2010 Guide to Investigative Services

Los Angeles Lawyer

July/August 2010 /$4

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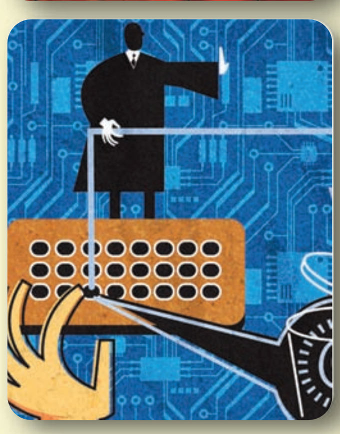

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Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.

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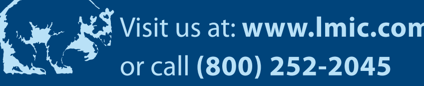

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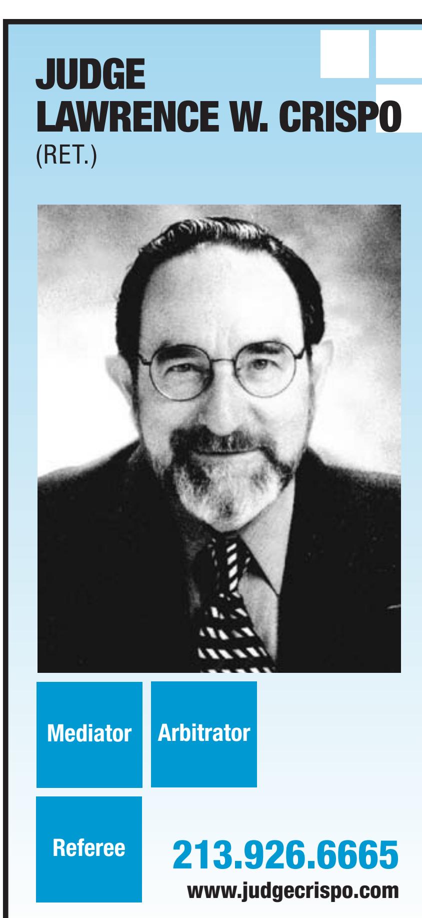

FROM THE CHAIR

Justice Paul Boland left a mark on the legal community that is indelible. He penned hundreds of opinions at the California Court of Appeal and issued thousands of decisions while he sat in the Los Angeles Superior Court. Even with all these accomplishments, his greatest legacy may be his impact on the many people who appeared before him. The reason is simple. Whether presiding over a mundane motion or inviting a party into the hallway outside chambers during a settlement conference, Justice Boland made sure that no one was left with a sense of incivility or disrespect for the process.

He was intensely focused on the fact that the litigants in the cases before him were real people with real interests. Justice Boland always made sure that each party was heard, and he did so usually with one elbow resting on the other arm, a finger raised to his lips as if to make sure he would not speak out of turn and miss something that was said.

Many have rightly lauded Justice Boland's achievements. For me, none was more gratifying than to see him elevated to the court of appeal as a justice. I know of no one for whom the title was more fitting.

I believe that Justice Boland's plan to advance civility and respect for the legal profession and the cause of justice stemmed from two factors: mentoring and writing. In some ways, the two were one. While I was in law school and clerking for him, Justice Boland encouraged me to write and to write well. He took the time to show rather than to preach. At the time, I hardly knew that our precious time together was but a continuation of what he had been doing ever since he began in the profession at the Western Center on Law and Poverty, then as a professor, associate dean, and director of clinical legal education at UCLA. In showing me the way the law was supposed to work, he explained how to understand the implications of a pending decision while deciding only the case before him. During my early years of practice, it was Justice Boland who channeled my angst about what the law failed to address into writing articles about where the law should be.

This month could not be more timely for sharing Justice Boland's encouragement with *Los Angeles Lawyer*'s readership (and future authors). Gerald Uelmen's article in the June 2010 issue of *California Lawyer* reminds readers of the 2007 *Cardozo Law Review* survey about the editorial direction of law reviews. The survey concludes that since 1960, the trend among law reviews has been to move away from practical articles that address questions of law and provide solutions to relevant legal problems. Instead, these reviews are electing to publish theoretical articles that, impliedly, help few or none. *Los Angeles Lawyer*'s goal (and the reason for its success, in my view) is to each month provide its readers with at least one article of interest that directly applies to their widely varied areas of practice.

While I mourn Justice Boland's passing, I also smile every time I read or cite one of his opinions. Without his lessons and encouragement, I would neither have the pleasure of serving on *Los Angeles Lawyer*'s Editorial Board nor the honor to now serve as its chair. With Justice Boland's spirit of respect for the cause and process of justice, and an awareness of the shared need of all lawyers to advance the law, I invite encourage more seasoned lawyers to mentor their younger counterparts—and I invite all lawyers to submit articles of practical significance for publication in *Los Angeles Lawyer*. ■

Michael A. Geibelson is a business trial lawyer with Robins, Kaplan, Miller & Ciresi L.L.P., where he handles unfair competition, trade secret, and class actions. He is the 2010-11 chair of the *Los Angeles Lawyer* Editorial Board.

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LETTERS

In the From the Chair column in the March 2010 issue, Mr. Schnider's points about willingness to compromise are well taken. However, I am shocked and dismayed that not only does he not know how to spell Dr. Seuss, but apparently not a single one of your editors does, either, because no one caught the mistake. And it's misspelled more than once (every time it appears, in fact). Shame on you.

Susan Oder

I was an expert witness in a medical malpractice case that was tried in a Los Angeles County courtroom recently. What side I testified on behalf of and what the outcome of the trial was is of no consequence. What is important is how what happened, happened.

The matter at issue was that a person was an inpatient at a hospital in Los Angeles County and while there developed another medical problem of some seriousness. The family maintained that the cause of the second illness was substandard and inappropriate care, and the hospital and doctors involved said that was not the case.

While the matter was obviously contentious, it was not complicated. The essential medical records to be reviewed constituted a stack of documents less than six inches high. The necessary literature review by experts could have been done in less than three hours. The individuals involved and their lawyers and the expert witnesses and a neutral party could have sat around a conference table and in two hours presented and discussed the entire matter and its background and allowed a fair conclusion to be decided upon.

As you can no doubt guess, that's not what happened.

What happened was a three-week trial involving over 100,000 pages of documents being prepared, copied, re-copied, and duplicated again. A judge, multiple expert witnesses, a bailiff, a court clerk, a court stenographer, jurors and alternate jurors, and I don't know how many other supporting players were involved, as were two lawyers on each side and three weeks of use of a beautiful, wood-paneled courtroom that had to be almost 1,000 square feet.

Thirty-four years ago in California we enacted the Medical Injury Compensation Reform Act. Since that time almost every physician has loved it and almost every lawyer has hated it. What we should be able to agree on, however, is that the frictional costs of our current legal system are spinning out of control and are increasingly interfering with the ability of that system to serve the people who depend on it for justice.

Left unchecked, the operating costs of our legal system, like our healthcare delivery system, are on a path to becoming unsustainable. As such they demand reform. At the present time the legal profession has the ability to take the lead and provide the real, significant, and to some, painful reforms needed to reduce the unnecessary, cumbersome, and expensive procedures now in place.

How long you will retain that ability before some level of government takes it away from you remains to be seen, but it's not as long as some of you would like.

Richard Corlin, M.D.

In reading the November 2009 issue's Closing Argument ("We Need a Creative Solution to the Superior Court Funding Crisis") written by Judge Charles W. McCoy Jr., I couldn't help notice the cause of the court's funding problems and wonder about possible solutions.

The cause is, obviously, one branch of government (the legislature) dictating and controlling another branch of government (the judiciary) through the use of the power of the purse. The court has limited itself to a submissive role, thereby abandoning its authority and role in society.

Real solutions include variations of going rogue. For example, the courts could declare the legislature's authority over it to be unconstitutional and order the shutdown of the legislature until it submits. It could also direct the payment from the state treasury for its needs. It could retain all fines, forfeitures, fees, and costs for its own use. It could prohibit active members of the bar from representing either of the other two branches of government in matters affecting its jurisdiction and ability to exercise it. It could claim a share of all judgment satisfactions to be used for its support. It could go on strike by simply not showing up for work. Creative ideas are unlimited.

The courts have let themselves become the servants of the other branches of government and have abdicated the role that citizens believe they should have. The various judicial officers have various powers over all lawyers, courtrooms, declarations to the people, and directives to the other branches of government. Getting some ambition from rereading *Marbury v. Madison,* the courts need to assert their position and take back the authority they have abdicated to the other branches of government. The alternative of judicial officers getting a full paycheck, courthouse doors closed 20 days per month, accused released for failure to provide speedy trials, criminal and civil justice abdicated to mobs in the streets, is a shocking scenario.

Without bold action by the courts, the day is coming when justice will fail and anarchy will take its place.

Jerry O. Crow

Libel Tourism

Regarding "The Danger of 'Anti-Libel Tourism' Legislation in America" (Closing Argument, December 2009): what is the ominous "danger" that Neville Johnson and his colleagues who represent plaintiffs in libel cases are so alarmed about? That any foreign libel judgment sought to be enforced in U.S. courts was obtained under laws at least as protective of freedom of speech and the press as provided by the U.S. and state constitutions. Sounds good to me.

It's been well established for centuries that a foreign judgment will not be enforced if rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law, or is based on laws and procedures that are repugnant to our public policy.

The bipartisan Free Speech Protection Act of 2009, sponsored by Senators Arlen Specter, Joseph Lieberman, Charles Schumer, and Ron Wyden, would achieve these laudable goals. The bill is widely supported by

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The tradition of the Red Mass has continued in the United States. Each year in Washington, D.C. the members of the United States Supreme Court join the President, and members of Congress in the celebration of the Red Mass at the National Shrine of the Immaculate Conception. Los Angeles has celebrated a Red Mass for a quarter of a century. The Mass is attended by government officials, judges, members of the legal profession and their supporters and is open to all faiths.

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Stephen F. Rohde

Regarding the Closing Argument column of December 2009: should America's freedom of speech be destroyed by allowing the wacky libel laws of our overthrown colonial masters, the British, to eviscerate the First Amendment?

The answer, of course, is not just no but hell, no! Even so, the Closing Argument claims that the United States should enforce foreign libel judgments attacking the free speech of Americans and, effectively, repeal the First Amendment.

Even the British are worried about their screwy libel laws—Jack Straw, the British justice secretary, formed a committee to propose reforms by March 2010. *See* "Overdue Reforms May Be on the Way," *The Economist*, December 30, 2009. As *The Economist* notes, "Scientists worry that claimant friendly rules are stifling the criticism on which science depends. Henrik Thomsen, a Danish academic, is being sued by GE Healthcare after he suggested at a conference in Oxford that one of the company's drugs might have potentially fatal side-effects. Peter Wilmshurst, a British cardiologist, is facing a lawsuit from an American firm, NMT Medical, over comments he made on an American Web site about a study into using heart implants to treat migraines."

The one-party dictatorship of Singapore is infamous for using British-type libel laws to destroy political opponents and to prevent the slightest criticism of the regime.

There is no good reason to allow foreigners to effectively repeal the First Amendment.

Congress should speedily pass legislation to defend American free speech rights against oppressive foreign libel suits and judgments.

Howard Strong

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BY ALAN K. STEINBRECHER

Coming to Terms with the Fallout from the Recession

THE COUNTRY'S SEVERE ECONOMIC RECESSION has affected all of us in some way. Many of us have family members or friends who have lost their jobs, had their hours reduced, become subject to compulsory furlough, or been unable to find work. Others have felt the recession directly in their legal practices. Most of us have experienced first hand the diminution of services provided by state government and our communities.

The Los Angeles County Bar Association, too, has felt the effects of the recession, and coming to terms with that fallout will define the areas to which the Association's leadership will devote much of its attention this coming year. These include 1) ensuring the Association's continued financial stability, 2) increasing public recognition of the Association and its services, and 3) supporting the Los Angeles Superior Court as it addresses its monumental budget challenge.

The economic conditions have had a predictable effect on the Association: membership has declined slightly; traditional sources of nondues revenue have diminished; and, most significantly, interest derived from investments has plummeted. In response, the Association's leadership has acted proactively to reduce costs in a number of ways, including instituting salary and hiring freezes, reducing retirement plan contributions, and closely controlling expenditures. Much of this burden has unfortunately been borne by the Association's staff. Our staff has remained extremely loyal throughout this period and continued to perform their jobs in an exemplary manner, but they should be relieved of this sacrifice as soon as feasible.

This year the leadership will continue to monitor the Association's finances closely. Each service that the Association provides will be scrutinized to ensure that we are achieving maximum benefit for the costs incurred, and, where practical, we will consider every opportunity to reduce direct costs while maintaining the level of services and support that our members, and those to whom we provide service, expect. This effort will be led by the Association's Finance Committee, with the purpose of cutting any unnecessary expense or redundancy so that we can end the salary, hiring, and retirement contribution freezes as soon as is prudent.

The second area that will occupy the leadership's attention this year is raising the awareness of both attorneys and the general public of the Association and what it does. Too often attorneys, including members, confess that they really are not sure why they belong to the Association, or what it does other than provide continuing legal education. Even those who are aware of the good services the Association provides to the community, including our Lawyer Referral and Information Services, Dispute Resolution Services, and the Domestic Violence, Immigration, and HIV/AIDS Projects, often do not realize that those programs are provided by us. Of course, the public has even less appreciation than we do. There is simply very little understanding of the totality of the Association's contributions to its members, nonmember attorneys throughout Southern California, and the public at large.

During this year we will discuss how best to increase awareness of the Association and how better to communicate with our members, other attorneys and organizations, and the public. This involves a perhaps underappreciated effort first to understand who we are, who we want to be, and how we are presently perceived. Once those questions are addressed, it can be determined how best to articulate our message to others. That effort is underway and will take significant time and attention throughout the year.

Supporting the Los Angeles Superior Court

California's daunting budget woes are forcing severe budget cuts on the superior courts throughout the state—nowhere with more pain than in the Los Angeles Superior Court. The court has faced a significant budget shortfall during the last two years, and more is expected for the 2010-11 fiscal year. The Association, under the leadership of Immediate Past President Don Mike Anthony, has taken a strong stand in support of Presiding Judge Charles W. "Tim" McCoy's efforts to reduce the amount of those cuts as much as possible in order to avoid closing courtrooms and courthouses—facilities that are absolutely critical for the just functioning of society. That support will continue.

Because this issue is so vital to our membership and the public at large, it is important to understand the situation as it exists at this writing in mid-June. The future that the court potentially faces is dire: "[R]eductions in funds previously made available to the Los Angeles Superior Court will result in lost court days, courtroom closures, and reductions in capacity…."[1] To appreciate the severity of the problem confronting the court, it is important to review its operation and the current budget situation.

The Los Angeles Superior Court is the largest and most complex trial system in the country. It serves 9.5 million people, operates 49 courthouses, has 600 judicial officers, and employees more than 5,000 individuals. Every day more than 100,000 people utilize court services throughout the cities and neighborhoods of Los Angeles County. The court experienced a $79.3 million budget shortfall for the 2009-10 fiscal year. Under a reasonable worst-case scenario, that annual deficit could continue for three more years, rising to $118.3 million in the 2012-13 fiscal year.

Under the leadership of Judge McCoy, the court has acted proactively to lessen the severity of that deficit. It has 1) saved $8 million per year through salary savings, 2) made cuts in its services and supplies budget to save an additional $8 million a year, 3) saved $12 million through a furlough and one-day-a-month court closure plan, a plan that was conceived by Judge McCoy and later adopted statewide, 4) generated ongoing savings of an initial $9.4 million per year by the reduction of 150 employees through attrition, 5) canceled programmed raises for employees not represented by a union, 6) declined to offer raises and requested substantial salary reductions in negoti-

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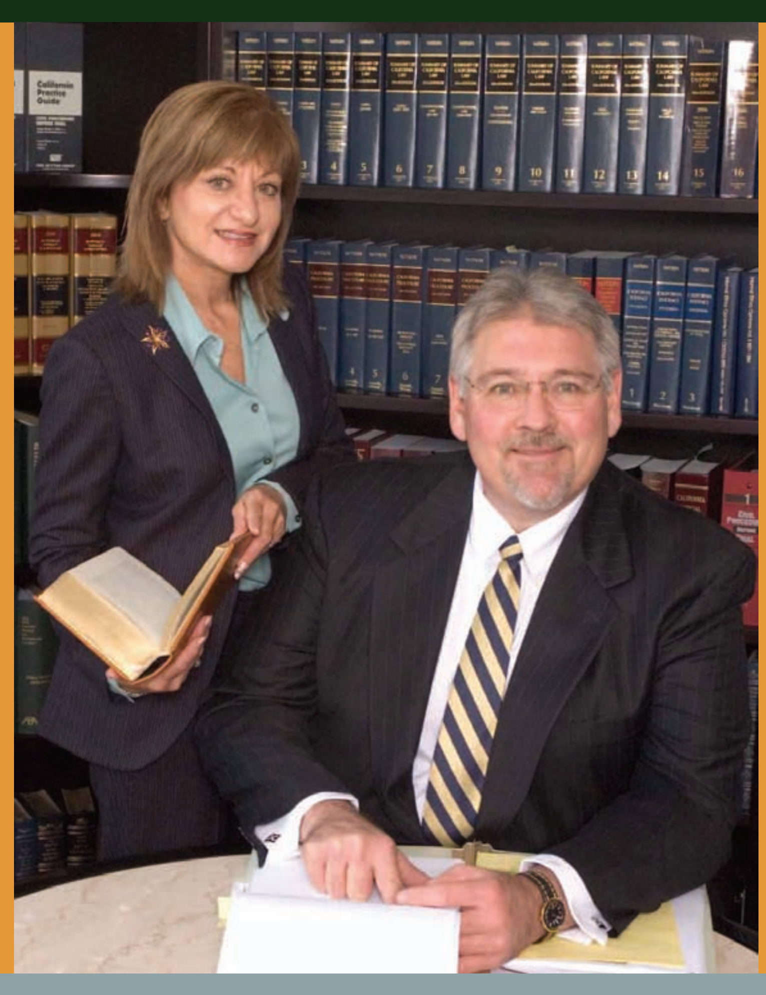

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ations with represented employees, and 7) restructured operations to deal with ongoing workforce reductions.[2]

In addition, the court used $37.2 million of a $109 million discretionary fund that it had created over the past several years for the purpose of mitigating occasional budget shortfalls. As Judge McCoy has explained, however, "This is *one-time money* that needs to be deployed over time to facilitate a gradual, prudent, manageable contraction of the organization."[3] These funds, moreover, can defer layoffs for only several months.

The court, having exhausted all cost-reducing methods that could generate large-scale savings and having used its discretionary fund balance to postpone layoffs, now has reluctantly initiated a planned layoff that would reach 829 court employees: 329 employees were laid off in March, and an additional 500 will be terminated in September.[4] Unless a compromise is reached, these layoffs could continue through August 2011 and, when completed and coupled with ongoing attrition, could result in the court having 1,827 fewer employees than it had in 2008-09—a reduction of more than 30 percent of its workforce.

The effects of these personnel reductions would be devastating to the court and the community. A rough rule of thumb is that it takes 10 court employees to operate each courtroom. The currently planned reduction will therefore effectively force the closure of approximately 180 courtrooms and nine courthouses. Since the first priority of the court will be to retain as many criminal courtrooms as possible for public safety reasons, the burden of closed courtrooms will be borne disproportionately by the civil, family law, and specialty courts.

In addition to taking the steps necessary to implement the budget cuts the court has faced to date, Judge McCoy has exercised significant statewide leadership by advocating that other revenue streams be created or be made available in order to reduce some of the most onerous results of the budget shortfall. Fortunately, his efforts have borne some fruit and may prove successful. In May, nearly identical bills to provide additional revenue to the courts passed the California Senate and Assembly. If this consensus survives the entire budget process, it will free funds that were previously dedicated solely to internal court programs such as courthouse construction and a statewide computer system. It will also direct additional funds to the courts from increased user fees and fines. While not perfect, it will provide significant relief to the courts, particularly to our Los Angeles Superior Court, and avoid the September layoffs.

A fundamental goal of the Los Angeles County Bar Association is to support the administration of justice. Nothing is more critical to the administration of justice than keeping courthouses open so that criminal trials may be held and the community has the ability to resolve family, probate, and civil disputes expeditiously. The Association has steadfastly supported the May court funding budget bill. On May 27, for instance, its leadership traveled to Sacramento to express its continuing commitment to keeping the courthouses in Los Angeles County open and to thank the legislative leaders involved in passing the court funding bills.

The economic environment of the last two years has presented significant challenges to the Association. We are responding to those challenges, preparing for the future, and speaking on behalf of our courts and the public's access to justice. It will be a trying but hopefully rewarding year. ■

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[1] Roy Weinstein & Stevan Porter, Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court 1 (Micronomics Inc. 2009).

[2] Letter from Judge Charles W. McCoy to the Judicial Council of California (Feb. 22, 2010).

[3] *Id.*

[4] *Id.*

BY DAVID REINERT

The Barristers Offers a Multitude of Professional Opportunities

AS THE INCOMING PRESIDENT of the Los Angeles County Bar Association's Barristers, it is my privilege to write about the coming bar year and invite participation in this vibrant organization. For decades the Barristers has represented the young attorneys of Los Angeles. Our membership includes all those under 36 and those who have been practicing for five years or less. We offer opportunities for young lawyers to engage in their profession through continuing education, community service, and interaction with established lawyers.

Continuing legal education is one of the cornerstones of Barristers programming. We strive to educate our members with top-notch programming and to introduce our members to the most prestigious names in the Los Angeles legal community. This year, thanks to the Professional Development Committee, we provided dozens of hours of MCLE credit for our members. The committee is already engaged in planning for next year to increase the number of hours we offer while making every program interesting at a cost that allows broad participation.

The Bench and Bar Committee supports the Professional Development Committee by providing small-format programs with prominent judges, including one-on-one discussions with members of the bench about specific topics. The Legal Profession Committee is working on programming to address the structural needs of lawyers by tackling such topics as getting a job in a down market and starting a solo practice.

Being part of a bar organization means more than just keeping up with education requirements. The Government Relations Committee is reaching out to local and state politicians and hosting gatherings at which Barristers can meet the heads of government agencies in small settings. These events provide an excellent opportunity to network with other lawyers while providing up-close exposure to the people who make things happen in Los Angeles. We have hosted or cohosted City Attorney Carmen Trutanich, U.S. Attorney Andre Birotte, and City Council President Eric Garcetti, among others. This committee is continuing to reach the Angelenos who shape this city's future.

The Networking Committee gives attorneys of all ages a chance to gather to socialize and network with the top names in Los Angeles as well as one another. We are very proud that this year we have increased the relevance of these programs with our Networking for a Cause events, at which we charge a nominal fee for entry to support a charity. We have hosted events for Children's Law Center and the Barrister's Domestic Violence Clinic and are planning on expanding these events in the coming year. The members of the Networking Committee are excited about finding fun and interesting places to hold events and making a difference while having a good time.

Barristers have also made great strides this year in making a difference by reaching out beyond our own membership. The Community Outreach Committee has partnered with the Los Angeles Superior Court to put on several power lunches at which high school students are introduced to the court and grouped with judges, lawyers, and dignitaries. These memorable programs are valuable for all those involved. Students get a hands-on learning experience, and our members get to interact with judges. The partnership with the court has been a great success, and we will be expanding it over the course of the year.

Continuing legal education is one of the cornerstones of Barristers programming. We strive to educate our members with top-notch programming and to introduce our members to the most prestigious names in the Los Angeles legal community.

Our Pro Bono Committee is focused on providing our members with pro bono opportunities. For a second year in a row we had an overwhelming response to our Law Day program; we had more volunteers than we could effectively use. The committee is currently working with established nonprofit organizations to ensure that we match community needs with the services that our members want to offer.

The Barristers is unique within the Los Angeles County Bar Association. We represent lawyers who practice in a multitude of areas with many different skill sets. This is a challenge—as we cannot narrowly tailor ourselves to any one area—and a blessing, as we can bring together talents and skills that encompass every area of law.

The Los Angeles legal community is so diverse that we have a tendency to step on one another's toes. My goal for the coming year is to streamline the services and programming we provide to our community. That means we will be active with other bar associations, including bars from divergent geographic and ethnic communities and other sections within LACBA. Our goal should not be to create lots of programs. We need to ensure that each program we create is an exceptional program and unique enough to be valuable to our constituents. Our committees are hard at work creating content that meets those ideals.

I want to encourage members to participate in the Barristers. Involvement is an exciting way to become a better lawyer and a more informed member of the Los Angeles legal community. ■

David Reinert is a deputy district attorney and the president of the Barristers.

BY JAMES P. KREINDLER AND MEGAN WOLFE BENETT

Finding Justice for Victims of State-Sponsored Terrorism

LAWSUITS AGAINST FOREIGN GOVERNMENTS accused of supporting terrorism present problems that are not routinely encountered in more conventional actions. Legislation to solve these problems has repeatedly fallen short of its goals. In light of the idiosyncrasies of terrorism tort actions, counsel for plaintiffs are well advised to think beyond the law, consider their cases in a historical context, and look for solutions that do not involve litigation.

No less an authority than Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia has reached this same conclusion. Judge Lamberth has overseen a number of private actions against the Islamic Republic of Iran and has observed, "[T]he stark reality is that the plaintiffs in these actions face continuous roadblocks and setbacks in what has been an increasingly futile exercise to hold Iran accountable for unspeakable acts of terrorist violence."[1]

Judge Lamberth has also acknowledged that the only realistic means for victims of state-sponsored terrorism to obtain compensation are political, not judicial. The 2008 Libya Claims Resolution Act serves as an example of this process. After years of tumultuous litigation against Libya for its role in the bombing of Pan Am Flight 103 on December 21, 1988, diplomatic and judicial negotiations came to a close in 2008 with the final payment made by the Libyan government to victims of the bombing. The settlement demonstrated that the best—indeed perhaps the only—way to obtain cooperation from a foreign government that has sponsored terrorism is through diplomatic or political efforts.

The Terrorism Exception

Ordinarily, foreign governments (including government agents) are granted immunity from the jurisdiction of courts of the United States pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA).[2] Under the original FSIA, no exception to the bar on jurisdiction for acts of terrorism existed. Consequently, suits against foreign governments or agents either directly or indirectly responsible for terrorist acts causing deaths and injuries were routinely dismissed.[3]

In 1996, however, Congress created an exception to immunity under the FSIA for state-sponsored terrorist acts.[4] This provision, originally codified as 28 USC Section 1605(a)(7) and known as the "terrorism exception,"[5] eliminated foreign sovereign immunity for actions against a country that the State Department has listed as a State Sponsor of Terrorism and that either 1) engaged in a direct act of terror or 2) provided material support or resources for terrorist acts.[6]

Section 1605(a)(7) was intended to provide U.S. victims of state-sponsored terrorism judicial redress for their injuries. Predictably, substantial effort was spent defining and clarifying what it meant to provide "material support or resources" for terrorist acts,[7] but, as it turns out, the greatest obstacle for plaintiffs was not that phrase but the dispute over whether Section 1605(a)(7) provided a litigant anything more than a forum. The terrorism exception allowed a plaintiff into the courthouse, but did it give a plaintiff a way to recover money damages?

RICHARD EWING

Congress, seeking to answer in the affirmative, adopted what is commonly known as the Flatow Amendment five months after enacting Section 1605(a)(7).[8] The Flatow Amendment stated that a foreign state or an agent of a state sponsoring terrorism "shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that [party] for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28 United States Code [repealed] for money damages…[including] punitive damages."[9] The exception and the amendment gave plaintiffs not only access to federal courts but also a substantive legal right to recover punitive damages.

The cosponsors of the Flatow Amendment were buoyed by the

James P. Kreindler is a partner and Megan Wolfe Benett is an associate at Kreindler & Kreindler LLP. Kreindler & Kreindler LLP were lead counsel in the Libya terrorism litigation.

result in the first case tried under it. Stephen Flatow sued the government of Iran after his daughter was killed in a 1995 suicide bombing attack in the Gaza strip.[10] Judge Lamberth, in a bench trial, returned a compensatory damages award of $22.5 million and a punitive damages award of $225 million. After that landmark case, hope arose that victims of terrorism were going to "sue the terrorists out of business."[11] Many other plaintiffs with claims against Iran followed Flatow's lead, and, in part because Iran refused to appear, large judgments quickly accumulated.

Obtaining an initial judgment was only the beginning of the battle, however. In 2004, the Court of Appeals for the District of Columbia, in the case of *Cicippio-Puleo v. Islamic Republic of Iran*, ruled that neither Section 1605(a)(7) nor the Flatow Amendment established a cause of action against foreign state sponsors of terrorism. Rather, the appellate court explained, Section 1605(a)(7) was "merely a jurisdiction conferring provision" and the Flatow Amendment only provided a right against individual agents, officers, or employees of the foreign state, but "not against the foreign state itself."[12]

Plaintiffs were quick to begin using Section 1605(a)(7) as a mechanism to obtain jurisdiction over the foreign state while relying on state tort laws or other federal statutes for their substantive causes of action.[13] Plaintiffs had a means by which they could obtain substantial judgments under existing law, but the actions remained unwieldy and produced little actual recovery. For example, in *Peterson v. Islamic Republic of Iran*, the plaintiffs were awarded a $2.6 billion judgment for the injuries and deaths suffered in the 1983 bombing of the U.S. Marine barracks in Beirut but have yet to receive payment. Judges also quickly realized that the damages available to plaintiffs who were domiciled in different jurisdictions varied depending on the law of the plaintiff's home jurisdiction, and thus a court would be left to apply the law of dozens of different jurisdictions in a single action.[14] Added to the difficulties of recovery, with the inapplicability of the Flatow Amendment to actions against governmental entities themselves, plaintiffs lost the opportunity to claim punitive damages, and the deterrent purpose of exemplary awards disappeared.

Frustrations with Section 1605(a)(7) were not limited to the damages determinations. Perhaps the greatest disappointment arising from litigation against Iran was the inability to enforce the judgments. An issue peculiar to the plaintiffs in actions against Iran was the existence of the Algiers Accords, executed on January 19, 1981, to end the Iranian hostage crisis. Pursuant to the Algiers Accords, U.S. presidents for nearly 30 years have issued executive orders and treasury regulations by which the United States has taken control of all U.S.-based Iranian assets and either held them or returned them to Iran. Consequently, despite judgments totaling an astounding $9.6 billion, victims had recourse only to about $16.8 million of Iranian assets.[15]

A New Section 1605A

In response to these obstacles to recovery, Congress took action again, repealing Section 1605(a)(7) and replacing it with Section 1605A. While the new law's exception to foreign sovereign immunity is identical to that in the repealed legislation, Section 1605A adds new substantive rights and remedies.[16]

First, the new law expressly provides a federal right of action, eliminating the problems with the pass-through function of Section 1605(a)(7). Judge Lamberth, relying on an appellate decision that rejected the application of federal common law to terrorism exception cases under the Flatow Amendment, has concluded that in cases brought pursuant to Section 1605A, federal courts will apply, instead of federal common law, "well-established principles of law, such as those found in the Restatement (Second) of Torts and

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other leading treatises, as well as those principles that have been adopted by the majority of state jurisdictions."[17] The consistent application of legal principles and precedents in all liability and damages determinations will result in greater uniformity than before in Section 1605(a)(7) actions and will surely ease some of the burdens on courts and plaintiffs.

Other improvements from Section 1605(a)(7) include access to punitive damages (functionally unavailable after the *Cicippio-Puleo* decision), compensation for special masters appointed to assist the courts in determining damages awards, and enhanced mechanisms for the enforcement of civil judgments. This final point is important because many plaintiffs litigating actions under the old section or under the Flatow Amendment found themselves in the unhappy position of winning the battle and losing the war. They obtained sizable judgments against a state sponsor of terrorism but were without means for collecting and thus achieving their goals of accountability, deterrence, and justice.

The new Section 1605A is an improvement, but as Judge Lamberth observed, "The most difficult issues confronting this unique area of the law relate to how plaintiffs in these FSIA terrorism cases might enforce their court judgments."[18] With great frustration, he noted:

> [W]hat the Court sees in [Section 1605A] is not so much meaningful reform, but rather the continuation of a failed policy and an expansion of the empty promise that the FSIA terrorism exception has come to represent. Through the enactment of [Section 1605A], the political branches have promoted or otherwise acquiesced in subjecting Iran to sweeping liability while simultaneously overlooking the proverbial elephant in the room—and that is the fact that these judgments are largely unenforceable due to the scarcity of Iranian assets within the jurisdiction of the United States courts.[19]

The enforcement problem in Judge Lamberth's Iran litigation is specific to that defendant, but the fact is that any foreign government that falls within the terrorism exception of the FSIA will have been designated a state sponsor of terrorism by the State Department and, thus, its assets for satisfaction of judgments will be minimal. This is because the designated nations have little to no commercial assets in the United States, or because the assets of the designated nations are held in institutions that are immune from the enforcement of judgments under the FSIA. For all its good intentions, the new Section 1605A leaves plaintiffs where they were with the old Section 1605(a)(7) in terms of enforcement and collection.

The Libya Claims Resolution Act

Under either section, then, the difficulty of recovery endures. Judge Lamberth has excoriated the political branches of the federal government for continuing to authorize private litigation when "these private terrorism suits represent a novel…experiment…that has failed."[20] Plaintiffs suing Libya and Iran faced the same problem: limited access to assets in the United States. With the Libya cases, however, settlement negotiations succeeded.

Among the 22 consolidated actions filed against Libya was the Pan Am 103 suit arising from the Lockerbie, Scotland, bombing on December 21, 1988. Had the plaintiffs proceeded to trial and obtained a judgment, some Libyan assets frozen in the United States were in theory available to satisfy the claims. Those assets, however, were modest compared to the potential liability exposure and were sought by other creditors. Nevertheless, by proceeding through political and diplomatic channels, the Pan Am 103 plaintiffs obtained a global settlement of $2.7 billion fully paid by Libya.

Settlement negotiations led, after several years, to an agreement in May 2002 in which the Libyan delegation agreed to pay up to $10 million in each of the 270 decedents' cases in

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three installments upon the occurrence of three trigger events. Trigger A was that the U.N. Security Council would lift the sanctions imposed on Libya in U.N. Resolutions Numbers 731, 748, and 833, and Libya would pay $4 million to each estate representative. An additional $4 million was to be paid upon the lifting of certain U.S. commercial sanctions imposed on Libya (Trigger B). The final $2 million was to be paid upon the removal of Libya from the state sponsors of terrorism list (Trigger C).

In August 2003, Libya submitted a letter formally accepting responsibility for the Lockerbie bombing to the U.N. Security Council—the accountability that so many plaintiffs felt was of primary importance. Libya then deposited $2.7 billion in an escrow account to fund the settlement agreement. The Trigger A and Trigger B payments were distributed to the victims by 2004, but the removal of Libya from the U.S. State Department list of state sponsors of terrorism was delayed. After Libya was removed from the list in June 2006, it argued that its payment obligation had lapsed due to the expiration of the escrow account, from which it had withdrawn the remaining funds in February 2005. The plaintiffs argued that since Libya breached the good faith provision of the 2002 settlement agreement, its Trigger C obligation continued. While never conceding that point, Libya grew frustrated with the many suits filed against it. They included not only the Lockerbie bombing actions but also litigation initiated by victims of the UTA Flight 772 bombing in Africa, the LaBelle disco explosion, and Abu Nidal attacks. With the prospect of substantial liability exposure, Libya was anxious to resolve all U.S. lawsuits.

The State Department, with the assistance of counsel for the plaintiffs, was able to negotiate an agreement with Libya that would provide for the dismissal of all U.S. lawsuits when Libya deposited sufficient funds to adequately compensate all plaintiffs pursuing claims against Libya in U.S. courts. For this agreement to work, Congress had to pass extraordinary legislation, and the Senate and House of Representatives did so, passing the United States-Libya Resolution Act in August 2008. Several months after the act was passed, Libya deposited $1.5 billion to resolve all U.S. claims against it. All litigation against Libya is now terminated.

Four countries still remain on the State Sponsors of Terrorism list: Cuba, Syria, Sudan, and Iran. It is likely that eventually 1) all four countries will be removed from the list when their conduct warrants doing so, 2) each country will prefer a global resolution of all claims against it pending in U.S. courts to piecemeal resolution of each suit individ-

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ually, and 3) the U.S. government will also want an end to claims pending against those countries in U.S. courts. Given the experience Judge Lamberth detailed in his recent opinion, the fairest and only practical resolution for these potential future actions is the establishment of an adequate claims fund, as happened with Libya. ■

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[1] In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 35-36 (D. D.C. Sept. 30, 2009).

[2] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602-1611.

[3] Two plaintiffs sued Libya for the Pan Am Flight 103 bombing and had their complaints dismissed in 1995 on the ground that "Libya's alleged terrorist actions do not fall within the enumerated exceptions to the Foreign Sovereign Immunities Act...." Smith v. Socialist People's Libyan Arab Jamhiriya, 886 F. Supp. 306, 315 (E.D. N.Y. 1995).

[4] The exception was first enacted as part of the Mandatory Victims Restitution Act of 1996, which was a part of the Anti-Terrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, §221(a)(1)(C), 110 Stat. 1214, 1241 (formerly codified at 28 U.S.C. §1605(a)(7)).

[5] *See, e.g.,* Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F. 3d 1123, 1126 (D.C. Cir. 2004).

[6] 28 U.S.C. §§1605(a)(1) and (a)(7) (repealed).

[7] *See* Rux v. Republic of Sudan, 461 F. 3d 461, 474 (4th Cir. 2006) (The plaintiffs' allegations were sufficient to establish jurisdiction under the FSIA.); *see also* Weiss v. National Westminster Bank PLC, 453 F. Supp. 2d 609 (E.D. N.Y. 2006) (The plaintiffs' allegations were sufficient to survive motion to dismiss.); United States v. Khan, 309 F. Supp. 2d 789 (E.D. Va. 2004) (The defendant's travel to Afghanistan to fight on behalf of al Qaeda was not providing "material support" as defined in 18 U.S.C. §2339A.).

[8] Pub. L. No. 104-208, §589, 110 (1996), 110 Stat. 3009-1, 3009-172 (codified at 28 U.S.C. §1605 note).

[9] *Id.*

[10] In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 43 (D. D.C. Sept. 30, 2009); 28 U.S.C. §§1330, 1602-1611.

[11] Neeley Tucker, *Pain and Suffering: Relatives of Terrorist Victims Race Each Other to the Court, but Justice and Money Are Both Hard to Find*, WASH. POST, Apr. 6, 2003, at F1.

[12] Cicippio-Puleo v. Islamic Republic of Iran, 353 F. 3d 1024, 1032-33 (D.C. Cir. 2004).

[13] *See, e.g.,* Bodoff v. Islamic Republic of Iran, 424 F. Supp. 2d 74, 83 (D. D.C. 2006). For a pre-*Cicippio-Puleo* example of the use of state substantive law in an FISA action, *see* Pescatore v. Pan Am. World Airways, Inc., 97 F. 3d 1, 12 (2d Cir. 1996).

[14] In Heiser v. Islamic Republic of Iran, 466 F. Supp. 229 (D. D.C. 2006), the court issued a nearly 150-page decision applying the laws of 11 jurisdictions. In Peterson v. Islamic Republic of Iran, 515 F. Supp. 2d 25 (D. D.C. 2007), the court applied the laws of nearly 40 jurisdictions.

[15] *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPARTMENT OF THE TREASURY, TERRORIST ASSETS REPORT 14-15, tbls. 1, 3 (2007), *available at* http://www.treas.gov/offices/enforcement/ofac/reports/tar2007.pdf.

[16] *See* 28 U.S.C. §1605A.

[17] In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 61 (D. D.C. Sept. 20, 2009).

[18] *Id.* at 120.

[19] *Id.* at 122.

[20] *Id.* at 131.

BY RICHARD S. CONN

Caveat Donor for Charitable Giving

AMONG ALEXIS DE TOCQUEVILLE'S many observations about the United States during his sojourn there during the early 1830s was the commitment of Americans to fostering nongovernmental civic groups through charitable giving. Since Tocqueville's famous visit, Americans continue to be known throughout the world for their philanthropy. In 2008, Americans gave more than $300 billion to charitable causes—and individual donors were the source of the great preponderance of these funds.

In the vast majority of these transactions, both the donor and the charitable organization are satisfied with the gift, its use, and the donor's recognition. In the past, even frustrated donors may frequently have regarded their pique as private matters, not to be addressed by legal action. However, as both the size of donations and the bureaucratic nature of charitable recipients have increased, opportunities for misunderstanding and abuse have multiplied.

In addition to commenting on the proliferation of civic groups, Tocqueville also noted the importance of law and the prevalence of lawyers in American society. It is then, perhaps, not surprising that the American charitable impulse has been sometimes met with the less charitable impulse to litigate. This litigation has frequently arisen from the desire of donors, variously expressed, either to see their donations used for a particular purpose or to secure name recognition for the donor or a family member—including signage on a building, the title of a scholarship fund, and the like.

The donor, and even the donor's counsel, may be surprised by the limited remedies available to a donor who takes even substantial precautions to secure the donor's charitable objectives. For example, say a Wall Street executive desires to donate $10 million to the donor's university of choice for research into the cause of the illness with which the donor has recently been afflicted. The donor, being a sophisticated business person, directs the donor's lawyer to prepare a contract that recites in sufficient words that the donation is being made on the condition that the university use the donated funds to build a research laboratory to be named in honor of the donor and to be used only to discover the cause of the donor's disease. Five years after the gift, the university determines that the laboratory built with the donor's funds is better used for research into the causes of a disease other than the one for which the donor contributed.

Can there be any question concerning the right of the donor to the return of the contribution? The answer is that, under existing California law, substantial doubt exists as to the donor's right of recovery. This is because, as the California Court of Appeal reaffirmed in 2005 in *L.B. Research and Education Foundation v. The UCLA Foundation,*[1] gifts to a charitable institution, even on an express condition, are likely to be deemed to have been made in charitable trust. According to the court, "Trusts can be created by words of condition. Property given 'upon condition' that it be applied to certain charitable purposes is especially likely to be construed as having been given in a charitable trust."[2]

The effect of a finding that a gift has been made in trust is to limit severely the standing of the trustor to enforce the gift. As noted by the court in *Patton v. Sherwood*, because charitable gifts are intended to benefit the public generally, they should ordinarily be enforced by the state through its representative, the attorney general.[3] Only if the trustor retains express powers, such as the power of revocation or the power to audit, will the trustor have standing to enforce the terms of a gift.

Apart from an expressly retained power by a donor, the *L.B. Research* court recognized an additional ground for standing: the making of a gift outright, subject to a condition subsequent of forfeiture.[4] The court found this issue litigable, based on language in the gift contract that expressly provided for the funds contributed to UCLA Medical School to be diverted to UC San Francisco Medical School in the event they were not used for the intended purpose by UCLA. When only language of condition is used, and not language susceptible of being construed as a forfeiture, substantial doubt remains as to whether the donor can prevail. As noted by the court in *L.B. Research*:

> Courts favor the construction of a gift as a trust over a conditional gift for several reasons. Because forfeiture is a harsh remedy [citation], any ambiguity is resolved against it [citation]. Moreover, the transferor's objective is to use the transferee to confer a benefit upon the public. To ensure that the benefit is conferred as intended, the transferor ordinarily wants the intended beneficiary to be able to enforce that intent. Because the only remedy for the breach of a condition is a forfeiture, a condition is not a very effective method of accomplishing those goals. For both of those reasons, courts will generally construe a conveyance as one upon trust rather than upon condition."[5]

This analysis is consistent with authority holding that "'contracts…declaring a forfeiture must be strictly construed, and a forfeiture can never take place by implication, but must be effected by express, unambiguous language.'"[6]

Religious Corporations

Would the result be any different if, having given up on hope of a cure, the Wall Street donor had made a contribution to the donor's favorite religious institution (a religious corporation) on the condition that it be used to construct a church, and subsequently the religious institution proposes to use the funds to construct a school? Maybe.

The rules governing contributions to religious corporations are in fact materially different from those governing donation to other charities. These differences derive in substantial part from the realization on the part of the legislature that the attorney general is not the appropriate party to enforce charitable religious trusts, given

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the need to ensure the separation of church and state. Thus, under California Corporations Code Section 9142(a), a member, as well as a person with a "reversionary, property or contractual interest" in assets subject to a trust, has standing to bring an action "to enjoin, correct, obtain damages for or to otherwise remedy a breach of trust."[7] However, Section 9142(c) limits this standing: "No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law" unless the assets are received in trust pursuant to a board resolution, the articles of incorporation, or an "expressly imposed…trust, in writing, at the time of the gift or donation."[8]

Would the gift of funds on the condition that they be used to construct a church be deemed such an express imposition of a trust? The *L.B. Research* court held that gifts on condition are "especially likely to be construed as having been given in a charitable trust."[9] Further, the reference in Section 9142(a) to persons holding a "contractual interest" in property subject to a charitable religious trust supports the argument that the donor's gift should be deemed to constitute an "expressly imposed…trust."[10] However, to date, no court has issued a decision construing Section 9142(d). Therefore, the issue is still subject to litigation.[11]

If the donor's gift to a church is not deemed to constitute an "expressly imposed…trust," the donor is not necessarily without a remedy—at least if the donor acts in a timely manner. Under Corporations Code Section 9143, a donor who learns that a contribution solicited for one purpose has been used for another may send the religious corporation a written notice "that an action will be brought unless the corporation takes immediate steps to correct any improper diversion of funds."[12] If the religious corporation does not remedy the diversion within a 10-day period, the donor may bring suit—although Section 9143 does not specify the precise remedies available.[13]

However, Section 9143(b) vests the religious corporation with a unique defense to this type of action. If the religious corporation can demonstrate that "it was impractical or impossible for the corporation to devote the property to the specific purpose for which it was contributed" or if "the stated purpose for which the property was contributed is no longer in accord with the policies or best interests of the corporation," the board or membership of the religious corporation can adopt any other good faith use, including the use of contributed funds for general operating expenses.

While Corporations Code Sections 9142 et seq. may be helpful for addressing most issues concerning charitable donations to religious corporations, the statutory scheme leaves open certain questions. May a donor make a gift to a religious corporation outright subject to a condition subsequent of forfeiture without being subject to Section 9143(b)'s defense of impracticality or altered purpose? May such a gift be established by parole evidence? Are the essentially personal remedies of damages and rescission available under Section 9143(b)—remedies that the attorney general cannot invoke? Did the legislature intend Sections 9142 et seq. to set forth the exclusive rights and remedies existing between donors and religious corporations?

Answers to these questions will need to await decisional law or further action by the legislature. In the meantime, donors and their attorneys must place their faith in express written trust agreements with explicit reservations of rights in the trustor. Any other mode of donation may well leave both donors and their attorneys praying for one of several uncertain outcomes.

Drafting Considerations

The issues involved in the drafting of gift instruments require care by counsel to adapt each instrument to the intent of the specific donor. The following are examples of language that address the wishes of donors:

"In the event of the cancellation of the Project due to events or conditions outside the reasonable control of Donee, a substantial deviation from current plans for the Project as reviewed and approved by Donor, or suspension of significant work on the Project, other than as a result of natural causes or labor disruption, for a period in excess of two years, Donee agrees to redirect the remaining funds not used in the planning, design, construction, and renovation of the Project, as well as an amount equal to the economic benefit, if any, derived from prior expenditures, to any other tax exempt nonprofit organization described in Sections 501(c)(3) and 509(a)(1), (2) or (3) of the Internal Revenue Code, or to repay any remaining portion of the pledge to Donor, as directed by Donor, or in the event of Donor's death, by his executor, trustee of his revocable trust, or, in their absence, by his oldest living issue."

"Donee agrees to furnish regular reports to Donor as to expenditure of the Pledge and a final report upon completion of the Project. Pending completion of the Project, all payments on the Pledge shall be kept in a separate interest bearing account until expenditure for an authorized purpose. Donor reserves the right to compel an accounting concerning the expenditure of all donated funds."

"In the event there shall be unexpended funds remaining on completion of the Project, Donee shall use such funds for maintenance of the Project and for support of approved activities therein."

"The building to be constructed pursuant to the Pledge shall be named 'The Donor School' (the 'Name'). Donor's obligations under this agreement are contingent on maintenance of the Name on the building in perpetuity. The name will not be abbreviated or shortened without the consent of Donor. All references to the building or the Project in any publicity, catalogues, advertising, or any other form of communication shall refer to the building by the Name. The removal or alteration of the Name shall be a material breach of this donation agreement, entitling the Donor to refund of amounts donated, plus accrued interest. The Name shall be affixed to any building constructed to replace that to be built with funding from the Pledge."—R.S.C.

Lessons from Recent Controversies

If counsel is aware of the need for retention of express rights in the donor, counsel should lay an adequate foundation for accomplishing the client's donative intent. However, numerous other potential pitfalls exist. For example, if the client wants naming rights to all or part of a structure, will the wording and visual presentation meet with the client's approval? Will recognition afforded other donors unduly detract from that sought by the client? If the structure is subsequently modified or torn down, eliminating or adversely affecting the donor's recognition, is the donee institution obligated to provide substitute acknowledgement? If the donor intends a specific use for the structure, what will be the effect, if any, of the inconsistent uses for limited or extended periods of time? If the donor is no longer alive when a condition of the gift is violated, who will have the authority to enforce the terms of a gift? Depending on the sensitivities of donors, counsel who draft the wording of donor gifts may wish to address one or more of these issues.

Nevertheless, drafters should not be surprised if the donee institution resists particular proposed restrictions. Many institutions are now sensitized to the need to retain flex-

ibility after a series of recent, high-profile cases in which institutions have been penalized for ignoring restrictive covenants.

One case has its origins in 1933, when Peabody College, a predecessor-in-interest to Vanderbilt University, agreed that in return for a gift of $50,000 from the Tennessee United Daughters of the Confederacy (TUDC), a dormitory would be built and named Confederate Memorial Hall.[14] This name was inscribed in stone over the entrance of the building. In 2002, Vanderbilt announced that the inscribed name would be changed to Memorial Hall. The TUDC sued for declaratory judgment, specific performance, and damages.

Both parties moved for summary judgment, which the trial court granted in favor of Vanderbilt on the grounds that it would be "impractical and unduly burdensome for Vanderbilt to continue to perform that part of the contract pertaining to the maintenance of the name 'Confederate' on the building and at the same time pursue its academic purpose of obtaining a racially diverse faculty and student body."[15] The appellate court reversed this decision, finding a contract between the TUDC and Peabody College to maintain the name. It further held this obligation could be reasonably inferred to be applicable for the life of the building. Thus maintaining the name for over 70 years was not substantial performance, and the donor's remedy when a donee fails or ceases to comply with the condition of a gift is recovery of the gift.[16] The court concluded that the recovery would be $50,000 adjusted for inflation since 1933 by reference to the Department of Labor's consumer price index[17]—a significant amount. Vanderbilt did not appeal and did not change the name of the building.

Another case involved a donation by Avery Fisher of funds to construct a hall for concerts by the New York Philharmonic Orchestra, which named the concert hall after him.[18] When Lincoln Center was preparing to build a new concert hall, its plans to name it after a new donor were revealed. Members of the Fisher family threatened a lawsuit. The matter was resolved by allowing interior portions of the new building to be renamed, but the building itself was named Avery Fisher Hall.

In 1961, the Robertson Family contributed $35 million to Princeton University to fund a school of public and international affairs.[19] Subsequently, the Robertson Foundation provided additional funds to support the school. In 2002, heirs of the Robertsons filed suit claiming that Princeton had failed to fulfill the donor's goals. Princeton allegedly incurred $40 million in legal fees in defending the suit. In addition, Princeton settled the suit by transferring $40 million plus interest to a Robertson family foundation to cover costs of the lawsuit and $50 million to create a new foundation to fulfill the Robertsons' original purpose.[20]

In light of these widely publicized controversies, many charitable institutions have adopted gift policies that afford the institutions with the right to modify the terms and conditions of their gifts for good cause—in effect, a contractual analogue of Corporations Code Section 9143(b). These policies may be incorporated expressly or by reference in individual donation agreements.

In an era in which a bride and groom are frequently both represented by counsel to negotiate the terms of a potential dissolution, perhaps one should not be surprised that even the charitable impulse creates grist for the lawyer's mill. It is tempting to describe this as a sad state of affairs. However, these legal precautions are not as sorrowful as a donor who feels violated by a donee's failure to carry out the donor's heartfelt wishes. The careful lawyer thus may avoid grief for the client greater than that experienced in paying for legal services. ■

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[1] L.B. Research & Educ. Found. v. The UCLA Found., 130 Cal. App. 4th 171, 177-78 (2005).
[2] *Id.* at 178. *See also* Bus. & Prof. Code §17510.8 ("The acceptance of charitable contributions by a charity…establishes a charitable trust….").
[3] Patton v. Sherwood, 152 Cal. App. 4th 339, 342 (2007).
[4] The *L.B. Research* court stated in dicta that even if the gift at issue were deemed a transfer in trust, the donor would be held to have standing, because the donor's particular interest in enforcement of the gift in the circumstances presented made recognition of standing appropriate. L.B. Research, 130 Cal. App. 4th at 180. The California attorney general has expressed his intent to vigorously oppose this deviation from common law in future litigation.
[5] L.B. Research, 130 Cal. App. 4th at 180 (citing City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613, 621-22 (1999)).
[6] ABI, Inc. v. City of Los Angeles, 153 Cal. App. 3d 669, 682 (1984) (citing Cullen v. Sprigg, 83 Cal. 56, 64 (1890)).
[7] Corp. Code §9142(a)(1)-(4).
[8] Corp. Code §9142(c).
[9] L.B. Research, 130 Cal. App. 4th at 178.
[10] Corp. Code §9142(a).
[11] Corp. Code §9142(d).
[12] Corp. Code §9143.
[13] This option is in contrast with Corporations Code §9142(a)'s specified array of remedies.
[14] Tennessee Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W. 3d 98 (Tenn. Ct. App. 2005).
[15] *Id.* at 111.
[16] *Id.* at 117.
[17] *Id.* at 119.
[18] Robin Pogrebin, *Avery Fisher Hall Forever, Heirs Say*, N.Y. Times, May 13, 2002.
[19] Robertson v. Princeton Univ., Docket No. C-99-02 (N.J. Super. Ct. 2006).
[20] Agreement of Settlement in Robertson v. Princeton Univ., *available at* http://www.princeton.edu/robertson/about/.

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by David B. Parker and Elliott Benjamin

KEEPERS OF THE SECRETS

The duty of attorneys to preserve the secrets of their clients is limited only by a very few exceptions

The phrase "attorney-client privilege" contains the most powerful words that lawyers may hear in the course of their professional lives. However, while the privilege provides lawyers with protections available to few other professionals, it also imposes strict and exacting obligations. California law uses commanding and forceful words throughout Business and Professions Code Section 6068(e)(1), declaring that every attorney has a duty "to maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client."

Does Section 6068 (e)(1) require lawyers to guard client secrets under every and all circumstances? The answer is generally yes, with specific exceptions. Business and Professions Code 6068(e)(2) contains a statutory exception to the attorney-client privilege that is often misunderstood. This exception provides for permissive, but not mandatory, disclosure to law enforcement regarding future criminal acts creating risk of death or serious bodily injury to another. Evidence Code Section 956.5, which addresses the evidentiary attorney-client privilege, sets forth a similar express exception for situations in which a lawyer believes that the disclosure of confidential communication is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

Unlike many jurisdictions, California does not permit attorneys to reveal past wrongdoing by a client—even if those acts are criminal. Nor can the attorney disclose information relating to future criminal actions that do not involve the risk of death or serious bod-

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

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ily injury. Even if the attorney is compelled to withdraw from the representation of a client, California law does not permit a "noisy withdrawal." Rule 3-600(B) of the California Rules of Professional Conduct provides:

> If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in B&P 6068, subdivision (e).

Moreover, the attorney's response is limited to his or her right (and appropriate duty) to resign in accordance with Rule 3-700 of the Rules of Professional Conduct.

The Evidence Code recognizes various statutory exceptions to the attorney-client privilege. These include Evidence Code Section 956, which provides that the attorney-client privilege does not apply "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." Nevertheless, no court has held this provision to be an exception to the ethical prohibition in Business and Professions Code Section 6068(e)(1). Apparently the Section 956 exception is one that third parties may assert.

The Sarbanes-Oxley Act of 2002[1] may present a federal exception. The act governs the disclosure obligation of public reporting companies and mandates that attorneys and others disclose violations of the federal securities laws. However, it is unclear at present whether this federal statute preempts California ethics rules.[2]

Rule 3-100(A) of the Rules of Professional Conduct contains further guidance regarding the attorney-client privilege: "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule." Paragraph 1 of the Official Discussion to Rule 3-100(A) states, "Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. [Citations omitted.]"

Paragraph 2 of the Official Discussion delineates what attorney-client confidentiality encompasses:

> [M]atters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. [Citations omitted.] The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law....

Moreover, Rule 3-100(B) mirrors Business and Professions Code 6068 (e)(2)'s narrow exception for future criminal acts. Thus, according to Paragraph 5 of the Official Discussion, disclosure under Rule 3-100(B) is permissive, not mandatory, and an attorney who elects to make the disclosure in compliance with the rule is not subject to disciplinary action.[3]

Self-Defense

The attorney-client privilege yields to an attorney's right of self-defense when accused by a client of a breach of duty. Under Evidence Code Section 958, "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

Technically, Section 958 is not framed as a waiver but rather provides that no privilege exists in those circumstances. Also, the scope of the exception contained in Section 958 is not expressly limited to a claim of breach in a legal proceeding nor does it require that both the lawyer and the client be parties to a proceeding in which the issue of breach arises. This suggests that the exception to the privilege could extend to accusations made outside a judicial proceeding. To date, however, the exception has been upheld only in proceedings, though not necessarily proceedings between lawyers and clients. Section 958 also addresses alleged breaches, whether by lawyers or clients. In that sense it is broader than merely self-defense.

Curiously, this self-defense exception to the attorney-client privilege is found only in the Evidence Code and is not recognized in the broader ethical mandate of Business and Professions Code Section 6068(e). Thus a tension exists between the self-defense exception in Evidence Code Section 958[4] and Section 6068(e)'s more arduous duty to preserve client secrets.

Case law and ethics opinions have sought to reconcile this tension. As a result, authority exists for attorneys to make limited disclosures consistent with the scope of Section 958, including those that are 1) in support of a claim for unpaid legal fees against a client[5] and 2) in defense of client-initiated State Bar disciplinary complaints.[6]

In *Carlson, Collins, Gordon & Bold v. Banducci*,[7] the appellate court addressed the issue in an action to recover unpaid attorney's fees for legal services rendered and to recover payments allegedly made under duress and undue influence. The court held that:

> It is an established principle involving the relationship of attorney and client that an attorney is released from those obligations of secrecy which the law places upon him whenever the disclosure of the communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights. [Citations omitted.] Accordingly, when, in litigation between an attorney and his client, an attorney's integrity, good faith, authority, or performance of his duties is questioned, the attorney is permitted to meet this issue with testimony as to communications between himself and his client.[8]

Similarly, in *Glade v. Superior Court*, the court of appeal held that Section 958 may be invoked when either the attorney or client charges the other with a breach of duty arising from their professional relationship.[9]

Further, courts have extended the self-defense exception to client allegations against an attorney in judicial proceedings in which the attorney is not a party. For example, in *People v. Morris*,[10] the defendant was convicted of perjury and sentenced to a prison term. In an effort to vacate the plea, the defendant offered a declaration under penalty of perjury that his plea of guilty resulted from assurance by his defense attorney that the sentencing judge, with the prosecutor's concurrence, had agreed to no more than a six-month county jail term for the defendant and the dismissal of all charges against the defendant's wife. The attorney, asked to give a declaration by the prosecution, insisted that he had made no such assurance.

The court of appeal affirmed the conviction, rejecting the defendant's contention that it was reversible error to admit the testimony of his former attorney in violation of the attorney-client privilege. Regarding that issue, the court concluded, "The privilege securing the secrecy of a confidential communication between a lawyer and his client is not absolute. Evidence Code section 958 sets forth a specific exception in the situa-

tion where, as here, the communication relates to an issue of alleged breach by the lawyer of a duty arising out of the lawyer-client relationship." The court reasoned, "If, in litigation between an attorney and his client or between the client and a third person, or in any other proceeding, the attorney's integrity, good faith, authority or performance of his duties are questioned, the attorney should be permitted to meet this issue with testimony as to communications between himself and his client."[11] Thus, the court found that because the attorney's "good faith, honesty and professional conduct were under attack, he was authorized to testify to the contrary, and [the] appellant's initial privilege was lost pursuant to Evidence Code section 958."[12]

Later case law reinforces *Morris* in criminal matters. For example, the court in *In re Scott* held, "[B]y claiming trial counsel provided ineffective assistance, petitioner waived the attorney-client privilege to the extent relevant to the claim."[13]

Generally, the self-defense exception under Evidence Code Section 958 has been construed narrowly based on the legitimate need of an attorney to defend a claim or a client's disciplinary complaint. *Dixon v. State Bar*[14] illustrates the limits to the exception. In *Dixon*, a client filed suit seeking to enjoin an attorney from harassing her. The attorney, in response, filed a declaration containing gratuitous information about the client. This declaration "was found by the bar court to have been made for the purpose of harassing and embarrassing" the former client.

The invocation of the Section 958 exception usually arises in malpractice actions in which attorneys are defending themselves. Whether the self-defense exception extends to other actions involving the client in which the client is barred from asserting the privilege against third parties is uncertain. The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee (PREC), in its Formal Opinion No. 519, relied on case law limiting attorney disclosures to those based on need. The committee concluded that an attorney cannot disclose confidential information during litigation that does not involve claims or allegations against the attorney.

Whether the Section 958 waiver of the privilege commences with the mere filing of a client's claim or requires the actual disclosure of confidential information in a pleading or similar circumstance is likewise unsettled. This issue is particularly tricky when a client files a malpractice claim to preserve the statute of limitations but does not serve it or attempt to prosecute the action (or serves it and immediately seeks a stay pending resolution of the underlying action). In any event, clients who file complaints against their counsel should be advised to not make actual disclosures of confidential information in their pleadings. Doing so could be a waiver under Evidence Code Section 912(a).

Waiver Limits

Courts have frequently limited the scope of Section 958. For example, in *In re Rindlisbacher*,[15] a former client sought a discharge of liability for the attorney's unpaid fees. By doing so, according to the court, the former client did not waive the attorney-client privilege, and thus the attorney could not use prior confidential communications relating to client wrongdoing to support the attorney's objection to discharge.

The limits of the waiver are also apparent in suits involving multiple clients pursuing claims jointly against their attorney. In this situation, other clients (and former clients) not involved in the action do not lose their confidentiality rights. The *Glade*[16] court held that the scope of the Section 958 waiver was limited to communications and information disclosed between a specific client and the attorney and did not act "to waive the attorney-client privilege held by other clients of the same attorney. None of the statutory exceptions to the attorney-client privilege are designed to permit such a result."[17]

Similarly, the court in *Schlumberger Limited v. Superior Court*[18] held that when a former client sues an attorney for malpractice, the Section 958 self-defense exception does not extend to the former client's communications with successor counsel in the course of mitigation efforts to protect the client from the consequences of the alleged malpractice. The same is true in the context of disciplinary proceedings.[19]

Clients can assert their reliance on advice of counsel either as an affirmative defense or as evidence against a claim of malice. By doing so, however, the client puts at issue the attorney's advice and the client's communications with the attorney relating to that advice, because the court must determine that the client provided candid disclosures, received counsel's advice, and acted in a manner consistent with that advice.

The waiver of the attorney-client privilege under the self-defense exception is limited to the scope of advice that is the subject of the defense. It implicates Evidence Code Section 912, which provides, "Except as otherwise provided in this section, the right of any person to claim a privilege...is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone."

Formal Opinion No. 519 underscores the element of consent and examines whether the exception has any validity:

> Under current California law, an attorney cannot, without a former or present client's consent, disclose the client's privileged communications with the attorney or the client's confidential information, for the purpose of defending allegations brought against the attorney by a third party. No matter how critical the client's information is to the lawyer's defense, there is no statutory "self-defense" exception to the attorney-client privilege or the lawyer's duty to maintain the confidentiality of client information under Business and Professions Code § 6068(e).
>
> Additionally, while no California appellate court has specifically confronted the exception issue, there is dictum in various cases strongly suggesting that it does not exist. [Citations omitted.] It is also the case in California that the courts lack the authority to create exceptions to the attorney-client privilege and other privileges in the California Evidence Code.

PREC's opinion notes that several federal district and appellate courts have acknowledged a self-defense exception and cites these decisions. Nevertheless, the California Court of Appeal in *McDermott Will & Emory v. Superior Court*[20] expressly rejected the application of these federal authorities:

> [L]ong-standing California case authority has rejected this application of the federal doctrine, noting it contravenes the strict principles set forth in the Evidence Code of California which precludes any judicially-created exceptions to the attorney-client privilege.

The *McDermott* court held that a shareholder's derivative action could not proceed against the lawyer because there was no waiver by the corporate client, and the self-defense exception did not apply.

Qualcomm Inc. v. Broadcom Corporation, a patent infringement case, illustrates the difference in the federal and state approaches to a self-defense exception to the attorney-client privilege.[21] The litigation involved a battle between two corporate giants and the consequence of silence in the face of a duty to disclose patents. The case focused on the circumstances in which outside corporate counsel can reveal confidential communications with their client in aid of their defense to a motion and an order to show cause re sanctions. The outside lawyers filed a motion seeking an order determining that the federal common law self-defense exception applied to a sanctions motion. In a case with many complex procedural

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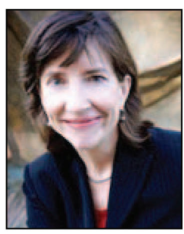

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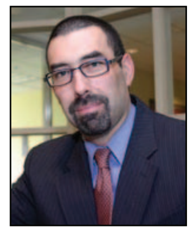
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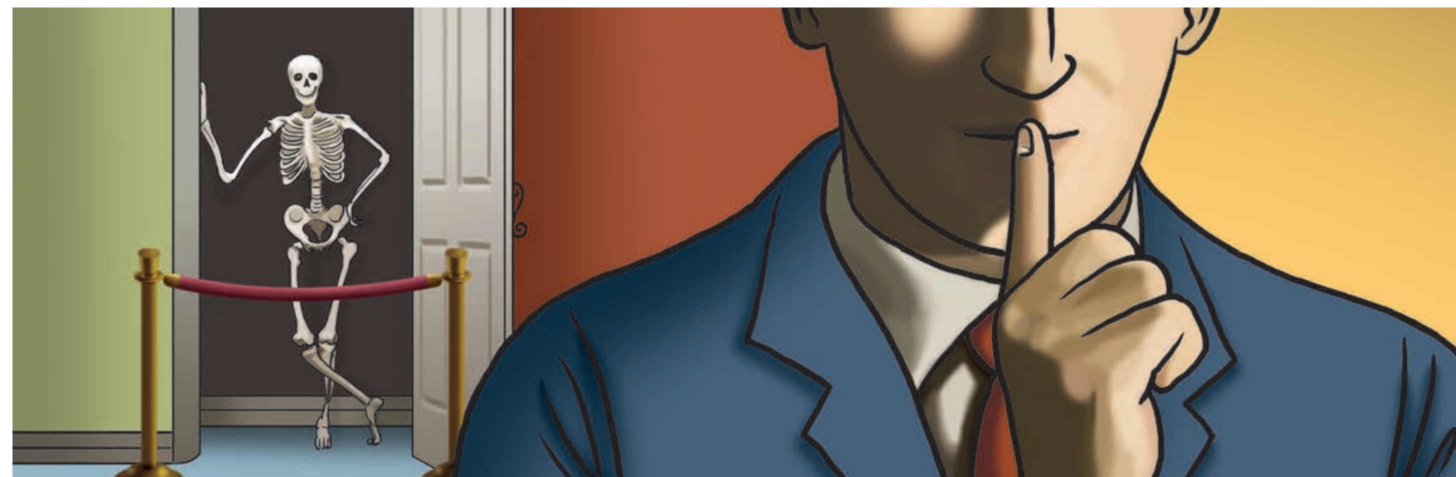
maneuvers, the magistrate denied outside counsel's motion and imposed sanctions on Qualcomm as well as outside counsel for not complying with the attorney-client privilege. Upon de novo review at the behest of the outside attorneys, the district court reversed and remanded for further proceedings in which the attorneys would be free to disclose confidential communications relevant to the issues provoked by Qualcomm's filing.



Qualcomm's initial response to the motion for sanctions did not include declarations and did not attack the conduct of its outside counsel or raise reliance on advice of counsel. However, after the magistrate rejected the self-defense exception, Qualcomm changed course and, without waiving the attorney-client privilege, submitted employee declarations as a means to exonerate the corporation and criticize outside counsel's services and advice. The district court ruled that this submission "changed the factual basis" for the magistrate's rejection of the self-defense motion.

Similarly, the State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) has opined in favor of the self-defense exception when a client seeks to shift blame to the attorney and upon counsel's mandatory withdrawal. This exception would only be valid to the extent necessary to defend a request for sanctions.[22] As stated in *McDermott*, if an attorney cannot defend an action without the ability to disclose confidential information, third-party actions may be subject to dismissal.[23] The court explained that:

> [B]ecause a derivative action does not result in the corporation's waiver of the privilege, such a lawsuit against the corporation's outside counsel has the dangerous potential for robbing the attorney defendant of the only means he or she may have to mount any meaningful defense. It effectively places the defendant attorney in the untenable position of having to preserve the attorney client privilege (the client having done nothing to waive the privilege) while trying to show that his representation of the client was not negligent.

In *Solin v. O'Melveny & Myers*,[24] an attorney sued another law firm from which he sought advice in connection with his representation of his clients. Those clients were not a party to the malpractice litigation and refused to waive the attorney-client privilege. Since the defendant law firm could not defend without disclosing its confidential information (which had been transmitted to the defendant firm by the consulting attorney), the court dismissed the lawsuit.

Lawyers Seeking Advice

While there is no express exception recognized in Business and Professions Code Section 6068(e) or in Rule 3-100 of the Rules of Professional Conduct, lawyers may reveal confidential client information to outside counsel in order to obtain advice. They may do so pursuant to case law—including *Fox Searchlight Pictures, Inc. v. Paladino*[25]—and ethics opinions.[26] Similarly, the court in *Travelers Insurance Companies v. Superior Court*[27] allowed the disclosure of an insurance policy mandated communication by an insured with the insurer, with the intention that the information was to be provided to carrier-appointed defense counsel.

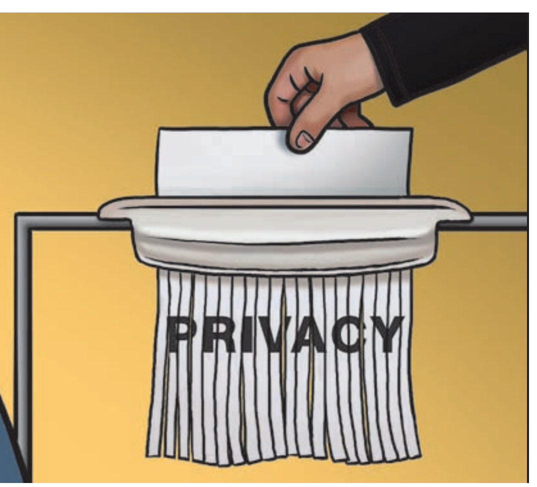
Lawyers can seek confidential advice from other members of the firm just as they can with outside counsel. But there is a difference between protecting these communications in actions against third parties and in matters involving clients. For example, in *United States v. Rowe*,[28] the court found a law firm entitled to assert privilege regarding internal confidential communications involving an investigation into the conduct of a member of the firm in the context of a grand jury proceeding. *Rowe* was distinguished in *Thelen Reid & Priest v. Marland*,[29] a case in which the plaintiff law firm sought to protect internal communications between members of the firm and the firm's general counsel that occurred during the time the former client—the defendant in the case—was represented by the firm.

Clearly law firms cannot represent themselves in client controversies, such as potential malpractice claims, and protect the confidentiality of these communications against the client while at the same time still representing the client. The *Thelen* decision follows a series of similar federal trial court decisions, including *In re Sunrise Securities Litigation*,[30] *Versuslaw Inc. v. Stoel Rives*,[31]and *Koen Book Distributors, Inc. v. Powell Trachtman, Loggan, Carrle, Bowman & Lombardo, PC.*[32] The *Thelen* court overruled the firm's objections based on the attorney-client privilege and work product doctrine. The court acknowledged that lawyers in firms should be able to seek confidential advice within their firms, but by doing so they may yield the attorney-client privilege: "[O]nce the law firm learns that a client may have a claim against the firm or that the firm needs client consent in order to commence or continue another client representation, then the firm should disclose to the client the firm's conclusions with respect to those ethical issues." The adverse former client was jointly represented with another client. The court found that the firm represented the two clients for the "same purpose" and that the interests of the firm and the two clients were "intertwined" in "lifting the lid" on joint communications.

Similarly, *In re Sonic Blue Incorporated*[33] involved a chapter 11 corporate debtor that subpoenaed internal communications among members of Pillsbury Winthrop Shaw Pittman LLP, its former counsel. The law firm asserted its attorney-client privilege. Following *Thelen*'s focus on conflicting interests between a client and the client's law firm, the court rejected the claims of attorney-client privilege and work product protection. The court held that once the law firm became aware of the malprac-

tice accusations and its failure to adequately disclose conflicts of interest, it had no right to claim privilege for any communications with in-house counsel.

In its Formal Opinion 08-453, the ABA addressed whether lawyers within firms may seek in-house ethics advice and disclose client confidences to a fellow member of the firm, such as a firm's general counsel or ethics counsel. The ABA concluded that this was permissible. Whether an attorney must make



a disclosure before or after the consultation turns on the firm's ethical duties to the client pursuant to ABA Model Rule 1.4. The ABA found that the mere fact of an ethics consultation does not create a conflict with a client. When a firm designates a general counsel or ethics counsel, it must make clear to members of the firm that the designated counsel represents the law firm, not firm members in their individual capacity, unless arrangements are made to make the firm member a joint client.

In a wrongful discharge action, the court in *General Dynamics v. Superior Court*[34] used strong language to hold that the attorney-client privilege must be maintained:

> [T]he in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts. 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.[35]

The *General Dynamics* court suggests that trial courts may permit disclosure under court-imposed limitations, such as sealing or protective orders.[36] Moreover, the court discussed reconciling the tension between disclosure and the privilege. It focused on the applicability of statutory exceptions, including those in Evidence Code Section 956.[37] Still, the court did not directly address whether Evidence Code Section 958 would apply in a wrongful termination action by former in-house counsel.

The plaintiff in *Fox Searchlight Pictures, Inc. v. Paladino*[38] preemptively sued its former in-house counsel after learning of her plan to sue Fox for wrongful termination of employment. Fox claimed its former in-house counsel disclosed confidential and privileged information to her personal attorneys handling her wrongful termination case. The former in-house counsel filed a motion pursuant to Code of Civil Procedure Section 425.16, the anti-SLAPP statute. Fox, in turn, filed motions to disqualify the attorneys representing its former counsel on the ground they possessed confidential and privileged information belonging to Fox and material to the issues between the parties.

The trial court denied all the motions. The court of appeal affirmed the trial court's order denying the motions to disqualify but reversed the order denying the in-house counsel's anti-SLAPP motion.

The court noted that "in-house counsel, like all attorneys, are bound by the ethical rule against disclosure of client confidences." Further, it observed that "'an attorney who unsuccessfully pursues a retaliatory discharge suit, and in doing so discloses privileged client confidences, may be subject to State Bar disciplinary proceedings.'"[39] However, the case was not one for wrongful termination, and the *Fox Searchlight* court was only asked to address the right of a lawyer to disclose client confidences to obtain advice from another lawyer.

Importantly, according to the court, disclosure within the context of this type of consultation was permissible:

> If an attorney, in protecting her own rights, is entitled to introduce otherwise privileged communications at trial, a fortiori, she is entitled to reveal those communications to her lawyers in advance of trial....[I]f this were not the case, an attorney could successfully defend the ethics of her behavior in court only to be disciplined for unethical behavior by the State Bar.... For the preceding reasons, we conclude a lawyer does not violate Business and Professions Code section 6068, subdivision (e) when she discloses client confidences to her own attorney for purpose of determining whether those communications are admissible evidence under an exception to the attorney-client privilege.[40]

In *Van Asdale v. International Game Technology*,[41] former in-house attorneys brought a claim of retaliatory discharge in violation of the Sarbanes-Oxley Act. The appellate court found that the trial court erred in granting the defendant summary judgment because the district court has the capacity to use equitable measures to minimize disclosure of harmful information.

In reaching its decision, the *Van Asdale* court rejected the Illinois Supreme Court's decision in *Balla v. Gambro, Inc.*[42] The court in *Balla* prohibited Illinois in-house lawyers from bringing retaliatory discharge cases involving disclosure of confidential information. The *Van Asdale* court noted that the decision had not been extended beyond Illinois lawyers and that federal courts had declined to apply it to federal claims.

A case presently pending in the Los Angeles Superior Court has the potential to bring more illumination regarding the parameters of protection for client secrets. In *Biller v. Toyota Motor Corporation*,[43] the plaintiff, Biller, a former in-house attorney for Toyota, was forced to resign in 2007. Biller reached a confidential settlement agreement with Toyota that reportedly involved a $3.7 million severance payment. The plaintiff later set up a company through which he allegedly disclosed confidential information, triggering a lawsuit by Toyota. The plaintiff agreed to a restraining order, which concluded the case. Notwithstanding both the settlement agreement and stipulated restraining order, the plaintiff filed suit against his former employer accusing the automaker of destroying data regarding 300 accidents and withholding e-mails and other computer-stored information from attorneys for the accident victims. He also claimed wrongful termination, intentional infliction of emotional distress, and violations of RICO.

Toyota sought unsuccessfully to seal the complaint based on the fact that it contained confidential information. The company filed a second motion, challenged the complaint, and, in the alternative, sought to compel arbitration pursuant to the settlement agreement. Biller justified his disclosures based on the crime-fraud exception.

The judge in the earlier litigation between Biller and Toyota has referred Biller to the State Bar for a disciplinary investigation, ordered the reopened case into arbitration, and issued a preliminary injunction against further disclosures by Biller. The results of the disciplinary investigation and the arbitration will provide further insight into the area of client confidentiality and may bring new meaning to the phrase "at every peril."

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[1] Pub. L. No. 107-204, 116 Stat. 745 (2002).

[2] *See* Van Asdale v. International Game Tech., 577 F.

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3d 989 (9th Cir. 2009) and discussion in text, *infra*.

[3] *See* CAL. RULES OF PROF'L CONDUCT R. 3-100(B), 3-100(C), 3-100(D). Rule 3-100(C) and Rule 3-100(D) set forth the conditions and limitations to disclosures made under Rule 3-100(B). Paragraph 6 of the Official Discussion provides detailed and helpful guidance.

[4] R. Sall & C. Buckner, *The Self-Defense Exception to the Ethical Duty of Confidentiality*, ORANGE COUNTY LAWYER, July 2006.

[5] *See, e.g.*, Glade v. Superior Court, 76 Cal. App. 3d 738, 746-47 (1978); Carlson, Collins, Gordon & Bold v. Banducci, 257 Cal. App. 2d 212, 227-28 (1967).

[6] Brockway v. State Bar of Cal., 53 Cal. 3d 51, 63-64 (1991).

[7] Carlson, 257 Cal. App. 2d 212.

[8] *Id.* at 228-29 n.14.

[9] Glade, 76 Cal. App. 3d 738.

[10] People v. Morris, 20 Cal. App. 3d 659 (1971).

[11] *Id.* at 663 (citing WITKIN, CALIFORNIA EVIDENCE §824 (2d ed. 1966)).

[12] *Id.* at 664.

[13] In re Scott, 29 Cal. 4th 783, 814 (2003).

[14] Dixon v. State Bar, 32 Cal. 3d 728 (1982).

[15] In re Rindlisbacher, 225 B.R. 180, 183 (9th Cir. B.A.P. 1998).

[16] Glade v. Superior Court, 76 Cal. App. 3d 738 (1978).

[17] *Id.* at 747.

[18] Schlumberger Ltd. v. Superior Court, 115 Cal. App. 3d 386, 392 (1981).

[19] Brockway v. State Bar of Cal., 53 Cal. 3d 51, 63-64 (1991).

[20] McDermott Will & Emory v. Superior Court, 83 Cal. App. 4th 378, 385 (2000).

[21] Qualcomm Inc. v. Broadcom Corp., 548 F. 3d 1004 (Fed. Cir. 2008).

[22] State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC), Op. No. 1997-151.

[23] McDermott, 83 Cal. App. 4th at 385.

[24] Solin v. O'Melveny & Myers, 89 Cal. App. 4th 451 (2001).

[25] Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 313-14 (2001).

[26] *See, e.g.*, Los Angeles County Bar Association, Professional Responsibility and Ethics Committee (PREC), Formal Op. No. 519 (Feb. 2007).

[27] Travelers Ins. Cos. v. Superior Court, 143 Cal. App. 3d 436 (1983).

[28] United States v. Rowe, 96 F. 3d 1294 (9th Cir. 1996).

[29] Thelen Reid & Priest v. Marland, 319 Fed. Appx. 676, 2009 WL 725077 (9th Cir. 2009).

[30] In re Sunrise Secs. Litig., 108 B.R. 471, 475 (E.D. Pa. 1989).

[31] Versuslaw Inc. v. Stoel Rives, 127 Wash. App. 309, 334 (2005).

[32] Koen Book Distribs., Inc. v. Powell Trachtman, Loggan, Carrle, Bowman & Lombardo, PC, 22 F.R.D. 283, 283-86 (E.D. Pa. 2002).

[33] In re Sonic Blue Inc., 2008 WL 2875407 (Bankr. N.D. Cal. 2008).

[34] General Dynamics Corp. v. Superior Court, 7 Cal. 4th 1164, 1190-91 (1994).

[35] *Id.* at 1190.

[36] *Id.* at 1191.

[37] *Id.* at 1190-91.

[38] Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 313-14 (2001).

[39] *Id.* at 309-10 (citing General Dynamics Corp., 7 Cal. 4th at 1191).

[40] *Id.* at 313-14.

[41] Van Asdale v. International Game Tech., 577 F. 3d 989 (9th Cir. 2009).

[42] Balla v. Gambro, Inc., 584 N.E. 2d 104 (Ill. 1991).

[43] Biller v. Toyota Motor Corp., 2010 WL 300349 (C.D. Cal. Jan. 4, 2010).

MCLE ARTICLE AND SELF-ASSESSMENT TEST

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by Elleanor H. Chin and Ryan D. Derry

alt-delete

Judges have made it clear that ignorance is no longer an excuse for spoliation of electronic evidence

LAWYERS may be surprised to learn the extent to which they risk sanctions for not preserving electronically stored information (ESI) correctly. Indeed, recent headlines regarding judicial action in the electronic discovery area reveal a minefield of sanctionable conduct. Fortunately, court decisions regarding the preservation of ESI provide practical insights into common mistakes that, once understood, are easy to avoid.

Courts have defined "spoliation" as the "destruction or significant alteration of evidence, or the failure to preserve evidence for another's use in pending or future litigation."[1] In January 2010, a federal district court in New York stated, "By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence."[2] This statement, from the court's decision in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, captures the state of the law as it has developed in the past six years. It is expected to be the standard in the area of electronic evidence preservation for some time to come.

The *Pension Committee* decision also illustrates an emerging theme of judicial intolerance for litigants who convey to the court their inattention to detail in discovery practice and thus their lack of respect for the judicial process. *Pension Committee*'s author, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York, also authored the seven opinions in *Zubulake v. UBS Warburg LLC*, known as the *Zubulake* line of cases, which are the standard-setting decisions in modern electronic discovery.[3] *Pension Committee* summarizes a number of key decisions in the intervening years since the last *Zubulake* opinion and contains the implicit admonition to lawyers that they clearly have not been paying attention to what the court held before.

This tone from the bench should make lit-

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igators sit up and take notice. The duty to preserve documents falls on both litigants and counsel. For this reason it is important for litigators to understand not only the substantive requirements in this area, including issuing a written instruction to preserve documents, but also the potential consequences—including sanctions against counsel personally.

Practice and precedent in the area of electronic discovery have been evolving since the late 1990s, with an increasing formalization since the adoption of amendments to the Federal Rules of Civil Procedure in 2006.[4] State courts have also adopted rules to address the handling of electronic evidence in discovery and trial, including the adoption in California of Assembly Bill 5 in 2009, the Electronic Discovery Act.[5] Federal and state courts around the country have issued detailed decisions analyzing many nuances of attorney decision making, providing practical guidance on handling ESI.

The California Court of Appeal recently explained that spoliation is condemned because it "can destroy fairness and justice." Without access to complete evidentiary information, the risk of an erroneous decision increases.[6] Most practitioners are well aware of the impact of spoliation and condemn the conscious destruction of evidence. However, "spoliation" encompasses far more than intentional destruction of materials. The culpability for spoliation ranges from negligence to intentional conduct.[7]

While many decisions addressing spoliation focus on intentional destruction of evidence, those rulings are not particularly enlightening to the average litigator. If parties or counsel cannot figure out on their own that such behavior is inappropriate, telling them so will not help. Cases involving the deliberate purging of data on BlackBerries (*Southeastern Mechanical Services v. Brody*)[8] or disposing of laptops during litigation (*Arista Records LLC v. Usenet.com*)[9] make entertaining reading in the sensational manner of reality television. Less clear is how lawyers can avoid conduct that could result in a finding of spoliation in which something less than conscious destruction occurs. For example, *Pension Committee* stands for the proposition that certain basic standards of practice regarding litigation are so commonplace and widely understood that ignorance, even if innocent, is no longer an excuse that will avoid sanctions.

Like the types of sanctions available for spoliation under the Federal Rules of Civil Procedure, the sanctions that the California Code of Civil Procedure provides are equally broad and far ranging. Following notice and opportunity for a hearing, a court may impose several types of sanctions: 1) monetary sanctions (against a party or attorney), 2) issue sanctions, 3) evidence sanctions, or 4) terminating sanctions.[10] As a general rule, sanctions imposed for spoliation are not intended to punish the offending party but are instead supposed to remedy the underlying discovery abuse that has been committed.[11] Issue or terminating sanctions are typically requested to remedy the loss of relevant evidence due to spoliation.[12] An issue sanction would result if a court orders that "designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process."[13] Or a court may issue terminating sanctions for particularly egregious cases of intentional spoliation of evidence.[14]

Federal and State Spoliation Tests

Federal courts typically apply a three-part test in determining whether a party is responsible for spoliation. The party seeking sanctions must show that:

1) The party that has control over the evidence had an obligation to preserve it at the time it was destroyed.

2) The records were destroyed with a culpable state of mind.[15]

3) The relevance of the destroyed evidence to the party's claim would allow a reasonable trier of fact to find that the evidence would support that claim or defense.[16]

Courts have held that relevance can be established in a number of ways. They have found that relevance "may be inferred if the spoliator is shown to have a sufficiently culpable state of mind."[17] Also, the "moving party may submit extrinsic evidence tending to demonstrate that the missing evidence would have been favorable to it."[18]

Application of the federal test continues to evolve. In *Scalera v. Electrograph Systems, Inc.*,[19] a federal district court in the Eastern District of New York found the defendant negligent because counsel communicated the preservation obligation orally, and the defendant did not commence the process to search hard drives until after the human resources director had retired and her hard drive had been erased.[20] Nevertheless, the court ultimately did not impose any sanctions. Instead, the court held that the plaintiff had submitted no extrinsic evidence "tending to demonstrate" that the deleted materials would have been helpful to her case.[21]

The more recent *Pension Committee* case presents a slightly different analysis. In *Pension Committee*, a case originally filed in February 2004, the court held that a group of plaintiffs who failed to issue a written litigation hold until 2007 were not only negligent but grossly so.[22] The court also found that one or more of the plaintiffs failed to collect or preserve any electronic documents prior to 2007 and continued to delete documents after the duty to preserve arose. The court concluded that "it is fair to presume the responsible documents were lost or destroyed. The relevance of any destroyed documents and the prejudice caused by their loss may also be presumed."[23] The court held that a spoliation instruction was the appropriate sanction.[24]

Subsequent to *Pension Committee*, Judge Lee Rosenthal in the Southern District of Texas issued her ruling in *Rimkus Consulting Group v. Cammarata*[25]—a decision commentators sometimes treat as a companion to *Pension Committee*. In *Rimkus*, Judge Rosenthal applied a slightly different standard for finding culpable negligence.[26] The *Rimkus* test includes an analysis of reasonableness and proportionality, compared to what many perceive as a bright-line test in *Pension Committee*. According to Judge Rosenthal, "Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards."[27] Accordingly, under the *Rimkus* test, the extent of preservation efforts should be analyzed in light of factors such as the size of the lawsuit and the burden of the preservation efforts.

In California, courts apply a burden-shifting approach that requires the accused spoliator to disprove any prejudice:

> [A] party moving for discovery sanctions based on the spoliation of evidence must make an initial, prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense.[28]

In *Williams v. Russ*,[29] the California Court of Appeal's application of this burden-shifting test resulted in the imposition of terminating sanctions. The court determined that the plaintiff had intentionally allowed material unfavorable to his claims to be destroyed. As to the relevance test, the trial court applied a burden-shifting test that was affirmed on appeal: "Because [the plaintiff] bore the burden of disproving prejudice [under the burden-shifting test], he was required to show that any other documents from the file that he claimed existed [and did not spoliate] would in fact have allowed [the defendant] to adequately reconstruct the client file. He did not."[30]

A useful resource for lawyers analyzing the issue of electronic discovery sanctions can be found at the blog e-Discovery Team, written and moderated by electronic discovery scholar Ralph Losey.[31] Losey's blog offers a

MCLE Test No. 194

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.

1. The intent of sanctions for spoliation is to punish the offending party.

True.

False.

2. The judge who decided *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC* wrote which other significant electronic discovery decision?

A. *Qualcomm v. Broadcom*.

B. The *Zubulake v. UBS Warburg LLC* line of cases.

C. *William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Company*.

D. *Aguilar v. Immigration and Customs Enforcement Division of the U.S. Department of Homeland Security*.

3. Under California law, sanctions for spoliation are limited to monetary sanctions against a party and/or the party's attorney.

True.

False.

4. Federal courts apply a three-part test for determining whether a party is responsible for spoliation.

True.

False.

5. California Assembly Bill 5, the Electronic Discovery Act, was codified in 2009.

True.

False.

6. The court in *Pension Committee* held that the failure to issue a written litigation hold was grossly negligent.

True.

False.

7. The U.S. District Court for the Southern District of New York decided *Swofford v. Eslinger*.

True.

False.

8. The judge in *Rimkus Consulting Group v. Cammarata* applied a test based on reasonableness, proportionality, and clearly established applicable standards.

True.

False.

9. The court of appeal in *Williams v. Russ* issued terminating sanctions after determining that the plaintiff had intentionally allowed material unfavorable to his claims to be destroyed.

True.

False.

10. The *Swofford* court found that the evidence that was the subject of the litigation—including guns, radios, and uniforms—were appropriately preserved after the plaintiff sent preservation requests to counsel.

True.

False.

11. What type of sanctions were imposed by the court in *Pension Committee* as a result of the plaintiffs' failures to correctly implement preservation procedures?

A. Monetary sanctions.

B. Adverse jury instructions.

C. Terminating sanctions.

D. A and C.

12. In *Swofford*, the sanctions included:

A. An award against the defendants for the plaintiff's fees and costs.

B. Monetary sanctions against the defendants' in-house counsel.

C. Adverse inference instruction on lost e-mail.

D. All of the above.

13. In *Scalera v. Electrograph Systems, Inc.*, the court found that the duty to preserve arose when:

A. The plaintiff slipped and fell at work.

B. The plaintiff retained counsel.

C. The defendant received plaintiff's counsel's demand letter.

D. The defendant received notice of the EEOC charge.

14. *Rimkus* was issued this year, 2010.

True.

False.

15. A party moving for discovery sanctions in California courts must show that the responding party destroyed evidence having a substantial probability of damaging the moving party's ability to establish an essential element of his or her claim or defense.

True.

False.

16. Lee Rosenthal is the author of the e-Discovery Team blog.

True.

False.

17. In *Qualcomm*, outside counsel were personally sanctioned for their failure to produce documents until after trial.

True.

False.

18. *Swofford* included a 42 USC Section 1983 claim against the sheriff.

True.

False.

19. The facts in *Scalera* included the erasure of the human resources director's hard drive following her retirement.

True.

False.

20. Following *Pension Committee*, a party's best practice is to issue written instructions for the preservation of documents and electronically stored information when the party anticipates litigation.

True.

False.

MCLE Answer Sheet #194

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10.	☐ True		☐ False	
11.	☐ A	☐ B	☐ C	☐ D
12.	☐ A	☐ B	☐ C	☐ D
13.	☐ A	☐ B	☐ C	☐ D
14.	☐ True		☐ False	
15.	☐ True		☐ False	
16.	☐ True		☐ False	
17.	☐ True		☐ False	
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19.	☐ True		☐ False	
20.	☐ True		☐ False	

holistic approach that is informed but not driven by case law. In an article posted on the blog, William Hamilton presents an "E-Discovery Sanctions Cube" demonstrating how sanctions become increasingly likely as a party or counsel progresses along a graph of vertical and horizontal axes that represent willfulness, prejudice, and time.[32] For example, discovery errors that occur with a low degree of willfulness but perhaps create prejudice may be less likely to result in sanctions than a more willful, equally prejudicial mistake. As time to correct or remedy the error before trial decreases, the likelihood of sanctions also increases.

Hamilton's analytical framework is useful for considering *Pension Committee* and a number of other decisions in the electronic discovery arena, including the infamous *Qualcomm v. Broadcom*[33] series of decisions. These are often referred to as "judicial frustration" or "angry judge" cases. Without regard to the exact legal factors in a particular jurisdiction, it is simple and reasonable to look at a case and posit, "The longer you wait, the worse the problem gets; the worse the problem gets, the more prejudice to the party; and if you compound the problem by incompetence or inattention, you will offend the court." Under these circumstances, woe betide the litigator.

Beyond *Zubulake*

The decisions in electronic discovery cases are fact-intensive. Reading them requires a time investment, but practitioners can derive practical benefits from the mistakes of others in this area. The rulings apply critical judicial hindsight to litigation decision processes (or sometimes the lack of decisions).

Pension Committee[34] involved parties who were accused not of misconduct but merely of carelessness. The case involved claims by multiple investors of securities fraud against a group of funds. Judge Scheindlin found that numerous plaintiffs had been aware of the likelihood of litigation and yet failed to issue written litigation holds or undertake practical steps to preserve documents. As a result of the plaintiffs' failures to correctly implement preservation procedures, the court found that e-mail had actually been deleted and lost, and the circumstances warranted a finding that the lost material would have been relevant. Ultimately a number of plaintiffs were sanctioned for spoliation in the form of an adverse jury instruction.[35]

Judge Scheindlin took the opportunity to outline standards for finding negligence, gross negligence, and willfulness, as those terms are used regarding spoliation of evidence. Also, with respect to the actions of the plaintiffs, she discussed the type of conduct that falls in each of these categories, both generally and specifically. The judge found that in addition to the failure to issue written preservation instructions, the processes that the plaintiffs had followed to collect documents were inconsistent and unreliable, often including failure to identify and collect large amounts of e-mail. Some of these failures were a result of allowing the plaintiffs' executives or employees to decide individually what information might be relevant, and some resulted from having the data collection overseen by those with little knowledge of the parties' IT infrastructure or the steps necessary for proper collection.

The basic lessons of *Pension Committee* are first, when the party anticipates litigation, the party should issue instructions—in writing—to preserve documents and ESI. Second, those accountable for implementing the litigation hold should have sufficient personal knowledge of the technical processes to determine whether they are appropriate and are actually likely to capture all relevant information. *Pension Committee*'s explicit requirement that the litigation hold notice must be in writing arguably changes the existing standard. However, the accountability requirement is not new. Instead, it simply restates what litigators should already know. They must understand the evidence—most specifically, what it is, and where it resides.

Swofford v. Eslinger,[36] a September 2009 decision from the Middle District of Florida, is a decision in which the facts are straightforward, the language is blunt, and the take-home message for attorneys is unambiguous. If attorneys had not learned from *Zubulake* and its progeny to date that counsel is responsible for implementing and monitoring effective preservation of evidence, including specifically ESI, they cannot miss that message in *Swofford*.

The court captures the time frame for ESI preservation (or lack thereof) with precision. The claim was a state law tort and 42 USC Section 1983 action brought by Robert Swofford against the sheriff of Seminole County, Florida, and two individual deputies. The deputies had shot Swofford multiple times during the pursuit of an unrelated fleeing criminal suspect onto Swofford's property. The incident with Swofford and the deputies occurred in April 2006. In August 2006 and February 2007, Swofford's counsel sent letters to the sheriff's office requesting that evidence relating to the incident be preserved. Both deputies permanently deleted e-mails from their accounts between April 2006 and April 2007. The laptop of one of the deputies was erased in October 2007. Key physical evidence—including the guns, radios, and uniforms the deputies wore during the incident—were recycled, misplaced, or destroyed at various times after the plaintiff sent the preservation requests to counsel.

The court found that the steps taken by the sheriff's office to preserve documents were so ineffective as to warrant a finding of deliberate misconduct.[37] The in-house counsel of the sheriff's office acknowledged receiving the letter to preserve evidence, but admitted that he had done nothing to see that evidence was actually preserved other than send copies of the letter to the sheriff and several high-ranking officers within the sheriff's office. The two individual defendants never personally saw the request to preserve evidence, although the court found they had received notice through the in-house counsel and were accountable for complying. The court cited *Zubulake* and noted, "It is well established that counsel may not simply distribute a single written request to preserve evidence and do nothing more."[38]

The *Swofford* court granted the plaintiff's motion for sanctions for bad faith spoliation, including the recycling of the deputies' laptops and the deletion of e-mail. The order also sanctioned the in-house counsel personally for not effectively implementing the hold as well as issuing monetary sanctions in the form of a fee award and an adverse inference instruction.

Swofford and *Pension Committee* are cases in which the facts were complex and the stakes were high. Moreover, those high stakes were most likely apparent from the inception of the case. Both *Scalera v. Electrograph Systems, Inc.*[39] and *Estrada v. Delhi Community Center*[40] involved sanctions for spoliation of ESI in single-plaintiff employment discrimination cases. *Rimkus v. Cammarata*, a noncompetition case, falls somewhere in the middle.

One of the common questions that arises in discussions of electronic discovery is how to manage its impact in smaller cases, including those involving small business contracts, collections, and single-plaintiff employment claims. Practitioners should know that the underlying ethical and process management requirements in a small case are no different than in a large case and should in some ways be easier to address.

In *Scalera*, the plaintiff brought suit under the Americans with Disabilities Act and New York's human rights law for claimed failures to accommodate her chronic illness. She had a fall on the job and filed a workers' compensation claim. Her employment ended, she made an claim with the EEOC, and then she brought suit. The decision addressed her motion for sanctions for spoliation. The plaintiff alleged that the defendant had been negligent in not properly implementing a litigation hold and in failing to produce e-mail communications that would have revealed

the plaintiff's requests for accommodation. The defendant contended that various types of ESI were unrecoverable,[41] and the plaintiff requested an adverse inference instruction.

The court found that the employer's determination of when the duty to preserve arose was the right one. The defendant was on notice when it received the EEOC notice, not when the plaintiff fell or when she retained a lawyer or sent a demand letter to the landlord on a slip-and-fall injury.[42] Thus, because the EEOC charge was received after the date the plaintiff's hard drive and e-mails were erased pursuant to the defendant's policies, no duty to preserve potential evidence was breached.[43] In contrast, the hard drive of the director of human resources was erased following her retirement, which occurred over a month after the defendant received the plaintiff's EEOC charge. Thus, the court found that the defendant had been negligent in failing to preserve those documents, because the obligation to preserve already existed.

Given the influence of Judge Scheindlin's rulings in this area, the standard in *Pension Committee* is likely to be cited over the *Scalera* analysis of culpability and nonimposition of sanctions. However, the facts in *Scalera* remain illustrative of common discovery problems that crop up in smaller cases. Much of the defendant's initial response to litigation appears to have been conducted in house—probably because the claim was straightforward, and keeping costs low was a priority.

In-house counsel called a meeting to instruct employees to preserve data but did not circulate a formal litigation hold instruction. The company's IT group began collecting data from individuals designated by counsel at the first meeting as sufficiently important within the company. The key HR executive's computer was wiped and recycled. (This is a common risk when a litigation hold goes only to individuals with knowledge of case-specific facts and not to institutional custodians of information, such as management for IT and HR.) Individual employees had idiosyncratic ways of retaining e-mail outside of the company's backup system, and the company did not account for this, claiming that its HR records process provided for all pertinent records, such as e-mail requests for accommodation, to be printed out and placed in individual personnel files. The plaintiff produced e-mails that had not been printed and had not been produced by the defendant.

The defendant escaped sanctions because the court concluded that the lost data would not have helped the plaintiff. But the fact remains that the court found in this case that the discovery response was negligent.

Estrada v. Delhi Community Center, an unpublished 2009 court of appeal decision, is an unusual case because the plaintiff received terminating sanctions for electronic discovery violations (as well as other discovery problems). A close reading of the facts indicates that plaintiff's counsel was making multiple inappropriate tactical decisions and abusing the discovery process in more ways than just those concerning the electronically stored evidence. The electronic discovery issue was the plaintiff's conduct in taking her personal computer to a repair shop and having the operating system reinstalled during the course of the litigation. It is not clear how technically sophisticated she was personally (or how sophisticated her counsel was), but the court held that the plaintiff was informed about the reinstallation process and aware that it would result in the deletion of data.[44] There was no question that the plaintiff was on notice of the need to preserve data, because her counsel was closely involved in ongoing discovery, and the computer was alleged to contain material relating to her claims.

Guidance for Litigators

By the time a problem with the preservation of ESI comes to light, courts are left to reconstruct decisions made months if not years before, as in *Pension Committee*. The body of law on spoliation of ESI has now evolved well enough to be very useful for litigators generally, if not for the parties in the already decided sanctions decisions.

Pension Committee has attracted voluminous, detailed commentary and analysis, including discussions on the standards of care and whether the decision mandates that failure to issue a written litigation hold is negligence per se. *Pension Committee* does not address counsel conduct separate from that of the party, but *Swofford* received attention because it addresses the part of the *Zubulake* decisions establishing that evidence preservation is a lawyer's personal and ethical responsibility, separate from the obligation of his or her litigant client. While *Swofford* involves no written instruction to preserve documents other than the request of the plaintiff's counsel, the activity in that case occurred when *Zubulake* was a well-known and well-publicized legal standard. *Zubulake* and *Swofford* teach that a lawyer must have personal knowledge of the measures taken to implement a litigation hold. The cases further instruct that a party (and thus the party's lawyer) must conform to a specific standard of conduct to ensure that documents do not actually get deleted or disappear.

Attorneys are required to perform their duties competently in the representation of their clients.[45] Competence includes the ability to advise clients about preservation—both the timing of preservation obligations and

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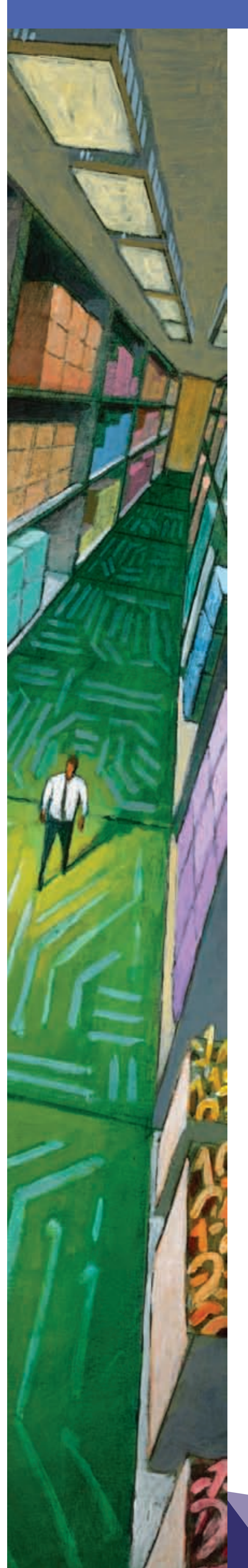

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the actual substance and process of preservation, including the type of data and format for collection, but also what kind of ESI is likely to be inadvertently lost. Judges now expect counsel to be competent in electronic discovery. In admonishing counsel, a judge stated, "Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI....It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this."[46]

Effective electronic discovery starts with properly implemented preservation, including the issuance of clear, practical, preservation instructions. The duty to preserve is a dual duty, falling on both counsel and parties. Decisions like *Swofford*[47] make it clear that attorneys have an independent duty to preserve information as well as a duty to ensure that the client also does so. Failure to properly preserve electronic evidence is a breach of an attorney's professional obligations as well as a breach of the attorney's duty to provide competent professional service to the client. Counsel who breach their dual duties place themselves and their clients at risk for sanctions.

What *Pension Committee* requires for parties regarding their conduct indirectly creates more specific and detailed requirements for counsel.[48] In *Pension Committee* the absence of a written litigation hold was part of the problem.[49] Most counsel will probably deduce that they must issue a formal written communication for a litigation hold. This is a prudent default approach but, like all rules, proper application depends mostly on lawyers having a nuanced, context-sensitive understanding of what the rule means. For example, if a client is a very small entity with very few computers (as were some of the sanctioned plaintiffs in *Pension Committee*), counsel may question whether it is really necessary to issue a written preservation instruction. However, if the employees in the small organization are not tech savvy and have no understanding how to prevent deletion of documents, counsel's obligations include the development of that understanding on the part of both counsel and client employees and instructing the client to make a record of the necessary instruction and its implementation.

By contrast, in a large and complex organization with a well-informed and sophisticated IT staff, the client presumably is capable of implementing a litigation hold. Indeed, the client may have an existing litigation hold protocol and a written form for issuing the holds. However, if the claim concerns sexual harassment, for example, or stalking by an executive or a technically sophisticated employee with a high security clearance, issuing a written litigation hold may be affirma-

tively harmful because it may alert a significant witness or codefendant to delete e-mail. In that case, the best implementation of a litigation hold strategy may include a directive from outside counsel to inside counsel only, as well as a call for an immediate forensic investigation documented solely in counsel's files.

It is easy to say that the cure for preservation problems is to issue litigation holds consistently and document the steps to implement them. However, these actions are only part of counsel's responsibility. The real solution is for practitioners to take the issuance and implementation of litigation holds seriously and treat the evidence preservation process as an integral part of the litigation response and investigation.

Early evidence assessment and preservation sets the stage for executing the rest of the case correctly. Practitioners should be flexible and consider the possibility that litigation may terminate early and not require a detailed and prolonged investigation and collection of data. Nevertheless, counsel's preservation model should prepare for a launch into the full-scale collection of ESI.

Cases like *Swofford* critique (and impose consequences for) the unexamined and mechanistic circulation of litigation holds. Most litigators understand that at some point they should acquaint themselves in detail with witnesses and evidence. The requirement to issue a litigation hold ensures that counsel will do so sooner rather than later, because issuing a litigation hold correctly requires counsel to understand precisely where potential evidence resides and how witnesses communicate with one another.

All litigators learn—or should learn—the difference between, and the consequences of, doing their jobs while fully engaged or practically asleep. The lesson of *Pension Committee* may just be that simple. ■

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[1] Williams v. Russ, 167 Cal. App. 4th 1215, 1223 (2009) (citing Willard v. Caterpillar, Inc., 40 Cal. App. 4th 892, 907 (1995)). *See also* Kearney v. Foley & Lardner, LLP, 582 F. 3d 896, 908-09 (9th Cir. 2009).

[2] Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *1 (S.D. N.Y. Jan. 15, 2010).

[3] *See* Zubulake v. UBS Warburg LLC, 382 F. Supp. 2d 536 (2005) (Zubulake VII), 231 F.R.D. 159 (2005) (Zubulake VI), 229 F.R.D. 422 (2004) (Zubulake V), 220 F.R.D. 212 (2003) (Zubulake IV), 216 F.R.D. 280 (2003) (Zubulake III), 230 F.R.D. 290 (2003) (Zubulake II), 217 F.R.D. 309 (2003) (Zubulake I).

[4] *See* Fed. R. Civ. P. 16, 26, 33, 34, 37, 45 (amended 2006); *see also* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Excerpt of the Report of the Judicial Conference (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_STReport_CV.pdf.

[5] *See also* State Bar of California, Litigation

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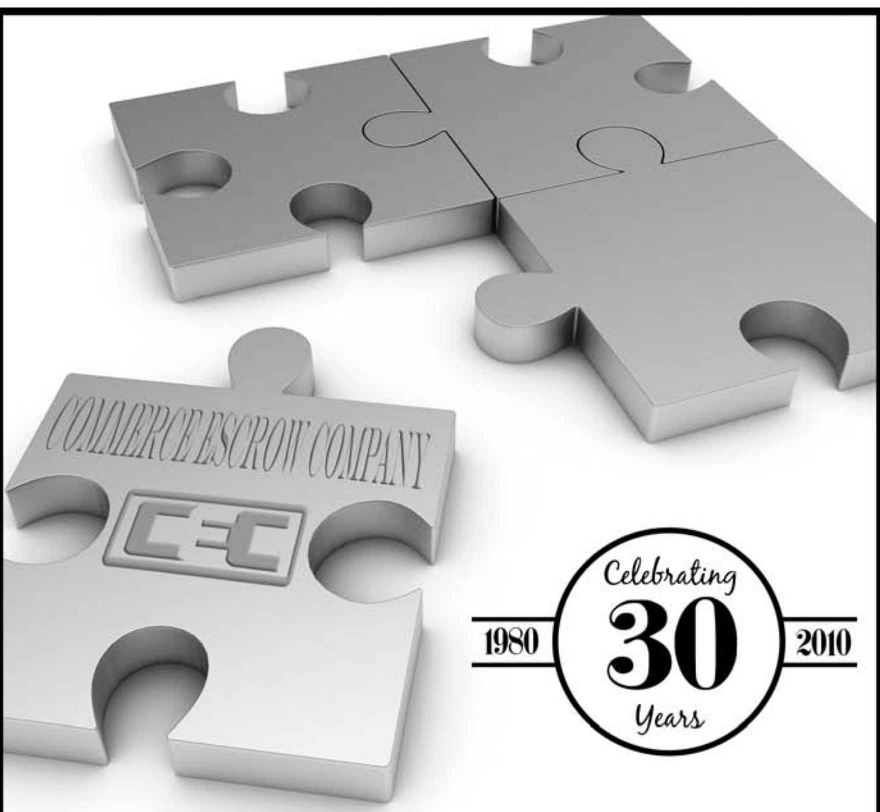

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Section, E-Discovery Pocket Guide (Aug. 2008), *available at* http://www.calbar.ca.gov/calbar/pdfs/sections/litigation/e-discovery-pocket-guide.pdf.

[6] *See* Williams v. Russ, 167 Cal. App. 4th 1215, 1223 (2009).

[7] *See id.* at 1221 (discussing a finding of negligent spoliation by discovery referee); In re NTL, Inc. Sec. Litig. (Gordon Partners v. Blumenthal), 244 F.R.D. 179, 198 (S.D. N.Y. 2007) ("The culpable state of mind requirement is satisfied in this circuit by a showing of ordinary negligence.").

[8] Southeastern Mech. Servs. v. Brody, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009).

[9] Arista Records LLC v. Usenet.com, 2009 WL 1873589 (S.D. N.Y. June 20, 2009).

[10] *See* Code Civ. Proc. §2023.030.

[11] *See* Williams, 167 Cal. App. 4th at 1223 ("Sanctions should be tailored to serve that remedial purpose [of remedying the underlying discovery abuse], [they] should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery....").

[12] *See, e.g., id.* at 1227 ("'Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action.'" (quoting Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 14 (1998)).

[13] *See* Code Civ. Proc. §2023.020(b).

[14] *See* R. S. Creative, Inc. v. Creative Cotton, Ltd., 75 Cal. App. 4th 486, 497 (1999).

[15] Negligence can be a sufficient "culpable state of mind" for a finding of spoliation.

[16] *See* Scalera v. Electrograph Sys., Inc., ___ F.R.D. ___, 2009 WL 3126637, at *8 (E.D. N.Y. Sept. 29, 2009).

[17] *Id.* at *16.

[18] *Id.*

[19] *Id.* at *1.

[20] *Id.* at *16 ("[H]ad clearer instructions been provided, [the] hard drive would have been searched (rather than erased) at or before the time she retired.").

[21] *Id.* at *17.

[22] Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *3 (S.D. N.Y. Jan. 15, 2010) ("[D]efinitely after July, 2004 when the final relevant *Zubulake* opinion was issued, the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.").

[23] *Id.* at *12.

[24] *Id.*

[25] Rimkus Consulting Group v. Cammarata, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010).

[26] *Id.*

[27] *Id.* at *5.

[28] Williams v. Russ, 167 Cal. App. 4th 1215, 1226-27 (2009).

[29] *Id.*

[30] *Id.* at 1227 ("In fact, the record does not show that [the plaintiff] ever supplied the trial court with, or has ever described, the contents of the 11 file boxes he did copy. Without those documents as a starting point, it seems impossible to determine whether those documents might have been sufficient for [the defendant] to mount an adequate defense.").

[31] http://www.e-discoveryteam.com.

[32] http://e-discoveryteam.com/2009/11/29/the-e-discovery-sanctions-cube/.

[33] Qualcomm v. Broadcom, Case No. 05cv1958-B (BLM), 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010). This is the final of a series of decisions concerning the failure to produce documents until after trial. Despite an order to show cause in 2008, the court determined counsel would not be sanctioned personally.

[34] Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, Amended Op. and Order, Case No. 05 Civ. 9016 (SAS), 2010 WL 184312, at *1 (S.D. N.Y. Jan. 15, 2010).

[35] *Id.* at *23.

[36] Swofford v. Eslinger, ___ F. Supp. 2d ___, 2009 WL 3818593 (M.D. Fla. 2009).

[37] *Id.* at *8.

[38] *Id.* at *5-8.

[39] Scalera v. Electrograph Sys., Inc., ___ F.R.D. ___, 2009 WL 3126637, at *1 (E.D. N.Y. Sept. 29, 2009).

[40] Estrada v. Delhi Cmty. Ctr., Superior Court Case No. 06CC12880, Cal. App. 4th Dist. No. G040405, 2009 WL 3359194 (2009) (unpublished).

[41] Scalera, 2009 WL 3126637, at *12-13.

[42] *Id.* at *12.

[43] *Id.*

[44] Estrada, 2009 WL 3359194, at *3-8.

[45] Cal. Rules of Prof'l Conduct 3-110; ABA Model Rules of Prof'l Conduct 1.1.

[46] William A. Gross Constr. Assoc., Inc. v. American Mfrs. Mut. Ins. Co., 256 F.R.D. 134 (S.D. N.Y. 2009) (Judge Andrew Peck admonishing counsel over the creation of key words).

[47] Swofford v. Eslinger, ___ F. Supp. 2d ___, 2009 WL 3818593 (M.D. Fla. 2009).

[48] *See, e.g.*, Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (2003) (Zubulake IV); *see also* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (2003) (Zubulake I) (setting forth seven cost and relevance factors to determine whether cost-shifting is appropriate).

[49] The *Zubulake* series of decisions set forth the standard under which a court should consider the relative importance and accessibility of electronic information in the context of backup tapes.

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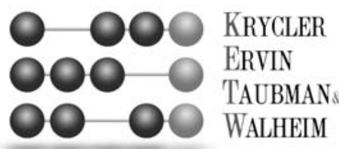

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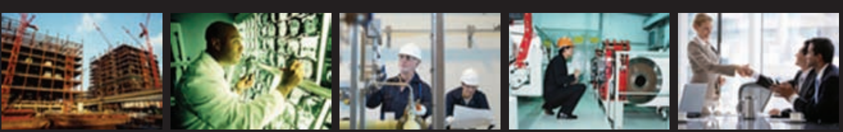

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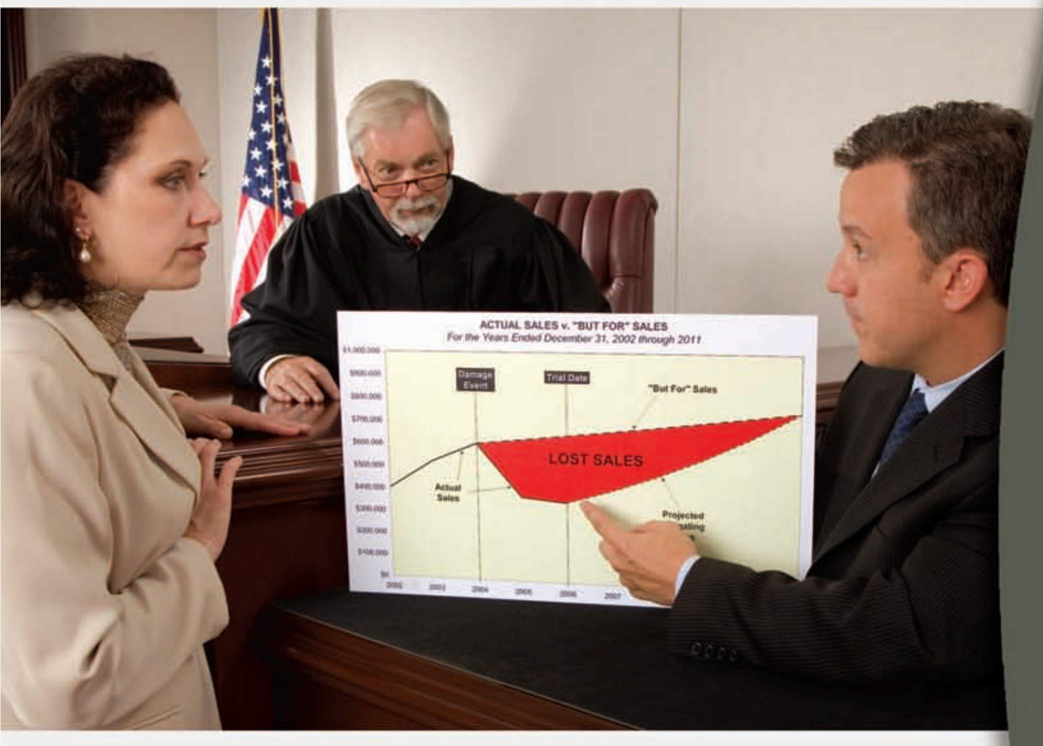

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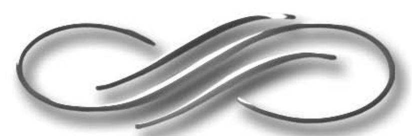

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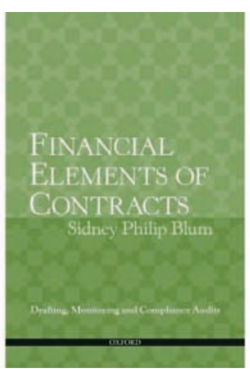
Financial Elements of Contracts



By Sidney Philip Blum
Oxford University Press, 2010
$225, 384 pages

Sidney Philip Blum is an accountant, not a lawyer, but his book is valuable for any lawyer who deals in licensing agreements. *Financial Elements of Contracts: Drafting, Monitoring, and Compliance Audits* provides a detailed, practical overview of what happens once the ink has dried and performance begins. Auditing accountants typically work with a contract that a lawyer has already written. From this experience, Blum provides a wish list of what could have been in the contract had an accountant been consulted when it was created. This perspective gives the book considerable authority on how to draft effective contracts, including those in which licensees self-report financial information to the licensor.

In a typical licensing agreement, a licensor grants a licensee a limited right to use some form of intellectual property. Rights granted may include copyright, trademark, right of publicity, trade secret, or patent. The permitted use will be in connection with specific types of goods or services in a particular territory in exchange for payment of a percentage of something, usually sales. Voluntary reporting of sales and royalties is common among these agreements. How can an attorney help the licensor increase its bottom line?

Blum explains how to account for not only what was sold but also what was manufactured. He identifies tests for whether the self-reporting of licensees is accurate. With knowledge of contract provisions that indicate what information the licensor will receive after a licensing agreement is signed, an attorney can benefit clients. Without adequate types of information, it will be difficult to test the accuracy of royalty reporting.

The author devotes considerable space to contractual monitoring programs that ensure better compliance. Unless counsel or the client is sophisticated, organized monitoring compliance may not be addressed in a licensing agreement. Blum describes contract monitoring programs, known as CMPs, which provide for the monitoring of a company's licensees with in-house and outside help. His pragmatic approach covers drafting compliance plans and working with auditors. Blum stresses the importance of provisions for better remedies as an alternative to termination. He tends to favor provisions that create disincentives for breaching the agreement. Although those provisions are often not given much attention, they may encourage compliance and result in more successful audits.

How can an attorney sell a CMP to a licensor client? Blum notes that one purpose of the CMP is to maintain and develop long-term relations between the licensor and licensee. As with personal relationships, regular communication is important. For example, underreporting often results when the licensee's employees lack understanding of the importance of the process. Also, the licensee may believe the benefit of underreporting royalties outweigh the risks. This belief may be reduced by enhanced licensee communication. For example, Blum guides the reader through the process of selecting and contracting with an auditor, as well as how and when to notify the licensee of an audit. Blum details the red flags, such as the licensee's only meeting minimum guarantees, that suggest underreporting. These guidelines may all be considered as a part of how to pitch a CMP to a licensor client.

Self-Reporting Contracts

Financial Elements of Contracts covers a variety of self-reporting contracts, not all of which are license agreements for merchandising. Others include construction contracts, advertising agency contracts, digital distribution agreements, franchise arrangements, manufacturing contracts, and joint venture and partnership agreements. Blum identifies areas of risk for the different types of agreements and industries and indicates the types of documents to request in reporting. The "books and records" provisions identified in contracts take on new meaning, and the terms can be adjusted to ensure that they include the specific documents likely to be requested by an auditing accountant when the time comes to test for compliance.

Blum explains how a determination of what royalties are due under a contract can depend on understanding who influences the reporting of royalties. He addresses the different types of people who may be involved in supplying, filtering, or withholding information that factors into the calculation of royalty payments. For example, he reviews the practical considerations associated with obtaining information in transactions that occur outside the United States.

The author also offers practical guidelines for royalty agreements. In litigation, lawyers must evaluate what may be a reasonable interpretation of a contract, including custom and usage of terms. He offers positive and negative examples of contract language, highlighting the likely consequences in litigation of the use of specific terms. Finally, Blum provides a collection of sample documents, including a license agreement and audit documents, to provide a general understanding of the way auditing and compliance may be obtained.

Blum's background as an accountant in Los Angeles—as well as his prior experience with a big accounting firm, a motion picture studio, and an oil company—amply qualifies him to offer his insights to lawyers engaged in drafting, performance, and litigation of licensing agreements. This book is helpful for lawyers involved in drafting licensing agreements, monitoring the performance of agreements, or contemplating litigation when performance proves to be less than satisfactory. ■

Paul D. Supnik practices copyright, trademark, and entertainment law in Beverly Hills. He is a former chair of the Los Angeles Copyright Society and of the Entertainment Law and Intellectual Property Section of the Los Angeles County Bar Association.

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Will Wall Street Executives Seek the Protection of the Fifth Amendment?

AFTER THE WORST FINANCIAL COLLAPSE since the Great Depression, the finger-pointing has escalated in earnest. Major financial institutions that participated in the subprime market or failed to accurately price or rate the risks involved with mortgage-backed securities are now scrambling to protect themselves from the outrage observed in the recent congressional hearings and evidenced by many civil lawsuits. So far, Wall Street executives have not asserted the Fifth Amendment, but as multiple civil and possible criminal proceedings loom, will they?

The Fifth Amendment privilege may be raised in any proceeding by a witness who reasonably fears an answer may incriminate him or her. While a corporation cannot claim the privilege, its officers, directors, and employees can. In addition, a witness may invoke the Fifth Amendment protection if disclosure would serve as a link in the chain of evidence tending to establish criminal liability. Although documentary evidence is generally not protected, exceptions may apply if the production itself is testimonial and incriminating.

The recently televised congressional hearings involving Goldman Sachs allowed us to observe how Wall Street executives handled the hot seat. I can only imagine the hours they spent with legal counsel preparing to testify. They did not assert the Fifth Amendment, which is one means of giving the appearance of cooperation and transparency. Perhaps some of the public were even persuaded. After the testimony of Lloyd Blankfein, chief executive of Goldman Sachs, the firm's shares rose while the broader market fell.

As a lawyer, I found many of their answers to be calculated, evasive, and deceptive. They took advantage of the less rigorous demands of a congressional hearing, particularly given that most, if not all, of the senators are less sophisticated than the executives when it comes to complicated financial transactions. But even easy questions were sidestepped. For example, Senator Susan Collins asked multiple Goldman Sachs witnesses if they had a duty to act in the best interests of their clients, not their firm. The query elicited some impressive verbal contortions: "I believe we have a duty to serve our clients well," one witness replied. Each refused to say yes. Goldman Sachs executives were paid millions while leading the country into the meltdown. It calls to mind the term "bankster," a term coined in 1929 in connection with the stock market crash of that year. It combines "banker" and "gangster" to label bankers as criminally irresponsible.

While we can hope congressional hearings will lead to legislative reform, the more likely means of shining some light on the financial practices of the big banks may be multiple civil lawsuits, including the civil fraud charges recently filed by the SEC against Goldman Sachs. In that case, the SEC alleges that Goldman did not tell investors that a security the bank was selling had been designed by someone betting against it. Perhaps, away from the cameras and grandstanding politicians, we may get some real answers from Wall Street executives once the plaintiffs engage in discovery and trial. Plaintiffs' lawyers will have more time and skill to challenge evasive answers and spin control. Judges will also be more likely to keep the defendants on a short leash. Civil litigation will force Wall Street executives to provide answers that Congress simply did not have the time, ability, or inclination to obtain.

At the same time, Wall Street executives must be warily eyeing the threat of criminal prosecution. So far, criminal prosecutions for fraud have been brought against mostly lower-level players rather than senior-level Wall Street executives. Yet at a congressional hearing in December, when asked why no criminal cases had yet been brought against CEOs, the assistant attorney general for the Criminal Division of the U.S. Department of Justice, Lanny Breuer, commented, "It takes a long time in hatching them and developing them. But they will be brought."

Perhaps, away from the cameras and grandstanding politicians, we may get some real answers from Wall Street executives.

In mid-May, New York's top prosecutor, Attorney General Andrew Cuomo, subpoenaed eight banks and three ratings firms seeking information on how the financial institutions may have tried to influence the ratings of mortgage-backed securities that lost value with the housing market collapse. About that same time, it was disclosed that federal investigators were expanding their inquiry into potential criminal activities at a number of the biggest banks.

With the likelihood that criminal prosecutions will follow the many civil cases, Wall Street executives must certainly be considering whether they need Fifth Amendment protection against self-incrimination. If so, the investment banking firms, the ratings agencies, and other financial institutions involved in the meltdown could certainly suffer consequences in the civil suits. Because blanket invocations of the privilege are not allowed, Wall Street executives must invoke the Fifth in response to each question that threatens them with criminal prosecution. That could result in those witnesses being precluded from testifying at trial. Invocation of the Fifth Amendment privilege may be treated as a vicarious admission.

The legal consequences to the firms and organizations involved—particularly the criminal exposure—will keep their civil and criminal attorneys busy for some time. That also will surely aggravate a public relations nightmare for the defendant companies by enhancing the bankster image. ■

Robert M. Heller is a litigation attorney located in Century City. He focuses his practice on business and entertainment litigation with an emphasis on shareholder disputes.

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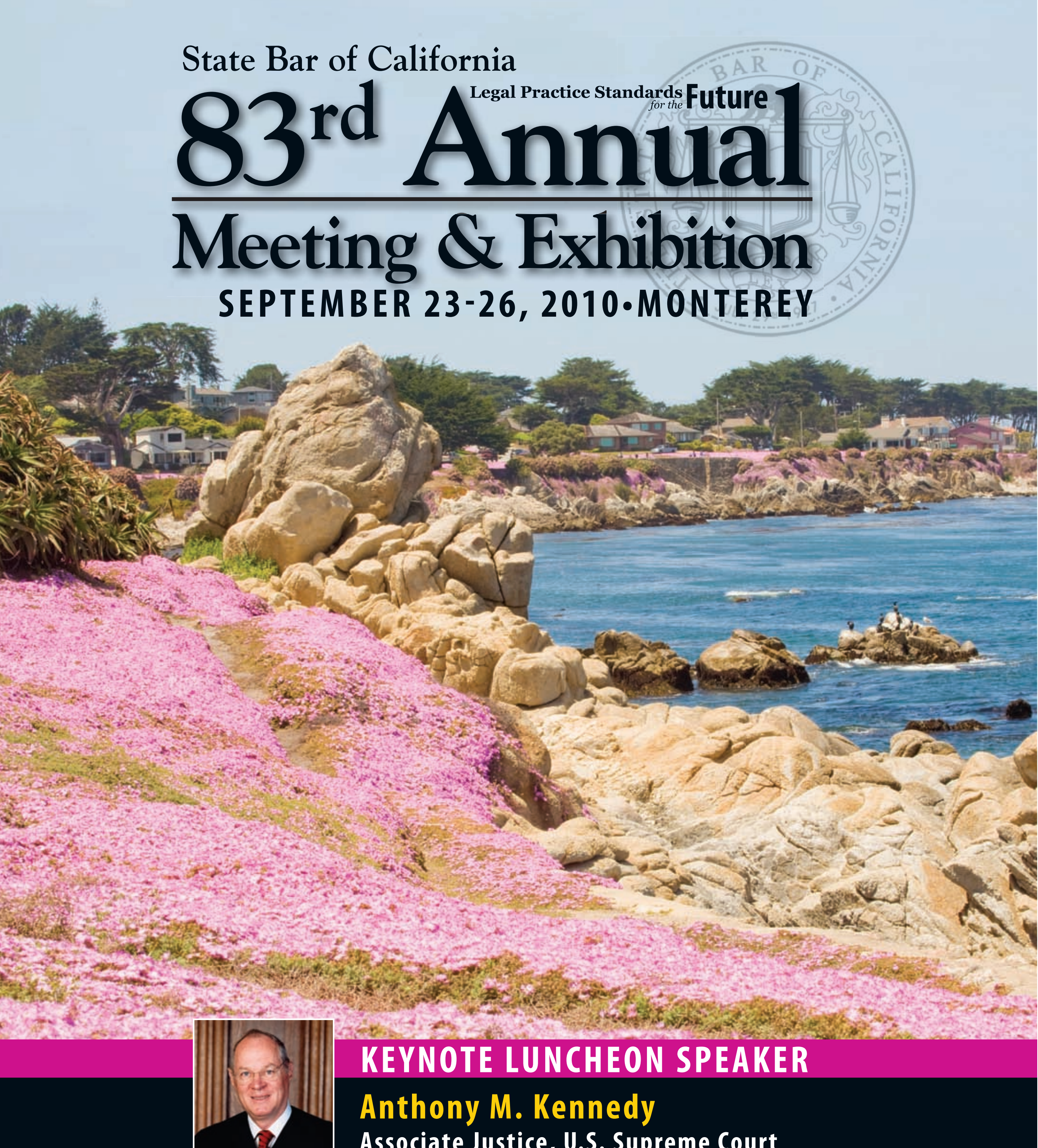

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