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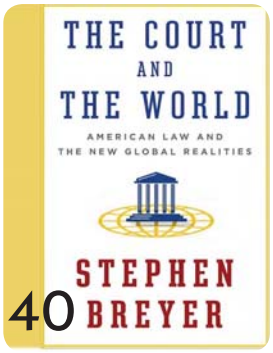

FEATURES

COLUMNS

DEPARTMENTS

VALLEY LAWYER

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Valley Lawyer is published monthly. Articles, announcements, and advertisements are due by the first day of the month prior to the publication date. The articles in Valley Lawyer are written for general interest and are not meant to be relied upon as a substitute for independent research and independent verification of accuracy.

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Tolerating Our Differences

CAROL L. NEWMAN
SFVBA President

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THIS COLUMN WAS INSPIRED by an op-ed piece in the *Los Angeles Times* from December 18, 2015. On December 18, 1944, just 71 years ago, the United States Supreme Court decided the case of *Korematsu v. United States.*[1] In that case, the petitioner, an American citizen of Japanese descent, was convicted of remaining in San Leandro, California, a "military area," contrary to a military order which directed that after May 9, 1942, all persons of Japanese ancestry were to be excluded from that area. Mr. Korematsu was prosecuted under an Act of Congress of March 21, 1942, codified at that time at 18 U.S.C. Section 97a, which allowed the President and the military to restrict access to any "military area or military zone."

The military order at issue, known as Exclusion Order No. 34, was one of a number of military orders and proclamations based upon Executive Order No. 9066, 7 Fed. Reg. 1407, which declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage . . ."

The Ninth Circuit Court of Appeals affirmed the conviction, and certiorari was granted because of the constitutional question involved. No issue was raised as to Mr. Korematsu's personal loyalty to the United States. In short, the issue was whether all persons of Japanese descent could be barred from an area of the United States during wartime simply because of their race.

The Supreme Court held that they could be. Relying on an earlier decision in which the Court found that all persons of Japanese ancestry could be subjected to a curfew order, *Hirabayashi v. United States,*[2] the Court stated, in an opinion by Justice Black, "[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did."[3] The Court further stated, quoting from the *Hirabayashi* case:

> "[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."[4]

The Court further stated:

> We uphold the exclusion order as of the time it was made and when the petitioner violated it. . . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. . . . But hardships are part of war, and war is an aggregation of hardships. . . . Compulsory exclusion of large groups of

citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[5]

The Court sidestepped the issue of whether Mr. Korematsu had violated separate but related orders requiring those of Japanese ancestry to assemble at "assembly centers" and thereafter to be detained in "relocation centers," stating that this case involved only an exclusion order.[6]

Powerful dissents were written by three justices, including Justice Roberts, who said, "[I]t is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition toward the United States."[7]

As lawyers, this case is still important to us because, amazingly, it has never been overruled or reversed, even though it has been severely criticized. Furthermore, in difficult times, *Korematsu* is trotted out to justify exclusion and repression. Last year, Justice Scalia, while criticizing the decision, told law students at the University of Hawaii that "you are kidding yourself if you think the same thing will not happen again." And in recent weeks, politicians have cited this case as justification for excluding Syrian refugees and banning Muslim immigrants from this country.

This case is not from the far distant past—it is only 71 years old. We should resist the temptation in times of crisis to circle the wagons and exclude or imprison those who simply look or sound different from us, for no reason other than their differences from us. My grandfather was a refugee from Russia in 1917, nearly 100 years ago now. Thank God he was able to enter the United States! Our strength—what makes us different from nearly every other country—is that we have always been a nation of immigrants. Screening is one thing, but excluding is another.

[1] *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193 (1944).
[2] *Hirabayashi v. United States,* 320 U.S. 81 (1943).
[3] 65 S.Ct. at 194-195.
[4] *Id.* at 195.
[5] *Id.*
[6] *Id.* at 197.
[7] *Id.* at 198.

Mark Your Calendar for Judges' Night

ELIZABETH POST
Executive Director

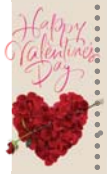
epost@sfvba.org

A HIGHPOINT ON THE SFVBA CALENDAR OF EVENTS IS JUDGES' NIGHT. About 400 lawyers and judges are expected to attend this year's event on February 25 at the Warner Center Marriott. Los Angeles Superior Court Judge Huey Cotton, featured in January's *Valley Lawyer*, will be recognized as 2016 Judge of the Year. LASC Presiding Judge Carolyn Kuhl and Assistant Presiding Judge Daniel Buckley will be in attendance to honor Cotton.

Neighborhood Legal Service Los Angeles (NLSLA) Executive Director Neal Dudovitz will be presented with the Stanley Mosk Legacy of Justice Award for his more than 40 years of dedication to providing meaningful access to justice to the poor. NLSLA is celebrating 50 years of serving the holistic needs of the Valley's diverse communities. Since Neal took the helm of NLSLA in 1993, NLSLA has become a multi-office agency with a $14 million annual budget serving all of Los Angeles County. Through Neal's leadership, NLSLA has developed the country's largest network of Self-Help Legal Access Centers, the Health Consumer Center, and a growing network of Medical Legal Community Partnerships.

The inaugural recipient of the Legacy of Justice Award was Valley legal icon, U.S. Court of Appeals Judge Harry Pregerson. The SFVBA established the award in 2001 following the death of California's longest-serving Supreme Court justice, Stanley Mosk. Judge Pregerson is the longest-serving judge in the history of the Ninth Circuit and will be recognized at Judges' Night on his retirement to senior status. U.S. District Judge Dean Pregerson and Superior Court Judges Leland Harris, Reva Goetz and Russell Kussman will also be recognized on their retirements.

Judges' Night is the perfect occasion for SFVBA members to meet and socialize with fellow Valley attorneys and judicial officers. Member price is $105 for individual tickets and $1,050 for tables of 10; SFVBA President's Circle members receive a discount on tables. To purchase tickets, sponsorships or program ads, contact SFVBA Director of Education & Events Linda Temkin at events@sfvba.org or (818) 227-0490, ext. 105.

SUN	MON	TUE	WED	THU	FRI	SAT
BLACK HISTORY MONTH						
	1 *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for March issue.	2	3	4 Membership & Marketing Committee 6:00 PM SFVBA OFFICE	5	6
7	8	9 Probate & Estate Planning Section Updates on Critical Cases 12:00 NOON MONTEREY AT ENCINO RESTAURANT Marc Sallus and Marshall Oldman will give the latest litigation updates on the cases every probate and estate planning attorney should know. (1 MCLE Hour) Board of Trustees 6:00 PM SFVBA OFFICE	10 Business Law & Real Property Section Identity Theft No one Is Talking About: Risk to Business Owners 12:00 NOON SFVBA OFFICE Heather Louise Parker will address this important topic. (1 MCLE Hour)	11 Employment Law Section 2016 Employment Law Update 12:00 NOON SFVBA OFFICE Nicole Kamm and Tal Yeyni of Lewitt Hackman will review new laws that employers and their counsel need to know. (1 MCLE Hour)	12	13
14 	15 	16 Taxation Law Section Bankruptcy Court: Get Your Client's Tax Bill Lowered! 12:00 NOON SFVBA OFFICE John D. Faucher will discuss how the Bankruptcy Court is another place to get your client's tax bill lowered. (1 MCLE Hour)	17 Workers' Compensation Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT	18	19 Bankruptcy Law Section Ninth Circuit Bankruptcy Appellate Panel Review 12:00 NOON SFVBA OFFICE Bankruptcy Judge Martin Barash and attorney Michael Avanesian headline our annual Ninth Circuit Bankruptcy Appellate Panel (BAP) case review. (1 MCLE Hour)	20
21	22 Family Law Section Same Sex Marriage—Two Years Later 5:30 PM MONTEREY AT ENCINO RESTAURANT Judge Amy Pellman and attorney Diane Goodman update the group on this important legislation. Approved for Family Law Legal Specialization. (1.5 MCLE Hours)	23 Editorial Committee 12:00 NOON SFVBA OFFICE	24	25 ANNUAL JUDGES' NIGHT DINNER THURSDAY, FEBRUARY 25 WARNER CENTER MARRIOTT See page 15		27
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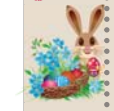
CALENDAR

MARCH 2016

SUN	MON	TUE	WED	THU	FRI	SAT
WOMEN'S HISTORY MONTH						
		1 *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for April issue.	2	3 Membership & Marketing Committee 6:00 PM SFVBA OFFICE	4	5
6	7	8 Probate & Estate Planning Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT Board of Trustees 6:00 PM SFVBA OFFICE	9 New Lawyers Section 6:00 PM SFVBA OFFICE	10	11	12
13	14	15 Taxation Law Section IRS International Tax Enforcement 12:00 NOON SFVBA OFFICE Stephen J. Turanchik of Paul Hastings, who litigated for six years for the U.S. Department of Justice, Tax Division, will discuss FATCA and Voluntary Disclosures. (1 MCLE Hour)	16 Workers' Compensation Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT	17 St. Patrick's Day 	18	19
20	21	22	23	24	25	26
27 Happy Easter 	28 Family Law Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT Approved for Family Law Legal Specialization. (1.5 MCLE Hours)	29 Editorial Committee 12:00 NOON SFVBA OFFICE	30	31		

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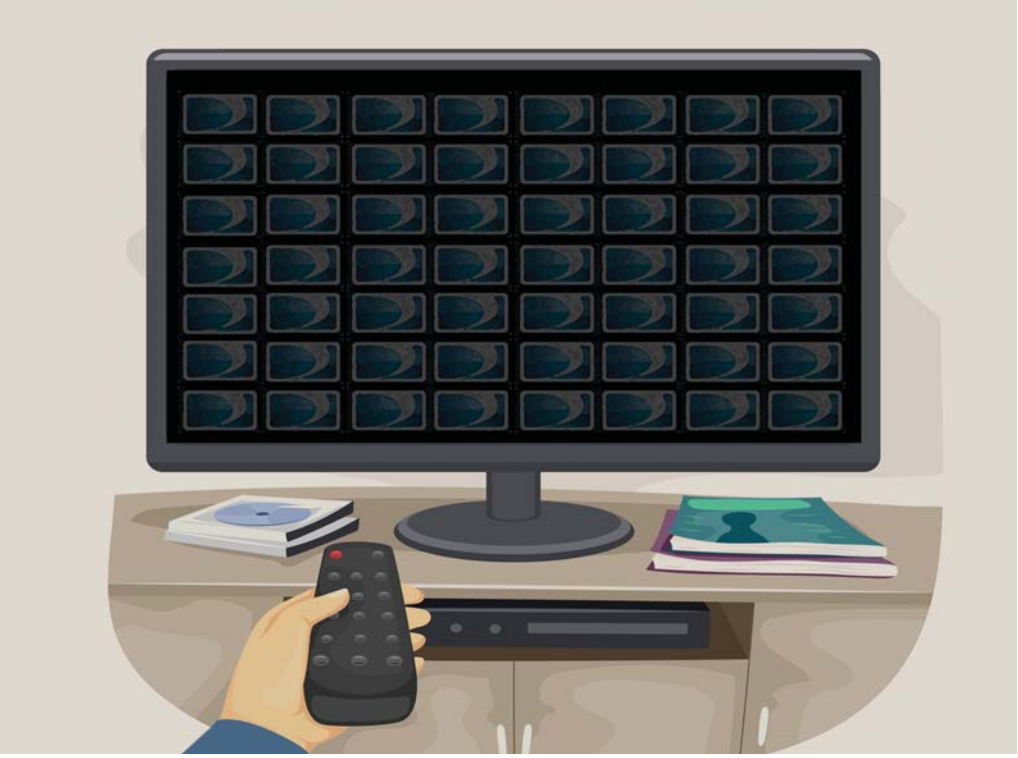


WATCHING DIRECTV:

The Recent Case of *DIRECTV, Inc. v. Imburgia* and Its Impact on Arbitration

By Elliott Gurnick

IN DECEMBER 2015, THE U.S. Supreme Court ruled in favor of DIRECTV's motion to compel arbitration in *DIRECTV, Inc. v. Imburgia*.[1] The case concerned the phrase "law of your state" in an arbitration agreement, and whether these words refer only to valid state law, or also encompass invalid state law.

The suit, a class action by DIRECTV customers challenging early termination fees, began in Los Angeles Superior Court, which denied DIRECTV's motion to compel arbitration. The arbitration clause waived class actions. The trial court ruled partly based on California law prohibiting class action waivers in arbitration agreements.[2] The court also considered a provision in the arbitration clause that purported to invalidate the agreement to arbitrate if state law prohibited class action waivers.

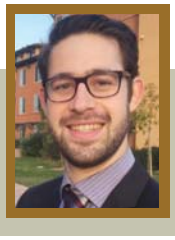
The California Court of Appeal upheld the trial court ruling and the California Supreme Court declined to hear the case.[3] The U.S. Supreme Court granted certiorari and reversed, ruling that DIRECTV's motion to compel arbitration should have been granted. The high court ruled 6-3, in an opinion by Justice Breyer, that the Federal Arbitration Act (FAA), under which class action waivers are permitted, preempts California law, which prohibits them. FAA preemption overcame the California state law prohibition of class action waivers. That neutralized the agreement's provision purporting to void the arbitration agreement.

This Supreme Court decision reinforces FAA preemption, and clarifies the rule that courts must treat agreements to arbitrate equally with other contracts. The decision also indicates that although an arbitration agreement may choose any body of law to govern the agreement (even, in the Court's words, "the law of Tibet" or "of pre-revolutionary Russia"[4]), the choice must be clearly specified.

This article discusses key aspects of the *DIRECTV* decision, its effects, the scope of the FAA, and some of the decision's teachings for lawyers drafting arbitration agreements.

Case Summary

Amy Imburgia, a California resident, subscribed to DIRECTV. Her agreement included an arbitration clause[5] which prohibited either party from bringing a class action, but said "the entire arbitration provision was unenforceable if 'the law of your state' made class-arbitration waivers unenforceable."[6] In view of the California Supreme Court's prohibition of such waivers,[7] the self-destruct language of the arbitration clause appeared to render DIRECTV's agreement unenforceable. The trial court and Court of Appeal both ruled



Elliott Gurnick is a student at University of California, Irvine School of Law. He can be reached at elliottgurnick@gmail.com.

to this effect, rejecting DIRECTV's motion to compel arbitration.

In 2005, the California Supreme Court had ruled in *Discover Bank v. Superior Court*[8] that class action waivers in consumer contracts are unenforceable. After *Discover Bank*, the U.S. Supreme Court ruled, in *AT&T Mobility LLC v. Concepcion*.[9] that Section 2 of the FAA[10] preempts the *Discover Bank* Rule.[11] In other words, the FAA, as applied by the Supreme Court in *AT&T*, invalidates the rule adopted by the California Supreme Court, refusing to enforce class action waivers in arbitration agreements.

The interplay of these decisions raised the question in DIRECTV whether the scope of the phrase "law of your state" referred only to valid state law, or would be construed to encompass invalid law (the invalidated rule of *Discover Bank* that voided class action waivers). The U.S. Supreme Court held that "law of your state" should be construed to mean "valid state law" only. Therefore, this phrase in the DIRECTV arbitration agreement referred only to valid California law and did not refer to the *Discover Bank* rule (which is invalid law). Thus, the Supreme Court ruled that the DIRECTV arbitration agreement was valid and enforceable.[12]

The Court's logic was that arbitration contracts must be "on equal footing with all other contracts."[13] By rendering the agreement unenforceable, California treated the phrase, "law of your state" to include invalid state law, since the law applied by the California court (in *Discover Bank*) was superseded by the FAA. "Absent any indication in the contract that [law of your state] is meant to refer to invalid state law," and absent reference to any contract case that interprets similar language to include invalid state law, the U.S. Supreme Court held that "law of your state" is unambiguous, "and takes its ordinary meaning: valid state law."[14]

Effects of the DIRECTV Decision

The Supreme Court's affirmation that the FAA preempts state law encourages lawyers to become or remain familiar with the scope of the FAA. Lawyers who litigate or draft arbitration clauses may frequently need to consider the FAA. Rather than multiple sets of laws governing interstate arbitrations, the FAA provides a single nationwide set of rules governing arbitration involving parties in multiple states, or commerce that Congress can regulate or parties who agreed to have the FAA apply. Thus, lawyers working with arbitration agreements in commercial settings can look to the FAA as the applicable law. Lawyers must also be familiar with relevant state law, for example, California's arbitration act,[15] and potentially international law, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, for arbitrations outside the scope of the FAA.

The Supreme Court in *DIRECTV* also repeated the rule that courts must place arbitration agreements on the same footing as other contracts.[16] As a result, the potential exists that contract cases in other fields may be precedent for cases concerning arbitration agreements. Lawyers working with arbitration agreements will devote attention to reviewing a wider range of contract cases to extract relevant law. Contract lawyers may also draft arbitration agreements with greater confidence, knowing the applicable rules are those governing contracts generally.

The FAA allows parties to invoke any body of law to govern their arbitration agreements. "The Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs

some or all of its provisions."[17] However, lawyers should specify clearly and unambiguously which law they wish to select. While DIRECTV prevailed in the Supreme Court, and may now compel Ms. Imburgia to arbitrate, had DIRECTV specified clearly which body of law would govern, it could have avoided years of litigation, or at least prevailed in the trial court in its motion to compel arbitration.

Overview of Federal Arbitration Act

The FAA establishes a framework for enforcement of arbitration agreements. It provides that arbitration agreements in general "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[18] Under the FAA, if a party to an arbitration agreement brings suit, any of the other parties may ask the court to stay proceedings and compel the parties to proceed with arbitration "in the manner provided for in such agreement."[19]

The FAA also addresses arbitration procedure. It allows an arbitration agreement to select an arbitrator or set forth a procedure for selection of the arbitrator, "but if no method be provided…[or if a party fails] to avail himself of such method, [or if there is] a lapse in the naming of an arbitrator…[or] filling a vacancy…then upon the application of either party to the controversy the court shall designate and appoint an arbitrator."[20] The FAA also lets parties call witnesses and obtain process to compel them to appear. The FAA even provides for holding persons in contempt who fail to appear.[21] However, compulsion to appear and contempt must be sought and obtained in federal district court.[22]

The FAA includes procedure for enforcing an arbitral award. "At any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award."[23] The court must grant the award "unless the award is vacated, modified, or corrected."[24] The FAA establishes when a court may vacate an arbitral award, including when the award was obtained by corruption, fraud, or undue means, partial corruption, or when an arbitrator is guilty of certain misconduct.[25] The FAA permits awards to be modified or corrected, such as when an evident miscalculation has occurred.[26] Section 16 of the FAA contains provisions concerning appeal from certain actions of the court relating to arbitration.[27]

Considerations for Arbitration Drafters

Lawyers drafting arbitration agreements should consider availing clients of the FAA. Lawyers can expressly incorporate FAA procedure into arbitration agreements. Doing so invokes the FAA's provisions for compelling arbitration, appointment of arbitrators, compelling witnesses and obtaining and enforcing awards.

Drafters may wish to consider and try to anticipate potential developments in the law and address these in the arbitration clause. Long-term forward thinking can provide an advantage to those seeking to strengthen the enforceability of their arbitration clause. Courts are likely to uphold arbitration where the agreement's language is clear, unambiguous, and takes reasonably foreseeable changes in the law into account.

Lawyers working with arbitration agreements should try to keep in mind general contract law principles because these govern arbitration agreements. The rule that courts must treat arbitration agreements on equal footing with other contracts means precedents in all manner of contract cases may apply to disputes over arbitration agreements.

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[1] *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015).
[2] *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 152 (2005) (ruling that at least in some circumstances, in California, class action waivers in consumer contracts of adhesion are unenforceable).
[3] *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 467 (2015).
[4] *Id*. at 468.
[5] *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015).
[6] *Id.* at 464.
[7] *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 152 (2005).
[8] *Id.*
[9] *AT&T Mobility LLC v. Concepcion* 563 U.S. 333, 356 (2011).
[10] 9 U.S.C. §2.
[11] *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 152 (2005).
[12] *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 471 (2015).
[13] *Id.*at 475 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).
[14] *Id.* at 469.
[15] Cal. Civ. Proc. Code §1281-1288.8.
[16] *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 475 (2015) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).
[17] *Id.* at 468.
[18] 9 U.S.C. §2.
[19] 9 U.S.C. § 3-4.
[20] 9 U.S.C. §5.
[21] 9 U.S.C. §7.
[22] *Id.*
[23] 9 U.S.C. §9.
[24] 9 U.S.C. §10.
[25] 9 U.S.C. §11.
[26] 9 U.S.C. §15.
[27] 9 U.S.C. §16.

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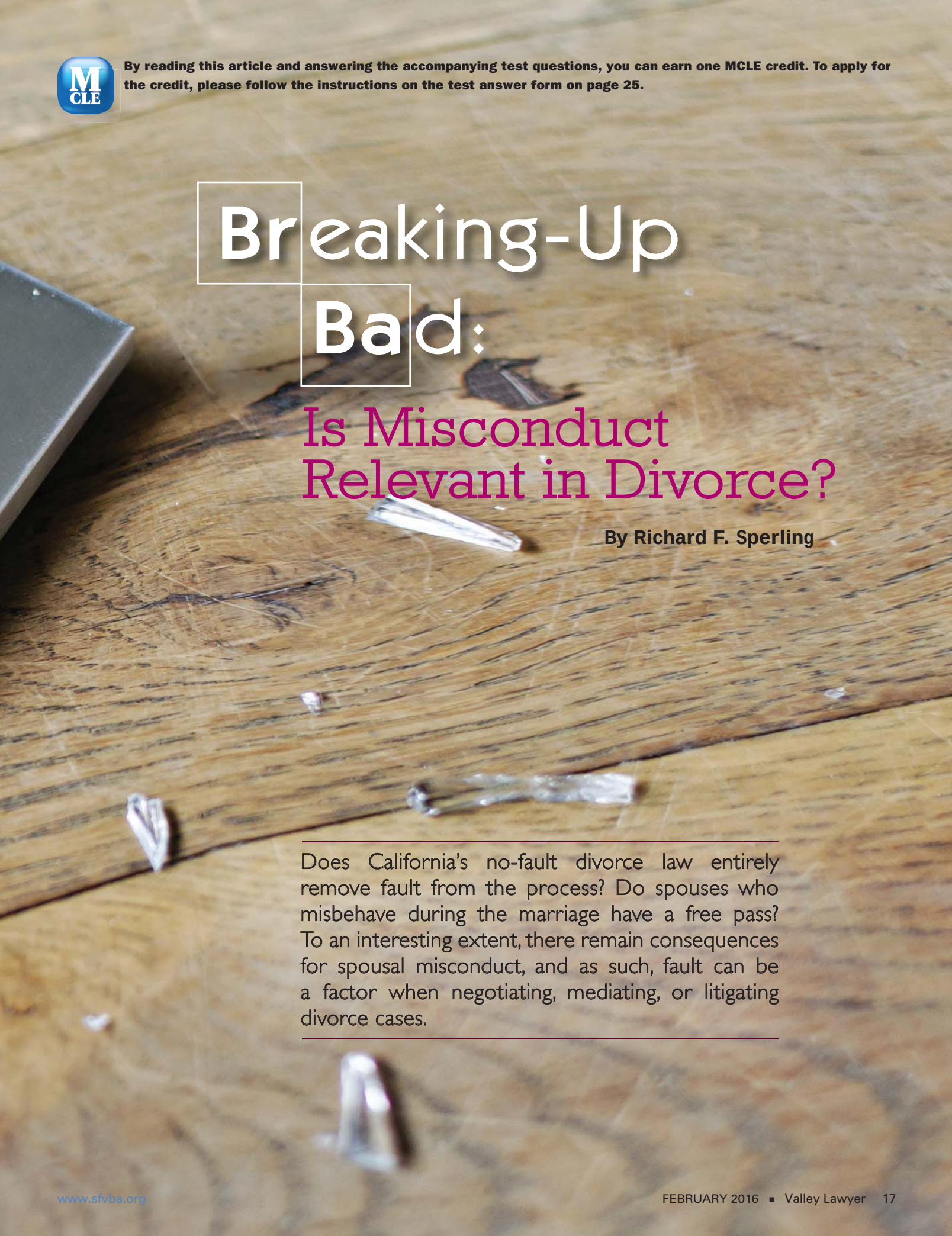
Breaking-Up Bad:

Is Misconduct Relevant in Divorce?

By Richard F. Sperling



Does California's no-fault divorce law entirely remove fault from the process? Do spouses who misbehave during the marriage have a free pass? To an interesting extent, there remain consequences for spousal misconduct, and as such, fault can be a factor when negotiating, mediating, or litigating divorce cases.

CALIFORNIA'S FAMILY LAW ACT (THE ACT) BECAME effective January 1, 1970.[1] California was the first state to enact no-fault divorce. Soon thereafter, each state passed some form of no-fault divorce.[2] The Act removed proof of misconduct as grounds for divorce. Prior law required proof of "adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction of a felony, or incurable insanity."[3] The Act requires proof only of irreconcilable differences or incurable insanity as required grounds.[4]

In principle, the Act also sought to remove fault as a factor in the division of property and debt. As one legislator stated, the goal was "to eliminate the spectacle of private detectives sneaking around gathering salacious evidence against one of the spouses for presentation in a court room exposé."[5] The Act's new provisions stated courts must divide the community estate (assets and liabilities) equally.[6] This was real change. Prior to 1970, spousal misconduct determined community property awards. Innocent spouses were awarded greater shares of the community, and where one spouse's misconduct was flagrant or ongoing, the award to the innocent spouse increased accordingly.[7]

The Act also included an exception to the no-fault rule. California Family Code §2335 states "except as otherwise provided by statute... evidence of specific acts of misconduct is "improper and inadmissible." There is in fact a variety of bad spousal behavior, for which the Act or the courts have provided remedies.

Adultery

Family Code §720 states spouses "contract toward each other obligations of mutual respect, fidelity, and support." Nevertheless, the Act effectively made adultery a non-factor in property divisions. In fact, spouses are not permitted to enter into agreements which impose penalties or unequal property divisions as punishment for adultery.

In *Diosdado v. Diosdado*,[8] the spouses agreed if one proved the other was sexually unfaithful, the innocent party would receive $50,000 in liquidated damages. This agreement was held unenforceable, as a violation of the no-fault provisions of the Act. Similarly, an agreement in which a husband promised to grant his wife all of his interest in certain community property if he used mind-altering drugs was also held unenforceable.[9]

While evidence of adultery in property division may be inadmissible, adultery has been held to be grounds for annulment. In *Marriage of Ramirez and Llamas*,[10] the facts are remarkable. Jorge married Lilia, who was a successful real estate broker and investor. When Lilia signed key immigration documents for Jorge, he announced his plan to divorce her. Lilia phoned her sister Blanca, and when Blanca received the call, she was at a restaurant with Jorge. Blanca reached into her purse to push the end call button on her cell phone, but accidently pushed the answer button. The result was Lilia overheard Jorge profess his love to Blanca, as well as his promise to marry her.

Lilia petitioned for a judgment of nullity, as a valid marriage would have gained Jorge a community property share in the brokerage and in several properties. The trial court's judgment of nullity was affirmed on the grounds that Jorge's adultery and deceit constituted proper grounds for a judgment of nullity. This decision was controversial, and not without dissent.[11]

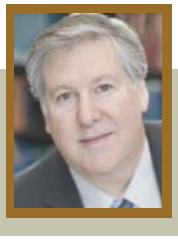
Deliberate Misconduct-Violence

The Act does not insulate the violent spouse. A spouse convicted of attempting to murder or soliciting the murder of the other forfeits his community property share in the pension and retirement benefits of the other.[12] In a case of murder, the Probate Code is definitive. No inheritance or benefit is permitted a spouse who ends a marriage by homicide.[13] There are also federal cases which hold that permitting a violent spouse to benefit from a wrongful act violates public policy.[14]

In addition to criminal penalties, where a spouse has committed domestic violence, the court must consider the domestic violence as a factor when imposing a spousal support obligation,[15] and there is a rebuttable presumption that a spouse guilty of domestic violence shall not receive spousal support.[16]

Conspiracy to murder was a permissible factor for the court to consider in *Marriage of Guasch.*[17] Charlene Guasch's husband James was convicted of soliciting her murder, and his girlfriend Pamela pled guilty as an accessory. Pamela loaned James money for bail, sued him for nonpayment, and obtained a default judgment against James.

Pamela was joined as a party to the Guash divorce, and she placed a judgment levy on the community accounts. Charlene moved to quash the levy, arguing that James permitted Pamela to take a default so she could levy on community property. Charlene pleaded collusion with the court, stating that having failed to murder her, James and



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Charlene were "now attempting to ruin (me) financially." The court granted Charlene's motion to quash the levy, in sympathy with Charlene's plight as a targeted victim in these unusual circumstances.

Deliberate Conduct-Domestic Torts

Another exception to the no-fault rule is the area of domestic torts. In divorce cases, a spouse may obtain a judgment against the other for damages for assault, and collect from the guilty spouse's community property share.[18] Where one spouse injures another by negligence, the wronged spouse may recover from the tortfeasor spouse's separate property first, before community property is used to discharge liability.[19] Domestic torts are recognized in California,[20] and this emerging area of potential liability restores, to some extent, the concept of fault to the divorce process.[21]

Deliberate Misappropriation Doctrine

Family Code §2602 permits the court to divide property unequally when it determines property has been "deliberately misappropriated by the party to the exclusion of the interest of the other party in the community estate." While this doctrine is an explicit exception to the equal division requirement, courts are reluctant to apply it. The conduct must be severe. "Deliberate misappropriation" has been held to mean "calculated thievery, not the mere mishandling of assets."[22]

For example, in *In re Marriage of Partridge,*[23] despite the wife's best efforts, the community incurred penalties when the husband chose to file their tax return late with inaccurate data. The trial court's award of the entire tax debt to the husband was reversed. The husband's misconduct was held "not such that the court was entitled to make an uneven allocation… under the deliberate misappropriation doctrine…"

Where the husband sold community property to generate funds for the purchase of alcoholic beverages, the sales were held not to fall within the deliberate misappropriation doctrine.[24] However, gambling away community funds has been held to fall under the deliberate misappropriation doctrine. In *In re Marriage of Cairo,*[25] the husband incurred credit card debt, admitting he needed money for gambling. The trial court's assignment of the entire credit card debt to the husband was affirmed. The court noted that gambling loses are "…not incurred for the benefit of the community."

Attorney's fees, in addition to reimbursement, have been awarded as a remedy for deliberate misconduct. In *Marriage of Lister*, the husband convinced his wife to sign a deed, representing that a sale of their home would net the community $48,000. He concealed the fact that the sole consideration for the transfer was a cancellation of his separate property debt. For this deceit, the husband was ordered to reimburse the community one-half the value of the house, plus he was ordered to pay his wife's attorney's fees, as she "incurred substantial attorney's fees in investigation of the… true character of what husband had misrepresented or withheld from her."[26]

In *Marriage of Economou*,[27] the husband concealed property and sale proceeds, and left the country with millions in community assets. In addition to attorney's fees, the court awarded the wife property interests which exceeded one-half the value of the community property. The court's award was affirmed, holding the husband's conduct constituted deliberate misappropriation.

Criminal conduct which diminishes a spouse's share in a community property asset has been held to support an unequal division of assets. In *In re Marriage of Beltran*,[28] the husband, an Army colonel, was convicted of child molestation. He was dismissed from the Army and stripped of all military benefits, including his pension and accrued leave. The court calculated the value of the community interest in the pension and accrued leave, and ordered the husband to pay the wife an amount equal to the value of her lost community interest in the retirement and accrued leave.

On appeal, the award was affirmed not based upon deliberate misappropriation, but instead on equitable grounds: "In our view, wife should not be made in effect to share in a penalty imposed upon husband for his criminal conduct. We accordingly conclude as a matter of equity that criminal conduct on the part of husband which directly caused forfeiture of pension benefits justified the trial court's conclusion that wife was entitled to reimbursement for her share of such lost community property."

A spouse who wastes community assets in the mismanagement of a community business must reimburse the community for its losses. In *In re Marriage of Czapar*,[29] the husband used a community business to purchase a new Porsche (the company had purchased a new Porsche for him only two years prior), to make charitable contributions to his alma mater, and to hire his girlfriend as a marketing director (she had no experience, and her efforts "produced virtually no sales").

The court based its order of reimbursement not on deliberate misappropriation, but instead on a violation of his duty to manage the community business in good faith. It was held he had wasted community assets in violation of that duty.

Fiduciary Duties to Preserve the Community

Where misconduct does not meet the thievery standards calling for unequal asset division under the deliberate misappropriation doctrine, mismanaging the community calls for reimbursement and in some cases, attorney's fee awards.

A spouse may not gift community property, or dispose of community property for less than fair value, and a spouse may not sell household items or clothing without the other spouse's written consent.[30] A spouse who uses community funds to improve his own separate property must reimburse the community for the amount expended or the value added, whichever is greater.[31]

Any transaction by a spouse which impairs or has a detrimental impact on the other spouse's one-half interest in community property constitutes a violation of fiduciary duties. The remedy for such conduct can be both reimbursement and attorney's fees. In *Marriage of Fossum*,[32] a wife concealed a $24,000 cash advance on a credit card. The trial court found this violated her fiduciary duties, and ordered a reimbursement but no attorney's fees. On appeal, it was held that attorney's fee awards are mandatory for violations of fiduciary duties under Family Code §1101(g).

Malicious Concealments

Remedies for malicious fiduciary duty violations under Family Code §1101(h) include forfeiture to the innocent spouse of 100% of any asset undisclosed or transferred in breach of the fiduciary duty. In the classic case, *Marriage of Rossi*,[33] when Denise Rossi learned she had won a $1,336,000 lottery prize, she filed for divorce and omitted the lottery winnings from her declarations of disclosure. Her husband Thomas learned of the lottery winnings, and filed a motion for 100% of the winnings.

The court granted his motion. On appeal, the award to Thomas of 100% of the lottery winnings was affirmed, based on fraud and Denise's breach of her fiduciary duty to disclose community property.[34]

Duty of Due Care

Spouses also owe each other a robust duty of care and a duty of disclosure concerning management and investments during marriage. In *Marriage of Duffy*,[35] the court ruled an investing spouse who dissipated community funds had no duty of care and no duty of disclosure absent a demand for information. In response, in 2002 the legislature amended Family Code §721b to clarify that spouses owe each other the same duties of disclosure (without request) and due care as are owed non-married business partners under the Corporations Code's "business judgment rule,"[36] which requires one to refrain from "engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of the law."[37]

Spouses now owe each other access to books and records, and the duty to disclose financial information to the other spouse, without demand. These duties arise at the time of marriage (the very high duties of disclosure do not apply in the premarital agreement process),[38] and they continue

to exist until the marital assets have been divided "by the parties or by a court."[39] Among other remedies in this area, a spouse may bring a motion for marital asset protection and an accounting, without commencing a marital dissolution.[40]

Post-Judgment Relief

Notwithstanding the strong public policy favoring the finality of judgments,[41] post-judgment relief is available in cases of misconduct during the legal process of divorce. When community assets and debts are negligently or innocently omitted, the court retains continuing jurisdiction to award such assets, and may divide them unequally upon "good cause."[42] In cases of mistake in "law or fact," a stipulated or uncontested judgment may be set aside in whole or in part if the set-aside motion is commenced within one year after the date the judgment was entered.[43]

The entire divorce judgment may be set aside in cases of deliberate misconduct. A defrauded party alleging she was "kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding..." may move to set aside the judgment if the motion is brought within one year after the date the party discovered or should have discovered the fraud.[44] The deliberate concealment of assets has been held to constitute extrinsic fraud, and the defrauded party may obtain equitable relief, which may include setting the judgment aside.[45] Separate tort actions for fraud or conversion are permitted to redress the concealment of assets.[46]

Actions to set aside a judgment for duress must be commenced within two years from the date the judgment is entered.[47] Duress must be so severe as to deprive a litigant from a fair hearing. Duress was found in *McIntosh v. McIntosh*, where a husband assaulted his wife, and she signed a settlement agreement after her husband threatened to have her "exterminated."[48]

A spouse's failure to disclose the existence or "true value" of a community asset is grounds for setting aside a judgment. In *Varner v. Varner*,[49] the wife presented, among other evidence, loan applications signed by the husband in which he had assigned asset values significantly higher than the values represented by him in his declarations of disclosure and at trial. The husband was held to have committed perjury in failing to disclose in his declarations of disclosure "all material facts and information regarding the valuation of all assets that are contended to be community." The court held he had "breached his (statutory) duty to disclose the existence or value" of community assets. The court also held that providing "incomplete or inadequate information" constitutes a failure to disclose.

Fraudulent Transfers

The remarkable case of *Mejia v. Reed*[50] concerned a husband's misconduct towards the mother of his child in an action for child support. The court found that Dr. Reed, a physician, had an extramarital affair with Rhina Mejia which produced a child. After Rhina commenced an action for child support, Dr. Reed's wife filed for divorce. The Reeds entered into a marital settlement agreement in which all of the married couple's real estate holdings were assigned to his wife, and Dr. Reed's medical practice was assigned to him. Thereafter, Dr. Reed abandoned his medical practice and moved in with his mother.

Rhina contended Dr. Reed's transfer of real estate to his now former wife under the marital settlement agreement should be voided. She argued the transfers were for the purpose of avoiding a child support obligation, and as such, they violated the Uniform Fraudulent Transfer Act.[51] Dr. Reed argued the transfers of real estate to his former wife were final. He cited what is now Family Code §916, which states that when a party is assigned property in a divorce action, neither the property nor the receiving party is liable for a debt incurred by the person's spouse before or during marriage unless the debt is assigned to the receiving person.[52]

The court balanced the public policy favoring finality and reliability of dissolution judgments versus the policy of protecting creditors, and held that the Uniform Fraudulent Transfer Act should apply to property transfers under marital settlement agreements. The transfer was prohibited.

Discovery and Declarations of Disclosure

In some cases, spouses going through the emotional divorce process resist complying with discovery requests, or fail to provide properly completed Declarations of Disclosure under Family Code §2104-2105. The courts have imposed severe monetary sanctions upon spouses under Family Code §271 as well as Family Code §2107 for conduct which constitutes the abuse of discovery or the frustration of settlement efforts (*Marriage of Fong,*[53] $100,000 in attorney's fees; *Marriage of Feldman,*[54] $250,000 in sanctions, $140,000 in attorney's fees). Sanctions are upheld in amounts which are designed to be "sufficient to deter repetition of the conduct."[55] However, a court may be precluded from making an award under Family Code §2107(c) where the moving party is not in compliance.[56]

It should be noted that whereas Family Code §2335 states that in general, discovery requests as to specific acts of misconduct are improper, an exception to this limitation exists where the discovery concerns an alleged deliberate misappropriation as grounds for unequal division.[57]

Despite the spirit of California's no-fault divorce laws, spousal misconduct during the marriage and during the divorce process remains a relevant consideration. For litigators, proving misconduct may be an important case strategy. In negotiations, discussing consequences of misconduct and making concessions can create important deal points. For mediators, the parties' discussion of misconduct and potential remedies can be useful bargaining chips when asking a mediating client to define her best alternative to a negotiated agreement.

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[1] Cal.Stats.1969, c. 1608, p. 3314. The Family Law Act was recodified in West's Ann. California Family Law Code, operative January 1, 1994.
[2] Freed & Walker, *Family Law in the Fifty States: An Overview*, 19 Family Law Quarterly 331 (1985).
[3] Former Cal. Civ. Code §82, et seq.
[4] Cal. Fam. Code §2310. These grounds are further defined in Cal. Fam. Code §2311 and §2312.
[5] Pacific Law Journal, January 1970, Vol. 1, No. 1, *California's Divorce Reform: Its Sociological Implications*, Stuart A. Brody, quoting State Senator Donald Grunsky, page 231.
[6] Cal. Fam. Code §2550.
[7] *Arnold v. Arnold*, 76 Cal.App.2d 877 "the greater the offense the larger the proportion of the community property that must be awarded to the innocent spouse."
[8] *Diosdado v. Diosdado*, 97 Cal.App.4th 470 (2002).
[9] *Marriage of Mehren and Dargan*, 118 Cal.App.4th 1167 (2004). This case concerned drugs prescribed by a physician. It is unclear whether an unequal division for using illegal drugs would be enforceable.
[10] *In re the Marriage of Ramirez and Llamas*, 165 Cal.App.4th 751, 81 CR3d 180 (2008).
[11] The dissent stated: "The majority holds that infidelity alone...may serve as a basis for annulment on the ground of fraud, relying upon the case of *Security-*

First Nat. Bank of Los Angeles v. Schaub (1945) 71 Cal.App.2d 467, 162 P.2d 966. That case involved a plot by a woman and her longtime lover to cheat an unsuspecting older gentleman out of a half interest in his real property, while the wife maintained illicit extramarital relations with her lover. In the 63 years since the Schaub case was decided, it has never been cited, until today, for the proposition that the infidelity of a spouse, without more, constitutes a fraud which justifies an annulment. Today's decision could have unintended repercussions in family law practice…."

[12] Cal. Fam. Code §782.5.

[13] Cal. Prob. Code §250. (a) A person who feloniously and intentionally kills the decedent is not entitled to any of the following: (1) Any property, interest, or benefit under a will of the decedent, or a trust created by or for the benefit of the decedent or in which the decedent has an interest, including any general or special power of appointment conferred by the will or trust on the killer and any nomination of the killer as executor, trustee, guardian, or conservator or custodian made by the will or trust. (2) Any property of the decedent by intestate succession….

[14] *Shoemaker v. Shoemaker* (6th Cir 1959) 263 F2d 931; See also *Practice Under the California Family Law Code: Dissolution, Legal Separation, Nullity* (Cal CEB Annual) §5.76, 2012.

[15] Cal. Fam. Code §4320(i) provides the court "shall consider all of the following circumstances: Documented evidence of any history of domestic violence, as defined in §6211, between the parties or perpetrated by either party against either party's child, including, but not limited to consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party."

[16] Cal. Fam. Code §4325, See *Marriage of Cauley* (2006) 138 Cal. App. 4th 1100.

[17] 201 Cal.App.4th 942 (2011).

[18] Cal. Fam. Code §2603.5.

[19] Cal. Fam. Code §782.

[20] *Dale v. Dale*, 66 Cal.App.4th 1172.

[21] See *Reconstructing Fault: The Case for Spousal Torts*, Pamela Laufer-Ukeles, V. 79 University of Cincinnati law Review, Issue 1, Article 5, http://scholarship.law.uc.edu/uclr.

[22] *In re Marriage of Schultz*, 105 Cal.App.3d 846 (1980).

[23] 226 Cal.App.3d 120 (1990).

[24] *In re Marriage of Moore*, 28 Cal.3d 366 (1980); West Group Cal. Civ. Practice 2002, §6:22, at page 26.

[25] 204 Cal. App. 3d (1988).

[26] *In re Marriage of Lister*, 152 Cal.App.3d 412 (1984).

[27] *In re Marriage of Economou*, 223 Cal.App.3d 76 (1990).

[28] *In re Marriage of Beltran*, 183 Cal.App.3d 292 (1986).

[29] *In re Marriage of Czapar*, 232 Cal.App.3d 1991 (1991).

[30] Cal. Fam. Code §721, and §1100(b), (c).

[31] *Marriage of Warren*, 28 Cal.App.3d 778 (1972).

[32] *In re Marriage of Fossum*, 192 Cal.App.4th 336 (2011).

[33] *Marriage of Rossi*, 90 Cal.App.4th 34 (2001).

[34] Concealment of separate property assets does not fall under Cal. Fam. Code 1101(h), see *In re Marriage of Simmons*, 215 Cal.App.4th 584 (2013).

[35] 91 Cal.App.4th 923 (2001).

[36] Cal. Corp. Code §16403, §16404, §16503.

[37] Cal. Corp. Code §16404(c).

[38] *Marriage of Bonds*, 24 Cal.4th 99 (2000).

[39] Cal. Fam. Code §1000(e).

[40] *Wilcox v. Wilcox* (1971) 21 Cal.App.3d 457, also see Oldham, *Management of the Community Estate During an intact Marriage*, 56 Law & Contemporary Problems 99 (1993).

[41] Cal. Fam. Code §2120(c).

[42] Cal. Fam. Code §2556 permits the court to make an unequal division of omitted assets "upon good cause shown that the interests of justice require an unequal division of the asset or liability."

[43] Cal. Fam. Code §2122(e).

[44] Cal. Fam. Code §2122(a).

[45] See *Marriage of Umphrey*, 218 Cal.App.3d. 647 (1990); *Resnik v. Superior Court*, 185 Cal.App.3d 634 (1986).

[46] *Worton v. Worton*, 234 Cal.App.3d 1638 (1991).

[47] Cal. Fam. Code §2122(c).

[48] *McIntosh v. McIntosh*, 209 Cal.App.2d 371 (1962).

[49] *Varner v. Varner*, 55 Cal.App.4th 128 (1997).

[50] *Mejia v. Reed*, 31 Cal.4th 657 (2003).

[51] Cal. Civ. Code §§3439-3439.12.

[52] Cal. Fam. Code §916(a)(2).

[53] *Marriage of Fong*, 193 Cal.App.4th 278 (2011).

[54] *Marriage of Feldman*, 153 Cal.App.4th 1470 (2007).

[55] Cal. Fam. Code §2107(c).

[56] *Marriage of Fong*, supra.

[57] See Hogoboom & King, CAL. PRAC. GUIDE: FAMILY LAW (The Rutter Group 2015) §11:195A.

Test No. 88

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. California's divorce law removes fault entirely, without exception, when dividing property between spouses.
   ❑ True ❑ False
2. The grounds for divorce are only irreconcilable differences or incurable insanity.
   ❑ True ❑ False
3. Spouses may enter into agreements for a payment between them of liquidated damages if one spouse commits adultery.
   ❑ True ❑ False
4. Deceit along with adultery have been held as grounds for annulment.
   ❑ True ❑ False
5. The court must consider any documented acts of domestic violence between spouses when considering an award of long-term spousal support.
   ❑ True ❑ False
6. Causes of action for domestic torts are not permitted in California.
   ❑ True ❑ False
7. A spouse who gambles and loses community property may be ordered to reimburse the community.
   ❑ True ❑ False
8. Loss of a pension due to a spouse's criminal conduct is grounds for reimbursement to the innocent spouse.
   ❑ True ❑ False
9. Spouses managing a community business owe a non-managing spouse a duty not to waste the community business by gross mismanagement.
   ❑ True ❑ False
10. Each spouse has the authority to make a gift of community property.
    ❑ True ❑ False
11. An award of attorney's fees for fiduciary duty violations under Family Code 1101(g) is mandatory.
    ❑ True ❑ False
12. Concealing a community property asset in a divorce may result in an award of the entire asset to the victim spouse.
    ❑ True ❑ False
13. During the marriage, spouses owe each other a duty to disclose financial dealings, but only upon request.
    ❑ True ❑ False
14. The business judgment rule now applies to a spouse who invests community funds.
    ❑ True ❑ False
15. A spouse seeking a protection order and an accounting of a spouse's investment activity with community funds must commence an action for divorce.
    ❑ True ❑ False
16. A spouse guilty of deliberate misconduct may be required to pay the innocent spouse's attorney's fees.
    ❑ True ❑ False
17. A spouse using community funds to improve his or her separate property must reimburse the community the amount expended or the value added, whichever is greater.
    ❑ True ❑ False
18. An action to set aside a divorce judgment signed under duress must be commenced within two years from the date the judgment is entered.
    ❑ True ❑ False
19. Understating the value of a community asset on a declaration of disclosure constitutes perjury and is grounds for setting a divorce judgment aside.
    ❑ True ❑ False
20. Discovery concerning spousal misconduct, including suspected acts of deliberate misappropriation of community assets, is not permitted.
    ❑ True ❑ False

MCLE Answer Sheet No. 88

INSTRUCTIONS:

1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
3. **Answer the test questions by marking the appropriate boxes below.**
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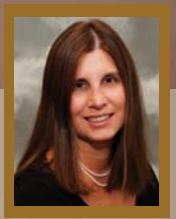
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**	❑ **False**
13.	❑ **True**	❑ **False**
14.	❑ **True**	❑ **False**
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

Law and Marriage

By Elizabeth Post

Seven couples share their experiences about practicing law with a spouse. SFVBA members reveal their life-changing decisions to marry and work together. Like Harlequin romance novels, the couples relay their stories concerning teenage love, online courtship, whirlwind romances, and love at first sight. The partners provide words of wisdom about balancing two law careers with raising a family, and disclose their secrets to succeeding as law partners and life partners.



Elizabeth Post is Executive Director of the San Fernando Valley Bar Association, a position she has held since 1994, and Publisher of *Valley Lawyer*. She can be reached at epost@sfvba.org.

Ronald and Cynthia Berman

Cynthia was working as a medical social worker when she met Ron Berman, a stockbroker, through a mutual friend. After dating for two weeks, they became engaged and married five months later on August 23, 1970.

After they were married for a few years, Ron decided to go to law school, but after passing the bar exam in 1978, he postponed practicing law because he was a managing vice president for E.F. Hutton by that time. Cynthia graduated law school and passed the bar in 1989 and immediately began practicing family law. After Cynthia had been practicing for a year, Ron and Cynthia established Berman & Berman in Woodland Hills and Ron "retired" from the brokerage industry. Today, Cynthia is a Certified Family Law Specialist and Ron practices probate, trust administration, and estate planning.

They work both together and separately according to Cynthia and Ron. "We do not practice the same areas of law. One partner does not 'work for' the other. Although we have some shared clients and consult with each other in regards to cross-over issues, our roles as attorneys are defined and different. We have some shared staff, but we each have our own paralegals. We also have separate and defined tasks in regards to management of the office… We try to keep our office management issues separated from our life together as a couple."

Ron and Cynthia have two adult daughters and four grandchildren. They maintain a sense of humor after 45 years of marriage. "Since Cynthia is a family law attorney, when people ask Ron how we can work together every day, be together outside of work and stay married, Ron tells them that he's afraid of what Cynthia would do to him if he tried to divorce her."

Daniel and Sandra Davisson

Family law attorneys Sandi and Dan Davisson have been married since November 8, 1987, and have practiced law together for 21 of those. They have two adult children and three grandchildren.

Daniel graduated from the San Fernando Valley College of Law and began practicing law in 1979. Their family was raised before Sandi became a lawyer. According to Sandi, "I was a legal secretary complaining about training new lawyers every year, and Dan said, 'why don't you go to law school,' so I did!" She enrolled at the University of LaVerne College of Law and Dan and Sandi established Davisson & Davisson in Van Nuys when Sandi passed the bar in 1994.

"Doing family law really helps to make you appreciate your spouse," says Sandi. "You understand that you are going to have disputes, but try not to take it personal and do not take it home."

Dan adds, "You also have an understanding of what your spouse goes through at work every day, and the enormous amount of time it takes away from your personal life. It also helps to know that you are with someone that you can trust and someone to share your good and bad days."

The couple agree on how the workload is shared: Sandi manages Dan and Dan manages the business. And they treasure their time working together. "When we are both in the office at the same time, we always have a lunch date!"

Eric Gordon and Bonnie Braiker-Gordon

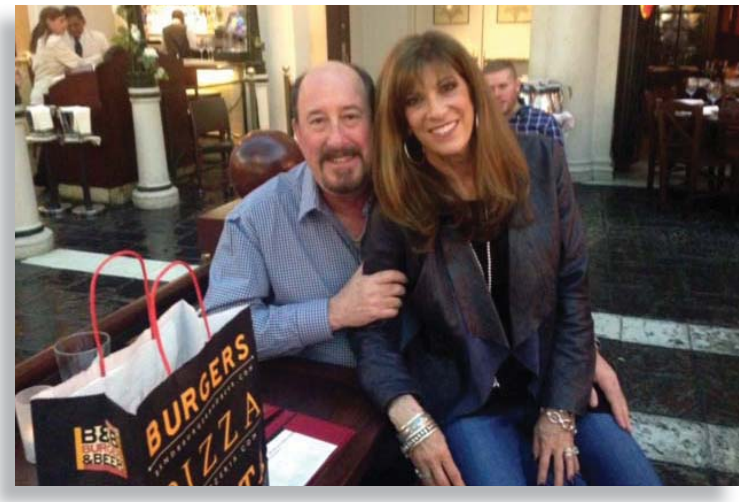
Eric was a sophomore and Bonnie was a junior at Valley High School in Las Vegas. Bonnie walked to and from school each day and Eric drove. Eric offered to drive Bonnie to school in the mornings and home from school. On occasion Bonnie would accept. By Bonnie's senior year, Eric asked Bonnie to go steady and gave her his high school ring (which she has to this day). Upon Eric's high school graduation in 1971, Eric left Las Vegas for CSUN. Bonnie joined Eric in Northridge a year later, both graduating in May 1975.

Bonnie and Eric promised their respective parents that they would not marry until they graduated college, so on June 8, 1975, they married at Temple Beth Am in Los Angeles. Eric and Bonnie put honeymoon plans on hold and instead went directly to the University of San Diego School of Law, where they commenced law school that August. Upon graduation, Bonnie and Eric left for a lengthy honeymoon and traveled Europe extensively.

They relocated to Los Angeles in 1980 where their daughter and son were born. Eric and Bonnie decided to join forces and open their own law practice in August 1981, renting office space in Woodland Hills and establishing the firm of Gordon & Braiker-Gordon. Eric practices family law, business law, and personal injury; Bonnie's area of practice is probate and estate planning, and business and real estate law.

Family is Bonnie's priority. "I made sure I was home for dinner and available for any and all school activities and extracurricular activities, while Eric was busy building the law practice." Bonnie never missed a moment and juggled her law career simultaneously. "When our youngest [son Spencer] was 15 months old, I returned to actively practice law on a full-time basis."

Today, they have two grandchildren, 4-year-old little leaguer Myles and 5-month-old Sydney Claire, and are expecting a new grandson, Jack Gordon, on Valentine's Day. Asked how they make their marriage and practice work, Bonnie believes, "Most of all, life is a compromise. Next comes large doses of tolerance, patience, perseverance, laughter and love."



Glenn and Lisa Kantor

USC law student Glenn Kantor met Lisa, a young lawyer, via a mutual friend at a party in the summer of 1984. They knew they were meant to be together; they discussed marriage on their first dinner date. They married a year later on October 26, 1985, and had three sons.

Lisa began her law career as an associate in a large Los Angeles firm and later became a partner with a split off of the firm. After their third son was born in 1992, she decided the rigors of private practice in a downtown firm were incompatible with her desire to spend more time with her sons, so Lisa became a staff attorney with the California Court of Appeals and later started her own appellate practice.

Glenn practiced with a partner in a plaintiff's health, life and disability firm. After Glenn and his partner dissolved their firm in 2004, he and Lisa created Kantor & Kantor in Northridge. A decade later, Kantor & Kantor, a member of the SFVBA President's Circe, has 14 lawyers representing individuals with health, life and disability insurance issues. Lisa represents individuals who have been denied treatment for mental health problems, particularly for eating disorders such as anorexia and bulimia. Glenn specializes in the representation of individuals who have been denied health, life or disability benefits by insurance companies or their employer's self-funded plan.

According to Lisa and Glenn, being law and marriage partners requires give and take. "We feel that being law partners and marriage partners simultaneously makes both being law and marriage partners easier, and more difficult. The keys are probably constant communication and the willingness to compromise."

They agree there are advantages to having one's own firm, "We were able to make our own hours. We would work early in the morning, and late at night, to make sure that we were able to be with our children during a substantial amount of their free time. They are now all college graduates. As they became more independent, our hours became more traditional."

Lawrence Miller and Marcia Kraft

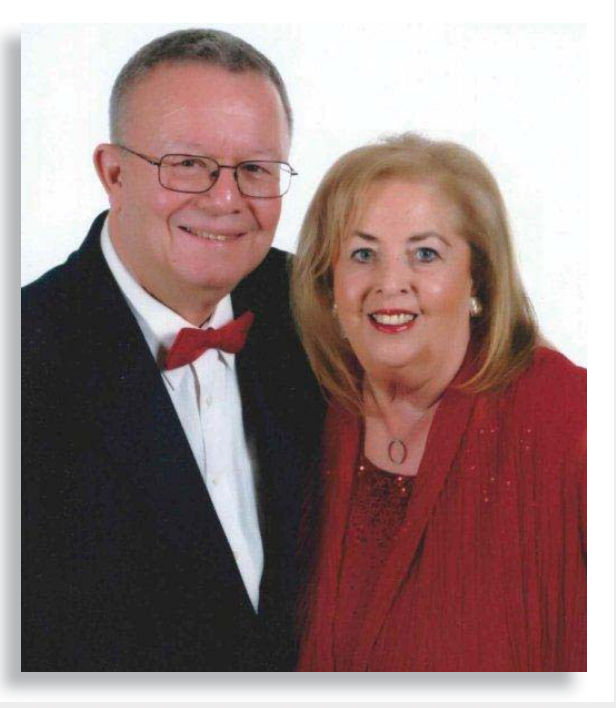
Widow Larry Miller and Marcia Kraft, who was then recently divorced, were already established attorneys when they met on Match.com. Larry served as a deputy public defender in Los Angeles since he passed the bar in 1989 and previously was a licensed real estate broker for several years. Marcia ran a full-service family law firm in Woodland Hills.

Marcia and Larry married on Valentine's Day, February 14, 2004. Their blended family includes five children and nine grandchildren.

After retiring from the Office of the Los Angeles County Public Defender following 21 years of service, Larry teamed with Marcia four and a half years ago. "I had my own practice which needed more manpower, so we decided to join forces," Marcia notes.

In 2015, they formed Kraft Miles & Miller, which includes Marcia's daughter, attorney Joy Miles. Marcia practices family law, probate and estate planning, personal injury, and employment law; Larry's practice is limited to criminal defense and real estate matters. In addition to representing their clients, the couple divide the administrative responsibilities of their office. Larry manages collection and other administrative work; Marcia handles client matters and most other financial issues.

There are a lot of practical benefits to working together according to Marcia. "We travel together in one car and save double expenses. We share caseload information and discussions are often very productive."



David and Arna Pillemer

Family law attorney Arna Pillemer tells the story about how she met her future husband David halfway around the world. "We met in Israel while I was doing my year abroad… at the Hebrew University in Jerusalem. David had immigrated to Israel from South Africa and was in law school at the Hebrew University as well. We met in December 1971 through mutual friends... We became best friends first and spent a lot of time together traveling and exploring...

"David proposed in June of 1972 and we were married in New Jersey … on August 20, 1972. So we both agree that our 'courtship' was a whirlwind of excitement and one of the best times of our new relationship together."

David and Arna worked together in various ventures to support themselves until he received his law degree from Loyola Law School in 1979. In 1986, David started a new law firm with three partners and Arna managed the firm and its finances. "Our youngest daughter was about six years old and I was able to work during the day and be home and take care of our three kids after work," Arna recalls. "After managing the firm for 18 years, I decided to go to law school. I went to school at night and continued to manage the firm during the day… When David's final partner left the firm in 2004, we decided to start our current firm, Pillemer & Pillemer, in Encino."

Arna and David worked as a team raising two daughters and a son. "When the children were little, David was going to law school and working; however, he still managed to be home to actively participate in taking care of the kids, read stories to them, and put them to bed… I worked from home until our youngest child was six. As the kids grew older, we shared car pool responsibilities and both of us helped the kids with their homework. We both participated in their extracurricular activities. We believed that it was key that we considered raising our kids as team. Whenever I needed help with the kids, David was always there. Whenever David was not available, I was there for the kids. While I was attending law school at night, David was the cheerleader dad for our youngest daughter, Talia..."

To date, David and Arna have nine grandchildren. Asked about the key to their 43-year marriage and successful law practice, they disclosed, "We believe that communication is very important and we talk things through. We make decisions, on the whole, together. There is a lot of give and take in the work relationship. The same applies at home where we share tasks and responsibilities. We like to be with one another and have the same interests. We do everything together and enjoy it."

Jeff and Bonnie Stern

Workers' compensation attorney Bonnie Stern tells the story of how she met her future husband Jeff, "I was living in San Diego, where I had graduated from law school... I was working part time for attorney… and he knew Jeff's firm in Encino [Gray, York & Duffy] was looking for an associate. I met with Jeff, had a great interview and was hired soon thereafter. Turns out he made a wise choice, both professionally and personally! Our friendship turned romantic some time later and we eventually wed in 2004."

"Hiring Bonnie was an incredibly easy decision to make," Jeff reminisces. "She was engaging, bright, and energetic. Those qualities have not changed. We started dating after a few months and continue to do so to this day."

Their office romance was kept private in the beginning. "Many years ago, when our relationship was still on the 'down low' from our colleagues, we all attended a legal conference in Lake Tahoe," Bonnie recalls. "The jig was up when the fire alarm went off at 3:00 in the morning and we both came out of the same room in our hotel robes…"

Since 2001, they have called workers' compensation and employment law firm Pearlman, Borska & Wax in Encino home, Jeff as a partner and Bonnie as a senior associate.

They have two daughters under ten. "We have been very fortunate in that our firm has allowed me to work part time since our oldest daughter Bridget was born," Bonnie remarks. "My favorite days are Fridays when I volunteer at my daughters' elementary school. That being said, I crave the mental stimulation and camaraderie that comes with the practice of law. I do not feel I have had to sacrifice my family life for my professional life, and visa-versa."

"Family is foremost at the firm," adds Jeff. "I have no doubt our colleagues would rather see my children than see me.

"All kidding aside, we were blessed to find each other and cannot imagine a life without the other. Our thought is if we can inspire just one set of colleagues to engage into an inappropriate workplace relationship, we have done our job…it sure worked out well for us!"

Employers Labor over New Laws in 2016

By Richard S. Rosenberg

A WAVE OF NEW EMPLOYMENT laws which took effect on January 1 will significantly impact the workplace in 2016. These new regulations will result in higher pay and more time off for California workers, while increasing the burden on employers to comply with the nuances of the new laws.

Equal Pay Act Protections

California's Equal Pay Act is the state law version of a federal law mandating gender wage parity. These laws prohibit an employer from paying an employee less than what it is paying to employees of the opposite sex for equal work (meaning jobs which require equal skill, effort, and responsibility and performed under similar working conditions in the same establishment).

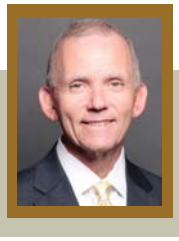
Under the new version of the law, the term "equal" work is replaced by the term "substantially similar" work. So, employers are now required to pay the same to employees of the opposite sex when performing substantially similar work when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions. If disagreements occur as to what all that means, juries will decide whether two jobs are indeed substantially similar.

Notably, the new law eliminated the requirement that the work in question be performed at the same location. As a practical matter, this means that an employee alleging discrimination may compare him/herself to a much larger pool of so-called comparators. Using this new legal standard, an employee suing the company for gender-based pay discrimination may now compare himself/herself with employees holding different job titles and with different responsibilities who are working in different locations of the company.

The new law explains that if a wage differential does exist, the employer will not be in violation of the law only if it is based upon a seniority system; a merit system; a system which measure earnings by quantity or quality of production; or a bona fide factor other than sex, such as education, training or experience.

While the last of these factors appears to provide a welcome defense to employers, the new law makes it clear that the bona fide factor other than sex defense is only available to the employer if the employer can demonstrate that the factor meets all of the following conditions: (1) it is not based on or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity.

In regard to the first item, employers need to know that a deep dive will be made into any employer claim that the wage difference is justified by the market or linked to the prior earnings history of the comparators. That's because the legislators believe that the market may be inherently biased. Even if an employer can meet this heavy burden, an employee can still prove a violation of the new law if the employee can demonstrate that an alternative business practice exists which would serve the same business purpose without



Richard S. Rosenberg is a founding partner of Ballard Rosenberg Golper & Savitt, LLP in Glendale. He assists management defend and risk manage workplace related legal matters and proposed personnel transactions and also works as a mediator in contentious employment disputes. He can be reached at rrosenberg@brgslaw.com.

producing the wage differential. With this new framework fraught with ambiguity, commentators predict a veritable tsunami of new equal pay litigation.

Many legislators felt that the existing wage disparity was due, in part, because there was very little transparency in the workplace when it comes to wages. To change all that, the new law encourages employees to talk openly about their wages and, thus, foment pressure for their companies to restructure wages accordingly.

To that end, the law expands protections currently provided to employees for disclosing or discussing the amount of their wages. The new law expressly prohibits an employer from discriminating or retaliating against any employee who seeks to enforce the provisions of the new law and further makes clear that an employer may not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under the new law.

The major implication of this new law is that employers will now have a far greater burden to justify any wage differentials between employees of the opposite sex. It will increase an employer's burden to defend wage decisions based on factors such as local market conditions, cost-of-living in the particular work location, prior pay history, subjective performance factors, the employer's current financial situation, the need to increase wages to retain certain key employees, and/or the need to pay higher wages to recruit a certain employee.

Job one is to proactively examine pay practices to determine whether gender inequities exist as between substantially similar positions, and if so, whether those differences can be legally justified based on one of the factors listed above. Coordination with an expert compensation consultant may be needed in more complex situations. When making this assessment, employers should be expansive when evaluating which positions are substantially similar.

The next step is to proactively address these differences, and do so before a legal claim is mounted unless the wage difference can comfortably be explained under the available excuses permitted in the law.

Increase in Minimum Wage

The California minimum wage rate increased to $10/hour, up from $9. Employees may not waive this right. This increase also impacts who qualifies as an overtime exempt employee. Because of the new minimum wage, exempt employees must now earn an annual salary of no less than $41,600 ($800/week). In addition, employers must be sure that these employees spend at least 51% of their average workweek engaged in what the lawmakers consider truly exempt duties.

Employers should also be aware that there are numerous industry specific, city and county ordinances that have established even higher minimum rates of pay which must be followed if the business is covered by one or more of these rules. For example, businesses operating within the City of Los Angeles, with 25 or more employees, must pay a higher minimum wage of $10.50 per hour beginning July 1, 2016. And larger hotels located within the City of Los Angeles are already obligated to pay a considerably higher minimum wage of $15.37. Businesses that contract with various federal and state governmental agencies also are subject to higher so-called "living wage" or "prevailing wage" obligations.

E-Verify System

A new California law prohibits most California employers from using the federal E-Verify system to check the employment authorization status of any existing employee or any applicant who has not yet received an offer of employment. The only exception is where doing so is required by a federal law or as a condition of receiving federal funds. Employers who use the E-Verify system in violation of this new law are liable for a civil penalty of up to $10,000 per violation.

It is important to note, however, that the new law only applies to applicants that have yet to receive a job offer. It does not affect an employer's right to use the E-Verify system to check the employment authorization status of applicants who have already received a job offer.

The federal E-Verify system is administered by the U.S. Citizenship and Immigration Services, the U.S. Department of Homeland Security, and the U.S. Social Security Administration. E-Verify enables employers to check whether a new employee is eligible to work in the United States. E-Verify compares information from an

employee's Form I-9 to data from Department of Homeland Security and Social Security Administration records.

If the information matches, the E-Verify system will confirm almost immediately that an individual is authorized to work in the United States. If the information does not match, the E-Verify system will issue a tentative non-confirmation (TNC) notice. A TNC means that federal government databases cannot confirm whether an individual is eligible for employment.

The new law will prohibit employers from using E-Verify to check on the employment status of existing employees and pre-screening job applicants, except as required by federal law or as a condition of receiving federal funds.

The law also requires employers who use the E-Verify system to furnish affected job applicants and employees with a copy of any notification issued by the Social Security Administration or the United States Department of Homeland Security containing information specific to the employee's E-Verify case or any TNC notice.

Although the Department of Homeland Security states that employer participation in E-Verify is for the most part voluntary, it is estimated that the service is used by more than 600,000 employers across the country.

Parental Time Off

A new revision to the Family-School Partnership Act expands employees' rights to job-protected leave. Under the law, employers with 25 or more employees are required to permit employees with school age children to take up to 40 hours of job protected leave (unpaid) each year to attend to their kid's school activities. The employee must be either the parent or legal guardian of the child, or a grandparent having custody of the child. Children covered are those who are either enrolled in a licensed child day care facility, kindergarten, or grades 1 to 12.

The only restriction is that the business may limit the leave to just 8 hours in any one month and may require the employee to provide reasonable notice of the absence. The law did not define reasonable notice, putting employers at risk of a violation if the employee offered just about any amount of advance notice.

The new law expands these parental time off rights in several material respects. First, the new law no longer requires the child to be in a licensed child day care facility. Leave rights must be offered so long as the child is under the care of a licensed child care provider.

Second, while existing law only permits time off for a parent to participate in school activities, the new law permits employees to also take time off: "to find, enroll, or reenroll the child in a school or with a licensed child care provider."

Third, the new law also expands the definition of "parent" beyond biological parents to include a legal guardian, stepparent, foster parent, or grandparent of the child or any person who stands in loco parentis to the child.

Fourth, in recognition of the exigencies of parenting, the new law also adds a new emergency leave provision to require the employer to grant a covered parent time off to address a so-called "child care provider or school emergency." This term is defined to mean that an employee's child cannot remain in a school or with a child care provider due to any one of the following:

- The school or child care provider has requested that the child be picked up, or has an attendance policy, excluding planned holidays, that prohibits the child from attending or requires the child to be picked up from the school or child care provider
- Behavioral or discipline problems
- Closure or unexpected unavailability of the school or child care provider, excluding planned holidays

- A natural disaster, including, but not limited to, fire, earthquake, or flood

In the case of emergency leave, the usage rules are relaxed so that the employee may use as many of the 40 hours as needed (no 8 hour/month limit) and the employee is relieved of the obligation to give reasonable advance notice due to the unplanned nature of the event precipitating the need for time off.

As written, the law requires a great deal of flexibility on the part of employers. For example, the law will permit covered parents to leave work 20 minutes early for so-called emergency matters over 100 times per year. It seems that a simple request by the child's care provider to pick up the child early would be sufficient, in addition to the several other reasons listed in the new law.

Also, while the new law permits an employer to ask for documentation of the need for the time off, this provision offers little protection to the employer because the new law states that "documentation" means whatever written verification of parental participation the school or licensed child care provider deems appropriate and reasonable. As such, it appears as though the employer is left with no choice but to accept whatever documentation is provided and may not question the reasonableness of the documentation.

Fifth, the new law strengthens the anti-retaliation provisions in the existing law. The new law prohibits employers from terminating, demoting, or in any other manner discriminating against an employee as a result of the employee's exercise of the right to take time off. This means that an employer cannot discipline employees under an attendance policy or otherwise, when arriving late, leaving early or otherwise taking time off for one of the many reasons in the law.

Also, all people managers must be trained to avoid expressing disapproval when employees inform them of the need to be absent for a reason covered by the law. Such comments are in many cases the smoking gun evidence that employees rely upon when asserting that they were victims of unlawful discrimination or retaliation for taking or asking for this leave. The law assumes that employers will shoulder a certain amount of inconvenience without making the employee feel bad for having taken advantage of these new rights.

Employers must review and update all parental leave policies to ensure compliance with these changes. Employers should also review internal procedures for receiving, documenting, recording and tracking employee time off requests and usage under the new law. Be sure that the employee is not accumulating attendance demerits for using the time authorized by law. Given the expansive reasons permitted for time off under the new law, the lack of notice requirements, and the flimsy documentation required, the new law opens the door for potential abuse by employees as well.

Mileage Reimbursement Rates

The new IRS standard mileage reimbursement rate is 54 cents per mile. This number decreased from 57.50 cents per mile set in 2015 due to the lower cost of gasoline. Employers should ensure that employees are tracking expenses and submitting expense reports for actual business mileage.

Remember, the IRS rate is a safe harbor that should suffice in most situations. However, if an employee claims that his or her actual vehicle maintenance costs are higher, the employee has the right to that reimbursement if the employee can prove that his/her maintenance costs are indeed higher. Both California and federal law prohibit any kind of workplace retaliation against employees who assert their right to these wage or expense reimbursement payments.

NEW MEMBERS

The following new members were approved by the SFVBA Board of Trustees:

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Shahriar Adorbehi
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William J. Burkhardt
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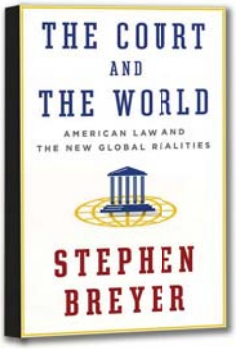


A Justice's View of Global Truths

By Marc Steven Colen

THE COURT AND THE WORLD: American Law and the New Global Realities by United States Supreme Court Justice Stephen Breyer discusses how the Supreme Court considers, and must increasingly consider, matters that extend far beyond our borders. The concomitant social challenges and political ramifications that such considerations entail are discussed in Justice Breyer's lucid presentation.

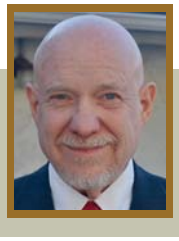
Justice Breyer noted in a release by the publisher that, "Since I have been a member of the court, the number of cases concerning foreign or international matters has grown exponentially." This book is very timely and highly recommended for the relevance of the subject matter, the breadth of its coverage, and the depth of its analysis, all in a volume of reasonable length and high intelligibility. According to Justice Breyer, "The interdependence of today's world presents a considerable challenge for our judiciary, and my aim in this book is to show how and why the Supreme Court must increasingly consider the world beyond our national frontiers." He has done so with style, eloquence and aplomb.

The book is divided into four parts, which are in turn divided into subparts comprising examples of the topics. Part I is entitled "The Past is Prologue: The Constitution, National Security and Individual Rights," and contains subparts concerning the diminution of people's rights when national security threats arise, particularly during wartime.

Justice Breyer begins his analysis of the American history of rights during wartime with President Abraham Lincoln's suspension of the writ of habeas corpus during the Civil War and compares it to the intrusion into the privacy of Americans, especially those Americans in contact with foreign nationals from what the federal government considers to be "suspect" countries, under the authority provided by the Patriot Act, which is further discussed herein.

Part II is entitled "At Home Abroad: The Foreign Reach of American Statutory Law," and contains subparts concerning the regulation of international commerce and the human rights aspects of the Alien Tort Statute. With regard to commerce, significant attention is given to the Sherman Antitrust Act[1] and the Foreign Trade Antitrust Improvements Act of 1982[2] by way of exceptions, which state that although the Act was not to apply to conduct involving trade or commerce with foreign countries, they could be applied in situations where there was a "direct, substantial and reasonably foreseeable effect" on American commerce and when it involved "import trade or import commerce." These exceptions have been extensively litigated in such cases as *Hoffman-LaRoche Ltd v. Empagrans,*[3] *Intel Corp v. Advanced Micro Devices, Inc.,*[4] and *Morrison v. National Australia Bank.*[5]

Also within Part II is a discussion of the Alien Tort Statute[6] and human rights. Although deceptively simple, stating that, "The district courts shall



Marc Steven Colen practices in West Hills and specializes in defamation, First Amendment, anti-SLAPP, fraud, intellectual property litigation in both federal and state courts. A former failure analyst and rocket engineer, he also consults on the technical aspects of product liability litigation. He may be reached at mcolen@colenlaw.com.

have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," there is no concomitant simplicity in its application. The breadth of the Alien Tort Statute, a portion of the Judiciary Act of 1789, has been significantly expanded and, since the 1980s, the courts have interpreted this statute to allow foreign citizens to seek remedies in U.S. courts for human rights violations derived from conduct committed outside the United States. It is, nonetheless, of comparatively narrow scope, as discussed by the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co*.,[7] wherein it was held that the Alien Tort Claims Act does not apply extraterritorially. As discussed by Justice Breyer, this is a gray area and will remain an active area for litigation in the future.

Justice Breyer also repeats the important point that he made in his prior book published in 2010, *Making Our Democracy Work: A Judge's View*, to wit, that the American government and American business interests are becoming increasingly enmeshed with foreign governments and foreign business interests. As a result, Justice Breyer states that the federal courts, particularly the appellate courts and the Supreme Court, are obliged to take account of the laws, decisions and underlying reasoning of other nations' legislatures and courts, not to incorporate them, but to evaluate them in the context of the problem before the court.

Part III is entitled "Beyond Our Shores: International Agreements." Subparts include treaty interpretation as it applies to child custody, investment treaty arbitration, interpreting treaties, as well as a discussion of the politics involved. With regard to child custody, the Hague Convention on the Civil Aspects of International Child Abduction and the United States International Child Abduction Remedies Act, were applied to the situation where a Chilean court granted partial custody to an American astronomer working in Chile, precluding the American mother from removing the child from Chile to Texas. In *Abbott v. Abbott,*[8] the Supreme Court held that the child had to be returned to Chile since it had been wrongfully removed to the detriment of the rights of the father. (In the end, the opinion, to which Justice Breyer dissented, was dismissed because the child reached age 16 and the Hague Convention no longer applied to the conflict.)

With regard to investment treaties, an extensive discussion of arbitration provisions in such treaties is provided with comprehensive analysis concerning the recent case, *BG Group PLC v. Republic of Argentina.*[9]

Part IV is entitled "The Judge as Diplomat" and contains two subparts which concern, first, interchange and substantive progress, and second, advancing the rule of law. Of most interest to the reviewer was the discussion of *Holder v. Humanitarian Law Project,*[10] another opinion to which Justice Breyer dissented.

Holder concerns the Patriot Act, which, among many other things, forbids providing expert advice or assistance to a foreign terrorist group. A group of Americans, which included a retired judge, wished to help a Kurdish group on the State Department's terrorist watch list. The group wanted to provide advice and assistance concerning international and humanitarian law as a means to peacefully resolve the disputes. This was held to violate the Patriot Act, which result this reviewer must question.

An epilogue discusses the future and notes that "the important divisions in the world are not geographical, racial, or religious, but between those who believe in a rule of law and those who do not." With this point, this reviewer does not entirely agree. The clash between our law and the perverted forms of Islam and Islamic law practiced by the Islamic State appear to this writer to be little, if at all, different from a comparison of our law and no law at all.

The expected notes and references are provided. Anyone with an interest in the Supreme Court, international law, international trade, treaties, and human rights should find this volume an important read. Justice Breyer's exposition is clear and lucid, amenable to reading by attorney and non-attorney alike, and demonstrative of an emergent reality that increasingly, for better and for worse, has direct effects on the American people.

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[1] 15 U.S.C. §§1-7.
[2] 15 U.S.C. §6a.
[3] *Hoffman-LaRoche Ltd v. Empagrans*, 542 U.S. 155 (2004).
[4] *Intel Corp v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).
[5] *Morrison v. National Australia Bank*, 561 U.S. 247 (2010).
[6] 28 U.S.C. §1350.
[7] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).
[8] *Abbott v. Abbott,* 130 S. Ct. 1983, 560 U.S. __ (2010)
[9] *BG Group PLC v. Republic of Argentina*, 134 S.Ct. 1198 (2014).
[10] *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010).

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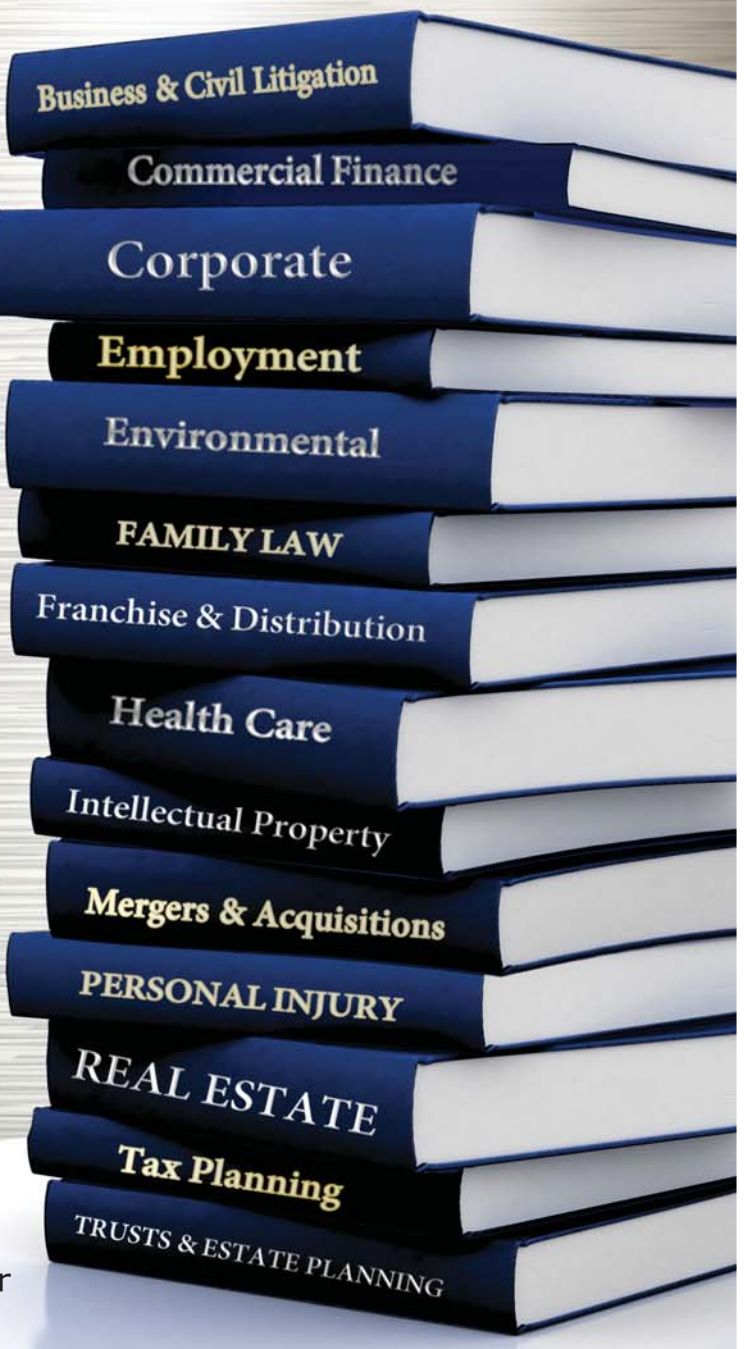

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