroup.com. **Contact Michele Brooke.** Full-service marijuana business law firm; corporate services, litigation, product liability, contracts, administrative, due diligence, hemp, and corporate counsel services for commercial cannabis business.

MEDIATION

THE HOLMES LAW FIRM

225 South Lake Avenue, Suite 300, Pasadena, CA 91101, (626) 432-7222, fax (626) 432-7223, e-mail: r_holmes@ix.netcom.com. Web site: www.theholmeslawfirm.com. **Contact Reginald A. Holmes, Esq.** Intellectual property, employment, and international law. Arbitrator, mediator, referee, special master, and private judge in the resolution of complex business disputes. **See display ad on page 6.**

JUDGE MEDIATION

5850 Canoga Avenue, Suite 400, Woodland Hills, CA 91367, (818) 610-8799, fax (818) 610-8699, e-mail: sean@judgemediation.com. Web site: www.judgemediation.com. **Contact Sean Judge.** Mediation of civil disputes focused in the areas of business, PI, employment, real estate, and professional responsibility. Available for arbitration.

MUNICIPAL LAW

JON GOETZ

223 West Foothill Boulevard, 2nd Floor, Claremont, CA 91711, (909) 451-6290, fax: (909) 624-3313, e-mail: jgoetz@kmtg.com. Web site: www.kmtg.com. **Contact**



MOSKOVITZ TIEDEMANN & GIRARD

Legal Expertise
Affordable Housing
Economic Development
Health Care
Higher Education
Municipal Law
Real Estate & Land Use

Jon Goetz | Ronald Vera | Henry Barbosa
223 West Foothill Boulevard, 2nd Floor Claremont, CA 91711
909-451-6290 | www.kmtg.com

Jon Goetz. Specialty areas: land use, real estate, economic development, affordable housing, municipal law, health care, senior living centers, and education. Kronick is a full-service law firm with a dedicated legal team of more than 40 attorneys that collectively represent a diverse mix of private business and public sector clients throughout California in over 25 legal disciplines. Our clients include small to mid-sized businesses, publicly traded companies, including Fortune 500 companies, hospitals and health systems, local and state government agencies, cities, counties, joint powers authorities and joint powers insurance authorities, school and community college districts, special districts, water districts, landowners, and developers. **See display ad on page 34.**

NURSE LIFE CARE PLANNER, LEGAL NURSE CONSULTANTS

JANSE LLC

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

PUBLIC EMPLOYEE DISABILITY RETIREMENT CLAIMS

CANTRELL, GREEN, A PROFESSIONAL CORPORATION

444 West Ocean Boulevard, Suite 1750, Long Beach,

CA 90802, (562) 432-8421, fax (562) 432-3822, e-mail: newclient@workercomplaw.com. Web site: www.workercomplaw.com. **Contact Justine Schierberl.** Since 1971, our firm has specialized in work-related disability claims, including a focus on safety officers and other public employees. A disability retirement can result in increased benefits and, in some cases, tax advantages over a regular service retirement. We specialize in coordinating workers' compensation claims with disability retirement claims, when appropriate. Referring attorneys are acknowledged at intake, and referral fees are paid at the conclusion of the case.

SOCIAL SECURITY DISABILITY/SSI

LAW OFFICE OF JERRY PERSKY

5657 Wilshire Boulevard, Suite 410, Los Angeles, CA 90036, (323) 938-4000, fax (323) 938-4068, e-mail: jp90036@gmail.com. Web site: www.jerryperskylaw.com. We represent Social Security claimants to help them qualify for disability benefits or to help them with termination of benefits or overpayments.

CANTRELL, GREEN, A PROFESSIONAL CORPORATION

444 West Ocean Boulevard, Suite 1750, Long Beach, CA 90802, (562) 432-8421, fax (562) 432-3822, e-mail: newclient@workercomplaw.com. Web site: www.workercomplaw.com. **Contact Justine Schierberl.** Our firm includes attorneys who are skilled and experienced in Social Security Disability claims. For clients whose disability prevents any substantial employment, a successful claim can result in Social Security payment and Medicare coverage. Representation in these claims is on a contingency basis regulated by the federal government. Attorneys who refer these significantly disabled clients will be acknowledged at intake, and referral fees will be paid upon successful completion.

TAXATION LAW

HOCHMAN, SALKIN, RETTIG, TOSCHER & PEREZ

9150 Wilshire Boulevard, Suite 300, Beverly Hills, CA 90212-3414, (310) 281-3200, fax (310) 859-1430, e-mail: rettig@taxlitigator.com. Web site: www.taxlitigator.com. **Contact Charles Rettig.** The firm specializes in federal and state civil tax and criminal tax litigation controversies with federal, state, and local taxing authorities, white collar crime criminal defense, forfeitures, estate and business planning, probate, tax-exempt organizations, real estate, business and corporate transactions.

TRADEMARK LAW

LAW OFFICE OF PAUL D. SUPNIK

9401 Wilshire Boulevard, Suite 1250, Beverly Hills, CA 90212, (310) 859-0100; fax (310) 388-5645, e-mail: paul@supnik.com. Web site: www.supnik.com www .NotSoBIGLAW.com. Trademark litigation in federal courts; local counsel for out-of-town firms; trademark registration in the United States; trademark registration internationally in association with foreign counsel; trademark availability searches; Trademark Trial and Appeal Board proceedings; licensing; right of publicity; domain name matters. Past chair of both LACBA's Entertainment and Intellectual Property Section as well as International Law Section. **See display ad on page 16.**

LAW OFFICES OF WILLIAM J. KROPACH

6345 Balboa Boulevard, Suite 222, Encino, CA 91316, (818) 609-7005, fax (818) 609-8126, e-mail: William@kropachlaw.com. Web site: www.williamkropach.com. **Contact Milena Kropach.** Specializing in workers' compensation law, representing the injured workers for over 40 years. Extensive experience in all on-the-job injuries.

PAGA Performance

(Continued from page 22)

and Amey, 2015 WL 2251504, at *2, (alleged violations of Labor Code §§200-204, 226, 226.7, 510, 512, 1174, 1194, and 1198).

²¹ See, e.g., Jeske, 2012 WL 78242, at *19.

²² Arias v. Superior Court, 46 Cal. 4th 969 (2009).

²³ Duran v. U.S. Bank Nat. Ass'n, 59 Cal. 4th 1, 29 (2014).

²⁴ Ortiz v. CVS Caremark Corp., No. 12-CV-5859 EDL, 2014 WL 1117614, at *3-5 (N.D. Cal. Mar. 18, 2014).

²⁵ Id.

²⁶ Id. at *4.

²⁷ Id. (citing York v. Starbucks Corp., No. 08-cv-07919-GAF-PJW, 2011 WL 8199987 (C.D. Cal. Nov. 23, 2011)).

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Litty v. Merrill Lynch & Co., Inc., 2014 WL 5904904 (Nov. 10, 2014).

³² Id. at *3.

³³ Id.

³⁴ Bowers v. First Student, Inc., No. 2:14-CV-8866-ODWEX, 2015 WL 1862914 at *4 (C. D. Cal. Apr. 23, 2015).

³⁵ Id.

³⁶ Raphael v. Tesoro Ref. and Mktg. Co., LLC, 15-CV-2862 ODW, 2015 WL 5680310 (C.D. Cal. Sept. 25, 2015).

³⁷ Id. at *7.

³⁸ Amey v. Cinemark, No. 13-CV-5669 WHO, 2015 WL 2251504, at *16 (N.D. Cal. 2015).

³⁹ Id. at *2.

⁴⁰ Id. at *8, 16.

⁴¹ Id. at *17.

⁴² Id.

⁴³ Zhang v. Amgen, Inc., No. 56-2012-00420162 (Ventura Super. Ct. Aug. 13, 2015).

⁴⁴ Id. It remains to be seen how other state trial and appellate courts will address these issues.

⁴⁵ Zackaria v. Wal-Mart Stores, Inc., No. 12-CV-1520 FMO, 2015 WL 6745714, at *6 (Nov. 3, 2015). See also Plaisted v. Dress Barn, Inc., 2012 WL 4356158, at *2 (C.D. Cal. 2012); Alcantar v. Hobart Serv., No. ED-CV-11-1600 PSG, 2013 WL 146323 (C.D. Cal. Jan. 14, 2013).

⁴⁶ Zackaria, 2015 WL 6745714, at *6.

⁴⁷ Id. at *6 n.2.

⁴⁸ Bronco Wine Co. v. Frank A. Logoluso Farms, 214 Cal. App. 3d 699 (1989).

⁴⁹ Id. at 715.

⁵⁰ Id. at 715-16.

⁵¹ Id. at 720-21.

⁵² South Bay Chevrolet v. General Motors Acceptance Corp., 72 Cal. App. 4th 861 (1999).

⁵³ Id. at 897.

⁵⁴ Marshall v. Standard Ins. Co., 214 F. Supp. 2d 1062 (C.D. Cal. 2000).

⁵⁵ Id. at 1064.

⁵⁶ Id.

⁵⁷ Id. at 1070-71.

⁵⁸ Id.

⁵⁹ See, e.g., Plaisted v. Dress Barn, Inc., No. 2:12-CV-01679, 2012 WL 4356158, at *2 (C.D. Cal. 2012); Alcantar v. Hobart Serv., No. ED-CV-11-1600 PSG, 2013 WL 146323 (C.D. Cal. Jan. 14, 2013).

⁶⁰ Alakozai v. Chase Inv. Servs. Corp., 11-CV-9178 SJO, 2014 WL 5660697, at *21 (Oct. 6, 2014).

⁶¹ Id.

⁶² Hibbs-Rines v. Seagate Techs., LLC, No. 08-CV-5430 SI, 2009 WL 513496, at *4 (N.D. Cal. Mar. 2, 2009).

⁶³ See Alakozai, 2014 WL 5660697 at *21.

⁶⁴ Zackaria v. Wal-Mart Stores, No. 12-CV-1520

FMO, 2015 WL 6745714, at *5-6 (Nov. 3, 2015); Medlock v. Host Intern, Inc., 12-cv-2024, 2013 WL 2278095, at *3-4 (May 22, 2013).

⁶⁵ See, e.g., Reich v. Southern Maryland Hosp., Inc., 43 F. 3d 949, 952 (4th Cir. 1995).

⁶⁶ Duran v. U.S. Bank Nat'l Ass'n, 59 Cal. 4th 1 (2014).

⁶⁷ Id.

⁶⁸ Delgado v. New Albertson's Inc., No. 08-806, slip. op. (C.D. Cal. Jun. 21, 2010).

⁶⁹ Delgado, No. 08-806, Dkt. No. 103.

⁷⁰ Id.

⁷¹ Delgado, No. 08-806, Dkt. No. 102.

⁷² Delgado, No. 08-806, Dkt. No. 109.

⁷³ Garvey v. Kmart Corp., No. 11-cv-2575 WHA, 2013 WL 6599534, at *1 (N.D. Cal. Aug. 13, 2013). Notably, this PAGA case was certified as a class action before proceeding to trial.

⁷⁴ Id., Dkt. No. 75.

⁷⁵ Garvey v. Kmart Corp., No. C 11-02575 WHA, 2012 WL 2945473, at *7 (N.D. Cal., July 18, 2012).

⁷⁶ Id. at *6.

⁷⁷ Garvey, No. 11-cv-2575 WHA 2012 WL 6599534, at *1 (N.D. Cal. July 18, 2012).

⁷⁸ Id.

⁷⁹ Rix v. Lockheed Martin Corp., No. 09-2063 CAB, slip. op. at 1-2 (S.D. Cal. Feb. 15, 2013).

⁸⁰ Id.

⁸¹ Id. at 3.

⁸² Id. at 2.

⁸³ Id. at 1.

⁸⁴ Rix, No. 09-2063, Dkt. No. 97.

⁸⁵ Rix, No. 09-2063 CAB slip. op. at 3.

⁸⁶ Guifu Li v. Perfect Day Franchise, Inc., No. 10-cv-1189 LHK, 2012 WL 2236752, at *17 (June 15, 2012).

⁸⁷ Guifu Li, No. 10-1189, Dkt. No. 520-1.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Guifu Li, 2012 WL 2236752, at *17.

Proposals for Bridging the Justice Gap across the Nation

RECENT CENSUS BUREAU DATA shows that one in three Americans qualify financially for legal services to obtain the basic needs of living—safety, subsistence, and family stability. The Legal Service Corporation (LSC), in turn, estimates that 59.4 million Americans—a 17 percent increase from 2007—will qualify for legal services in 2017. Given federal budget limitations, LSC's 2017 budget request, however, is at the 2007 funding level. Throughout the nation, states are closing courthouses and agencies and limiting services while the need for basic civil legal assistance for those who cannot afford to pay for it is great and rising. Even though the profession's pro bono efforts have improved—LSC reports 2014 was the best year for pro bono ever—pro bono efforts are not a panacea. Cost-cutting measures and technological efficiencies likewise cannot quell the harm to public protection from the tide of staff reductions, office and court closures, and denial of basic legal services. In spite of strong support and effort for legal service funding and pro bono provision of legal services, a great justice gap persists for the poor and persons of moderate means. The access to justice gap is a public protection crisis.

Protecting the public by bridging the justice gap has been the hard work of the legal profession, with support from the courts and local, state, and national bar associations. The Los Angeles County Bar Association's Counsel for Justice, through the generous support of its members, provides crucial legal services to veterans, victims of domestic abuse, people with AIDS, and immigrants, as well as education about mediation and alternative dispute resolution. Fulfilling LACBA's mission to advance the administration of justice, many members of LACBA, including the Access to Justice Committee, provide educational and hands-on services for those in need of civil and criminal legal services.

Public protection is the California State Bar's statutory mission, and many entities within the State Bar are developing bridges to the justice gap. The State Bar's Access to Justice Commission spearheads numerous committees and programs that enable innovation in, and funding for, the expansion of legal services to the poor and those of modest means, including the very successful Incubator Guide, a national resource for incubator attorney programs. A working group of the State Bar's Committee on Regulation, Admission and Discipline Oversight investigated and recommended regulating limited licenses to practice law without attorney supervision in the limited areas of creditor/debtor, family, landlord/tenant, and immigration law. The State Bar's Civil Justice Strategies Task Force is further studying the issue.

California has the largest state court system in the nation. California courts serve 38 million people, nearly 12 percent of the U.S. population. The California courts implemented a spate of cost-cutting efficiencies and technological innovations, court facilitators and self-help centers, but the demand for legal assistance, and the lack of representation for it, continues to explode across the state. To meet the challenges of

protecting the public's access to state courts, California Supreme Court Chief Justice Tani Cantil-Sakauye established the Commission on the Future of California's Court System. The commission held hearings on innovations in technology to assist self-represented parties, enhance court proceedings, and enable online transactions. The commission also explored ways to reduce misdemeanors to infractions. Additional suggestions include reducing jury size in certain civil cases and the number of peremptory challenges in misdemeanor cases. In public addresses, the chief justice also suggests that the practice of imposing bail in certain infraction cases should not be required.

Underfunding the legal system across the nation has fueled a proliferation of unregulated legal service providers.

Underfunding the legal system across the nation has fueled—albeit unintentionally—a proliferation of unregulated and potentially inadequate legal service providers (LSPs) and entities. To respond to the potential public protection threat posed by unregulated LSPs and entities, the American Bar Association's House of Delegates (HOD) approved amended resolution 105, adopting the ABA's Model Regulatory Objectives for the Provision of Legal Services. This ABA resolution urges the states to recognize that each "state's highest court, and those of each territory and tribe" has the authority to regulate LSPs, including nontraditional legal service providers. The resolution recommends that LSPs' regulation should be guided by a number of enumerated model regulatory objectives, the first of which is public protection. The ABA Commission also recently circulated for comment an Issues Paper Concerning Unregulated LSP Entities. With the public increasingly turning to unregulated LSPs, especially internet entities, as a solution to the shortage of legal services, the commission believes full exploration of "the regulatory issues associated with this development" is necessary to ensure adequate public protection. The regulation of traditional law practice entities, such as law firms, is not exempt.

Judy Martinez, chair of the ABA's Futures Commission, reminds us that we are sworn to serve the public and we "must embrace change in terms of how it will help the public we are sworn to serve." The father of the ABA's Futures Commission, former ABA President William Hubbard, holds our feet to the fire to develop a sense of urgency about bridging the "justice gap while continuing to deliver services in an effective and efficient way." Guided by a commitment to public protection, we distinguish ourselves as members of the profession of law, as opposed to members in the business of law. ■

Mary E. Kelly is a member of LACBA's Board of Trustees and an ex officio commissioner of the California Access to Justice Commission.

**MOST AFFORDABLE ABA LAW SCHOOL IN CALIFORNIA
RANKED #3 IN DIVERSITY IN THE NATION**

The Only ABA-Approved Law School in Inland Southern California

**OUR MISSION IS TO EDUCATE
ATTORNEYS FROM THE COMMUNITY
THAT WILL RETURN TO SERVE
THEIR COMMUNITY.**

Educational reforms such as True Tuition (a flat tuition rate for all and the lowest in California), bar exam readiness built into the curriculum, and practical hands-on experience that clients and employers welcome – this is what makes our brand of law education accessible and ultimately, successful.

And, as the only ABA-approved law school in our area, our graduates will fill the critical need for highly qualified attorneys in the inland counties of San Bernardino, Riverside, and the eastern San Gabriel Valley, fighting for the basic rights of individuals and justice for all.

Find out more at law.laverne.edu.



UNIVERSITY OF LAVERNE
College of Law

320 East D Street / Ontario, CA 91764
Tel: (877) 858-4529 / Fax: (909) 460-2082
law.laverne.edu



PAYMENT PROCESSING, EXCLUSIVELY FOR ATTORNEYS.

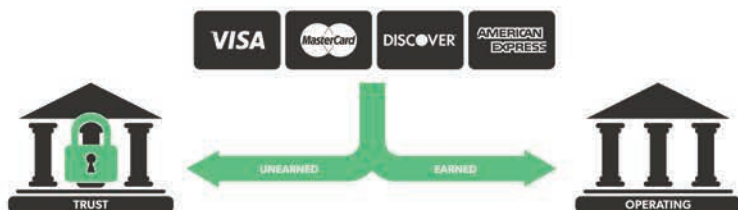


LACBA
LOS ANGELES COUNTY BAR ASSOCIATION
Proud Member Benefit Provider

1.95% & 20¢ per transaction | No swipe required | No equipment needed

Helping law firms get paid.

IOLTA guidelines and the ABA Rules of Professional Conduct require attorneys to accept credit cards correctly. We guarantee complete separation of earned and unearned fees, giving you the confidence and peace of mind that your transactions are handled the right way.



www.LawPay.com/lacba | 866.376.0950

LAWPAY[®]
CREDIT CARD PROCESSING